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# LEGAL STUDIES

## FOR VCE

LISA FILIPPIN
ANNIE WILSON
PETER FARRAR

16TH EDITION

UNITS

# 3&4

obook pro

OXFORD
UNIVERSITY PRESS

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Published in Australia by
Oxford University Press
Level 8, 737 Bourke Street, Docklands, Victoria 3008, Australia.

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First published 1994
Sixteenth edition 2023

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ISBN 9780190342548

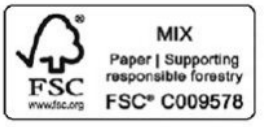



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Edited by Trischa Mann
Text design by OUPANZ
Typeset by Newgen KnowledgeWorks Pvt. Ltd., Chennai, India
Proofread by Carly Slater and Diane Fowler
Indexed by Mary Russell
Printed in Singapore by Markono Print Media Pte Ltd

The authors and publisher of *Legal Studies for VCE Units 3 & 4 16th edition* would like to thank Emily Yates (Bundjalung) for her review of content concerning First Nations peoples of Australia.

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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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# Summary of legal scenarios

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No legal cases

# Unit 3 Rights and justice

## Chapter 2 Introduction to Unit 3 – Rights and justice

No legal cases

## Chapter 3 Key concepts in the Victorian criminal justice system

*CDPP v Chan & Chen* [2022] VCC 1463 (12 September 2022)
*Gray v DPP* [2008] VSC 4 (16 January 2008)
*Weissensteiner v The Queen* (1993) 178 CLR 217

## Chapter 4 The principles of justice in a criminal case

*Jago v District Court of NSW* (1989) 168 CLR 23
*DPP v Abdelmalek* [2022] VCC1806 (25 October 2022)
*Cook v The Queen* [2016] VSCA174 (25 July 2016)
*Farah v The Queen* [2019] VSCA 300 (12 December 2019)
*R v Goodall* [2007] VSCA 63 (13 April 2007)
*Smith v Western Australia* (2014) 250 CLR 473
*R v Russo* [2004] VSCA 206 (19 November 2004)
*Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017)
*R v Kina* [1993] QCA 480 (29 November 1993)

## Chapter 5 Sentencing

*Mohamed v The Queen* [2022] VSCA 136 (13 July 2022)
*DPP v Gonzalez* [2022] VSC 331 (9 June 2022)
*R v Farrell* [2021] VSC 414 (13 July 2021)
*DPP v Potts & Ors* [2022] VCC 1825 (27 October 2022)
*R v Shoma (No 2)* [2021] VSC 797 (3 December 2021)
*DPP v Herrmann* [2019] VSC 694 (29 October 2019)
*DPP v Quinlan* [2022] VCC 29 (21 January 2022)
*DPP v Haberfield* [2019] VCC 2082 (16 December 2019)

## Chapter 6 Key concepts in the Victorian civil justice system

*Zantuck v Richmond Football Club & Ors* [2022] VSC 405 (19 July 2022)

## Chapter 7 The principles of justice in a civil dispute

*Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (14 June 2018)
*McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* [2016] VSC 734 (2 December 2016)
*Chol v Pickwick Group Pty Ltd* [2023] VCC 66 (6 February 2023)
*Aurisch & Anor v Wilson* [2022] VCC 720 (13 May 2022)
*She v RMIT University & Anor* [2021] VSC 2 (19 January 2021)
*Kumari v Bervar Pty Ltd (Human Rights)* [2023] VCAT 21 (9 January 2023)
*Loftus v Australia and New Zealand Banking Group Ltd [No 2]* [2016] VSCA 308 (8 December 2016)

## Chapter 8 Remedies

*Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145 (25 March 2022)
*Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 (19 December 2017)
*Medic v Kandetzki* [2006] VCC 705 (13 June 2006)
*Webster v Brewer (No 3)* [2020] FCA 1343 (22 September 2020)

# Unit 4 The people, the law and reform

## Chapter 9 Introduction to Unit 4 – The people, the law and reform

*DPP v Fowler* [2020] VCC 738 (5 June 2020)

## Chapter 10 Law-making powers

*McBain v State of Victoria* (2000) 99 FCR 116

*R v Brislan; Ex parte Williams* (1935) 54 CLR 262

*Commonwealth v Tasmania* (1983) 158 CLR 1

## Chapter 11 Parliament and the Constitution

*Roach v Electoral Commissioner* (2007) 233 CLR 162

*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

*DPP (Cth) v Besim* [2017] VSCA 158 (23 June 2017) and *DPP (Cth) v M H K (a Pseudonym)* [2017] VSCA 157 (23 June 2017)

*Williams v Commonwealth* (2012) 248 CLR 156

*Betfair Pty Limited v Western Australia* (2008) 234 CLR 418

*JT International SA v Commonwealth* (2012) 250 CLR 1

*Alqudsi v The Queen* (2016) 258 CLR 203

*Street v Queensland Bar Association* (1989) 168 CLR 461

*Levy v Victoria* (1997) 189 CLR 579

## Chapter 12 The courts

*Deing v Tarola* [1993] 2 VR 163

*Lansell House Pty Ltd v Commissioner of Taxation* (2011) 190 FCR 354

*Davies v Waldron* [1989] VR 449

*DPP v Brown* [2020] VCC196 (3 March 2020) and *Brown v The Queen* [2020] VSCA 212 (25 August 2020)

*Google LLC v Defteros* [2022] HCA 27 (17 August 2022)

*Imbree v McNeilly* (2008) 236 CLR 510

*Mabo v Queensland (No. 2)* (1992)175 CLR 1

*Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (11 February 2020)

*Attorney-General of the Commonwealth v Montgomery & Ors* [2021] FCA 1423 (15 November 2021)

*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 11)* [2020] QSC 5 (31 January 2020)

*Kuczborski v State of Queensland* (2014) 254 CLR 51

*Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372

## Chapter 13 Law reform

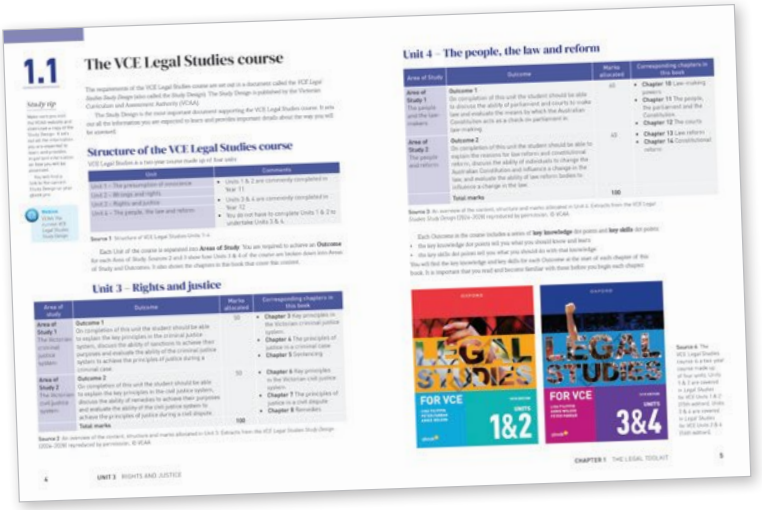
*Masson v Parsons* [2019] HCA 21 (19 June 2019)

## Chapter 14 Constitutional reform

*Re Canavan* (2017) 263 CLR 284

## Key features of the Student Book

- *Legal Studies for VCE Units 3 & 4* (16th 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:

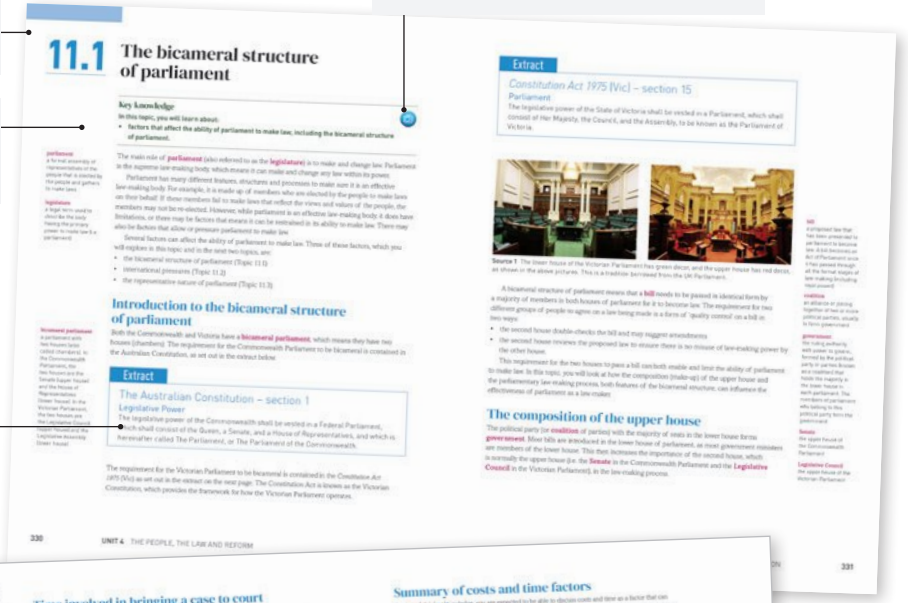
- the outcome for the Area of Study
- key knowledge and key skills from the Study Design
- a list of key legal terms
- a link to an interactive warm-up quiz
- a link to a Quizlet set for key legal terms in the chapter.

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

Clear **topic-based** approach.

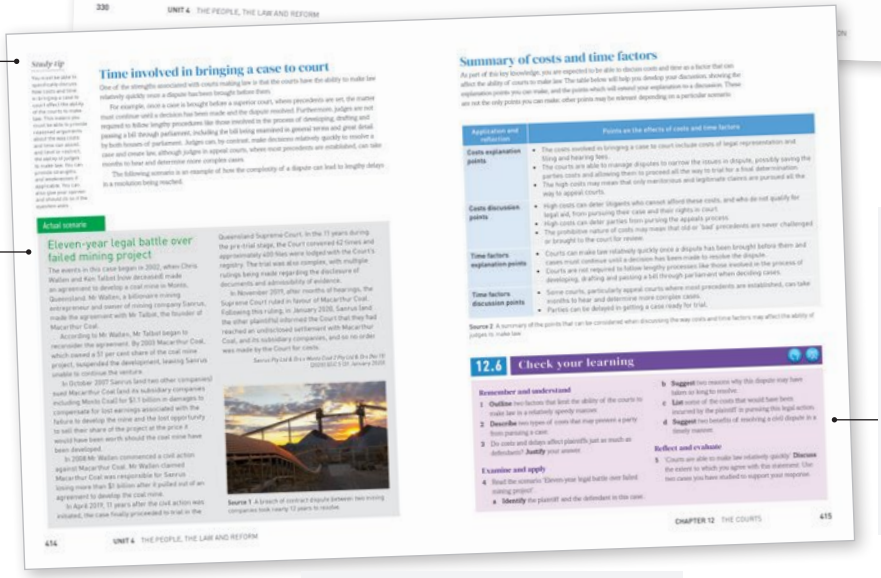
**Key knowledge** points link topics to the Study Design.

**Extracts** from relevant legislation support student learning.




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

**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.




**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

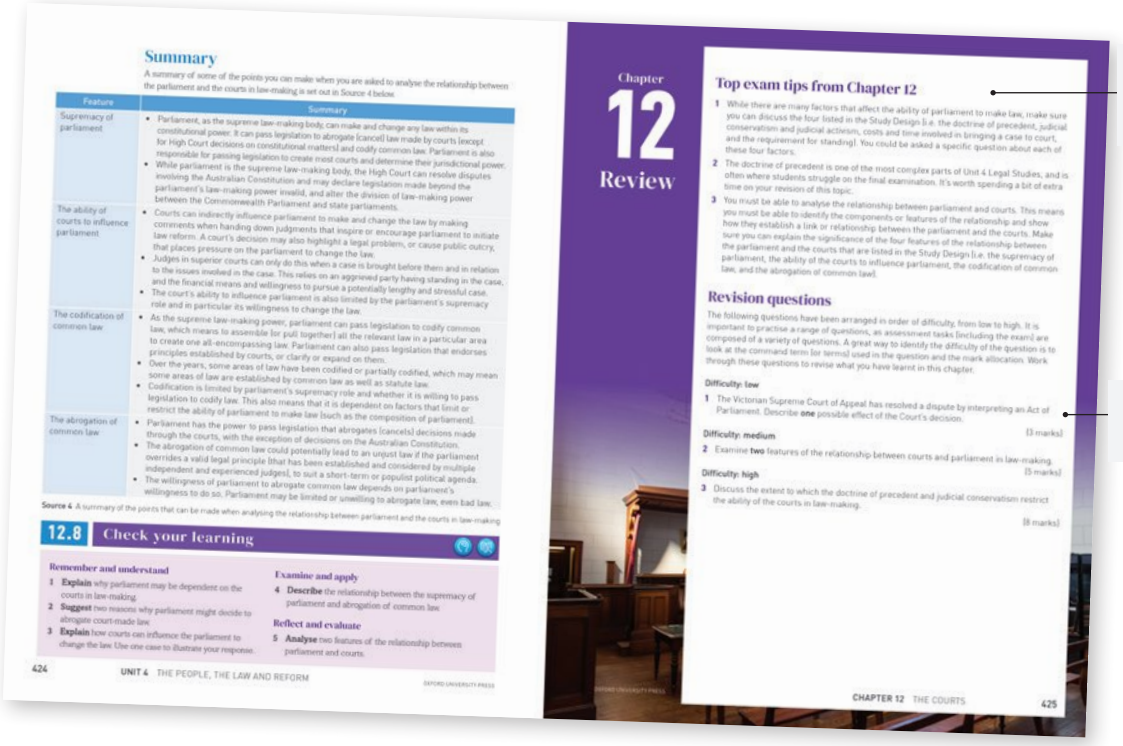
Definitions in the margin for **key legal terms** support student understanding at the point of learning. Key terms also appear in a combined glossary at the back of the book.




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

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

# Chapter review



Summary

A summary of some of the points you can make when you are asked to analyse the relationship between the parliament and the courts in law-making is set out in Source 4 below.

| Feature | Summary |
|---|---|
| Supremacy of parliament | • Parliament, as the supreme law-making body, can make and change any law within its constitutional power. It can pass legislation to abrogate (cancel) law made by courts (except for High Court decisions on constitutional matters) and codify common law. Parliament is also responsible for passing legislation to create most courts and determine their jurisdictional power.<br>• While parliament is the supreme law-making body, the High Court can resolve disputes involving the Australian Constitution and may declare legislation made beyond the parliament's law-making power invalid, and alter the division of law-making power between the Commonwealth Parliament and state parliaments. |
| The ability of courts to influence parliament | • Courts can indirectly influence parliament to make and change the law by making comments when handing down judgments that inspire or encourage parliament to initiate law reform. A court's decision may also highlight a legal problem, or cause public outcry, that places pressure on the parliament to change the law.<br>• Judges in superior courts can only do this when a case is brought before them and in relation to the issues involved in the case. This relies on an aggrieved party having standing in the case, and the financial means and willingness to pursue a potentially lengthy and stressful case.<br>• The court's ability to influence parliament is also limited by the parliament's supremacy role and in particular its willingness to change the law. |
| The codification of common law | • As the supreme law-making power, parliament can pass legislation to codify common law, which means to assemble (or pull together) all the relevant law in a particular area to create one all-encompassing law. Parliament can also pass legislation that endorses principles established by courts, or clarify or expand on them.<br>• Over the years, some areas of law have been codified or partially codified, which may mean some areas of law are established by common law as well as statute law.<br>• Codification is limited by parliament's supremacy role and whether it is willing to pass legislation to codify law. This also means that it is dependent on factors that limit or restrict the ability of parliament to make law (such as the composition of parliament). |
| The abrogation of common law | • Parliament has the power to pass legislation that abrogates (cancels) decisions made through the courts, with the exception of decisions on the Australian Constitution.<br>• The abrogation of common law could potentially lead to an unjust law if the parliament overrides a valid legal principle (that has been established and considered by multiple independent and experienced judges), to suit a short-term or populist political agenda.<br>• The willingness of parliament to abrogate common law depends on parliament's willingness to do so. Parliament may be limited or unwilling to abrogate law, even bad law. |

Source 4 A summary of the points that can be made when analysing the relationship between parliament and the courts in law-making

12.8 Check your learning

**Remember and understand**

1 **Explain** why parliament may be dependent on the courts in law-making.
2 **Suggest** two reasons why parliament might decide to abrogate court-made law.
3 **Explain** how courts can influence the parliament to change the law. Use one case to illustrate your response.

**Examine and apply**

4 **Describe** the relationship between the supremacy of parliament and abrogation of common law.

**Reflect and evaluate**

5 **Analyse** two features of the relationship between parliament and courts.

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Chapter 12 Review

**Top exam tips from Chapter 12**

1 While there are many factors that affect the ability of parliament to make law, make sure you can discuss the four listed in the Study Design [i.e. the doctrine of precedent, judicial conservatism and judicial activism, costs and time involved in bringing a case to court, and the requirement for standing]. You could be asked a specific question about each of these four factors.
2 The doctrine of precedent is one of the most complex parts of Unit 4 Legal Studies, and is often where students struggle on the final examination. It's worth spending a bit of extra time on your revision of this topic.
3 You must be able to analyse the relationship between parliament and courts. This means you must be able to identify the components or features of the relationship and show how they establish a link or relationship between the parliament and the courts. Make sure you can explain the significance of the four features of the relationship between the parliament and the courts that are listed in the Study Design [i.e. the supremacy of parliament, the ability of the courts to influence parliament, the codification of common law, and the abrogation of common law].

**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 [including the exam] 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 The Victorian Supreme Court of Appeal has resolved a dispute by interpreting an Act of Parliament. Describe **one** possible effect of the Court's decision. (3 marks)

**Difficulty: medium**

2 Examine **two** features of the relationship between courts and parliament in law-making. (5 marks)

**Difficulty: high**

3 Discuss the extent to which the doctrine of precedent and judicial conservatism restrict the ability of the courts in law-making. (8 marks)

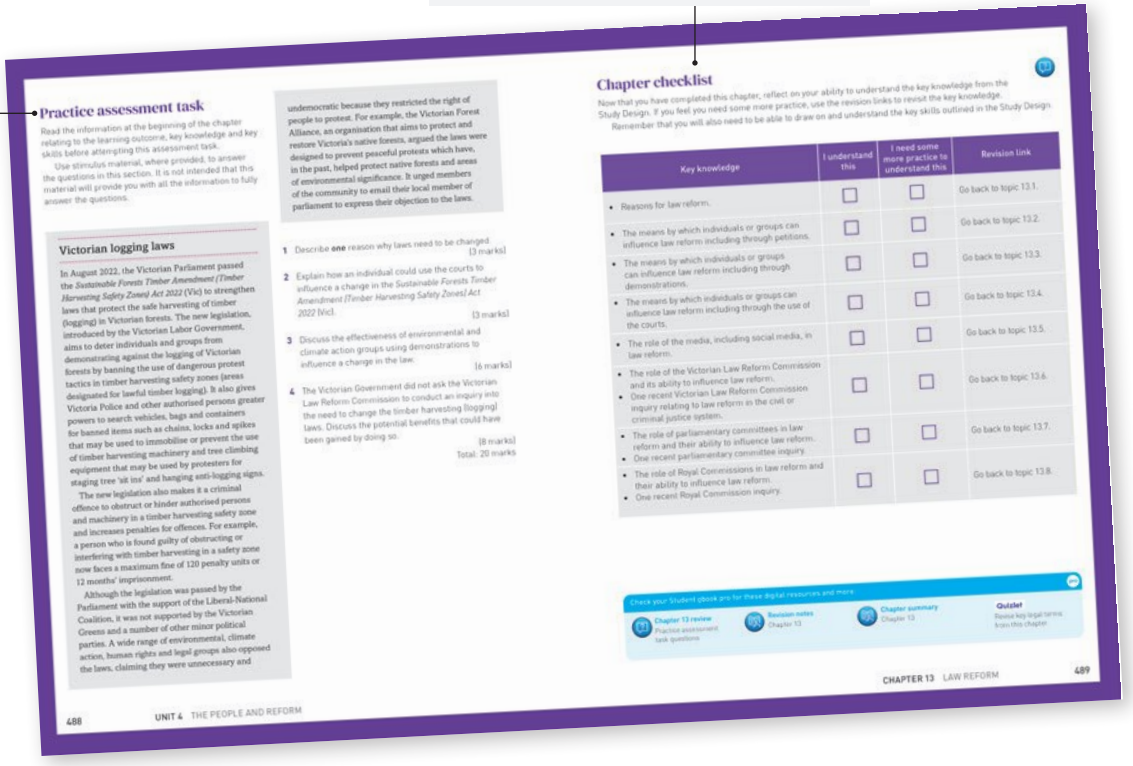
CHAPTER 12 THE COURTS 425

Three **top exam** 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*.



**Practice assessment task**

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

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

**Victorian logging laws**

In August 2022, the Victorian Parliament passed the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic) to strengthen laws that protect the safe harvesting of timber (logging) in Victorian forests. The new legislation, introduced by the Victorian Labor Government, aims to deter individuals and groups from demonstrating against the logging of Victorian forests by banning the use of dangerous protest tactics in timber harvesting safety zones (areas designated for lawful timber logging). It also gives Victoria Police and other authorised persons greater powers to search vehicles, bags and containers for banned items such as chains, locks and spikes that may be used to immobilise or prevent the use of timber harvesting machinery and tree climbing equipment that may be used by protesters for staging tree 'sit ins' and hanging anti-logging signs.

The new legislation also makes it a criminal offence to obstruct or hinder authorised persons and machinery in a timber harvesting safety zone and increases penalties for offences. For example, a person who is found guilty of obstructing or interfering with timber harvesting in a safety zone now faces a maximum fine of 120 penalty units or 12 months' imprisonment.

Although the legislation was passed by the Parliament with the support of the Liberal-National Coalition, it was not supported by the Victorian Greens and a number of other minor political parties. A wide range of environmental, climate action, human rights and legal groups also opposed the laws, claiming they were unnecessary and undemocratic because they restricted the right of people to protest. For example, the Victorian Forest Alliance, an organisation that aims to protect and restore Victoria's native forests, argued the laws were designed to prevent peaceful protests which have, in the past, helped protect native forests and areas of environmental significance. It urged members of the community to email their local member of parliament to express their objection to the laws.

1 Describe **one** reason why laws need to be changed. (3 marks)
2 Explain how an individual could use the courts to influence a change in the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic). (3 marks)
3 Discuss the effectiveness of environmental and climate action groups using demonstrations to influence a change in the law. (6 marks)
4 The Victorian Government did not ask the Victorian Law Reform Commission to conduct an inquiry into the need to change the timber harvesting (logging) laws. Discuss the potential benefits that could have been gained by doing so. (8 marks)

Total: 20 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 |
|---|---|---|---|
| • Reasons for law reform. | ☐ | ☐ | Go back to topic 13.1. |
| • The means by which individuals or groups can influence law reform including through petitions. | ☐ | ☐ | Go back to topic 13.2. |
| • The means by which individuals or groups can influence law reform including through demonstrations. | ☐ | ☐ | Go back to topic 13.3. |
| • The means by which individuals or groups can influence law reform including through the use of the courts. | ☐ | ☐ | Go back to topic 13.4. |
| • The role of the media, including social media, in law reform. | ☐ | ☐ | Go back to topic 13.5. |
| • The role of the Victorian Law Reform Commission and its ability to influence law reform.<br>• One recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system. | ☐ | ☐ | Go back to topic 13.6. |
| • The role of parliamentary committees in law reform and their ability to influence law reform.<br>• One recent parliamentary committee inquiry. | ☐ | ☐ | Go back to topic 13.7. |
| • The role of Royal Commissions in law reform and their ability to influence law reform.<br>• One recent Royal Commission inquiry. | ☐ | ☐ | Go back to topic 13.8. |

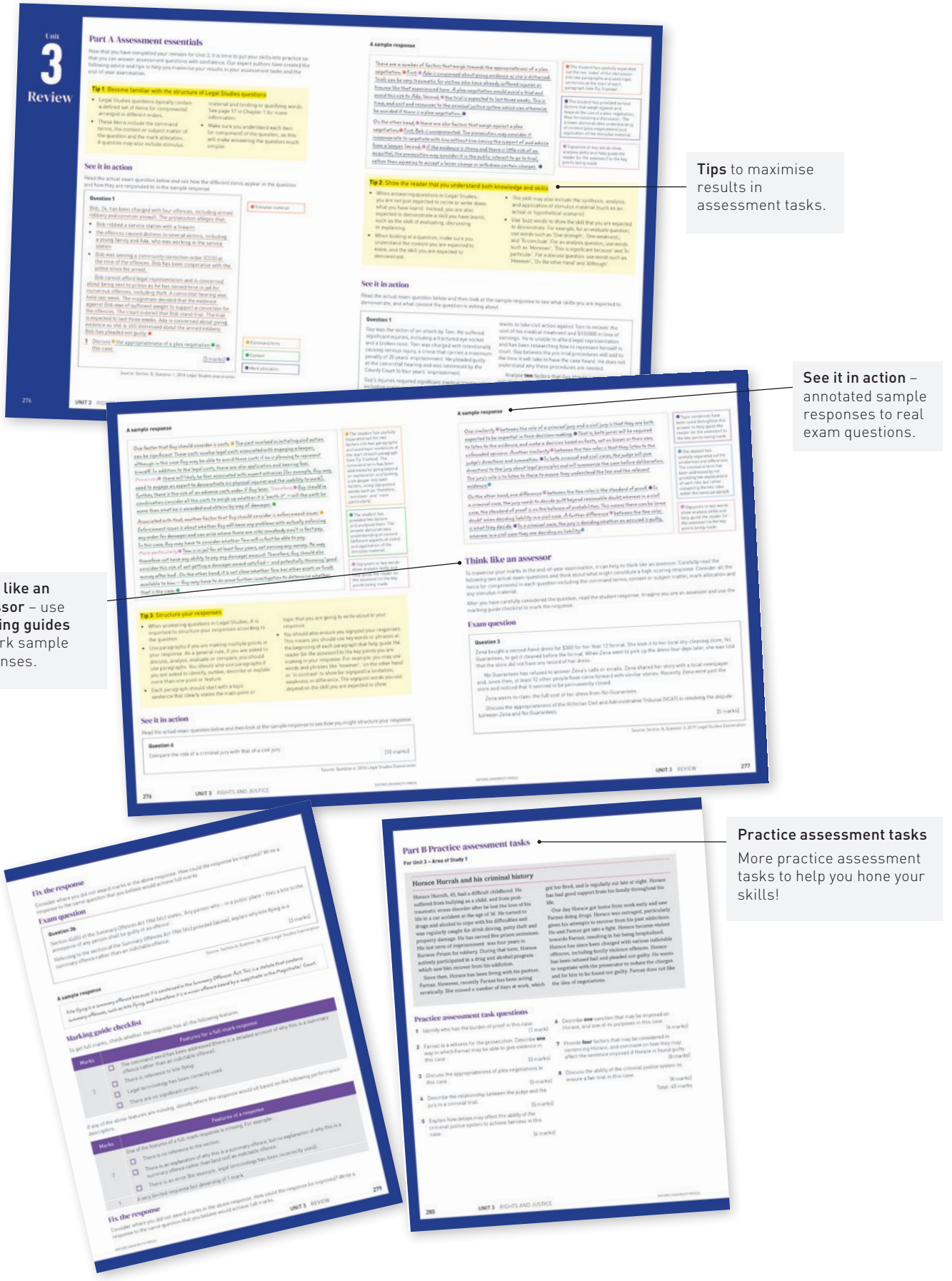
Check your Student obook pro for these digital resources and more:

Chapter 13 review — Practice assessment task questions
Revision notes — Chapter 13
Chapter summary — Chapter 13
Quizlet — Revise key legal terms from this chapter

CHAPTER 13 LAW REFORM 489

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# Assessment essentials – put your skills into practice!




**Tips** to maximise results in assessment tasks.

**See it in action** – annotated sample responses to real exam 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**.
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- The Student Book can be downloaded for offline use.

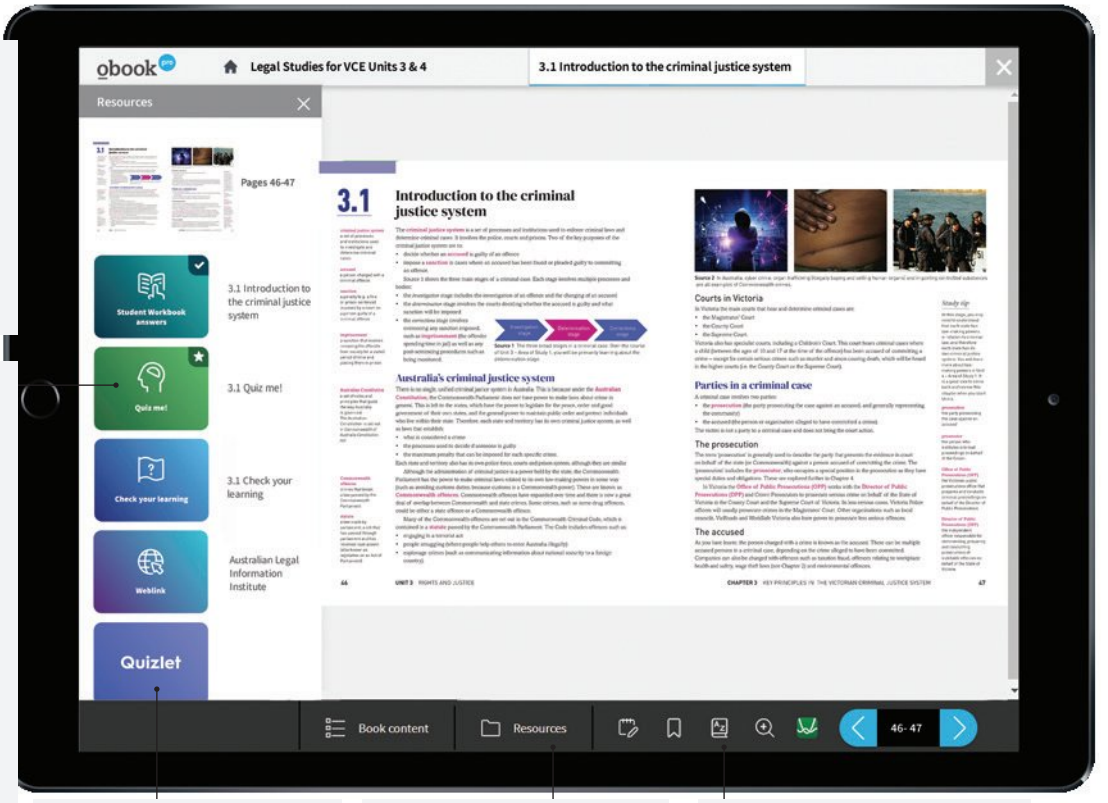
## Focus on eLearning

### 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-marked 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, 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 consolidate 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.

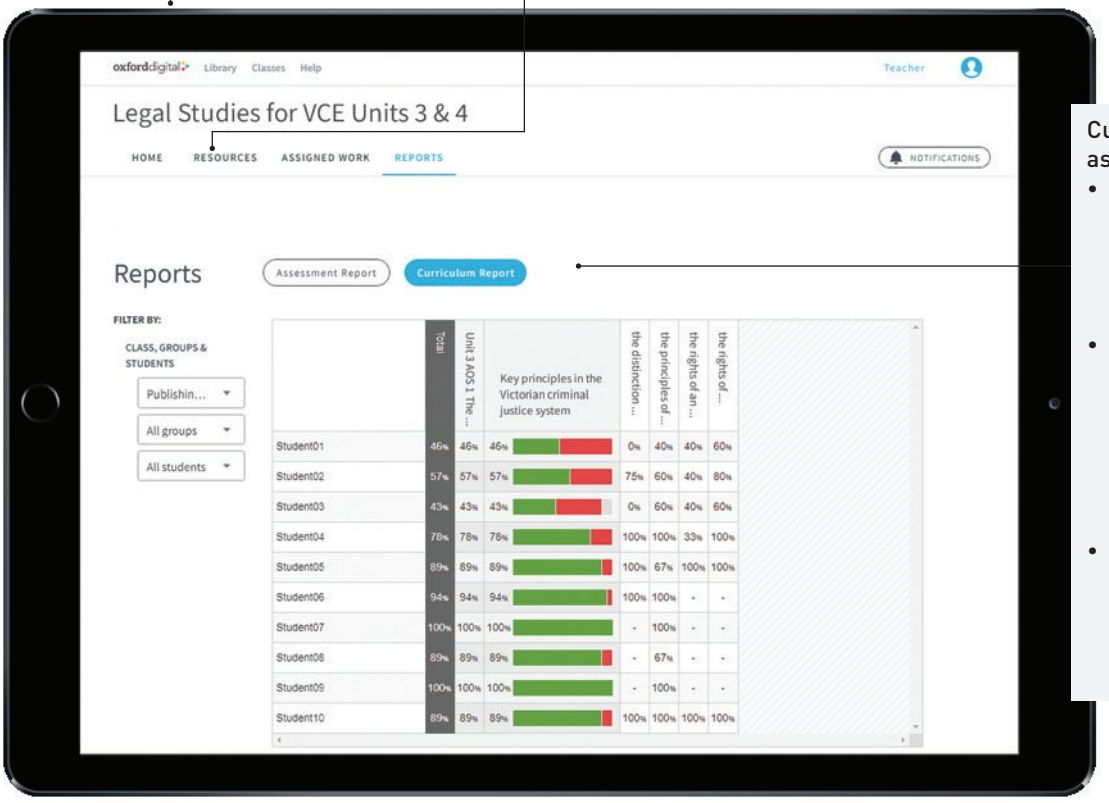
## Focus on assessment and reporting

**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.

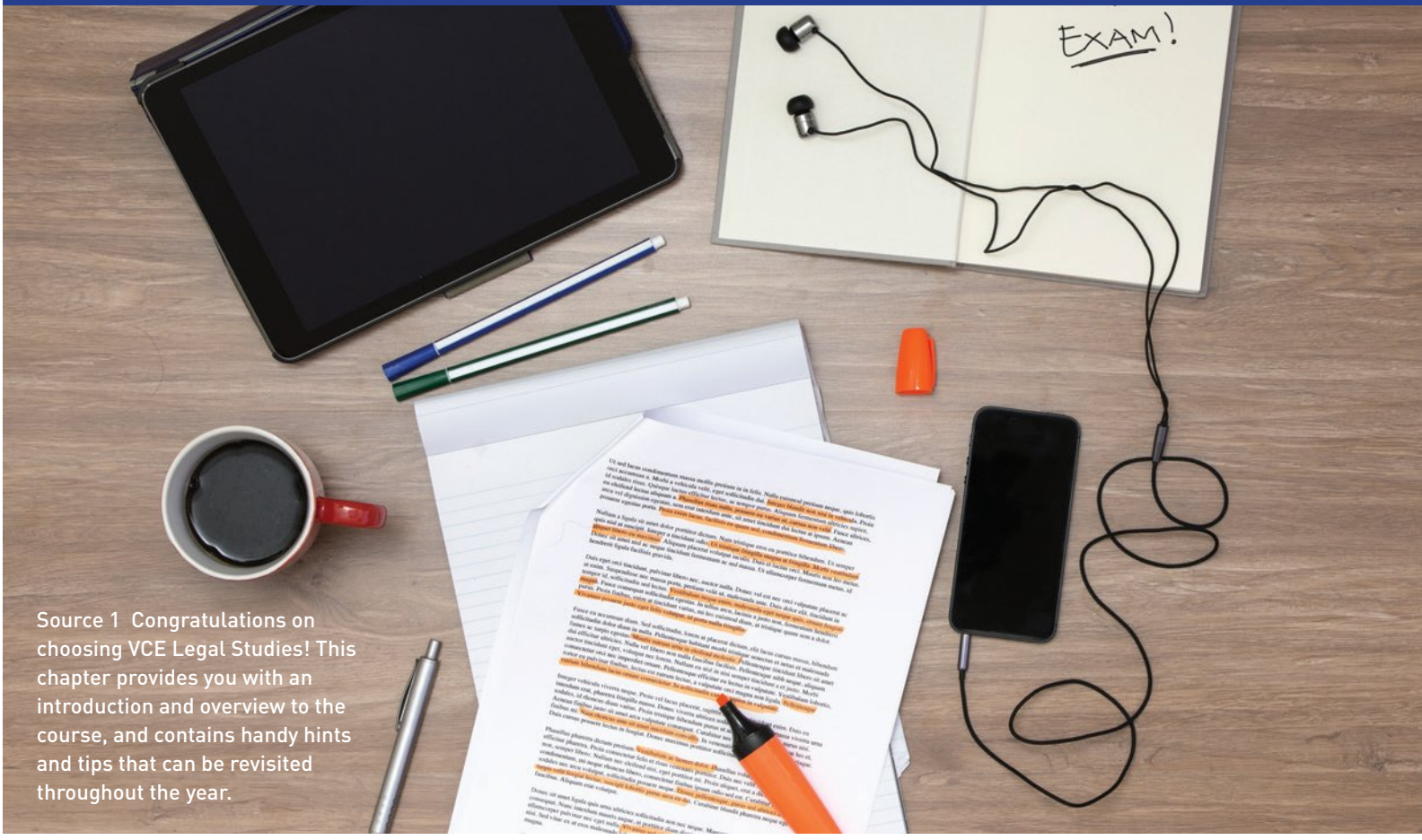
## Benefits for teachers

- 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 3 & 4

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

Legal Studies is an exciting, relevant and engaging course that explores the 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 3 & 4.

This legal toolkit contains a range of useful and relevant information to help you get the most out of VCE Legal Studies. It can be used as an introduction and overview to the course, but 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 on 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<br>• 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 3 & 4 of the course are broken down into Areas of Study and Outcomes. It also shows the chapters in this book that cover this content.

## Unit 3 – Rights and justice

| Area of study | Outcome | Marks allocated | Corresponding chapters in this book |
|---|---|---|---|
| **Area of Study 1** The Victorian criminal justice system | **Outcome 1** On completion of this unit the student should be able to explain the key principles in the criminal justice system, discuss the ability of sanctions to achieve their purposes and evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case. | 50 | • **Chapter 3** Key principles in the Victorian criminal justice system<br>• **Chapter 4** The principles of justice in a criminal case<br>• **Chapter 5** Sentencing |
| **Area of Study 2** The Victorian civil justice system | **Outcome 2** On completion of this unit the student should be able to explain the key principles in the civil justice system, discuss the ability of remedies to achieve their purposes and evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute. | 50 | • **Chapter 6** Key principles in the Victorian civil justice system<br>• **Chapter 7** The principles of justice in a civil dispute<br>• **Chapter 8** Remedies |
| | **Total marks** | **100** | |

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

# Unit 4 – The people, the law and reform

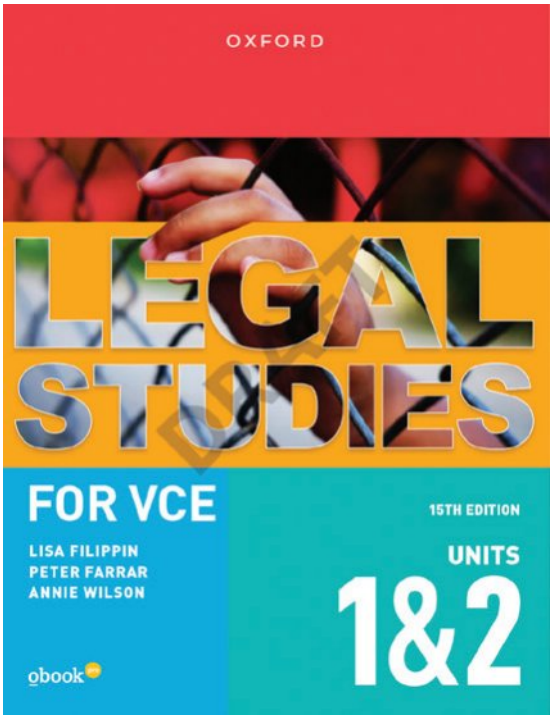
| Area of Study | Outcome | Marks allocated | Corresponding chapters in this book |
|---|---|---|---|
| **Area of Study 1** The people and the law-makers | **Outcome 1** On completion of this unit the student should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making. | 60 | • **Chapter 10** Law-making powers<br>• **Chapter 11** The people, the parliament and the Constitution<br>• **Chapter 12** The courts |
| **Area of Study 2** The people and reform | **Outcome 2** On completion of this unit the student should be able to explain the reasons for law reform and constitutional reform, discuss the ability of individuals to change the Australian Constitution and influence a change in the law, and evaluate the ability of law reform bodies to influence a change in the law. | 40 | • **Chapter 13** Law reform<br>• **Chapter 14** Constitutional reform |
| | **Total marks** | **100** | |

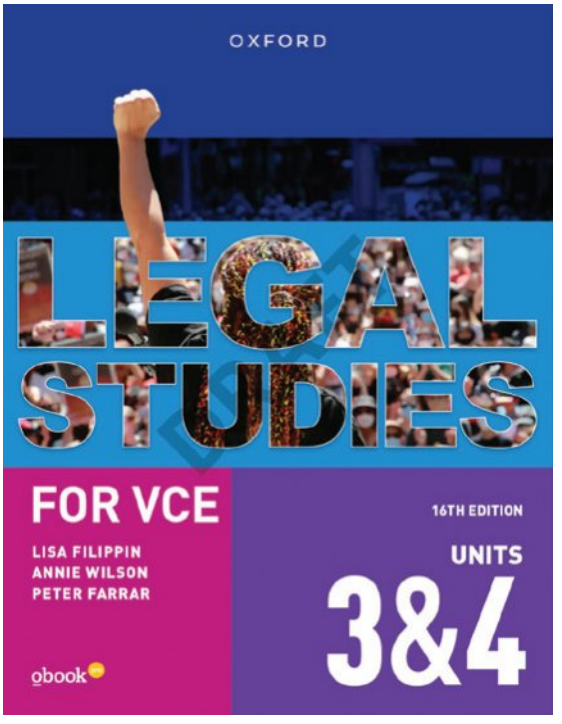
**Source 3** An overview of the content, structure and marks allocated in Unit 4. Extracts from the *VCE Legal Studies Study Design* (2024–2028) reproduced by permission, © VCAA

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

## Satisfactory completion

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

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

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

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



**Source 5** The final assessment task that you will undertake is the end-of-year examination, set by VCAA and held in November each year.

## Assessment tasks

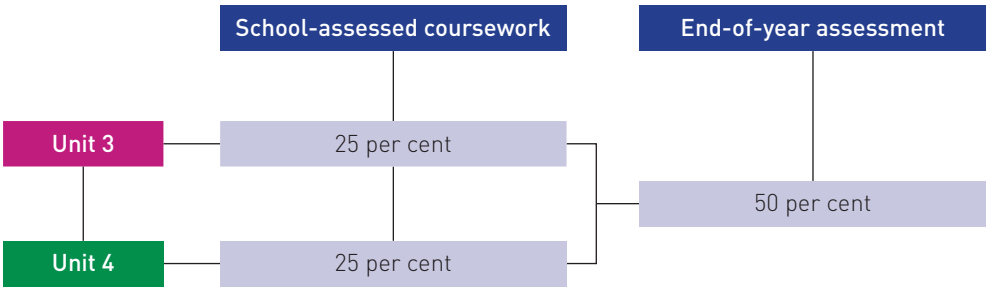
Your level of achievement in VCE Legal Studies Units 3 & 4 is determined by:

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

**Source 6** School-assessed coursework and assessment tasks

**Weblink**
VCE examination timetable

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




**Source 7** Percentage contributions to the final VCE Legal Studies study score

# Key themes of the VCE Legal Studies course

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

| Key theme | Description |
|---|---|
| Active citizenship | Many parts of the course demonstrate the ways in which you can become active and informed citizens. This is known as active citizenship. You will study this through Units 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:<br>• **fairness**<br>• **equality**<br>• **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:<br>• argue a case for or against a party in a criminal or civil matter<br>• discuss the extent to which our legal processes, methods and institutions are effective<br>• 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 Unit 4 you are required to evaluate the ability of law reform bodies to influence a change in the law, using recent examples. '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 8** Key themes covered in VCE Legal Studies Units 3 & 4

**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 school assessed coursework (SACs) or exams. Here are some tips to help you study effectively.

### Choose the best place to study

- Everyone has their own idea about the best study environment. Whether it is in your bedroom, at your local library or at your favourite cafe, 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.<br>• 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).<br>• 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.<br>• A separate list of weekly or monthly goals can help you keep the bigger picture in mind.<br>• 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!<br>• 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.<br>• 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.<br>• Use your textbook, revision notes or quiz cards to quiz yourself.<br>• 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.<br>• Ask your teacher to provide feedback on your practice responses to help you improve. |

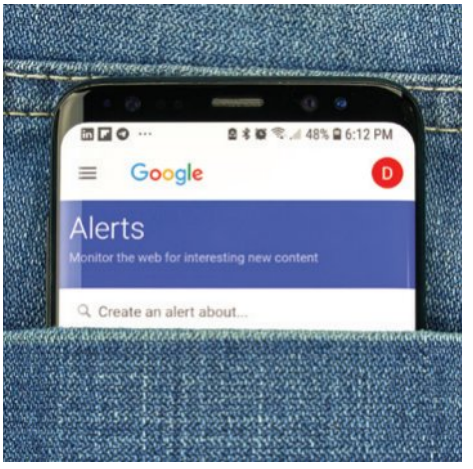
**Source 6** Revision strategies that you can use in VCE Legal Studies

# 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.

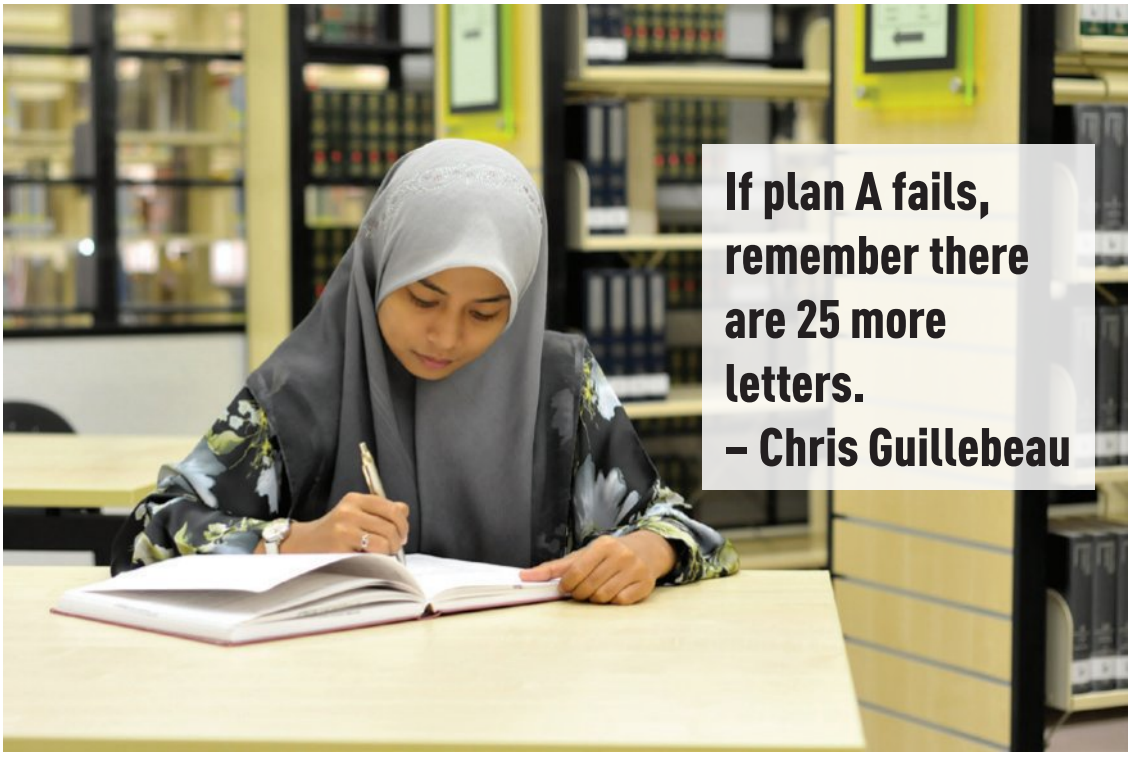
Your break should have nothing to do with your studies. Get up from your desk and leave your study space. Go for a quick walk, make something to eat or chat to your family or friends.

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 school-assessed coursework (SACs) to assess your understanding of key knowledge and key skills. To give yourself the best chance of success on these SACs – and the end-of-year examination – try to follow these five tips.

## Tip 1 – Use key legal terminology

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

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

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

- writing words and definitions on sticky notes and sticking them around your room or house
- making flashcards that you can carry with you and use to quiz yourself and others
- using the Quizlet sets provided on your obook pro to test yourself and compete against others.

***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)<br>*See the examination for the stimulus material.*<br>**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)<br>*See the examination for the stimulus material.*<br>**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)<br>**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)<br>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)<br>**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)<br>**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)<br>*See the examination for the stimulus material.*<br>**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)<br>*See the examination for the stimulus material.*<br>**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)<br>**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)<br>**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)<br>*See the examination for the stimulus material.*<br>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)<br>**Outline** how a victim impact statement is used when determining a sentence. |
| **Provide** | Give, supply or specify | Low | Section A, Question 3 (2020)<br>*See the examination for the stimulus material.*<br>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)<br>**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)<br>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.<br>**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)<br>*See above for the stimulus material.*<br>**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)<br>**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 exam questions

*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!

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

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

| 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.<br>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 exam 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

There are two sections to the VCE Legal Studies exam: Section A and Section B. Section B *will* be scenario-based, which means there will be source material or a scenario that you will have to read. For every Section B question, you must use stimulus material. You must do this even if the question does not specifically refer to the scenario or stimulus material. If you do not use the source material, you cannot get full marks for your responses in Section B.

For Section A questions, there may or may not be stimulus material or a scenario-based question. Some questions are stand-alone, which means that you answer them without reference to any stimulus material. Other questions may be attached to stimulus material. To make sure you achieve 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<br>• 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<br>• Answer must be more specific to the case, not just summarise what fairness means<br>• 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<br>• Requires a detailed consideration of events<br>• 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).

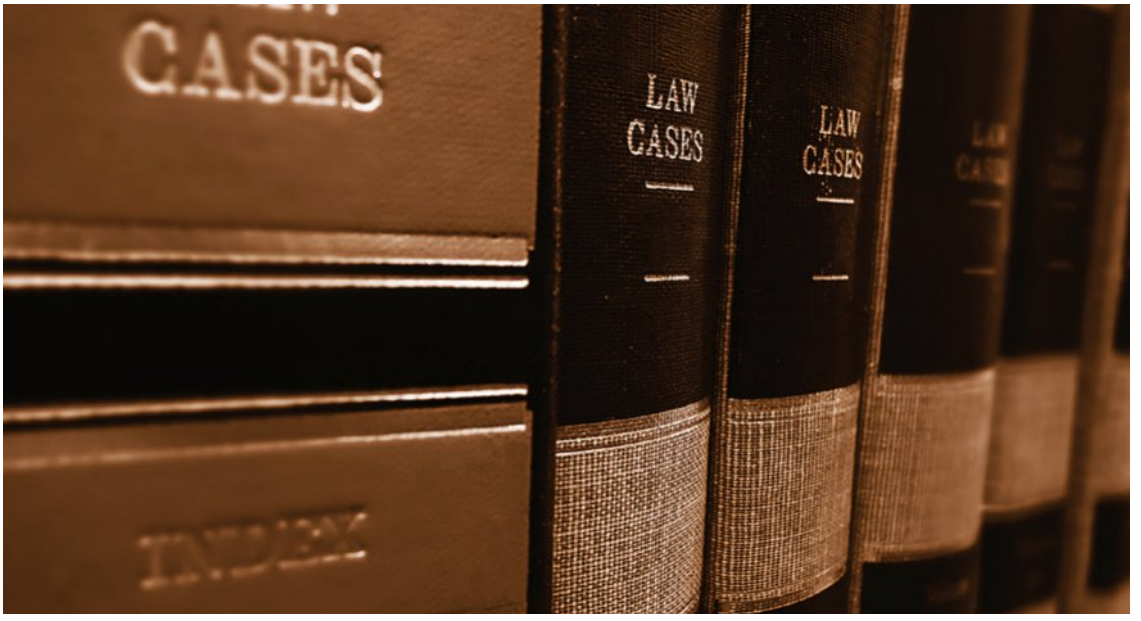
The following information will help you when reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.

## 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.

*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.

### Example 1 – an Act made by the Victorian Parliament

*Crimes Act 1958* (Vic)

Title Year Parliament

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

### Example 2 – an Act made by the Commonwealth Parliament

*Competition and Consumer Act 2010* (Cth)

Title Year Parliament

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

## Citing amending Acts

*Study tip*

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!

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.

# 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 (e.g. 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





# Unit 3
# Rights and justice

Source 1 In Unit 3 of VCE Legal Studies, you will explore the principles of justice (fairness, equality and access), the different processes and key personnel involved in the Victorian criminal and civil justice systems, and the extent to which these systems uphold each of the principles of justice. This photo shows the Supreme Court of Victoria, which hears both criminal and civil matters.

# Unit 3 — Rights and justice

## Area of Study 1 – The Victorian criminal justice system

### Outcome 1

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

| | Chapter | Title | Key knowledge |
|---|---|---|---|
| Unit 3 – Area of study 1<br>The Victorian criminal justice system | Chapter 3 | Key concepts in the Victorian criminal justice system | • the distinction between summary offences and indictable offences<br>• key principles of the criminal justice system, including the burden of proof, the standard of proof, and the presumption of innocence<br>• the rights of an accused, including the right to be tried without unreasonable delay, the right to silence, and the right to trial by jury<br>• the rights of victims, including the right to give evidence using alternative arrangements, the right to be informed about the proceedings, and the right to be informed of the likely release date of the offender |
| | Chapter 4 | The principles of justice in a criminal case | • the principles of justice: fairness, equality and access<br>• the role of Victoria Legal Aid and Victorian community legal centres in assisting an accused and victims of crime<br>• the purposes and appropriateness of plea negotiations<br>• the reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals<br>• the roles of key personnel in a criminal case, including the judge or magistrate, the jury, and the parties<br>• the need for legal practitioners in a criminal case<br>• the impact of costs, time and cultural differences on the achievement of the principles of justice |
| | Chapter 5 | Sentencing | • the purposes of sanctions: rehabilitation, punishment, deterrence (general and specific), denunciation and protection<br>• fines, community correction orders and imprisonment, and their specific purposes<br>• factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements |

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## Area of Study 2 – The Victorian civil justice system

### Outcome 2

On completion of this unit you should be able to explain the key principles in the civil justice system, discuss the ability of remedies to achieve their purposes and evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute.

| | Chapter | Title | Key knowledge |
|---|---|---|---|
| Unit 3 – Area of study 2<br>The Victorian civil justice system | Chapter 6 | Key concepts in the Victorian civil justice system | • key principles in the Victorian civil justice system, including the burden of proof and the standard of proof<br>• factors to consider before initiating a civil claim, including costs, limitation of actions and enforcement issues |
| | Chapter 7 | The principles of justice in a civil dispute | • the principles of justice: fairness, equality and access<br>• the purposes and appropriateness of methods used to resolve civil disputes, including mediation, conciliation and arbitration<br>• the reasons for the Victorian court hierarchy in determining civil disputes, including administrative convenience and appeals<br>• the roles of key personnel in a civil dispute, including the judge or magistrate (including the role of case management), the jury, and the parties<br>• the need for legal practitioners in a civil dispute<br>• the use of class actions to resolve civil disputes<br>• the purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the courts<br>• the impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute |
| | Chapter 8 | Remedies | • damages and injunctions, and their specific purposes |

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Chapter

# 2

# Introduction to Unit 3 – Rights and justice




Source 1 The rule of law is a fundamental concept in Australia. It is the principle that everyone in society (including those who make the law) is bound by and must obey the law. One of the principles of the rule of law is that people should be able to assemble and demonstrate without fear. This picture is of a demonstration held in Melbourne on Australia Day in 2023. In Chapter 2, you will explore the rule of law, law-making in Australia and the differences between criminal law and civil law, to assist you in your learning in Unit 3 (Chapters 3 to 8).

## Aim

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

## Topics covered

This chapter provides an overview of the following topics:

- the legal system in Australia, including the Australian Constitution and law-makers
- the nature of (and overlap between) criminal law and civil law
- the meaning of the rule of law.

## Key legal terms

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

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

**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)

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

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

**constitutional monarchy** a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

**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

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

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

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

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

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

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

**remedy** any order made by a court (or tribunal) 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

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

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

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

**statute** 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)

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

**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 rights and justice before you start.

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

# 2.1

# An overview of the Australian legal system

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

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

**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*

A 'legal system' is a term used to describe the rules, procedures and institutions that create, administer, interpret and enforce laws. **Laws** are legal rules made by a legal authority (such as **parliament** or the courts). There are many reasons why laws are needed, including to:

- protect society and our safety
- establish basic human rights
- protect the most vulnerable in our society.

A key objective of our legal system and laws is to achieve **social cohesion** and help everyone to live together in a harmonious way by establishing boundaries of acceptable behaviour.

Although laws are established to achieve social cohesion and regulate behaviour, it is inevitable that disputes will arise and laws will be broken. This means the legal system must also include procedures and bodies to interpret laws and decide an outcome when crimes are committed and disputes arise. It therefore consists of:

- parliaments, which make laws
- bodies or authorities such as the police, which ensure laws are followed and enforced
- the courts, which interpret and apply laws to cases.

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 in the late 1700s. Before this, First Nations peoples had lived here for at least 65 000 years, which means they have the longest continuing cultures anywhere in the world. First Nations peoples have their own systems and practices that have developed over time and which regulated human behaviour.



## The Australian Constitution

Before 1901 the Commonwealth of Australia did not exist. Instead, between 1788 (when Australia was colonised) and 1859, six separate British colonies were formed, each with its own parliament. Each colony made laws for its own residents.

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

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

**Source 1** Prior to the colonisation of Australia and the creation of the Australian Constitution, First Nations peoples had their own systems of laws and customs, some of which are still observed today.

The Australian Constitution is contained in the *Commonwealth of Australia Constitution Act*. It came into operation on 1 January 1901, the date of **Federation**. The Constitution established the framework for our parliaments and their law-making powers and how Australia was to be governed.

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

## Constitutional monarchy

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

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



**Source 2** Australia is a constitutional monarchy with the British monarch as the head of state. King Charles III became King after the death of his mother, Queen Elizabeth II, in 2022. His coronation (a celebration ceremony) took place in May 2023.

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

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

**constitutional monarchy**
a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

**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

# Law-makers in Australia

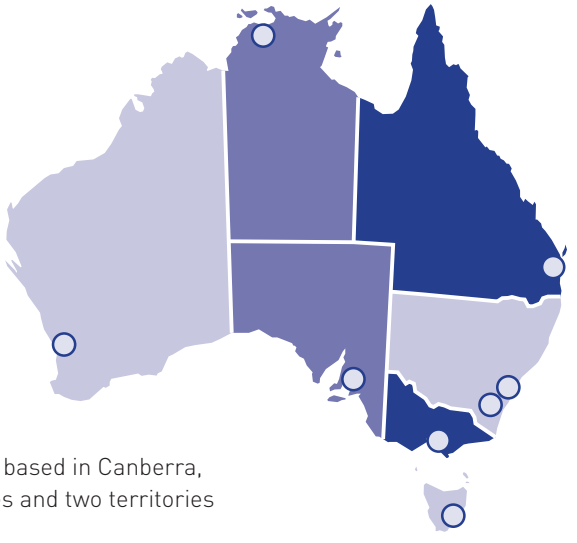
Two main law-makers in Australia are parliament (which makes statute law) and the courts (which make common law, also called case law or judge-made law).

## Parliament

Parliament is the primary law-making body in Australia's legal system. Parliaments debate and pass laws for the peace, order and good government of the community.

There are nine parliaments in Australia: one Commonwealth Parliament, six state parliaments and two territory parliaments. Each parliament is the supreme law-making body within its area of power (jurisdiction), meaning that each parliament can make, change or abolish laws within its law-making powers whenever it wants to (though there are factors that limit parliament's ability to do so, as you will explore in Unit 4).

Australia's parliamentary system is based on Britain's **Westminster system**. Two features of the Westminster system are:



**Source 3** As well as the Commonwealth Parliament, based in Canberra, which makes laws for the whole country, the six states and two territories have parliaments based in their capital cities.

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

- there is a separation of those who make laws (parliament), those who administer laws (executive or **government**), and those who interpret how the law is to be applied (the courts)
- the government (or executive), which is responsible for administering and carrying out the laws, is accountable for its actions and answerable to the elected parliament. This feature is referred to as the principle of **responsible government**.

In Australia, most parliaments are bicameral, meaning they consist of two separate houses (see Source 4). This means there are two groups of people, who sit in a separate 'chamber' or 'house' to debate and pass laws. The houses are referred to as the upper house and the lower house, and are made up of members who have been democratically elected by the people and who represent their views and values.

In Australia today, the only parliaments that are not bicameral are Queensland, the Northern Territory and the Australian Capital Territory, which are unicameral, meaning they each have one house of parliament.

Parliament also includes the King, represented by the Governor-General at the Commonwealth level and governors at state level, who act on behalf of the King.

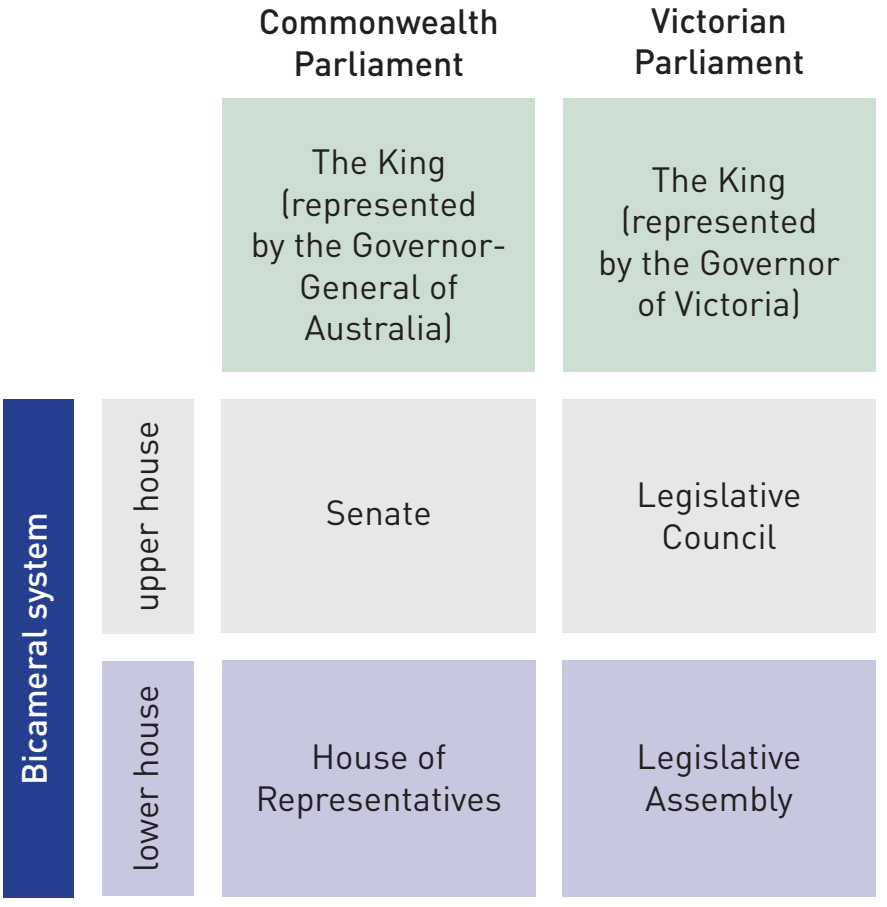
The political party with the majority of members in the lower house forms government. The main political party other than the government forms the **opposition**. Other political party members and independent members are called **crossbenchers**.

**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

**responsible government**
a legal principle which requires the government to be answerable to elected representatives of the people for its actions and which requires the government to maintain the confidence of the majority of the lower house

**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

**crossbenchers**
members of Parliament who are not members of either government or opposition (i.e. independent members or members of minor parties). They are named after the set of seats provided in parliament for them, called the 'crossbench'




**Source 4** Both the Commonwealth Parliament and the Victorian Parliament are bicameral parliaments.

## Statute law

A **statute** (also known as an **Act of Parliament** or legislation) is a law passed by parliament. Parliament's main role is to pass laws. This involves presenting a **bill** (a proposed law) in one of the houses of parliament and having it debated and passed by a majority of members in each house. After both houses of parliament have voted in favour of a bill, it must then receive **royal assent** or approval by the King's representative before finally becoming an Act of Parliament.

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

## Secondary legislation

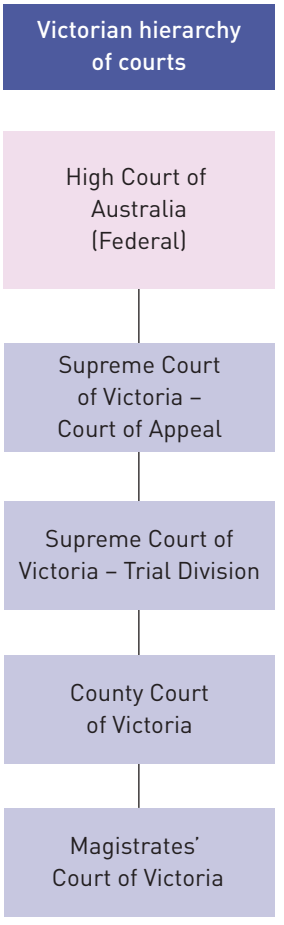
**Secondary legislation**, or delegated legislation, is made by people or bodies who have been given limited powers by the parliament to make certain regulations or rules. It allows specialised bodies (such as local councils) to make and implement regulations, rules and orders relatively quickly because they do not have to be passed by the parliament. Examples include building and planning laws made by local councils and court rules made by the court.

# Courts

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

In Australia, some courts are Commonwealth (federal) courts and some are state courts. Generally, each court deals with issues that arise under its **jurisdiction**. The Commonwealth courts are the High Court of Australia, the Federal Court, and the Federal Circuit and Family Court of Australia. The main Victorian courts are the Supreme Court (divided into the Trial Division and the Court of Appeal), the County Court and the Magistrates' Court. There are two specialist courts in Victoria, the Children's Court and the Coroners Court, which hear very specific types of cases. There are specialist divisions within the main courts, such as the Koori Court division in the Magistrates' Court and the County Court.

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




**Source 5** The Victorian court hierarchy

**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)

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

**bill**
a 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)

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

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

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

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

### *Study tip*

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

## Common law

When courts interpret and apply laws made by parliament, they can broaden or narrow the meaning of a word or phrase in a statute. Once the meaning is decided, it can become a principle of law (**precedent**) that is to be followed in the future.

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

**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 be either binding or persuasive

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

# 2.1 Check your learning

### Remember and understand

1 **Define** the terms 'government' and 'opposition'.
2 **Distinguish** between statute law and common law.
3 Did the High Court of Australia and the Commonwealth Parliament exist before the Australian Constitution? **Explain** your answer.
4 **Why** is Australia described as a democracy?

### Examine and apply

5 **State** whether each of the following laws is an Act of Parliament or secondary legislation. If it is an Act of Parliament, **identify** which parliament made the law.
   **a** *Home Affairs Act 2023* (Cth)
   **b** *Child and Youth Safe Organisations Act 2023* (Tas)
   **c** Street Numbering State Law

# 2.2 Criminal law and civil law

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

## Criminal law

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

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

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

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

A crime is an act or an omission that:

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

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

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

## Civil law

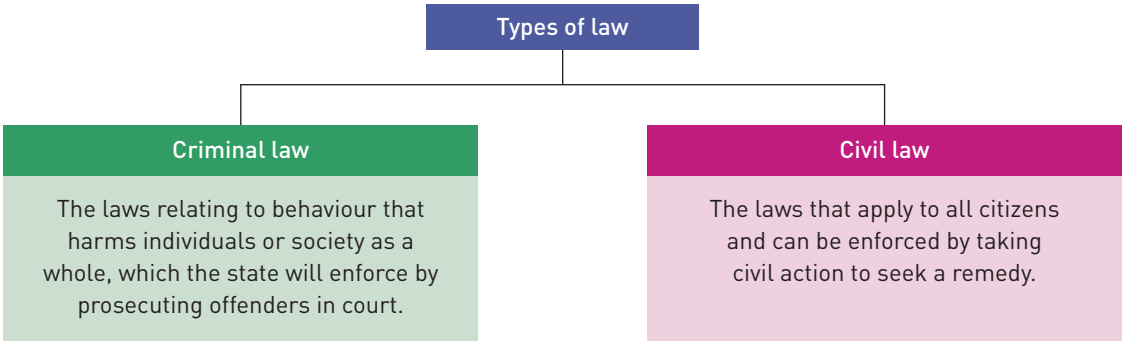
**civil law**
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes

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

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

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

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




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

**accused**
a person charged with a criminal offence

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

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

**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

# The overlap between criminal law and civil law

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

Where the same behaviour results in both types of action, the two cases will be heard separately and may even be heard in different courts. The outcome of one does not affect the outcome of the other, because there are different elements that need to be proven in criminal cases and in civil cases. It is therefore possible for an **accused** to be found not guilty in a criminal case, but found liable in a civil case relating to the same behaviour.

In addition, there is a different **standard of proof** in both cases. The jury at a criminal trial (or the magistrate if the case is heard in the Magistrates' Court) needs to find the accused guilty 'beyond reasonable doubt'. However, in the civil case, the magistrate, judge or jury only has to decide what probably happened, not what happened beyond reasonable doubt, and may find the **defendant** liable. You will learn more about these concepts in Chapters 3 and 6.

The scenario below is an example of how the underpayment of staff could result in both criminal charges and civil proceedings.

**Actual scenario**

## Wage theft laws introduced in Victoria

In 2020, the Victorian Parliament passed the *Wage Theft Act 2020* (Vic) after the Victorian Government promised to criminalise wage theft. Wage theft is the withholding or non-payment of employee entitlements (e.g. wages, allowances or certain types of leave such as annual leave) owed by an employer to an employee as part of their employment. The *Wage Theft Act* makes it a crime for an employer to dishonestly withhold the whole or part of an employee entitlement owed by the employer to an employee. The penalty is up to a maximum of 10 years in prison or a maximum fine of about $220 000 for a business owner, and up to approximately $1.1 million for a company.

In November 2022, it was reported that a restaurant had been charged under the *Wage Theft Act* for failing to pay staff members their entitlements, including wages and superannuation. It was the first time charges had been laid under the legislation.

The issue of whether an employer fails to pay its employees their full entitlements can also be the subject of a civil dispute. Employees can make a claim for employee entitlements in the civil justice system, such as through the courts. In addition, there have been **class actions** on behalf of employees to recover wages owing to them. For example, it was reported in December 2022 that a group of junior Victorian doctors had commenced a civil claim, alleging underpayment in relation to overtime work. There was also a class action commenced against a large pizza company in relation to alleged underpayment of workers.




**Source 2** The introduction of wage theft laws followed campaigns for the law to be changed, including a campaign by Young Workers Centre. You will learn more about ways to influence law reform in Chapter 13.

## 2.2 Check your learning

### Remember and understand

1 **Distinguish** between a criminal case and a civil dispute.

2 **Describe** one purpose of criminal law.

3 Using an example, **explain** how one set of facts may give rise to both a criminal case and a civil dispute.

### Examine and apply

4 **a** Which parliament passed the *Crimes Act 1958* (Vic)?

**b** Access the *Crimes Act* from the Victorian Legislation website (see weblink on your obook pro) and **describe** three types of crimes.

5 Read the scenario 'Wage theft laws introduced in Victoria'.

**a** Access the *Wage Theft Act 2020* (Vic) from the Victorian Legislation website (see weblink on your obook pro). **Identify** the section that makes it an offence for an employer to dishonestly withhold employee entitlements.

**b** The penalty units for a body corporate (company) is 6000 penalty units. Conduct some research and **explain** what is meant by 'penalty units', and how much each penalty unit is.

**c** Other than the two in the scenario, conduct some research and **identify** one class action that has been commenced in relation to underpayment of wages. **Summarise** the allegations in the class action and any outcome.

**d** If a company is charged under the wage theft laws, does this automatically mean compensation for an employee? **Explain**.

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

**Weblink**
*Crimes Act 1958* (Vic)

**Weblink**
*Wage Theft Act 2020* (Vic)




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

# 2.3

# The rule of law

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

One of the central foundations of Australian society is the concept of the **rule of law**. It means that everyone – individuals, groups and those in government – is bound by the law and must obey 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.

The fact that parliaments and governments must obey the Australian Constitution is an example of the rule of law at work in Australia. The Constitution also imposes restrictions on the law-making powers of the parliaments so that they do not have unlimited power.

A number of legal principles combine to uphold the rule of law. For example:

- laws must be clear, understood, known and accessible
- courts and judges must be independent so that trials and hearings can be free from pressure or influence from the other branches of government
- the law must be applied equally and fairly, without favour or discrimination, and no person is above the law
- all people charged with a crime are presumed to be innocent until proven guilty in court
- people are free to criticise and challenge parliament and government, can seek to influence changes in the law, and can demonstrate without fear
- trials and hearings should be conducted in public so justice can be 'seen to be done'.

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

The scenario below is an example of commentary about the rule of law.

### *Study tip*

The rule of law is referred to on page 6 of the Study Design. It underpins many of the legal principles you study in Units 3 and 4. You should try to refer to it in answers to questions where it is relevant.

**Actual scenario**

## Riot at the US Capitol

In November 2020, following the 2020 United States presidential election, Democrat Joe Biden defeated Republican (and then President) Donald Trump. After the closing of polls, Trump claimed that he had won the election, and that there had been widespread voter fraud in the election that resulted in the election being 'stolen' from him.

On 6 January 2021, the formalisation of Biden's victory was to occur at the US Capitol building in Washington, DC, which is where the legislative branch (called Congress) of the US federal government meets. Thousands of supporters of then President Trump attended a rally, with Trump in attendance. The supporters began to march to the US Capitol building. Shortly after, rioters stormed the Capitol, broke windows and managed to get inside. Members of Congress were moved to safety, and havoc and destruction took place both inside and outside the building. A police officer died after he was overpowered and beaten, and a rioter was shot dead. It took several hours for calm to be restored. Members of Congress then returned to the building and President Biden's victory was formalised.

More than 1000 rioters have since been charged with committing a crime in relation to the riot. A committee was also established to investigate the events leading up to and on the day of the riot. Various references have been made to the rule of law, including that what happened at the Capitol was a disregard for the 'rule of law'. The then Leader of the Federal Opposition in Australia, Anthony Albanese, tweeted at the time that what happened was an 'assault on the rule of law and democracy'.



**Source 1** The attack on the US Capitol on 6 January 2021

## 2.3 Check your learning

### Remember and understand

1 **Describe** the concept of the rule of law.

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

### Examine and apply

3 Read the scenario 'Riot at the US Capitol'.

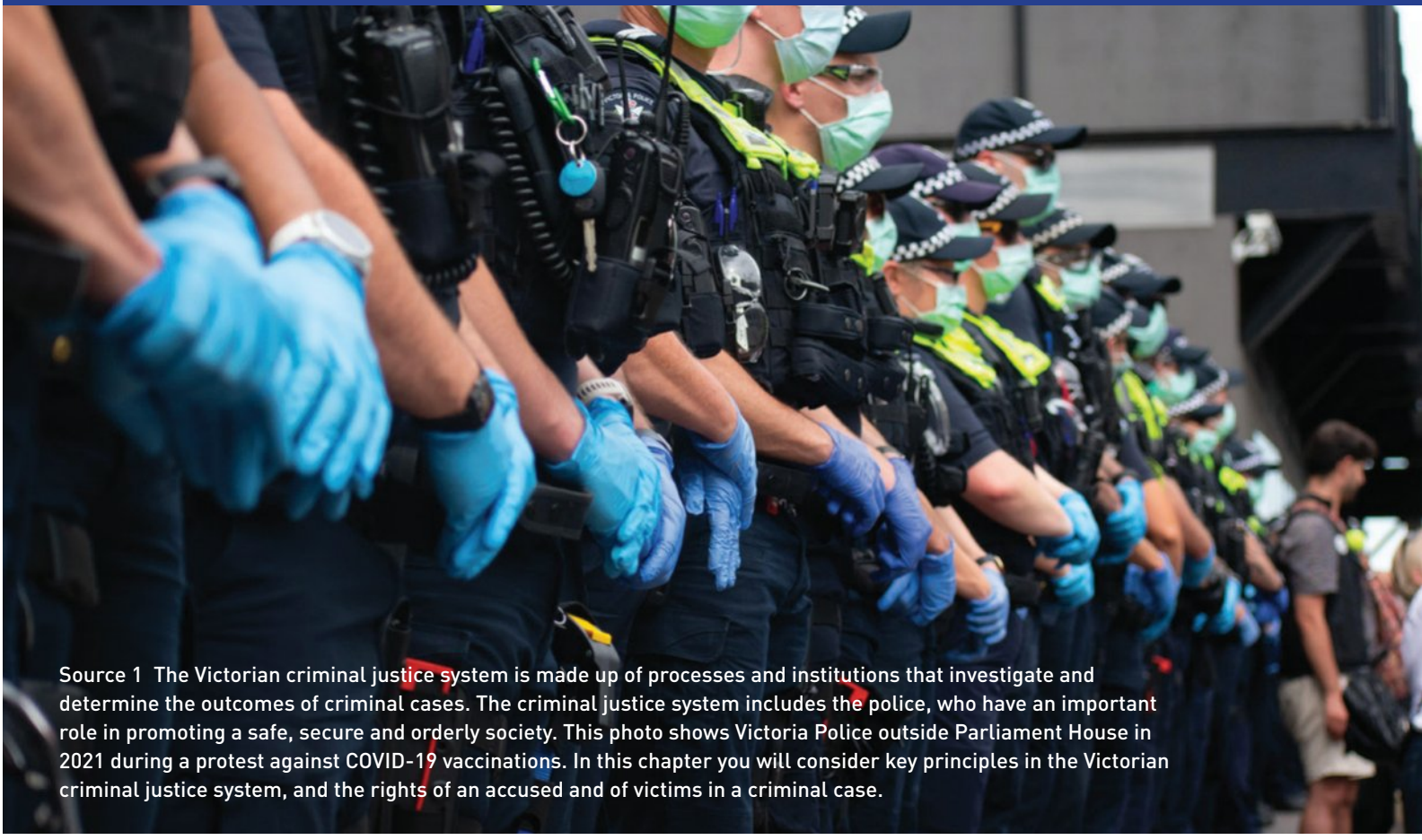
- **a** **Identify** three principles of the rule of law, and **explain** how each of them may be relevant to the riot at the US Capitol.
- **b** Conduct some research and gather facts about the riot (such as how many people stormed the US Capitol, how many were charged, how many have been found guilty, and how many have been imprisoned). Use software such as Canva to **construct** an infographic that presents the information you found.

4 **Investigate** countries overseas and **identify** some examples where the rule of law is discussed. Share as a class.

Chapter

# 3

# Key concepts in the Victorian criminal justice system



Source 1 The Victorian criminal justice system is made up of processes and institutions that investigate and determine the outcomes of criminal cases. The criminal justice system includes the police, who have an important role in promoting a safe, secure and orderly society. This photo shows Victoria Police outside Parliament House in 2021 during a protest against COVID-19 vaccinations. In this chapter you will consider key principles in the Victorian criminal justice system, and the rights of an accused and of victims in a criminal case.

## Outcome

By the end of **Unit 3 – Area of Study 1** (i.e. Chapters 3, 4 and 5), you should be able to explain the key principles in the criminal justice system, discuss the ability of sanctions to achieve their purposes and evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case.

## Key knowledge

In the chapter, you will learn about:

- the distinction between summary offences and indictable offences
- key principles of the criminal justice system, including the burden of proof, the standard of proof, and the presumption of innocence
- the rights of an accused, including the right to be tried without unreasonable delay, the right to silence, and the right to trial by jury
- the rights of victims, including the right to give evidence using alternative arrangements, the right to be informed about the proceedings, and the right to be informed of the likely release date of the offender.

## Key skills

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

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

## Key legal terms

**accused** a person charged with a criminal offence

**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)

**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)

**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

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

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

**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)

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

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

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

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

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

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

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

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

## Key legal cases

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

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



**Warm up!**
Check what you know about key concepts in the Victorian criminal justice system before you start.

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

# 3.1 Introduction to the criminal justice system

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

**accused**
a person charged with a criminal offence

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

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

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

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

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

**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)

The **criminal justice system** is a set of processes and institutions used to enforce criminal laws and determine criminal cases. It involves the police, courts and prisons. Two of the key purposes of the criminal justice system are to:

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

Source 1 shows the three main stages of a criminal case. Each stage involves multiple processes and bodies:

- the *investigation* stage includes the investigation of an offence and the charging of an accused
- the *determination* stage involves the courts deciding whether the accused is guilty and what sanction will be imposed
- the *corrections* stage involves overseeing any sanction imposed, such as **imprisonment** (the **offender** spending time in jail) as well as any post-sentencing procedures such as being monitored.




**Source 1** The three broad stages in a criminal case. Over the course of Unit 3 – Area of Study 1, you will be primarily learning about the determination stage.

## Australia's criminal justice system

There is no single, unified criminal justice system in Australia. This is because under the **Australian Constitution**, the Commonwealth Parliament does not have power to make laws about crime in general. This is left to the states, which have the power to legislate for the peace, order and good government of their own states, and the general power to maintain public order and protect individuals who live within their state. Therefore, each state and territory has its own criminal justice system, as well as laws that establish:

- what is considered a crime
- the processes used to decide if someone is guilty
- the maximum penalty that can be imposed for each specific crime.

Each state and territory also has its own police force, courts and prison system, although they are similar.

Although the administration of criminal justice is a power held by the state, the Commonwealth Parliament has the power to make criminal laws related to its own law-making powers in some way (such as avoiding customs duties, because customs is a Commonwealth power). These are known as **Commonwealth offences**. Commonwealth offences have expanded over time and there is now a great deal of overlap between Commonwealth and state crimes. Some crimes, such as some drug offences, could be either a state offence or a Commonwealth offence.

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

- engaging in a terrorist act
- people smuggling (where people help others to enter Australia illegally)
- espionage crimes (such as communicating information about national security to a foreign country).





**Source 2** In Australia, cyber crime, organ trafficking (illegally buying and selling human organs) and people smuggling are all examples of Commonwealth crimes.

## Courts in Victoria

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

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

Victoria also has specialist courts, including a Children's Court. This court hears criminal cases where a child (between the ages of 10 and 17 at the time of the offence) has been accused of committing a crime – except for certain serious crimes such as murder and arson causing death, which will be heard in the higher courts (i.e. the County Court or the Supreme Court).

# Parties in a criminal case

A criminal case involves two parties:

- the **prosecution** (the party prosecuting the case against an accused, and generally representing the community)
- the accused (the person or organisation alleged to have committed a crime).

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

## The prosecution

The term 'prosecution' is generally used to describe the party that presents the evidence in court on behalf of the state (or Commonwealth) against a person accused of committing the crime. The 'prosecution' includes the **prosecutor**, who occupies a special position in the prosecution as they have special duties and obligations. These are explored further in Chapter 4.

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

## The accused

As you have learnt, the person charged with a crime is known as the accused. There can be multiple accused persons in a criminal case, depending on the crime alleged to have been committed. Companies can also be charged with offences such as taxation fraud, offences relating to workplace health and safety, wage theft laws (see Chapter 2) and environmental offences.

### *Study tip*

At this stage, you only need to understand that each state has law-making powers in relation to criminal law, and therefore each state has its own criminal justice system. You will learn more about law-making powers in Unit 4 – Area of Study 1. It is a good idea to come back and review this chapter when you start Unit 4.

**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

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

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

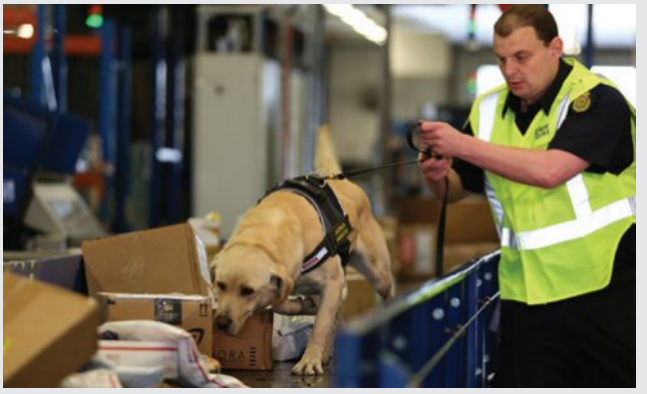
In the scenario below, the Commonwealth Director of Public Prosecutions (CDPP) charged two people in relation to importing into Australia a commercial quantity of ephedrine, an ingredient used to manufacture the drug known as 'ice'. They were tried by a **jury** in the County Court.

Actual scenario

## Two men jailed for importing a banned substance

Section 307.11(1) of the Commonwealth Criminal Code makes it an offence for a person to import or export certain 'precursors' (chemicals that can be used to manufacture drugs) of a 'commercial quantity'. The maximum penalty is 25 years in prison or 5000 penalty units, or both. One of these precursors is ephedrine. Ephedrine can be used to manufacture the drug methamphetamine ('ice'), a dangerous drug that has had devastating effects on people's health and lives, sometimes resulting in death.

In this case, two men were charged with importing more than 1000 kg of ephedrine, well above the commercial quantity of 1.2 kg. One of the men was alleged to have overseen the importation of the substance, and the other was alleged to be in charge of the finances and handling its sale in Australia. After a trial that ran for 17 days, the jury returned a verdict of guilty against each accused. They were both sentenced to more than 17 years in prison for their role in the crime. In sentencing the two men, the judge said the crime was in the worst category of its type, particularly given the size of the importation, the potential profits involved, and the roles played by the offenders. In his comments, the judge congratulated the police involved in the investigation, noting that the community had been saved from the 'ravages' of large volumes of the drug being distributed around the country.



**Source 3** The Commonwealth can prosecute crimes in Australia, including importing banned substances.

*CDPP v Chan & Chen* [2022] VCC 1463 (12 September 2022)

# 3.1 Check your learning

### Remember and understand

1 **Define** the term 'criminal justice system'.
2 Is there one single unified criminal justice system in Australia? **Explain**.
3 **Distinguish** between police prosecutors and the OPP.

### Examine and apply

4 Create a visual diagram that shows the three stages of a criminal case. Include as many bodies, people or processes as possible involved at each stage. You may need to conduct some further research.
5 Read the scenario 'Two men jailed for importing a banned substance'.
   a **Identify** the parties in the case.
   b **Describe** the nature of the offence.
   c **Explain** why a jury was required in this trial.
   d **Explain** why this offence is a Commonwealth offence.
6 Visit the Australasian Legal Information Institute (AustLII) website (see weblink on your obook pro). Find the page with this year's County Court judgments.
   a Find a recent criminal judgment in which a sentence was handed down.
   b **Provide** a summary of the parties to the case, the charges alleged against the accused, whether there was a jury trial, and the sentence.
   c Write some questions for a classmate to answer based on your summary of the judgment.

Weblink
Australasian Legal Information Institute

# 3.2 Summary and indictable offences

## Key knowledge

In this topic, you will learn about:

- the distinction between summary offences and indictable offences.

In Victoria, offences are often classified based on the nature of the offence. For example, there are crimes against the person (such as assault and attempted murder), and crimes against property (such as theft and arson).

Crimes are also classified in terms of their seriousness; that is, as either summary offences or indictable offences.

## Summary offences

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

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

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

Most crimes that are committed in Victoria are summary offences. The number of criminal cases initiated or commenced and finalised in each of the main Victorian courts for the financial year 2021–22 is set out in Source 1 below. As shown, most criminal cases heard each year in Victoria – more than 95 per cent – are heard in the Magistrates' Court, which hears summary offences.

| Court | Number of criminal cases initiated in 2021–22 | Number of criminal cases finalised in 2021–22 |
|---|---|---|
| Magistrates' Court | 122 578 | 134 351 |
| County Court | 2315 | 2205 |
| Supreme Court (Trial Division) | 110 | 83 |
| **Total** | **125 003** | **136 639** |

— Annual Reports of the Magistrates' Court, County Court and Supreme Court, 2021–22

**Source 1** The number of criminal cases finalised in 2021–22 in the main Victorian courts

## Indictable offences

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

An **indictable offence** is a serious crime. Examples of indictable offences include homicide offences (such as murder or manslaughter), sexual offences, some theft crimes and drug trafficking.

As a general rule, offences in the *Crimes Act 1958* (Vic) are indictable offences unless the offence is stated in the Act to be a summary offence. Indictable offences are heard in the County Court or Supreme Court of Victoria, and the final hearing is known as a *trial*. A jury is used to determine guilt if the accused pleads not guilty.

## Committal proceedings

**committal proceeding** the pre-trial hearings and processes held in the Magistrates' Court for indictable offences

**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

When an accused has been charged with an indictable offence and pleads not guilty, **committal proceedings** take place in the Magistrates' Court. Committal proceedings involve several stages, including a final stage, called the **committal hearing**, at which the magistrate will decide whether there is evidence of sufficient weight to support a conviction at trial.

If the magistrate does find there is sufficient evidence, the accused is committed to stand trial and the case is then transferred to the higher court that will hear the case.

If the magistrate does not find there is sufficient evidence, the accused is discharged and allowed to go free. If further evidence is found in future, the accused can be brought before the court again, because the committal proceeding is not a trial, and no guilt has been decided.

The committal process has several important purposes, including:

- ensuring that cases where there is inadequate evidence do not go to trial
- finding out whether the accused plans to plead guilty or not guilty
- ensuring a fair trial by making sure the prosecution's case is disclosed to the accused
- giving the accused the opportunity to put forward a case at an early stage and possibly cross-examine witnesses.

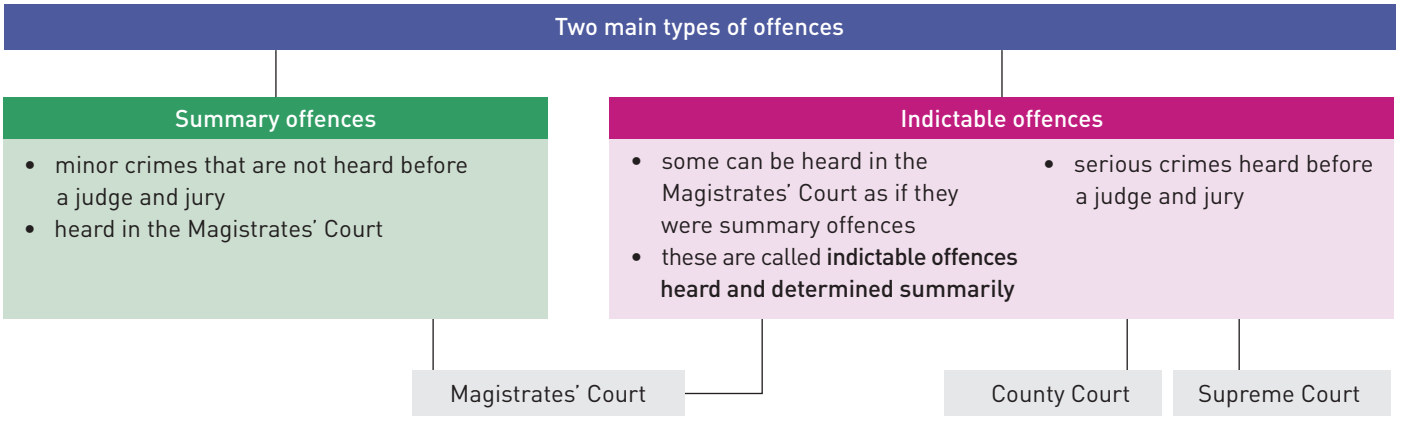
There are no committal proceedings for summary offences.

## Indictable offences heard and determined summarily

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

Some indictable offences are known as **indictable offences heard and determined summarily**. These are indictable (serious) offences, but they can be heard in the Magistrates' Court as if they were summary (minor) offences. Whether an indictable offence can be dealt with as a summary offence is determined by statute. For example, Schedule 2 of the *Criminal Procedure Act 2009* (Vic) lists a number of these offences, which includes theft if the property alleged to have been stolen is a motor vehicle.

The accused will usually choose to have an offence heard summarily, mainly because it is quicker and cheaper to have a case heard in the Magistrates' Court, and the maximum penalty that can be handed down is less than if it were heard as an indictable offence. The Magistrates' Court can only impose a maximum of two years' imprisonment for a single offence, and a maximum of five years' imprisonment for multiple offences. However, the court must agree that the offence is appropriate to be heard summarily, and the accused must also agree.




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

The main differences between summary and indictable offences are set out in Source 3 below, which will help you distinguish between the two offences.

| | Summary offences | Indictable offences |
|---|---|---|
| Nature of offence | Minor crimes | Serious crimes |
| Courts that will generally hear the case | Magistrates' Court | County Court or Supreme Court |
| Entitlement to a jury trial | No | Yes (if the accused has pleaded not guilty) |
| Use of committal proceedings | No | Yes |
| Name of final hearing | Hearing | Trial |
| Main statute(s) in which the offences are contained | *Summary Offences Act* and other statutes and regulations | *Crimes Act* |
| How it can be heard | Can only be heard as a summary offence | Some indictable offences can be heard summarily |
| Examples | Disorderly conduct, drinking offences, minor assaults | Homicide offences, fraud, drug trafficking, sexual offences |

**Source 3** Key differences between summary and indictable offences

### *Study tip*

The *VCE Legal Studies Study Design* requires you to know how to distinguish between summary offences and indictable offences. That means you should be able to point out the differences between the two. Try to do more than just use words such as 'whereas', 'on the other hand' or 'in contrast' when explaining the types of offences. Within your answer, try to show **how** they are different.

## 3.2 Check your learning

### Remember and understand

1 Using an example, **define** the term 'summary offence'.

2 **Identify** the two courts in Victoria that hear and determine indictable offences.

### Examine and apply

3 **Explain** how summary offences and indictable offences are heard and determined differently.

4 Using the *Summary Offences Act 1966* (Vic), the *Crimes Act 1958* (Vic) and Schedule 2 of the *Criminal Procedure Act 2009* (Vic), **classify** each of the following crimes as summary offences, indictable offences, or indictable offences heard and determined summarily. **Justify** each response. See weblinks to each of these Acts on your obook pro.

- **a** intentionally causing injury to an ambulance officer while the officer was on duty
- **b** writing obscene words on a public toilet block
- **c** stealing $90 000
- **d** carjacking
- **e** flying a kite to the annoyance of another person.

5 For each of the following scenarios, **state** whether the person has been charged with an indictable offence or a summary offence. Give one reason for your answer.

- **a** Uri has been charged with stalking and has pleaded not guilty. A magistrate committed Uri to stand trial in February 2023.
- **b** Andy has been charged with stealing $40 000 and was found guilty at a hearing in the Magistrates' Court last week.
- **c** Babak has been charged with intentionally causing serious injury. A jury trial will begin next week.

**Weblink**
*Crimes Act 1958* (Vic)

**Weblink**
*Summary Offences Act 1966* (Vic)

**Weblink**
*Criminal Procedure Act 2009* (Vic)

# 3.3 Key principles of the criminal justice system

## Key knowledge

**In this topic, you will learn about:**

- **key principles of the criminal justice system, including the burden of proof, the standard of proof, and the presumption of innocence.**

In this topic you will learn about three key principles of the Victorian criminal justice system:

- the burden of proof
- the standard of proof
- the presumption of innocence.

## The burden of proof

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

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

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

In a few cases the burden of proof can be reversed – for example, if the accused is pleading a defence such as mental impairment.

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

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

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

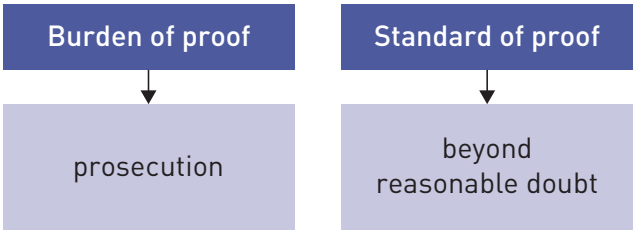
## The standard of proof

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

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

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

In a criminal case involving indictable offences, the case is heard in the County or Supreme Court and a jury will be given instructions that it must be satisfied of guilt beyond reasonable doubt (Chapter 4 has more information about juries).




**Source 1** The burden of proof and the standard of proof in criminal cases

In a criminal case involving summary offences, the case is heard in the Magistrates' Court and a magistrate (not a jury) will decide on guilt. If the burden of proof is on the accused (e.g. the accused is relying on a certain defence), then the standard of proof is on the **balance of probabilities**.

**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 presumption of innocence

The **presumption of innocence** is one of the most important principles of our criminal justice system and of the rule of law. It means that if a person is accused of committing a crime, they are considered innocent until proven otherwise. That is why a person is called an 'accused' before they are proven guilty.

The presumption of innocence is an old **common law** right. It is now also guaranteed by the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This is a Victorian statute that protects certain human rights. You will learn more about this statute in Topic 3.4.

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

The principle of the presumption of innocence is often discussed, including in relation to 'innocence projects' that have been established around the world to investigate claims of wrongful convictions.

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

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

Actual scenario

## Innocence projects

Innocence projects seek to free innocent people who have been convicted for a crime that they did not commit. The projects are usually independent and not-for-profit, and they are often staffed or assisted by university professors and university students, such as students studying law.

For example, the University of Baltimore's Innocence Project Clinic seeks to help clients who profess their innocence. One of its directors is Professor Erica J. Suter. Law students at the university work to free wrongly convicted prisoners, including taking up cases where new DNA testing is available to help prove innocence.




**Source 2** Hae Min Lee, who was murdered in 1999. Her family still seeks justice for what happened to her.

One of the more high-profile cases taken on by Professor Suter (and others) was in relation to Adnan Syed. Adnan Syed was sentenced to life in prison for the 1999 murder of his former high school girlfriend, Hae Min Lee. He was found guilty by a jury in 2000 and sentenced to life in prison. He maintained his innocence. Adnan Syed's case received worldwide interest after a podcast, 'Serial', was released about the case. The episodes were downloaded more than 68 million times. In October 2022, after Adnan had spent 23 years in prison, prosecutors dropped all charges against him and he was released from prison. His DNA excluded him, as it did not match the DNA recovered from the crime scene.

Questions remain about who killed Hae Min Lee. Her relatives have made emotional pleas, saying this has been a 'never-ending nightmare' for their family.

Closer to home, the Bridge of Hope Innocence Initiative in Melbourne is a joint venture between RMIT University and The Bridge of Hope Foundation. It investigates claims of wrongful conviction. Law students can complete an internship at the Initiative as part of their studies.

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

- an accused has the right to silence, which means they do not need to answer any questions, and do not need to give evidence in court. A person's silence is not to be taken as a sign of guilt. You will learn more about this right in Topic 3.4
- police must reasonably believe a person has committed a crime before they can arrest that person
- for indictable offences, the prosecution must prove there is enough evidence to support a conviction before they can take a case to trial
- generally, a person's prior convictions cannot be revealed until sentencing (after they have been found guilty)
- an offender has the right to appeal a wrongful conviction (such as where the judge applied the wrong law).

## 3.3 Check your learning

### Remember and understand

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

2 **Define** the term 'the presumption of innocence' and **describe** three ways it is upheld in a criminal case.

3 **Describe** a circumstance in which the accused will have the burden of proof in a criminal case, and **identify** the relevant standard of proof in that circumstance.

### Examine and apply

4 Two co-accused have been charged with the murder of a 23-year-old woman. A great deal of forensic evidence has been put to the jury during the trial. Evidence showed:

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

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

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

**c** Write down two or three reasonable doubts you may have based on the evidence provided.

### Reflect and evaluate

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

6 Conduct some individual research on the role of the media and podcasts in investigating the innocence of convicted prisoners. You can use the Adnan Syed case and the podcast 'Serial' to form your research, but you should also research more widely than that.

**a** Once you have completed your research, come together as a class. Form a line and position yourselves along the line in relation to the following statement: 'The media and podcasts should not play a role in investigating whether a person is innocent'. Students who strongly disagree with the statement should stand at one end of the line, and students who strongly agree should stand at the other end. Students who fall somewhere in between should position themselves along the line to represent their point of view.

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

**c** As you discuss and debate the issues:

**i** Be prepared to move up or down the line if you are persuaded by what someone else presents as a persuasive, credible argument. Also be prepared to move more than once during the discussion to demonstrate any changes in your thinking.

**ii** Be prepared to challenge any arguments put forward that are not substantiated by evidence or data.

# 3.4 The rights of an accused

## Key knowledge

In this topic, you will learn about:

- the rights of an accused, including the right to be tried without unreasonable delay, the right to silence, and the right to trial by jury.

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

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

Human rights in Australia also include rights available to people accused of crimes. This includes the right to be presumed innocent until proven guilty, as described in the previous topic. In this topic we will examine three other rights available to people accused of crimes.

## Introduction to the rights of an accused

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

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

In Victoria, many rights are protected by statute, including the *Charter of Human Rights and Responsibilities Act 2006* (Vic), otherwise known as the **Human Rights Charter** (or the Victorian Charter of Human Rights). The main purpose of the Human Rights Charter is to protect and promote human rights. It is designed to ensure that any statute passed by the Victorian Parliament is compatible (i.e. does not interfere) with the human rights set out in the Charter.

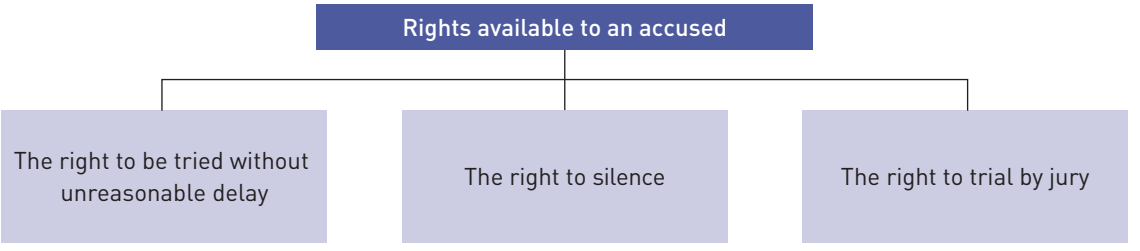
The rights protected by the Human Rights Charter are based on those in the *International Covenant on Civil and Political Rights* (1966). This is an **international treaty** to which Australia is a signatory. Many of the rights in the Human Rights Charter mirror those in the Covenant, but a number have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

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

In addition to the rights in the Human Rights Charter, other statutes contain rights available to an accused. Three of the rights available to an accused are shown in Source 1, and are discussed further below.

*Study tip*

In the end-of-year examination, you may be expected to explain the three rights shown in Source 1. You can learn other rights, but the three rights in Source 1 are the ones you **must** know.

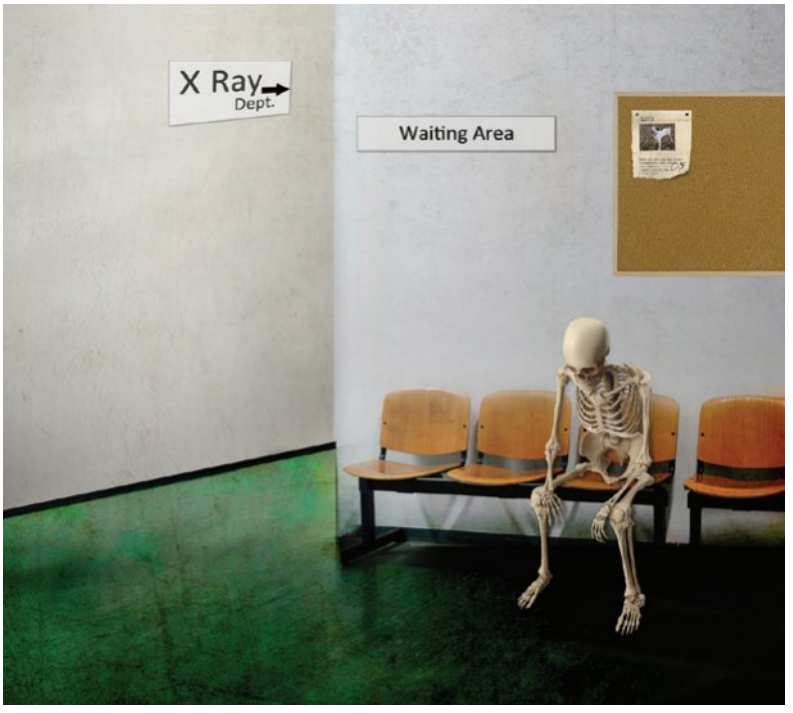



**Source 1** Three rights available to an accused in a criminal case

# The right to be tried without unreasonable delay

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

This means that an accused is entitled to have their charges heard in a timely manner, and that delays should only occur if they are considered reasonable. This right is 'without discrimination'. Every accused person is entitled to this right regardless of their prior convictions or personal characteristics.




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

The right recognises that there may be a delay in the case, but that delay must not be unreasonable. The term 'unreasonable delay' is not defined, but the reasonableness of any delay will depend on factors such as the complexity of the case and the legal issues involved. For example, it would be reasonable for the prosecution to need more time to prepare for a case involving multiple crime scenes, multiple crimes and multiple accused people with few or no witnesses, as opposed to a case where there was a single incident with multiple witnesses.

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

***Study tip***

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

## Extract

### *Charter of Human Rights and Responsibilities Act 2006* (Vic) – sections 21 and 25

#### 21 Right to liberty and security of person

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

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

#### 25 Rights in criminal proceedings

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

**(c)** to be tried without unreasonable delay;

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

One of the cases that considered the right to be tried without unreasonable delay was *Gray v DPP*, as described in the scenario below.

**Actual scenario**

## Release on bail as a result of delays

The accused had been charged with several indictable offences that were alleged to have occurred in November 2007. He was **remanded** in custody. A co-accused was released on **bail**. Following the initial charges, additional charges had either been laid or were contemplated in relation to separate events alleged to have occurred before November 2007.

By January 2008, no date had been set for a committal hearing. It was also likely there would be delays before the matter would be finalised, with a potential trial in October or November in 2008. However, there was no certainty about that date.

The accused applied for bail. He argued that it was not appropriate for him to continue to be detained, pointing to the delays and uncertain trial date.

Justice Bongiorno of the Supreme Court of Victoria referred to the Human Rights Charter and ordered that the accused be released on bail. In doing so, he noted that it was possible that by the time the trial was held, the accused may have served more time in custody than he was likely to serve in prison as a sanction. He noted that the only remedy the Court could provide to ensure that the accused's rights under the Charter were met was to release him on bail. The accused was therefore released pending the next hearing.

*Gray v DPP* [2008] VSC 4 (16 January 2008)

**remand**
the situation where an accused is kept in custody until their criminal trial can take place

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

# The right to silence

In addition to the right to be tried without unreasonable delay, the accused has a right to silence. The term 'right to silence' describes different types of protections given to an accused person to not have to say or do anything. These include the following protections:

- the accused has a right to refuse to answer any questions, and does not have to give any information as part of the investigation of a crime
- the accused cannot be forced to give evidence in a criminal trial or answer any questions, file any defence, or call a particular witness as part of a trial.




**Source 3** A person's right to silence includes a right to refuse to answer questions asked of them (with one exception related to giving police their name and address).

The right to silence is protected by common law, which has established:

- an accused person has the right to remain silent
- no adverse inferences (negative conclusions) can be drawn (made) from the fact that a person has not answered any questions or given any evidence. This means it should not be assumed that a person is guilty simply because they have failed or refused to say or do anything in a criminal case.

The right to silence also extends to the following types of situations:

- where an accused later relies on a defence that was not raised earlier, no conclusions should be drawn that the new defence is a 'new invention' or is 'suspicious' because the accused only just raised it
- where the accused has chosen to answer some questions but not others (known as 'selective silence'), this cannot be used to conclude guilt.

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

**Statute law** now also protects the right to silence. For example, section 89 of the *Evidence Act 2008* (Vic) states that unfavourable inferences (negative conclusions) cannot be drawn because a person has failed or refused to answer questions or respond to a matter put to them in an investigation.

When giving directions to a jury, a judge may direct the jury that the accused has a fundamental right to remain silent, and that the jury should not conclude that the accused is guilty because they remained silent. A judge must also not suggest to a jury that it can conclude the accused is guilty because they did not give evidence or call a particular witness.

There are some exceptions to the right to silence. For example, if the police believe that a person has committed or is about to commit a crime, or may be able to assist in the investigation of an indictable offence, the person must give their name and address if asked to do so.

It was not always the case in Victoria that a person could remain silent and that this would not be held against them. As described in the case below, previously a judge could instruct a jury that they could draw some conclusions if a person remained silent.

**Actual scenario**

## The Weissensteiner principle

In this 1993 case, Weissensteiner was charged with murdering his two companions while travelling on a boat. His companions disappeared and were never found. The accused remained silent during the investigations and throughout the trial. Upon instructing the jury, the trial judge stated that an inference of guilt 'may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts that can be easily perceived must be within his knowledge'. To put this another way, the jury was instructed that they could assume guilt more safely when an accused person chooses not to give evidence about something that they *could* give evidence about. This was because Weissensteiner was the only person who was able to give evidence about what happened to the two people. The jury convicted Weissensteiner, who later appealed to the High Court. The High Court upheld the conviction.

The *Jury Directions Act 2015* (Vic) abolished the principle that a judge may give a direction to the jury that an inference of guilt can be drawn when an accused person elects not to give evidence. Section 41 of the *Jury Directions Act* requires that, if the accused does not give evidence or call a particular witness, the judge may direct the jury about that, and must explain certain matters, including:

- the prosecution has the burden of proof
- the accused is not required to give evidence or call a witness
- the fact that the accused did not do so is not evidence against the accused.

*Weissensteiner v The Queen* (1993) 178 CLR 217

# The right to trial by jury

A trial by jury is where a person's peers within the community decide the outcome of the case – in a criminal case, whether or not the accused is guilty. This right dates back to well before the Magna Carta in England, established in 1215, which said that no free man shall be imprisoned except by lawful judgment of his peers. The jury system provides the opportunity for community participation in the legal process, and for the law to be applied according to community standards.

The right to trial by jury is not protected by the Human Rights Charter, but rather protected in part by statute law in Victoria (for state indictable offences), and in part by the Australian Constitution (for Commonwealth indictable offences).

***Did you know?***

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



**Source 4** *12 Angry Men* is a famous movie about a jury of 12 men who deliberate on whether a teenager charged with murder is guilty. It shows how the men have to consider their own morals and biases as they disagree on whether there is 'reasonable doubt' about whether the teenager committed the crime.

## State indictable offences

For Victorian indictable criminal offences, the *Juries Act 2000* (Vic) requires there to be a jury of 12. The *Criminal Procedure Act 2009* (Vic) and the *Juries Act* also contain provisions about processes in relation to jury empanelment and directions to be given to juries. There is no right to trial by jury for summary offences.

**Extract**

### *Juries Act 2000* (Vic) – section 22

#### Civil and criminal juries

**(2)** A criminal trial is to be tried by a jury of 12 or, if the court makes an order in accordance with section 23, by a jury of not more than 15.

While a criminal jury is made up of 12 jurors, the court can order the empanelment of up to three additional jurors, considering factors such as the length and nature of the trial (but only 12 jurors will ultimately deliberate on the accused's guilt). This can help to avoid any disruptions in the trial if, for example, one or more of the jurors gets sick.

The jury will hear the case and will need to reach a verdict on whether the accused is guilty or not guilty. The jurors must make this decision beyond reasonable doubt. You will learn more about criminal jury trials in Chapter 4.

## Commonwealth indictable offences

Section 80 of the Australian Constitution states that any person who is charged with a Commonwealth indictable offence is entitled to a trial by jury. In the past, the High Court has interpreted this as a right that cannot be refused by an accused. That is, an accused cannot choose to be tried by judge alone if they have been charged with a Commonwealth indictable offence. Commonwealth indictable offences are serious offences set out in Commonwealth law, and include those described in Topic 3.1 (such as organ trafficking, terrorism and importation of illegal substances).

However, section 80 of the Australian Constitution provides only a limited right to trial by jury, because most indictable offences are crimes under state law, and this section only applies to Commonwealth offences. In addition, the Commonwealth Parliament can determine by statute which offences are 'indictable'.

**Extract**

### The Australian Constitution – section 80

#### Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.



**Source 5** An empty jury room, showing 12 seats for the members of the jury

# Summary of three rights of the accused

A summary of the three rights of the accused described in this topic is contained in the table below.

| Right | Description | Main source of right |
|---|---|---|
| Right to be tried without unreasonable delay | An accused is entitled to have their charges heard in a timely manner. Any delay should be reasonable. Whether a delay is reasonable will depend on the facts of the case and surrounding circumstances. | Human Rights Charter |
| Right to silence | An accused has the right to remain silent when questioned or when asked to give information in the investigation. They also have the right to stay silent in a criminal proceeding and not be required to give evidence or call a particular witness. As a general rule, the exercise of the right cannot be used against them. | Common law and statute law (including the *Evidence Act*) |
| Right to trial by jury | A person charged with an indictable offence is entitled to be tried by their peers. The jury will be made up of 12 members of the community. The right does not extend to people charged with summary offences. | *Juries Act* (for state indictable offences) and Section 80 of the Australian Constitution (for Commonwealth indictable offences) |

**Source 6** A summary of three rights of an accused

## 3.4 Check your learning

### Remember and understand

1 **a** **Outline** three rights available to an accused in a criminal proceeding.
   **b** **Describe** any exemptions or exceptions that apply to each right.
2 **Describe** the role of parliament in upholding one of the rights of an accused.
3 **Define** the term 'unreasonable delay', and **outline** what delays may be considered 'reasonable'.

### Examine and apply

4 Your friend has been charged with drink driving, and believes she is entitled to a jury trial under the Australian Constitution. Is she correct? **Justify** your answer.
5 In *Gray v DPP*, **explain** how Justice Bongiorno attempted to remedy the fact that there may not be a timely trial.

### Reflect and evaluate

6 Conduct a debate or engage in a class discussion about one of the following two statements.
   **a** All criminal trials and hearings should be determined by a jury.
   **b** The jury should be entitled to conclude that an accused person is guilty if they are the only ones that know what happened in a crime, but refuse to say anything or give any evidence.
7 You have met several people who do not believe that an accused should have any rights. They refer to a number of criminals who have recently been convicted for violent crimes. Create a list of three arguments you might use to convince those people that rights are necessary for everyone.

# 3.5 The rights of victims

## Key knowledge

In this topic, you will learn about:

- the rights of victims, including the right to give evidence using alternative arrangements, the right to be informed about the proceedings, and the right to be informed of the likely release date of the offender.

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

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

## Introduction to the rights of victims

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

Victims are recognised by several statutes in Victoria, including the *Victims' Charter Act 2006* (Vic), known as the **Victims' Charter**. Some of the objectives or key principles of the Victims' Charter are to:

- recognise the impact of crime on victims
- recognise that victims should be offered certain information during the investigation and prosecution process
- help reduce the likelihood of secondary victimisation that may be experienced by the victim as a result of their interaction with the criminal justice system.

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

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

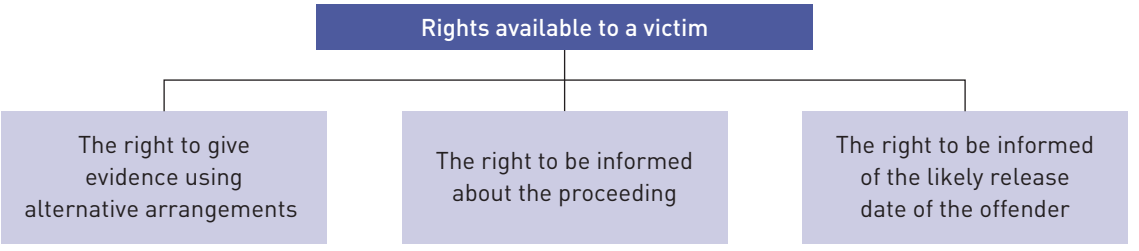
The Victims' Charter sets down principles such as respectful treatment of victims, respect for victims' privacy, and ensuring victims are given information about any criminal case brought to court. However, a breach of those principles does not entitle the victim to take civil action to enforce them.

In addition to the principles contained in the Victims' Charter, several other statutes provide some protections for victims.

Three of the rights given to victims are listed in Source 1. Each of these is discussed further below.

### *Study tip*

In the end-of-year examination, you may be asked about the rights of victims listed in Source 1. You should be able to explain each of the rights. You can learn more than these three, but you **must** know the ones in Source 1.




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

# The right to give evidence using alternative arrangements

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

A number of sections in the *Criminal Procedure Act (2009)* Vic aim to protect certain witnesses in certain types of cases. In particular, the *Criminal Procedure Act* allows for **alternative arrangements** to be used; that is, different ways in which a witness can give evidence. These are described below.

**alternative arrangements** measures that can be put in place for witnesses in certain criminal cases (e.g. as sexual offence cases) to give evidence in a different way (e.g. via video link)

## Cases in which alternative arrangements can be made

The court can direct alternative arrangements to be made for any witness who gives evidence in criminal proceedings that relate to a charge for:

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

The arrangements can be made at any stage of the criminal proceeding, including any appeal or rehearing.

## Types of alternative arrangements

The types of alternative arrangements are as follows:

- The witness may give evidence from a place other than the courtroom by means of closed-circuit television (or other like facilities) to enable communication between that place and the courtroom. The evidence will be recorded.
- Screens may be used to remove the accused from the direct line of vision of the witness.
- A support person may be chosen by the witness to be beside them while the witness is giving evidence, so they can provide emotional support. The court needs to approve the support person chosen.
- Only certain persons (specified by the court) may be allowed in court when the witness is giving evidence.
- Legal practitioners may be required not to be formally dressed in robes.
- Legal practitioners may be required to be seated while asking the witness questions.




**Source 2** A witness may give evidence from a place other than the courtroom by means of closed-circuit television. This may occur if they are a witness in a sexual offence case.

There are some situations when a court must direct the use of certain alternative arrangements; for example, if the witness is a **complainant** in a criminal proceeding that relates to a charge for a sexual offence or a family violence offence. In such a case, the court must direct the use of closed-circuit television or other facilities unless the prosecution applies for the complainant to give evidence in the courtroom, the complainant is able and wishes to do so, and the complainant is aware of their right to give evidence in another place.

**complainant** a person who makes a formal legal claim that another person has committed a criminal offence against them

## Purpose of alternative arrangements

The purpose of alternative arrangements is to try to reduce the trauma, distress and intimidation that a witness may feel when giving evidence. This is particularly so in cases involving charges for sexual offences and family violence, where the trauma and injuries suffered may be significant, and witnesses are at greater risk of suffering secondary trauma because of giving evidence about what happened.

In the following scenario, alternative arrangements were put in place in relation to an ongoing, sensitive case in Victoria.

**Actual scenario**

### Evidence given by complainants in high-profile case

In this case, a former principal was accused of sexually abusing three of their students nearly 20 years ago. At a committal hearing in 2021, the three complainants gave evidence in a closed court, which was described as now being standard practice for sexual assault cases in Victoria. The court remained closed for the rest of the day. The complainants also had a support person in the room as they gave evidence. The court was opened later that week to the media and other parties when members other than the complainants gave evidence.

The accused was committed to stand trial, and pleaded not guilty on all counts when the hearing commenced in February 2023.

In April 2023, the accused was found guilty of 18 charges, including rape and indecent assault against two of the complainants. The accused was acquitted of nine charges, including all five charges relating to the third complainant. In August 2023, the accused was sentenced to 15 years' imprisonment, with a non-parole period of 11.5 years.



## The right to be informed about the proceedings

The Victims' Charter recognises that people adversely affected by crime should get certain information about the proceeding and about the criminal justice system.

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

**Source 3** Fiona McCormack is the Victims of Crime Commissioner, whose job it is to be a voice for victims of crime.

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

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

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

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

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

## The right to be informed of the likely release date of the offender

A person who is a victim of a criminal act of violence may apply to be included on the **Victims Register**. The criminal acts of violence are identified in Source 4.

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

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

**Source 4** Criminal acts of violence

Once a person is registered on the Victims Register, they may receive certain information about an offender who has been imprisoned, including notification of the release of the prisoner on **parole** at least 14 days before the release.

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

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

# Summary of three rights of victims

A summary of the three rights of victims is shown in the table below.

| Right | Description | Source of right |
|---|---|---|
| Right to give evidence using alternative arrangements | Victims who are witnesses in some cases, such as sexual offence and family violence cases, are able to give evidence using alternative arrangements. Those arrangements include:<br>• giving evidence used closed-circuit television or other like facilities<br>• the use of a screen between the accused and the witness<br>• the use of a support person for the witness<br>• only allowing certain people to be in the court while the witness is giving evidence<br>• requiring legal practitioners not to be formally dressed in robes<br>• requiring legal practitioners to be seated while asking the witness questions. | *Criminal Procedure Act* |
| Right to be informed about the proceedings | Victims are entitled to be informed at reasonable intervals about the progress of an investigation into a criminal case (unless they do not want that information, or that information may jeopardise the investigation). Once a prosecution has commenced, victims should be informed about the charges, hearing dates and times, outcomes, sentences and details of any appeal. | Victims' Charter |
| Right to be informed of the likely release date of the offender | If a person is a victim of a criminal act of violence and is on the Victims Register, they may receive information about the likely release date of the imprisoned offender. | Victims' Charter and the *Corrections Act* |

**Source 5** A summary of three rights of victims

## 3.5 Check your learning

### Remember and understand

1 Are all victims entitled to receive information about the likely release date of a prisoner? **Explain** your answer.

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

### Examine and apply

3 Create a poster or visual diagram that shows the alternative arrangements that may be available to a witness giving evidence in a sexual offence or family violence case. Try to think of a way to represent those arrangements in a way that will help you remember them.

4 For each scenario below, **state** whether each of the witnesses is entitled to the protections they seek.

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

**b** Maya is a witness for the prosecution in a proceeding where Kalani has been charged with singing an obscene song (the offence of using obscene, indecent or threatening language or behaviour). Maya wants her mother by her side while she is giving evidence.

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

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

### Reflect and evaluate

5 A breach of the Victims' Charter does not entitle the victim to take civil action to enforce those rights. Do you think it should? Discuss with a classmate.

6 Access Chapter 8 of the Victorian Law Reform Commission's (VLRC) report 'The Role of Victims of Crime in the Criminal Trial Process' (see weblink on your obook pro).

**a** **Identify** three problems or issues that the VLRC identified in relation to alternative arrangements.

**b** Discuss as a class.

Weblink
VLRC report

Chapter

# 3

# Review

## Top exam tips from Chapter 3

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

2 One of the most common errors students make is stating that a person has a right to a trial by jury under section 80 of the Australian Constitution. That is not entirely correct, and depending on the question, this could result in not getting full marks for a response. The right to trial by jury under the Australian Constitution is only for Commonwealth indictable offences. For state indictable offences, statute law provides the right to trial by jury.

3 One thing you need to avoid in Legal Studies is writing 'circular' definitions; that is, using the same words to describe a phrase or right. For example, don't describe 'alternative arrangements' as 'arrangements to give evidence in alternative ways'. Instead, write something like 'different methods or measures put in place to allow witnesses in certain types of cases to give evidence'.

## 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 (including the exam) 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 an indictable offence and a summary offence.

(3 marks)

**Difficulty: medium**

2 'Sometimes, limitations may need to be imposed on the rights of victims.' With reference to **one** right of victims, explain what this statement means.

(4 marks)

**Difficulty: high**

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

(6 marks)

# Practice assessment task

Read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.
Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

## Simon's trial

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

The Director of Public Prosecutions (DPP) has three witnesses in its case against Simon: Georgia, Georgia's friend Kostas, who was at the premises at the time of the sexual assault, and Georgia's mother, Sally, who was the first person to see Georgia when she got home. Sally helped Georgia get to the local hospital.

All three witnesses have been provided with information about Simon's upcoming trial, including the date and time, and Georgia has found staff members at the Office of Public Prosecutions (OPP) to be helpful. Georgia is nervous about giving evidence and is not sure about the way she can give that evidence. She does not want to see Simon during the trial or have any direct communication with him. Sally is happy to be in the courtroom while giving her evidence, but she is nervous about the formalities that come with a trial. Kostas wants to have a group of friends with him while he gives evidence.

Simon wants a closed trial because he does not want his name publicised any further, and he wants the County Court trial to be heard quickly. He is already frustrated by all the delays that have occurred.

# Practice assessment task questions

**1** Identify the complainant, the prosecution and the accused in this scenario.
(3 marks)

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

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

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

**5** Simon wants a quick trial that is closed to the public and does not want to give evidence. Explain whether he would be entitled to both those rights.
(6 marks)

**6** Explain whether there are rights available to Sally, Kostas and Georgia to give evidence in a way that addresses their concerns.
(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 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 distinction between summary offences and indictable offences. | ☐ | ☐ | Go back to Topic 3.2. |
| • Key principles of the criminal justice system, including the burden of proof, the standard of proof, and the presumption of innocence. | ☐ | ☐ | Go back to Topic 3.3. |
| • The rights of an accused, including the right to be tried without unreasonable delay, the right to silence, and the right to trial by jury. | ☐ | ☐ | Go back to Topic 3.4. |
| • The rights of victims, including the right to give evidence using alternative arrangements, the right to be informed about the proceedings, and the right to be informed of the likely release date of the offender. | ☐ | ☐ | Go back to Topic 3.5. |

**Check your 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

# The principles of justice in a criminal case



Source 1 A statue of 'Lady Justice'. She is holding the scales of justice in one hand and a sword in the other, and has a blindfold over her eyes. Each of them is a symbol of justice. In this chapter, you will look at the meaning of justice in the Victorian criminal system, and how the system aims to achieve justice.

## Outcome

By the end of **Unit 3 – Area of Study 1** (i.e. Chapters 3, 4 and 5), you should be able to explain the key principles in the criminal justice system, discuss the ability of sanctions to achieve their purposes and evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case.

## Key knowledge

In this chapter, you will learn about:

*The principles of justice during a criminal case*

- the principles of justice: fairness, equality and access
- the role of Victoria Legal Aid and Victorian community legal centres in assisting an accused and victims of crime
- the purposes and appropriateness of plea negotiations
- the reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals
- the roles of key personnel in a criminal case, including the judge or magistrate, the jury and the parties
- the need for legal practitioners in a criminal case
- the impact of costs, time and cultural differences on the achievement of the principles of justice.

## Key skills

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

- define and use relevant legal terminology
- discuss, interpret and analyse legal principles and information
- explain the roles of Victoria Legal Aid and Victorian community legal centres in assisting an accused and victims of crime
- analyse the roles of key personnel in a criminal case
- justify the reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals
- discuss the appropriateness of plea negotiations
- discuss the impact of costs, time and cultural differences on the achievement of the principles of justice during a criminal case
- evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case
- synthesise and apply legal principles and 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 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

**equality** one of the principles of justice; 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

**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)

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

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

**Victoria Legal Aid (VLA)** a government agency that provides free legal advice to all members of the community and low-cost or no-cost legal representation to some people who cannot afford a lawyer

## Key legal cases

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

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 the principles of justice in a criminal case before you start.

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

# 4.1 The principles of justice

## Key knowledge

**In this topic, you will learn about:**

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

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

Every day, newspaper articles, news reports, websites and radio commentators talk about the outcome of certain criminal cases being 'just', while others are seen as 'unjust'. There are common sayings such as 'justice delayed is justice denied', 'justice prevailed' and 'justice was (not) served today'.

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

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

**accused** a person charged with a criminal offence

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

## Defining justice

The *Oxford English Dictionary* defines justice as the 'maintenance of what is just or right by the exercise of authority of power; assignment of deserved reward or punishment; giving of due desserts'. However, what is 'just' or 'right' may depend on the perspective, views and experiences of the people involved, such as the **accused**, **victims**, the judge and the community.

In VCE Legal Studies, the principles of justice are:

- fairness
- equality
- access.

The three principles can be used to determine whether the criminal justice system is achieving, or upholding, justice. When looking at a case or how the criminal justice system operates, consider whether fairness, equality and access are being upheld.

In this topic you will examine each of the three principles of justice. It is essential that you gain a solid understanding of these principles because, later in this chapter, you will need to evaluate the ability of the criminal justice system to achieve these principles during a criminal case. You will find it helpful to continually revisit this topic when examining specific aspects of the criminal justice system throughout the chapter.

You should also be aware that there can be some degree of overlap between the principles of fairness, equality and access.

### *Did you know?*

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



**Source 1** 'Lady Justice' holds the scales of justice in her hand. These scales symbolise the impartial weighing of arguments and evidence for or against a case tried in court.



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# The principle of 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'.

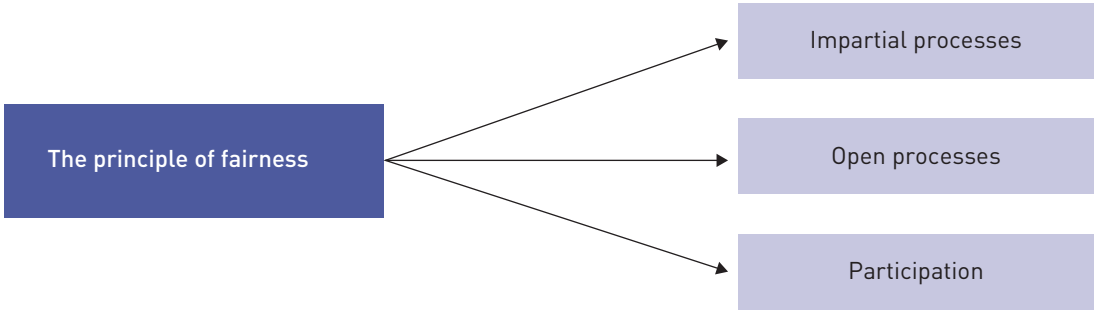
The High Court has described a fair trial as being a 'central pillar' of our criminal justice system. It is a fundamental right that is now recognised by statute law (particularly the Human Rights Charter), **common law**, and in the *International Covenant on Civil and Political Rights* (1966), an international treaty to which Australia is a signatory. Fairness is designed to ensure that:

- innocent people are not found guilty of a crime that they did not commit
- public confidence is maintained in our criminal justice system through features such as open and public hearings.

The VCE Legal Studies definition of fairness incorporates three broad features: impartial processes, open processes, and participation. These are described further below.

**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

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




**Source 2** Fairness in VCE Legal Studies includes impartial processes, open processes and participation.

## Impartial processes

Central to the principle of fairness is that our courts and personnel, including judges, magistrates and jury members, are independent and impartial. This means that people should not show **bias** towards or against either party, and the case must be decided based on facts and law, not on prejudices.

The requirement for impartiality extends to the need to ensure there is no **apprehended bias**. This is where a fair-minded person, with knowledge of the key objective facts, might reasonably apprehend (believe) that the judge, magistrate or jury member might not be impartial and unprejudiced when deciding the case. For example, a party may allege that a judge *might* be biased because they are close friends with one of the witnesses. If there is apprehended bias, then the judge or magistrate might need to remove themselves from being involved in the case, or a jury member might need to be discharged (released).

Impartiality also extends beyond the courtroom. For example, the police should not act with bias, nor should court personnel when helping an accused person.

**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

Having open processes in the criminal justice system is central to the achievement of fairness. This is because it helps ensure the institutions and people who administer justice can be scrutinised by the public and held accountable for their actions, decisions and practices. This includes the police, the courts and government departments and bodies (such as Corrections Victoria, which manages the prison system). For example, requiring hearings to be conducted in public and having court judgments (decisions) made available to the public ensure that court processes and decisions are fair and accurately reported. Allowing the community, media and victims to attend court hearings also enables people to be informed about the operations of the courts and helps ensure that justice can be 'seen to be done'.

***Study tip***

Use words other than 'fair', 'fairly' and 'fairness' when discussing 'fairness'. You can demonstrate how something is fair or unfair by referring to the features of fairness.



Source 3 Scrutiny of the justice system includes allowing media to have access to most court cases.

However, in some circumstances, courts may need to be closed to the public or media, or details of a case may need to be unavailable to the public. For example, the name of a child victim may be redacted or not disclosed to protect the child; or a courtroom may need to be closed to protect a witness. These are seen to be reasonable restrictions on the requirement for there to be 'open processes'.

## Participation

The third feature of fairness is that people are able to participate in the criminal justice system. This primarily relates to the accused, but it can also extend to people such as victims. Some of the key characteristics of participation are set out below:

- **opportunity to know the case put against them:** the parties, more particularly the accused, should have the opportunity to know the facts of the case and the case that is put against them. The prosecution must disclose all relevant evidence to the accused (even evidence that may be detrimental to the prosecution's case)
- **opportunity to prepare a defence:** the accused must have adequate time and facilities to prepare a defence, and they 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
- **opportunity to examine witnesses:** as an extension of the above, both parties should have the opportunity to examine witnesses called by the other side (there are some exceptions in relation to vulnerable witnesses)
- **use of a lawyer:** the accused should be able to defend themselves personally or through legal assistance chosen by them. If they are eligible, they should be entitled to legal aid through **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
- **use of an interpreter:** an accused person should have access to the free assistance of an interpreter if they cannot understand or speak English. This allows them to understand what is happening in the case and helps them to communicate with the court
- **tried without unreasonable delay:** a fair trial is one where there is no unreasonable delay. This is also a right of an accused (as explored in Chapter 3).

As the Legal Studies definition of fairness includes 'all people', this extends to victims. The criminal justice system also allows victims to participate in criminal cases. Examples include:

- **allowing some victims to give evidence using** alternative arrangements: as you learnt in Chapter 3, the use of alternative arrangements for witnesses in certain criminal cases allows them to give evidence in a way that aims to avoid further trauma or stress
- **the use of victim impact statements:** victims are able to explain the impact that a crime has had on them by giving a **victim impact statement** as part of the sentencing process. You will learn more about victim impact statements in Chapter 5
- **providing an opportunity to give their views:** victims may have the opportunity to give their views to the prosecution about certain matters, such as their views on **plea negotiations**. They may also be able to obtain legal aid through bodies such as VLA to assist them in doing so. You will learn more about plea negotiations in Topic 4.4.

**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

**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

**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)

## Other features of fairness

Two additional, important features of fairness are as follows:

- **the right not to testify against oneself:** as discussed in Chapter 3, the accused has a right to silence. This means the accused has a right to decide whether to give evidence or say anything in the trial. The right not to testify (give evidence) against oneself or confess guilt is an important feature of fairness
- **the presumption of innocence:** the accused is presumed to be innocent until proven guilty, and the prosecution has the burden of proving the case against the accused beyond reasonable doubt. Laws or processes that infringe on this important principle may be perceived as 'unfair', because it means that the presumption is lost, and a potentially innocent person is viewed as being 'guilty'.

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

**Actual scenario**

### The right to a fair trial

Jago had been charged on 30 counts of fraud, alleged to have occurred between April 1976 and January 1979. The matter was not listed for a final hearing until 1987 – eight years after the last crimes were said to have been committed. The case went to the High Court on appeal because Jago argued that the charges should be stayed permanently due to the delay in the time it took for the case to go to trial.

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

> [The right to a fair trial] is one of several [rights] entrenched in our legal system in the interests of seeking to ensure that innocent people are not convicted of criminal offences … there is no reason why the right should not extend to the whole course of the criminal process …
>
> *Jago v District Court of NSW* (1989) 168 CLR 23



**Source 4** A fair trial can help avoid an incorrect guilty verdict.

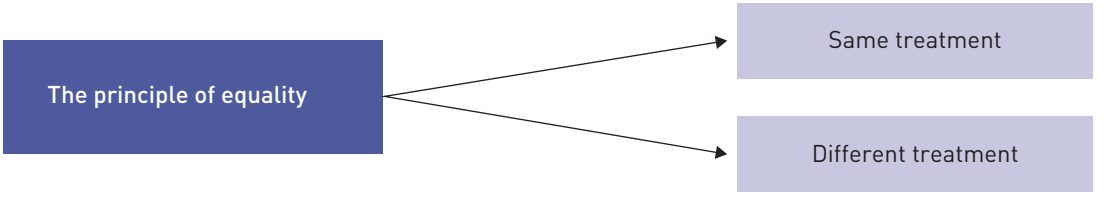
Fairness does not mean that all people who have been accused of a similar criminal offence will have the same type of hearing or, if found guilty, receive the same sentence. Each case and circumstance is different, and these differences will be reflected in the outcome. For example, as you will learn in Chapter 5 as part of sentencing, some factors specific to each case may mean that a more severe, or less severe, sentence should be imposed in a case that may be similar to another one.

In this chapter, you will consider whether the criminal justice system achieves fairness. When considering the issue of fairness, refer to the above features to determine whether fairness is being upheld.

# The principle of 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 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 everyone to engage with the justice system without disparity or disadvantage'.




**Source 5** Equality in VCE Legal Studies incorporates the ideas of 'same treatment' and 'different treatment'

The Human Rights Charter protects equality by stating that every person:

- is equal before the law
- is entitled to equal protection of the law without discrimination
- has the right to equal and effective protection against discrimination.

In the criminal justice system, equality is about how a person is treated. The definition of equality above incorporates the ideas of 'same treatment' and 'different treatment'. Both are relevant to determining whether equality has been achieved. These are considered further below.

## Same treatment

The first feature of the definition of equality is that people must be treated in the same way. This is often referred to as 'formal equality'; that all people are treated the same and given the same levels of support, regardless of their personal differences or characteristics (such as race, religion, gender identity or age).

This idea of equality adopts a 'one size fits all approach'. Being treated the same means the same processes will apply in every case, for every party. It will also mean there are no changes to the way cases are run, and that everyone is given the same opportunities and the same level of support or assistance. For example, this would mean that anyone who contacted a **community legal centre (CLC)** for advice or assistance would be entitled to the same information, advice or assistance, regardless of whether they could afford to pay for services, or whether they were in a more vulnerable position, and had a greater need for support, than someone else.

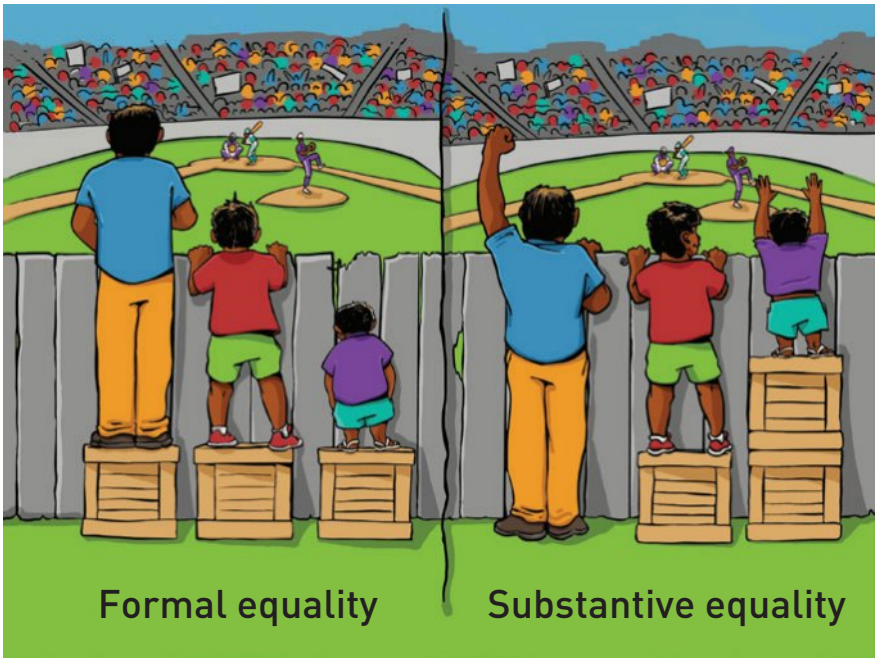
**community legal centre (CLC)**
an independent community organisation that provides free legal services to people who are unable to pay for those services. Some are generalist CLCs and some are specialist CLCs

## Different treatment

The second feature of the VCE Legal Studies definition of equality is that if treating people in the same way could in fact cause disparity (a gap or difference between the way the two parties are treated) or disadvantage, 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'; that is, that sometimes the 'one size fits all approach' does not work, and special measures are needed so that people do not suffer disadvantage simply because of who they are.

For example, consider an accused person who does not speak any English. If only formal equality was applied, then the court hearings for the accused person would be conducted in the same way as for every other person, meaning no interpreter or assistance would be provided, no

information would be given in the accused's own language and no one would slow down their speaking. While this would achieve 'formal equality', the accused person would be at a disadvantage because they cannot speak English. To avoid this disadvantage, special measures may need to be put in place. For example, an interpreter should be made available, and the accused should have access to information in their own language. People may also be required to speak more slowly or use less legal jargon.




**Source 6** Does equality always mean that people should be treated the same?

## Examples of measures

It is impossible to provide a complete list of the types of measures that may need to be put in place to avoid disparity or disadvantage, as they will depend on the circumstances of the case and of the parties. However, some examples are listed below. Like fairness, these measures should apply to all parts of the criminal justice system, not just to the trial itself:

- **interpreters:** interpreters may be required for people who are not able to understand or communicate in English
- **providing information in a different way:** information may need to be communicated in a different way. For example, people with no or little English may need to get information in their own language; and in some situations there may be a need to speak more slowly and in an ordinary tone, without the use of legal jargon (particularly for people who are from different cultural and linguistic backgrounds, or for children and young people)
- **changes to court processes:** it may be necessary to change court processes or even change the courtroom. For example, a young accused person may feel overwhelmed by the formality of certain courtrooms, so a smaller, less formal courtroom may be required. As another example, alternative arrangements are put in place in some cases to ensure more vulnerable witnesses do not suffer additional trauma from having to give evidence
- **different form of oath or affirmation:** people are able to use different religious texts when taking an **oath** or, if they do not follow a religion, they can choose to declare and affirm to tell the truth without referring to religious beliefs or a god

**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

- **changes for the purposes of cultural differences:** different processes or procedures may be needed to ensure there is no disadvantage because someone is of a particular culture. For example, some First Nations peoples do not make direct eye contact, which may be assumed by some as being dishonest or evasive. However, in some First Nations communities, it may be seen to be a sign of disrespect or aggression to force direct eye contact. Therefore, in the justice system, measures are needed to ensure that the wrong assumptions are not made about this and other cultural differences (e.g. the judge may explain this to the jury). You will learn more about cultural differences later in this chapter
- **breaks and adjournments:** some people may need flexibility during a trial or hearing. For example, a person with a disability may need more frequent breaks (as may a juror with a disability). Children and young people may also need more regular breaks as they may struggle to stay focused or may find the situation more stressful.

In this chapter, you will learn more about the ways in which the criminal justice system tries to achieve equality. Try to look for the following:

- when formal equality (same treatment) alone will achieve equality
- whether the same treatment will create disparity or disadvantage
- if the same treatment will cause disparity or disadvantage, what special measures may need to be put in place to avoid that disparity or disadvantage.

*Study tip*

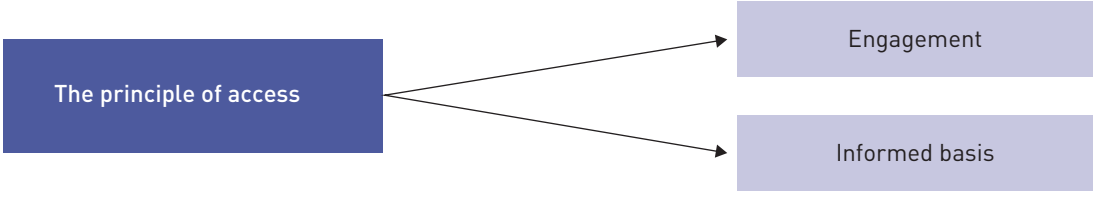
At the end of your notes, create a page for each principle of justice: fairness, quality and access.

- When you learn about a feature of the justice system that upholds one of these principles, make a note of it on the relevant page.
- Do the same thing when you come across a feature of the justice system that opposes or detracts from the achievement of these principles.

# The principle of access

Access is the third principle of justice. 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'.

This means that not only should people be able to engage with the justice system, but that 'engagement' should be on an 'informed basis'. These concepts are explored further below.




**Source 7** Access in VCE Legal Studies incorporates two elements: engagement in the legal process, and people being informed.

## Engagement

To engage with the justice system, people need the means and ability to be able to use and participate in the system. This includes:

- **physical access:** people should be able to physically access the courts, services or legal representation. This may be more difficult for people in rural or remote areas, or for people who have disabilities that mean they are not able to physically attend
- **technological access:** if virtual or online methods are used to provide services or even conduct court hearings, then people should be able to engage with those methods. This may be more difficult for people with special needs, those who are not able to use technology, or for people who do not have computer access (such as people in jail)
- **financial access:** people should not be prevented from defending their case and using the criminal justice system because they do not have the financial means to do so. This can be particularly important for accused people who may need money to pay for a lawyer to defend them in court

- **no delays:** people should be able to have their case resolved without unreasonable delays. Delays have an impact on access as it limits the ability of people to engage with the justice system.

## Informed basis

The second element of the principle of access is that people should be able to engage on an informed basis. This means that they should be able to:

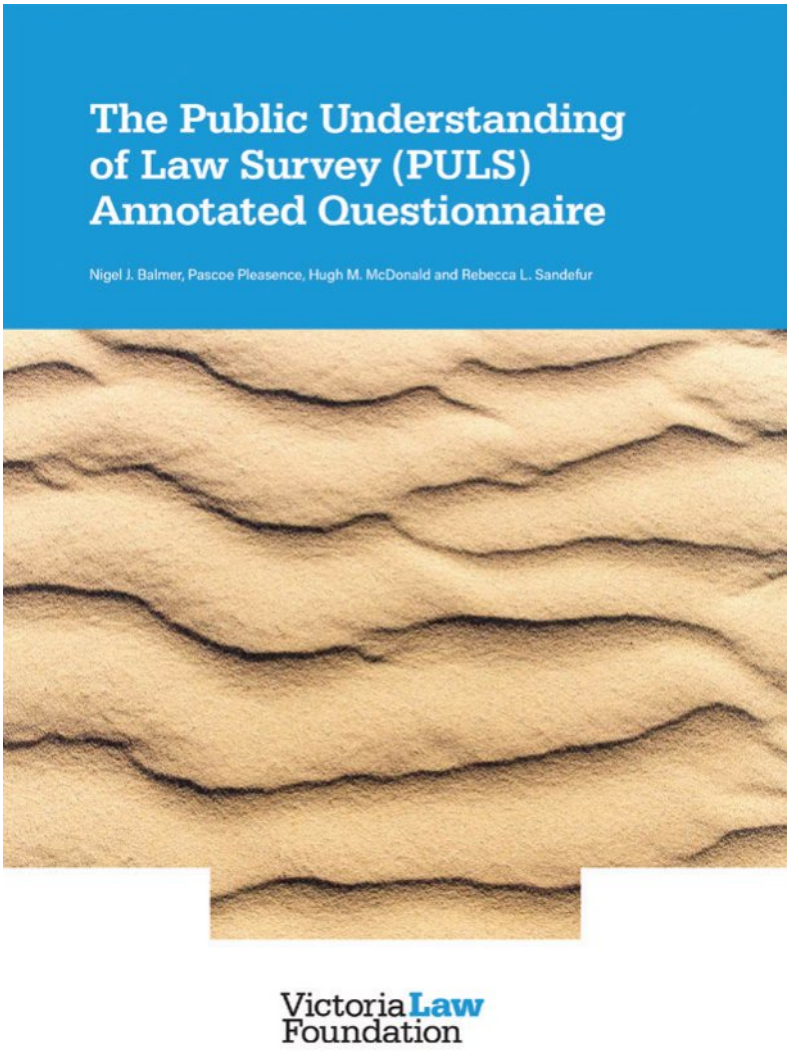
- understand their legal rights and the processes involved in their case
- obtain, or be provided with, enough information to make reasoned and sensible decisions (e.g. a decision about whether to plead guilty or not guilty).

This can be more difficult for people who do not understand English, First Nations peoples, young children, people with disabilities, and people from different cultural and linguistic backgrounds.

The following may help a person be more informed:

- **education:** people who have completed higher levels of education or have particular knowledge of the criminal justice system or their rights may help them become informed. Lower literacy levels, for example, can impact on a person's ability to understand legal processes
- **information:** people should have access to information about court processes and their rights. This information may be available from the courts, and legal bodies and agencies such as VLA. Information may be provided in person or online. People should also have information about where to go to seek help
- **legal and support services:** having free access to legal and support services can help people be more informed about their rights and legal processes. These may include specific services for accused people or victims, or community legal services that provide information about rights and legal principles
- **legal representation:** having legal representation is one of the most effective ways that a person, particularly an accused person, can be informed about and understand their rights and legal processes. This means a person may have greater access to justice if they can financially afford legal representation.

Access to the criminal justice system does not necessarily mean that the people seeking access will get the outcome they want. However, it does mean they will have the opportunity to make use of the processes and institutions within the criminal justice system, and that these are not beyond their reach.




**Source 8** The Public Understanding of Law Survey has been conducted by the Victoria Law Foundation to explore what Victorians know about the law and the justice system, how it plays a part in their lives and how they experience legal problems.

The following scenario about Sally provides an example of the way the criminal justice system can sometimes be inaccessible to some Victorians.

**Hypothetical scenario**

## Sally's inability to access the legal system

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

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

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

In this chapter, you will explore how and whether the criminal justice system achieves the principle of access. Try to look for the above features to determine whether access has been achieved.

# 4.1 Check your learning

### Remember and understand

1 **Identify** the three principles of justice and **provide** a brief description of each.

2 **Describe** three features or elements of the principle of fairness.

3 **Distinguish** between formal equality and substantive equality.

### Examine and apply

4 Imagine you are a teacher in a classroom. **Describe** a situation where a teacher may be treating all students in the same way, but that treatment will result in disparity or disadvantage.

5 Look at Source 5. With a partner, create another way to visually show the difference between formal equality and substantive equality.

6 Create a poster that shows each of the three principles of justice visually, and the features or characteristics of each. Use a program such as Canva to help you.

### Reflect and evaluate

7 Read the scenario 'Sally's inability to access the criminal justice system'. **Explain** how each of the three principles of justice may not be achieved in this case, and what could be done to ensure they are achieved.

8 'There should be no measures put in place in criminal cases to achieve equality. Everyone should be treated the same in every case.' **Discuss** the extent to which you agree with this statement.

# 4.2 Victoria Legal Aid (VLA)

## Key knowledge

In this topic, you will learn about:

- the role of Victoria Legal Aid in assisting an accused and victims of crime.

The criminal justice system can be difficult to understand without legal assistance. Often an accused has not had experience with the criminal justice system, does not know their rights, and does not understand key concepts such as the burden of proof. This also applies to victims, who may already be traumatised from a crime that has occurred, but are required to navigate a system that they may not have had to interact with before.

While every person is entitled to engage (or arrange the use of) lawyers to help them with their legal case, some may not be able to afford a lawyer. The High Court has found that if a person is charged with a serious indictable offence and, through no fault of their own, is unrepresented, they should be given the opportunity to seek legal representation. This is based on the principle that every accused person has the right to receive a fair trial, and that legal representation is necessary for a fair trial of a serious criminal offence. A court can adjourn a trial if the accused has no legal representation, cannot afford a lawyer and will not get a fair trial if they are not represented. However, this does not apply to all accused people, and does not apply to victims (who are not a party to a criminal case).

If an accused cannot afford to engage a lawyer, government-funded institutions such as Victoria Legal Aid (VLA) and Victorian community legal centres (CLCs) may be able to help them. These bodies also have services available for victims of crime. In this topic, you will learn about VLA. In the next topic, you will learn about CLCs.




## The role of VLA

VLA is a government agency that provides free legal information to the community, and legal advice and legal representation for people who cannot afford to pay for a lawyer. It prioritises people who need it the most and cannot get legal assistance any other way.

VLA's vision is for a fair, just and inclusive society where people can get help with their legal problems and have a stronger voice in how laws and legal processes affect them. In the 2021–2022 financial year, VLA helped 80 547 unique clients (i.e. people who accessed one or more legal services). It receives most of its funding from the Commonwealth Government and the Victorian Government.

**Source 1** A snapshot of the VLA's 2021–2022 annual report, which shows the diversity of its clients

The objectives of VLA are to:

- provide legal aid in the most effective, economic and efficient manner
- manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout Victoria
- provide the community with improved access to justice and legal remedies
- pursue innovative means of providing legal aid to minimise the need for individual legal services in the community
- ensure the coordination of the provision of legal aid and legal assistance information so that it responds to the legal and related needs of the community.

## Types of assistance for accused people

***Did you know?***

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

'Legal aid' does not just mean legal representation in court. In fact, legal aid incorporates all the types of assistance set out in Source 2 below. For criminal matters, some services are available to everyone, but others are available only to people who need it the most and meet VLA's guidelines.

| Assistance | Description | Available to |
|---|---|---|
| Free legal information | VLA's website has free information for all Victorians about the law, court processes and basic legal principles. These include:<br>• publications and resources, such as booklets and fact sheets<br>• a public law library that includes books, cases, commentary and journals<br>• opportunities to speak with a VLA officer, either on the phone or online using their Legal Help Chat function.<br>Assistance can also be provided in many languages other than English. | All accused people |
| Free legal advice (including Help Before Court service) | VLA offers legal advice in person, by video conference or over the phone. Advice can be given about what happens in court, or about the law that applies to the case.<br>VLA's Help Before Court service is available for people charged with a criminal offence in the Magistrates' Court (or Children's Court). If the court date is more than six days away, VLA may be able to arrange for legal advice from a lawyer to help the accused person to prepare, or may arrange for a **duty lawyer** to give legal advice on the day. Depending on the situation, VLA may also represent the person in court. | Access to legal advice will depend on an accused's income. Advice is available for people who need it the most.<br>The Help Before Court service is only available for those with criminal charges in the Magistrates' Court (or Children's Court), and for those who need it most (which depends on a person's income and their legal matter). It is not available for indictable offences heard in higher courts, or for committal proceedings. |

**duty lawyer**
a VLA lawyer who is at court (on duty, on a particular day) to help people who come to court for a hearing

| Assistance | Description | Available to |
|---|---|---|
| Duty lawyer services | A duty lawyer is a lawyer who is at court (on duty) on a particular day and who can help people who are at court for a hearing on that day.<br><br>Duty lawyers can give information about what happens in court, offer legal advice or represent an accused in court on that day. They may also be able to arrange for an adjournment of the hearing so that a lawyer can run the case.<br><br>The priority of duty lawyers is those people who are in custody and First Nations peoples. They do not need to satisfy any tests to be eligible for a duty lawyer. | Duty lawyers are only available in the Magistrates' Court (and the Children's Court); they are not available for indictable offence trials or for committal proceedings.<br>• Fact sheets with legal information are available to anyone charged with an offence.<br>• Legal advice is only available to accused people who satisfy the **income test** and are facing a straightforward charge. People in custody are given priority and do not need to satisfy the income test.<br>• Legal representation at a hearing is only available to accused people who satisfy the income test, and either face a significant charge (such as stalking or threat to kill) or belong to a category of people the VLA prioritises (which includes those in custody; those with a disability, acquired brain injury or mental health issue; people experiencing homelessness; people who cannot speak, read or write English well; and First Nations people). |
| Grants of legal assistance (paying for a lawyer) | VLA may be able to give a grant of legal assistance to people who cannot afford a lawyer. This may include helping the accused resolve matters in dispute, preparing legal documents and representing the accused in court.<br><br>The person may be given legal assistance by a VLA lawyer, or VLA may arrange a private lawyer to assist (one who is on VLA's panel of practitioners). | • VLA has strict guidelines about who can get a grant of legal assistance so that money is given to accused people who need it the most. All grants are capped. Accused people must meet the **means test** to be eligible for a grant.<br>• VLA also considers other tests when determining whether assistance should be made available; for example, it must consider the extent of any benefit or detriment (disadvantage) that a grant might give to the person or the public. |

**income test**
the test applied by Victoria Legal Aid (VLA) to determine whether a duty lawyer can represent an accused. The test is satisfied when the accused can show they have limited income (e.g. their primary source of income is social welfare provided by government)

**means test**
the test applied by Victoria Legal Aid (VLA) to determine whether an applicant qualifies for legal assistance or representation in court (beyond the services of the duty lawyer on the day). It takes into account the applicant's income, assets and expenses

**Source 2** Legal assistance available from VLA for accused people

## Duty lawyers – the income test

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

*Did you know?*

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

Duty lawyers are not available in the County Court or the Supreme Court. VLA has said its duty lawyer services are stretched, and duty lawyers are often limited in the time they can spend with a client.

## Grant of legal assistance – the means test

The means test is not the same as the income test. The income test is for accused people who need advice or representation from a duty lawyer on a particular day. The means test is for people who are seeking a grant of legal assistance (including help with preparing for a case, or representation in court).

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

If VLA has denied an accused person legal assistance, they can apply to have the decision reviewed by an independent reviewer. A decision made by the independent reviewer can then be appealed to the Supreme Court of Victoria.




**Source 3** VLA also tries to connect with people to increase awareness of its services and to provide legal information to the community about their legal rights.

## Other tests

Other than the means test, the accused person must satisfy other tests to be eligible for a grant of legal assistance. The tests depend on the type of legal matter and the seriousness of the offence. For example, depending on the case, VLA may assess the merits of the case, whether it would be in the interests of justice to fund the case, and whether there is any benefit or detriment to the accused or the public in granting legal assistance.

This means it is not a straightforward process to get a grant of legal assistance, and it often requires more than just showing a person has 'no money'. In addition, the VLA has indicated that many people who do not qualify for legal assistance from services such as VLA also do not have enough money to pay for a lawyer themselves. These people are sometimes referred to as the 'missing middle'. In its 2021–22 annual report, VLA noted that it continues to have discussions with governments to seek additional funding to meet the long-term challenges due to increased demand for legal assistance.

# Types of assistance for victims of crime

The types of legal aid available to victims of crime from VLA are different from that available to accused people, because victims of crime are not parties in a criminal case and therefore will not need to actively participate in the case. However, they still need help with the following:

- navigating the criminal justice system, including understanding their rights, the processes involved, and their options to participate in the criminal justice system. They may also need help with understanding certain processes, such as plea negotiations (which you will learn about in Topic 4.4) and **appeals**

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

- getting advice or assistance with obtaining protection orders, such as a family violence intervention order (a court order which aims to protect a person, their partner or property from a family member), or a personal safety intervention order (a court order that seeks to protect a person, their children and their property from another person)
- obtaining financial assistance or compensation because of the loss suffered as a result of a crime. Compensation or financial assistance can be obtained in the following ways:
  - through the Victims of Crime Financial Assistance Scheme. The Scheme (which replaces a tribunal dedicated to victims) provides financial assistance to victims of violent crime (which include family members). The financial assistance is government funded
  - in a criminal case compensation and restitution orders can be made by a court. A restitution order requires an offender to return stolen property (such as where the offender was convicted of theft offences). A compensation order is a payment by the offender to the victim for loss or injury
  - a victim may instead take civil action and **sue** an offender, or someone else, for loss that has been inflicted on them
- identifying other supports that may be available to them, particularly social or mental health support.

Source 4 below sets out the types of legal aid available to victims of crime from VLA.

**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)

| Assistance | Description | Available to |
|---|---|---|
| Free legal information | VLA's website has free information about the law, court processes and basic legal principles. This includes information about going to court as a witness, making applications in relation to family violence, and information about how to obtain financial assistance.<br>In 2023, VLA launched its Victims Legal Service. Delivered in partnership between VLA, community legal centres and Aboriginal legal services, this service provides information and advice to victims through its helpline. Assistance can be provided in many languages. | All victims |
| Free legal advice | The Victims Legal Service provides free legal advice and support to victims of crime about how to make an application for financial assistance CA, or get compensation from the offender.<br>The advice is limited to assisting with obtaining financial compensation; it cannot be used to seek support as a witness or other processes such as civil processes (e.g. where the victim is suing). | Victims who are seeking assistance with obtaining financial compensation for loss they have suffered |
| Duty lawyer services | VLA provides duty lawyers in the Magistrates' Court for victims of crime who are seeking a personal safety intervention order.<br>The duty lawyer can provide advice or legal information to help the victim understand the matter they are facing, how to represent themselves, and where to access services. In some situations, the lawyer may represent the victim in court on the day. | VLA's resources are limited, so it provides duty lawyer services to victims who are most in need of legal help. While no income test applies, children and adults who have a disability are prioritised |

| Assistance | Description | Available to |
|---|---|---|
| Grants of legal assistance | VLA can make a grant of legal assistance to victims of crime in limited matters, such as to a person who is applying for a family violence protection order, or a personal safety intervention order. The person may be given legal assistance by a VLA lawyer, or VLA may arrange a private lawyer to assist (one who is on VLA's panel of practitioners).<br><br>Grants of legal assistance cannot generally be provided to allow a victim of crime to sue an accused person for compensation or to represent them in relation to the actual criminal case in which the accused is charged. | VLA has strict guidelines as to when it will provide a grant to a victim of crime. Generally, the state reasonableness test will need to be satisfied, which requires VLA to consider various factors, such as the extent of any benefit or detriment (disadvantage) that a grant might give to the person or the public. |

**Source 4** Legal assistance available from VLA for victims of crime

## Strengths and weaknesses

A summary of some of the strengths and weaknesses of VLA is set out in Source 5. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice. For example, the free legal information available on VLA's website enables people to become more informed about the processes and the legal system, thus increasing access. This can also achieve fairness by allowing an accused person to better understand legal processes and therefore be able to participate in their criminal case.

| Strengths | Weaknesses |
|---|---|
| Free legal information is available on VLA's website (through its online chat and resources) to everyone, including victims, regardless of their income or means. This includes information about court processes, an accused person's or victim's rights, and basic legal principles. | The free legal information available on VLA's website may not be enough for certain people, particularly those who are charged with an indictable offence and cannot otherwise get access to legal services in other ways. |
| Free legal advice and assistance, such as through duty lawyers and grants of legal assistance, is given to eligible people who are most in need, including people in custody and First Nations peoples. The aim is to prioritise the most vulnerable in our society. | VLA does not have unlimited resources, so it must apply criteria to ensure that its funding is used appropriately and targeted to those who need it the most. It is possible that some people who cannot afford a lawyer may also not be eligible for legal assistance and will therefore be left without representation and unable to properly defend themselves. Victims of crime also do not get assistance such as legal representation for when they give evidence. |
| Some legal information is provided in more than 30 languages. VLA's website also states that its staff speak many languages and can organise a free interpreter. | The ability of VLA to meet demand for services depends, among other things, on continued funding. An increase in demand and/or constraints on VLA's budget could mean that fewer people are eligible for legal aid. |

| Strengths | Weaknesses |
|---|---|
| VLA uses online tools to provide legal information and legal advice, including its online chat, telephone services and website. This means that information and advice is also available to people who live in regional, rural and remote areas, not just those who live in or near the city. | The extent to which VLA is able to help people may depend on whether accused people and victims of crime are aware of its existence and/or have the technological means to access free information. |

**Source 5** Strengths and weaknesses of VLA

## 4.2 Check your learning

### Remember and understand

1 'Legal aid means getting someone to represent you in a case.' **Explain** why this statement is incorrect.

2 Are people entitled to any assistance from VLA if they have enough money to pay for their own lawyer? **Justify** your answer.

### Examine and apply

3 For each of the following scenarios, **describe** the types of legal aid that VLA could provide to the person.

**a** Amelie has been charged with three summary offences. She is quite wealthy, but does not know where to start to defend the charges.

**b** Malik's court hearing for a summary offence is in three weeks in the Magistrates' Court. He wants to be represented on the day. He has a pension card.

**c** Samandar is on welfare benefits. They have been charged with an indictable offence. They cannot afford a lawyer, but have been told they have a good chance of success. They want to defend the charge.

**d** Aliyah cannot speak, read or write English well, and is facing a summary offence in the Magistrates' Court in three weeks. She has a significant income.

**e** Franco is a victim of a violent offence. He needs legal assistance to understand what his rights are in the criminal case, how to speak with the prosecutors, and to sue the perpetrator.

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

### Reflect and evaluate

5 As a class, link each of the strengths and weaknesses of VLA to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by including a column next to each strength and weakness. An example is provided below.

| | |
|---|---|
| Some legal information is provided in more 30 languages. VLA's website also notes that its staff speak many languages and can organise a free interpreter. | Providing legal information in different languages can achieve:<br>• **Fairness:** by increasing the ability of some accused people to participate in their case (e.g. an interpreter to help them understand the legal processes and communicate with another person about the action they should take).<br>• **Equality:** by ensuring people are not disadvantaged because they do not speak English.<br>• **Access:** by enabling people to understand the justice system and its processes, and therefore engage with the system. |

6 **Discuss** the ability of VLA to achieve the principle of equality. In your answer, refer to two measures put in place by VLA to help avoid disparity or disadvantage for accused people.

# 4.3 Community legal centres (CLCs)

## Key knowledge

**In this topic, you will learn about:**

- the role of Victorian community legal centres in assisting an accused and victims of crime.

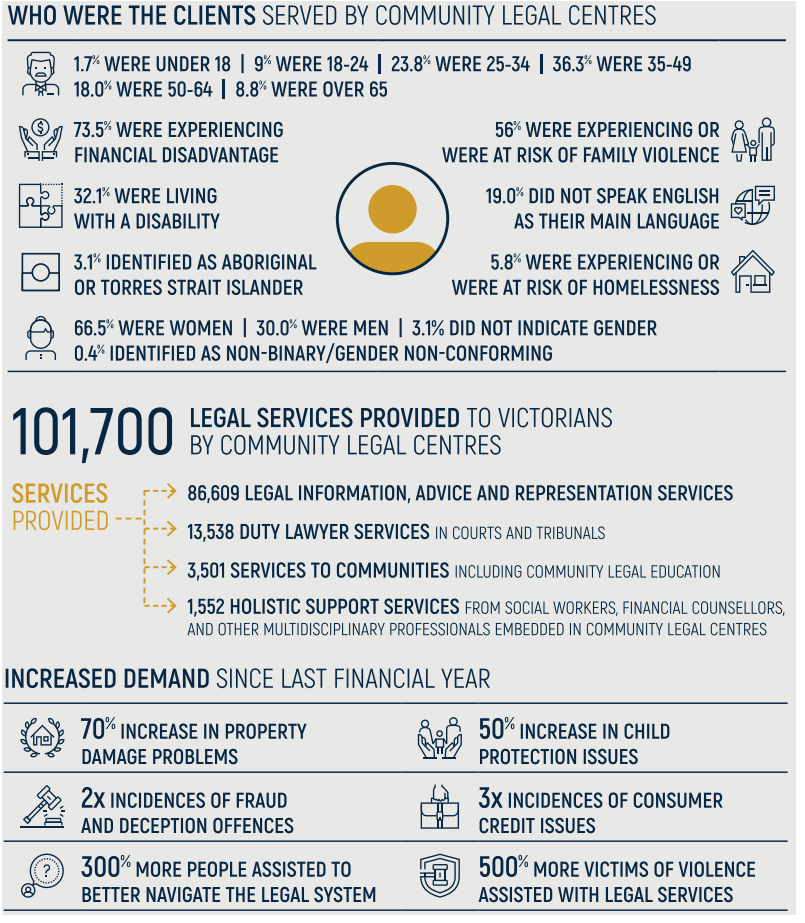
Community legal centres (CLCs) are one type of legal assistance service provider in Australia. As independent organisations they provide free legal services, including advice, information and ongoing assistance and representation, to people who may not be able to access legal services in any other way. There are two types of community legal centres:

- **generalist CLCs**, which provide broad legal services to people in a particular geographical area (e.g. Barwon Community Legal Service Inc. and Moonee Valley Legal Service are generalist CLCs that serve their respective local areas)
- **specialist CLCs**, which focus on a particular group of people or area of law (e.g. YouthLaw provides free legal services for people under the age of 25).

There are approximately 46 CLCs in Victoria. The Federation of Community Legal Services Inc. is the peak body for CLCs and Aboriginal Legal Services, and enables a strong collective voice to ensure access to justice for people who are facing disadvantage. CLCs have a collaborative relationship with Victoria Legal Aid (VLA) in that sometimes CLCs assist people in getting help from VLA, and sometimes VLA refers people to a CLC if VLA cannot help them.

**generalist CLC**
a community legal centre that provides a broad range of legal services to people in a particular geographical area of Victoria

**specialist CLC**
a community legal centre that focuses on a particular group of people or area of law (e.g. young people, asylum seekers, domestic violence and animal protection)




**Source 1** A snapshot of data from the Federation of Community Legal Centres, for the year from July 2021 to June 2022. This data provides an overview of the clients and services of 31 of the 46 Victorian Community Legal Centres in Victoria.

# The role of CLCs

Community legal centres provide accused people with information, legal advice and ongoing assistance in a case. They also provide legal education to the community so that there is a greater awareness of rights and understanding of legal information, and they advocate for changes to the justice system to address what they see as unfair laws, policies or practices.

## Funding of CLCs

VLA funds CLCs in Victoria through Commonwealth and state funding. Some CLCs receive grants from government or private sources. Many who assist at CLCs are volunteers.

CLC funding is an issue in Australia, partly because of the significant demand for legal assistance. In its 2021–22 annual report, the Federation of Community Legal Centres indicated that there is a growing 'service gap', and that more people need access to legal support and advice than ever before. An article published in the *Law Institute Journal* in January/February 2023 noted that the Southside Justice CLC had turned away half of those seeking legal assistance in the past year. Other legal centres also turned away people, noting that they did not have enough staff and had trouble retaining a skilled workforce.

Like VLA, CLCs prioritise people who need legal assistance the most because of their personal circumstances. These include people who have a disability or mental health issues, refugees, people in domestic violence situations, the homeless, young people, and those who cannot afford a lawyer. CLCs also help victims of crime and their families and some offer interpreter services.

# Types of assistance for accused people

The broad types of assistance available are shown in Source 2.

| Assistance | Description |
|---|---|
| Basic legal information | CLCs provide basic legal information on a day-to-day basis. Some of the information is online. For example, Barwon Community Legal Centre has information online about criminal offences and where to get more assistance.<br>CLCs also provide people with basic legal education. For example, Fitzroy Legal Service has produced *The Law Handbook*, a resource available online and in hard copy, which provides legal information about criminal matters such as those in relation to fines. |
| Legal advice and assistance | CLCs provide legal advice and preliminary assistance, such as help with writing short letters and completing forms. They can also help people apply for a grant of legal assistance from VLA.<br>Some CLCs have a legal advice service that allows people to visit the CLC with or without an appointment. For example, Peninsula Community Legal Service offers legal advice on a broad range of matters, including criminal law, at its night service, which is operated by a team of volunteer lawyers. Whittlesea Community Connections Community Legal Centre attends public places in the Whittlesea area with its coffee van, 'Express Legal', to talk with people about their legal problems over coffee. |
| Ongoing casework | Some CLCs will provide casework or assistance for an accused. This involves ongoing legal representation and assistance. Each CLC has its own eligibility requirements. Many CLCs do not offer assistance for indictable offences. |

**Source 2** The types of assistance that CLCs can provide to accused people

In relation to ongoing casework in particular, each CLC has its own eligibility criteria for assisting an accused, and for how much assistance they can provide. CLCs generally consider the following factors:

- the type of legal matter the person needs help with
- whether other assistance is available (such as through VLA)
- whether the person has a good chance of success
- whether the CLC is available to assist.

Many CLCs only help with minor criminal matters. For example, St Kilda Legal Service cannot assist an accused charged with an indictable offence.




**Source 3**
Australia's first non-Aboriginal community legal centre was Fitzroy Legal Service, which opened on 18 December 1972. The current service continues to provide critical legal services to the community, including *The Law Handbook*, available online.

An example of a CLC is shown in the scenario below.

**Actual scenario**

## YouthLaw

YouthLaw is a statewide, free community legal centre for people under 25. It works to address legal issues facing young people by providing preventative education programs and legal services. It is based in the Melbourne suburb of Carlton.

YouthLaw provides legal advice by phone and email, and it has a drop-in clinic at Frontyard Youth Services that supports the physical, emotional and social needs of young people and helps them to develop pathways out of homelessness. Common issues that YouthLaw advises on include fines, criminal charges and some civil issues such as debts and **discrimination**. Every Friday, it holds a Fines Clinic to help people who have been fined, and also provides free and confidential legal advice to enrolled RMIT students at their campuses. It also has fact sheets, including one about going to court for a criminal charge.

YouthLaw relies on volunteers to assist with casework. Some may be law students seeking to gain experience in the legal sector.

**discrimination**
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

# Types of assistance for victims of crime

As described in Topic 4.2, victims of crime may need assistance with navigating the criminal justice system, applying for family violence intervention orders, obtaining financial assistance or compensation from the offender or from someone else, or identifying other supports that they may need as part of a criminal case.

Some specialist CLCs have expertise in helping certain victims of crime. For example:

- the Women's Legal Service Victoria provides women experiencing family violence with free legal advice and representation with their family violence or victims of crime matters
- the Law and Advocacy Centre for Women Ltd can help victims of crime in making applications for financial assistance, including preparing the paperwork
- YouthLaw provides assistance to young people under the age of 25 years in relation to various issues, including intervention orders
- various generalist CLCs can assist with some victims of crime matters, such as making applications for financial assistance

In addition, Djirra, an Aboriginal Community Controlled Organisation, provides culturally safe and accessible services to First Nations people through its Aboriginal Family Violence Legal Service program. They assist those who are experiencing family violence in relation to issues such as intervention orders, and seeking compensation for harm suffered as a victim.

Although the type of legal aid and assistance varies depending on the CLC, Source 4 below sets out the general types of legal aid available for victims of crime.

| Assistance | Description |
|---|---|
| Basic legal information | Many CLCs provide basic legal information to victims of crime. For example, Djirra has fact sheets on family violence available to download online. The Women's Legal Services Victoria also has information, such as detailed information about applying for financial assistance. |
| Legal advice and assistance | CLCs provide legal advice and preliminary assistance, such as help with making applications or filling in forms. Victims of crime can also visit CLCs to obtain free legal advice, or can call to get legal advice and assistance. YouthLaw provides legal advice over the phone, and has a helpline for young people who are victims of crime. |
| Duty lawyer services | Some CLCs provide duty lawyer services to victims of crime who are seeking a family violence protection order or personal safety protection order. For example, Women's Legal Service Victoria provides duty lawyers at the Melbourne Magistrates' Court who can give free legal advice and representation on the day in relation to a family violence intervention order hearing. Fitzroy Legal Service also provides duty lawyers at the Specialist Family Violence Court at Heidelberg Magistrates' Court for family violence intervention order matters. |
| Ongoing casework | Some CLCs will provide ongoing casework or assistance for a victim of crime. This will involve ongoing legal representation and assistance. Each CLC has its own eligibility requirements. Much of the casework will be in relation to an application for financial assistance, or an application for a family violence intervention order or personal intervention order. |

**Source 4** Types of legal aid available to victims of crime

## Strengths and weaknesses

Source 5 below sets out some of the strengths and weaknesses of CLCs. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Free legal information is available on many CLC websites. For example, *The Law Handbook* published by the Fitzroy Legal Service is a comprehensive resource that provides accused people and victims of crime with information about court processes. | CLCs have noted that there is insufficient funding to be able to help everyone who needs legal assistance, and that there is a 'service gap', which means some people are not receiving help. |
| Some legal information is provided in different languages, and some CLCs offer free interpreter services. This helps people who do not communicate in or understand English to get legal information or advice in their own language. | Many CLCs do not assist people charged with an indictable offence, and many are limited to assisting people charged with a summary offence or victims of crime. Victims of crime may also be unable to get assistance for all the issues they face. |
| CLCs provide information to help educate the community about processes and their rights. *The Law Handbook* can be accessed at any time, and programs are often delivered by CLCs to help educate people about the justice system. | CLCs may not have enough staff or volunteers to meet the needs of accused people and victims of crime. This may result in people being turned away from drop-in clinics, or in less time being given to people with complex legal issues. |

**Source 5** Strengths and weaknesses of CLCs

## 4.3 Check your learning

### Remember and understand

1 **Describe** the difference between generalist CLCs and specialist CLCs.

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

### Examine and apply

3 Go to the Federation of Community Legal Centres Victoria website (a link is provided on your obook pro). **Justify** whether there is a CLC available for the following people:

- **a** Kirra is a First Nations person living in Victoria and has been charged with a summary offence.
- **b** Narvan lives in Werribee and wants some free legal advice about suing an offender.
- **c** Yola lives near Gladstone Park and wants some help to draft a letter.
- **d** Gianna has a hearing disability and has been charged with an indictable offence.

### Reflect and evaluate

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

5 As a class, link each of the strengths and weaknesses of CLCs to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by including a column next to each strength and weakness.

6 **Discuss** the ability of VLA and CLCs to enable access to the criminal justice system for people charged with an indictable offence.

**Weblink**
Federation of Community Legal Centres Victoria

# 4.4 Plea negotiations

## Key knowledge

**In this topic, you will learn about:**

- **the purposes and appropriateness of plea negotiations.**

**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

**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)

Criminal cases are heard and determined only in the courts (unlike some **civil disputes**, which can be resolved by bodies other than the courts). That is, only the courts have the power to decide if an accused is guilty and sentence an offender if they are guilty of an offence.

There are, however, ways in which a criminal case can be determined or resolved without the need to go to trial (or hearing in the Magistrates' Court). One of these is through **plea negotiations**.

## Introduction to plea negotiations

Plea negotiations take place between the prosecutor and the accused about the charges against the accused. They can result in an agreement being reached between the two parties about the accused pleading guilty in exchange for some concession or agreement by the prosecutor (e.g. to withdraw some charges). Plea negotiations can take place in relation to summary and indictable offences. Other terms for plea negotiations are 'plea bargaining' or 'charge negotiations' (although some people discourage the use of the term 'plea bargaining', as it may suggest something 'sinister' or negative about the process).

The agreement reached between the prosecutor and the accused following plea negotiations may be that:

- the accused pleads guilty to fewer charges, with the remaining charges not proceeding
- the accused pleads guilty to a charge, but an agreement is reached about the facts on which the plea is based
- the accused pleads guilty to a lesser charge (a charge for an alternative offence with a lower maximum penalty). For example, a person charged with culpable driving causing death could negotiate to have this changed to dangerous driving causing death, which carries a lower maximum penalty than culpable driving, on the basis that the person pleads guilty to the lesser charge.




**Source 1** Plea negotiations can be used in summary or indictable offences.

Plea negotiations usually begin when the accused (or their lawyer) indicates to the prosecution that they are willing to discuss the charges, though either party can indicate to the other party that they are prepared to consider negotiations. Negotiations are usually conducted on a 'without prejudice' basis. This means that any offers made by either party during the negotiations cannot be used against them if the negotiations are not successful. Therefore the accused may be free to negotiate with the prosecution without fear that whatever they say during the negotiations will be used against them at trial or hearing if the negotiations fail.

Negotiations can take place by phone, email/letter or face to face (though negotiations usually occur in writing). Negotiations can often be extensive and take place over a long period before an agreement is reached. Generally, negotiations occur where there are multiple charges; this is because it provides an opportunity for the prosecution to substitute a more serious charge for a less serious charge, such as substituting a charge of culpable driving causing death with dangerous driving causing death.

Plea negotiations do not determine the sentence, because the prosecutor has no power to sentence an offender. Only the courts have that power. Following plea negotiations, the accused will still need to be sentenced by a court. The court will be informed of the charges the accused has pleaded guilty to, and will decide what **sanction** to impose.

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

Plea negotiations can happen at any stage, and even before the charges have been laid. Victims should be consulted before the plea negotiations, and the victims' views should be taken into account when deciding to enter into an agreement with the accused. However, the victims' views are not a deciding factor for the prosecutor to enter into such an agreement.

## Purposes of plea negotiations

Plea negotiations have several purposes:

- to **ensure certainty of the outcome of a criminal case.** In a plea negotiation, the accused may plead guilty to the charges, thus ensuring certainty of outcome (i.e. a plea of guilt) and removing the risk of an acquittal. However, the charges must adequately reflect the accused's wrongdoing. For example, an accused who is charged with murder may agree to plead guilty to a lesser charge of manslaughter. However, a manslaughter charge must still adequately reflect the conduct of the offender so that the community and the victims do not think that the plea negotiations have resulted in the accused being 'let off'.
- to **save on costs, time and resources.** If a plea negotiation results in an early guilty plea, it avoids the need for a trial or hearing and therefore saves the court and the prosecution's resources, as well as avoids the costs and time associated with a trial (or hearing)
- to achieve a **prompt resolution to a criminal case without the stress, trauma and inconvenience of a criminal trial (or hearing)**. An early resolution relieves victims and witnesses of the burden and trauma of having to give evidence, and may help victims move on from what has happened.




**Source 2** In 2021, after originally being charged with murder, a 54-year-old man pleaded guilty to aiding or abetting suicide (which has a maximum penalty of 5 years' imprisonment) after fulfilling his terminally ill 80-year-old father's wish for his life to end. The judge released the man on the condition he undertook counselling and treatment and remained of good behaviour. In this photograph, police are arriving at the scene of the incident.

There are also some advantages for an accused, who may receive a reduced sentence because of a plea of guilty before trial (depending on the sentencing factors and the time the **guilty plea** was entered).

Plea negotiations are widely used in the criminal justice system, as shown in the extract below.

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

## Extract

### Resolving matters

The Director's Policy sets out when a criminal prosecution should proceed, when resolution may occur, and the factors that must be considered when deciding whether to resolve a matter.

A matter may only resolve if it is in the public interest to do so. The OPP will consider a number of factors including the strength of the available evidence, whether the charges appropriately reflect the criminality and provide for adequate sentencing scope, and the views of the victim and Informant on resolution.

Resolving matters at an early stage, where appropriate, saves resources being applied to trials that should not ultimately proceed, may relieve victims and witnesses from giving evidence, provides certainty of outcome, and helps to achieve fair and just outcomes efficiently.

In 2021/22:

> 77.6% of prosecutions were finalised as a guilty plea, down from 88.7% the previous year.
> Of the guilty pleas achieved in 2021/22, 63.7% were achieved by committal.

These statistics were impacted by COVID-19 restrictions and the reduced number of jury trials.

Director of Public Prosecutions Victoria and Office of Public Prosecutions Victoria, Annual Report 2021–22

# Appropriateness of plea negotiations

Plea negotiations may only occur if it is in the public interest. A number of factors are considered when deciding whether plea negotiations are in the public interest and appropriate for a particular case, including:

- whether the accused is willing to cooperate in the investigation or prosecution of co-offenders, or offenders of other crimes
- the strength of the evidence, including the strength of the prosecution's case and of any defences
- whether the accused is ready and willing to plead guilty
- whether the accused is represented. The prosecution may be less willing to negotiate with a **self-represented party** (accused person) who may not understand the processes
- whether the witnesses are reluctant or unable to give evidence, which would jeopardise the prosecution's ability to achieve a guilty verdict
- the possible adverse (negative) consequences of a full trial, including the stress and inconvenience on victims and witnesses giving evidence
- the time and expense involved in a trial, particularly the costs associated with running the case
- the views of the victim (the prosecutor should consult the victims and take their views into account when considering plea negotiations).

**self-represented party** a person before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

In addition, the accused and their legal representatives will need to consider whether it is in the best interests of the accused to negotiate with the prosecution. For example, the impacts of a guilty plea may be significant for an accused person (e.g. it may impact on future employment). Alternatively, the costs and delays of proceeding to trial may impact on the client significantly, making a negotiation appropriate.

The following scenario is an example of a plea negotiation.

**Actual scenario**

### Plea negotiation following fire

In December 2020, a fire at a townhouse in one of Melbourne's suburbs resulted in the death of a young couple and their baby daughter. The couple and their daughter were staying at the townhouse, which was owned by a friend of the couple. A woman who did not know any of the victims, or know they were inside, set fire to the townhouse as part of a dispute with the friend of the couple.

Following an investigation, the woman was charged with three charges of murder and three charges of arson causing death. The woman offered to plead guilty to arson causing death, which was finally accepted by the prosecutors in May 2022 before trial. It was reported that both parties were in negotiations about the charges. The murder charges were ultimately withdrawn, and the woman was sentenced to 13 years in prison. She must serve 8 years before she is eligible to be released.

Following the sentence, it was reported that the victims' family said they felt 'devastated' and that no justice had been done.

## Strengths and weaknesses

Source 3 sets out some strengths and weaknesses of plea negotiations. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Negotiations help with the prompt determination of criminal cases. This is because they avoid a full hearing or trial, and the matter can proceed to sentencing.<br>It is possible that our criminal justice system would not be able to cope without plea negotiations. | Negotiations do not need to be disclosed and can be held privately. This lack of transparency may make some people question the agreement or the reason why the prosecution decided to negotiate with the accused. |
| Victims, witnesses and their families, and the accused's family are saved the trauma, inconvenience and distress of the trial process. Sometimes the trial process makes victims and witnesses relive the crime and hear evidence that may be distressing. | The negotiation process may be seen as the prosecutor avoiding the need to prove the case **beyond reasonable doubt**, which is a fundamental principle of our justice system and upholds the **presumption of innocence** (some people may argue in turn that an innocent person would not enter into negotiations). |

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

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

| Strengths | Weaknesses |
|---|---|
| The prosecutor will consult with victims and may take their views into consideration when deciding whether to negotiate with an accused. | Victims do not have a 'final say' on whether a prosecutor negotiates with the accused (i.e. their views are not determinative on whether there will be a plea negotiation). |
| Plea negotiations provide substantial benefits to the community by saving the cost of a full trial or hearing. In particular, they save the resources of the prosecution and the court. | A self-represented party (accused person) may feel pressured into accepting a deal even if the evidence is not strong (though strong safeguards are in place when pleas are negotiated). |
| Plea negotiations help to make sure there is certainty of outcome for the parties. Going to trial or other hearing risks the possibility of an acquittal. Therefore, a plea negotiation can help achieve a guilty plea for an offence that reflects the crime. | There may be a failure of one or both parties to engage early on in a case to try to resolve the charges. This can then result in costs and resources being taken up by a case that could have resolved much earlier. |

**Source 3** Strengths and weakness of plea negotiations

## 4.4 Check your learning

### Remember and understand

1 **Define** the term 'plea negotiations'.

2 Is the court involved in plea negotiations? **Justify** your answer.

3 **Describe** two possible outcomes of a plea negotiation.

### Examine and apply

4 Read the scenario 'Plea negotiation following fire'.
   - **a** **What** was the agreement reached between the parties?
   - **b** Would a jury have been involved in this case? **Justify** your answer.
   - **c** Do you think a victim should be able to have a final say in whether a plea negotiation should occur? Give reasons for your answer.

5 For each of the following scenarios, decide whether you think plea negotiations are appropriate. **Justify** your answer.
   - **a** The accused maintains her innocence of the charges laid against her.
   - **b** The DPP is expected to call more than 200 witnesses at trial. Many of those witnesses were physically injured in the incident and are reluctant to give evidence. However, the accused has refused to cooperate so far with the DPP.
   - **c** A rape victim is nervous about giving evidence at trial, but does not agree with the idea that the accused should be able to negotiate his way out of a rape charge.
   - **d** The trial against the three co-accused is expected to take three weeks. The DPP's evidence is strong against two of the co-accused.

### Reflect and evaluate

6 As a class, link each of the strengths and weaknesses of plea negotiations to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

7 **Evaluate** the ability of plea negotiations to achieve the principle of fairness.

# 4.5 The Victorian court hierarchy

## Key knowledge

In this topic, you will learn about:

- the reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals.

Victorian courts, like courts in other Australian states, are arranged in a hierarchy. They are ranked based on the severity and complexity of the cases they can hear. The Magistrates' Court is at the bottom of the hierarchy and the Supreme Court of Victoria (divided into the Trial Division and the Court of Appeal) is the highest state court. It deals with the most serious (indictable) offences. Each court has its own **jurisdiction** (powers) to hear criminal cases.

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

**original jurisdiction** the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

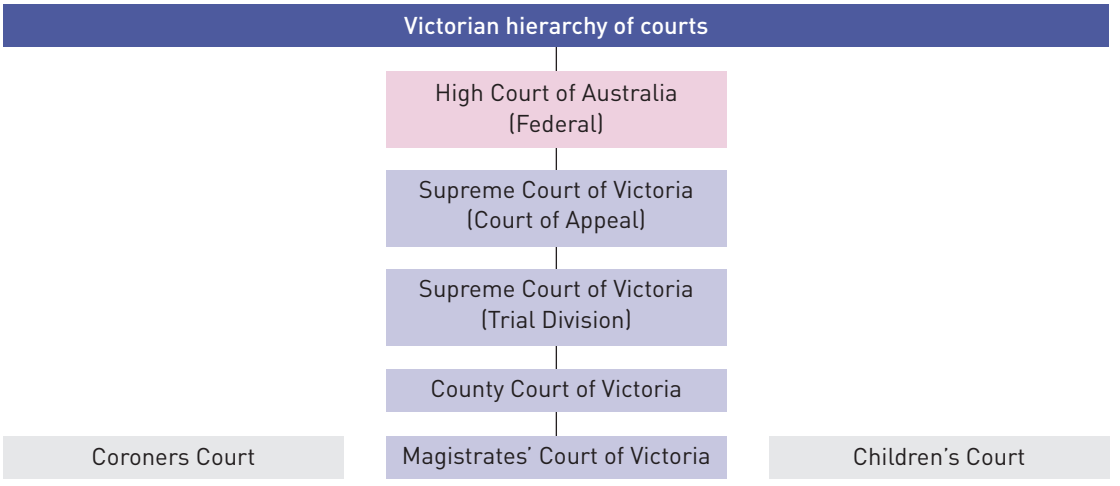
**appellate jurisdiction** the power of a court to hear a case on appeal

Jurisdiction can be broken down into two types:

- **original jurisdiction** – the power of a court to hear a case for the first time
- **appellate jurisdiction** – the power of a court to hear a case in which a decision is being reviewed or challenged on a particular ground (i.e. being appealed to a higher court).

As you learnt in Chapter 3, the Magistrates' Court hears summary offences. The County Court and the Supreme Court hear indictable offences, with the Supreme Court generally hearing the most serious indictable offences (such as murder, manslaughter or attempted murder).

The High Court is a federal court. The High Court hears appeals from the state and territory Courts of Appeal. The High Court needs to give leave (consent) to a party who wants to appeal.




**Source 1** The Victorian court hierarchy, including state courts and the High Court (a federal court)

### *Did you know?*

In the award-winning podcast about the Supreme Court, *Gertie's Law*, it was suggested there are ghosts in the Supreme Court, which are supposed to be in Court 4 because that's where many of the significant criminal cases were heard.

There are many reasons for a court hierarchy, two of which are specialisation and appeals.

## Specialisation

Within the hierarchy, the courts have been able to develop their own areas of expertise or specialisation. In relation to criminal cases:

- the **Supreme Court (Court of Appeal)** specialises in determining criminal appeals in indictable offences, and has expertise in sentencing principles

- the **Supreme Court (Trial Division)** hears the most serious indictable offences (such as murder and manslaughter) and has developed its own specialisation in those types of crime and the elements of each crime, as well as developed expertise in trial processes such as giving evidence
- the **County Court** has expertise in hearing particular types of indictable offences (such as cases involving drug offences, sexual offences and theft)
- the **Magistrates' Court** is familiar with cases involving summary offences that need to be dealt with quickly and efficiently (such as drink-driving and traffic offences), as well as **committal proceedings**. The Magistrates' Court also has more familiarity with and experience in dealing with self-represented accused people, because the number of people charged with a summary offence who choose to represent themselves is high
- other specialist courts such as the **Children's Court** and **Coroners Court** deal with specialised cases. The Children's Court specialises in cases where young people have been charged with a crime, and the Coroners Court specialises in investigating deaths and fires involving suspicious circumstances or where the cause of death is unknown.

*Study tip*

The *VCE Legal Studies Study Design* requires you to know about the Supreme Court, County Court and Magistrates' Court. Make sure you can explain specialisations and appeals in relation to these courts.

**committal proceeding** the pre-trial hearings and processes held in the Magistrates' Court for indictable offences



**Source 2** The Shepparton Law Courts building, opened in 2018, has six courtrooms and state-of-the art facilities, safe waiting areas and enhanced security.

# Appeals

If there are grounds for **appeal**, a party who is dissatisfied with a decision in a criminal case can take the matter to a higher court to challenge the decision. A party who appeals is known as the **appellant**, and the other party is the **respondent**. The system of appeals provides fairness and allows for any mistakes made in the original decision to be corrected. If there were no higher courts, there could be no system of appeals, which would create unfairness if a court incorrectly determined a case.

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

**appellant** a person who appeals against a decision (i.e. a person who applies to have the ruling of a lower court reviewed or reversed by a higher court)

**respondent** the party against whom an appeal is made

Grounds for appeal in a criminal case can include:

- appealing on a question of law (where some law has not been followed; for example, if the court was allowed to hear inadmissible evidence or the court misinterpreted a **statute**)
- appealing a conviction (which can only be appealed by the offender)
- appealing because of the severity (or leniency) of a sanction imposed. The prosecution will appeal on leniency, and the offender will appeal because of severity. An offender will usually appeal the sanction on the basis that it was 'manifestly excessive'.

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

Prosecutors are not able to appeal an acquittal (i.e. where an accused person has been found not guilty).

Generally, the appellant will need the leave (consent) of the court that will hear the appeal. This includes where an offender is appealing a conviction or sentence to the Court of Appeal, or appealing a decision of the Court of Appeal to the High Court.

## Summary of the criminal jurisdiction of Victorian courts

Source 2 sets out the original and appellate criminal jurisdictions of the main Victorian courts.

| | Original jurisdiction | Appellate jurisdiction |
|---|---|---|
| Magistrates' Court | • All summary offences and indictable offences heard summarily<br>• Committal proceedings, bail applications and warrant applications | • No appellate jurisdiction |
| County Court | • Indictable offences except murder, attempted murder, certain conspiracies, corporate offences | • From the Magistrates' Court on conviction or sentence |
| Supreme Court (Trial Division) | • Most serious indictable offences, including murder, attempted murder, certain conspiracies and corporate offences | • From the Magistrates' Court on points of law |
| Supreme Court (Court of Appeal) | • No original jurisdiction | • From the County Court or the Supreme Court (Trial Division)<br>• From the Magistrates' Court where the Chief Magistrate decided the case |

**Source 3** The main Victorian courts with criminal jurisdiction

An example of an appeal on leniency is provided in the scenario below, in which the offender's sentence was increased on appeal, even though the offender had herself appealed.

Actual scenario

## Offender gets more jail time after losing appeal

In this case, the appellant appealed against convictions and the sentence imposed in the Magistrates' Court in June 2019.

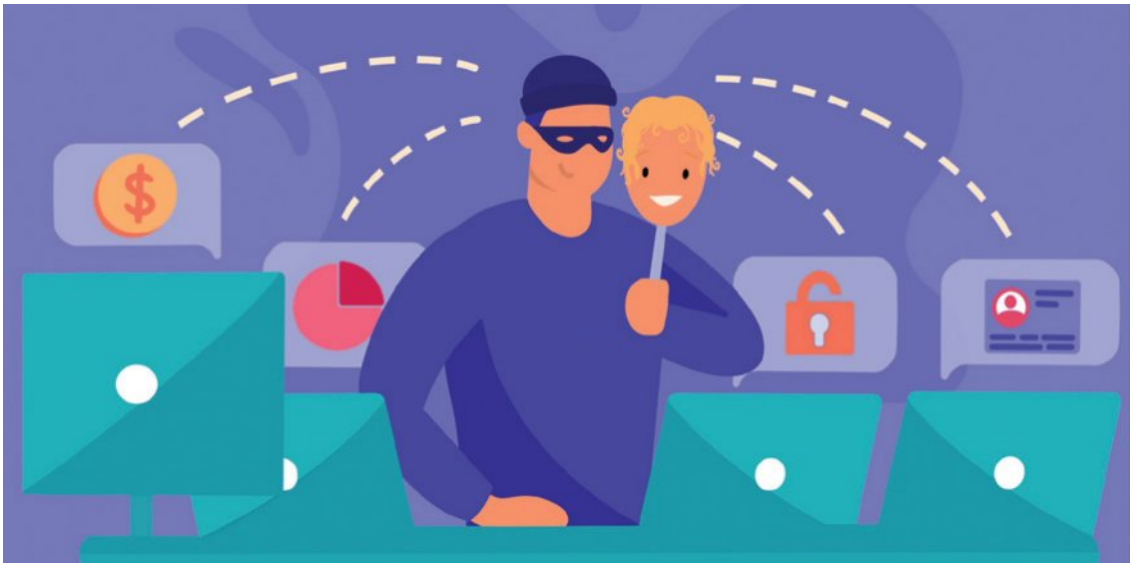
The offender had been posing as an Australian movie star online, tricking women into thinking they were communicating with or were in a relationship with the star. The offender also convinced women to send her nude photographs, following which she stalked and harassed them. The actions caused significant distress and embarrassment for the victims, who remained anonymous. Much of the evidence obtained from the police was from the data on the devices in the offender's possession which were seized (which included records of texts, chats and notes, photos and emails).

The magistrate in the original hearing found the offender guilty and imposed a total sentence of two years and eight months in jail. The offender had to serve 21 months before she could be released from prison. The offender appealed against the convictions and against the sentence imposed.

The County Court heard the appeal and found that all charges were proven against the offender (appellant). During the course of the appeal, the County Court judge warned the offender on more than one occasion that she faced the possibility that a more severe sentence could be imposed. Despite these warnings, the offender proceeded with the appeal.

In resentencing the offender, the County Court received victim impact statements from various victims. The Court on appeal increased the sentence to four years in prison. The offender would not be eligible for release until she had served two years and eight months. As a result, an additional one year and four months was added to the original sentence. In sentencing the offender, the County Court judge noted that those who communicate on social media platforms need to be wary of the dangers of engaging with people they do not know.

*DPP v Abdelmalek* [2022] VCC 1806 (25 October 2022)



**Source 4** Catfishing is when someone pretends to be someone they are not by creating a false identity. Young people in particular are at risk of being the victim of catfishing.

## Strengths and weaknesses

Source 5 below sets out some of the strengths and weaknesses of the court hierarchy. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| A court hierarchy allows courts to specialise in different types of criminal matters, which allows more efficient processes or resources based on the cases they hear (e.g. there are more Magistrates' Courts and magistrates to hear the volume of summary offences). | The many different courts can be confusing for people who do not understand the criminal justice system. This can be particularly so for people charged with an indictable offence, where the case will involve both the Magistrates' Court (for a committal proceeding) and one of the higher courts (for the trial). |
| The existence of a court hierarchy allows appeals to be made by both parties if there is an error in the original decision. | The court hierarchy does not allow for an automatic right to appeal in most instances; offenders need to establish grounds for appeal. This can restrict the ability of accused people to access the appeal hierarchy, particularly self-represented people, who may struggle to formulate grounds for appeal. |

**Source 5** Strengths and weaknesses of a court hierarchy

## 4.5 Check your learning

### Remember and understand

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

### Examine and apply

4 Which court is specialised to hear the following types of cases in its original jurisdiction?
   **a** Summary offences
   **b** Indictable offences
   **c** Serious indictable offences
   **d** Committal proceedings
   **e** Indictable offences heard and determined summarily
5 Read the scenario 'Offender gets more jail time after losing appeal'.
   **a** Which court sentenced the offender?
   **b** Which court heard the appeal?
   **c** Which party appealed, and on what grounds?
   **d** **What** was the original sentence, and what was the sentence handed down on appeal?
   **e** **Explain** how the ability to appeal the decision upheld the principle of fairness in this case.

### Reflect and evaluate

6 As a class, link each of the strengths and weaknesses of the court hierarchy to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.
7 'Access to the criminal justice system would be enhanced if there was only one court, as it would avoid confusion with multiple courts.' **Discuss** the extent to which you agree with this statement.

# 4.6 The judge and magistrate

## Key knowledge

**In this topic, you will learn about:**

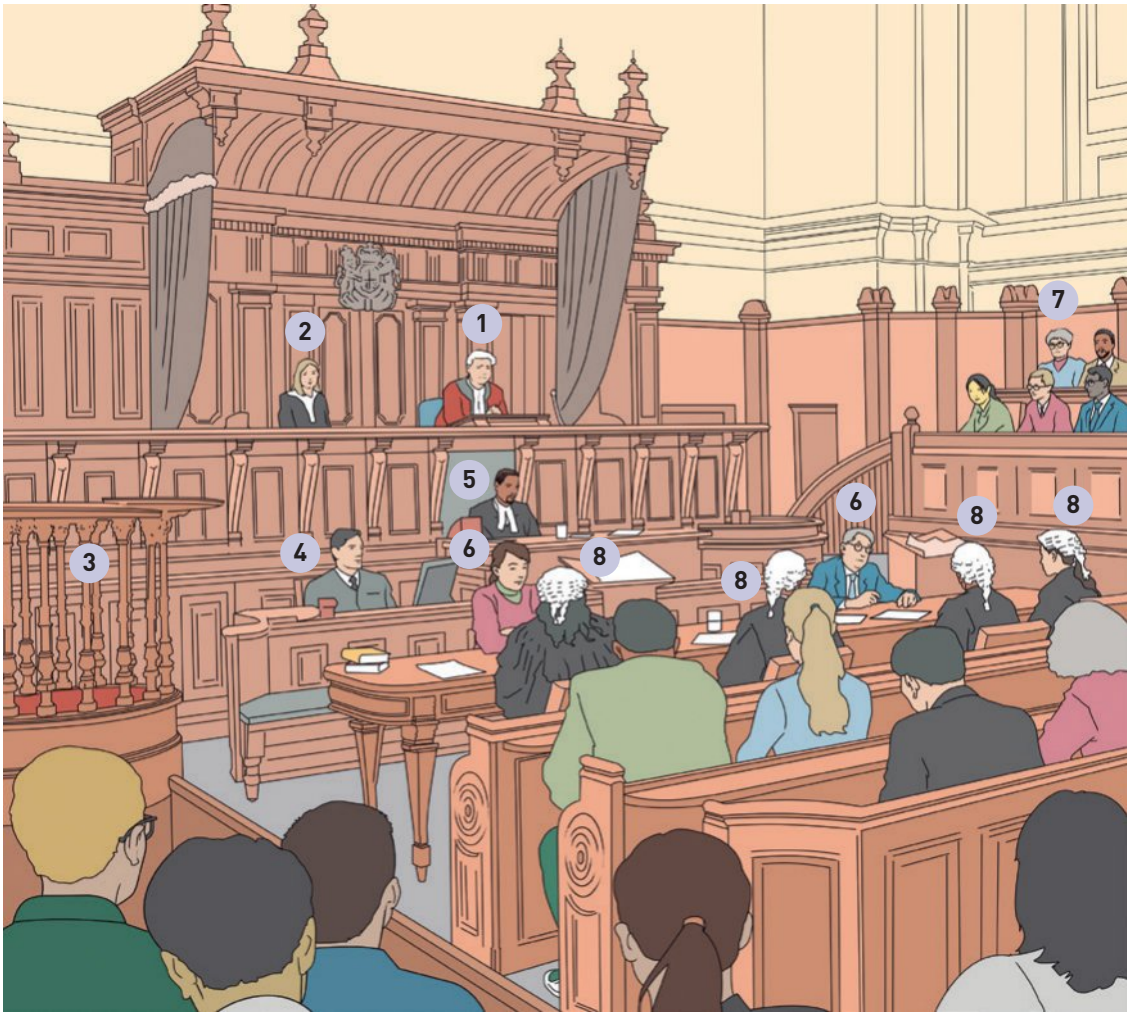
- **the roles of key personnel in a criminal case, including the judge or magistrate.**

If a criminal case is not resolved before the final hearing, and the accused continues to plead not guilty, their guilt will be determined by a court.

The three key personnel in a criminal case are the judge or magistrate (depending on the court), the jury (if there is one) and the parties. You will explore the role of the judge and magistrate in this topic, and the role of the jury and the parties in the next two topics (4.7 and 4.8).

### *Study tip*

When you see the words 'key personnel' used in relation to a criminal case, you should recall that the key personnel are the judge (or magistrate), the jury and the parties. You could be asked about any one of them in an assessment task.




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

**Source 1** Key personnel in a criminal trial in a higher court. You are required to know the roles of the judge or magistrate, the jury and the parties.

# Introduction to the judge and magistrate

If the accused is charged with a summary offence, the offence will generally be heard in the Magistrates' Court, and the magistrate will have the primary role in the case. A judge in the higher courts will not be involved in the case.

If the accused is charged with an indictable offence, the offence will generally be heard in the County Court or the Supreme Court, and the judge will therefore have a primary role in the case. The magistrate will also play some part in a case involving an indictable offence, as they will need to oversee the committal proceeding stage of the case in the Magistrates' Court, after which the case will be transferred to one of the higher courts.

# Roles of the judge and magistrate

The judge or magistrate is one of the central figures in a criminal case. They oversee the case, act as an 'umpire' or 'referee' at trial or hearing, and make sure that the court procedures are carried out in accordance with the court's rules to ensure that the parties are treated fairly. The judge (or magistrate) must act impartially, not favour any side, and must have no connection with the prosecution or the accused.

Judges and magistrates in Victoria are appointed, not elected. To be eligible to be appointed a judge, a person must be under the age of 70 years and either have experience as a lawyer, or already be a judge or magistrate. To be eligible to be appointed as a magistrate, a person needs to have completed a law degree and have at least eight years' experience as a lawyer.

Judges and magistrates have a number of roles in a criminal case, including to:

- act impartially
- manage the trial or hearing
- decide or oversee the outcome of the case
- sentence an offender.

These roles are explained in more detail below.

## Act impartially

As you explored in Chapter 3, impartiality is one of the central features of a fair trial. Judicial impartiality is a fundamental part of our legal system; it ensures public confidence in our court system and in our justice system generally.

Impartiality also extends to the appearance of impartiality. That is, judges and magistrates must not only be unbiased, but there must be no apprehension or belief that a judge or magistrate may *not* be unbiased for a particular reason. This is known as **apprehended bias**. Apprehended bias may be seen in a judge or magistrate's conduct (e.g. a judge has previously done or said something that might suggest they may not be able to act impartially) or in a judge or magistrate's association (e.g. where a magistrate has a relationship with someone that may have some direct or indirect involvement in the case). In these sorts of cases, a party may argue that a judge or magistrate should remove themselves from having any involvement in the case to avoid any possibility they may not bring an impartial mind.

**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

Recently, there has been a federal inquiry into the issue of judicial impartiality to ensure that potential issues of judicial bias are managed in the federal courts.

## Manage the trial or hearing

In both summary offence cases in the Magistrates' Court and indictable offence cases in the County and Supreme Courts, magistrates and judges have the important role of controlling and supervising the case.

More particularly, they are required to:

- make sure that correct court procedure is followed so that both parties have an equal opportunity to present their case. This can involve controlling witnesses, controlling the order of events, and working with legal practitioners as to the conduct of the trial
- ask occasional questions of a witness, recall a witness for a matter to be clarified, or call a new witness with the permission of both sides
- make decisions during the course of the trial, such as whether **evidence** is to be permitted or excluded. There are rules and laws about how evidence can be given, and what evidence is admissible. During a hearing, the judge or magistrate will often need to make decisions about whether evidence is admissible. For example:
  - evidence must be relevant to the issues in dispute
  - in most instances, **hearsay evidence** is not admissible. Hearsay evidence is when a witness relies on something that someone else said about a situation, but the witness did not actually see what happened. There are some exceptions to the hearsay evidence rule
  - evidence of an opinion is generally not admissible. If someone 'thinks' that the accused committed the crime, this is not admissible. There are some exceptions to this rule
- adjust trial processes if necessary to ensure a party does not suffer **disparity** or disadvantage (e.g. allowing for breaks, or requiring legal practitioners to sit down).

The judge (or magistrate) is not an active participant in the trial, and they do not take sides. They do not try to make up for a **barrister** who is not doing an adequate job.

The following case is an example of the Court of Appeal considering whether the judge in a criminal case managed the trial appropriately and was unbiased in doing so.

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

**hearsay evidence**
evidence given by a person who did not personally witness the thing that is being stated to the court as true

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

**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

Actual scenario

## Heated exchanges between judge and barrister

On 25 March 2015 the appellant was convicted on two counts of armed robbery in the County Court. He appealed against his conviction on various grounds, including that the trial judge repeatedly interrupted cross-examination in both trials, interjected on too many occasions, and descended 'to the arena'. He also appealed on the ground that the judge was biased. The appellant was self-represented at the appeal.

The Court of Appeal considered in detail the transcript of the trial and the dealings between the judge and the barrister for the accused (the appellant). Some parts of the transcript showed heated exchanges between the judge and the barrister for the accused (after the jury had been sent out). The Court of Appeal noted that 'it clearly emerges that the judge was highly unimpressed by forensic decisions being made by defence counsel'.

It stated:

> No matter what view a judge has of the manner in which counsel is running the case, to insult and demean counsel, even in the absence of the jury, is not only likely to offend and embarrass counsel but also to risk impeding counsel in conducting the trial and thus risk giving rise to a miscarriage of justice.

It went on to say that exchanges like those between the judge and the barrister may give rise to an apprehension that the accused is not being treated fairly by the judge.

Ultimately, the Court of Appeal decided that the grounds of appeal had not been made out, and there was no ground for considering that a reasonable apprehension of bias was demonstrated. The Court dismissed the appeal.

*Cook v The Queen* [2016] VSCA 174 (25 July 2016)

*Study tip*

Collect articles about criminal cases. In each article, identify when it talks about key personnel in the cases and what occurred. This will give you practical examples of how the responsibilities play out in a case.

## Decide or oversee the outcome of the case

### Magistrate

In the Magistrates' Court, the magistrate will have the role of deciding whether the accused is guilty of committing the crime. This is because there is no jury in summary offences.

The magistrate will be required to listen to the cases presented by both parties and decide whether, based on the facts and the law, the accused is guilty beyond reasonable doubt. If the accused is found guilty, they will be sentenced at a later date. If they are found not guilty, this will be the end of the matter.

### Judge

In the County or Supreme Courts, a jury will decide on guilt, not the judge. The judge, however, has the important role of ensuring the jury understands their role, and summing up the case to the jury. More particularly, the judge will be required to:

- give directions to the jury to ensure a fair trial. This may include telling the jury that the accused is not required to give evidence, and that the jury should not assume the accused must be guilty because they did not give evidence
- once the trial has concluded, summarise the case to the jury. They must explain the law involved, identify the evidence that will assist the jury and refer to the way the parties have put their cases. They may also have to explain certain legal definitions or principles to the jury so they understand what they mean. For example, the judge may have to give the jury an explanation of what is meant by 'beyond reasonable doubt'.

In some cases, the judge may also be required to decide whether to accept a majority verdict (i.e. 11 out of 12 jurors) if all 12 jurors cannot agree beyond reasonable doubt whether the accused is guilty.



**Source 2** A victim impact statement sets out the harm suffered by the victim; the court takes this harm into account when deciding the offender's sentence.

## Sentence an offender

If an accused is found guilty, or the accused pleads guilty, the case will be set down for a plea hearing and the parties will make submissions about sentencing. Following that hearing, the judge or magistrate will then hand down a sentence. This may occur on the same day as the plea hearing, or at a later date. The judge or magistrate must follow the sentencing guidelines in the *Sentencing Act 1991* (Vic) and comply with legislation about the sentence that should be imposed.

In sentencing the offender, the judge or magistrate will hear from both parties, and can hear from victims about the impact that the offence had on them through **victim impact statements**. In doing so, the judge or magistrate ensures procedural fairness by allowing the parties to make appropriate submissions (tell them their views) about the offending and the sentencing considerations. If this does not occur, there may be grounds for appeal, as described in the following scenario.

**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

Actual scenario

## Appeal allowed due to denial of procedural fairness

In April 2019, the offender pleaded guilty to a single charge of conspiracy to commit common assault. He owned and operated a shop, and sought to conspire with another person to commit an assault on a person who operated a business nearby. Before the assault occurred, the offender was arrested and his phones were seized.

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

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

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

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

**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



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

### *Study tip*

The Study Design requires you to analyse the roles of key personnel. You may also be required to evaluate the ability of these personnel to achieve the principles of justice. Make sure you don't miss the 'analyse' skill when considering key personnel.

## Strengths and weaknesses

Source 4 below sets out some of the strengths and weaknesses of the roles of the judge or magistrate in a criminal case. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| The judge or magistrate acts as an impartial umpire. They oversee the trial process, but they do not overly interfere in a trial or help either party argue their case. This means no party is advantaged or disadvantaged because the judge or magistrate 'takes sides'. | Judges and magistrates are human, and there can be risks that they have actual or apprehended bias that impacts their decision-making, such as when they are fatigued. |
| Judges and magistrates manage the hearing processes, ensuring that rules of evidence and procedure are followed, and both parties have an opportunity to present their case. | Previous research suggests there is a lack of diversity in Australian judges and magistrates. In Victoria in 2015, four judicial officers were Asian Australians. Women were also underrepresented in higher courts. Some people believe this can impact on the extent to which accused people feel comfortable in the courtroom and/or the extent to which people feel confident in the administration of justice. |
| Judges and magistrates are able to assist self-represented accused people and can adjust the trial process to accommodate more vulnerable people, such as young people, people with a disability, or people with a mental health condition. | Judges and magistrates cannot overly interfere in a case, including those involving a self-represented accused person, even though they are one of the most experienced in the room. |

**Source 4** Strengths and weaknesses of the roles of the judge and magistrate

## 4.6 Check your learning

### Remember and understand

1 **Describe** the relationship between the role of the judge and the principle of fairness.
2 **Explain** why a judge does not decide guilt.
3 **Outline** two examples where there may be an allegation of apprehended bias in relation to a judge or magistrate.

### Examine and apply

4 The judge does not have investigatory powers. **Explain** how this upholds the principle of equality.
5 Read the scenario 'Heated exchanges between judge and barrister'.
   a **Explain** how the trial judge may have not acted according to a judge's duties or responsibilities.
   b Which party appealed?
   c Did the Court of Appeal uphold the appeal? **Why** or why not?
   d **Describe** the relevance of the principle of fairness to this case.

### Reflect and evaluate

6 As a class, link each of the strengths and weaknesses of the roles of the judge and magistrate to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.
7 **Discuss** the role of the judge or magistrate in a criminal case when there is a self-represented party.

# 4.7 The jury

## Key knowledge

**In this topic, you will learn about:**

- **the roles of key personnel in a criminal case, including the jury.**

**Magna Carta**
a 'peace treaty' made in England in 1215 between the barons (noblemen who pledged their allegiance to the King) and the King

The jury system is a trial by peers. It dates back to well before the **Magna Carta** in England, but the Magna Carta made it a fundamental right. No free man was to be imprisoned 'but by the lawful judgment of his peers … and by the law of the land'. The jury system provides the opportunity for community participation in the legal process, and for the law to be applied according to community standards.

As you learnt in Chapter 3, an accused person has a right to trial by jury where they have pleaded not guilty to an indictable offence. Therefore, criminal trials in the County Court and the Supreme Court of Victoria are generally jury trials. A jury is *not* used for sentencing.

The criminal jury is *the decider of the facts*. In other words, it decides which facts it believes to be true. For example, was the accused at the scene of the crime, or at the cinema as she said? Did the witness see the accused or was the witness mistaken, and saw someone else? Did the accused intend to kill?

A criminal jury comprises 12 jurors. They are chosen randomly from people who are eligible to vote and are on the electoral roll. In some criminal cases, up to 15 people will be empanelled on a jury, particularly for long trials where there may be a risk that not all 12 jurors will be able to remain on the jury for the entire time.

Before people are able to sit on a jury, an empanelment process occurs during which it is decided who can sit on a jury panel for a particular case. Some members of society are disqualified (such as some prisoners) or ineligible (such as lawyers and police officers) from being on a jury. Others can be excused if they have a valid reason (e.g. if they are significantly unwell). Potential jurors can also be challenged by the prosecution or the defence, with or without a reason (but they are limited in the number of people they can challenge without good reason).

The jurors must take the job of being on a jury seriously and make every effort to reach the right decision. Each juror must make their own decision without undue influence from other jurors.

***Did you know?***

In a British murder trial in 1994, four jurors who were staying overnight in a hotel during deliberations conducted a séance to ask one of the victims who committed the murder. A new trial was ordered.

## Roles of the jury

In a criminal trial the jury has the following roles:

- be objective
- listen to and remember the evidence
- understand directions and summing up
- deliver a verdict.

The roles are explained in more detail below.

### Be objective

The jury must be unbiased and bring an open mind to the task, putting aside any prejudices or preconceived ideas. A jury member must have no connection with any of the parties, and must also ensure they decide whether the accused person is guilty or not guilty based on the facts and not on their own biases.

The following scenario is an example of case that involved a situation of apprehended bias and resulted in one of the jurors being discharged.

Actual scenario

## Discharge of juror

In this 2007 case, the accused was on trial for maintaining a sexual relationship with a child under the age of 16 years. During the prosecutor's closing address, one of the jury members was showing signs of emotional distress. This was noticed by the trial judge. The trial judge adjourned the trial, and requested the jury go to the jury room so that the distressed juror could regain his composure. During the adjournment, a note was given to the judge indicating that the distressed juror had himself been a victim of abuse, but was now able to continue. Both parties were made aware of the note.

After the adjournment, the accused's legal representatives argued that the particular juror was biased and may have 'tainted' the rest of the jury. The judge decided to discharge the distressed juror and allowed the trial to proceed with 11 jurors (which can happen in certain circumstances). Enquiries were made about whether each of the 11 other jurors was able to be 'true' to their **oath** and was able to make a decision based on the evidence. Each of the jurors confirmed that they felt confident they could do so. The trial concluded, and the 11 jurors found the accused guilty.

The offender appealed against his conviction on the ground that the trial judge failed to discharge the remaining jurors, claiming that the remaining jurors would have been 'tainted' in discussions with the discharged juror, and that there was an apprehended bias with respect to the remainder of the jury members.

In handing down its decision, the Court of Appeal reasoned that jurors will frequently suffer emotional stress during a trial, but that this will not necessarily mean that they cannot complete their duties. It also noted that the role of the jury is the collective deliberation process of a fair cross-section of the community, and the jurors can manage or control irrational or unfair reasoning. The Court of Appeal ultimately dismissed the appeal, noting that the trial judge's actions in this case were appropriate.

*R v Goodall* [2007] VSCA 63 (13 April 2007)

**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

## Listen to and remember the evidence

Evidence is sometimes complicated, particularly in cases involving fraud and drugs, and often presented gradually and in the form of questions and answers. The jury members will need to be able to make sense of all this evidence.

Jurors can take notes if it helps them to remember information, but they must make sure they continue to concentrate on what is taking place in the courtroom. In the past a jury has been discharged because a jury member fell asleep.

A jury must not undertake its own investigations of what happened, conduct any research on the case, or make any enquiries about trial matters. They are not allowed to use the internet to search for information. Doing so can lead to penalties and the discharge of the jury. For example, in May 2023, a jury had to be discharged after it was discovered one of the jury members had researched the case on the internet. The jury member was referred to the Director of Public Prosecutions for investigation.

## Understand directions and summing up

**jury directions**
instructions given by a judge to a jury either during or at the end of a trial

At the conclusion of a trial the judge will give **jury directions**; that is, instructions to the jury about issues or points of law, and will sum up the case. The jury is required to listen to the directions and the summing up given by the judge, and can ask for an explanation about any legal point they do not understand.

For example, in sexual offence cases the trial judge may give directions to the jury about the meaning of 'consent', including a direction that just because a person did not protest or physically resist the accused before or during the sexual act does not mean they consented.

## Deliver a verdict

The jury must take part in the deliberations in the jury room and form an opinion about which party's story or arguments they believe. Deliberations should be undertaken freely and without any pressure from another juror to reach a particular verdict. Deliberations are confidential. Evidence about what happens during deliberations is not generally admissible or allowed to be disclosed, so that jurors can be free to be candid about their views.

The jury must make a decision on the facts of the case. In a criminal trial, this means the jury must decide whether the accused is guilty. A criminal jury must aim to reach a **unanimous verdict**. If they are unable to agree on a verdict, the court may accept a **majority verdict** unless the accused is charged with murder, treason or certain drug offences. The court may also accept a guilty verdict for an alternative offence.

**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

An interesting legal case that demonstrates the importance of jury deliberations being undertaken freely and without coercion is provided in the following scenario.

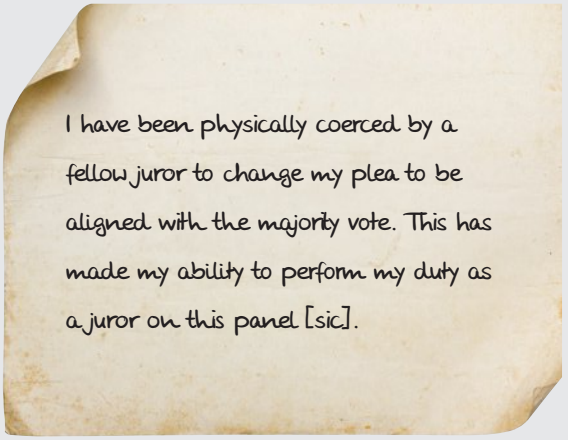
**Actual scenario**

### Juror coerced into making decision

In *Smith v Western Australia*, a note was found in the jury room after the jury had decided the case. The note suggested that one juror had been physically threatened to agree with the majority so a decision could be reached. The jury had found the accused guilty on two counts of indecently dealing with a child under the age of 13 years. The foreperson (the head juror chosen to be spokesperson for the jury) was asked, in accordance with usual practice, whether the verdict was the verdict of all the jury, and he said it was.

Smith appealed the conviction on the grounds that the 'trial had miscarried due to a juror being physically coerced into changing his verdict to one of guilty'. The Court of Appeal dismissed Smith's appeal on the basis that the **common law** rule known as the 'exclusionary rule' applied. That rule prevents evidence of jury deliberations being given in a court.

Smith appealed to the High Court. The High Court found that the exclusionary rule was aimed at preserving the secrecy of jury deliberations and the integrity and finality of the formal verdict, but did not extend to evidence of unlawful physical coercion. A jury must be able to deliberate freely. In this case there was evidence that was capable of creating a reasonable suspicion that a juror's verdict had been unduly influenced. The High Court found that Smith's appeal should be reheard by the Court of Appeal. In 2016 the Court of Appeal again dismissed Smith's appeal, having found that it was not satisfied that the juror who wrote the note was coerced.




**Source 1** The text of the note (not the actual note) left in the jury room after Smith's trial

*Smith v Western Australia* (2014) 250 CLR 473

**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)

## Strengths and weaknesses

Source 2 below sets out some of the strengths and weaknesses of the roles of the jury. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Jury members are randomly picked, have no connection to the parties, and make a decision based on facts, not on biases or on their own enquiries. | Jury members may have unconscious biases or prejudices, and as they do not give reasons for their decisions, there is no way of knowing whether bias played a role in their decision-making. |
| The jury system allows members of the jury to participate in the criminal justice system processes and ensures that justice is 'seen to be done'. | Criminal trials can be complex, including directions given to the jury and the evidence given at trial. It is not clear whether 12 laypersons on a jury will be able to understand the legal principles involved and the evidence that is given to then make a decision based on the facts. |
| Collective decision-making can reduce the possibility of bias, as it means any personal, subconscious biases can be identified during the deliberation process and addressed by the group. | Jury trials may result in further delays as rules, evidence and processes need to be explained to the jury, and a jury may require some time to deliberate. |
| Juries represent a cross-section of the community. They are made up of a diverse group of people, which can lead to the decision reflecting the views and values of our society. | A number of people cannot participate in a jury because they are ineligible, excused or disqualified. Therefore, it is possible that a large section of the community is not represented. |

**Source 2** Strengths and weaknesses of the roles of the jury

## 4.7 Check your learning

### Remember and understand

1 **Identify** two reasons why there may not be a need for a jury in a criminal case.
2 **Outline** two roles of the jury in a criminal trial.
3 **Describe** the relationship between the judge and the jury in a criminal trial.

### Examine and apply

4 Research the conduct of a criminal jury in a case against Bilal and Mohammed Skaf in New South Wales.
   a **What** did two of the jurors do in that case?
   b **Why** do you think this was an issue?
   c **What** did this result in?
   d Do you think the decision by the Court was appropriate, given the discovery about what the jurors had done? **Justify** your answer.
5 Read the scenario 'Discharge of juror'.
   a **Explain** what it means to discharge a juror.
   b **Explain** why the juror was discharged in this case.
   c **Why** did the accused's legal representatives argue that the other jury members should have been discharged?
   d **What** principle of justice does this case most demonstrate? **Justify** your answer.
6 Read the scenario 'Juror coerced into making decision'.
   a **What** was the accused charged with?
   b **What** was the verdict of the jury?
   c **What** was later discovered in the jury room?
   d **What** is the exclusionary rule, and why do you think it is important?
   e **Why** did the High Court decide that the exclusionary rule did not apply in this case?

### Reflect and evaluate

7 As a class, link each of the strengths and weaknesses of the roles of the jury to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.
8 Do you think jury deliberations should be secret? Give reasons for your opinion, referring to the principle of fairness.

# 4.8 The parties

## Key knowledge

**In this topic, you will learn about:**

- **the roles of key personnel in a criminal case, including the parties.**

In a criminal case there are two parties:

- the prosecution – the party bringing a criminal case to court
- the accused – a person who has been charged with a criminal offence.

Each party has control over the way the case will be run. This is known as 'party control'. This is different from the trial system in some other countries, where an external investigator seeks out the truth to determine guilt. In controlling their own case, however, the parties must comply with the court's rules, directions and orders, and any laws that impose duties or obligations on the parties (e.g. an obligation on the accused to 'show up' at trial).



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

## Roles of the prosecution

As noted earlier, the prosecutor has a special role in a criminal case. Unlike civil disputes in which the plaintiff has an interest in 'winning', prosecutors are not supposed to 'win at all costs'. Rather, their role is to present the entire case to the jury (or magistrate), and let them decide on guilt.

More specifically, the prosecution has the following roles:

- disclose information to the accused
- participate in the trial or hearing
- make submissions about sentencing.

### Disclose information to the accused

The role of the prosecutor is to disclose all relevant matters to the accused. The accused must be informed about the evidence that will be used against them (including the names and statements of witnesses), and any material that may assist the accused's case. In recent times, consideration has been given to strengthening these disclosure obligations. For example, in 2020 the **Victorian Law Reform Commission (VLRC)** recommended that legislation be amended to make it clear that the Director of Public Prosecutions (DPP) has an ongoing disclosure obligation, even after the case is concluded, and regardless of the outcome of the prosecution.

**Victorian Law Reform Commission (VLRC)**
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

The obligation of disclosure extends to disclosing any relevant convictions of prosecution witnesses, as this may give the opportunity for the accused's legal representatives to cross-examine the witness on things that may suggest the witness is not credible or being truthful. For example, if a witness has prior convictions for fraud, and is giving evidence against the accused, this could affect their credibility about what they are saying about what the accused did or did not do.

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

## Participate in the trial or hearing

During the trial or hearing, the prosecutor must present the case. This includes:

- presenting their opening address. This outlines the prosecution's case so that jury members (in the higher courts) or the magistrate (in the Magistrates' Court) understand the issues and what the evidence will be. Opening (and closing) addresses are only given in summary hearings if leave is granted
- presenting the evidence that supports the case. This includes calling and examining witnesses (called **examination-in-chief**). This may include both lay witnesses (such as people who saw what happened) and expert witnesses (people who have a particular specialisation and can give evidence, such as about psychological illnesses)
- **cross-examining** any witnesses called by the accused
- making a closing address after the close of all the evidence. In this address, the prosecutor must limit themselves to the evidence, and must not try to use comments that will cause 'emotions'. They should also not convey any personal opinions.



**Source 2** *A Time to Kill* is a popular movie showing a closing address to the jury where the defence counsel (played by Matthew McConaughey) uses emotion. Media portrayals do not always reflect what happens in practice.

In the scenario below, an appeal was allowed after the offender complained about the way the prosecutor conducted the closing address.

### Actual scenario

## Who was it?

In this case, the offender was charged with murdering his parents. He pleaded not guilty. After a trial that involved 32 witnesses, and during which the offender did not produce any evidence, the jury found the offender guilty of murder. The offender was sentenced to 28 years in prison.

The offender appealed on three grounds, one of which was that there was a miscarriage of justice because many times during the closing address, the prosecutor posed a question along the lines of, 'if it was not the accused who murdered his parents, then who was it?'. It was argued that the questions invited the jury to consider who else might be responsible for the murder of the victims. That question was also seen to be reversing the burden of proof, in that it suggested that unless the jury was satisfied someone else was responsible, then the jury should assume the accused was responsible.

In deciding the appeal, Justice Nettle noted that the question posed by the prosecutor during the closing address was not one-off; rather, the prosecutor repeated it many times, and strategically, such that it must have been left 'ringing' in the jurors' ears. The Court of Appeal held that there was a significant risk of jury members believing that unless they could conceive why someone else would have committed the crime, then they should conclude the accused was guilty. The appeal was allowed, and a new trial was ordered.

In 2005, the offender was ultimately found guilty for a second time and was again sentenced to 28 years in prison.

*R v Russo* [2004] VSCA 206 (19 November 2004)

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

## Make submissions about sentencing

If the accused pleads guilty or is found guilty, the matter will be set down for a plea hearing at which the parties can make submissions about sentencing. The prosecutor can inform the court about the laws that apply, and anything about the offence or the offender that is relevant to sentencing.

The duty of the prosecutor is to assist the court in determining the sentence. The High Court has previously held that the prosecutor should not make submissions about the sentencing range that should be applied.

# Roles of the accused

The accused's role in a criminal case is different to the role of the prosecutor, because the accused does not have the burden of proof, and can choose to remain silent during the entire case.

Broadly, the roles of the accused in a criminal case are to:

- participate in the trial or hearing
- make submissions about sentencing.

If the accused is represented by legal practitioners, the legal practitioners will perform these roles. The roles are explained in more detail below.

## Participate in the trial or hearing

The accused, if they choose to do so, can fully participate in the trial or hearing, or they are entitled to remain silent and do nothing. If they choose to present a defence, then the role of the accused (or their legal practitioners) may include:

- presenting their opening address. Similar to the prosecutor, they will summarise the evidence, but should not include any material that is not relevant or will not be called as evidence (like the prosecutor, an accused must be given leave in the Magistrates' Court to make an opening and closing address)
- presenting evidence that supports their case. This will normally be done through calling witnesses. The accused may also give evidence at any stage
- cross-examining any witnesses called by the prosecution
- making a closing address after the prosecutor gives their closing address. The closing address should be limited to the evidence.

## Make submissions about sentencing

As noted above, the offender is also entitled to make submissions about sentencing. In doing so, the offender (or their legal practitioners) will try to obtain the least possible sentence available, relying on factors or information that weigh towards a lighter sentence. In doing so, however, they must not mislead the court.

# Strengths and weaknesses

Source 3 below (and continuing on the next page) sets out some of the strengths and weaknesses of the roles of the parties. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| The prosecutor has special obligations to disclose all relevant matters to the accused. The accused must also not seek to change witnesses without notice to the accused. This ensures there is no 'trial by ambush' in that another party is unable to challenge evidence of the other party because they have not been given prior notice. | The Victorian Law Reform Commission (VLRC) noted in one of its inquiries that early and adequate disclosure is an issue in Victoria. For example, it noted that sometimes the police often wait to see what the defence requests rather than providing disclosure upfront. |

| Strengths | Weaknesses |
|---|---|
| Both parties have the opportunity to present their cases, including when making opening and closing addresses. This also includes the opportunity to examine and cross-examine witnesses (in examination in chief and cross-examination). | The processes involved are complex and difficult to understand without a lawyer, making it difficult for self-represented accused people. |
| The accused has no obligation to present evidence or do or say anything in the trial. | 'Party control' and the right to silence may mean that the truth does not come out. For example, the accused may not say or do anything. This is particularly so in situations where the accused is the only person that knows what happened. This may feel particularly unjust for victims and their families. |

**Source 3** Strengths and weaknesses of the parties

# 4.8 Check your learning

## Remember and understand

1 **Provide** one similarity and one difference between the roles of the prosecution and the accused.

2 **Why** does the prosecution have a special duty to disclose all relevant matters to the accused?

3 **Define** the term 'party control' in relation to a criminal trial.

## Examine and apply

4 For each of the following scenarios, **explain** the roles of two relevant key personnel, including the role of the key personnel in bold. Refer to one of the principles of justice.

- **a** The **prosecution** has evidence that is relevant, but the evidence is not helpful in obtaining a guilty verdict.
- **b** The **accused** is not a fan of jury trials, and has asked one of her big, burly friends to attend trial each day to 'stare down' each of the jurors.
- **c** The **prosecution** is going to call a witness who has a long history of deception convictions.
- **d** A **member of the jury** has realised that he used to date the accused's sister and thinks very fondly of the family.
- **e** The **judge** is overseeing a trial in which the accused is self-represented, does not speak English very well and is having difficulty understanding procedural matters.

## Reflect and evaluate

5 As a class, link each of the strengths and weaknesses of the roles of the parties to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

6 Read the scenario 'Who was it?'

- **a** **Explain** the key facts of the case.
- **b** Which party appealed?
- **c** **Explain** why there was an argument that the prosecution's closing address was seen to be reversing the burden of proof.
- **d** Did the Court of Appeal uphold the appeal? **Why** or why not?
- **e** 'Given the outcome of this case, the appeal was a waste of time'. **Discuss** the extent to which you agree with this statement.

7 **Analyse** the roles of two key personnel in a criminal trial.

# 4.9 Legal practitioners

## Key knowledge

In this topic, you will learn about:

- the need for legal practitioners in a criminal case.

Our criminal justice system involves unique processes, as well as particular legal terminology and legal principles. Because of this, it is broadly accepted that an accused person (particularly when faced with an indictable charge) should engage legal practitioners to assist them. In addition, as you learnt in Chapter 3, the High Court has found that legal representation is generally necessary for accused people who have been charged with a serious indictable offence.

In this topic you will explore why legal practitioners are needed in a criminal case.



**Source 1** Legal practitioners, including barristers, are important in ensuring a fair trial.

## Why are legal practitioners needed?

**Law Council of Australia**
the peak national representative body of the Australian legal profession. It advocates on behalf of the legal profession at a national level about issues such as access to justice

The **Law Council of Australia** has previously stated that access to legal advice is essential to upholding the rule of law:

> Access to adequate legal advice is an internationally recognised human right and a fundamental pillar of the rule of law. It is something that the Law Council considers should be available to everyone, particularly those people who face criminal charges or other potential restrictions on their liberty.

While the above refers to legal advice, it is broadly accepted that a person charged with a criminal offence requires legal practitioners to represent them. This is to ensure that a person has an adequate opportunity to test the evidence put against them, and to ensure that no mistakes are made when deciding whether someone is guilty of a crime.

Some of the reasons why lawyers are needed are:

- a person who is representing themselves lacks the skills and experience to navigate the criminal justice system and test the evidence. This includes being able to navigate procedures such as **plea negotiations**, trial processes and the examination of witnesses
- a self-represented accused person does not generally have the objectivity to be able to make the right decisions. They may be overly invested or emotional about the outcome, and not have the ability to 'stand back' and assess the risks and the facts of the case
- for traumatic or difficult cases, it avoids a situation where the accused is directly questioning witnesses, such as victims of crime, which can risk a victim being re-traumatised
- although the court and judges can assist self-represented accused people to some extent in understanding the processes, this cannot extend to advocating on behalf of the self-represented accused person.

**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)

Some of these issues were highlighted in the actual scenario below.

## Actual scenario

### Unrepresented mother and daughter

A mother and daughter were charged with various offences by Yarra Ranges Council because they failed to secure and demolish their home after an arsonist burned it down. Both the mother and daughter were self-represented at the hearing in the Magistrates' Court. They were ultimately fined. When they appealed to the County Court, the appeals were struck out because they did not appear. They sought an application to reinstate the appeals, and again they were self-represented at the hearings. Their applications were dismissed.

The mother was a pensioner with a learning disability. Her daughter, whose first language was not English, was her carer. They struggled to explain themselves to the judge and were given limited assistance. They did not fully understand what was going on at the hearing. They sought a review of the decision in the Supreme Court, arguing that they did not get a fair hearing, and their rights to equality were not ensured.

In the Supreme Court, Justice Bell found in favour of the mother and daughter, and made orders that their case be reinstated and heard by a different judge. The judgment is an important and useful summary of the rights to a fair hearing and to equality before the law. Justice Bell stated the following in relation to a fair hearing and the ability to achieve one without legal representation:

> Participation by self-represented parties in criminal or civil legal proceedings, including but not only where the other party is represented, gives rise to human rights challenges. Their lack of legal representation creates serious risk of unfairness by reason of ineffective participation in the proceeding or participatory inequality between the parties. This risk arises because self-represented parties lack the professional skill and ability and objectivity usually necessary for effective participation in legal proceedings and adequately to respond to other parties who are represented.

*Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017)

However, as you have learnt, and as you will explore in the next topic, not everyone can afford a lawyer, and legal service providers such as Victoria Legal Aid (VLA) and community legal centres (CLCs) cannot help everyone. Therefore, there is a 'gap' such that some people are not able to be represented.



**Source 2** The Honourable Kevin Bell AM, a former Supreme Court judge, was a key figure in important court decisions about human rights. He was later appointed one of the Commissioners of the Yoorrook Justice Commission, which you will explore in Chapter 13.

# Court order for legal representation

The *Criminal Procedure Act 2009* (Vic) gives the courts power to adjourn a trial for serious offences until legal representation from VLA has been provided. The court must be satisfied that the accused person would not be able to receive a fair trial without legal representation, and the accused cannot afford to pay for their own lawyer. The burden of proof is on the accused to establish that they cannot afford the full cost of obtaining legal representation.

This power, where a court can adjourn a trial and order that the accused obtains legal representation, is consistent with the decision made by the High Court in 1992 in *R v Dietrich*. In that case, the offender could not afford legal costs, was charged with serious offences, and was denied legal aid. The High Court held that in some situations a court will need to stay a criminal case so that an accused charged with a serious offence can get representation where that representation is needed to ensure a fair trial.

## Extract

### *Criminal Procedure Act 2009* (Vic) – section 197

#### Order for legal representation for accused

**(3)** If a court is satisfied at any time that—

**(a)** it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and

**(b)** the accused is in need of legal representation because the accused is unable to afford the full cost of obtaining from a private law practice or private legal practitioner legal representation in the trial—

the court may order Victoria Legal Aid to provide legal representation to the accused, on any conditions specified by the court, and may adjourn the trial until that legal representation has been provided.

## Strengths and weaknesses

Source 3 below sets out some of the strengths and weaknesses of the use of legal practitioners. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Legal practitioners are experts who can help the accused person navigate the criminal justice system. This includes assisting and conducting opening and closing addresses, where there are rules about what they can or cannot say. | Not all legal practitioners are equal or have the same level of experience and skills. Some legal practitioners are more experienced than others, which may impact on the quality of the legal services. |
| Legal practitioners have objectivity in being able to make decisions in the criminal case, such as whether to accept an agreement in a plea negotiation. Self-represented accused people do not have that objectivity. | Not everyone can afford legal representation, so some people may be left to represent themselves. However, often self-represented accused people do not have the necessary skills, experience or objectivity to be able to make the right decisions, so there may be a risk that they do not get a fair trial. |
| Legal practitioners can help avoid delays that may arise with self-represented accused people (as the trial processes may slow down to allow accused people to understand what is happening). | Legal representation alone may not assist an accused, particularly those who cannot understand English or those suffering trauma (such as victims). Therefore, more support may be needed. |

**Source 3** Strengths and weaknesses of legal practitioners

## 4.9 Check your learning

### Remember and understand

1 **Describe** two types of legal practitioners.

2 **Explain** why a legal practitioner is needed in a criminal case.

### Examine and apply

3 Read the scenario 'Unrepresented mother and daughter'.
   - **a** **What** offences were alleged in this case?
   - **b** **What** were the vulnerabilities of the accused persons?
   - **c** **What** were the difficulties faced by the accused persons in the County Court?
   - **d** Do you agree with Justice Bell's view about the right to a fair hearing? Discuss with another person in your class.

4 As a class, randomly choose regional or rural towns in Victoria.
   - **a** Conduct some research and identify two law firms close to the towns that specialise in criminal law.
   - **b** Write down as much as you can about the experience of each law firm. You may wish to do additional research, such as searching for their names on recent court judgments using AustLII (a weblink is provided on your obook pro).
   - **c** Come together as a class to discuss your findings about the availability of lawyers for a criminal case in your chosen town.

### Reflect and evaluate

5 As a class, link each of the strengths and weaknesses of legal practitioners to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

6 'If we invested more money in education about our justice system and our rights, there may be less need for legal practitioners.' **Discuss** the extent to which you agree with this statement.

**Weblink**
Australasian Legal Information Institute (AustLII)

# 4.10 Costs, time and cultural differences

## Key knowledge

In this topic, you will learn about:

- the impact of costs, time and cultural differences on the achievement of the principles of justice.

Although there are many parts of the criminal justice system that work well, and there are structures, personnel and processes in place to ensure the achievement of the principles of justice, there are some factors that can impact on the achievement of those principles. Three of those factors, which you will explore in this topic, are:

- costs
- time
- cultural differences.

## Costs

The costs associated with the criminal justice system can be significant, particularly for an accused who cannot afford legal representation. They can also be significant for a victim of a criminal case who needs legal assistance and advice, and even for the public given the costs associated with prosecuting a criminal case.



**Source 1** The costs associated with the criminal justice system can be significant, especially for those who cannot afford legal representation.

### Costs of legal representation

The main costs a person is likely to incur in a criminal case are the costs of engaging a lawyer to provide legal services such as legal advice or representation. The greatest impact tends to be on the accused, who is likely to need legal representation to navigate the criminal justice system. Victims can also be affected, as they may require legal assistance to assert their rights, contact investigative and prosecution agencies and understand procedures such as giving evidence.

While everyone has the right to legal representation, not everyone can afford it. This can be a particular disadvantage for an accused person, because our criminal trial system relies on the parties presenting their own case before the decider of facts (the magistrate or the jury).

An accused who cannot afford legal representation can seek legal aid through institutions such as Victoria Legal Aid (VLA) or obtain free legal services from a community legal centre (CLC). They might also be able to obtain **pro bono** legal representation from a private legal practitioner or pro bono institution. However, those who cannot get assistance will have to represent themselves. This can place even more pressure on the courts and the parties.

**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)

## Measures to address costs

One of the key measures put in place to address the issue of costs is the provision of free legal aid through bodies such as VLA and CLCs.

When VLA was first established, its aim was to repair an unjust system that provided greater opportunities to those who could afford legal services. But due to increased demand and a need to manage funding and budgets, a large part of the community is not eligible for legal aid, and VLA and CLCs are stretched in their ability to offer legal aid to people affected by crime.

**Weblink**
Justice Connect

The criminal justice system is therefore seeing growing numbers of self-represented parties. Some choose to self-represent, while others have no choice because they cannot afford a lawyer and they are not eligible for legal aid. Justice Connect, a legal service provider that provides pro bono services to those who need it, estimates that every year, 8.5 million Australians have a legal problem, but fewer than half access legal help.




**Source 2** Justice Connect helps people who are ineligible for legal aid and cannot afford a lawyer to access free legal assistance.

This can create challenges for the courts and for the parties because a self-represented party often lacks understanding of the law and its formalities, procedure, evidence and language. Trials and hearings where there is a self-represented accused often take longer, because the judge or magistrate has to explain things along the way and allow the party more time to complete processes they are not familiar with. Many people who cannot afford legal representation are also vulnerable. For example, they may be homeless, have a disability, or they may be young. This places them at extra risk in the criminal justice system.

As a result of the rise in self-represented parties, courts and judges must adapt by changing their processes and changing the information they provide. For example, the County Court has a dedicated page on its website for those who represent themselves, which includes information sheets to help people understand the processes involved.

Some of the other measures that may assist in addressing the burden of costs include:

**committal proceedings** the pre-trial hearings and processes held in the Magistrates' Court for indictable offences

- using **committal proceedings** to 'filter out' weak cases so that those cases do not go to unnecessary trials. Committal proceedings are used for indictable offences, and they provide an opportunity for an accused person to plead guilty. (An accused person may wish to plead guilty once they have heard and read the evidence during the committal process.) This can help to reduce costs. However, some people see the committal proceeding system as being an 'ineffective' filtering system, as a vast majority of cases are committed to trial

- using **plea negotiations** to resolve criminal cases. As you learnt earlier in this chapter, many criminal cases are resolved by agreement, which can help avoid the need for a trial. This can therefore also help to avoid the costs involved in running a trial, including the costs of the prosecution and the costs of the 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)

# Time

As examined in Chapter 3, an accused has a right under the Victorian **Human Rights Charter** to be tried without unreasonable delay. Where possible, delays should be avoided, and parties should work with practical speed to ensure an accused is tried within a reasonable time. What is considered a reasonable time will, however, depend on the case.

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

The motto 'justice delayed is justice denied' is just as relevant today as it was when the idea was expressed in the Magna Carta: 'to no one will we sell, to no one will we refuse or delay, right or justice'. Delays in having a trial heard and determined can affect the ability of the criminal justice system to achieve justice.

## Court delays

Most criminal cases involve a range of tasks such as gathering evidence, locating and interviewing witnesses, determining what happened, and determining what charges should be laid against an accused. How long these tasks take to complete is different from case to case.

The more complicated the case is, the longer it is likely to take for the case to be ready for trial. As of 1 July 2022, the County Court of Victoria estimated that once initiated, a case will take between 14 and 16 months to be ready for trial.

Many, however, see the delays in preparing a case for trial to be a result of the nature of our justice system, which relies on the prosecution gathering evidence, an over-reliance on hard copy documents, and the need for committal proceedings in what may be seen to be straightforward cases.

In addition to delays in getting a case ready for trial, parties must often wait for a hearing date in court. The COVID-19 pandemic also resulted in many trials being adjourned or rescheduled, which means there is an ongoing backlog of cases waiting to be heard.



**Source 3** Court hearings were significantly affected by the COVID-19 pandemic, which interrupted criminal cases, particularly jury trials, because of social distancing measures.

## Measures to address delays

The use of plea negotiations in criminal matters has significantly helped to address the delays faced by the courts and the prosecution.

Plea negotiations can reduce delays by achieving an early **guilty plea** in a case. This means the case can be determined more quickly and saves the time (as well as costs, stress and inconvenience) of having to take a case all the way to trial. This can often take months, even years, and so there is a recognition by our system that early guilty pleas allow for early resolution of disputes.

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

Plea negotiations also save time in other ways. The resolution of cases before they go to trial ensures that the courts are freed up to hear and determine other cases that the prosecution is unwilling to negotiate on, or where it is in the best interests of the public that they be heard by a judge and jury (or magistrate).

In addition, to assist in the court delays suffered during the COVID-19 pandemic (where jury trials in particular were halted because of social distancing measures), the Victorian Parliament passed

temporary legislation to allow for judge-alone trials. The legislation allowed a court to order that an indictable offence charge could be heard by a trial judge alone if the accused consented, the accused had obtained legal advice, and the court considered it in the interests of justice to make the order. A number of accused people opted for a judge-alone trial.

Further, the investment in digital technology to allow for more remote hearings can help to address delays. This includes allowing people to appear by video link rather than in person. In addition, the Magistrates' Court's technology program 'Online Magistrates' Court' enables cases to be heard online with parties appearing from remote locations. It is expected that this system will be expanded so that more cases can be heard in this way.

***Study tip***

The factors explored in this topic are not the only factors that you can consider. You should read more widely and identify other cultural differences that may also be relevant to the criminal justice system.

# Cultural differences

The community in general is becoming more aware of the need to ensure that all people have access to the justice system, and that all people are treated equally and fairly. But this is not always the case, particularly for different cultural groups. These include people for whom English is not their first language and First Nations peoples.

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

## Difficulties faced by First Nations peoples

***Did you know?***

In a famous 1932 High Court case, a guilty verdict was overturned because of the behaviour of participants in an all-white, prejudiced trial. The facts became a case study in legal ethics and the focus of an award-winning film, *Dhakiyarr v The King* (2004). Descendants of the accused and the victim met to reconcile in 2003.

First Nations peoples have a complex system of laws and customs, handed down from generation to generation. First Nations peoples from traditional areas who are not familiar with contemporary Australian society are likely to experience difficulties in giving and understanding evidence given in courts. For some First Nations peoples, these difficulties are heightened by cultural or language barriers, embarrassment and fear.

The following are some of the difficulties faced by some First Nations peoples in the courtroom:

- **language barriers** – there are subtle differences in the way language is used by some First Nations people that can cause misunderstandings. For example, 'kill' may mean to hit someone, probably causing injury, but not necessarily ending their life; 'story' in Aboriginal usage usually means the truth, the real account of an event, not something that has been made up
- **direct questioning** – the question-and-answer method of obtaining evidence, which is often the way evidence is obtained in criminal matters, can be inappropriate for some First Nations witnesses who are not used to this method. In many First Nations cultures, group agreement through long discussion and telling with stories is the polite way to settle differences, and directness is impolite. In the criminal justice system, with its forced yes/no answers, some First Nations people may be perceived by some who are unfamiliar with certain cultural practices as evasive or dishonest when they are actually being respectful
- **body language** – direct eye contact is seen as disrespectful to some First Nations people, who may try to limit or avoid it by looking down or to the side. This may make First Nations people appear uninterested or unreliable to those who do not understand these customs
- **cultural taboos** – within some First Nations cultures it is considered taboo to speak of certain things, such as the names of deceased people, or someone the community holds in disgrace. In some instances, it is forbidden to mention gender-based knowledge (i.e. Men's Business or Women's Business) in front of the other gender. These traditional laws can cause difficulties and misunderstandings for First Nations people who have been charged with an offence

- **lack of understanding of court procedures** – some First Nations peoples may not understand why they have to tell the same story over and over, such as during examination-in-chief and then cross-examination. In an attempt not to offend the authorities, they may think they are required to change their story for each telling. This makes it easier for the barrister to make a witness appear inconsistent.

Some of the difficulties that First Nations peoples may face in their involvement with the criminal justice system are highlighted in the following scenario.

**Actual scenario**

## Miscarriage of justice in short trial

This case, involving an Aboriginal woman, illustrates some of the problems that First Nations people face when confronted with the criminal justice system.

A woman was charged with murdering her sadistic de facto partner on 20 January 1988 by stabbing him with a knife. Her partner had subjected her to physical and sexual torture and was about to rape her niece.

The accused did not give or call evidence at trial, which lasted less than a day. She found it difficult to talk to her legal representative and to the police. She was scared, embarrassed and shy. It would have been unlikely for her to reveal sensitive or significant information unless a person communicated with her in the traditional way, which does not involve direct questions. Her sense of family responsibility would have obstructed her ability or willingness to discuss the threats made by her de facto husband, who said he was going to have sex with her niece, which was one of the provoking factors.

The jury took 50 minutes to reach a guilty verdict. The accused appealed to the Queensland Court of Appeal on the basis that she did not receive a fair trial. The Court of Appeal held that there was a miscarriage of justice, noting there were a number of interacting factors which presented difficulties of communication between the woman and her legal representatives.

*R v Kina* [1993] QCA 480 (29 November 1993)

In addition, the statistics and history show there is an overrepresentation of First Nations people in the criminal justice system. For example, the Yoorrook Justice Commission (a **Royal Commission**, which you will explore in Chapter 13) indicated that First Nations people are around 14 times more likely to be imprisoned than non-Indigenous people.

First Nations people in Australia have experienced social and economic disadvantage, caused by **intergenerational trauma** arising from colonisation and discriminatory government policies, that make them increasingly vulnerable when engaging with the criminal justice system. In particular, many have pointed out that the laws relating to the age of criminal responsibility and **bail** laws disproportionately affect First Nations people compared to non-Indigenous people.

**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

**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

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

## Cultural and language barriers

Many members of the Australian community were born overseas and have a language other than English as their first language. This can affect whether an accused is able to understand court documents, court processes and the language used in criminal cases.

This can also affect victims of crime and witnesses who are in contact with the criminal justice system. Victims and witnesses who do not have English as their first language may not necessarily understand their legal rights, the different types of agencies that exist, and the legal processes that happen in a courtroom. These can all be difficult to understand, even for those who do use English as their first language. Without knowing how the legal system works and what the processes are about, an accused person, victim or witness can be at a significant disadvantage.

Under the Human Rights Charter, one of the rights guaranteed to a person charged with a criminal offence is the right to have the assistance of an interpreter (at no cost) if they cannot understand or speak English. Interpreters can help accused people who cannot speak English to speak with their lawyer and to court personnel.

## Measures to address cultural differences

**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

One measure put in place to address the challenges faced by First Nations people in the criminal justice system is the **Koori Court**. The Koori Court, a division of the Magistrates' Court and the County Court, is a sentencing court (i.e. it is not used to determine guilt) for First Nations offenders that aims to respect First Nations cultures and encourage the participation of the accused, and the First Nations community, in the sentencing process. The Koori Court also aims to reduce the overrepresentation of First Nations people in the criminal justice system and improve overall outcomes.

The sentencing processes in the Koori Court are informal and conducted in a culturally appropriate way, giving people the opportunity to tell their story, with the support of their Elders and their family, rather than sitting behind a lawyer (as in a mainstream courtroom). For example, an oval table is used as the bar table, and First Nations Elders and Respected Persons provide the Court with information about the cultural issues relating to the accused and their offending. All participants in the sentencing hearing speak in plain English (rather than using technical legal terminology) and the Court is smoked (i.e. cleansed in a traditional First Nations ceremony) and decorated with First Nations artwork and artefacts.






**Source 4** At the Broadmeadows Magistrates' Koori Court, parties are seated around an oval table to allow direct communication.

A number of Koori Courts operate across Victoria. To be eligible to be sentenced in the Koori Court, the offender needs to be a First Nations person, they must plead guilty, and they must live within, or have been charged within, the relevant area of the Koori Court. There are some restrictions in the types of cases that the Koori Court can hear.

The Koori Court aims to provide fair, equitable and culturally relevant justice to the First Nations community, as well as providing Koori Court participants with greater protection and participation. However, it is not available to everyone – it is only a sentencing court, and the offender must fall within its jurisdiction.

Other than the Koori Court, measures that seek to address the impact of cultural differences include:

- the provision of free interpreters to people accused of committing a crime. The Magistrates' Court will arrange and pay for an interpreter for an accused in a criminal matter. For an indictable offence, the prosecution will arrange and pay for an interpreter. The provision of an interpreter can ensure a fair outcome. However, access to an interpreter can vary greatly from court to court. There have been calls to adopt a national interpreter scheme to ensure that there is no risk that someone is without an interpreter
- information from the courts, VLA and some CLCs is provided in different languages to assist people in understanding their rights and processes.

# Summary

Source 5 below sets out a summary of the impact of costs, time and cultural differences on the criminal justice system. The summary points will allow you to discuss the impact of each factor on the ability of the criminal justice system to achieve the principles of justice.

| Factor | Summary |
|---|---|
| Costs | • The costs associated with the criminal justice system include costs of legal representation, which can be significant for accused people and victims of crime if they seek legal representation.<br>• While everyone has a right to legal representation, not everyone can afford it. This can disadvantage accused people in particular, as they lack the necessary skills, experience and objectivity to navigate the system without a lawyer.<br>• Legal services can be provided through legal service providers such as VLA and CLCs, as well as pro bono institutions. However, they are stretched in the number of people they can assist.<br>• As a result, the courts are seeing growing numbers of self-represented people. This can create pressures on the courts and can also result in delays.<br>• Some measures are in place to try to reduce the costs, such as committal proceedings and plea negotiations. Committal proceedings may be seen to be a limited measure to address costs if most accused people are committed to stand trial. They do, however, provide an opportunity for plea negotiations and for the accused to plead guilty. |
| Time | • An accused has the right to be tried without unreasonable delay, and where possible delays should be avoided for the benefit of everyone, including victims and the accused.<br>• However, there are court delays associated with the complexities of the case, and delays associated with the COVID-19 pandemic which resulted in adjournment of some trials.<br>• Plea negotiations aim to address delays by achieving an early guilty plea and avoid the need for trial.<br>• Temporary judge-alone trials also sought to address the issue of delays.<br>• Improved technology and increasing use of virtual hearings may also help alleviate the pressure. |

| Factor | Summary |
|---|---|
| Cultural differences | • Different cultural groups, such as people whose first language is not English and First Nations people, can find the criminal justice system confronting and difficult to navigate. Cultural differences can include cultural misunderstandings, a lack of knowledge of the legal system, and a lack of understanding of the English language.<br>• Cultural differences between First Nations people and non-Indigenous people are not always well understood by people in the court system and can create challenges in the courtroom for some First Nations people, including in regard to body language and direct questioning.<br>• First Nations people are overrepresented in the criminal justice system, being more likely to be imprisoned than non-Indigenous people. First Nations people are also increasingly vulnerable when engaging with the criminal justice system.<br>• Language barriers can also be difficult for people who do not have English as their first language. While everyone has the right to an interpreter, it is not always the case that one is available.<br>• The Koori Court seeks to address the cultural differences faced by First Nations offenders. However, it is limited in that it is a sentencing court only.<br>• Information is also provided by VLA and some CLCs in different languages. |

**Source 5** A summary of costs, time, and cultural differences

# 4.10 Check your learning

## Remember and understand

1 **Describe** the ways court processes create problems for First Nations peoples.

2 **Explain** how delays in a criminal case affect fairness, equality and access

3 **Explain** how the use of an interpreter can enable greater fairness in the criminal justice system.

4 **What** assistance can be given by the courts to self-represented parties? What sort of assistance cannot be given by the courts?

## Examine and apply

5 Read the scenario 'Miscarriage of justice in short trial'.

- **a** **What** were the problems faced by the accused?
- **b** **Suggest** reasons why the trial lasted less than a day, and the jury took 50 minutes to reach a guilty verdict.
- **c** **Why** was there a miscarriage of justice in this case?
- **d** **What** changes would you suggest to ensure this type of situation does not happen again?

## Reflect and evaluate

6 'The right to a fair trial requires legal representation. It should be a rule that no accused person should ever be unrepresented in a hearing or trial before the court.' **Discuss** the extent to which you agree with this statement.

7 **Discuss** the impact of costs on the criminal justice system.

8 **Evaluate** the ability of the criminal justice system to recognise cultural differences.

Chapter

# 4

# Review

## Top exam tips from Chapter 4

1 The principles of justice are traditionally the more challenging area of the course. It is useful to create a visual chart or diagram of each of them, showing the essential features of each, and revisit them as you work through your notes for this chapter. Remember to refer to the features of each when talking about the principles, and not just repeat the words 'fair', 'equal' and 'access'.

2 You must be able to evaluate the ability of each of the key knowledge points in this chapter to achieve the principles of justice. While that may seem like a lot, there are key themes that mean you can 'group' strengths and weaknesses together. For example, identify all of the strengths that are about costs, or time, or impartiality, or all of the weaknesses that are about the need for a legal practitioner.

3 Many key knowledge points in this chapter use the word 'including', which means you could be tested on anything specific after the word 'including'. For example, you could be asked a specific question about specialisation, appeals, the judge, the jury and the parties. You could also be asked about them in the context of another key knowledge point, such as the principles of justice; for example, how a judge achieves fairness.

## Revision questions

The following questions have been arranged in order of difficulty, from low to high. It is important to practise on a range of questions, as assessment tasks (including the exam) 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 Describe **one** role of Victoria Legal Aid (VLA) in assisting an accused person.

(3 marks)

**Difficulty: medium**

2 Jaylin has pleaded guilty at the earliest possible opportunity after negotiating with the prosecution to reduce their charge from culpable driving causing death to dangerous driving causing death. The victim's family is furious because they did not agree with Jaylin being able to negotiate their plea.

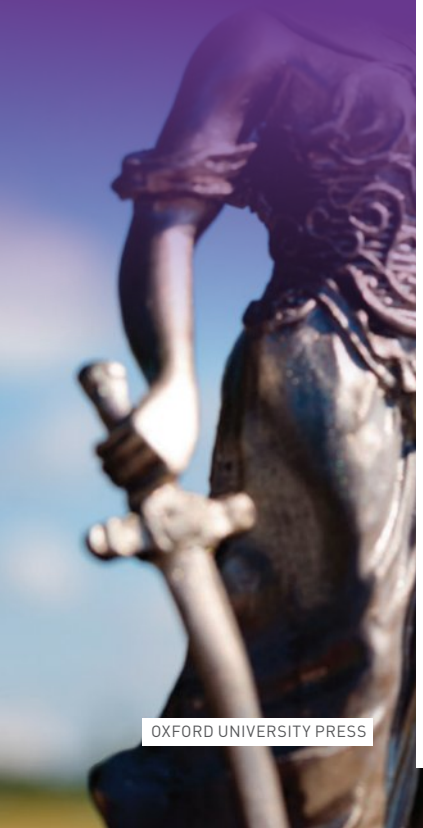
In your view, is a plea negotiation appropriate in this case? Justify your answer.

(6 marks)

**Difficulty: high**

3 Evaluate the ability of the judge and jury to achieve the principle of fairness.

(8 marks)



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# Practice assessment task

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

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

### June's trial

June, 30, is a recently arrived migrant from Vietnam. She has limited English communication skills and lives in the Victorian city of Mildura. June has been the subject of violence from her ex-husband, Manny, from whom she separated three months ago.

One night, Manny arrived at June's house. He was drunk. Manny pushed his way into the house and was violent towards June. Manny left June on the floor in the kitchen, then sat on the couch and turned on the TV. June eventually got up, walked to the coffee table where there was a large ornament she had bought on a recent trip to Daylesford, and hit Manny over the head. He fell over and was unconscious. June continued to beat him, and then left him there. Manny survived, but suffered significant injuries. June has now been charged with a number of indictable offences, including attempted murder and intentionally causing serious injury.

June does not have a lawyer, and she has been relying on people she knows to tell her what her options are. One of her friends told her that June will automatically receive free legal aid from Victoria Legal Aid (VLA). A second friend told June that the jury will need to decide whether June is guilty and then sentence her. A third friend has told June that her case will be heard and determined in the Magistrates' Court.

## Practice assessment task questions

Prepare a paper that addresses the following issues:

**1** A description of who the parties in the trial are, including who June will be known as.
(3 marks)

**2** One way in which a community legal centre could help June.
(3 marks)

**3** Whether each of June's friends is right in their advice, and the reason for your answer.
(6 marks)

**4** Whether a plea negotiation is appropriate in this case.
(5 marks)

**5** The ability of the judge to achieve the principle of fairness.
(5 marks)

**6** The extent to which the criminal justice system may assist in achieving the principle of equality in this case.
(8 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 principles of justice: fairness, equality and access. | ☐ | ☐ | Go back to Topic 4.1. |
| • The role of Victoria Legal Aid in assisting an accused and victims of crime. | ☐ | ☐ | Go back to Topic 4.2. |
| • The role of Victorian community legal centres in assisting an accused and victims of crime. | ☐ | ☐ | Go back to Topic 4.3. |
| • The purposes and appropriateness of plea negotiations. | ☐ | ☐ | Go back to Topic 4.4. |
| • The reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals. | ☐ | ☐ | Go back to Topic 4.5. |
| • The roles of key personnel in a criminal case, including the judge or magistrate. | ☐ | ☐ | Go back to Topic 4.6. |
| • The roles of key personnel in a criminal case, including the jury. | ☐ | ☐ | Go back to Topic 4.7. |
| • The roles of key personnel in a criminal case, including the parties. | ☐ | ☐ | Go back to Topic 4.8. |
| • The need for legal practitioners in a criminal case. | ☐ | ☐ | Go back to Topic 4.9. |
| • The impact of costs, time and cultural differences on the achievement of the principles of justice. | ☐ | ☐ | Go back to Topic 4.10. |

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

- **Chapter 4** Chapter review quiz
- **Revision notes** Chapter 4
- **Chapter summary** Chapter 4
- **Quizlet** Revise key legal terms from this chapter.

Chapter

# 5

# Sentencing




Source 1 If a person is guilty of a crime, one of the roles of the courts is to sentence them. In Victoria, a range of sanctions can be imposed, such as imprisonment (time in jail). Ravenhall Correctional Centre opened in late 2017 and is a medium-security men's prison that also provides mental health services and care for offenders. In this chapter, you will consider the purposes of sanctions, three types of sanctions (imprisonment, community correction orders, and fines), and the ability of those sanctions to achieve their purposes.

## Outcome

By the end of **Unit 3 – Area of Study 1** (i.e. Chapters 3, 4 and 5), you should be able to explain the key principles in the criminal justice system, discuss the ability of sanctions to achieve their purposes and evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case.

## Key knowledge

In this chapter, you will learn about:

- the purposes of sanctions: rehabilitation, punishment, deterrence (general and specific), denunciation and protection
- fines, community correction orders and imprisonment, and their specific purposes
- factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss the ability of sanctions to achieve their purposes
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

## Key legal terms

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

**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

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

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

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

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

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

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

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

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

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

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

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

**specific deterrence** one purpose of a sanction, designed to discourage the offender from committing further offences

**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

## Key legal cases

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

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**Please note**

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 sentencing before you start.

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

# 5.1 Introduction to sanctions

As you have learnt, if a person is guilty of a crime, the person will be referred to as the offender (not the accused), and the judge or magistrate (not the jury) will decide on the appropriate **sanction** resulting from their **conviction**. A sanction is a penalty imposed by courts on a person who is guilty of an offence.

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

**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 *Sentencing Act 1991* (Vic) sets out the powers of the courts to impose sanctions and establishes various types of sanctions. Three of the purposes of the *Sentencing Act* are to:

- promote consistency of approach in sentencing
- provide fair procedures for imposing sanctions
- prevent crime and promote respect for the law

Sentencing an offender is a complex and difficult task. It requires the court to consider the relevant factors in each case as well as the significance of each factor, and decide the most appropriate sentence. Sentencing should take place in an open hearing, and fairness should apply to the sentencing process.

## Types of sanctions

The nature of criminal sanctions in Australia has changed over time, from harsh, inhumane penalties aimed at deterring others and punishing the offender, to a greater focus on addressing the underlying causes of offending and seeking to reduce the risk of **recidivism** (reoffending). For example, sanctions in the late 1700s and 1800s included execution, flogging and solitary confinement. These sanctions are no longer imposed, nor would they be considered appropriate given the society in which we live.

**recidivism**
re-offending; returning to crime after already having been convicted and sentenced

The *Sentencing Act* provides a hierarchy of sanctions, as set out in Source 1. The most severe sanction, and the sanction of last resort, is imprisonment. When imposing a sentence, the judge or magistrate must not impose a sentence that is more severe than necessary to achieve the purposes of the sentence imposed. This is known as the *principle of parsimony*.

In this chapter, you will look at the purposes of sanctions and three types of sanctions: imprisonment, community correction orders (CCOs), and fines. You will also consider the ability of each of these sanctions to achieve its purposes.

| | Sanction | Description |
|---|---|---|
| Most severe | **Imprisonment** with conviction | Record a conviction and order that the offender serve time in a prison (jail). |
| | **Court secure treatment order** with conviction | Record a conviction and order that the offender be detained and treated in a health facility (such as a hospital) as a security patient. |
| | **Drug and alcohol treatment order** with conviction | Record a conviction and order that the offender undertake a judicially supervised drug or alcohol treatment program. Only available in the Drug Court Division in the Magistrates' Court or County Court if a person pleads guilty and the Court is satisfied that the offender is dependent on drugs or alcohol and that dependency contributed to the committing of the offence. |

| | Sanction | Description |
|---|---|---|
| | **Youth justice centre order** with conviction | In the case of an offender aged between 15 and 20 years at the time of being sentenced, record a conviction and order that the young offender be detained in a youth justice centre. |
| | **Youth residential centre order** with conviction | In the case of an offender aged under 15 years at the time of being sentenced, record a conviction and order that the young offender be detained in a youth residential centre. |
| | **Community correction order (CCO)** with or without conviction | With or without recording a conviction, make a community correction order. The order will be made with certain conditions attached to it. |
| | **Fine** with or without conviction | With or without recording a conviction, order the offender to pay a fine, which is a sum of money payable to the court. |
| Least severe | **Adjournment** with conviction | Record a conviction and order the release of the offender on adjournment with conditions attached. If a person breaches the conditions, they may be re-sentenced by the court. |
| | **Discharge** with conviction | Record a conviction and order the discharge of the offender. This means that no further penalty will be imposed (but a conviction will be recorded). |
| | **Adjournment** without conviction | Without recording a conviction, order the release of the offender on adjournment with conditions attached. If a person breaches the conditions, they may be re-sentenced by the court. |
| | **Dismissal** without conviction | Without recording a conviction, order the dismissal of the charge for the offence. This means that a charge may be proven, but the person is released and there is no record of the charge. |

**Source 1** Sanctions available in Victoria. The sentences in the second column highlighted in darker purple (imprisonment, fines and CCOs) are explored in this chapter.

***Did you know?***

The last person to be executed in Victoria was Ronald Ryan, on 3 February 1967. The death penalty was ultimately abolished in Victoria in 1975.

# 5.1 Check your learning

## Remember and understand

1 **Identify** the most serious sanction and the least serious sanction that can be imposed in Victoria.

2 **Distinguish** between an adjournment and a discharge.

3 **Describe** the two types of sanctions in Source 1 that can only be imposed on youth offenders.

## Examine and apply

4 'A court secure treatment order and a drug and alcohol treatment order are focused on treatment, as they recognise the personal characteristics of an offender.' **Explain** what this statement means.

5 Search newspaper articles to find as many examples of the different sanctions set out in Source 2 as you can. Create a table that lists the type of sanction and the corresponding example.

## Reflect and evaluate

6 'Harsh penalties are better than penalties that seek to address the underlying causes of offending.' Discuss this statement as a class.

# 5.2 The purposes of sanctions

## Key knowledge

In this topic, you will learn about:

- the purposes of sanctions: rehabilitation, punishment, deterrence (general and specific), denunciation and protection.

*Study tip*

You must be familiar with each of the five purposes of sanctions because they are listed in the *VCE Legal Studies Study Design*.

The purposes of sanctions are set out in section 5(1) of the *Sentencing Act* and are:

- rehabilitation
- punishment
- deterrence (general and specific)
- denunciation
- protection.

A sentencing judge must take these purposes into consideration when imposing a sentence, but not all the purposes will be relevant in each case. The purposes often overlap, and a sentence usually aims to achieve a combination of two or more purposes.

Each of the purposes is summarised below.

## Rehabilitation

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

One purpose of sanctions is **rehabilitation**. Rehabilitation is designed to address the underlying causes of offending, and and treat the offender based on those causes. For example, a person may have a drug and/or alcohol addiction which led to them committing the crime. Rehabilitation will focus on treating that addiction.

If rehabilitation is a relevant purpose, the aim of the sanction will be to help an offender to change their attitude and behaviour with the goal of preventing them from reoffending. This not only helps them, but it also benefits the community. If the offender is properly rehabilitated, they will stop committing crimes, preventing further harm to the community.

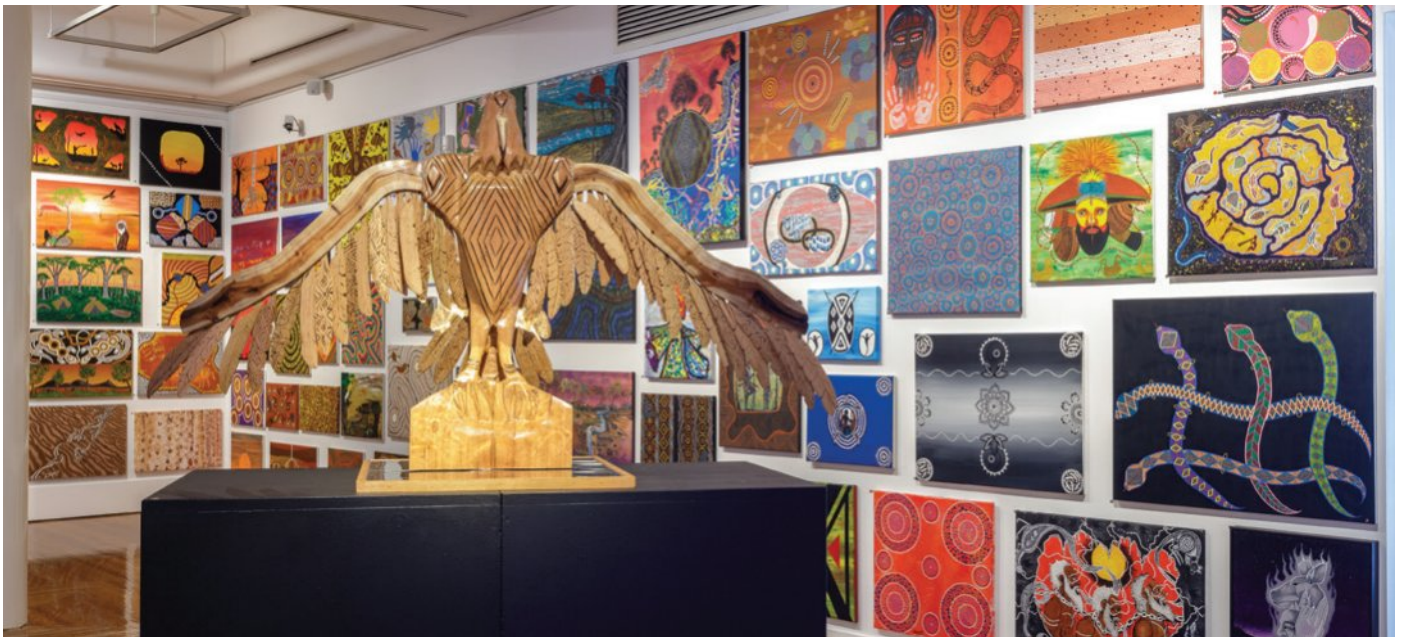
**community correction order (CCO)**
a flexible, non-custodial sanction (one that does not involve a prison sentence) that the offender serves in the community, with conditions attached to the order

An example of how rehabilitation can be achieved is through a **community correction order (CCO)**, which may encourage rehabilitation by requiring offenders to participate in skills training or to undergo drug and alcohol treatment. You will learn more about CCOs in Topic 5.4.

Although imprisonment is the sanction of last resort, rehabilitation programs are carried out within prisons to help offenders once they are released from prison. Prisoners may be offered the opportunity to undertake life skills programs such as drug treatment and anti-violence programs, and specific employment, education and training programs. For example:

- The Torch program (see Source 1) helps First Nations prisoners and former prisoners reconnect with their culture through art and helps provide a pathway towards rehabilitation. The artwork can also be sold.
- Programs and initiatives have been established to ensure prisoners maintain strong family connections, as research shows that family relationships help to reduce reoffending and promote rehabilitation. For example, one program allows prisoners who are parents to record themselves reading a book to their child, which is then sent to the child with a copy of the book.

Given the nature of imprisonment, including the restrictions it imposes on offenders, the ability for a person to rehabilitate while in prison may depend on the offender, the programs available, and the length of the sentence. In addition, as explored later in this chapter, prisons can reinforce criminal behaviour and promote reoffending rather than reduce reoffending.



**Source 1** The Torch program inspires Aboriginal and Torres Strait Islander prisoners and former prisoners to reconnect with their culture through art and find new pathways beyond the criminal justice system. An annual exhibition, Confined, showcases artworks by program participants.

For rehabilitation to be a relevant purpose in sentencing, the offender must demonstrate remorse. Remorse can often be seen through the offender's actions after the offending (e.g. pleading guilty early, cooperating with police, or taking active steps to address their behaviour). If an offender has not taken the opportunity to rehabilitate themselves, or has otherwise not shown any signs of remorse, then other purposes of sanctions may be a higher priority for the court.

An example of a case in which a sentence was reduced in the Supreme Court (Court of Appeal), and where rehabilitation was a relevant consideration for the Court, is set out in the scenario below.

**Actual scenario**

## Offender resentenced on appeal

In this case, the offender had two separate jury trials for two separate terrorism offences.

In November 2016, the offender and another person set fire to a mosque in Melbourne, burning a small section of carpet. The fire burned out. The next month (in December 2016), the offender and two others again set fire to the mosque, resulting in significant destruction. The Court said the actions were done with the intention of advancing a political, religious or ideological cause. A jury found the offender guilty of one charge of attempting to engage in a terrorist act, and one charge of engaging in a terrorist attack. He was sentenced in July 2019 to 22 years in prison for both offences.

In the second trial, it was alleged that the offender, along with two others, planned to commit a mass casualty attack, using explosives, bladed weapons and firearms, in Melbourne's Federation Square on Christmas Day in December 2016. The plot was stopped after a joint counter-terrorism team comprising various agencies arrested the men. A jury found the offender guilty of conspiring to do acts in preparation for, or planning, a terrorist attack. The offender was sentenced to 16 years in prison for this offence.

Ultimately, the Court directed that the total effective sentence to be served was 38 years (i.e. the two sentences of 22 years and 16 years were to be served one after the other, which is known as a cumulative sentence). The offender was required to serve 28 years and 6 months in prison before he would be eligible for parole.

The offender appealed the sentence on the basis that the 16 years was required to serve cumulatively (i.e. after the 22-year sentence), which resulted in a total effective sentence of 38 years. He argued that it was a 'crushing' sentence in that it was so long it created a feeling of helplessness in him and destroyed any expectation of a life after release from prison. Interestingly, he did not seek leave to appeal against the sentences themselves or the non-parole period to be served.

In considering the appeal, the Court of Appeal noted that the trial judge was satisfied that the offender had reasonable prospects of rehabilitation. This was demonstrated by the offender giving evidence in his case, renouncing his extreme ideology, admitting guilt and therefore showing remorse. The Court of Appeal held that a total effective sentence of 38 years would cause a feeling of hopelessness and may affect the offender's prospects of rehabilitation. The total effective sentence was reduced to 32 years in prison, with a new non-parole period of 24 years. In doing so, the Court of Appeal noted:

> In the present case, there are other sentencing objectives of great significance. Foremost amongst them, in our view, is the need to maximise the applicant's prospects of rehabilitation. When attention is directed to rehabilitation, the sentencing court is not — as is sometimes misleadingly suggested — giving priority to the private interests of the offender. Rather, the court is concerned with the community's interest in minimising the risk of further offending following the completion of the sentence. Self-evidently, that objective — of reducing the risk of reoffending — is of particular importance in a case like the present, where the offender has committed offences of such seriousness.

*Mohamed v The Queen* [2022] VSCA 136 (13 July 2022)

# 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

**Punishment** is another purpose of sanctions. When a crime has been committed, an offender has done something unacceptable to society, and must be penalised so that the victim of the crime and the community feel justice has been done. Usually, the purpose of punishment is combined with another purpose such as deterrence or denunciation.

The process of punishment through the courts avoids the need for the victim of a crime to take the matter into their own hands. However, punishment must be proportionate to the offence committed. An overly harsh sanction should not be imposed if it does not match the offending; likewise, a sanction that is too lenient may not act as enough of a punishment.

Punishment is often a purpose of sanctions in serious or violent cases, such as those involving the death of another person, serious injury, culpable or dangerous driving, or sex offences. While people often view punishment as depriving a person of their liberty and putting them in prison, other sanctions can also seek to punish an offender. For example, a fine can be used to punish a person or a company that has committed a crime (such as a crime related to workplace safety).

The serious sanction handed down in the following scenario was appropriate because of the nature of the offence, even though the offender was advanced in years.

Actual scenario

## Punishment important despite old age and ill-health

The offender, J, had begun a relationship with T in 2020. At times, J was controlling and jealous, and the relationship ended in early 2021. Shortly after, T married another man.

One afternoon, the offender went to T's unit and shot her at close range. The shot was fatal, and T died. The offender fired a second shot then left. The victim was found by her daughter. The offender later handed himself in at a police station and admitted that he had shot T twice.

At the time of offending, J was 76 years of age and had been diagnosed with a rare type of cancer. The Supreme Court judge noted that the offender had confessed almost immediately, and he had pleaded guilty at the earliest possible opportunity. The Court recognised that the offender's age and ill-health were both relevant in the sentencing process, but it also noted that ill-health cannot be allowed to become a 'licence' to commit crimes or escape punishment, and that punishment cannot be reduced simply because the offender was old and unwell. In particular, the Court noted that murder deserves significant punishment, regardless of when in a person's life it is committed.

The offender was sentenced to 24 years in prison and is required to serve a minimum of 17 years in prison before he can be released.

*DPP v Gonzalez* [2022] VSC 331 (9 June 2022)

# Deterrence

Another purpose of sanctions is **deterrence**, which is aimed at discouraging people from committing similar crimes. Like previous purposes, whether deterrence is relevant will depend on the circumstances of the case.

There are two types of deterrence: **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

## General deterrence

The purpose of general deterrence is to discourage or deter others from committing offences because they see the consequences of committing the crime. It is particularly important in violent or serious offences, such as homicide and sexual offences, where vulnerable members of the community are affected, or in relation to public, violent acts of crime.

Whether general deterrence is achieved depends on people knowing the sentence that is being imposed. Sentences should be communicated to the public (e.g. through the media or court websites). If people do not know about sentences that are imposed, then the sentences may not act as a general deterrent. People should also understand the sentence that is being imposed. While imprisonment and fines are well-known sanctions, sanctions such as CCOs may be less familiar or understood by members of the community, so they may not appreciate the seriousness or punishing nature of these sanctions.

## Specific deterrence

Sanctions can also act as specific deterrence. This is when the court seeks to discourage a particular offender from engaging in criminal activity in the future.

One of the more important factors that is relevant to whether an offender will be specifically deterred is whether the offender has prior convictions (that is, has committed crimes before). If they

have committed crimes before, they may be at risk of offending again, and so deterring the offender may be a high priority for the court.

On the other hand, specific deterrence may not be as significant if the offender is remorseful, is a first-time offender or if the circumstances of offending are unique.

# Denunciation

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

**Denunciation** refers to the disapproval of the court. A sanction may be given to show the community that the court and society disapproves of and condemns the offender's conduct. For example, the judge may give a harsh sentence for a particularly violent rape and comment that the court is showing disapproval of this type of behaviour.

Over recent years, public denunciation of offences has been seen in offending related to family violence, significant violent acts, and offences motivated by hatred or prejudice (e.g. based on the victim's race, religion, sexuality or impairment). As part of its sentencing, the court will seek to reinforce that community expectations and values mean that this type of behaviour is not acceptable, and must be condemned.

On the other hand, there may be a situation where the rehabilitation of an offender is given more weight, or is more important, than the need to show the community's disapproval of an action.

In the scenario that follows, the need for denunciation and deterrence were considered important, given the nature of the offending.

**Actual scenario**

## Plea of guilty in manslaughter case

In this case, the offender pleaded guilty to the manslaughter of a young man whom the offender regarded as his 'best friend'.

The offender and the victim were born in the same year and went to the same schools. In May 2020, the offender rented an apartment in the Melbourne suburb of Docklands to celebrate his girlfriend's birthday. The celebration turned violent, and the two men began fighting. The fight moved to the kitchen, where the offender grabbed a knife and stabbed the victim once. The victim died.

The offender was ultimately arrested and charged. He cooperated with police during the arrest and showed remorse about what he had done. The Court heard from the victim's family about the pain they had suffered as a result of the death of the victim.

In sentencing the offender, the judge noted that general deterrence was important in the case, as was denunciation. The judge accepted the Crown's submission that general deterrence was important in this case, saying young people need to be discouraged from getting into fights and using weapons under the influence of drink and drugs. Denunciation was also relevant, because the offender brought a knife into the fight. Punishment and community protection were less important, because the event unfolded in a sudden and unplanned way and the offender did not arm himself with a weapon until moments before the stabbing.

The judge also gave some consideration to specific deterrence, but the Court found that the offender's youthfulness and good prospects for rehabilitation allowed for less weight to be given to specific deterrence.

The offender was convicted and sentenced to seven years in prison. He must serve five years in prison before he is eligible for parole.

*R v Farrell* [2021] VSC 414 (13 July 2021)

# Protection

The purpose of **protection** is to ensure that the community is safe from any further harm that can be caused by the offender.

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

Sometimes it is necessary to remove an offender from the community (put them in prison) to achieve this aim, because the offender is physically prevented from reoffending.

However, a non-custodial sentence (when an offender is not put in prison), such as a CCO, can also protect the community from the offender because it keeps them busy when they might otherwise be engaged in criminal activity. Conditions attached to a CCO, such as preventing the offender from going to certain places, can also protect society.

Protection may be particularly relevant where an offender refuses to participate in treatment or rehabilitation programs (and so there is a greater risk that the underlying causes of offending will result in further offending), where there is no sign of remorse, or where there is significant criminal history such that it is very possible the offender will harm again.

In some cases, the court can impose an **indefinite sentence**. An indefinite sentence is a term of imprisonment with no set end date, and is used for offenders who have committed serious crimes and are a serious danger to the community. In most cases, this has involved offenders who have committed serious violent or sexual offences. Only the court can decide whether to release a person on an indefinite sentence. The courts have, at times, imposed an indefinite sentence, particularly where the offender was a serious violent offender and was considered to remain a threat in the community, even at an old age.

**indefinite sentence**
a term of imprisonment that has no fixed end date, usually given to the most serious offenders

In other cases, parliament has intervened and has created specific legislation for specific offenders, preventing them from easily getting released from prison, as explained in the scenario below.

**Actual scenario**

## Parliament steps in to protect the community

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

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

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

Section 74AA of the *Corrections Act 1986* (Vic) was introduced into legislation in 2014 and is titled 'Conditions for making a parole order for Julian Knight'. It says that the Parole Board (which considers applications for parole) cannot approve a parole application unless it is satisfied that Knight is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person, and he has demonstrated that he does not pose a risk to the community. Similarly, section 74AB of the *Corrections Act* was introduced into legislation in 2018 and is titled 'Conditions for making a parole order for Craig Minogue'. It contains similar provisions as those related to Julian Knight.

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




**Source 2** Julian Knight shot dead seven people and injured a further 19 during a shooting on Hoddle Street, Melbourne in 1987.

## 5.2 Check your learning

### Remember and understand

1 **Identify** and **describe** three purposes of criminal sanctions. **Provide** an example of when each of those purposes might be a relevant consideration when sentencing an offender.

2 **Explain** why a fine could help to achieve punishment.

3 **Distinguish** between general deterrence and specific deterrence.

### Examine and apply

4 Read the scenario 'Offender resentenced on appeal'.

- **a** **Explain** why there were two separate trials in this case.
- **b** **Identify** the party that appealed this case, and why they were appealing.
- **c** Conduct some research. **Explain** what is meant by the terms 'cumulative sentence' and 'concurrent sentence'. If the sentence was served concurrently, **what** would have been the total sentence?
- **d** **Explain** why rehabilitation was a relevant consideration in this case.

5 Read the scenario 'Punishment important despite old age and ill-health'.

- **a** **Explain** why the offender was sentenced in the Supreme Court.
- **b** Would a jury have been used in this case? **Justify** your answer.
- **c** Could this sanction also seek to achieve denunciation and general deterrence? **Justify** your response.

### Reflect and evaluate

6 'There should only be one main purpose of sanctions: punishment. The rest of the purposes should come after punishment.' Do you agree? In your answer, refer to at least two cases.

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

# 5.3 Fines

## Key knowledge

In this topic, you will learn about:

- fines and their specific purposes.

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

## What is a fine?

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

A **fine** is an amount of money ordered by the court to be paid by the offender to the state of Victoria. A fine can be imposed as the only sanction, or it can be imposed with any other sanction. It can also be imposed with or without a conviction.

The amount of the fine will often depend on the maximum penalty that may be imposed for a certain offence, which is normally stated in the statute setting out that offence. An example relating to contamination of goods is provided in the extract below.

### Extract

*Crimes Act 1958* (Vic) – section 249A

**Contaminating goods with intent to cause, or being reckless as to whether it would cause, public alarm or economic loss**

1 A person must not contaminate goods with the intention of causing, or being reckless as to whether or not the contamination would cause —

**(a)** public alarm or anxiety; or

**(b)** economic loss through public awareness of the contamination.

Penalty: Level 5 imprisonment (10 years maximum) or a level 5 fine (1200 penalty units maximum) or both.

Fines are expressed in levels. Level 2 is the highest level, and level 12 is the lowest. Each level refers to a number of penalty units. Level 2 attracts a fine of 3000 penalty units, whereas level 12 attracts a fine of 1 penalty unit. The court cannot order a fine at level 1 ('level 1' crimes are very serious offences such as murder and a fine would not be appropriate).

The use of 'penalty units' instead of fixed monetary amounts allows the government to increase all fines by increasing the value of a penalty unit each year without changing all statutes. Using the example above of the offence in relation to contamination of goods, setting the fine to a maximum of 1200 penalty units will mean that the maximum fine that can be imposed will increase annually, because the value of penalty units will increase.

### Determining the amount of the fine

Under the *Sentencing Act*, when determining the amount of a fine, a court must consider:

- the financial circumstances of the offender, and the burden that its payment will impose on the offender. Note that this is not relevant to whether a fine should be imposed, but rather the amount of the fine



**Source 1** Marking graffiti is an offence that can be punished by imposing a fine of up to about $40 000 or imprisonment.

- whether any other orders have been made in relation to the taking of an offender's property or orders requiring the offender to make amends or pay compensation. An order requiring an offender to restore property or pay compensation to a victim should be given preference over a fine, though a fine can also be imposed
- any loss or destruction of, or damage to, property suffered by a person as a result of the offence
- the value of any benefit to the offender as a result of the offence.

If the offender is a company, a fine can be imposed that is no greater than five times the amount of the maximum fine that could be imposed on a human being. If a company cannot pay the fine, then in some circumstances the court can declare that any person who was a director of the company is also liable to pay the fine.

The court can allow a fine to be paid in instalments.

## What happens if a fine cannot be paid or is not paid?

A court can vary or discharge the fine if the circumstances of the offender substantially change. For example, a fine can be converted into a requirement to perform unpaid community work if:

- the circumstances of the offender have changed such that they are no longer able to pay the fine
- the fine is not greater than 100 penalty points.

If an offender refuses to make payment:

- steps may be taken to enforce payment of the fine (e.g. warning notices may be sent)
- the offender may be ordered to undertake community work (to a maximum of 500 hours)
- a warrant may be obtained to seize (take) property to satisfy payment of the fine
- the offender may be imprisoned (1 day for each penalty unit that is unpaid, to a maximum of 24 months), but only if this is the only appropriate order that can be made. For example, imprisonment cannot be ordered if the offender had a reasonable excuse not to pay.

The scenario that follows is an example of a fine imposed on a company.

**Actual scenario**

### Fine imposed on company after teenager suffers injuries

In 2022, a carpentry company was sentenced in the Magistrates' Court after it was found guilty of eight charges under the *Occupational Health and Safety Act 2004* (Vic).

In 2021, a young apprentice suffered a deep cut on his hand after a colleague threw a saw towards him. Later that day, the apprentice and the same colleague were facing each other, using nail guns on a doorframe. The colleague fired his nail gun, which struck the young worker in the forehead and penetrated his skull and brain. Neither incident was reported to WorkSafe, Victoria's workplace health and safety regulator, which regulates businesses and their compliance with workplace health and safety obligations.

The company was found guilty of, among other offences, failing to report both incidents to WorkSafe, and failing to provide and maintain a safe system of work when assembling the doorframe.

The company was convicted and fined $130 000. Separately, the worker who threw the saw at the young apprentice was fined $500, without conviction, after he pleaded guilty to failing to take reasonable care for the health and safety of his colleague.



**Source 2** An injury such as the one described in the scenario caused by a nail gun should have been reported to WorkSafe.

### *Did you know?*

The longest known sentence to be handed down in Australia was given to Martin Bryant, who was responsible for Australia's worst mass shooting in Port Arthur, Tasmania, in 1996. He is currently serving 35 life sentences for the murder of 35 people, as well as a further 21 years for other crimes. He is also not eligible for parole.

## Sentencing purposes of fines

The two main purposes of imposing a fine are punishment and deterrence, though denunciation could also be achieved by fining an offender. Rehabilitation and protection are less relevant for fines.

Source 4 sets out the purposes of fines and some of the factors to consider when assessing the ability of fines to achieve their purposes. Other factors may also be present depending on the circumstances of the offender and offending and the particular case or scenario.




**Source 3** The main purposes of fines are to punish, deter and, in some circumstances, denounce the offending. The purposes highlighted in darker purple are the more relevant ones.

| Purpose | Factors to consider when assessing the ability of fines to achieve their purposes |
|---|---|
| **Punishment**: depending on the financial circumstances of an offender, fines can serve to *punish* by requiring them to pay money to the state. | • *The financial circumstances of an offender and their ability to pay*. The amount of a fine needs to be high enough to act as a punishment, having regard to the person's financial circumstances and the nature of the offending. For example, if a fine is too low (and the offender has sufficient financial resources to pay the fine), it may not punish the offender. On the other hand, if a fine is too high (and the offender does not have the ability to pay), the offender may not ever pay it or may commit another offence (such as theft) to be able to pay it.<br>• *The amount of the fine.* Generally, the fine must be high enough to impose a burden on the offender, although a smaller fine could be appropriate depending on the offender's social and financial circumstances and the type of the offence.<br>• *Whether the offender is a person or a company*. Where a company is fined, the people who are responsible for the company's offending may not suffer any impact unless there is an order that they are also liable to pay it.<br>• *Whether the fine is paid and/or enforced*. An unpaid fine that is not enforced may not act as a punishment. |
| **Specific deterrence**: depending on the financial circumstances of an offender, fines can serve to *specifically deter* by requiring them to pay money to the state. | • *The financial circumstances of an offender and their ability to pay*. As with punishment, the amount of a fine needs to be high enough to have an impact on the offender and therefore deter them from committing further crimes, having regard to the person's characteristics and the nature of the offending. For example, if a fine is low and the offender has sufficient financial resources to pay the fine, it may not deter the offender.<br>• *The amount of the fine*. Generally, the fine must be high enough to impose a burden on the offender, although a smaller fine could be appropriate depending on the offender's social and financial circumstances and the type of the offence.<br>• *Whether the offender is a person or a company*. Where a company is fined, the people who are responsible for the company's offending may not be deterred as it is not them who has to pay.<br>• *Whether the fine is paid and/or enforced*. An unpaid fine that is not enforced may not act as a specific deterrent, as it has no ultimate impact on the offender's financial circumstances. |
| **General deterrence**: fines can also *act as a general deterrence* by discouraging other members of the public from committing a similar offence because they can see the consequence of offending (i.e. know they will be required to pay a sum of money). | • *The amount of the fine and the circumstances of people in the community*. While a smaller fine may not deter some members of the community, a larger fine is more likely to act as a general deterrent, although this will depend on each individual's personal circumstances.<br>• *Whether the fine is enforced*. Other members of the community may be less likely to be deterred if they know there will be no repercussions if they do not pay the fine.<br>• *The extent to which the sentence is known to the community*. As fines are easily understood, members of the community will appreciate the personal impact of receiving a fine, which will vary depending on their circumstances and whether they are aware of the fine being imposed. The use of media and online sites may help to generate attention to the sanction imposed. For example, WorkSafe's publication of sanctions imposed for workplace safety offences could become known to companies in the same industry and therefore increase awareness of the types of fines that could be imposed. |

| Purpose | Factors to consider when assessing the ability of fines to achieve their purposes |
|---|---|
| **Denunciation**: fines can also act as a form of *denunciation* (i.e. a clear public declaration that certain acts and behaviours are unacceptable). | • *The nature of the offence and the fine imposed*. A larger fine (e.g. a level 2 fine) may send a stronger message of disapproval than a smaller fine (e.g. a level 12 fine). A smaller fine (e.g. a level 12 fine) may not be sufficient enough to send a strong message to the community.<br>• *Whether the fine is enforced*. The strong message of disapproval that may be expressed when imposing the fine could be weakened if the fine is not enforced. A fine that is imposed and then enforced may send a stronger message that the behaviour is unacceptable. |
| **Rehabilitation**: rehabilitation is less relevant as a purpose in relation to a fine, as it is not intended to address underlying causes of behaviour. | • While a fine is not intended to address underlying causes of behaviour, it could assist in rehabilitation as it may help 'condition' the offender to avoid similar types of behaviour (e.g. changing the way they drive so they stop speeding). |
| **Protection**: protection is unlikely to be a primary consideration when imposing a fine. | • While protection is unlikely to be a primary consideration when imposing a fine, long-term protection could be achieved if an offender is deterred from reoffending.<br>• A fine could assist in protection if it is imposed on a company that is willing to address the reason why it was given a fine (e.g. fixing an unsafe workplace). |

**Source 4** The ability of fines to achieve their purposes is based on many factors, including those set out in the table above.

# 5.3 Check your learning

## Remember and understand

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

2 **Why** are fines expressed in penalty units and not dollar amounts?

## Examine and apply

3 Find out the current financial year's penalty units. **What** would be the amounts imposed for the following offences?
   - **a** tattooing a juvenile (or person aged under 18 years) – Penalty: 60 penalty units.
   - **b** lighting and leaving a fire in the open air – Penalty: 25 penalty units or 12 months' imprisonment or both.
   - **c** public display of a Nazi symbol – Penalty: 120 penalty units or 12 months' imprisonment or both.

4 **Describe** two factors that may be relevant in determining whether a fine achieves general deterrence in each of the following hypothetical scenarios.
   - **a** Paulo is a homeless person who lives in Flinders Street Station. He has been charged with begging.
   - **b** Sharika attends the University of Melbourne and has been fined for not having a valid tram ticket.
   - **c** Ursula, 75, was found urinating on a public street. She lives in public housing.
   - **d** Jorge has a successful tech business he recently started that he is spending a lot of money on. He has pleaded guilty to minor theft.

## Reflect and evaluate

5 Read the scenario 'Fine imposed on company after teenager suffers injuries'.
   - **a** **Outline** the key facts of the case.
   - **b** **Explain** why there were two sentences imposed in this case. In your response, **outline** two differences in the sentences.
   - **c** Would imprisonment have been an appropriate sanction? **Justify** your answer.
   - **d** **Discuss** the ability of the sanction imposed on the company to achieve general and specific deterrence.

6 **Discuss** the ability of fines to achieve punishment and protection.

# 5.4 Community correction orders (CCOs)

## Key knowledge

**In this topic, you will learn about:**

- **community correction orders and their specific purposes.**

A community-based sanction is a type of sentence that is served in the community, under the supervision of correctional officers. Community-based sanctions have been considered a useful form of sentence for those offenders whose sentence is best served in the community. They sit in the middle range of the sentencing hierarchy. The primary community-based sanction in Victoria is a community correction order (CCO).

## What is a community correction order?

**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

A **community correction order (CCO)** is a non-custodial, supervised sentence served in the community. It is intended to be a flexible order that can be tailored to the offending and the offender by way of conditions attached to the order. A CCO can be used as a sanction for a range of offences.

CCOs give offenders the opportunity to address their criminal behaviour and undergo treatment or take part in educational, vocational or personal development programs, while remaining in the community. They also help offenders to avoid the potentially negative impacts of imprisonment.

A CCO can be imposed for up to two years in the Magistrates' Court for a single offence, and no more than five years in any of the Victorian courts.

A CCO can be combined with a fine or up to one year in prison. When combined with a prison sentence, the CCO will commence on the offender's release from jail.

***Study tip***

The Sentencing Advisory Council's 'A Quick Guide to Sentencing' is available on its website. It is a useful summary of sentencing laws in Victoria written in plain English (with glossary terms and summaries of sanctions and the sentencing process). A link is provided on your obook pro.

**Weblink**
The Sentencing Advisory Council: A quick guide to sentencing

### Eligibility for a CCO

A court can only impose a CCO if the offender has been convicted or found guilty of an offence punishable by more than 5 penalty units, the court has received a pre-sentence report, and the offender consents to the order. The court must also be satisfied that the CCO is appropriate for the offender.

A CCO cannot be imposed for certain offences known as 'category 1 offences'. These include murder, various sexual offences, some assault offences and some drug offences.

A CCO can also not be imposed for 'category 2 offences' except in certain circumstances (e.g. where the offender has a mental impairment, or the offender has assisted enforcement authorities in an investigation or prosecution, or the offender has assisted enforcement authorities in an investigation or prosecution). Category 2 offences include manslaughter, child homicide, kidnapping, arson causing death and some drug offences.




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

## Conditions attached to CCOs

Every CCO made in the court includes 'core conditions', which are that the offender:

- must not commit another offence punishable by imprisonment during the period of the order
- must report to a specified community corrections centre within two working days of the order coming into force
- must report to and receive visits from a community corrections officer
- must notify an officer of a change of address or employment within two working days after the change
- must not leave Victoria without permission
- must comply with any directions of community corrections officers.



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

The court is also required to attach at least one additional condition (see Source 3 below).

| Additional condition | Description |
|---|---|
| Unpaid community work | The offender must perform a number of hours of community work, as specified in the court order, which must not exceed 600 hours. The number of hours must also not exceed 20 over a seven-day period unless the offender requests to do more. The purpose is to adequately punish the offender. |
| Treatment and rehabilitation | The offender must undergo treatment and rehabilitation ordered by the court, designed to address the causes of the offending. The court must have regard to the need to address the underlying causes of offending if attaching such an order. |
| Supervision | The offender is supervised, managed and monitored by a community corrections officer. |
| Non-association | The offender must not contact or associate with a person, or people, specified in the order. |
| Residence restriction or exclusion | The offender must live at some place (or not live there), as specified in the order. |
| Place or area exclusion | The offender must not enter or remain in a specified area or venue (e.g. a particular sporting venue, the central business district of Melbourne or a licensed premises). This condition is for people who have a habit of committing crimes in certain places. |
| Curfew | The offender must remain at a place specified in the order between specified hours of each day (e.g. staying at home between 9 pm and 6 am). |
| Alcohol exclusion | The offender must not enter or remain in licensed premises, or the location of a major event, or consume liquor in any licensed premises. |
| Bond | The offender must pay an amount of money as a bond which will be forfeited if they fail to comply with the CCO. |
| Judicial monitoring | The offender must be monitored by the court (which may involve appearing before the court for a review of their compliance). |

| Additional condition | Description |
|---|---|
| Electronic monitoring | The offender must be electronically monitored if this is suitable, depending on the offender's residence. The purpose is to monitor compliance with a 'monitored condition', which are the curfew conditions and the place or area exclusion condition (see above). The person will be fitted with an electronic monitoring device. |
| Justice plan | For intellectually disabled offenders, a justice plan condition may be attached directing them to participate in services that are designed to reduce the likelihood of further reoffending. |

**Source 3** At least one of these additional conditions must be attached to the CCO.

## What happens if an offender cannot or does not comply?

In some circumstances, the court can vary a CCO, including where:

- the circumstances of the offender materially change, which means they are not able to comply with any condition
- the offender no longer consents to the order
- it is no longer in the interests of the community or the offender for the CCO to continue to be served. This can also occur when a person contravenes (breaches) the conditions of a CCO and therefore commits an additional offence.

The court can also impose a different sanction, vary the conditions, or even cancel the CCO and make no further order.

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

**Actual scenario**

### Public and violent act results in CCOs

Four men had attended a birthday party in Fitzroy Street in the Melbourne suburb of St Kilda in 2019. After the party, they went to a nightclub. At around 3 am, when they were on their way home, a verbal argument occurred with another person on Fitzroy Street. The police were called, and two police officers arrived in response.

An interaction occurred between the men and the two police officers. The two officers were assaulted, with the men kicking, punching and grabbing at them. The police officers suffered significant injuries. The scene was described as 'ugly' and 'violent', and the officers were left traumatised and affected by the assault on them.

The four men pleaded guilty to assaulting an emergency worker on duty and affray (fighting in public). Two of the men were each charged with an additional offence.

In sentencing the offenders, the County Court judge noted that it was a very serious affray involving alcohol-fuelled violence where the police officers were overcome by numbers and violence. The judge also said:

> Random street violence is a scourge on our society. Mob violence must be condemned. Otherwise law-abiding men out on the town intoxicated and belligerent need to understand that attacks and assaults on police will not be tolerated.

The offenders were each sentenced based on their own conduct and for the offences they pleaded guilty to. One of the men was sentenced to 3 months in prison in combination with a two-year CCO. He was required to perform 180 hours of unpaid

community work and was to be subject to supervision. Two of the other offenders were sentenced to a 2-year CCO and were required to perform unpaid community work and were to be subject to supervision. All three offenders were to be assessed for drug and alcohol treatment and rehabilitation, and for other specific programs that may help to reduce reoffending.

The fourth offender was sentenced to 15 months in prison and was to serve a non-parole period of 8 months.

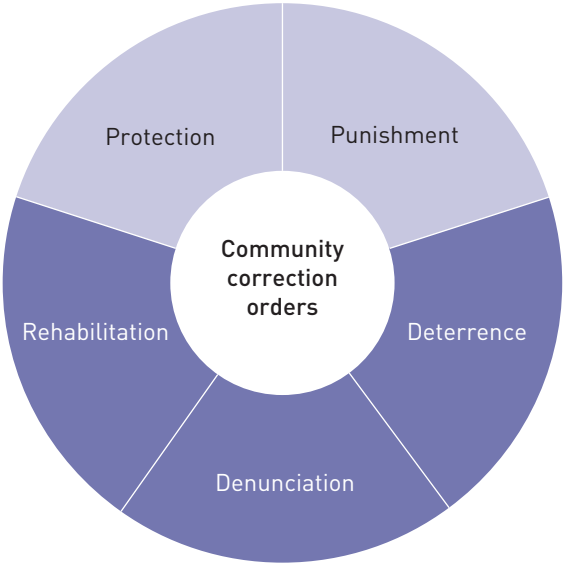
*DPP v Potts & Ors* [2022] VCC 1825 (27 October 2022)



**Source 4** Alcohol-fuelled violence and assaults in public can often increase the need for general deterrence and denunciation.

## Sentencing purposes of CCOs

As a CCO is a flexible sentencing option, it can achieve all of the purposes of sanctions, depending on the circumstances of offending and the offender. Deterrence, rehabilitation and denunciation are often purposes of imposing a CCO, but protection and punishment can also be achieved.




**Source 5** As a CCO is a flexible sentencing option, it can potentially achieve all purposes of sanctions, but deterrence, rehabilitation and denunciation may be more arguable.

Source 6 below sets out the purposes of CCOs and some of the factors to consider when assessing the ability of CCOs to achieve their purposes. Other factors may also be present depending on the circumstances of the offender and offending and, in a particular case or scenario.

| Purpose | Factors to consider when assessing the ability of CCOs to achieve their purposes |
|---|---|
| **Punishment**: depending on the length of the CCO, the conditions imposed and the offender, CCOs can serve to *punish* offender, such as by requiring them to perform community work and imposing restrictions over a long period of time. | • *The length of the CCO*. The duration of the CCO can have an impact on whether it punishes the offender. A CCO that is shorter is less likely to feel punitive than a longer CCO, including one that extends up to five years.<br>• *The mandatory conditions imposed*. Many of the mandatory conditions, particularly the requirement not to leave Victoria without permission, can punish an offender. However, these conditions may not be seen to be significantly punishing to some members of the community.<br>• *The nature of the additional conditions imposed*. A key factor in determining whether a CCO punishes the offender is the conditions that are imposed. The greater the restrictions imposed on the offender, the more likely they will feel like the CCO is a burden on them. For example, some conditions such as electronic monitoring and significant community work can act as a form of punishment as they restrict the offender's freedom.<br>• *The restriction on a person's liberty*. In some ways the CCO cannot 'punish' an offender like imprisonment does because there is not a complete loss of liberty. |
| **Specific deterrence**: CCOs can serve to *specifically deter* an offender, depending on the conditions imposed. | • *The length of the CCO*. The duration of the CCO can have an impact on whether it deters the offender. A shorter CCO may be less likely to have a deterrent effect than a longer CCO.<br>• *The mandatory conditions imposed*. Many of the mandatory conditions, particularly the requirement not to commit another offence punishable by imprisonment, can act as a specific deterrent on an offender as they can be resentenced if they breach such a condition. This can itself have a powerful impact on whether the offender offends again, even though the conditions do not extend beyond the length of the CCO.<br>• *The nature of the additional conditions imposed*. If the conditions imposed seek to minimise the risk of the offender reoffending, then specific deterrence could be achieved. For example, exclusions or curfews can help change the offender's behaviours and help reduce the risk of reoffending. |
| **General deterrence**: a CCO can *generally deter* an offender depending on the nature and length of the CCO, and the enforceability of the CCO. | • *The nature of the CCO*. A CCO that is overly restrictive on an offender is more likely to deter the community as it will be seen to be punishing or to be an unwelcome sanction. This depends on the nature and length of the CCO. Significant hours of community work and electronic monitoring, for example, may be seen to be harsh conditions that impact on a person's freedom.<br>• *Whether the CCO is communicated to the public*. Whether a CCO can deter the community depends on whether the public know about it. It may also depend on the extent to which the communication of the CCO clearly demonstrates how harsh the CCO is, or how punishing or impacting it is on the offender. The public may see this as a lesser sanction to imprisonment, so it may not be as effective as imprisonment in deterring the public. |
| **Denunciation**: a CCO can act as a form of *denunciation* (i.e. a clear public declaration that certain acts and behaviours are unacceptable). | • *The length of the CCO*. A longer CCO is likely to send a stronger message that this type of behaviour is not acceptable than a shorter CCO.<br>• *The conditions imposed*. A strong message of disapproval may be sent if harsh conditions are imposed, such as curfews, monitoring, or even exclusion conditions. Other conditions, such as a single condition requiring community work, may not send as strong a message. |

| Purpose | Factors to consider when assessing the ability of CCOs to achieve their purposes |
|---|---|
| **Rehabilitation**: rehabilitation can be achieved depending on the *treatment* of the offender through conditions, as well as the ability of the offender to remain in the community and avoid imprisonment. | • *Conditions imposed*. Treatment conditions in particular can focus on the rehabilitation aspect of a CCO, including drug and alcohol treatment and any other programs that seek to address underlying causes of behaviour.<br>• *Active participation*. Whether the offender is rehabilitated may depend on whether they actively participate in the rehabilitation programs and are willing to continue that treatment, or continue to address their behaviour, when the CCO comes to an end.<br>• *Offender circumstances, such as support from family and friends*. Factors beyond treatment, such as an offender's ability to remain employed and the support they get from family and friends, are vital to the achievement of rehabilitation. These supports can help the offender treat underlying causes of behaviour. |
| **Protection**: although *protection* is not achieved in that the offender remains in the community, long-term protection may be achieved if rehabilitation and specific deterrence are achieved. | • *Whether the offender is rehabilitated and deterred*. Society is protected in the long term if the offender 'changes their ways' and is rehabilitated and deterred from offending again. The recidivism rate for CCOs in 2021–22 (being the rate of return to corrective services within two years) was 10.5 per cent, which may suggest it is an effective way to reduce reoffending.<br>• *Additional conditions imposed*. Some conditions are far more restrictive and may reduce any potential harm to the community. For example, exclusion conditions and judicial monitoring can restrict the ability of the offender to harm the community while serving a CCO. |

**Source 6** The ability of CCOs to achieve their purposes is based on many factors, including those set out in the table above.

# 5.4 Check your learning

## Remember and understand

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

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

## Examine and apply

3 For each of the following offenders, **describe** one additional condition that may be imposed as part of a CCO.
   - **a** Jarrod pleaded guilty to harassing people at the MCG on a regular basis.
   - **b** Maria was sentenced for harassing her ex-husband.
   - **c** Winona has assaulted a retail worker. She has significant mental health issues.
   - **d** Asher is a Chief Financial Officer who pleaded guilty to assaulting her best friend.
   - **e** Valerie is an alcoholic who has committed five separate offences while out partying late at night.

4 Read the scenario 'Public and violent act results in CCOs'.
   - **a** **Explain** why there would have been no jury in this case.
   - **b** **Justify** why there were four different sentences imposed on the offenders, even though they were involved in the same offending.
   - **c** Read the quote from the judge that starts with 'Random street violence'. **What** purpose of sanctions is the judge referring to? **Justify** your response.
   - **d** **Compare** the ability of CCOs and fines to protect the community.

## Reflect and evaluate

5 Find and save three articles from the past 12 months that refer to a CCO imposed on an offender. In each article, highlight the way in which the CCO was communicated to the public. In your view, can the CCOs imposed in these cases generally deter the community? Discuss your views as a class.

6 'CCOs do not adequately punish offenders.' **Discuss** the extent to which you agree with this statement.

# 5.5 Imprisonment

## Key knowledge

**In this topic, you will learn about:**

- **imprisonment and its specific purposes.**

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

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

## What is imprisonment?

People who have been convicted of a crime (usually, for serious crimes) can be sentenced to imprisonment. This means they will be removed from society and have to spend time in prison, losing their freedom and liberty. As at 30 June 2023 there were 6440 prisoners in the Victorian prison system; 6142 of those were male prisoners.

Prison terms are expressed in levels from 1 to 9, with 1 being the most serious (life imprisonment) and 9 being for the least serious (six months). These levels are shown in Source 2.

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

**non-parole period**
the minimum term a prisoner must serve before they can be given parole

**Parole** is the conditional release of a prisoner after a minimum period has been served. If the sentence is between one and two years, the court can state a **non-parole period**. After this minimum period, the Adult Parole Board reviews the prisoner's suitability for parole. If a sentence is for two years or more, the court must state a minimum, non-parole period. Conditions can be attached to a period of parole. If there is no non-parole period or parole is rejected, the prison sentence is served in full. For some, this will mean that they will never be released from prison.



**Source 1** The Melaleuca unit, HM Barwon Prison, Victoria. Barwon was the first new prison in Victoria to be designed specifically for unit management (management of small groups of prisoners by a permanent staff team).

For some offences, a term of life imprisonment can be imposed. This means 'the term of the prisoner's natural (entire) life'. The Magistrates' Court is limited in the length of imprisonment it may impose; the maximum term of imprisonment it can impose for a single summary offence is two years, and five years for two or more offences.

If an offender has been held in custody (that is, on **remand**) before sentencing, any time spent in prison may be considered as part of the sentence to be served.

**remand**
the situation where an accused is kept in custody until their criminal trial can take place

| Level | Maximum term | Sample offences |
|---|---|---|
| Level 1 | Life imprisonment | Murder<br>Trafficking in a drug of dependence (large commercial quantity) |
| Level 2 | 25 years | Manslaughter<br>Rape<br>Sexual penetration of a child under 12 years<br>Armed robbery<br>Aggravated burglary<br>Arson causing death |
| Level 3 | 20 years | Intentionally causing serious injury<br>Culpable driving causing death |
| Level 4 | 15 years | Recklessly causing serious injury<br>Handling stolen goods<br>Trafficking in a drug of dependence (not a commercial quantity)<br>Arson |
| Level 5 | 10 years | Threats to kill<br>Indecent assault<br>Theft<br>Negligently causing serious injury<br>Knowingly possessing child pornography |
| Level 6 | 5 years | Recklessly causing injury<br>Possession of a drug of dependence (for the purpose of trafficking) |
| Level 7 | 2 years | Going equipped to steal |
| Level 8 | 1 year | Cultivation of a narcotic plant (not for the purpose of trafficking)<br>Possession of a drug of dependence (not for the purpose of trafficking) |
| Level 9 | 6 months | Concealing the birth of a child |

Source: Sentencing Advisory Council, 'Maximum penalties'

**Source 2** Examples of offences ranked according to the penalty scale

## Concurrent and cumulative sentences

Terms of imprisonment can be served concurrently or cumulatively. A **concurrent sentence** runs at the same time as another sentence. For example, someone who has been found guilty of theft and assault and sentenced to six months for theft and two years for assault 'to be served concurrently' will be in prison for only two years because the two sentences are served at the same time. Sentences are usually ordered to be served concurrently.

**concurrent sentence**
a sanction that is to be served at the same time as one or more other sentences; usually given in relation to two terms of imprisonment

A **cumulative sentence** is served straight after another sentence. In the above example, the offender would serve two years and six months. A cumulative sentence must be given for various offences, including the following:

**cumulative sentence**
where two sentences are imposed, and are to be served one after the other; for example a term of imprisonment is to be commenced after the first term is served

- for certain serious offences (as defined, and which includes arson, and certain drug, sexual and serious violent offences)

- where the imprisonment is in default of payment of a fine or sum of money
- for an offence by a prisoner or an escape offence
- for an offence committed by a person released on parole or on bail.

## Indefinite sentences

If a person (other than a young person) is convicted by the Supreme Court or the County Court of a serious offence, the court may sentence them to an indefinite term of imprisonment. Serious offences include murder, manslaughter, child homicide, threats to kill, rape, kidnapping, armed robbery and sexual offences involving children under 16.

**indefinite sentence**
a term of imprisonment that has no fixed end date, usually given to the most serious offenders

The court can only impose an **indefinite sentence** if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community because of:

- their character, past history, health, age or mental condition
- the nature and gravity of the serious offence
- any special circumstances.

The court will review the indefinite sentence periodically. Unless the court is satisfied, to a high degree of probability, that the offender is still a danger to the community, the indefinite sentence must be discharged and the offender must undertake a five-year reintegration program administered by the Adult Parole Board. The offender or the Office of Public Prosecutions (OPP) may appeal against a decision to discharge or not discharge an indefinite sentence.

The scenario below demonstrates how an imprisonment term can be increased if further offences are committed in prison.

**Actual scenario**

### Jail term increased to 48 years

The offender in this case was serving 42 years in prison for an act of terrorism after she stabbed a man in 2019.

While in prison in 2020, the offender left her cell early one morning and joined other prisoners who were able to go outdoors. The prisoner was able to get her hands on some gardening shears. She approached another prisoner, intending to stab her with the shears. The other prisoner noticed and raised her hands to defend herself. The victim suffered a cut on her hand and was later taken to hospital. The offender was restrained, and ultimately admitted that she intended to kill the victim for Islamic State (a terrorist organisation).

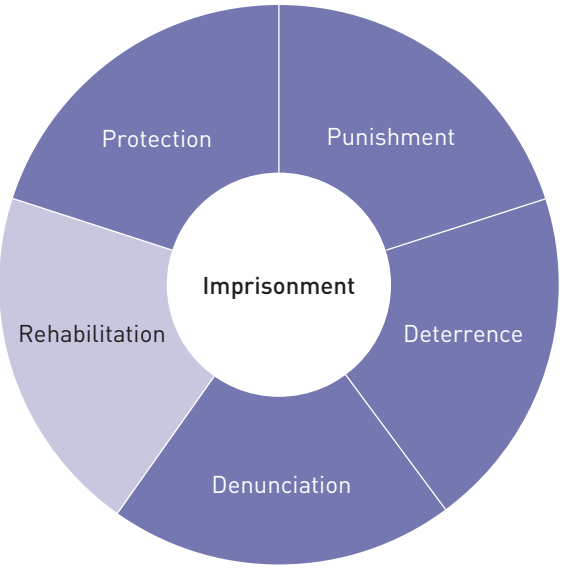
The offender pleaded guilty to engaging in a terrorist attack and being a member of a terrorist organisation. The Supreme Court increased her sentence by 6 years so the new sentence was 48 years. The Court noted that due to the seriousness and prior offending, no sentence other than imprisonment was appropriate, but that the Court should not impose a sentence that extinguishes 'all hope of release'. In sentencing the offender, the Court recognised that the prospects for rehabilitation appeared to be poor, though not totally non-existent, and that there was a greater need for deterrence, punishment, denunciation and community protection.

*R v Shoma (No 2)* (2021) VSC 797 (3 December 2021)

# Sentencing purposes of imprisonment

The primary purposes of imprisonment are punishment, protection, deterrence and denunciation, given it is the most serious sanction that can be imposed and results in a loss of liberty. However, rehabilitation can also be achieved in some circumstances.

Source 4 below sets out the purposes of imprisonment and some of the factors to consider when assessing the ability of imprisonment to achieve their purposes. Other factors may also be present depending on the circumstances of the offender and offending and, in a particular case or scenario.




**Source 3** Imprisonment can, in some circumstances, achieve most purposes of sanctions.

| Purpose | Factors to consider when assessing the ability of imprisonment to achieve its purposes |
|---|---|
| **Punishment**: depending on how long the term is, imprisonment can achieve *punishment* given its punitive nature and the fact that offenders lose their freedom. | • *The length of the imprisonment term.* A longer prison term acts as a greater restriction on freedom and therefore may act as a greater punishment. However, this depends on the offender. Even a short period of time in prison can be punishing given the removal of liberty.<br>• *The offender's circumstances.* Whether imprisonment acts as a punishment may depend on the circumstances of the offender. For example, the courts have recognised that a mentally disabled offender, who cannot understand the impact of a term in prison, may not appreciate the punitive nature of the sentence and therefore punishment may not be achieved. |
| **Specific deterrence**: imprisonment can achieve *specific deterrence* given the nature of imprisonment. | • *The length of the imprisonment term.* A longer prison term acts as a greater restriction on freedom and therefore may specifically deter an offender from offending again. However, this depends on the offender.<br>• *The offender's circumstances.* Whether imprisonment specifically deters may depend on the circumstances of the offender. For example, an offender with a mental disability may not be specifically deterred as they may not be able to appreciate or understand the nature of imprisonment.<br>• *The nature of the imprisonment term.* Some research suggests that time in prison can normalise violence and reinforce criminal behaviour, and that time spent in prison can be traumatic and disruptive. If the offender is exposed to negative influences or they learn 'negative behaviours' in prison, this can impact on specific deterrence. |
| **General deterrence**: imprisonment can act as a *general deterrence* because of its custodial nature and given the seriousness of the sanction. | • *The circumstances of the offender.* General deterrence may not be an appropriate purpose or may not be achieved if the offender has particular circumstances that would mean that the sentence or the offending will not deter the general public. For example, if the offender has a particular illness or their circumstances are particularly unique, then this may not necessarily serve as a deterrent to others.<br>• *The length of the sentence*. Longer sentences may act more as a general deterrent, sending a strong message to the community that this type of behaviour is not acceptable. |

| Purpose | Factors to consider when assessing the ability of imprisonment to achieve its purposes |
|---|---|
| **Denunciation**: by taking away a person's liberty, imprisonment sends a strong message to the community that this type of behaviour is not acceptable. | • *The length of the sentence.* A longer term in prison is likely to send a stronger message. A shorter term, which may not need to be served at all (because of time on remand), may not send as strong a message.<br>• *Communication of the sentence to the public*: sentences, including terms of imprisonment, must be communicated to the public in a way that makes people understand that particular types of behaviour are unacceptable and may result in time in jail for others who engage in similar behaviour. |
| **Rehabilitation**: *rehabilitation* can be achieved depending on the offender and the programs. | • *Programs available:* whether an offender is rehabilitated may depend on the programs available and whether they are tailored to their individual needs. For example, programs that promote connection to family may be effective, given research that suggests that family and community involvement in rehabilitation can result in better outcomes.<br>• *Whether the offender is willing to participate:* voluntary participation is required. An individual who is forced to participate may not be willing to address underlying causes of behaviour, but rehabilitation may be achieved if a person voluntarily participates.<br>• *The offender's prospects of rehabilitation:* the court will generally make comments, as part of sentencing, about the offender's prospects of rehabilitation. Factors such as remorse and a person's criminal record can give indications of an offender's prospects. Lower prospects of rehabilitation might suggest that the offender may be less likely to be rehabilitated, but it may still be possible.<br>• *Whether the offender has any addictions:* whether the offender is prepared to face their addictions may be relevant to rehabilitation. For example, if the offender does not address an addiction to drug and alcohol, their prospects of rehabilitation may be lower.<br>• *The length of the sentence:* the custodial nature of imprisonment and the restrictions imposed on the offender may mean that rehabilitation is harder to achieve. 'Crushing' sentences may impact on an offender's prospects of rehabilitation. A shorter prison term may allow a greater focus on rehabilitation and avoid the individual spending a long time in a custodial environment. However, whether a shorter prison term is available or acceptable will depend on the offending and the offender. Having a short non-parole period may also be an incentive for a person to be rehabilitated. |
| **Protection**: *protection* is achieved as the offender is removed from society, but there should also be consideration to long-term protection. | • *The length of the sentence*: society will be protected while the offender is in custody. Longer sentences mean a greater time during which the offender cannot harm the community. Sentences such as indefinite sentences protect the community from particular offenders if they are considered to still be a danger to the community. Shorter sentences are less of a protection.<br>• *Circumstances of the offender*: these are relevant to determining whether society needs to be, and can be, protected from the offender. If the offender is reluctant to be treated and has many prior convictions, then it is possible that they may harm again once they are released.<br>• *Whether the offender is treated*: The community benefits if the offender participates in rehabilitation programs and is treated, as once they are released, the ideal is that they will no longer commit further crimes. This depends on the rehabilitation opportunities and the willingness of the offender to address the reasons for offending. It also depends on other factors, such as whether the offender has a drug addiction and whether drugs are available to the prisoners (in the past, some prisoners targeted for a drug test returned a positive result). |

**Source 4** The ability of imprisonment to achieve its purposes is based on many factors, including those set out in the table above.

# 5.5 Check your learning

## Remember and understand

1 **Define** the term 'non-parole period'.

2 **Distinguish** between a cumulative sentence and a concurrent sentence.

3 **Explain** why imprisonment is described as the 'sanction of last resort'.

## Examine and apply

4 Conduct some research on Kevin John Carr.

- **a** **What** was Carr convicted of?
- **b** Has he sought to be released from prison? When?
- **c** **What** was the view of the court in determining whether he should be released?
- **d** In your view, are indefinite sentences appropriate? Share your views with the class.

5 Create a scenario in which a term of imprisonment was imposed on an offender. In the scenario, include whether the sentence was cumulative, concurrent and/or indefinite. Exchange your scenario with another class member for them to work out the type of sentence imposed.

## Reflect and evaluate

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

7 Conduct a debate or discussion in class on the following statement: 'The solution to the increasing number of prisoners in Victoria is to build more prisons.' You should consider factors including the cost of prisons, the number of prisoners, recidivism and the purposes of sanctions. You may need to conduct some further research before you engage in the discussion.




**Source 5** The former Pentridge Prison, where many of Victoria's most notorious criminals were held.

### Did you know?

H.M. Pentridge Prison in the Melbourne suburb of Coburg was one of the most famous prisons in Australia's history. It held some of the more violent criminal offenders from Victoria, including Ned Kelly. It closed in 1997. It has now been redeveloped and restored with a shopping centre and a cinema, and tours are available to look inside the prison.

# 5.6 Sentencing factors

## Key knowledge

In this topic, you will learn about:

- factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements.

*Study tip*

Each of the four sentencing factors discussed in this topic are specifically listed in the *VCE Legal Studies Study Design*. This means each of them is examinable – either in your assessment tasks or on the end-of-year examination.

When a court is deciding on the appropriate sanction to be imposed on an offender, it is required by the *Sentencing Act* to take several factors or matters into account. Four of these are:

- aggravating factors
- mitigating factors
- guilty pleas
- the impact of the crime on victims, often determined through victim impact statements.

You should become familiar with each of these types of sentencing factors and be able to identify each of them when looking at a scenario.

## Aggravating factors

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

**Aggravating factors** are circumstances about the offender or the offence that tend to increase the offender's culpability and the sentence that they will receive. Which aggravating factors will be relevant to sentencing depends on the circumstances of the offending. Examples of aggravating factors include:

- the use of violence, explosives or a weapon when committing the offence
- where the offending was planned or premeditated
- the nature and gravity of the offence (e.g. if the victim suffered a particular type of brutality or cruelty, or the offence involved family violence, or the offence was unprovoked)
- any vulnerabilities of the victim (such as having a disability or being very young, old or frail)
- the offender being motivated by hatred or prejudice against a group of people with common characteristics
- the offence taking place in front of children, or seen by them
- a breach of trust by the offender towards the victim (e.g. the offender was in a position of trust such as a parent who has abused a child or a teacher who has committed a crime against a student)
- prior convictions of the offender
- the offence occurred while the offender was on a CCO, on parole or on bail.

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

## Mitigating factors

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

**Mitigating factors** are circumstances that a court should consider when determining the appropriate sentence. They can be circumstances relevant to the offender, the victim or the crime itself, and may decrease the offender's culpability and lead to a reduction in sentence. Examples of mitigating factors include:

- the offender showed remorse (this can often be demonstrated through the offender's conduct after the offence, such as cooperating with police, pleading guilty early, or general behaviour at court hearings)

- the offender has no prior criminal history or is of good character
- the offender was acting under duress
- the offender has shown efforts towards rehabilitation while awaiting sentencing, or has good prospects of rehabilitation
- the offender was under personal strain at the time or they have a unique background, which means a lighter sentence should be imposed (e.g. they have had a difficult and violent childhood)
- the effect that prison may have on the offender (e.g. courts have identified that prison may not be suitable for offenders with serious mental health issues)
- the injury or harm caused by the offence was not substantial, or there was no risk to any people
- the offender was young, or had some disability that made them not fully aware of the consequences
- the offender pleaded guilty early (described further below).

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

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

**Actual scenario**

## Moral culpability to horrible crime reduced by personality disorder

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

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

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

The victim's family members and friends were deeply affected by the crime, and gave emotional and powerful victim impact statements both about the victim and the impact the crime had on them. The crimes were described as deeply shocking and they deeply affected those close to the victim and the general community.

Some of the aggravating factors included the fact that the offender had tried to destroy evidence in relation to the crime, and the circumstances of the offending, including the brutality of the crime.



**Source 1** Melburnians gathered on the steps of Parliament House to mourn the loss of the victim in the days after her death.

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

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

The offender was ultimately sentenced to a total effective sentence of 36 years in prison. He is to serve 30 years in prison before he becomes eligible for parole. The prosecution sought to increase the sentence on appeal, but the appeal was dismissed.

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

# Guilty pleas

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

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

The *Sentencing Act* allows the court to consider a guilty plea when sentencing an offender for several reasons. First, if the offender knows that an early guilty plea is considered in sentencing, it may encourage

them to plead guilty rather than going to trial. Second, an early guilty plea can have significant benefits for the criminal justice system, as well as the prosecution, the victim and their family society, the accused and their family, by avoiding the time, expense and stress of a trial. Criminal trials can be particularly traumatic for victims and their families, and an early guilty plea will spare them that trauma. A reduction in sentence as a result of an early guilty plea will therefore reward the offender for admitting to the crime that they have committed.

Generally, the earlier the guilty plea is made, the greater the reduction the court is inclined to give.

If a court imposes a less-severe sentence because the offender pleaded guilty, and the sanction is either a custodial sentence, a CCO for a period of 2 years or more, a fine exceeding 10 penalty units or an aggregate fine (i.e. a total fine given for more than one offence) exceeding 20 penalty units, the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.

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

**Actual scenario**

### Early guilty plea in dangerous driving causing death case

In this case, the offender pleaded guilty to one charge of dangerous driving causing death. The charge arose out of a collision on the road that resulted in the offender's vehicle crashing into a motorcycle, killing another person. Within seconds, the offender called 000 and did everything he could to help the victim. He immediately admitted what had happened and did not try to conceal or deny anything. He cooperated fully and pleaded guilty early. He showed remorse for what had happened. The offender had no prior convictions and had always worked hard in his life.

As part of sentencing, the Court noted that dangerous driving causing death is a serious offence, but that in this case it was a momentary 'inadvertence' on the road. In sentencing the offender, the Court said:

> The utilitarian benefit of this plea of guilty is, in my view, massive. It has saved the family of the deceased man a great deal of anxiety and a great deal of trauma if it had proceeded as a trial. It is my experience that in these types of circumstances the acknowledgement by the accused at an early time of their responsibility is a far different prospect to watching somebody get convicted by a jury, if that was what was going to happen, and you have to get the benefit of that.

The offender was sentenced to a CCO with conviction. The offender was required to perform 250 hours of community work.

*DPP v Quinlan* [2022] VCC 29 (21 January 2022)

## Victim impact statements

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

A **victim impact statement** contains particulars of any injury, loss or damage suffered by the victim as a direct result of the offence. Its purpose is to assist the court when it is deciding on the sentence.

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

A victim may make the statement to the court if a person is found guilty of an offence. A copy must be filed with the court before sentencing. Victims can also give the court medical and psychological reports, which can be attached to their victim impact statements.

A victim may request that their victim impact statement be read aloud in open court. This may be done by the victim, or a person whom the victim requests read the statement (and the court approves of that person).

Victim impact statements are used widely by the courts to allow victims to have their say in the sentencing process. This is evidenced in the following scenario.

**Actual scenario**

## This is not all about you

This was a serious case of violence against a member of an ambulance crew who came to the offender's assistance. It is an example of how important victim impact statements can be in sentencing.

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

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

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

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

> I turn now to the impact of your crimes. There is a large amount of victim impact material here including reports from an osteopath, a psychologist and a medical practitioner's progress notes in relation to [the victim]. She has also made two impact statements, the second quite recently. That is the one which she courageously read aloud in open court on the first day of the appeal. As I said last week, she should never have found herself sitting in a court in November 2019 reading such a document for she should never have been assaulted. No paramedic should be. She should have been out on the road doing the job that she has enjoyed doing for nine years, working as a serving paramedic and the reason that she was not is because of having the great misfortune of meeting with you. Her year has been a disaster because of you. It is that simple. There is less material as to the impact upon [her colleague]. He did not wish to prepare an impact statement which is his right but there is some

material relating to the medical notes and an excerpt from his statement describing his anger at what had occurred. That is perfectly understandable. In each case there are some photographs.

I take into account the impact of these crimes. I suppose I could say no more in that respect and move on to deal with the matters that have been raised on your behalf. But why should I do that? This is not all about you. This represents the only opportunity that your principal victim will ever have to provide information to the court about the impact of your crime. These sentencing remarks will be full of matters dealing with your own position, your age, your family, your character, your regret, your prospects, your future. You, You, You. That is how a plea in mitigation usually proceeds because of course I am sentencing you. But what about her future? I am sentencing you for the serious crime that you have committed upon your principal victim. Upon her. She is the victim not you. I must never lose sight of that fact …

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

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




**Source 2** The offender in this case was sentenced for assaulting paramedics while under the influence of drugs.

# 5.6 Check your learning

## Remember and understand

1 Which party would want to demonstrate to the court that there were significant aggravating factors, and which party would want to demonstrate to the court that there were significant mitigating factors? **Why?**

2 **Explain** why an early guilty plea is beneficial to the courts, the victims and the accused.

3 **What** is a victim impact statement, and **why** is it useful for the court in sentencing?

4 **State** whether the factors listed below are examples of aggravating factors or mitigating factors:
   - **a** Mary-Lou committed an offence while on bail.
   - **b** Hugo's childhood was such that he was constantly surrounded by drugs, alcohol and violence.
   - **c** Jacques used a home-made bomb when committing the crime.
   - **d** Ella was 16 when she offended.
   - **e** Luca committed the offence because he hates people with white hair.
   - **f** Rebecca assaulted her sister in front of her children.
   - **g** Kylie confessed to the commission of the offence within hours of being charged.

## Examine and apply

5 Read the scenario 'Moral culpability to horrible crime reduced by personality disorder'.
   - **a** **Identify** the aggravating factors and the mitigating factors in this case.
   - **b** **What** sentence was imposed?
   - **c** **Explain** the relevance of the offender's personality disorders on sentencing.

6 Read the scenario 'Early guilty plea in dangerous driving causing death case'.
   - **a** Would there have been a jury trial in this case? **Justify** your answer.
   - **b** **Identify** the factors that would have been relevant to each of the following purposes of sentencing: punishment, rehabilitation and specific deterrence.
   - **c** **Explain** how an early guilty plea benefits society, the courts and the victims.

7 Devise a hypothetical scenario in which a person has committed a crime and has either pleaded guilty or been found guilty. Write out the scenario and the sentence imposed. In doing so, include as many aggravating and mitigating factors as you can. Give your scenario to another person in their class and ask them to identify those factors.

8 Read the scenario 'This is not all about you'.
   - **a** Other than through a victim impact statement, **describe** two ways in which the impact of a crime on a victim may be known to a judge when sentencing an offender.
   - **b** Discuss as a class whether the impact of a crime on victims should be one of the most important matters to consider in sentencing.
   - **c** Conduct some research to find out whether any victims in any criminal cases have asked the judge not to impose a term of imprisonment in their victim impact statement.

## Reflect and evaluate

9 **Discuss** the extent to which a guilty plea should be considered as part of sentencing.

Chapter

# 5

# Review

## Top exam tips from Chapter 5

1. Do not confuse general deterrence and denunciation. They have two entirely different purposes, but often students mix them up. Denunciation is about the court saying that behaviour is unacceptable and must be condemned; deterrence is like a warning to stop people from offending.
2. Students sometimes incorrectly assume that victim impact statements are used as part of a trial or given to a jury, but they are used in the sentencing process, and they are not given to a jury as the jury is not involved in sentencing.
3. The more you understand the conditions that can be imposed as part of a CCO, the better your responses will be about whether a CCO can achieve its purposes. Try to identify the particular conditions that may be more punishing, those that seek to rehabilitate, and those that seek to protect the community.

## 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 (including the exam) 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. Using an example of each, distinguish between mitigating factors and aggravating factors.

(4 marks)

**Difficulty: medium**

2. Compare the ability of imprisonment and community correction orders to achieve protection and rehabilitation.

(6 marks)

**Difficulty: high**

3. Discuss the extent to which fines can achieve general deterrence and punishment.

(6 marks)

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# Practice assessment task

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

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

## Source 1

The following is a summary of a case heard in the Supreme Court of Victoria.

### Husband pleads guilty to manslaughter over wife's death

A husband was charged with murdering his wife after her body was found in a forest eight months after her disappearance. The husband was ultimately arrested and charged with murder following a long investigation. The husband's conduct was described as consisting of 'lies and deception' following her disappearance. For example, he had lied to family and friends, the police and even the public in a media conference about the victim's disappearance.

The offender pleaded not guilty to murder. He was committed to stand trial, and he then offered to plead guilty to manslaughter, which was ultimately accepted by the prosecution.

The offence was identified by the Supreme Court as a serious case of domestic violence because it resulted in the woman's death. The Court found that she was killed in her own home, a place which should have been a sanctuary for her.

The offender was depicted as being of good character. He had no prior criminal history, and his prospects of rehabilitation were described as 'good'. The Court acknowledged that the offender had entered a plea of guilty, which deserved a sentencing discount because it had spared family and friends the ordeal of a trial. However, the Court also noted that there was not 'full and frank disclosure' by the offender as he had remained silent, and nobody knew how his wife had died.

The offender was sentenced to nine years' imprisonment. The Court noted that the principles of general deterrence, denunciation and just punishment were important. The Court also noted that because the offender's prospects of rehabilitation were 'good', less weight was placed on specific deterrence or the need to protect the community. After an appeal by the prosecution, the sentence was increased to 12 years in prison. A non-parole period was set.

## Source 2

Manslaughter is a 'category 2' offence. For these offences, a court must impose a sentence of imprisonment unless the offender has assisted authorities, or the offender has impaired mental functioning.

## Practice assessment task questions

1 Describe the right to silence.
(3 marks)

2 Distinguish between specific deterrence and general deterrence.
(3 marks)

3 Describe the impact that a guilty plea may have on sentencing.
(3 marks)

4 Referring to Sources 1 and 2, explain why a fine and a community correction order were not appropriate sentences in this case.
(5 marks)

5 'Aggravating factors and mitigating factors act like a tug of war.' Referring to **one** example of each type of factor, explain what this statement means.
(5 marks)

6 Discuss the relationship between rehabilitation and protection of the community. Refer to the above case in your answer.
(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 purposes of sanctions: rehabilitation, punishment, deterrence (general and specific), denunciation and protection. | ☐ | ☐ | Go back to Topic 5.2. |
| • Fines and their specific purposes. | ☐ | ☐ | Go back to Topic 5.3. |
| • Community correction orders and their specific purposes. | ☐ | ☐ | Go back to Topic 5.4. |
| • Imprisonment and its specific purposes. | ☐ | ☐ | Go back to Topic 5.5. |
| • Factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements. | ☐ | ☐ | Go back to Topic 5.6. |

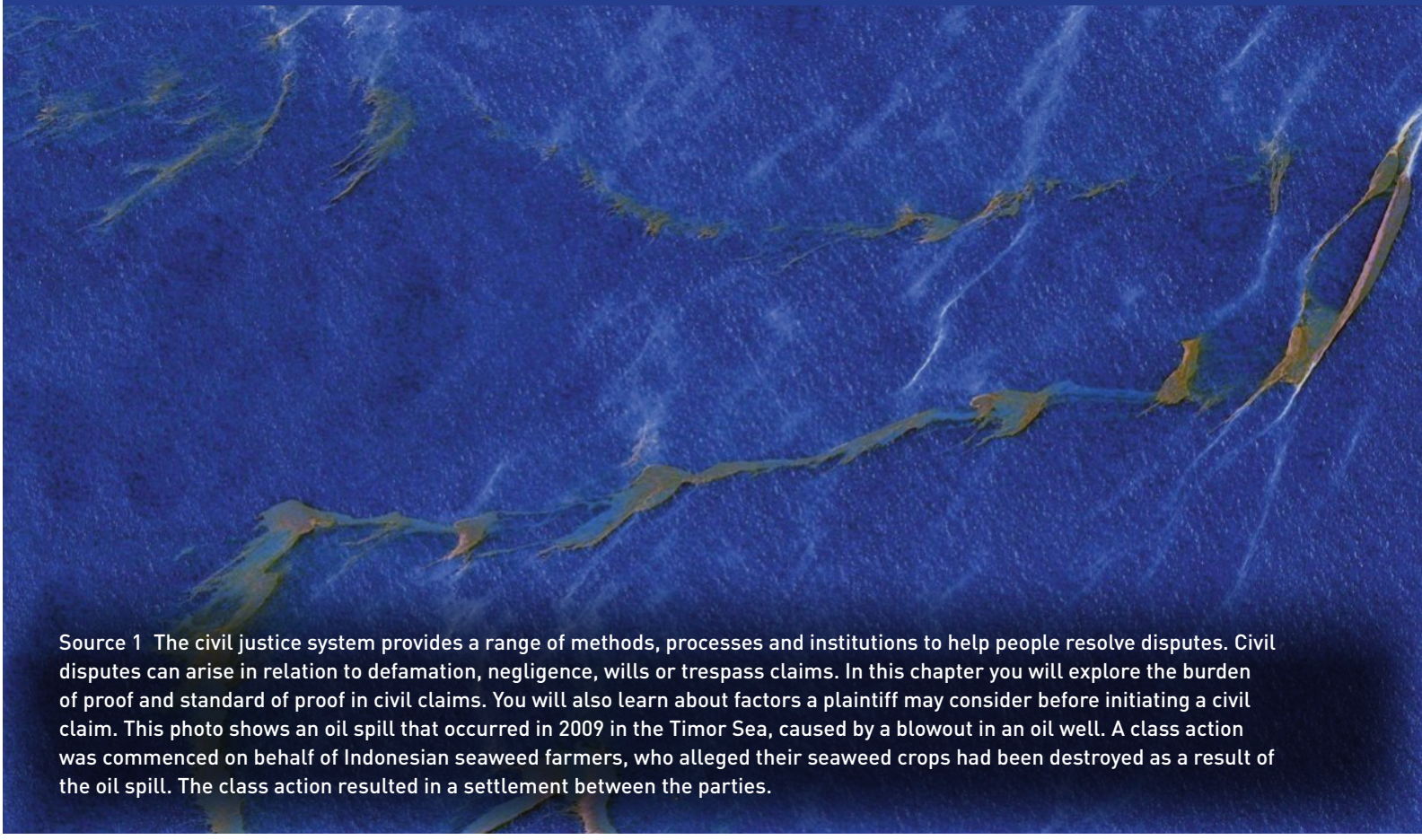
**Check your obook pro for these additional resources and more:**

- **Chapter 5** Chapter review quiz
- **Revision notes** Chapter 5
- **Chapter summary** Chapter 5
- **Quizlet** Revise key legal terms from this chapter.

Chapter

# 6

# Key concepts in the Victorian civil justice system



Source 1 The civil justice system provides a range of methods, processes and institutions to help people resolve disputes. Civil disputes can arise in relation to defamation, negligence, wills or trespass claims. In this chapter you will explore the burden of proof and standard of proof in civil claims. You will also learn about factors a plaintiff may consider before initiating a civil claim. This photo shows an oil spill that occurred in 2009 in the Timor Sea, caused by a blowout in an oil well. A class action was commenced on behalf of Indonesian seaweed farmers, who alleged their seaweed crops had been destroyed as a result of the oil spill. The class action resulted in a settlement between the parties.

## Outcome

By the end of **Unit 3 – Area of Study 2** (i.e. Chapters 6, 7 and 8), you should be able to explain the key principles in the civil justice system, discuss the ability of remedies to achieve their purposes and evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute.

## Key knowledge

In this chapter, you will learn about:

- key principles in the Victorian civil justice system, including the burden of proof and the standard of proof
- factors to consider before initiating a civil claim, including costs, limitation of actions and enforcement issues.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- analyse factors to consider when initiating a civil claim
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

## Key legal terms

**balance of probabilities** the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) that their claim is true

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

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

**civil justice system** a set of processes, bodies and institutions used to resolve civil disputes

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

**class action** a legal proceeding in which a group of 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

**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

**liability** legal responsibility for one's acts or omissions

**limitation of actions** the restriction on bringing a civil law claim after the allowed time

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

**remedy** any order made by a court (or tribunal) 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

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

**statement of claim** a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

**sue** to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

**tribunal** a dispute resolution body that resolves civil disputes and is intended to be less costly, more informal and a faster way to resolve disputes than courts

**vicarious liability** the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

## Key legal cases

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

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



**Warm up!**
Check what you know about key concepts in the Victorian civil justice system before you start.

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

# 6.1 Introduction to the Victorian civil justice system

**civil justice system**
a set of processes, bodies and institutions used to resolve civil disputes

**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

**remedy**
any order made by a court (or tribunal) 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

**liability**
legal responsibility for one's acts or omissions

The **civil justice system** is a set of methods, processes and institutions that provide mechanisms for people to assert their legal rights, and to help people resolve **civil disputes**. It includes dispute resolution bodies and processes such as:

- bodies that provide information and advice about civil disputes and people's legal rights, such as a community legal centre (CLC)
- pre-trial procedures (such as providing documents that are relevant to the dispute to the other side before trial)
- dispute resolution methods (such as mediation, conciliation and arbitration)
- dispute resolution bodies (such as complaints bodies, tribunals and courts)
- the ordering and enforcement of **remedies**.

Some of the key purposes of the civil justice system are to:

- enable a person to enforce their legal rights or take action over legal wrongs
- determine whether the defendant has a **liability** to that person
- award a remedy where the defendant has been found liable.

There are several stages in the resolution of a civil dispute. However, because there are different ways to resolve a civil dispute, and not all civil disputes are resolved in court, the stages can be different from case to case. In addition, not all cases go through the same process, as some cases will resolve earlier than others. An example of the broad stages that a civil dispute may go through is provided in Source 1.




**Source 1** An example of the stages of a civil dispute. In Unit 3 – Area of Study 2, you will primarily be learning about the three stages shown in the lighter colour above.

## Australia's civil justice system

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

Like the criminal justice system, there is no single civil justice system in Australia. This is because the law-making power in **civil law** is generally held by the six states and two territories in Australia. This means that each state or territory has:

- its own system of resolving civil disputes
- its own civil laws
- its own rules for determining civil disputes
- its own courts and other dispute resolution bodies (such as tribunals).

However, as it can for criminal laws, the Commonwealth can also make civil laws that provide mechanisms to help people resolve their civil disputes in relation to matters that fall within Commonwealth power. There are, therefore, Commonwealth courts (such as the Federal Court) that can resolve civil disputes arising under federal law, as well as other federal bodies.

# Dispute resolution bodies in Victoria

While criminal cases are heard and determined in the courts, civil disputes in Victoria can be resolved by different dispute resolution bodies, as well as courts. The three main types that you will learn about in Unit 3 are:

- **complaints bodies,** such as Consumer Affairs Victoria (CAV). Complaints bodies investigate complaints from people about the conduct of other parties, and may also offer dispute resolution services. For example, CAV, which you will explore in Chapter 7, provides people with information about consumer laws (e.g. laws in relation to buying goods and services), enforces consumer laws (e.g. it has powers to investigate real estate agents) and offers dispute resolution services for a limited number of disputes. CAV has information on its website and also provides information to people about their rights and where they can go to get help for their problem
- **tribunals,** such as the Victorian Civil and Administrative Tribunal (VCAT). Tribunals operate like a court in that they can resolve a broad range of disputes. This includes disputes about the provision of goods and services, or about rental agreements. Tribunals are less formal and generally quicker and less expensive than courts in resolving disputes. They are intended to be much more accessible for smaller claims that generally do not require the assistance of a lawyer
- **courts,** which are either Victorian courts (Magistrates' Court, County Court and Supreme Court) or federal courts. In Unit 3, you will consider only the Victorian courts, however as noted above, the Federal Court can also hear civil disputes. For example, some class actions are heard in the Federal Court (like the Montara Oil Spill class action described on page 176).

Whether or not dispute resolution bodies are able to resolve a dispute will depend on their jurisdiction and their powers. Some dispute resolution bodies have a restriction or limit on the types of disputes they can hear.

## Pre-trial procedures

Courts use pre-trial procedures as part of resolving disputes. These are useful to know as you work through this and the next chapter. They are steps taken by the parties before trial to try to narrow the issues in dispute and if possible resolve the dispute before hearing or trial. These procedures include:

- **pleadings**, which are a series of documents filed and exchanged between the plaintiff and the defendant, and which set out the claims and defences. The two main documents in the pleadings stage are:
  - the **statement of claim**, which is filed with the court by the plaintiff; this sets out details of the claims and the remedy that the plaintiff is seeking
  - the **defence**, which is filed by the defendant; this sets out the defendant's response to each of the plaintiff's claims
- **discovery of documents**, which enables the parties to get copies of each other's documents that are relevant to the issues in dispute
- exchange of evidence, which is where the parties exchange the evidence that will be given at trial. The parties may be relying on lay evidence (where people give evidence about what happened or what they saw) or on expert evidence (where experts give evidence about their professional opinion, such as a medical professional giving evidence about a psychological injury suffered by the plaintiff)
- **mediation**. The judge may order the parties attend mediation by a certain date to try to resolve the dispute before trial.

**pleadings**
(in civil cases) a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

**statement of claim**
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

**defence**
(in a civil case) a document filed by the defendant which sets out a response to each of the claims contained in the plaintiff's statement of claim; part of the pleadings stage of a civil dispute

**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

**mediation**
a method of dispute resolution that uses an independent third party (the mediator) to help the disputing parties reach a resolution

# Parties in a civil dispute

A civil dispute involves two parties:

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

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

- the **plaintiff** – the party who commences a civil action and who claims that their rights have been infringed or a wrong has occurred. The plaintiff is also known as the aggrieved party or wronged party
- the **defendant** – the party who is alleged to have infringed the plaintiff's rights or is alleged to be responsible for the wrongdoing.

In some dispute resolution bodies, words other than 'plaintiff' and 'defendant' are used to describe the parties involved. For example, in VCAT, the 'applicant' is the person bringing a civil action, and the 'respondent' is the person defending the action.

Sometimes there can be multiple plaintiffs, and multiple defendants, in a civil action. For example, if two people both own a property that has been damaged, they both may be plaintiffs. Similarly, if two people have damaged another person's property, they both may be defendants.

**sue**
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

**damages**
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

A party who has a valid legal claim can **sue** the defendant, which means bringing a civil action against them. The plaintiff will seek to obtain a remedy, such as **damages**. One purpose of damages is to return the plaintiff to the position they were in before the breach occurred. When a defendant has done something that cannot be reversed (e.g. if a finger was cut off in an accident they caused), the only legal solution may be compensating the person whose rights have been infringed, and who has suffered loss or injury as a result, by paying an amount of damages that reflects the irreversible loss that they have suffered.

The parties to a civil dispute can be:

- an individual suing or being sued in their own name, or a group of individuals suing or being sued together
- a corporation, otherwise known as a company – a separate legal entity from the directors or individuals who run the company, which can sue and be sued
- the Commonwealth or a state, or a government agency or body (such as a local council).

## Employers

**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)

If an employee infringes a person's rights while acting in the course of their employment, the injured person may be able to sue the employer. This is because of the concept of **vicarious liability** (responsibility for the actions of another person). The reason for making the employer liable is that employers have a right, ability and duty to control the activities of their employees. For example, if an employee chef is negligent in the preparation of food which then poisons someone, the employer may be sued. The important fact that must be established is that the employee was acting 'in the course of employment'.

## Children

A child under the age of 18 can sue another person or group through a litigation guardian, often known as a 'next friend'. This is usually a parent or guardian.

Children can also be sued. The extent of their legal liability depends on the child's level of maturity and the behaviour expected of a child of that age.



**Source 2** A child under the age of 18 can sue another person or group through a litigation guardian.

### *Did you know?*

Some people have made negligence claims against supermarkets for failing to remove food from the floor, which has caused them to slip and hurt themselves. For example, claims have been made in relation to dropped grapes, and even hot potato chips.

# Types of civil disputes

There are various types of civil disputes. Some of the more common disputes involve claims in relation to negligence, trespass, defamation, nuisance, wills and inheritance, and breach of contract. These are explained in Source 3.

| Types of civil disputes | |
|---|---|
| **Defamation** relates to saying or publishing material which causes damage to another person's reputation. For example, a newspaper article might falsely report that a business owner has committed fraud, which drives customers away. | **Breach of contract** actions arise where someone has failed to do something they promised in a legally binding agreement. For example, you might pay in advance for a new car, but when the time comes for delivery you find out the dealer sold it to someone else for more money, in breach of your contract. |
| **Trespass to land** occurs when someone goes onto another person's land without permission. For example, a news photographer who refuses to leave your home when asked to go may be trespassing on the property. | **Nuisance** claims are made by people who have lost enjoyment or use of property (either public or private). For example, a stench coming from a nearby factory might be a legal nuisance because it interferes with a person's ability to enjoy their home. |
| **Wills and inheritance** claims involve disputes over a will. For example, an elderly person might be pressured into making a will that leaves all their money to a scam artist. The family could go to court to claim that the will was not valid. | **Negligence** occurs when someone owes a duty of care to another and breaches that duty, causing harm or loss to them. For example, a doctor might carelessly cut an artery during a medical procedure and harm the patient. The patient may sue, alleging a breach of duty of care owed to them. |

**Source 3** Various types of behaviour can give rise to disputes.

The following scenario is an example of a negligence claim in the Federal Court, in relation to crop damage caused by the Montara oil spill.

Actual scenario

## Montara oil spill class action

The Montara Wellhead Platform is located off the northern coast of Western Australia in the Timor Sea. In August 2009, a 'blowout' occurred at the oil well, causing the release of oil and gas into the Timor Sea. The oil and gas leak continued for about 74 days. The oil spill is one of the largest in Australian history.

After the leak, seaweed farmers in one of Indonesia's provinces, Nusa Tenggara Timur, alleged that they began to notice oil in and around their farms. Soon after, the seaweed crops were destroyed, and the loss in the region was said to be widespread. The **lead plaintiff** (the plaintiff who takes the lead in the **class action** on behalf of **group members**) alleged the loss deprived him of an income.

In August 2016, a law firm in Australia, Maurice Blackburn, filed a class action in the Federal Court of Australia on behalf of Indonesian seaweed farmers. The class action was commenced against the company that operated the Montara Wellhead Platform. Maurice Blackburn sought compensation on behalf of the farmers, alleging that the oil company owed a duty of care to the farmers, and that the duty of care was breached as a result of the events that caused the oil spill.

In late 2022, it was reported that an out-of-court settlement was reached between the company and the seaweed farmers, with the company agreeing to pay $192.5 million (including legal and other costs). It was reported the settlement was reached as part of a mediation, and that compensation would be paid without the company admitting any liability. The settlement was reached following a judgment in the Federal Court which found that the company owed a duty of care to the farmers who formed part of the class action, and that it had breached that duty.

**lead plaintiff**
the person who is named as the plaintiff in a class action and represents the group members; also sometimes referred to as the representative plaintiff

**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

**group member**
(in relation to class actions) a member of a group of people who is part of a class action

# 6.1 Check your learning

### Remember and understand

1 **Identify** two purposes of the civil justice system.
2 **Identify** two institutions that resolve disputes, and **outline** the types of disputes that they hear.
3 **Who** are the parties to a civil dispute?

### Examine and apply

4 Look at the different types of civil disputes in Source 3. Search for newspaper articles and find three recent disputes that have occurred between individuals or groups relating to three of those types of disputes. Briefly **summarise** each.
5 Read the scenario 'Montara oil spill class action'.
   a **Identify** the parties in this case.
   b Conduct some research. **Describe** the nature of a class action, and **distinguish** between the role of the lead plaintiff and the role of group members.
   c **Outline** the type of claim made by the plaintiff.
   d **Describe** the loss suffered in this case.
   e Conduct some research to find out why a settlement was reached during mediation even though the Federal Court had found that the company owed a duty of care to the farmers. Provide a summary of your findings. In your summary, **describe** the compensation amount agreed to be paid to the farmers, and how much each of the farmers may receive.

### Reflect and evaluate

6 **Discuss** the benefits of being able to sue an employer for the actions of an employee.

# 6.2 Key principles of the civil justice system

## Key knowledge

**In this topic, you will learn about:**

- **key principles in the Victorian civil justice system, including the burden of proof and the standard of proof.**

There are two key principles or concepts in the Victorian civil justice system:

- the **burden of proof** – which side must prove the case
- the **standard of proof** – the level of certainty the person who is deciding the case (e.g. the judge) must have in deciding the dispute.

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

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

## The burden of proof

The burden of proof refers to who has the onus or responsibility to prove the facts of the case. The burden of proof lies with the person or party who is bringing the case. In a civil dispute, this is the plaintiff. When a plaintiff sues a defendant, the plaintiff must show that the defendant was in the wrong. This follows the principle that the party who brings the case must satisfy the decision-maker (usually the judge) that their claim is supported by the facts.

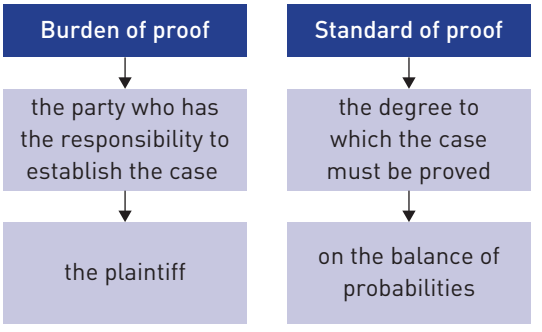
There are times when the defendant has the burden of proof in a civil dispute. For example:

- if the defendant files a counterclaim against the plaintiff, the defendant is therefore making a direct claim against the plaintiff and has the onus of proving that claim
- if a defendant raises a defence (e.g. the defence of contributory negligence in a negligence claim, claiming that the plaintiff contributed to the harm suffered), then the defendant is responsible for proving that defence.

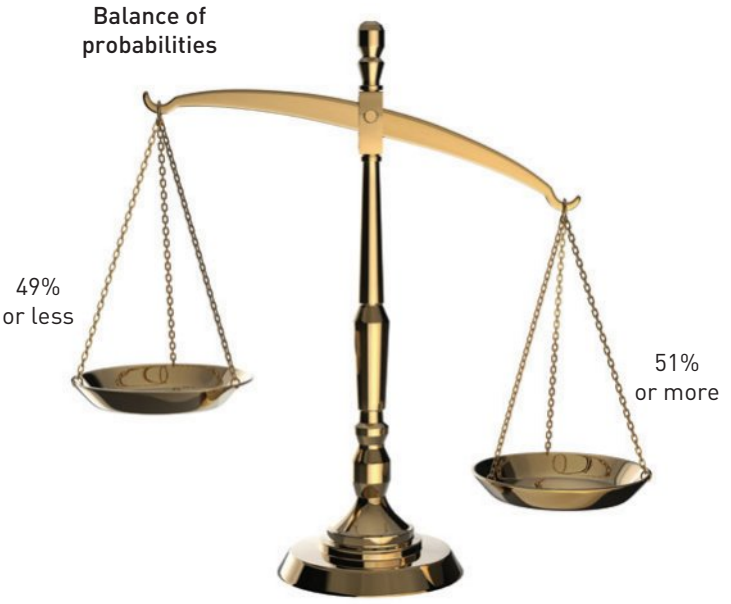
## The standard of proof

The standard of proof refers to the strength of evidence needed to prove the case. In a civil dispute the plaintiff must prove the case (or the defendant must prove the counterclaim or a certain defence) on the **balance of probabilities**. This means that the party must prove their version of events is more probable to have occurred than not. This is a less strict standard of proof than 'beyond reasonable doubt' in criminal cases, as it does allow for some 'reasonable doubt' to exist.

**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




**Source 1** The burden and standard of proof in civil disputes




**Source 2** Balance of probabilities is about a party convincing the person deciding the case that their version of events is more likely to have occurred than the other party's version of events.

## 6.2 Check your learning

### Remember and understand

1 **Explain** when the plaintiff will have the burden of proof in a civil dispute, and when the defendant may have the burden of proof.

2 **Distinguish** between 'beyond reasonable doubt' and 'on the balance of probabilities'.

### Examine and apply

3 For each of the following potential civil disputes, **identify** the potential parties in the case, who has the burden of proof, and the relevant standard of proof. **Justify** each response.

- **a** Portia teaches VCE Legal Studies. She read a Facebook post written by three of her students that suggested Portia is a terrible teacher.
- **b** Borak is a Year 8 student. He was playing in the yard at recess and fell out of a tree, badly injuring himself. The teacher who was supposed to be on yard duty was in their office at the time. It was later identified that Borak was acting recklessly when climbing the tree, as he had his shoes and socks off, and was trying to climb the tree only using one arm.
- **c** Freya was on a school excursion to a court and stole some chips from the milk bar near the train station.
- **d** Reece was on a school camp. The camp organisers lit a large campfire. The campfire got out of control, badly damaging Reece's tent and injuring one of Reece's classmates.

### Reflect and evaluate

4 In your view, should the standard of proof in a civil dispute be beyond reasonable doubt? **Justify** your answer.

# 6.3 Factors to consider before initiating a civil claim

## Key knowledge

In this topic, you will learn about:

- factors to consider before initiating a civil claim, including costs, limitation of actions and enforcement issues.

***Did you know?***

In a well-known 1994 American case, a woman sued McDonald's after buying a coffee that spilled on her lap and caused burns. The parties ultimately agreed to settle the claim.

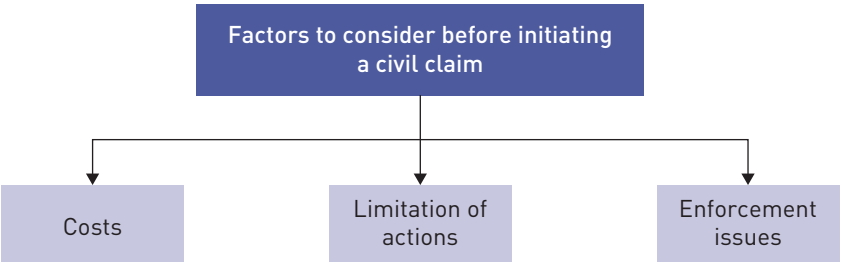
***Study tip***

You are required to analyse the factors that may be a consideration for a plaintiff in deciding whether or to sue a defendant. This means you need to identify the factors (i.e. costs, limitations of actions and enforcement issues) and examine each in detail (including, where possible, showing how they relate to one another). Examining as many relevant scenarios as possible will help you identify and analyse any series of facts in which these factors are present.

There are many reasons why a party may decide to initiate or commence a civil claim against person. Usually, the main reason is that the party wishes to be compensated for the loss they have suffered. In other situations, a party may wish to demonstrate to the defendant and to society in general that it is not acceptable to infringe a person's rights, and that people should be held accountable if they harm another person or engage in wrongdoing.

Initiating a civil claim is also known as 'issuing proceedings', 'bringing a civil action' or 'suing'. However, initiating a civil claim is risky. There is no guarantee a party will be successful, and the legal fees may be expensive. It can also be time-consuming and stressful and might lead to negative publicity. It is therefore important for a person, before initiating a civil claim, to consider various factors, including those shown in Source 1.

One or more of these factors may affect whether a party decides to initiate a civil claim. These factors are further explored below.




**Source 1** Three factors to consider before initiating a civil claim

## Costs

A party involved in a civil dispute may incur costs in resolving that dispute. The costs include fees for legal representation, disbursements (such as court fees, mediation fees and expert witness fees), and possible costs to be paid to the other party if the plaintiff is not successful.

### Fees for legal representation

The costs of legal representation include the costs of engaging a solicitor and a barrister. Depending on the case, and which dispute resolution body is used to resolve the dispute, sometimes a party will engage both a solicitor and a barrister. The role of the barrister will vary from case to case. For example, in some cases a barrister may only be engaged to advocate for the client in the pre-trial hearings and at trial. In other cases, a barrister may be more actively involved and may help draft court documents and, along with the solicitor, advise the client about the dispute.

It is not unusual for a party to pay their lawyers per hour. How much the solicitor or barrister will cost will depend on:

- the complexity of the case and the time it will take to resolve
- which dispute resolution body is used (e.g. VCAT generally does not allow lawyers, but a lawyer will generally be necessary for court cases)
- the size of the case – the number of witnesses, the extent of the evidence and the volume of documents involved
- the expertise of the legal practitioners; lawyers and barristers with greater seniority or expertise usually charge higher fees.

The high cost of legal representation can be a barrier for many people who wish to take a civil issue to court, and it is a factor to be considered before initiating a civil claim. The plaintiff also needs to consider the amount of costs in comparison with how much they are claiming. That is, will the costs be more than the amount the plaintiff is seeking, and if so, is it worth initiating the claim?

## Disbursements

**disbursements**
out-of-pocket expenses or fees (other than legal fees) incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third-party costs such as photocopying costs

Issuing a claim in court (or a tribunal) may result in a person having to pay a number of **disbursements** ('out of pocket' expenses), including:

- court fees (filing fees, hearing fees, and the fee for a jury if a party requests a jury) or tribunal fees (possibly filing fees and hearing fees)
- mediation fees (the costs of a mediator and possibly the costs of the venue where the mediation is held). Whether mediation fees are incurred will depend on whether the mediation is privately organised, or organised by the court or tribunal
- fees for expert witnesses (witnesses who are called to give their expert opinion, such as a medical expert called by the plaintiff to give evidence about the injuries they have suffered)
- the costs involved in using technology to manage documents that are relevant to the dispute. In larger disputes, there may be millions of documents, and the parties may use technology to manage and sort through those documents, particularly for the purposes of discovery.

The nature and amount of disbursements will depend on the case and whether the claim is heard in a court or tribunal. For example, a smaller claim in VCAT will incur very few disbursements, but a class action in the Supreme Court can incur significant disbursements.



**Source 2** In a large civil dispute, there may be thousands or even millions of documents to be managed. This can result in money having to be spent on technology to sort through and review those documents.

## Adverse costs orders

If the plaintiff is unsuccessful in a claim they have initiated in court, then not only will they have to pay for their own legal costs, but they may be ordered to pay for some of the defendant's costs. This is known as an **adverse costs order**.

**adverse costs order**
a court order (i.e. legal requirement) that a party pay the other party's costs

The general rule in civil disputes is that a successful party should receive an order from the court that their costs are paid by the losing party.

The fear of having an adverse costs order made against them could deter a plaintiff from initiating a civil claim. Therefore, it is a risk that the plaintiff needs to consider before initiating a civil claim.

Therefore, before initiating a claim, the plaintiff should consider:

- how much it will cost to have the dispute resolved
- whether they have the money to pay for those costs
- whether the damages that may be awarded outweigh the costs involved in making the claim
- whether they are eligible for legal aid or free legal assistance through other means
- whether they have the money to pay for the costs of the defendant if an adverse costs order is made
- what the risks are if they are ordered to pay the other side's costs and cannot afford to do so (e.g. will they have to sell their assets to pay those costs?).

# Limitation of actions

**Limitation of actions** refers to the restriction placed on the time within which a civil action can be commenced. For most types of claims, the plaintiff will need to commence the proceeding within a certain period of time. Once that period has passed, the plaintiff may be 'time barred' (prevented) from seeking remedy.

**limitation of actions**
the restriction on bringing a civil claim after the allowed time

The rationale for imposing limitations on the plaintiff is so that:

- the defendant does not have to face an action after a significant amount of time
- evidence is not lost and people can still remember what happened
- disputes can be resolved as quickly as possible, to promote social cohesion. That is, it is in the best interests of the community that disputes be settled quickly so that they do not 'linger' or 'fester' in the community.

In Victoria the main **statute** that imposes limitations on actions is the *Limitation of Actions Act 1958* (Vic). Depending on the type of claim, there are different limitation periods. For example, a plaintiff has one year to bring a defamation claim, and six years to bring a claim for breach of contract.

**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)

The effect of the expiry of any limitation period means that the plaintiff may be barred from obtaining any remedy. In some situations, the limitation period can be extended, as in the following scenario.

**Actual scenario**

### Limitation period extended for professional footballer

The plaintiff in this case was a professional football player who used to play for Richmond Football Club. The plaintiff has made personal injury claims against the club and two of its doctors.

The plaintiff played a number of senior games for the Club, after which he was traded to another club. He stopped playing at the end of 2005. The plaintiff is suing in relation to a chronic back injury. He is also suing the Club (not the doctors) in relation to a permanent brain injury allegedly arising from concussions.

In April 2021, the plaintiff filed a writ and statement of claim, alleging a breach of duty of care owed to him. The claim was filed well out of time, so the plaintiff sought an extension of time to pursue the damages

claim. When giving evidence, the plaintiff explained the delay, noting that he could not afford to bring proceedings earlier.

The Supreme Court of Victoria granted the extension. It noted that the explanations given by the plaintiff for the delays were understandable, given his situation. It was also noted that the concussion claim and brain injury were not discovered until about 2021. The Court was satisfied that a fair trial could be held even though there was a loss of some evidence, including some witnesses who were no longer available to give evidence.

The Supreme Court did not decide on the claim itself, but only on the issue of whether to extend the limitation period. No decision was made about the merits of the claim.

*Zantuck v Richmond Football Club & Ors* [2022] VSC 405 (19 July 2022)



**Source 3** Limitation periods are important, but in some circumstances, they can be extended.

In 2015 Victoria became the first state to remove limitation periods for persons who suffered physical or sexual abuse as a minor, or psychological injury that arose out of that abuse. The changes to the law followed a Victorian parliamentary inquiry into the handling of child abuse by religious and other non-government organisations, which found that time limitations were a major hurdle for victims who have suffered abuse as a child and who later wished to initiate civil claims.

## Enforcement issues

Normally, there are two ways that a plaintiff will obtain a settlement or remedy:

- by settling with the defendant before the court or tribunal hands down a decision
- by the court or tribunal making a decision about liability and awarding a remedy such as damages.

But what happens if a court orders an amount of money to be paid to a plaintiff, or the defendant agrees to pay a sum of money, but the defendant does not pay? Will the plaintiff be able to enforce the remedy they have been awarded?

Before initiating a claim, the plaintiff needs to consider whether the defendant *is able to* pay, and if so, whether the defendant *will* pay. Some of the issues that the plaintiff will need to consider are:

- whether the defendant has assets or money to pay anything to the plaintiff. For example, the defendant may be bankrupt (a formal process where the defendant acknowledges they are not able to pay their bills) and therefore not have any money available to them
- even if the defendant is not bankrupt, they may still be unable to pay
- the defendant may be in jail, particularly if the civil dispute arose out of a criminal action, and the defendant has been found guilty and imprisoned. It may therefore be more difficult to enforce the remedy. Alternatively, the defendant may be overseas or uncontactable, in which case it may be difficult to force them to pay any money
- if the defendant is a company, whether that company has any assets
- if the defendant has no assets or money, whether they have access to any other money (e.g. a loan from family or friends, or from a bank) to be able to pay the plaintiff.

Even if the defendant can pay, the plaintiff may have to issue enforcement proceedings to force a defendant to comply with a remedy. An example of an enforcement mechanism is obtaining from the court a warrant to direct the court sheriff to seize (take) the defendant's goods and sell them.

In short, the plaintiff needs to consider whether initiating a claim is 'worth it'. They may spend money on legal costs and be successful in a claim, only for the remedy to never be satisfied because they are unable to enforce it. Therefore, a plaintiff may wish to investigate the ability of a defendant to pay before they initiate a claim. The plaintiff might also consider whether some other person who has the ability to pay might be liable. For example, if the plaintiff can prove the defendant was acting in the course of their employment, the defendant's employer may be liable for their actions. This is called vicarious liability).

# Summary

A summary of the three factors to consider before initiating a civil claim is set out below. The summary points below will allow you to engage in an analysis of the factors.

| Factor | Summary |
|---|---|
| Costs | • The costs associated with the civil justice system include fees for legal representation, disbursements (court fees, mediation fees, expert witness fees) and possible costs to be paid to the other side if the plaintiff is not successful.<br>• The costs involved will depend on the matter; larger, more complex matters will likely cost more.<br>• The high cost is something that a party needs to consider, particularly in light of how much they are seeking. Will the costs be more than what they are claiming?<br>• The plaintiff may have to consider whether they are eligible for any free legal assistance, or whether they have the capacity to pay their costs or the defendant's costs if they are required to do so.<br>• Costs should also be considered in light of limitation of actions and enforcement issues. |
| Limitation of actions | • Plaintiffs must bring their case to court within a time limit. Once the time has passed, the plaintiff may be time barred from seeking a remedy.<br>• The time depends on the nature of the claim.<br>• The purpose is to ensure disputes are resolved quickly, evidence is not lost, and defendants do not have to face a civil claim long after the events occurred.<br>• Limitation of actions also need to be considered in light of costs; a plaintiff may need to spend money seeking an extension of the limitation period and will need to factor this in. |
| Enforcement issues | • Enforcement issues relate to whether the defendant refuses to pay, or cannot pay, damages.<br>• Issues can prevent a defendant from paying, such as where the defendant has no assets or money, is overseas, is in jail, or is a company and has no access to resources.<br>• Otherwise, a defendant may refuse to pay, in which case the plaintiff may need to spend money on legal proceedings to enforce the remedy.<br>• The plaintiff will need to consider whether it is worth it and may need to conduct research on the defendant before they initiate the claim. They may also wish to consider whether someone else may also be liable and can 'pay'. |

**Source 3** A summary of costs, limitation of actions, and enforcement issues

The three factors described above are emphasised in the scenario below.

## Hypothetical scenario

### Late-night fall

At 9 pm on 14 August 2023, 19-year-old Aria was walking home after spending time studying at her university library. As she walked, Aria began thinking about the previous weekend when she was at the beach with her friends.

Suddenly, Aria fell. Her leg got stuck in a large hole in the footpath. Her laptop and bag went flying and she heard something in her leg snap. She blacked out because of the pain. Aria was rushed to hospital with a broken leg, broken ribs, and bruising to her face and body. Aria missed four weeks at university, and remained on crutches.

The hole had been dug by council workers during the day. Ezra, a local council worker, had created the hole. When he heard about the accident, he was horrified. He was sure that he put up barriers around the hole. Later investigations revealed that Ezra had forgotten to put up the barriers, therefore there was nothing to stop people from falling into the hole.

Aria did not have enough money to see a lawyer, so decided to wait to do something about it until she was working and had saved up enough money to initiate a civil claim. Aria wants to sue for the damages suffered, as she now has a permanent injury to her leg. She is hoping her lawyer can run the case for her at a reduced cost.




**Source 4** Barriers are sometimes used to ensure people are not injured from works on pathways and roads

## 6.3 Check your learning

### Remember and understand

1 **Distinguish** between legal costs and disbursements in a civil dispute.

2 **Define** the term 'limitation of actions' and **explain** its relevance to a civil dispute.

3 **Describe** two factors that may be relevant to determining whether a defendant will be able to pay damages to a plaintiff.

### Examine and apply

4 On sticky notes or pieces of paper, write down as many other factors as you can think of that a plaintiff may need to consider before initiating a civil claim. Stick the notes up on the whiteboard or a wall in your classroom. As a class, group the factors together, and try to come up with a complete list of these factors.

As an extension activity, discuss with the class whether some factors are more important than others.

5 For each of the following scenarios, **explain** two factors that the plaintiff may need to consider before suing:

**a** Han, who is a lawyer, was defamed by James in a university article in 1979. Han wants to sue James for reputational damage. Han believes that James now lives in London and is a successful accountant.

**b** Bernard wants to sue his former friend for $6000 because his friend sold him a car that does not work. His lawyer has given him an estimate of $50 000 to recover the money and has indicated that Bernard has a 45 per cent chance of winning.

**c** Nhan gets along well with his neighbour, but they have an ongoing dispute about the neighbour's barking dog. The neighbour doesn't seem to see the issue and has already told Nhan that he has no money to pay a lawyer to defend himself. The neighbour owns his own home and drives an expensive car.

### Reflect and evaluate

6 Read the scenario 'Late-night fall'.

**a** What is the nature of Aria's claim?

**b** **Describe** the loss that Aria has suffered as a result of her fall.

**c** **Analyse** two factors that Aria should consider before initiating a civil claim.

Chapter

6

Review

## Top exam tips from Chapter 6

1 You must be able to analyse the three factors to consider before initiating a civil claim. These can be specifically examined. An analysis requires you to unpack each factor, possibly in connection with a scenario. For example, in relation to costs, consider issues such as whether the costs will in fact be high in light of the claim, whether the costs outweigh the downsides of incurring them, the possible damages amount, and whether costs can potentially be reduced. When doing this, make sure you use the language of analysis: *moreover, this is significant, therefore* and *in particular* can all be useful to show analysis.

2 You do not need to know minor details such as the limitation period for different types of claims, or the amount of costs that will be charged for filing a claim or for a hearing day. The Study Design does not require you to know that level of detail.

3 In the past, the VCE Legal Studies examination has asked questions about the difference between the standard of proof in a criminal case and the standard of proof in a civil dispute. Make sure you include notes about the differences between the burden of proof and the standard of proof in criminal and civil cases.

## 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 (including the exam) 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 Explain how the standard of proof in a criminal case is different to the standard of proof in a civil dispute.

(3 marks)

**Difficulty: medium**

2 'The amount of damages sought and the ability to recover damages are both relevant factors to consider before initiating a civil claim.' Explain what this statement means.

(4 marks)

**Difficulty: high**

3 Melissa has met with Victoria Legal Aid about a claim she has against her employer when she was in high school. Melissa claims that she suffered significant injuries and damage as a result of being bullied while working part-time. The employer is a small technology company. The company is very successful and has engaged lawyers, but it has most of its assets overseas. Melissa does not know how much she might be awarded as damages, but she is hopeful she can get enough money to get her through university.

Analyse **two** factors that Melissa should consider before initiating a claim against her employer.

(6 marks)

# Practice assessment task

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

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

## Escape after car drives into living room

In a shocking accident one night in August 2023, a family escaped serious injuries after an elderly woman lost control of her car and drove into their living room.

The driver, Penelope, is 79 years old and is on a pension (which means she gets benefits from the government). She was driving home from her daughter's house back to her aged care facility one night when she lost control of her car and drove into the front of a house. Pictures taken by fire crews showed the car completely inside the living room. The crash caused a large hole in the front of the home. The owners of the house were a young couple, Andy and Wendy, who also had a small child. They were lucky not to have been in the room at the time.

The police and ambulance attended the scene. Penelope was taken to hospital with minor injuries.

Andy and Wendy do not have insurance, and they have engaged a lawyer to help them with their claim. The estimate of damage on their home is $200 000. Andy is currently studying at university, and Wendy is working part-time. They have a large home loan to pay off.

The lawyer has explained that this is a straightforward case, but that it may be better for Andy and Wendy to try to resolve it out of court. The lawyer has also explained that she will try to keep costs 'as low as possible' and avoid the need to incur unnecessary fees.

# Practice assessment task questions

1 Who has the burden of proof in this case, and what is the standard of proof?

(2 marks)

2 In relation to this case, describe **two** reasons for imposing a time limitation on commencing civil claims.

(4 marks)

3 Explain why enforcement issues may be a factor to consider in this case.

(4 marks)

4 In relation to this scenario, analyse costs as a factor to consider before initiating a civil claim.

(5 marks)

Total: 15 marks

**Source 1** Costs are an important factor to consider when deciding whether to initiate a civil claim.



# 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 |
|---|---|---|---|
| • Key principles in the Victorian civil justice system, including the burden of proof and the standard of proof. | ☐ | ☐ | Go back to Topic 6.2. |
| • Factors to consider before initiating a civil claim, including costs, limitation of actions and enforcement issues. | ☐ | ☐ | Go back to Topic 6.3. |

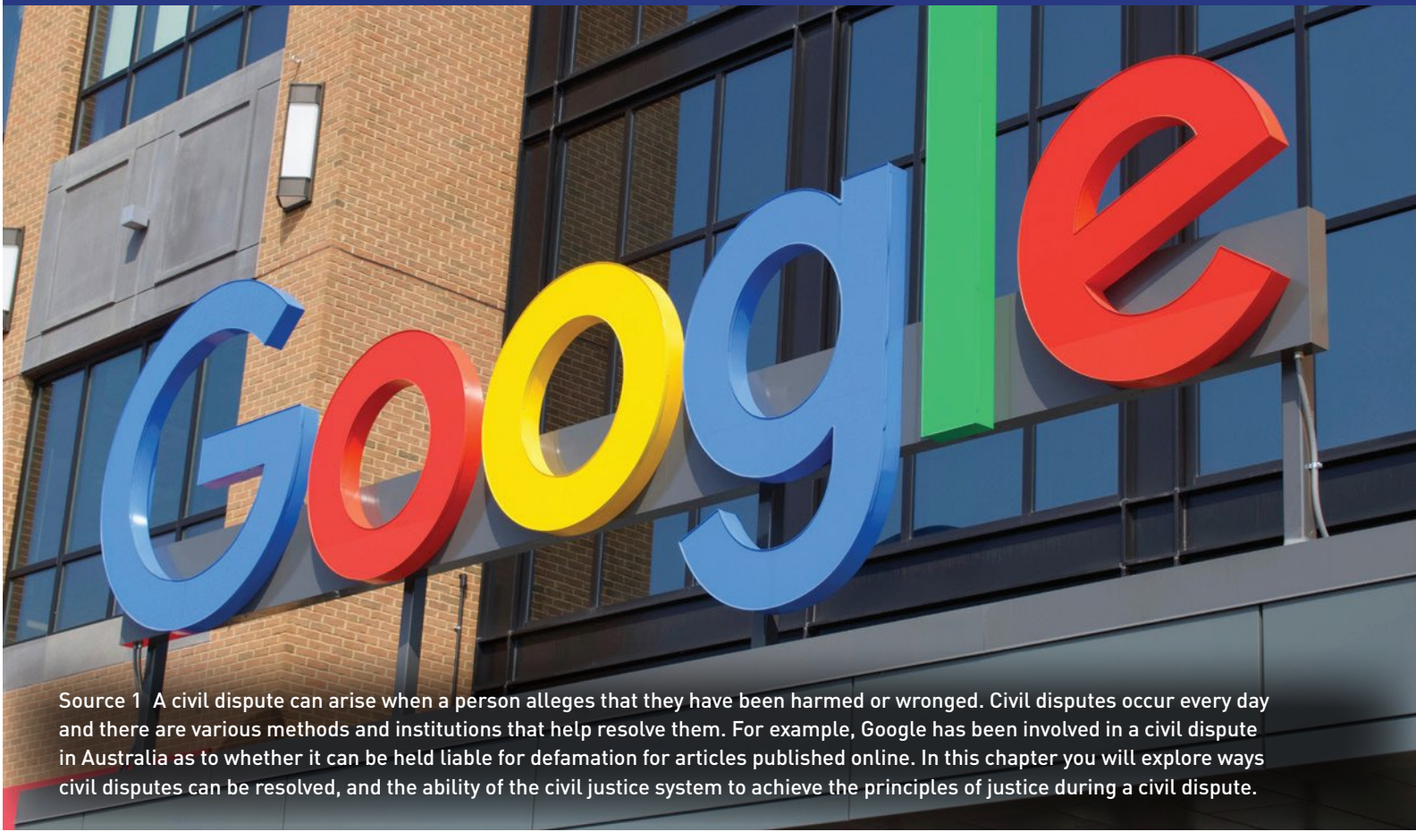
**Check your Student obook pro for these digital resources and more:**

- **Chapter 6** Chapter review quiz
- **Revision notes** Chapter 6
- **Chapter summary** Chapter 6
- **Quizlet** Revise key legal terms from this chapter.

Chapter

# 7

# The principles of justice in a civil dispute




Source 1 A civil dispute can arise when a person alleges that they have been harmed or wronged. Civil disputes occur every day and there are various methods and institutions that help resolve them. For example, Google has been involved in a civil dispute in Australia as to whether it can be held liable for defamation for articles published online. In this chapter you will explore ways civil disputes can be resolved, and the ability of the civil justice system to achieve the principles of justice during a civil dispute.

## Outcome

By the end of **Unit 3 – Area of Study 2** (i.e. Chapters 6, 7 and 8), you should be able to explain the key principles in the civil justice system, discuss the ability of remedies to achieve their purposes and evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute.

## Key knowledge

In this chapter, you will learn about:

*The principles of justice during a civil dispute*

- the principles of justice: fairness, equality and access
- the purposes and appropriateness of methods used to resolve civil disputes, including mediation, conciliation and arbitration
- the reasons for the Victorian court hierarchy in determining civil disputes, including administrative convenience and appeals
- the roles of key personnel in a civil dispute, including the judge or magistrate (including the role of case management), the jury, and the parties
- the need for legal practitioners in a civil dispute
- the use of class actions to resolve civil disputes
- the purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the courts
- the impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- compare the roles of key personnel in a criminal and civil case
- justify the reasons for the Victorian court hierarchy in determining civil disputes
- discuss the appropriateness of class actions, methods and institutions used to resolve a civil dispute
- discuss the impact of costs and time on the achievement of the principles of justice
- evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute
- synthesise and apply legal principles and 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

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

**arbitration** a method of dispute resolution in which an independent person (an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

**case management** a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (e.g. an order that the parties attend mediation)

**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

**conciliation** a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

**equality** one of the principles of justice; 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

**mediation** a method of dispute resolution that uses an independent third party (the mediator) to help the disputing parties reach a resolution

## Key legal cases

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

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



**Warm up!**
Check what you know about the principles of justice in a civil dispute before you start.

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

# 7.1 The principles of justice

## Key knowledge

In this topic, you will learn about:

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

In Chapter 4, you explored the principles of justice when looking at the criminal justice system. The principles of justice are:

- fairness
- equality
- access.

A brief overview of the three principles of justice, and how they relate to the civil justice system, is provided below.

## The principle of 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'. This incorporates three broad features: impartial processes, open processes and participation.

### Impartial processes

**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

In both the criminal and civil justice systems, our courts and personnel, including judges, magistrates, jury members, mediators and **arbitrators**, must be independent and impartial. They must not be biased towards or against either party, and the case must be decided based on facts and law, not on prejudices.

**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

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 judge who has shares in a public company that is being sued. The plaintiff may argue the judge might not be impartial because they have a 'financial interest' in the defendant.

### Open processes

Like criminal cases, civil trials and hearings should be open to the public and the court's judgment should be given in public. This ensures the administration of justice is transparent and open to scrutiny. In general, civil trials and hearings, and tribunal hearings, are open. Court judgments are made available to the public (online), so people can be informed about the operations of the courts and tribunals and see 'justice being done'.

There are, however, many instances in the civil justice system where disputes may be resolved in private. This is largely because of the private nature of civil disputes (as opposed to the public interest in criminal cases) and the ability of the parties to decide how their civil dispute should be resolved. For

example, a mediation, where two parties try to resolve their dispute out of court before a mediator, is conducted in private, and any agreement or resolution reached is normally kept confidential.

## Participation

The final feature of fairness is that all people should be able to participate in the civil justice system. This primarily relates to the two parties – the plaintiff and the defendant – but can also extend to participation in the civil justice system by members of the community who serve on a jury. Some of the key characteristics of participation in a civil case are as follows:

- **opportunity to know the case put against them**: both parties should have the opportunity to know the case that is put against them. This includes a requirement for the plaintiff and the defendant, before trial, to disclose their claims and defences, and all the relevant documents and **evidence** they will rely on in support of their case. This can be achieved through pre-trial procedures, which are steps taken by the parties before trial to try to narrow the issues in dispute, which provide an opportunity for the other side to understand the case that is put against them, and which try to limit the scope of the dispute. It also extends to participation in trial or hearing processes
- **opportunity to present their version of the case**: both parties should have the opportunity to make submissions, call their own witnesses, and produce documents in support of their case and in an attempt to show why they are right, and the other side is wrong. They should also have the opportunity to conduct a **cross-examination** of the other side's witnesses
- **use of an interpreter**: if a person is not able to understand English, they should have access to an interpreter. However, free interpreter services are not available for people involved in civil matters
- **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 old that they cannot 'enjoy' any remedy awarded to them.

Fairness in a civil case does not mean that every plaintiff should have the same outcome or **remedy** for every dispute of the same nature. As with the criminal cases, fairness is not about the outcome of the case. Instead, it is about the processes used to ensure a proper outcome. For example, if a famous young concert violinist loses a finger, the impact on their career will be much worse than the impact on a retired postal worker with the same injury. It is therefore possible that the remedy awarded for the violinist will be greater than that given to the postal worker.

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.

**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

**remedy**
any order made by a court (or tribunal) 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



**Source 1** Scrutiny of the justice system includes allowing media to have access to most court cases.

# The principle of 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

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 everyone to engage with the justice system without disparity or disadvantage'.

Equality is about how the parties are treated in the proceeding, which could involve same treatment, or different treatment.

## Same treatment

As in the criminal justice system, the parties to a civil dispute should be treated in the *same* way. This is known as 'formal equality'; all people are treated the same and given the same levels of support, regardless of who they are.

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

By way of example, as explained above, courts use pre-trial procedures as part of resolving disputes, which are steps taken by the parties before trial to try to narrow the issues in dispute and to resolve the dispute before hearing or trial. If both parties are treated the same, then the court will require both parties to complete these pre-trial procedures, regardless of who they are or whether they are represented by a lawyer.

## Different treatment

The second feature of equality is that sometimes people need to be treated differently; known as 'substantive equality'. Sometimes, treating two parties the same way results in disparity or disadvantage. For example, in an attempt to 'level the playing field' in a case where one party has legal representation and the other does not, the judge may need to assist the **self-represented party** by explaining the pre-trial procedures, or the court may need to assist the self-represented party by giving them instructions on how to complete those procedures.

**self-represented party**
a person before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

To achieve equality, the courts have recognised that changes may need to be made to processes to try to avoid, as much as possible, any disparity or disadvantage suffered by a person because of who they are.

### Examples of measures

Some of the measures that may be put in place in a civil case are as follows:

- **assistance to a self-represented party**: a judge or magistrate may need to take steps to explain certain rights or processes to a self-represented party, such as explaining what it means to cross-examine a witness; or they may have to provide some flexibility to the self-represented party when they may get things wrong (such as asking a witness a question they should not ask)
- **interpreters**: interpreters may be required for people who are not able to understand or communicate in English
- **providing information in a different way**: there may be a need for information to be communicated in a different way. For example, people with no or little English may need to get information in their own language; and in some situations there may be a need to speak more slowly and in an ordinary tone
- **changes to court or tribunal processes**: in some circumstances, it may be necessary to change processes. For example, the use of audio-visual links may be needed to assist people who are overseas or in a remote area
- **different form of giving evidence**: people who do not practise a religion can choose not to 'swear by almighty God'; alternatively, those who do practise a religion may wish to swear an **oath** using a particular religious text.

**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

In this chapter, you will learn about the civil justice system and make some assessments about whether it achieves equality for parties in civil disputes. Try to look for when formal equality, or same treatment, will achieve equality, or where there may be situations where measures may be needed to avoid disadvantage, and if so, what those measures should be.

# The principle of access

**Access** is the final principle of justice. 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'.

There are two features of access, which also apply to civil disputes: people should be able to engage with the justice system, and that engagement should be on an informed basis.




**Source 2** Does the above race achieve equality?

## Engagement

People should be able to use and participate in the civil justice system and its processes. This includes:

- **providing a range of dispute resolution methods**: using the courts to resolve a civil dispute can be costly and intimidating, so people need to have access to dispute resolution bodies and methods other than courts, including:
  - complaint bodies, such as **Consumer Affairs Victoria (CAV)**
  - tribunals, such as the **Victorian Civil and Administrative Tribunal (VCAT)**
- **physical access**: people should be able to physically access the courts, tribunals, services or legal representation. This may be more difficult for people in rural or remote areas, or for people who have disabilities that mean they are not able to physically attend
- **technological access**: if virtual or online methods are used to provide services or even conduct hearings, then people should be able to engage with those methods. This may be more difficult for people with special needs, those who are not able to use technology, or for people who do not have computer access (such as the elderly)
- **financial access**: people should not be prohibited from using the civil justice system because they do not have the financial means to do so. This has historically been one of the greatest challenges of the civil justice system, in that it is seen to be expensive and out of reach for some
- **no delays**: the ability to engage in the civil justice system also extends to the ability of the justice system to be able to resolve the case without unreasonable delays. Delays impact on access as it limits the ability of the system to achieve a just outcome, particularly if it impacts on people's memories about what happened.

**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

**Consumer Affairs Victoria (CAV)**
The consumer affairs regulator in Victoria, with advisory, information, compliance and enforcement roles

**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

## Informed basis

For people to engage with the civil justice system, they should be able to get information and use the procedures, methods and institutions that resolve a civil dispute. This includes the courts, tribunals, and bodies and institutions that provide legal advice, education, information, assistance and representation. People should also be informed about their rights, when those rights may have been infringed, and what

remedies may be available to them. As explored in Chapter 4, the following may help a person become more informed:

- **education**: a person who has a better understanding of the civil justice system or their rights may be better informed than others. Young people, people who are not familiar with our justice system, or people with lower literacy levels may be at a disadvantage in understanding the civil justice system
- **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 the courts, tribunals or other bodies such as community legal centres. For example, CAV has information on its website and also provides information to people about their rights and where they can go to get help for their problem
- **legal services**: people should have access to legal services. The legal services could be to inform people of their rights, or to advise them on the best way to resolve a dispute
- **legal representation**: having legal representation is one of the most effective ways for a person to be informed about the civil justice system, as legal practitioners are skilled and experienced in dispute resolution processes, the law and rights. Therefore, there may be greater access to justice if a person is able to afford legal representation.

In this chapter, you will learn about the civil justice system and consider whether it provides access to all parties in civil disputes. Try to look for the features listed here to determine whether there has been access.

***Study tip***

In Unit 3 – Area of Study 2, you are required to evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute. Throughout this chapter, keep these principles in mind when considering whether the civil justice system achieves justice. Make notes when you identify aspects of the civil justice system that achieve or do not achieve one or more of these principles.



**Source 3** People living in rural areas may not have the same access to legal services, courts and tribunals as those living in bigger centres.

# 7.1 Check your learning

## Remember and understand

1 What are the three principles of justice? **Describe** each one briefly.

2 Is 'access to justice' limited to access to courts? **Explain**.

3 **Why** are there a number of self-represented parties in civil disputes?

## Examine and apply

4 **Identify** two individuals or groups in Australia that may need to be treated differently in order to be treated equally. **Describe** how a judge may be able to achieve equality in these cases.

5 Two different plaintiffs have sued two different defendants in two different proceedings. **Explain** why a different remedy may be awarded in each of the proceedings, but the trial may still have been fair.

6 Look at the picture in Source 2. Consider the following:
   - **a** Does this achieve equality? Give reasons.
   - **b** Think of at least one different type of race that may achieve equality. Draw or write about the race.
   - **c** Come together as a class and share your views and your diagrams, pictures or scenarios.

## Reflect and evaluate

7 Choose one rural and remote town in Victoria and imagine that a person in that town has a civil dispute that needs resolving.
   - **a** Go to the Magistrates' Court, County Court and Supreme Court websites. Links are provided on your obook pro. Find the closest location of those courts to the town you have chosen.
   - **b** Using a map of Victoria, plot your chosen town and the closest location of the above courts to that town.
   - **c** Search online to find out whether there are any local lawyers in that town who specialise in resolving civil disputes. Write their names next to the map.
   - **d** Conduct some research to find out whether there are any community legal centres, legal education centres or any other centres nearby that offer free legal assistance, education or information.
   - **e** Prepare a short report on your findings about the accessibility of the civil justice system to a person living in your chosen town.

8 Imagine you are a plaintiff in a civil dispute. Write down three expectations you would have about the ability of the civil justice system to resolve your dispute (e.g. you may expect it to resolve your dispute cheaply). For each expectation, **identify** the principle of justice to which it most relates, and comment on the likelihood of the expectations being met. Discuss your answer with a member of your class.

9 Conduct some research and find out the top three reasons why the Victorian civil justice system is sometimes criticised for being inaccessible. Provide a summary of your findings.

**Weblink**
Magistrates' Court of Victoria

**Weblink**
County Court of Victoria

**Weblink**
Supreme Court of Victoria

# 7.2 Dispute resolution methods

## Key knowledge

In this topic, you will learn about:

- the purposes and appropriateness of methods used to resolve civil disputes, including mediation, conciliation and arbitration.

Parties and dispute resolution bodies can use a range of methods to resolve civil disputes. These include mediation, conciliation and arbitration, which are often referred to as **alternative dispute resolution methods** (ADR). However, their use is now so common that the word 'alternative' is becoming less appropriate to describe them.

**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

Mediation, conciliation and arbitration are dispute resolution methods that can be used by the parties without going to a court or tribunal. However, these methods are also used by dispute resolution bodies, such as courts and tribunals, to resolve disputes as an alternative to a final hearing or trial.

Very few civil cases initiated in court will proceed to a final hearing or trial; in fact, it is estimated that fewer than 5 per cent of cases will proceed to hearing. Most cases settle before the final hearing or trial, often because the parties have attended mediation.

In this topic, you will explore mediation, conciliation and arbitration as dispute resolution methods, including their appropriateness in resolving disputes, and their strengths and weaknesses.

# Mediation

**Mediation** is a cooperative method of resolving disputes that is widely used by courts, tribunals and other dispute resolution bodies. It is a tightly structured, joint problem-solving process in which the parties in conflict sit down and discuss the issues involved, develop options, consider alternatives and try to reach an agreement through negotiation and compromise. They do this with the help of an independent **mediator** who, rather than advocating (or arguing) for either party, facilitates communication between the parties and encourages them to reach their own agreement to resolve the dispute. Any decision reached is voluntarily made by the parties (not the mediator).

**mediation** a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

**mediator** an independent third party who does not interfere or persuade but helps the parties in a mediation as they try to reach a settlement of the matter

If the parties come to a decision, they may sign **terms of settlement** or a deed of settlement, which reflects their agreement about the way they will resolve their dispute. The terms of settlement may then be enforceable through a court if one of the parties does not follow through with the promises they made.

**terms of settlement** a document that sets out the terms on which the parties agree to resolve their dispute

## How mediation is used

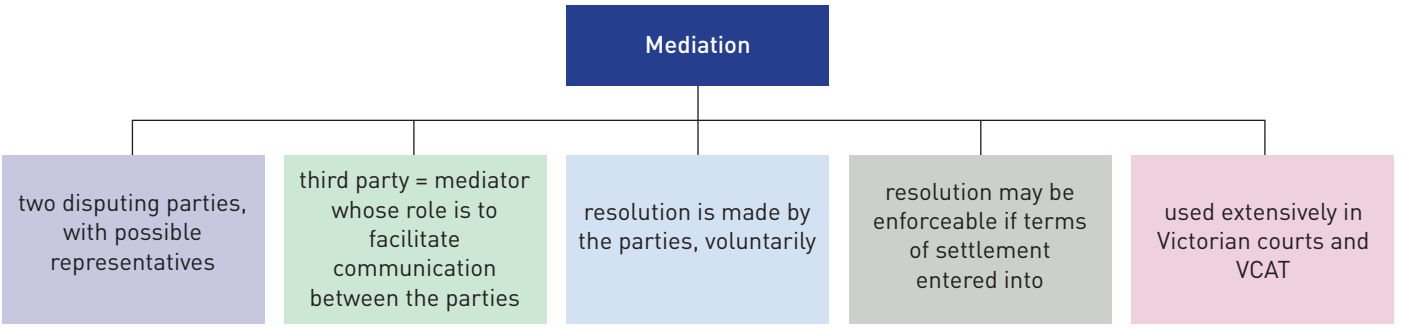
If the plaintiff issues their claim in court, the court will generally order the parties to go to mediation before the final trial or hearing, with or without the consent of the parties. The mediator can be appointed by the court or agreed on by the parties. The cost of the mediation is usually split between the parties. Associate judges (judges who have certain powers to resolve disputes) in the County Court and Supreme Court can also mediate disputes. This is known as 'judicial mediation'.

In 2021–22, the Supreme Court of Victoria estimated that 1035 hearing days were saved through using judicial mediation. This was in addition to savings in litigation costs, courtroom facilities, judgment writing time and reduction in stress on parties who are going through litigation.

**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)** also often refers a claim to mediation before a final hearing, as you will learn later in this chapter.

Alternatively, the parties may attempt to mediate the dispute at any time prior to or after they initiate a claim. Mediators can be accessed through centres, such as the Dispute Settlement Centre of Victoria, or through private mediation service providers.




**Source 1** The key features of mediation

In the following scenario, a case involving a young teenager was resolved through mediation.

## Actual scenario

# 'I'd give it back if she could walk': $20m payout over swim school accident

Tom Cowie, *The Age*, 16 October 2021

A girl who was paralysed when she hit her head on the bottom of a pool during a swimming lesson has won a settlement of $20 million, believed to be one of the biggest payouts to an individual in Victorian legal history.

Milly Yeoman, 17, was left a quadriplegic from spinal injuries suffered when she was instructed to dive into a toddlers' pool as a 12-year-old pupil at Ballarat North Primary School in 2016.

Ms Yeoman filed a claim in the Supreme Court in 2018, which was settled earlier this year at mediation.

Swimming school company De Kort Enterprises Pty Ltd agreed to pay $10 million, the state of Victoria $6.67 million and the lesson instructor $3.33 million, according to court documents. The settlement was reached with a denial of liability from the defendants.

At the time, the payout was kept confidential, however the full amount was revealed in court documents this week as part of proceeding to recover legal costs. Ms Yeoman's legal team is seeking $1.27 million in fees.

The incident was also the subject of criminal proceedings, which resulted in the swimming school being fined $150 000 in 2019.

During the lesson, Ms Yeoman was instructed to dive into a pool that was just 1.2 metres deep. She hit her head on the bottom, severing her spinal cord.

The incident was captured on CCTV cameras, with the footage shown during court hearings.

As recognition of the financial stress on Ms Yeoman's family, it was agreed that $2 million would be paid before the settlement was reached. The final amount will be held by the court in a fund as Ms Yeoman is under 18.

Ms Yeoman spent almost 200 days in the Royal Children's Hospital and requires 24-hour care. Her family said the money would be spent on building a new house to cater for Ms Yeoman's complex needs, including a therapy pool and gym.

'Nothing else has changed, it's still an everyday job,' said her father, Peter Yeoman.

...



**Source 2** An accident at a swimming lesson resulted in a large payout agreed to at mediation.

# Conciliation

**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

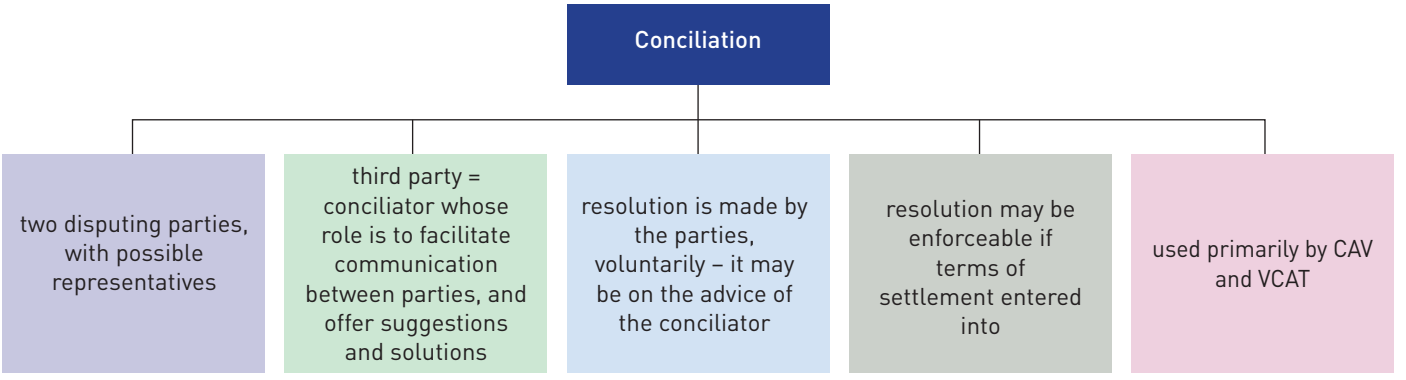
**Conciliation**, another co-operative method of dispute resolution, involves the use of an independent third party, a **conciliator**, to assist the disputing parties to resolve their conflict through negotiation and compromise. Rather than making the decision to resolve the dispute, the conciliator listens to the facts, makes suggestions about possible ways to resolve the dispute and assists the parties to reach their own mutually acceptable agreement or decision.

Conciliation can differ from mediation in that the conciliator has more influence over the outcome. The conciliator, who is usually someone with specialist knowledge, suggests options and possible solutions and is more directive than a mediator. However, their processes are very similar. Like with mediation, the parties can agree to enter into terms of settlement which document the basis upon which the parties agreed to resolve the dispute.

## How conciliation is used

Generally, the courts do not use conciliation, preferring to refer parties to mediation. However, all courts have the power to order any civil dispute issued in court to attend conciliation.

Conciliation is used by other bodies, such as Consumer Affairs Victoria (CAV), which you will learn about later in this chapter. VCAT can also order parties to take part in a compulsory conference to identify and clarify the nature of the issues in dispute in the proceedings, and to promote a settlement before a matter is heard in the tribunal. This conference is conducted using a conciliation-like process. Otherwise, like mediation, parties can themselves arrange a conciliation at any time.




**Source 3** The key features of conciliation

# Appropriateness of mediation and conciliation

Whether mediation or conciliation is most appropriate for a particular civil dispute will depend on the nature of the dispute and the parties. The following list shows some of the points to consider when determining whether mediation or conciliation is appropriate (there may also be other relevant points):

- whether the relationship between the parties will continue (e.g. the dispute is between neighbours or family members, or between employer and employee). In this situation, mediation and conciliation may help to preserve the relationship
- whether the parties are willing to meet in a spirit of compromise and stick to any agreement reached. If so, then mediation and conciliation may be more appropriate. If there is a history of broken promises or the parties do not show a willingness to compromise, they may be less appropriate
- whether there is a history of violent and threatening behaviour. In this case, it may be inappropriate for the parties to come together in such a setting

- whether one or both of the parties want the dispute to be resolved privately or confidentially (in which case mediation and conciliation may be appropriate), or whether they want a public record of what occurred or the plaintiff wants to 'make a point' about the defendant's conduct
- when the mediation or conciliation is to be held. If it is held too early, when the parties do not yet know the details of the claim or how much is in dispute, then it may fail to resolve. It may also be held too late, when the parties have already spent so much money on the claim that they feel they must go to trial or hearing on the issues
- whether the matter is urgent. If so, and there is a need for urgent court intervention, the parties may not be able to wait for a mediation or conciliation to be held
- whether there is a gross imbalance of power. If that is the case, the other party may prefer to resolve it in court or at a tribunal.

## Strengths and weaknesses

The strengths and weaknesses of mediation and conciliation are set out in Source 4. When you consider them, try to link most of them to at least one of the principles of justice (e.g. an independent third party assists *fairness* because they act impartially).

| Strengths | Weaknesses |
|---|---|
| Mediation and conciliation involve an independent, impartial third party (the mediator or conciliator) who does not take sides but facilitates the discussion and may assist the parties to reach a resolution themselves. | The decision reached may not be enforceable, or may be difficult to enforce, depending on the terms of settlement. If that is the case, there may be a lot of money and time spent on reaching a resolution, but the plaintiff will need to continue with their case anyway if the defendant fails to comply with the terms. |
| Mediation and conciliation are much less formal than a court hearing, and therefore are likely to be much less intimidating, stressful and daunting for parties, particularly those who do not have experience in civil disputes. | Because the court is not deciding the case, one party may compromise too much, or one may be more manipulative or stronger, so that the other party may feel intimidated. |
| Mediation and conciliation are conducted in a safe and supportive environment, in a venue that is suitable for both parties rather than a venue such as a courtroom, which one or both parties may find confronting or difficult to attend. | One of the parties may refuse to attend, or if they do attend, they may refuse to participate, in which case it may be a waste of time and money. |
| If successful, mediation and conciliation can save significant time in waiting for a final hearing or trial. They also save the costs of the final trial or hearing, which can be significant. This can also be a saving for the civil justice system itself. | If the matter does not resolve, then it may be a waste of time and money. Often the parties have to spend money on legal fees preparing for and attending the mediation or conciliation, only for it to be unsuccessful. |
| Mediation and conciliation are normally conducted in private. This can be beneficial particularly for a party who wishes to keep the settlement confidential. | Particularly for high-profile disputes where the community may have an interest in the outcome, there is no 'open justice' or no ability to know what the outcome was, or whether the defendant admitted that they were liable. |

**Source 4** 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 make a decision that is legally binding on the parties. The decision is known as an arbitral award

**arbitral award**
a legally binding decision made in arbitration by an arbitrator

**Arbitration** is a method of resolving disputes without a formal court process. An independent arbitrator (a third party given the task of presiding over the discussion) will listen to both sides and make a decision that is binding on the parties. Unlike mediation and conciliation, in an arbitration the arbitrator makes a final and binding decision. The final order is known as an **arbitral award**, and it is enforceable.

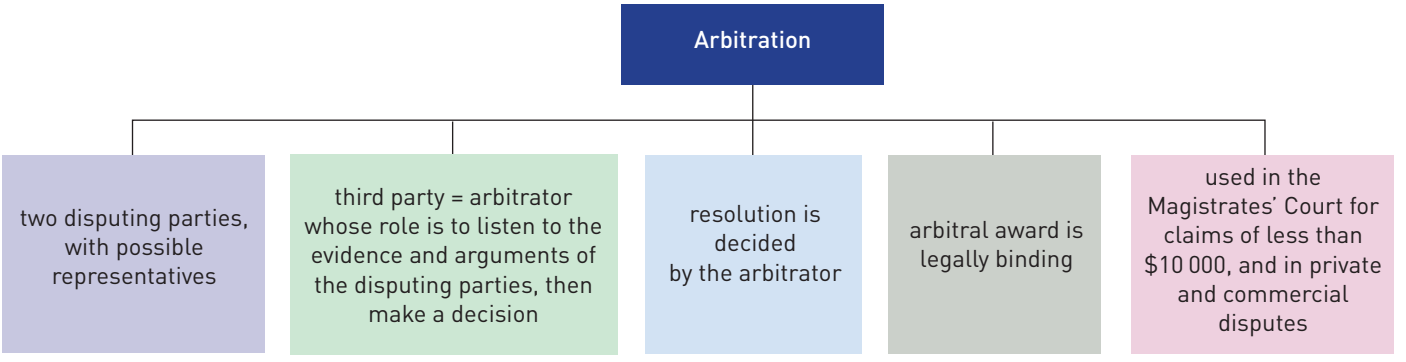
Arbitration is often conducted in private, and it can be less formal and more cost-effective than attending a court hearing or trial. Parties have much more control over the process and are free to agree on the procedure. For example, they may be able to agree on how evidence is to be submitted, or the time by which steps are to be completed.

Generally, the arbitrator:

- is not bound by rules of evidence but may inform themselves on any matter as they think fit
- must ensure that the parties are treated equally and each party is given a reasonable opportunity to present their case
- is not required to conduct the proceedings in a formal manner.

In Victoria, arbitration is available when:

- the parties have agreed to settle their dispute by arbitration. For example, a contract between two parties might include a clause stating that if a dispute arises, both parties agree to follow the decision of an independent arbitrator
- the court orders the parties to arbitration (though the consent of the parties is required for this to occur)
- the claim has been filed in the Magistrates' Court and the plaintiff is seeking $10 000 or less, in which case the Court will normally hear the case through arbitration.




**Source 5** The key features of arbitration

## How arbitration is used

The courts and VCAT have power to refer disputes to arbitration prior to a final hearing or trial, as long as the parties consent (with the exception of small claims in the Magistrates' Court). For small claims in the Magistrates' Court (less than $10 000), the Magistrates' Court can refer a dispute to arbitration by a magistrate.

Otherwise, arbitration is commonly used in a private setting, where it is arranged by the parties themselves because there is a term in the contract which states that the parties must arbitrate if a dispute arises. Arbitrators can be found using institutions such as the Resolution Institute or the Victorian Bar. The Melbourne Commercial Mediation and Arbitration Centre offers facilities for an arbitration, which can be booked by the parties.

# Appropriateness of arbitration

Whether arbitration is most appropriate for a civil dispute will depend on the nature of the dispute, and the parties. Some of the points to consider when determining whether arbitration is appropriate (there may also be other relevant points) are:

- whether the parties have agreed to arbitrate the dispute, or the claim is less than $10 000 and has been issued in the Magistrates' Court. If so, then arbitration is appropriate. If not, then the parties may not be willing to arbitrate the dispute
- whether the parties want the benefit of a binding and enforceable decision made by an independent third party, or whether they would prefer to have control over the outcome and decide on that outcome themselves (in which case, a method such as mediation may be more appropriate)
- whether the parties wish to have the dispute considered by a third party and want evidence to be presented to that third party as part of the dispute so that it can be finally decided on
- whether both or one of the parties want the dispute to be resolved privately or confidentially (in which case it may be more appropriate), or whether they want a public record of what occurred or the plaintiff wants to 'make a point' about the defendant's conduct (in which case it may be less appropriate).

# Strengths and weaknesses

Source 6 provides a summary of some of the strengths and weaknesses of arbitration. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| The decision is binding and is fully enforceable through the courts. This means that there is certainty in the outcome. | The parties have no control over the outcome, which will be imposed on them by the arbitrator. This means that a party could 'lose' or 'win', without feeling like they have both won and lost (as can be the case in a mediation). |
| The arbitration is normally held in private and will be confidential, which can be beneficial for parties wishing to avoid the publicity of a trial. | It is not available if the parties have not agreed to this form of dispute resolution, or if the claim is not a small claim in the Magistrates' Court. |
| The parties have control over how the arbitration is conducted, by determining how evidence is to be presented and when steps are to be undertaken. | It can be costly and take a long time depending on the nature of the dispute and the way the parties have decided to resolve it. For example, if the parties have agreed to exchange evidence and have a hearing, this will be much more expensive than a mediation. |
| The arbitrator is generally an expert on the subject matter and is required to act impartially when making a binding decision. | Arbitrations can be formal if the parties have agreed on a formal method of arbitration, adding to the stress, time and costs. |

**Source 6** Strengths and weaknesses of arbitration

# Comparison of dispute resolution methods

A comparison of the three methods of dispute resolution is set out in Source 7.

| | Mediation | Conciliation | Arbitration |
|---|---|---|---|
| **The third party** | | | |
| Name of third party | Mediator | Conciliator | Arbitrator |
| Is the third party independent? | Yes | Yes | Yes |
| Role of the third party | Facilitates discussion between the parties and ensures all parties are being heard. Does not need to be an expert in the field | Facilitates discussion and suggests options and possible solutions. Usually someone with specialist knowledge in the field | Listens to both sides and makes a binding decision on the parties. Usually someone with specialist knowledge in the field |
| **How it is conducted** | | | |
| Is it conducted in private? | Yes | Yes | Normally, yes |
| Are parties required to be present personally? | Yes | Yes | Yes, but they may be represented by someone else |
| Are there rules of evidence and procedure? | No | No | The parties may agree how it is to be conducted |
| **Final decision** | | | |
| Who makes the decision? | The parties | The parties | The arbitrator |
| Is a final order made? | No, unless the terms of settlement are formulated into orders that are then made by the court or VCAT to give effect to the settlement | No, unless the terms of settlement are formulated into orders that are then made by the court or VCAT to give effect to the settlement | Yes, called an arbitral award |
| Is the decision binding? | If the terms of settlement are formulated into orders, yes. If the parties settle the case, the terms of settlement can be enforced (but will require the party to institute proceedings to enforce them) | If the terms of settlement are formulated into orders, yes. If the parties settle the case, the terms of settlement can be enforced (but will require the party to institute proceedings to enforce them) | Yes |

**Source 7** A comparison of the three methods of dispute resolution

# 7.2 Check your learning

## Remember and understand

1 **Explain** what is meant by 'mediation'. **Identify** two types of disputes that would be suitable for mediation.

2 **Describe** two differences between the role of the mediator and the role of the conciliator.

3 **Distinguish** between the role of the conciliator and the role of the arbitrator.

4 **Explain** two ways in which arbitration is different from, and similar to, mediation.

## Examine and apply

5 A mediator usually starts a mediation by explaining the benefits of mediation. Prepare a speech that would be suitable for a mediator to make at the start of a mediation which involves a $5 million claim in the Supreme Court, with the trial expected to take more than three months.

6 Create a concept map showing the different types of dispute resolution methods. Use the concept map to show similarities and differences, and how the methods are used by courts, VCAT and CAV.

7 Form small groups. Each group is to create a role play of the resolution of a civil dispute using one of the following:

- mediation
- conciliation
- arbitration
- a final hearing or trial.

**a** Choose the type of civil dispute, the scenario that you will act out, and the dispute resolution method you have chosen. Think about scenarios in which the chosen dispute resolution method may or may not be appropriate. It is up to you whether the method is successful in resolving the dispute.

**b** Act out the role play in front of the class. They will need to work out which dispute resolution method you are acting out.

**c** Following the role play, discuss with the rest of the class the strengths and weaknesses of the dispute resolution method, and the appropriateness of the method for that particular type of dispute.

8 In the following scenarios, **identify** which dispute resolution method you would recommend to the parties (other than mediation, conciliation and arbitration, a court hearing or trial can also be used as a response). **Justify** your answer.

**a** Sally is suing her ex-husband for injuries suffered as a result of domestic violence. She fears him and does not want to be near him.

**b** Nasir is alleged to have breached his contract with Zara. The contract stipulates that the parties must arbitrate the dispute, but Nasir now wants to mediate the dispute.

**c** Harriet has issued a $5000 claim in the Magistrates' Court against their former employer.

**d** Leilani is suing the Victorian Government for negligence. Leilani wants all the publicity she can get to show the public how negligent she thinks the government has been.

**e** Thierry has a dispute against a building company. He thinks the dispute is complex and will require some assistance from a third party who has knowledge of the area of law. Both parties have agreed to try to resolve the dispute prior to court.

## Reflect and evaluate

9 As a class, link each of the strengths and weaknesses of the dispute resolution methods to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

10 Read the actual scenario '"I'd give it back if she could walk": $20m payout over swim school accident'. **Discuss** the benefits of this case being settled through mediation.

# 7.3 The Victorian court hierarchy

## Key knowledge

**In this topic, you will learn about:**

- **the reasons for the Victorian court hierarchy in determining civil disputes, including administrative convenience and appeals.**

As discussed in Chapter 4, Victorian courts, like those in other Australian states, are arranged in a hierarchy. This means they are ranked in order of the complexity and severity of cases that they hear. The Magistrates' Court is at the bottom of the hierarchy and deals with less serious issues. The Supreme Court of Victoria is the highest Victorian court.

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

The **High Court** is a federal court. It can hear **appeals** from the Court of Appeal, but a party must first get the High Court's leave (permission) to appeal.

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

There are many reasons to have a court hierarchy to resolve civil disputes. Two of those are to:

- ensure administrative convenience
- allow for appeals to be made.

## Administrative convenience

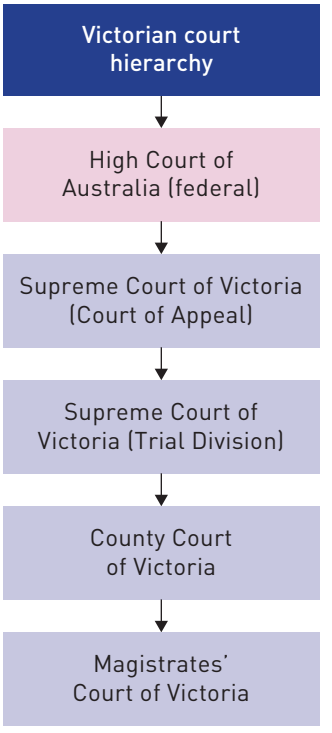
Using a hierarchy for courts means that cases can be distributed according to their seriousness and complexity. Less serious and less complex cases are heard in lower courts, while more serious and more complex cases are heard in the higher courts.

Minor civil disputes (claims where the plaintiff is seeking $100 000 or less) can be heard in the Magistrates' Court. These cases can be heard quickly and less expensively in the Magistrates' Court. Because there are a significant number of smaller disputes in Victoria, there are a greater number of magistrates, and there are more Magistrates' Courts across the state. If smaller claims had to be heard in the higher courts along with larger claims, then they would take longer to hear. With the Magistrates' Court hearing smaller disputes, they can then allocate resources and create processes to ensure those disputes are resolved efficiently.

The more serious and complex civil disputes are heard in the County Court and the Supreme Court, which both have an unlimited jurisdiction. Technically, a plaintiff with a large claim could choose to file it in either the County Court or the Supreme Court, but will generally opt for the Supreme Court when the matter is significantly large or complex, or is of a particular type of dispute that is better suited to Victoria's highest court (e.g. a complicated construction dispute).

**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

By being part of a court hierarchy, the County and Supreme Courts can more easily manage the allocation of time for the longer, more complicated cases. **Class actions**, which you will learn about later in this chapter, are only heard in the Supreme Court. They take longer to hear and require judges who are experts in managing class actions.




**Source 1** The Victorian court hierarchy. The High Court is a federal court, but it hears appeals from the Court of Appeal.

# Appeals

Someone who is dissatisfied with a decision in a civil trial can, if there are grounds for appeal, take the matter to a higher court.

Grounds for appeal in a civil case can include:

- a point of law (also known as a question of law) – where the law has not been correctly applied; for example, the court heard inadmissible evidence, or applied the wrong legal test in the case
- a question of fact – whether the facts of the case had been applied appropriately to reach the decision
- the remedy awarded – the way in which a court enforced a right, or the order that was made by the lower court.

If there were no court hierarchy, then there would be no higher court to review a decision that a party believes has been made in error. Therefore, having a court hierarchy ensures there is a system by which a decision can be reviewed by a more superior court. That is, it is accepted that sometimes, our courts get it wrong.

Most civil disputes now require leave to appeal. Getting the court's consent to hear an appeal in a civil case will usually require the party to satisfy the court that there is a real prospect of success.

Both the Court of Appeal and the High Court can determine special leave applications 'on the papers', which means that no formal hearing may be required. The aim of hearing applications this way is to streamline processes and to reduce the time, costs and stress involved in a formal hearing.




**Source 2** The Supreme Court of Victoria is the highest Victorian court.

### *Study tip*

The *VCE Legal Studies Study Design* requires you to know these two reasons (administrative convenience and appeals) for a court hierarchy in determining civil cases. These two reasons are different to those that you need to know for Unit 3 – Area of Study 1 in relation to the criminal justice system, which are specialisation and appeals. Make sure you remember which two reasons you need to know for each Area of Study.

# Summary of the civil jurisdiction of the Victorian courts

The jurisdiction of the Victorian courts is set out in Source 3 below.

| Court | Original jurisdiction | Appellate jurisdiction |
|---|---|---|
| Magistrates' Court | Claims of up to $100 000 | No appellate jurisdiction |
| County Court | Unlimited in all civil claims | No appeals, unless given power under a specific Act of Parliament |
| Supreme Court (Trial Division) | Unlimited in all civil claims | 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 | • All appeals from a single judge of the County Court or Supreme Court<br>• On a question of law from the Magistrates' Court when the Chief Magistrate made the order<br>• On a question of law from VCAT when the President or a vice-president made the order |

**Source 3** The civil jurisdiction of the Victorian courts

The importance of having a court hierarchy so that a decision can be reviewed by a superior court is seen in the case involving actor Rebel Wilson, described in the scenario below.

## Actual scenario

### Rebel Wilson awarded damages

In 2016 Australian actor and comedian Rebel Wilson, best known for her work in Hollywood films such as *Cats* and *Pitch Perfect*, brought an action for defamation in the Supreme Court of Victoria. The claim was in relation to a series of articles published in 2015 by Bauer Media, which published magazines such as *Woman's Day*. Rebel claimed that the publication of articles portrayed her as a liar who had invented stories about herself to become successful, that her reputation was ruined as a result, and that she had lost the opportunity to earn income by acting in feature films. She sought over $7 million in damages.

The dispute was heard by a jury of six in the Supreme Court of Victoria in 2017. The jury found in favour of Wilson, finding that the articles were defamatory and that Wilson had suffered damages as a result. The judge awarded her $650 000 in **general damages**, and **special damages** of nearly $4 million. This was the highest damages awarded in a defamation claim in Australia at that time.

The defendants appealed the decision to the Court of Appeal. They did not dispute the findings in relation




**Source 4** Rebel Wilson's dispute was ultimately considered by three courts.

to their defamatory conduct, but they did dispute the assessment of damages, including the finding that the plaintiff had established the loss of an opportunity to earn US$15 million to be cast in three feature films as a result of the publication of the articles. The Court of Appeal reassessed damages and reduced the amount to $600 000. In particular, it concluded that the special damages amount should not be awarded at all, because Wilson had not lost an opportunity to earn money from being cast in lead or co-lead roles.

Rebel Wilson appealed the Court of Appeal's decision to the High Court, but the High Court did not find that there were sufficient grounds for it to hear an appeal.

*Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (14 June 2018)

## Strengths and weaknesses

Source 5 sets out some of the strengths and weaknesses of the court hierarchy. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| A court hierarchy allows courts to adopt different processes and use their resources in a way that ensures cases can be resolved efficiently. For example, given the volume of smaller cases heard in the Magistrates' Court, there are more magistrates, and more court venues. | The different courts may be confusing for people who do not understand the civil justice system. This can be particularly so where there are overlapping jurisdictions (e.g. County Court and Supreme Court) or for self-represented parties. |
| A court hierarchy allows appeals to be made by both parties if there is an error in the original decision. | There is no automatic right to appeal, and appeal processes are difficult to understand without a lawyer, particularly as there is generally the need to establish grounds for appeal. |

**Source 5** Strengths and weaknesses of a court hierarchy

**general damages** an amount of money that one party is ordered to pay to another party to compensate for losses that are not easily quantifiable (e.g. pain and suffering)

**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)

## 7.3 Check your learning

### Remember and understand

1 **Explain** how a court hierarchy provides administrative convenience.
2 **Why** is a court hierarchy a necessary element of a system of appeals?
3 **What** is meant by 'leave to appeal'?

### Examine and apply

4 **Why** is VCAT not included in the court hierarchy?
5 Which court in Victoria would be called the 'intermediate court'? Which would be called the 'superior court'? Why?

### Reflect and evaluate

6 As a class, link each of the strengths and weaknesses of the court hierarchy to one or more of the principles of justice. You could create a poster or digital resource that to refer to, or annotate your notes by adding a column next to each strength and weakness.
7 **Discuss** two problems that could arise from having one court that heard all types of cases.
8 'The Rebel Wilson case demonstrates that there are flaws in our civil justice system, not strengths.' **Discuss** the extent to which you agree with this statement.

# 7.4 The judge and magistrate

## Key knowledge



In this topic, you will learn about:

- the roles of key personnel in a civil dispute, including the judge or magistrate (including the role of case management).

When a civil dispute is issued in a court (rather than a tribunal), generally there are three key personnel that are or may be involved. They are:

- the judge or magistrate, depending on the court
- the jury (if there is one)
- the parties (the plaintiff and the defendant).

In this topic you will explore the roles of the judge and magistrate in a civil dispute, and in the next two topic you will explore the roles of the jury and the parties.

## Introduction to the judge and magistrate

If the plaintiff issues the claim in the County Court or Supreme Court, the judge will be the central figure with authority over the case. If the plaintiff issues the claim in the Magistrates' Court, the magistrate will have the primary role. Unlike criminal trials, where indictable offences start in the Magistrates' Court and then move to one of the higher courts, civil cases do not generally involve a court other than the court in which the plaintiff issues the claim.

As you learnt in Chapter 4, the judge (in County and Supreme Court cases) or magistrate (in Magistrates' Court cases) acts as an impartial and independent 'umpire' or 'referee' in a trial, ensuring that the court procedures are carried out in accordance with the court's rules and that each of the parties is treated fairly. Where there is no jury to decide on the facts, the judge (in the higher courts) must make a decision on **liability** based on the facts and assess **damages** where necessary. In the Magistrates' Court, where there is never a jury, the magistrate will decide on liability and remedy. In fact, in most civil cases there is no jury, therefore the judge or magistrate plays a central role in the case.

**liability**
legal responsibility for one's acts or omissions

**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

## Roles of the judge and magistrate

Some of the main roles of a judge and magistrate in a civil case are outlined below.

### Act impartially

The judge or magistrate in a civil case must be impartial. This means the judge or magistrate must ensure that they oversee the case and make a decision on liability without any bias toward or against either party. Judges and magistrates are also independent of government and the parliament. They do not make decisions in favour of political parties or in favour of a particular interpretation of the law. The use of an independent and impartial judge or magistrate ensures that the rule of law is upheld.

### Case management (before trial or hearing)

Another role of the judge (or magistrate) is to manage the case during the pre-trial stages. Judges and magistrates do not only become involved in cases at the hearing or trial stage; rather, they will be actively involved in ensuring the case is ready for trial. In doing so, they will aim to ensure the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The Victorian Parliament has passed laws that give powers to Victorian judges and magistrates to actively manage civil disputes in Victorian courts. This gives judges and magistrates significant powers of **case management**.

**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)

One of these powers is the power to give **directions** to the parties. A direction is an instruction given by the court to one or more of the parties, which imposes an obligation on a party to do something by a certain time or specifies how a civil proceeding is to be conducted. It might be that one of the parties has to file a particular document by a certain date, or that both parties must attend mediation by a certain time.

**directions** instructions given by the court or tribunal to the parties about time limits and the way a civil proceeding is to be conducted

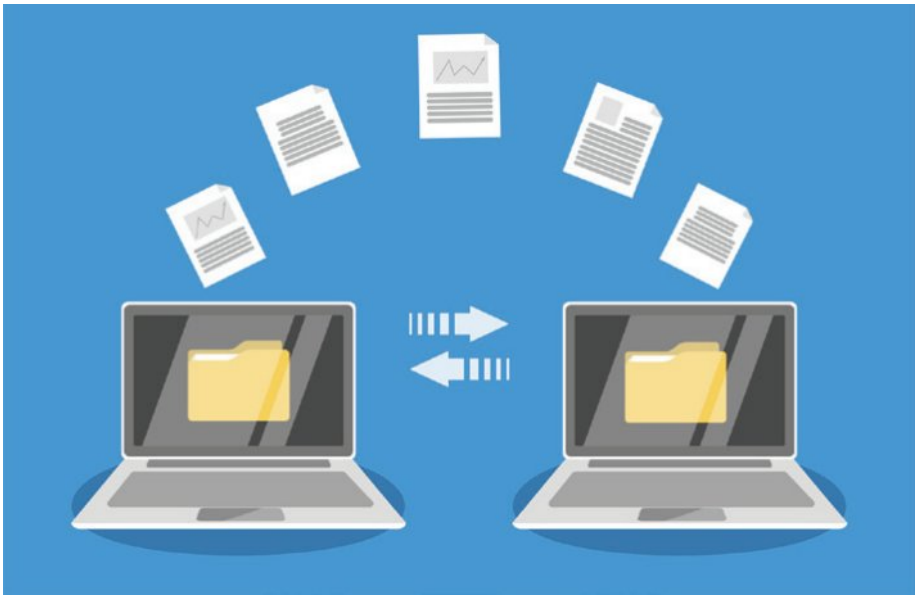
For example, the judge or magistrate may give directions to the parties to complete pre-trial procedures to ensure the case is ready for trial, the issues in dispute are narrowed, or the parties have an opportunity to settle the case before trial. Some of these procedures are:

- **discovery**, which enables the parties to get copies of each other's documents that are relevant to the issues in dispute. For example, if a plaintiff claims they have a written contract between themselves and the defendant, the plaintiff must produce the contract to the defendant. The judge or magistrate also has the power to limit discovery to a certain category or categories of documents, or even make different discovery orders in relation to each party. Often, 'discovery' occurs electronically, with the parties exchanging their documents using a document management platform, or by email
- **mediation**. The judge (or magistrate) may order the parties to attend mediation by a certain date to try to resolve the dispute before trial. Most civil proceedings in the Supreme Court go to mediation before trial, and mediation is considered successful in helping to resolve disputes. Former Chief Justice Marilyn Warren of the Supreme Court has previously said that the courts would face difficulties if they did not use mediation to encourage a timely and efficient resolution of disputes.

Judges and magistrates maintain control of a proceeding by giving directions along the way, so that delays can be minimised and the parties know what procedures they need to follow. Directions can be given at any time, but can be also given at what are known as **directions hearings**, which are pre-trial hearings before a judge or an associate judge (in the higher courts) or the magistrate in some civil matters (in the Magistrates' Court). Penalties can be imposed on a party who fails to comply with a direction of the court.

**directions hearing** a pre-trial procedure at which the court gives instructions to the parties about time limits and the way the civil proceeding is to be conducted

The following scenario is an example of how a court can effectively manage a case and make orders to ensure the case is resolved efficiently.



**Source 1** Exchanging documents in a civil case will often involve exchanging them via email or some other electronic means.

Actual scenario

## Electronic discovery

In December 2016, the Supreme Court of Victoria had to decide how discovery should be managed so that the Court could ensure the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The Court was hearing a large claim involving tens to hundreds of millions of dollars in relation to the design and construction of a natural gas pipeline in Queensland. Approximately 4 million electronic documents had been scanned by the plaintiff, which it estimated could be reduced to 1.4 million as potentially being relevant. The Court found that the cost of manually reviewing 4 million or even 1.4 million documents was unrealistic, as it would take more than 583 working weeks for one junior solicitor to review them.

Justice Vickery ordered that the use of predictive coding technology, or Technology Assisted Review, was appropriate in this case for the purposes of discovery. Predictive coding technology involved the use of computer software which would be 'trained' to review documents and identify those that were relevant.

His Honour referred to overseas cases that had approved the use of such technology, noting that the use of technology is just as accurate as, and probably more accurate than, a person manually reviewing documents.

Technology platforms and tools are now widely used as a method of searching and reviewing documents in large complex cases, particularly given the volume of documents (particularly emails) that are often relevant to civil disputes. Therefore, often judges will order the parties to complete discovery, and that discovery can be completed electronically.

*McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* [2016] VSC 734 (2 December 2016)

## Case management (during trial or hearing)

The judge (or magistrate) also has the role of managing the trial or hearing. Generally, a final hearing will be conducted according to a set procedure (e.g. the plaintiff will present the case, followed by the defendant), but the judge or magistrate has the power to change this procedure. For example, judges and magistrates have the power to:

- change the order in which evidence is to be given, or who will go first in addressing the court
- limit the time for the hearing or trial
- limit the examination of witnesses, or not allowing cross-examination of particular witnesses
- limit the number of witnesses that a party may call
- limit the length or duration of the parties' submissions to the court
- limit the number of documents that a party may tender into evidence.

The judge or magistrate also has power to ask a witness some questions to clarify their evidence, and hand down rulings throughout the trial where necessary. For example, there may be a need in the middle of trial or hearing to decide a point of law, such as whether a witness may give **hearsay evidence**. The judge or magistrate can make such a ruling at any time. It is more common in the higher courts, which hear more complex disputes that run over a number of days or weeks and where issues may arise mid-trial.

**hearsay evidence** evidence given by a person who did not personally witness the thing that is being stated to the court as true

In most civil trials, in the higher courts, there is no jury, and there is no jury available in the Magistrates' Court. However, if there is a jury in the higher courts, the judge may need to address the jury during the trial, give directions to the jury, and sum up the case to the jury at the conclusion of trial.

If one or both of the parties is self-represented (not represented by a lawyer), the judge or magistrate has the additional responsibility of ensuring they understand processes and their obligations and rights.

## Determine liability and the remedy

If there is no jury in the civil trial, the judge must decide whether the plaintiff has established their claim against the defendant, and if so, what remedy (if any) should be awarded. This means that the judge, not a jury, is the decider of facts. In Magistrates' Court civil cases, there is no option for a jury, therefore the magistrate will determine both liability and the remedy.

Judges and magistrates will generally 'reserve' their decision and deliver it a later time. In doing so, they will normally provide their written reasons for their decision. These written reasons, known as '**court judgments**', should be delivered in a timely manner and in a way that is accessible and readable. What is timely will depend on the complexity of the case, but parties should not have to wait significant months or years for judgment.

**court judgment**
a statement by the judge that outlines the decision of the court and the legal reasoning behind the decision

## Decide on costs

After each hearing in a civil case the judge or magistrate will decide which party should bear the costs. The general rule is that working out the costs is left to the end, and the successful party is entitled to costs, but that is not always the case.

# Comparison: criminal and civil

A summary of the similarities and differences between the role of the judge or magistrate in a criminal and civil case is set out in Source 2 below.

| | |
|---|---|
| **Similarities** | • A judge or magistrate in a criminal case and in a civil case is expected to act impartially and without bias, making decisions during the case on facts.<br>• Both judges/magistrates will have the role of assisting a self-represented party if the accused or one of the parties in the civil dispute is not represented by a lawyer.<br>• Both criminal and civil judges and magistrates have the role of instructing a jury and giving directions to the jury, if there is one in a civil case. This is not applicable to magistrates as there is no jury in the Magistrates' Court. |
| **Differences** | • A judge in a civil trial may have to decide on liability if there is no jury, and a magistrate in a civil case will decide on liability if the case is heard in the Magistrates' Court. However, a judge in a criminal trial in the higher courts will not decide guilt; this is left to the jury.<br>• A judge in a civil trial may have to decide on a remedy (and a magistrate will decide on a remedy if a party proves their claim), whereas in a criminal case a judge or magistrate decides the sanction if the accused is guilty of committing a crime.<br>• A judge/magistrate can order both parties to undertake procedures such as mediation and discovery. While a judge or magistrate in a criminal case also has case management powers, they do not extend to ordering procedures such as these, which are civil dispute procedures. |

**Source 2** Similarities and differences between the role of the judge or magistrate in a criminal and civil case

# Strengths and weaknesses

Source 3 on the next page sets out a summary of some of the strengths and weaknesses of the roles of the judge or magistrate in a civil case. Many are similar to those in a criminal case. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Judges and magistrates act as an impartial umpire. They oversee the trial process, but they do not overly interfere in a trial, nor do they 'enter the arena'. Therefore, no one party is advantaged or disadvantaged because the judge or magistrate 'takes sides'. | Judges and magistrates are human, and there are some risks that they may have actual or apprehended bias that impacts their decision-making, such as when they are fatigued. |
| Judges and magistrates are experts in law, legal processes and cases, and can use this expertise in managing the case and in making a decision on liability. | The cultural and general diversity of judges and magistrates has previously been criticised by some, which may increase any distrust felt by some people in the community about whether the outcome will reflect a 'just' outcome. |
| Judges and magistrates manage the case both before and during the trial. They have significant case management powers to ensure that disputes are resolved in a just, efficient, timely and cost-effective manner. For example, they can limit discovery, or limit the time people have to take to make submissions at trial. | The extent to which a case is managed by a judge or magistrate may depend on the case and who is overseeing it. Some cases may be less actively managed than others, or there may be situations where the parties continually fail to comply with pre-trial steps but no consequences arise, which means there will be a delay in the case being heard. |
| Judges and magistrates are able to assist self-represented parties, such as explaining cross-examination processes, or explaining what discovery is. | Judges and magistrates cannot interfere excessively in their cases, including those involving a self-represented party, even though the judge or magistrate is one of the most experienced people in the room. |

**Source 3** Strengths and weaknesses of the roles of the judge and magistrate

# 7.4 Check your learning

## Remember and understand

1 **Why** is it essential for the judge (or magistrate) to be independent and impartial?

2 **Identify** and **explain** two powers given to judges and magistrates in a civil proceeding.

## Examine and apply

3 **Describe** two roles of the judge in a civil trial. Refer to the principles of justice in your answer.

4 **Compare** the role of the judge in a criminal trial to the role of the judge in a civil trial.

5 In what ways are the roles of judges and magistrates different in a civil case?

6 For each of the following scenarios, **identify** one case management power that the court may use. **Justify** your answer.

**a** The parties have not yet attended mediation, and the matter is ready to be set down for trial.

**b** The trial is likely to be very complicated, and the judge wants to ensure it is conducted in the most cost-effective and efficient way.

**c** The plaintiff has five million documents, and it believes that it will take more than three years for them to be produced as part of discovery.

**d** The defendant wants to call 30 medical practitioners to give expert evidence at trial.

## Reflect and evaluate

7 As a class, link each of the strengths and weaknesses of the roles of the judge or magistrate to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

8 Should judges have more or fewer powers of case management? Give reasons for your answer.

9 In your view, should a magistrate be able to actively help a self-represented party? Discuss as a class.

# 7.5 The jury

## Key knowledge

**In this topic, you will learn about:**

- **the roles of key personnel in a civil dispute, including the jury.**

Unlike a criminal case, a civil dispute in court does not usually have a jury. However, juries may be used in two situations:

- the plaintiff or the defendant can specify during the **pleadings** stage that they wish to have the proceeding tried by a jury, though the court can still direct that the trial be without a jury if it decides a jury is not required. The party who wishes a civil dispute to be tried by a jury must pay the applicable fee
- the court may order that a proceeding be tried with a jury, though this is rare.

**pleadings**
(in civil cases) a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

Like a criminal jury, the civil jury decides which facts it believes to be true. For example, did an article written in a newspaper actually damage the reputation of the plaintiff in a civil case? Was it actually untrue? The jury must also apply the facts to the law as explained by the judge. The judge makes decisions on points of law.

The jury may also be required to assess damages. However, juries in defamation cases (cases which involve untrue statements made about a person which have damaged that person's reputation) cannot decide on the amount of damages. This is only a role for the judge in those types of disputes.

If a civil trial is to be tried by a jury, the jury is made up of only six jurors. The jurors are chosen randomly from persons eligible to vote and who are on the electoral roll, and following a lengthy selection process. The court can order the empanelment of up to two additional jurors, so that there may be up to eight jurors. However, when it comes to the jury deliberating on the verdict, only six jurors will be able to deliberate.

***Did you know?***

Civil juries are far less common than criminal juries. In 2020–21 there were 5 civil jury trials in the County and Supreme Courts, compared with 132 criminal jury trials in the same period.

## Roles of the jury

Many of the roles of a civil jury are the same as those in a criminal jury. The main ones are set out below.

### Be objective

The jury must be unbiased and bring an open mind to the task, putting aside any prejudices or preconceived ideas. Each juror (jury member) must have no connection with any of the parties and must be careful to decide on the facts, not on their own biases.

***Did you know?***

In a case in England in 1840, the verdict was decided by the jury picking options out of a hat. The court ordered a new trial because the jurors had not decided based on the facts of the case.

### Listen to and remember the evidence

As you learnt in Chapter 4, evidence can be complex. For example, a case about a business valuation may include complicated and detailed evidence about how to value a business and what method should be used to get to a value. This can often be difficult for ordinary laypeople to understand.

Jurors can take notes if it helps them to remember information, but they must make sure they still concentrate on what is taking place in the courtroom.

A jury must not undertake their own investigations of what happened, conduct any research on the case, or make any enquiries about trial matters.

## Understand directions and summing up

During the trial the judge will give directions to the jury about issues or points of law and will sum up the case at the end. The jury must listen carefully to the directions and summing up.



**Source 1** A civil jury will only have six jurors.

## Decide on liability and, in some cases, damages

In a civil trial, the jury must decide who or what to believe, and whether the plaintiff has established their case on the **balance of probabilities**. They must also decide whether the defendant has established any defence. A civil jury must try to reach a unanimous verdict (six out of six jurors), but the court may accept a majority verdict in all cases (five out of six jurors). Deliberations are confidential, so that jurors can feel free to discuss the issues with each other. This is also an opportunity for jurors to act as a check on each other, in that they can challenge each other if they are making decisions based on pre-conceived ideas rather than on the evidence.

**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

As noted above, civil juries are rare, but a civil jury was used in the case below. In an interesting turn of events, the defendant sought to get the judge to rule in their favour even though the jury found in favour of the plaintiff.

**Actual scenario**

### Interesting jury case

In this case, the plaintiff sought damages from the defendant for pain and suffering from a back injury and a psychiatric condition including anxiety and depression. The plaintiff claimed the pain and suffering came about through cleaning duties she carried out for the defendant.

The defendant sought a jury trial. The trial continued for 10 days. The plaintiff was represented and she gave evidence, along with a doctor and one of the defendant's employees. Documents were also given as evidence, including records, clinical notes and employment documents. The jury was also taken to view the areas the plaintiff said she cleaned during her time employed.

The jury decided that there was negligence on the part of the defendant which caused the plaintiff's injury, loss or damage, and that the defendant had breached some health and safety regulations. It assessed the plaintiff's pain and suffering damages at $250 000.

Following this verdict, the defendant applied for judgment in its favour despite the jury verdict. This can only happen if the defendant establishes that there was no evidence upon which a reasonable jury, properly directed, could return a verdict for the plaintiff. The courts have previously held that a judge should proceed with great caution when considering whether to disregard a jury's verdict.

The plaintiff opposed the application, and the trial judge heard from both parties. The judge considered the evidence in the trial and found that she was not satisfied there was no evidence upon which a reasonable jury could return a verdict for the plaintiff. The judge noted that the jury heard evidence from three witnesses, considered a number of documents, and viewed the defendant's premises. Without descending into the detail of the evidence, the judge was satisfied that it was open to the jury to return the verdict that it did, and that a judge should only exercise their power to disregard a jury's verdict 'in the clearest of cases'. The judge dismissed the application.



**Source 2** A jury found in favour of a plaintiff who sought damages for pain and suffering as a result of cleaning duties

*Chol v Pickwick Group Pty Ltd* [2023] VCC 66 (6 February 2023)

# Comparison: criminal and civil

Source 3 below sets out a summary of the similarities and differences between the role of the jury in a criminal and civil case.

| | |
|---|---|
| **Similarities** | • Both juries are expected to be impartial when making their decision. They decide based on facts and evidence, not on pre-conceived ideas or prejudices.<br>• Both juries must listen to and concentrate on the evidence. They can ask clarifying questions of the judge and can take notes if it helps them.<br>• Both juries have the role of ensuring they comply with their obligations, which include ensuring they do not undertake any outside research or read anything about the case. |
| **Differences** | • The jury in a criminal trial will decide on guilt, whereas the jury in a civil trial will decide on liability.<br>• The standard of proof is different; the jury needs to decide on guilt in a criminal trial beyond reasonable doubt, whereas in a civil trial it is a lesser standard and is on the balance of probabilities.<br>• A jury in a criminal trial will never decide the sanction, but in some civil trials a jury may determine the damages to be awarded to a successful plaintiff. |

**Source 3** Similarities and differences between the role of the jury in a criminal and civil case

## Strengths and weaknesses

Source 4 below sets out a summary of some of the strengths and weaknesses of the roles of the jury in a civil case. Many of the strengths and weaknesses are similar to those of the jury in a criminal case. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Jury members are randomly picked, have no connection to the parties and make a decision based on facts, not on biases or on their own enquiries. | Jury members may have unconscious biases or prejudices, and as they do not give reasons for their decisions, there is no way of knowing whether a bias played a role in their decision-making. |
| It allows members of the jury to participate in the civil justice system processes and ensures that justice is 'seen to be done'. This will therefore also enable them to become more informed about our civil justice system. | Civil trials can be complex, including directions given to the jury and particular types of civil disputes such as defamation claims. It is not clear whether the laypersons on a jury will be able to understand the legal principles involved and the evidence that is given to then make a decision based on the facts. |
| Collective decision-making can reduce the possibility of bias, as it means any personal, subconscious biases can be identified during the deliberation process and addressed by the group. | Jury trials may result in further delays as matters need to be explained to the jury, and a jury may require some time to deliberate. |
| Juries represent a cross-section of the community. They are made up of a diverse group of people, which can lead to the decision reflecting the views and values of our society. | A number of people cannot participate in a jury because they are ineligible, excused or disqualified. Therefore, it is possible that a large section of the community is not represented. |

**Source 4** Strengths and weaknesses of the roles of the jury

## 7.5 Check your learning

### Remember and understand

1 **Describe** two circumstances in which a civil jury may be required.

2 **Justify** one reason why a party may want to have a civil jury, and one reason why a party may not.

### Examine and apply

3 **Describe** two similarities and two differences between a criminal jury and a civil jury.

4 Read the scenario 'Interesting jury case'.

- **a** **What** was the nature of the claim?
- **b** **Who** decided liability and damages in this case?
- **c** **Explain** what happened after the jury returned its verdict.
- **d** In what circumstances can a judge disregard a jury's verdict? Do you agree with this rule? Give reasons.

### Reflect and evaluate

5 As a class, link each of the strengths and weaknesses of the roles of the jury to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by including adding a column next to each strength and weakness.

6 'Juries in civil trials should be abolished. They are expensive, the jury members are biased, and they don't understand how to calculate damages.' Do you agree? Give reasons.

7 **Analyse** the role of the judge and the jury in a civil case.

# 7.6 The parties

## Key knowledge

In this topic, you will learn about:

- the roles of key personnel in a civil dispute, including the parties.

The main parties in a civil trial are the plaintiff and the defendant, and in some situations, there can be more than one plaintiff and more than one defendant.

## Roles of the parties

The parties have various roles in a civil dispute. The plaintiff has the special role of proving the facts of the case, given that they have the burden of proof. The defendant has to prove that the defence has a good answer to the claim. A defendant who has filed a **counterclaim** will also have to prove their claim. The facts will need to be established on the balance of probabilities.

Other than those main roles, the roles of the parties are set out below.

**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)

**party control**
(in relation to criminal and civil cases) a term used to describe the power that each party in a legal case has to decide how they will run their case

### Make decisions about the conduct of the case

In the trial system in Victoria, each party controls its own case and has complete control over decisions about how the case will be run, as long as the rules of evidence and procedure are followed. This is known as '**party control**'. This is different from a system in which an external investigator seeks out the truth to determine liability. Therefore, the parties make their own decisions about what claims they will make, what defences they will raise, and which witnesses they will call.

### Disclose information to the other party

As explained earlier in this chapter, one of the key pre-trial procedures is to discover relevant documents in the proceeding. This is considered one of the most important steps in a civil proceeding, and it is the responsibility of the parties to hand over key relevant documents. There are some exceptions to this (e.g. where the documents are legitimately lost).

By way of example:

- if the plaintiff claims to have suffered physical injuries, there are likely to be medical records and other documents such as texts and emails to show they did in fact suffer those injuries
- if the plaintiff claims the defendant sent out various emails about them which humiliated them in the workforce, those emails are likely to be relevant to the issues in dispute and should be handed over
- if the defendant claims they did not breach a contract but in fact fulfilled their obligations under the contract, they may produce documents to show they did in fact fulfil the contract.

The parties' role to discover documents continues all the way up to and during trial.

### Exchange evidence

To prove their case, the plaintiff and defendant will generally need to rely on evidence. This is particularly the case where the documents are unable to speak for themselves, or where someone has to prove something that is contained within the emails.

For example, imagine a breach of contract case where the plaintiff has listed in discovery a contract with alterations in pen, marked with the initials 'LJ'. Either party may wish to rely on evidence about who crossed out the contract and who initialled it.

There are generally two types of evidence:

**lay evidence**
evidence (testimony) given by a layperson (an ordinary person) about the facts in dispute

- **lay evidence**, which is given by laypersons or ordinary people about what happened or what they saw. They do not give evidence about their opinion or expertise about a matter, but rather about what they know about the factual circumstances. The type of evidence from laypersons will depend on the case. For example, in a negligence case in which the plaintiff alleges she slipped and fell on some spilled oil left by the defendant outside his shop, the plaintiff may rely on evidence given by a layperson who saw her falling

**expert evidence**
evidence (testimony) given by an independent expert about an area within their expertise

- **expert evidence**, which is evidence given by people to give a professional opinion about an issue in the case. Depending on the nature of the case, the person may have expertise in a field such as medicine, accountancy, finance, engineering or law. Expert evidence is often given in cases involving personal or mental harm (where a medical professional may give evidence about the nature and extent of injury), and in cases involving financial or business loss (where an expert may be asked to give an assessment of the amount of loss suffered).

## Participate in the trial

The parties will be required to participate in the trial. This includes:

- making opening and closing addresses. If a party is legally represented, the legal practitioner will ordinarily present the opening and closing addresses (or submissions). The solicitor (and barrister) will prepare the submissions, and the barrister will present them orally in court
- presenting the case to the judge or jury. If witnesses give evidence orally, then the barristers will ask the witnesses questions through **examination-in-chief**
- cross-examination of the other side's witnesses. This will involve the barrister asking the other party's witnesses questions, in the hope of challenging the credibility (truthfulness) of the witness or identifying 'holes' or 'gaps' in their evidence.

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

The scenario below provides an example of the role of the parties in the case.

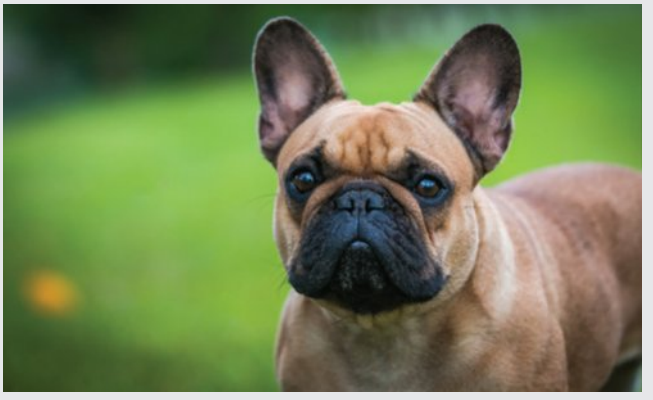
**Actual scenario**

## Defamation claim in the County Court

In this case, the plaintiffs (a company, and the owner of the company) operated a dog breeding business in Victoria, breeding and selling French Bulldogs.

In 2020, the defendant published written reviews on the business's Facebook page. The plaintiffs issued a statement of claim, claiming that the reviews were defamatory to them (ruined their reputation). The plaintiffs sought various remedies, including damages. The defendant raised several defences, including that the posts were her honest opinion, and that they were substantially true.

The plaintiffs were represented by lawyers, but the defendant was not. The trial was heard over 6 days in March 2022. At the trial, the plaintiffs called various witnesses, including employees. The plaintiffs also gave evidence. The defendant called one witness. The defendant chose not to call certain other witnesses who may have had relevant evidence.



**Source 1** A French Bulldog breeding business was at the centre of a defamation dispute.

The judge found in favour of the plaintiffs and ordered that the defendant pay damages of $115 000 to the plaintiffs, plus interest. The defendant was also ordered to pay the plaintiffs' costs of the proceeding, which were to be assessed if the parties did not agree on the amount of costs. The judge noted in his judgment that the evidence at trial did not establish any reason why the defendant made the posts, and that the reason remained 'a mystery'.

*Aurisch & Anor v Wilson* [2022] VCC 720 (13 May 2022)

# Comparison: criminal and civil

Source 2 below sets out a summary of the similarities and differences between the role of the parties in a criminal and civil case.

| | |
|---|---|
| **Similarities** | • Both the prosecution and the parties in a civil case have ongoing disclosure obligations, which require them to disclose relevant documents, even if they are detrimental to their own case.<br>• Both criminal and civil trials provide an opportunity for the parties to present their case, including allowing them to make opening and closing addresses and examine and cross-examine witnesses.<br>• The parties in both types of trials must not mislead the court and must cooperate with each other. |
| **Differences** | • The defendant in a civil case has an ongoing discovery obligation, but this does not apply to an accused in a criminal case.<br>• As there is normally no jury in a civil trial, the parties in a civil trial will generally not have to give opening and closing addresses to the jury or consider other jury issues (such as what instructions need to be given to a jury).<br>• The concept of 'party control' does not generally extend to many parts of the criminal trial process in that the prosecutor cannot always 'choose' what evidence to lead or not lead in a criminal trial. |

**Source 2** Similarities and differences between the role of the parties in a criminal and civil case



**Source 3** The Victorian WorkCover Authority is sometimes a party to a civil dispute when a workplace injury is involved.

## Strengths and weaknesses

Source 4 below sets out a summary of some of the strengths and weaknesses of the roles of the parties. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| The parties have an ongoing obligation to disclose and 'discover' all relevant documents to each other. This ensures there are no surprises as to the documents that may be relevant to the issues in dispute. | Some parties may be more familiar with their disclosure obligations than others; others may have less understanding of the requirement to disclose relevant documents, even those that are not helpful to their case. |
| Both parties have the opportunity to present their cases, including making opening and closing addresses. This also includes the opportunity to examine and cross-examine witnesses. | The processes involved are complex and difficult to understand without the use of a lawyer, thus making it difficult for self-represented parties. |
| The parties have complete control over how they run their case. They are not forced to do or say anything and can decide whether to make certain claims or defences, or what evidence to rely on. | 'Party control' mean that the parties need time to prepare their case, and make decisions about how to run their case, which can add to the delays. This can be stressful and cost money. |

**Source 4** Strengths and weaknesses of the roles of the parties

# 7.6 Check your learning

### Remember and understand

1 **Identify** the two parties in a civil case.

2 **Describe** four types of cases where expert evidence may be relevant.

### Examine and apply

3 Consider the roles of the parties in a civil trial. **What** problems would a party face in undertaking these roles without legal representation? Refer to one or more of the principles of justice in your answer.

4 Amanda is the plaintiff in a civil trial in the Supreme Court. Halfway through the trial she finds a document that is critical to the dispute but is harmful to her case. She tells her lawyer about the existence of the document. What should Amanda do? **Discuss** in relation to the principle of fairness.

5 Read the scenario 'Defamation claim in the County Court'.

- **a** **Describe** the key facts of the case.
- **b** Was a jury used in this case? **Explain**.
- **c** **Explain** how the role of the judge changes when a defendant is not represented by lawyers.
- **d** **Describe** one enforcement issue the plaintiffs may face in this case.

6 For each of the following scenarios, **identify** one document that the party is likely to have to disclose, and **explain** how each document may affect the outcome of the case.

- **a** Josiah is the lead plaintiff in a class action in which it is alleged that the class suffered physical injuries because of faulty personal protective equipment. Josiah has recently received medical advice that he has not suffered any injuries as a result of using that equipment.
- **b** Luca's company is the defendant in a defamation claim in which it is alleged the company allowed comments to be posted on their Facebook page about Paige. Luca's company has a policy in place which requires staff members to regularly monitor public comments on their social media pages.

### Reflect and evaluate

7 As a class, link each of the strengths and weaknesses of the roles of the parties to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

8 Do you agree with the concept of party control? Give reasons.

# 7.7 Legal practitioners

## Key knowledge

In this topic, you will learn about:

- the need for legal practitioners in a civil dispute.

Legal practitioners usually undertake the role of preparing and conducting a case on behalf on the parties. This representation is often necessary in a civil trial, because the legal practitioners are experts who are familiar with civil trials. These experts help to ensure that the parties are able to present their best possible case, and to assist in achieving a just outcome. They are also the ones to ensure that the rule of law is upheld, and that the law is applied equally and fairly.

## Why are legal practitioners needed?

It is difficult for a party to present their own case in a civil trial without legal representation. They may not know how to present their evidence in the most effective way or how to cross-examine a witness. A party may also be too emotionally invested in the case to be able to make objective decisions about the way they argue their case. Therefore, bringing out the truth and showing your case in the best light depends on a party being legally represented, with the best lawyer possible. The truth should emerge through each party presenting their own case to the best of their ability and the other side showing the flaws in the legal arguments and the evidence being presented (e.g. by cross-examining the witnesses). If one party is better represented than the other, this could lead to an unfair advantage and possibly an incorrect outcome. A person who is represented by a competent barrister may have a better chance of winning than a person whose barrister is less experienced. That is, a competent barrister may have greater skill at preparing a case and bringing out the desired evidence.

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

Obtaining **legal aid** through service providers such as Victoria Legal Aid (VLA) can be more challenging in the civil justice system than in the criminal justice system. That is because most of the grants of legal assistance are for criminal or family law matters. In addition, VLA does not give advice on every type of case; for example, it does not assist in relation to business matters, pay disputes or work injuries. In some situations, people may be able to get some assistance from a community legal centre (CLC), but that depends on the CLC and whether they have capacity to help.



**Source 1** Legal practitioners are necessary for many civil disputes resolved by courts.

On the other hand, some dispute resolution bodies and methods are set up so that the use of legal practitioners is not needed (or is even discouraged). For example, the Victorian Civil and Administrative Tribunal (VCAT) generally does not allow lawyers to represent people in disputes (though for larger VCAT claims, lawyers may be necessary). Some mediations may also not require the use of a lawyer.

The difficulties that can be faced by a self-represented litigant have been explored by courts many times, including in the civil case below.

**Actual scenario**

## Failure to assist self-represented plaintiff

The plaintiff had previously been enrolled in a course at a university. She brought a civil claim in the Magistrates' Court against the university, making broad allegations of negligence, bullying, improper hearing, unfair marking and delay in investigation of complaints. She claimed just over $7000 in damages. She was self-represented in the proceeding.

The defendant applied to 'strike out' the claim (a process that can happen where a defendant, for example, claims that there is no real claim or the claim issued is an abuse of the court's processes). At the hearing of this application, the plaintiff was given an opportunity to address the Court. A review of the hearing found that the plaintiff was given about five minutes to speak, and the defendant's solicitor was given about 13 minutes to speak. The defendant provided the magistrate with copies of cases to support their application, which the magistrate considered, but the plaintiff was not given a copy of those cases during the hearing (or at all). The magistrate decided to dismiss the plaintiff's case.

The plaintiff sought a review of this decision in the Supreme Court. One of the reasons was that she claimed she was denied procedural fairness in the hearing.

In deciding the case, Justice Incerti said:

> It is the 'inherent duty of a judge to ensure a fair trial by giving due assistance to a self-represented litigant.' This positive duty to assist self-represented litigants is part of a judge's overriding obligation to ensure a fair trial. This is because self-represented litigants lack qualities that competent lawyers possess, namely legal skill and ability, and objectivity. The absence of these qualities results in grave disadvantage to a self-represented litigant in legal proceedings ...
>
> ... due to the unique disadvantages of a self-represented litigant, the court's duty 'requires that a person does not suffer a disadvantage from exercising the recognised right of a litigant to be self-represented ...'

Her Honour also noted that unrepresented people may not be capable of communicating the case they wish to present, and that in this case the role of the court may be to try to elicit (draw out) the legal point the person is trying to make by communicating with them. In doing so, however, Her Honour emphasised that the duty does not extend to providing advice to a self-represented party, as there was a need to ensure neutrality.

Her Honour ultimately found that the magistrate did not give the plaintiff a reasonable opportunity to oppose the application, and that the magistrate should have provided the plaintiff with an opportunity to understand the nature of the application, and understand the effect of the orders made. The Supreme Court did note, however, that the statement of claim was deficient and that if the plaintiff wanted to make a claim, that she would need to file a new statement of claim.

*She v RMIT University & Anor* [2021] VSC 2 (19 January 2021)

## Strengths and weaknesses

Source 2 below sets out a summary of some of the strengths and weaknesses of the use of legal practitioners. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| Legal practitioners are experts who will be able to help the parties navigate the civil justice system. This includes assisting and conducting opening and closing addresses, examining witnesses, and defending against applications made by the other party. | Not all legal practitioners are equal or have the same level of experience and skills. Some legal practitioners are more experienced than others, which may impact on the quality of the legal services. |
| Legal practitioners have objectivity in being able to make decisions in the civil case, such as whether to agree with the other party to negotiate a settlement. Self-represented people lack that objectivity and may be too 'invested' in the decision to be able to see the weaknesses in their case. | Not everyone is able to afford legal representation, so some people may be left to represent themselves. However, often self-represented parties do not have the necessary skills, experience or objectivity to be able to make the right decisions. |
| Legal practitioners can help avoid delays that may arise with self-represented parties (as the trial processes may slow down to allow a party to understand what is happening). | Even if a self-represented party can afford a lawyer, this could potentially be at great expense to them or their family, particularly if they lose, and are ordered to pay the other party's legal costs, too. |

**Source 2** Strengths and weaknesses of legal practitioners

## 7.7 Check your learning

### Remember and understand

1 **Identify** the two types of legal practitioners used in civil cases.

2 **Describe** three attributes that legal practitioners have that a self-represented party does not. In your answer, refer to one or more of the principles of justice.

### Examine and apply

3 Juanita started an online business with her best friend, Kai, selling pre-packaged vegan foods. Juanita invested $100 000 in the business. Kai invested $10 000 and promised to invest the remaining $90 000 after he took a loan out from his parents. The business went well and started making significant amounts of money due to Juanita putting time and additional money into it. After three years, Kai has still not paid his share, and has not put in any time or effort into the business. He tells Juanita he wants 'out' and asks to receive 50% of the valuation of the business. Kai values the business at $2 million. Juanita disagrees and believes that Kai has breached their agreement to give equal time and equal money into the business. The business has three employees.

- **a** **Describe** three types of documents that each of Kai and Juanita may have that may be relevant to this dispute.
- **b** **Identify** one lay witness and one expert witness who may be able to give evidence in this case. **Outline** why their evidence may be relevant.
- **c** Kai has decided to sue Juanita but wants to represent himself. **Discuss** the benefits and downsides of Kai representing himself.

### Reflect and evaluate

4 As a class, link each of the strengths and weaknesses of legal practitioners to one or more of the principles of justice. You could create a poster or digital resource that to refer to, or annotate your notes by adding a column next to each strength and weakness.

5 VCAT requires all parties to be self-represented unless in particular circumstances. Do you think that this is a rule that should or could be adopted for some (or all) civil trials in court? Give reasons for your answer.

# 7.8 Class actions

## Key knowledge

In this topic, you will learn about:

- the use of class actions to resolve civil disputes.

One of the more recent developments in the civil justice system, and an increasing feature of civil disputes in Australia, is the use of class actions to resolve civil disputes.

## Introduction to class actions

A class action (also referred to as a group proceeding or a representative proceeding) is a type of proceeding where a group of people, who all have claims against the same party, join together in a proceeding. The 'class action' or proceeding can be commenced if:

- seven or more people have claims against the same person
- those claims relate to the same, similar or related circumstances
- the same issues need to be decided (such as whether the defendant owed a duty of care to those plaintiffs).

For example, imagine thousands of people bought a certain brand of jam from supermarkets and shops, and got seriously ill after eating the jam from the same 'batch' because it had not been properly made. All of those people who bought that batch of jam and became ill may form part of the 'class' or 'group' against the manufacturer, because seven or more people have claims against the same party (the manufacturer), their claim relates to the same circumstances (i.e. eating the jam, and getting sick), and the same issues need to be decided (such as whether the manufacturer breached its duty of care, and whether that breach caused loss and damage).

***Did you know?***

Since 2017, the amount of money distributed to group members as a result of class actions issued and settled in Victoria has been at least one billion dollars.

## How class actions work

Class actions are normally commenced by a single person who 'represents' the group (or class). That person is known as the **lead plaintiff** (sometimes called the representative plaintiff). The people who form part of the group are known as **group members**. The group members do not actively participate in the proceeding and are not named in the court documents. In fact, the group members may not even be known by the lead plaintiff or the law firm acting on behalf of the plaintiff, and the group members themselves may not even know a class action has been commenced or that they form part of a 'group'. Instead, the 'group' is broadly described in the statement of claim. An example is set out in the scenario on the next page, which is in relation to a claim commenced in the Supreme Court of Victoria related to cosmetic surgery performed on the group members.

**lead plaintiff** the person who is named as the plaintiff in a class action and 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

Once the group is described in the claim, every person in that group is assumed to be part of the representative proceeding unless they decide to 'opt out' of it by filing a notice with the court in a specified form. If a person opts out, then they will not be bound by the decision or settlement, and they may be able to pursue the defendant in separate legal proceedings. However, the group may be described in a way that requires people to 'opt in' rather than 'opt out'.

As noted earlier, group members do not actively participate. They do not have to give instructions to the law firm, appear in court, discover documents or give evidence. Their primary role is deciding whether to 'opt in' or 'opt out', and participating in any settlement if there is one.

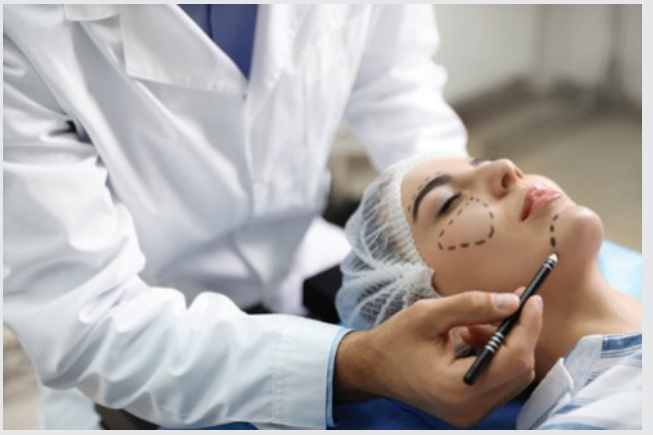
Actual scenario

## Cosmetic surgery class action

In March 2022, a class action was commenced in the Supreme Court of Victoria by a plaintiff against a cosmetic surgery business that operated out of various medical clinics around Australia, and five doctors who allegedly provided cosmetic surgery from one or more of those clinics. The class action related to alleged injury and losses suffered as a result of cosmetic surgery performed at the clinics by one or more of the doctors. The alleged loss and suffering includes ongoing severe pain, disfigurement, and psychological injury. The plaintiff alleges various causes of action, including negligence.

In the claim filed with the Supreme Court, the 'class' is described as including:

- all persons who have suffered loss or damage as a result of cosmetic surgery being performed on them by one or more of the defendants



**Source 1** Cosmetic surgery is the focus of one class action commenced in Victoria.

- all persons who have suffered loss or damage as a result of cosmetic surgery performed on them at one of the clinics pursuant to a contract between the person and the first defendant.

The court actively manages and supervises class actions. In particular, the court has an important role of approving any settlement agreed to between the parties, as well as approving legal costs and fees for **litigation funders** (see below). This allows the court to have oversight over the settlement to ensure that group members are protected, and that the settlement is fair and reasonable for them. As most class actions settle at mediation or prior to trial (with historically very few class actions going to trial), the role of the court is to approve any settlement rather than actually deciding on liability and damages.

**litigation funder**
a third party who pays for some or all the costs and expenses associated with initiating a claim in return for a share of the amount recovered. Litigation funders are often involved in class actions

**adverse costs order**
an order (i.e. legal requirement) that a party pay the other party's costs

## Costs in class actions

Generally, if a class action fails, then the lead plaintiff alone is responsible for the costs of the proceeding and any potential **adverse costs order**. This means that not everyone may be prepared to be the lead plaintiff.

Although the lead plaintiff is responsible for the costs if the class action fails, this is not often the case, as normally the law firm will either act on a 'no win, no fee' basis, or a litigation funder is involved. A litigation funder is a third party that agrees to pay the legal costs associated with the action in return for a percentage of any settlement or damages awarded. The percentage is normally between 20 and 40 per cent of the total amount awarded, but that varies from case to case. The litigation funder will also ordinarily agree that it will pay the costs of the class action if it fails. The use of litigation funders in Australia is now a regular feature of class actions.

More recently, in Victoria it is possible for the plaintiff law firm (i.e. the lawyers acting for the plaintiff) to 'fund' the class action and obtain an order from the court (known as a group costs order) to charge a fee calculated as a percentage of the amount of any award or settlement. This has been seen to be a positive development by some, in that it allows plaintiff law firms to fund smaller claims when a litigation funder is not prepared to, thus increasing access to justice.

If the class action is successful, then the group members will share the costs of bringing the proceedings as the costs will be 'taken out' of any damages amount awarded. Therefore, in that way, the costs are 'shared'.

## Types of class actions

One of Australia's first class actions was brought to the courts in 1995 when a firm of solicitors, Slater and Gordon, represented more than 1000 people who had suffered salmonella poisoning as a result of eating contaminated peanut butter (a type of product liability class action). Other well-known representative proceedings include:

- business owners suing Esso as a result of the Esso Longford gas explosion in 1998
- claims in relation to the bushfires that occurred in Victoria in 2009
- a series of bank fee class actions for repayment of fees charged by banks to their customers.

Types of class actions include:

- shareholder class actions, where shareholders of a company may make a claim about being misrepresented about the state of the company's affairs. For example, a claim was made against National Australia Bank in 2010 on behalf of the bank's shareholders, who alleged that the bank failed to disclose information to them that should have been disclosed. The case settled for $115 million plus costs
- product liability class actions, where consumers who have purchased a good or service have all suffered the same loss or damage. For example, a class action was launched in relation to alleged defective air bags in cars. Other products that have been the subject of class actions include soy milk, herbicides and medication
- class actions where employees group together to make claims in relation to underpayment or poor work conditions. For example, a class action was commenced against Domino's Pizza in relation to alleged underpayment of workers
- natural disaster class actions, where the group members have suffered loss or damage as a result of a natural disaster. An example of this, which resulted in the largest class action settlements in history in Victoria, is explored in the following scenario.

***Study tip***

The Supreme Court of Victoria has a page on its website dedicated to class actions (a link is provided on your obook pro). You can view video and audio webcasts from class actions on their website, which will provide you with an insight into a class action trial.

**Weblink**
Supreme Court of Victoria: Group proceedings (Class actions)



**Source 2** Contaminated peanut butter that caused salmonella poisoning was the subject of one of Australia's first class actions.

Actual scenario

## Settlement of bushfires class actions

The Black Saturday bushfires were a series of fires that occurred in Victoria in February 2009. They resulted in a number of class actions brought on behalf of various people who had suffered loss and damage. Two of those class actions were known as the Murrindindi Black Saturday bushfire class action and the Kilmore East-Kinglake bushfire class action. Both class actions were issued in the Supreme Court of Victoria and were ultimately settled through mediation.

The Supreme Court of Victoria reported that the Murrindindi bushfire class action settled after being referred to court-led mediation, resulting in significant cost and time savings for the community, the legal system and the parties. The total sum agreed to settle this class action was $300 million.

Separately, the Kilmore East-Kinglake class action was settled through an external mediation process. This class action settled after a 200-day trial before Justice Jack Forrest. The trial involved 40 expert witnesses, and the use of a paperless 'e-trial'. The total sum agreed to settle this class action was just over $494 million.



**Source 3** The Kilmore East-Kinglake bushfire class action was heard in a special courtroom in the William Cooper Justice Centre.

# Appropriateness of class actions

Whether a class action is appropriate to resolve the dispute will depend on the facts of the case and the nature of the claim. The following factors can be considered in determining whether a class action can be commenced, and if so, whether it is the most appropriate way of resolving a dispute:

- whether there are seven or more people who have a claim against the defendant which arises out of the same or similar circumstances. If not, then a class action is not an appropriate method of resolving the claims (e.g. if there are fewer than seven people, or the claims are in relation to different facts or against a different defendant)
- whether a plaintiff law firm or a litigation funder is prepared to fund the claim to avoid the lead plaintiff from having the burden of costs. In the past, it has been suggested that claims totalling less than $1 million are less likely to be attractive to fund, with claims totalling more than $5 million more likely to be funded
- whether there is someone willing and able to be the lead plaintiff
- the nature and size of the claims. Very small claims, for example, may not be economical (i.e. result in a outcome that is worth the effort and cost)
- whether one group member has suffered significantly more than other group members and may be prepared to conduct their own proceeding, and fund it, rather than having to 'share' any settlement with the other group members.

# Strengths and weaknesses

Source 4 below sets out a summary of some of the strengths and weaknesses of the use of class actions. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| The group members are not responsible for the payment of any costs (though they will share the costs if the claim is successful). This therefore increases access to justice for group members who may not otherwise be able to afford the costs of initiating a claim themselves. | Class actions impose a large cost burden on the lead plaintiff if the class action fails and there is no litigation funder or no 'no win no fee' agreement with the plaintiff law firm (though this scenario is extraordinarily rare). |
| It is a more efficient way of dealing with a number of claims because the court does not have to deal with multiple claims about the same issue, thus saving court time and resources. | Even though it avoids multiple claims, the size of the class action is normally such that it takes up a significant amount of court resources and time. The approval process for a settlement can also be significant. |
| People can pursue civil claims they may not otherwise be prepared to, because the claim is so small and the costs may be far too much. However, when the smaller claims are grouped together with hundreds or thousands of people, it becomes more economical and cost-effective to pursue the claims. | There has been a fear by some that class actions provide an opportunity for class action lawyers to 'take advantage' of class actions because they may get more out of the class action than the group members themselves. This is because while a group member may receive a very small amount, the plaintiff law firm stands to gain much more through costs to be paid to them. |
| The use of litigation funders and plaintiff law firms who are prepared to act on a 'no win, no fee' basis, or receive a fee if successful, increases access to justice, particularly if there is nobody prepared to act as the lead plaintiff. | Litigation funders have been criticised for taking a large percentage of the total amount awarded to the group members, which then substantially reduces the amount paid to group members and does not reflect their actual loss. |
| Class actions reduce the costs of defendants. Defendants respond to multiple claims, all with similarities, in the one proceeding, rather than having to respond to multiple claims in separate proceedings. | Sometimes multiple class actions are commenced by different law firms in relation to the same issue, increasing the costs of the defendant. This has been one area of the class action regime that has been criticised. |
| It is a more convenient way for group members who wish to pursue a claim but do not want the burden and inconvenience of having to actively participate in proceedings. | Some group members may not get adequate or up-to-date information about the proceeding or may not even know the proceeding is 'on foot' (ongoing). This is particularly so given many class actions involve thousands of group members and it would be impossible for them to get one-on-one communication about the proceeding. |

**Source 4** Strengths and weaknesses of the use of class actions

# 7.8 Check your learning

## Remember and understand

1 **Define** the term 'class action' and provide two examples of types of class actions.

2 **Describe** two differences between the lead plaintiff and a group member.

3 **What** is meant by the term 'group' in a class action, and where is the group described?

4 Which court in Victoria is the only court that can hear and resolve class actions?

## Examine and apply

5 Read the scenario 'Cosmetic surgery class action'.
   - **a** **What** type of class action is this?
   - **b** **Who** will be the group of people that make up the class, and **who** are the defendants?
   - **c** Conduct some more research on this case. **What** is the current status of the class action?

6 Conduct some research and find a class action that has been commenced in the Supreme Court of Victoria in the past two years. Prepare a summary showing:
   - **a** the names of the lead plaintiff and defendant(s)
   - **b** the nature of the claim
   - **c** the remedy sought
   - **d** whether there is any information about a litigation funder or third-party funder in this case
   - **e** the current status of the class action
   - **f** what you would need to establish to form part of the 'group' or 'class'.

7 For each of the following scenarios, **justify** whether a class action could be commenced.
   - **a** Benji is 12 years old and attended a camp as part of his Year 7 class. While on camp, Benji and three others who were sleeping in their tent suffered physical injury after a fire broke out at the nearby campfire.
   - **b** Rio lives in Melbourne. He has noticed a rash after buying t-shirts from an online store. Several other people in Melbourne have also broken out in rashes after wearing similar t-shirts bought from other stores.
   - **c** Eleanor is a lawyer and has just found out she has been underpaid by her employer. Eleanor's housemate also mentioned that there were a bunch of teachers, accountants and engineers that she knows of who have also been underpaid by their employer.

8 Read the scenario 'Settlement of bushfires class actions'. **Describe** one role of the judge before settlement, and one role of the judge after settlement.

## Reflect and evaluate

9 As a class, link each of the strengths and weaknesses of class actions to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

10 'Class actions are not good for our civil justice system. All they do is take up court time and group members get very little in the end.' Do you agree with this statement? Give reasons for your answer.

# 7.9 Consumer Affairs Victoria (CAV)

## Key knowledge

**In this topic, you will learn about:**

- **the purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria.**

*Study tip*

You should be able to distinguish between dispute resolution bodies (CAV, VCAT and the courts) and dispute resolution methods (mediation, conciliation and arbitration). Students often get the two (bodies and methods) confused.

Many organisations in Victoria provide information about the law and free dispute resolution services. Consumer Affairs Victoria (CAV) is one such body. In this topic you will explore the purposes of CAV and consider when CAV may be an appropriate body to help resolve a civil dispute.

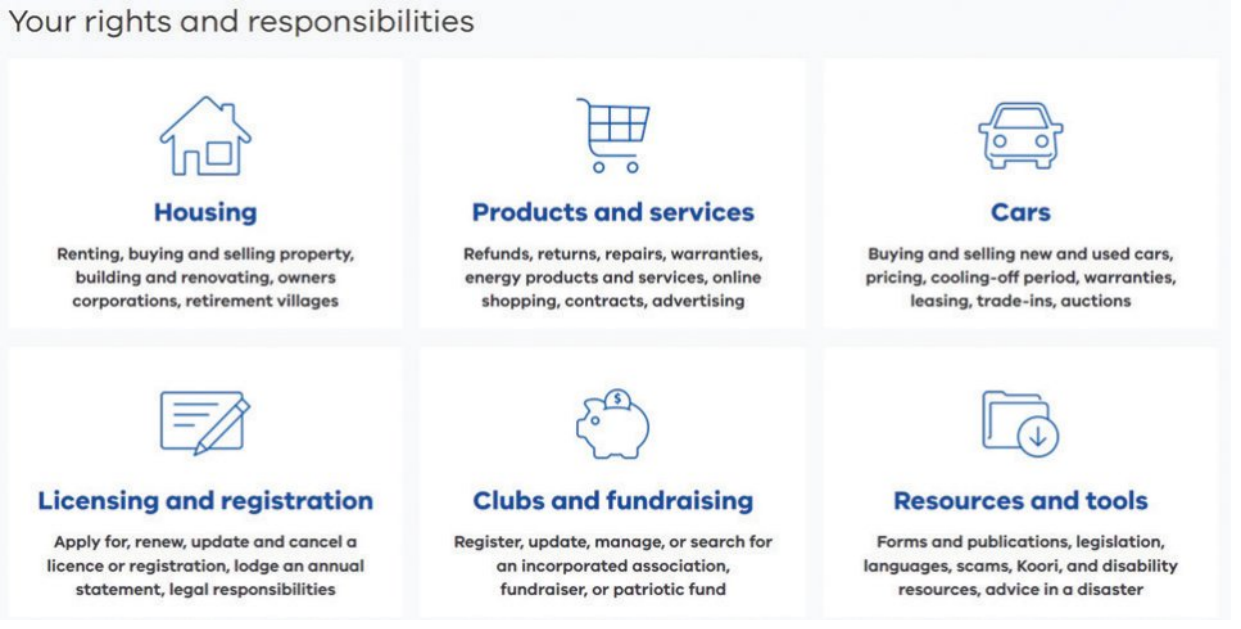
## Introduction to CAV

Consumer Affairs Victoria (CAV) regulates consumer law. Its purpose is to help ensure that Victorians are informed about consumer laws, and to ensure that businesses are complying with those laws.

More particularly, CAV:

- advises the Victorian Government on consumer legislation (laws about the sale and purchase of goods and services)
- provides information and guidance to educate people about consumer laws, including what their rights and responsibilities are, and whether there have been any changes to those laws
- enforces compliance with consumer laws
- in limited circumstances, provides consumers and traders, and landlords and tenants, with a dispute resolution process.

**Weblink**
Consumer Affairs Victoria (CAV)




**Source 1** Consumer Affairs Victoria (CAV) is Victoria's consumer affairs regulator. Its website lists services to help parties resolve different types of civil disputes.

# Purposes of CAV in resolving disputes

In relation to its dispute resolution services, two purposes of CAV are:

- to help people come to an agreement about how to resolve their disputes efficiently without any cost to them. This allows people with smaller disputes about goods or services provided to them, or about their tenancy, to obtain a dispute resolution service that is not expensive, or will not take too long to resolve
- to try to help the parties reach a resolution that is consistent with the law. In helping parties resolve their disputes, CAV has a compliance focus to ensure that any person who has not complied with the law is aware of that and does not breach the law again. For example, if a business has refused to replace goods that are faulty, this may be in breach of their obligations under the law. In helping the parties resolve the dispute, CAV seeks to reinforce the business's legal obligations to ensure they can replace goods.

  CAV only accepts complaints from consumers and tenants, not from businesses and landlords.

# CAV's jurisdiction

CAV is limited to assisting people in relation to disputes that are within its power or **jurisdiction**. It obtains its power through Victorian statutes. Two of the main types of disputes that CAV may be able to help with are set out in Source 2 below.

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

| Type | Examples |
|---|---|
| Disputes between purchasers and suppliers, or consumers and suppliers, about the supply or possible supply of goods or services | • Disputes about a product that is faulty, damaged, not fit for purpose or cannot be repaired.<br>• Disputes about a service that is not completed with care and skill, took too long, caused damage or is not fit for purpose.<br>• Disputes about buying cars, such as in relation to warranties, the price charged or the condition of the car. |
| Disputes between a tenant and landlord | • Disputes about rental agreements, rent, signing or ending a lease, or rental applications.<br>• Disputes about repairs. |

**Source 2** The kinds of disputes CAV can help to resolve through conciliation

CAV also provides dispute resolution services for other types of disputes, such as about retirement villages (where retired people over the age of 55 live).

# Dispute resolution methods used

CAV primarily offers dispute resolution services over the phone to try to resolve the dispute. In some cases, more tailored services can be provided such as an in-person conciliation. As you learnt earlier in this chapter, conciliation involves the assistance of an independent or neutral third party who helps the parties reach a mutually acceptable decision.

The third party, known as the conciliator, does not make the decision on behalf of the parties, but listens to the facts, makes suggestions, and explores possible solutions with the parties to help them come to their own decision. The conciliator is usually someone with specialist knowledge of the nature of the dispute.




**Source 3** Consumer Affairs Victoria can offer dispute resolution services to tenants who rent their property from a person known as a landlord.

## Appropriateness of CAV

Not all civil disputes can be resolved by CAV. A number of factors are considered when deciding whether CAV is appropriate and/or is willing to provide dispute resolution services, including:

- whether the dispute is within CAV's jurisdiction or power. If CAV does not have jurisdiction to hear a matter, then it is not an appropriate dispute resolution body for that matter. For example, CAV cannot assist in relation to discrimination disputes, employment disputes or family law matters
- whether the consumer or tenant has tried to resolve the matter themselves. If not, then CAV may not intervene
- whether the complaint justifies or needs CAV's involvement (e.g. it is not a trivial complaint)
- whether there has been a breach of legislation or a failure to comply with legal obligations by the landlord or business (in which case CAV may be more likely to get involved)
- whether the consumer is vulnerable or disadvantaged
- whether the issue has already been dealt with by CAV or the Victorian Civil and Administrative Tribunal (VCAT). If so, CAV will not intervene
- whether the issue is reasonably likely to be resolved. If so, then CAV may be more willing to assist.

Parties also need to consider whether there are other or better ways to resolve the dispute. For example, they may need to consider:

- whether they will be able to resolve the dispute themselves by negotiating with each other
- whether the dispute is best resolved by a court or tribunal making a binding order on the parties, rather than reaching a resolution themselves

- whether the other party is unlikely to take the conciliation process seriously, or may not show up, so issuing a claim in a court or tribunal is more likely to force them into realising the seriousness of the dispute
- whether one party would prefer the formality of the tribunal or court processes to resolve the dispute
- whether the matter is too big or complex to be appropriate for CAV
- whether resolution of the matter is urgent, so a court is a better option (such as an order to stop a trader selling a car to someone else).

An example of a dispute between a customer and a supplier that CAV might help with is provided in the following hypothetical scenario.

## Hypothetical scenario

### Lemons

A 'lemon' is a term used to describe a vehicle (such as a car) that is worthless or defective.

In late 2023, Matthew bought a car for his business from a second-hand car dealer. The car drove well when he tested it near the caryard, and he was told by the car dealer that it was in a 'very good used condition'. He paid $8000 for it and took it home. However, within 24 hours, the car would not start. He realised upon closer inspection that the motor was broken.

Matthew tried to contact the car dealer, but the dealer refused to answer his calls or return his emails. Matthew took the car to a mechanic, who told Matthew that the car needed a new motor.

When Matthew went online, he noticed that there were thousands of complaints about the same second-hand car dealer. Many of the complaints argued that the car dealer was selling 'lemons' and was placing the cars in a condition so that they would last 24 to 48 hours before the motor would stop working.

Matthew has been told that CAV may be able to help him.



**Source 4** Consumer Affairs Victoria can offer dispute resolution services to motor vehicle drivers who have been sold dodgy cars.

### *Study tip*

When you are answering a question about CAV conciliation services, remember that these government agencies are not courts or tribunals. They have no power to hear cases. Avoid using language in your answers which suggests that CAV has the power to make a binding decision on the parties.

## Strengths and weaknesses

Source 5 sets out a summary of some of the strengths and weaknesses of the use of CAV to resolve disputes. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| CAV's conciliation service is free, meaning that it is accessible to all Victorians, regardless of their ability to pay. | CAV's assistance is limited mainly to consumer and CAV disputes, meaning that it has no power to assist with many other types of civil disputes. |
| The conciliation process is informal, and can be conducted over the telephone, which removes many anxieties people have with the formalities of a courtroom. | CAV has no power to compel parties to undergo conciliation. A willing party to a dispute may not be able to use CAV's dispute resolution services if the other party is not willing. |
| CAV ensures procedural fairness by allowing both sides the opportunity to present their side of the story and challenge the other side's case as part of the conciliation process. | CAV has no powers to enforce any decisions reached by the parties in conciliation. Unless the parties have entered into a binding agreement at conciliation, then one of the parties may just ignore the outcome. This can leave the parties no better off than they were before conciliation. |
| CAV assesses disputes individually, case by case, reducing waste of time and resources on disputes that are clearly unlikely to be resolved through conciliation. | Not all cases are accepted by CAV, and its conciliation services are limited. This is because of CAV's criteria and its prioritisation of cases. |
| The conciliation process offered by CAV ensures that parties reach a resolution themselves. Parties may be more likely to accept an outcome if it has not been imposed or forced on them. | CAV is not appropriate for large and complex disagreements, including those with difficult legal questions or several different parties, which can only be resolved by a court or tribunal that has greater expertise in the law. |

**Source 5** Strengths and weaknesses of Consumer Affairs Victoria

## 7.9 Check your learning

### Remember and understand

1 **Explain** what CAV is and **describe** its role in resolving civil disputes.
2 **Describe** the main dispute resolution process used by CAV.
3 Does CAV have the power to force the parties to attend a conciliation or agree to a resolution? **Explain**.
4 **Describe** two types of disputes that CAV has jurisdiction to resolve.
5 **Identify** three factors that may be relevant to determining whether there is another or better way of resolving the dispute.

### Examine and apply

6 Conduct some research and find a recent article that discusses CAV assisting to resolve a dispute (hint: look for cases where CAV was helping a consumer, and not where CAV took action against somebody). Prepare a set of questions for another person in your class about CAV based on the article. Discuss the answers with your pair.
7 Read the scenario 'Lemons'.
   **a** In your view, is CAV an appropriate dispute resolution body for this dispute? **Justify** your answer.
   **b** **What** would you advise Matthew do in this situation?

### Reflect and evaluate

8 As a class, link each of the strengths and weaknesses of CAV to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.
9 **Evaluate** the ability of CAV to resolve small disputes between consumers and traders.

# 7.10 The Victorian Civil and Administrative Tribunal (VCAT)

## Key knowledge

In this topic, you will learn about:

- the purposes and appropriateness of institutions used to resolve disputes, including the Victorian Civil and Administrative Tribunal.

**tribunal**
a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

Other than complaints bodies and courts, another type of body that provides dispute resolution services in Victoria (and across Australia) is **tribunals**. Tribunals are dispute resolution bodies which deal with a limited area of law, and have expertise in that area. The process of dispute resolution is less formal than the courts, and is intended to be a cheaper and more efficient way of resolving disputes. There are a number of tribunals in Australia, including ones specifically set up to resolve mental health disputes, native title disputes, and disputes about migration decisions.

Victoria's biggest and most active tribunal is the Victorian Civil and Administrative Tribunal (VCAT). In this topic, you will look at the purposes of VCAT and its role in dispute resolution.

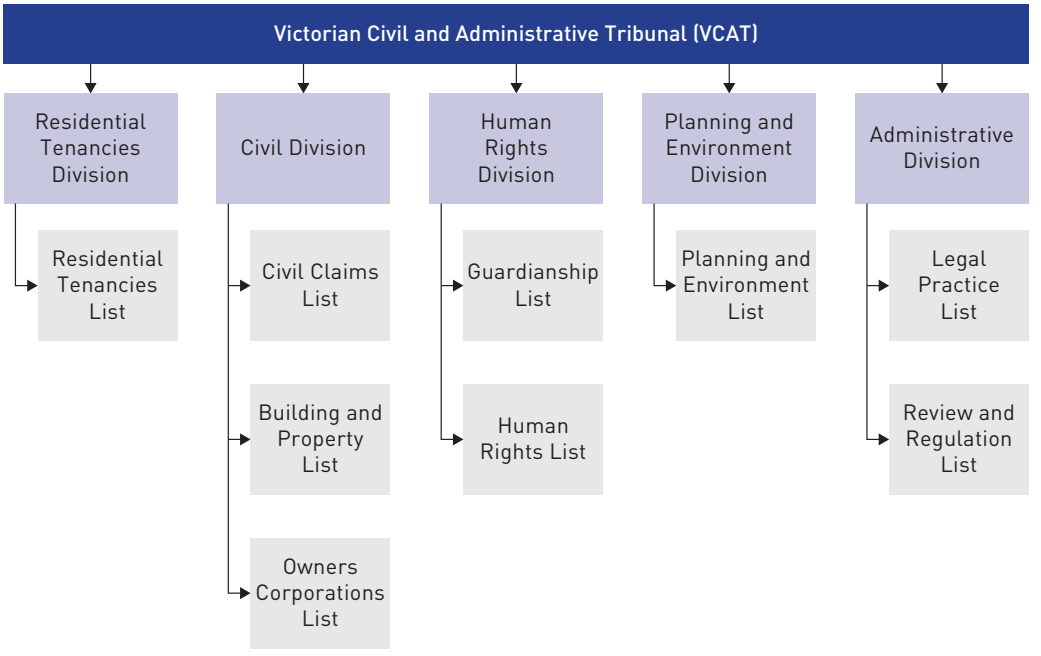
## Introduction to VCAT

Established in 1998, when the Victorian Parliament passed the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), VCAT hears and determines a range of civil and administrative cases in Victoria. VCAT is one of Australia's busiest tribunals, receiving more than 85 000 claims per year.

**member**
the person who presides over final hearings and compulsory conferences at the Victorian Civil and Administrative Tribunal (VCAT). Members include the VCAT President, vice-presidents, deputy presidents and senior and ordinary members

The governing body of VCAT consists of the President, vice-presidents, deputy presidents, senior **members** and ordinary members. The President is a judge of the Supreme Court, and vice-presidents are judges of the County Court. They are responsible for the management and administration of VCAT.

VCAT is divided into five divisions. Each contains one or more lists, which hear certain types of disputes. The divisions and lists as of July 2023 are shown in Source 1.




**Source 1** VCAT's divisions and lists as of July 2023

# Purposes of VCAT in resolving disputes

VCAT's commitment is to provide Victorians with a low-cost, accessible, efficient and independent tribunal delivering high-quality dispute resolution processes. How VCAT achieves this is set out in Source 2.

| VCAT's purpose | How VCAT achieves this |
|---|---|
| Low cost | • Generally the parties need only pay a small amount for filing their claim, although costs vary from list to list. As at 1 July 2023, the standard fee was just over $70 for smaller claims.<br>• VCAT has three tiers or levels of fees: corporate, standard and health care card holders. The aim is to make corporate applicants pay higher fees, and those who are less able to pay (being health care card holders) pay only nominal fees (or for some type of disputes, no fee).<br>• There are no hearing fees for many claims, such as civil claims where the claim is $100 000 or less or for a rental dispute that takes less than a day to hear. However, for other disputes a hearing fee may be payable.<br>• In many lists, the parties do not have to go through pre-trial procedures, which can often add to the legal costs incurred by the parties.<br>• Parties can represent themselves, rather than paying lawyers. More than 80 per cent of people represent themselves at VCAT. |
| Accessible | • VCAT conducts hearings in various locations in Victoria. Its main centre is in Melbourne but it has several venues across the state.<br>• VCAT allows people to make applications online and conducts hearings online or by phone.<br>• VCAT hearings are less formal than court hearings, which makes people feel more comfortable in using its services. In many disputes, there are no pre-trial procedures or formal evidence processes. |
| Efficient | • VCAT constantly aims to reduce waiting times. Reducing the waiting time for parties to have their disputes resolved makes the process more efficient. The average time for a case to be finalised in VCAT varies from list to list.<br>• VCAT generally does not use pre-trial procedures or formal processes, making it efficient in its resolution of disputes. |
| Independent | • VCAT's members are independent and will act as unbiased adjudicators. |

**Source 2** How VCAT achieves its commitment

**exclusive jurisdiction** the lawful authority or power of a court, tribunal or other dispute resolution body to decide legal cases to the exclusion of all others

# VCAT's jurisdiction

VCAT obtains its power to hear cases through statutes made by parliament. Often the parties will have no choice but to bring their dispute to VCAT, because it has **exclusive jurisdiction** to hear certain types of claims. Exclusive jurisdiction means that only VCAT has the power to hear and determine that type of dispute, and not a court.

Where VCAT does not have exclusive jurisdiction, parties can use VCAT or another dispute resolution body such as a court.

Some of the types of disputes that each of VCAT's division hears are set out in Source 3 below.

| Division | Type | Examples |
|---|---|---|
| Residential Tenancies | Tenancy disputes, including disputes between residential tenants and landlords, rooming house owners and residents, caravan park owners and residents, and site tenants and owners | • Unpaid rent<br>• Repairs, maintenance, damages or changes to property<br>• Excessive rent increases |
| Administrative | Professional conduct inquiries and applications from people seeking a review of decisions made by government and other authorities | • Costs disputes between lawyers and clients<br>• Disputes about a decision made by a government agency (e.g. decision to declare a dog dangerous) |
| Civil | Civil disputes relating to consumer matters, building works, owners' corporation matters, retail tenancies, and sale and ownership of property | • Products and services bought or sold<br>• Quality of domestic or commercial building works<br>• Loss or damage because of water flowing onto property |
| Human Rights | Matters relating to guardianship and administration, equal opportunity, racial and religious vilification, health and privacy information, disability matters and decisions made by the Mental Health Tribunal | • Discrimination complaints (e.g. relating to equal opportunity, harassment or vilification) |
| Planning and Environment | Reviews of decisions made by councils or other authorities | • Review about a decision by council to grant or not grant a permit<br>• Disputes about the valuation of a land for the purposes of paying rates and taxes |

**Source 3** The kinds of disputes that VCAT can hear

## Disputes that VCAT cannot hear

There are some disputes that VCAT cannot hear, so it is not an appropriate body to resolve these types of disputes. Examples include:

- class actions
- disputes between employers and employees
- disputes between neighbours (unless it is also a dispute about an owners' corporation)
- disputes between drivers in car accidents
- disputes involving federal or state law where VCAT has not been given any power to hear the matter.

More recently, and since a landmark decision in the Court of Appeal in February 2020, VCAT cannot decide cases where the parties are residents of different Australian states, or where the Commonwealth is a party.

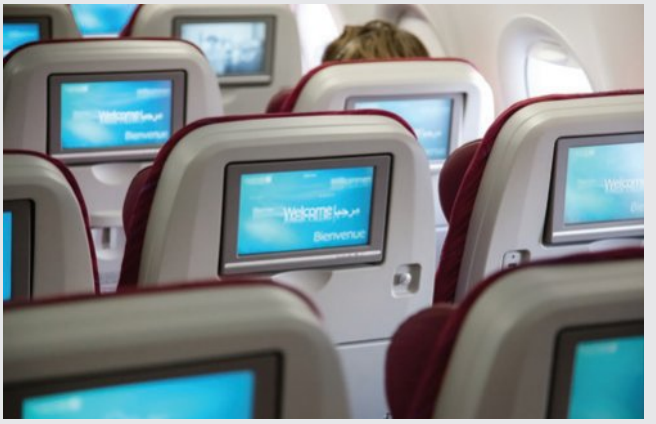
The scenario on the following page is an example of a dispute that was not able to be heard by VCAT.

Actual scenario

## Where's the entertainment?

A passenger on a Qantas flight issued a claim in VCAT seeking, among other things, $100 in compensation because the inflight entertainment system did not operate for the entirety of the flight. The passenger was compensated by Qantas with 3000 frequent flyer points, but he was not satisfied.

The VCAT member dismissed the claim. VCAT held that it did not have federal jurisdiction that would allow it to hear and determine a claim such as this, because the flight was an international flight and the ticket was subject to international rules. VCAT therefore found that any claim by the passenger needed to be brought in a court which had federal jurisdiction, and VCAT did not have jurisdiction in this particular instance.



**Source 4** What happens when your inflight entertainment system does not work and you have paid money to use it?

*Did you know?*

In one VCAT case, a bride (who was vegetarian) claimed compensation because the cook she hired for her wedding failed to serve marinated tofu or vegetable patties, and she therefore was left hungry on her big day.

# Dispute resolution methods used

VCAT uses three main types of dispute resolution methods:

- mediation, including a fast-track mediation and hearing process for small civil claims
- compulsory conferences
- a final hearing before a member.



**Source 5** A mediator allows the parties to have control of their dispute and ensures that both parties are heard.

## Mediation

VCAT actively uses mediation to help resolve disputes. As previously explored, mediation is a cooperative method of resolving disputes. It is a process in which the parties discuss the issues involved, develop options, consider alternatives and reach an agreement through negotiation. Parties may bring support people or legal representatives with them.

Although mediation is not legally binding, in most situations a deed or terms of settlement is drawn up once the parties reach a resolution. The deed of settlement is then enforceable through the courts if one party does not comply with its terms. In some situations, VCAT may make an order which gives effect to the terms of settlement, so that the terms will become a formal order of the tribunal and be binding. If the matter settles at mediation, then there is no need for a hearing.

### Fast track mediation and hearing

Disputes about goods and services in the Civil Claims List valued up to $10 000 may be listed for a **fast track mediation and hearing**. A qualified mediator conducts the mediation. If the dispute does not settle at mediation, then the matter will be listed for hearing before a VCAT member on another day.

**fast track mediation and hearing (FMAH)** a dispute resolution process used for small claims about goods and services in the Civil Claims List at the Victorian Civil and Administrative Tribunal (VCAT). Both the mediation and the hearing will be normally be conducted on the same day (if the dispute is not settled at mediation)

## Compulsory conferences

**Compulsory conferences** are confidential meetings during which the parties discuss ways to resolve their dispute in the presence of a VCAT member.

Compulsory conferences use a conciliation process. The VCAT member who assists in the process may suggest forms of settlement, and may explore the likely outcomes of the case if it goes to a hearing. That is, a member may give a view as to the possible decision that may be reached at hearing. The VCAT member who assists in the compulsory conference generally will not hear the case at the final hearing, and will not tell the member presiding over the hearing what happened at the compulsory conference.

**compulsory conference** a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences and explore possible resolutions

## Final hearing

If the matter has not settled at mediation, at compulsory conference or in any other way, it will be listed for a final hearing before a VCAT member. At the hearing the parties will be given an opportunity to present their case, which will include giving and hearing evidence, asking questions of witnesses and providing documents which support their case. A VCAT member will oversee the hearing and make a binding decision on the parties.

VCAT must conduct each proceeding with as little formality and technicality as possible, though it can adopt rules of evidence or procedures if necessary. VCAT also has an obligation to act fairly when resolving disputes.

### Orders

The types of orders that VCAT can make in a hearing vary from list to list. In general, VCAT can:

- require a party to pay money (e.g. where a person has purchased goods or services and has not paid for them)
- require a party to do something, such as perform work, carry out repairs or vacate premises (e.g. where a landlord refuses to repair a kitchen of the house they rent to tenants)
- require a party to refrain from doing something (e.g. to stop a demolition)
- declare that a debt is or is not owing (e.g. where there is a dispute about money owing under a contract)
- review, vary or cancel a contract
- dismiss a claim (where the applicant has been unsuccessful in providing their claim).

Decisions of VCAT are binding on the parties and can be enforced if a party does not comply with the decision.

The following scenario is an example of VCAT ordering the payment of money (damages).

Actual scenario

## VCAT sexual harassment claim

In this case, the applicant applied to VCAT for compensation from her former employer for injury, loss and damage suffered as a result of sexual harassment, discrimination and victimisation.

The applicant was an employee at a food manufacturer that distributed bread and pizza products to retailers. The applicant alleged that a fellow employee made her feel uncomfortable in that when he talked to her, he looked at her body instead of looking her in the eyes. She tried to raise it with her colleague, but he responded angrily. The tribunal found that the conduct amounted to sexual harassment, noting that 'a man who, instead of looking a woman in the face while talking to her, focuses his eyes on her body, when her body is not the mutual topic of conversation, is engaging in unwelcome conduct of a sexual nature which a reasonable person would anticipate would offend the other person'.

After reporting the conduct, the applicant alleged that her manager said something to the effect that he did not like Indians and that they 'always' cause problems. VCAT found that this amounted to discrimination as it involved treatment of a person unfavourably because of their race.




**Source 6** VCAT can resolve disputes about discrimination and harassment.

The tribunal also found that the applicant was treated less favourably than her male colleague when the complaint was being investigated, and that she was victimised by being directed to take a week's annual leave. VCAT ultimately awarded the applicant $53000 in compensation as a result of the conduct.

*Kumari v Bervar Pty Ltd (Human Rights)* [2023] VCAT 21 (9 January 2023)

### Appeals

Appeals from a decision made by VCAT may only be made on a question of law (also known as a point of law). For example, a party may argue that the law has not been properly interpreted in the case. Leave (permission) is required to appeal a VCAT decision.

If the tribunal was presided over by the President or a vice-president, the appeal will be heard in the Court of Appeal. All other appeals will be heard in the Trial Division of the Supreme Court.

# Appropriateness of VCAT

To determine whether VCAT is the most appropriate body to resolve a civil dispute, the following points should be considered:

- whether the dispute is within VCAT's jurisdiction. If the dispute is not the type of dispute that VCAT can hear (as set out in Source 3), then it is not an appropriate body to resolve the dispute. For example, VCAT cannot resolve disputes where the Commonwealth is a party or where there is a class action
- whether the parties can resolve the dispute themselves through negotiation or mediation
- the nature of the fees (for some lists, the fees are just as high as court fees, or even higher) and whether the applicant is able to pay those fees

- whether the parties wish to have greater avenues of appeal (appeals from VCAT decisions are limited to appeals on a question of law)
- whether one or more of the parties are unlikely to take VCAT seriously, and so a court is the preferred dispute resolution body
- whether one or more of the parties would prefer the formality of the courtroom
- whether the matter is of a complexity or size that is not appropriate for VCAT
- whether the party prefers the court to resolve the dispute because of the **doctrine of precedent**. VCAT is not a court, and it cannot make new law: it can only apply law made by parliament or the courts. Its own decisions do not form binding precedent in that they do not become binding on future cases (although they are binding on the parties).

**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

## Strengths and weaknesses

Source 7 below sets out a summary of some of the strengths and weaknesses of the use of VCAT to resolve disputes. In considering the strengths and weaknesses, you should link most of them to at least one of the principles of justice.

| Strengths | Weaknesses |
|---|---|
| VCAT is normally cheaper than courts due to low application fees, usually lower or no hearing fees, the costs saved by not having to undertake expensive pre-trial procedures and parties being able to represent themselves. | Due to increased use of legal representation, the costs of taking a matter to VCAT can sometimes be as high as, if not higher than, court costs. Changes to VCAT's fees mean that there are now fees for some hearings, as well as large fees for major cases in the Planning and Environment List. |
| VCAT generally offers a speedy resolution of disputes – the average time from application to resolution of disputes in its busiest list (the Residential Tenancies List) has been as low as two to three weeks. | VCAT has suffered delays in some of its lists, including following the COVID-19 pandemic. Some argue this hurts the economy, as many construction projects are unable to go ahead without the appropriate permits, as well as having a financial and mental impact on people who are waiting for their claim to be heard. |
| An informal atmosphere at VCAT ensures that parties can put their case forward in their own way, which can make people feel more comfortable with the process. | It may be too informal – some parties may feel uncomfortable or ill-equipped to deal with the lack of formal procedure or may prefer a formal process of giving evidence. Others may argue that this is not the right way for the 'truth' to come out. |
| The flexibility of VCAT's hearing processes ensures fairness and equality for an unrepresented party, because the member can aim to ensure an unrepresented party has an equal opportunity to understand processes and present their case. | VCAT is not a court, and it cannot create precedents: it can only apply law made by parliament or the courts. Its own decisions are do not form binding precedent in that they do not become binding on future cases |
| Each VCAT list operates in its own specialised jurisdiction, resulting in tribunal personnel developing expertise in resolving disputes in that area of law. | Decisions can only be appealed on a point of law, and to the Supreme Court, making it complex and expensive to appeal a case. |
| A decision made in a final hearing is binding on the parties, which means it is enforceable (unlike a decision that may have been reached by the parties themselves). | VCAT orders will still need to be enforced through the courts, which takes a little longer, rather than VCAT being able to assist in enforcement. |

**Source 7** Strengths and weaknesses of VCAT

# 7.10 Check your learning

## Remember and understand

1 **Define** the term 'tribunal', and **describe** two ways in which a tribunal is different to a court.

2 **Describe** three dispute resolution methods used by VCAT.

## Synthesise and apply

3 Read the scenario 'VCAT sexual harassment claim'.
   - **a** **Who** was the applicant in this case?
   - **b** **Why** would the employer have been the respondent in this case, instead of the colleague and manager that engaged in the conduct?
   - **c** Which dispute resolution method was used in this situation to resolve the dispute?
   - **d** In deciding the case, the VCAT member said '[the applicant] was not legally represented in this proceeding, but was assisted by her husband. It is well established that, where a party is not legally represented, the Tribunal will not require the same degree of precision by that party as would be expected of a party that was legally represented'. With reference to one of the principles of justice, **explain** what this statement means.

4 For each of the following scenarios, **state** whether VCAT is an appropriate body to help resolve the dispute. **Justify** your answer.
   - **a** Jan wants to sue her employer for failing to pay her enough. Jan is one of dozens of casual employees who allege the same employer underpaid them.
   - **b** Matthew is a landlord and is owed rental arrears by his tenant. He wants an order that the tenant pay the arrears.
   - **c** Georgia has been the subject of victimisation and discrimination at her school.
   - **d** June recently returned home to Melbourne from a terrible holiday in NSW. They want to sue the NSW hotel for not being a fit and proper accommodation service.

## Reflect and evaluate

5 As a class, link each of the strengths and weaknesses of VCAT to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.

6 **Discuss** the ability of VCAT to achieve the principle of fairness. In your answer, refer to the ability of VCAT to hear cases in a timely manner.

# 7.11 The courts

## Key knowledge

**In this topic, you will learn about:**

- **the purposes and appropriateness of institutions used to resolve disputes, including the courts.**

Earlier in this chapter, you explored the role of the courts in resolving civil disputes. More particularly, you have looked at:

- the reasons for the Victorian court hierarchy
- the roles of key personnel in a civil trial, including the judge and magistrate, the jury and the parties
- as part of the role of the judge and magistrate, the role of case management to resolve disputes in court
- the need for and role of legal practitioners
- the use of class actions to resolve disputes.

As part of the above, you have also considered the use of pre-trial procedures and some trial procedures (such as opening and closing addresses, and examining witnesses) in court disputes.

Following a consideration of these aspects of a civil trial, you should be able to consider the appropriateness of courts in resolving disputes, and their strengths and weaknesses.

## Appropriateness of courts

In determining whether a court is an appropriate dispute resolution body for a civil dispute, you should consider:

- whether the dispute falls within the court's jurisdiction
- whether there are other or better ways to resolve the dispute.



**Source 1** Are courts always the best option to resolve a dispute?

## Jurisdiction

Both the County Court and the Supreme Court of Victoria have unlimited jurisdiction to hear civil disputes. That means that it does not matter what amount the plaintiff is seeking; both those courts are able to hear the dispute.

The Magistrates' Court jurisdictional limit is $100 000. A plaintiff who is seeking damages of more than $100 000 must issue the claim in either the County Court or the Supreme Court. Alternatively, a plaintiff who prefers to go to the Magistrates' Court can always give up part of the claim to reduce it to below $100 000. This brings it within the Magistrates' Court's limit.

The Victorian Civil and Administrative Tribunal (VCAT) has exclusive jurisdiction over some matters, so courts cannot hear them. Those matters include:

- domestic building disputes
- retail tenancies disputes
- residential tenancies disputes
- planning disputes.

## Other or better ways to resolve a dispute

The parties should also consider whether there are other or better ways to resolve the dispute. Some of the things to consider include:

- whether the parties can resolve the dispute themselves through negotiation or mediation
- the costs of taking a matter to court, and whether CAV, VCAT or a private method might be better
- whether they are prepared to accept the risks and uncertainty involved with a third party making a decision on the dispute. This includes the possible risk of an adverse costs order
- whether they have access to and can afford legal representation, which is likely to be necessary to undertake pre-trial procedures and for trial
- whether they are comfortable with the formalities of the courtroom and the rules of procedure
- the size and complexity of the matter. In particular, more complex and larger claims are best dealt with in the Supreme Court, while smaller claims are best heard in the Magistrates' Court
- whether the proceeding is a class action that needs to be determined by the Supreme Court of Victoria
- the time it will take to have the matter heard in court, and possible delays in having the case resolved. If they want a swift resolution, then CAV, VCAT or a private mediation may be better
- whether the parties are prepared to have their disputes aired in an open hearing where members of the public and the media can be present. If they are sensitive to publicity, an arbitration may be better, because the dispute can then be heard in private.

# Strengths and weaknesses

*Study tip*

You should also go back to look at some of the previous strengths and weaknesses that are relevant to courts. For example, the strengths and weaknesses of the role of the judge or magistrate can also be relevant to assessing the strengths and weaknesses of the court.

The way courts resolve disputes has several strengths and weaknesses. The main ones are discussed below, drawing on the information from earlier in this chapter. The strengths and weaknesses are also relevant to determining whether courts are an appropriate dispute resolution body for a particular type of case.

| Strengths | Weaknesses |
|---|---|
| Various pre-trial procedures allow the parties to reach an out-of-court settlement. This includes mediation, which the judge can order the parties to attend before trial. This can potentially save the costs, time and stress of going to trial. | Cases taken to court often suffer delays. Pre-trial procedures take a long time to complete. Discovery of documents in particular has been criticised for adding to the time it takes for a trial to be heard and determined. Judges have sometimes been criticised for taking too long to deliver their decision, and if there is a jury, the trial may take longer. |

| Strengths | Weaknesses |
|---|---|
| In undertaking various pre-trial procedures, the parties to ensure a more efficient and timely resolution of dispute have an opportunity to know the strengths and weaknesses of each other's case, which may help narrow the issues in dispute or even help resolve the matter before trial. | The costs in having a dispute resolved in court may restrict access to the courts, and may jeopardise parties being treated equally because of their socio-economic status. This includes the costs of engaging a lawyer. |
| Courts use processes to ensure procedural fairness. For example, the judge can give directions and orders to ensure the dispute is resolved in a timely manner and will ensure that parties undertake procedures such as discovery which ensures both parties know the case that is put against them. | Many of the procedures are complex and difficult to understand without a lawyer. These include pleadings and directions, and trial procedures such as cross-examination of witnesses. |
| Court processes allow interaction between the court and the parties. For example, pleadings provide the court with a written record of the claim, and at directions hearings, the parties can raise issues with the judge and the other side that may need to be resolved. | The formalities of the court can be stressful. The courtroom has previously been criticised as being inaccessible to some parties because of formalities, and the idea of party control can be stressful and time-consuming for a party that needs to gather evidence. |
| The court makes a binding decision, meaning that the outcome is certain, and is enforceable. | Courts do not allow for 'compromise' or 'win-win' situations. Their decisions determine who bears responsibility for the plaintiff's loss, if any, and what remedy should be awarded. |

**Source 2** Strengths and weaknesses of courts

# Comparison of dispute resolution bodies

It is useful to compare the use of CAV, VCAT and the courts in resolving disputes.

| | CAV | VCAT | Courts |
|---|---|---|---|
| **The third party** | | | |
| Is there a third party who makes a decision? | No, CAV has no power to 'make a decision'. | Yes, if the dispute proceeds to a final hearing | Yes, if the dispute proceeds to a final hearing or trial |
| Role of third party | Facilitates discussion and suggests options and possible solutions. Usually someone with specialist knowledge in the field | Hears all the evidence at a final hearing and makes a binding decision | Hears all the evidence at a final hearing or trial and makes a binding decision |
| Is the decision binding? | No, though terms of settlement may be enforceable | Yes | Yes |

| | CAV | VCAT | Courts |
|---|---|---|---|
| **Processes and procedures** | | | |
| Is the resolution of the dispute conducted in private? | Yes | No, unless the parties settle before the final hearing | No, unless the parties settle before the final hearing or trial |
| Are there rules of evidence and procedure? | No | Generally, more flexible | Yes |
| Are there pre-trial procedures? | No | Generally, no | Yes |
| Is there a jury? | No | No | Only if the judge or one of the parties requires it (and only in the higher courts) |
| Do parties need legal representation? | No | Generally, no | Generally, yes |
| **Types of civil disputes** | | | |
| Are there restrictions on jurisdiction? | Yes | Yes | Yes, for Magistrates' Court. Also, some disputes fall within VCAT's exclusive jurisdiction |
| Types of civil disputes heard? | Disputes between tenants and landlords and consumers and traders , and other consumer-type disputes | Various types of disputes, including small civil claims, residential tenancies claims and retail tenancies | All types of claims, including complex claims |
| Appropriate for large complex claims? | No | Generally, no | Yes, Supreme or County Courts |
| Can they hear class action? | No | No | Yes, Supreme Court |
| **Dispute resolution methods used** | | | |
| Use of mediation? | No | Yes | Yes |
| Use of conciliation? | Yes | Yes | Generally, no, but could refer parties to conciliation |
| Use of arbitration? | No | No | Yes, in Magistrates' Court for claims less than $10 000 |
| **Hierarchy and appeals** | | | |
| Is there a hierarchy? | No | No | Yes |
| Can appeals be allowed? | No | Yes, on points of law to Supreme Court or Court of Appeal | Yes |

**Source 3** Ways in which CAV, VCAT and the courts are similar to and different from each other when resolving disputes

# 7.11 Check your learning

## Remember and understand

1 **What** does 'unlimited jurisdiction' mean?
2 Can the Supreme Court of Victoria hear a claim for $5000? Give reasons for your answer.
3 The plaintiff wants to issue his claim in the Magistrates' Court, but the claim is for $120 000. **What** are the plaintiff's options?
4 **Describe** two types of matters the courts cannot hear.

## Examine and apply

5 For each of the following, **identify** the dispute resolution body that the parties are using to resolve the dispute.
   **a** The parties are required to provide their list of discovered documents by next Friday.
   **b** The claim has been rejected for conciliation by this body because they consider it unlikely that the matter will settle.
   **c** The parties have been ordered to attend a compulsory conference.
   **d** A binding decision has just been made. Only an appeal on a point of law to the Court of Appeal can be made.
   **e** The parties have been ordered to attend a directions hearing.
   **f** Conciliation has been unsuccessful, and the consumer has been told that VCAT might be another option.
   **g** Trial is set down for next week.
   **h** A member will preside over the final hearing next week.
6 Prepare a visual diagram that shows the similarities and differences between CAV, VCAT and courts as dispute resolution bodies.

## Reflect and evaluate

7 As a class, link each of the strengths and weaknesses of courts to one or more of the principles of justice. You could create a poster or digital resource to refer to, or annotate your notes by adding a column next to each strength and weakness.
8 In your view, which dispute resolution body is the most effective way of resolving disputes? In your answer, you should consider the following matters:
   **a** expertise
   **b** powers of the dispute resolution body
   **c** large complex disputes
   **d** small claims
   **e** costs.
9 **Evaluate** the ability of the Magistrates' Court to achieve the principle of equality.

# 7.12 Costs and time

## Key knowledge

**In this topic, you will learn about:**

- **the impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute.**

This topic focuses on two factors that can affect the ability of the civil justice system to achieve the principles of justice (fairness, equality and access). Those two factors are costs and time.

## Costs

As you have learnt, some aspects of the civil justice system – such as alternative dispute resolution methods like mediation and conciliation – have been designed to help reduce legal costs for parties. However, even though some parts of our civil justice system aim to reduce costs, many people will still pay high costs to have their civil disputes resolved. These high costs can sometimes discourage or prevent people from pursuing civil claims or defences, or may mean they do not adequately make out their case because they represent themselves, but lack the skills, experience and objectivity to do so.



**Source 1** The cost of legal representation means not everyone can afford it.

### Legal costs

In Chapter 6 you learnt about some of the costs associated with initiating a claim. One of the costs incurred by the parties in resolving a civil dispute is the cost of legal representation. In theory everyone has the right to legal representation, but in reality not everyone can afford this right. The nature of the court system relies on both parties having good legal representation. This way, the chance of each party winning the case is maximised, the truth will come out, and a fair outcome will be achieved.

The amount of money a party spends on representation often depends on the nature of the dispute and the way the case needs to be resolved. For example, making a complaint through Consumers Affairs Victoria (CAV) is free, whereas a more complex claim issued in the Supreme Court of Victoria will often result in both parties spending a significant amount of money on legal costs. Issuing a claim through the Victorian Civil and Administrative Tribunal (VCAT) can be inexpensive – but that depends on the type of claim, and who is making it.

***Did you know?***

Large class actions can cost around $10 million in legal costs and expenses to bring.

In addition to costs of legal representation, there are also court costs and disbursements ('out of pocket' expenses) associated with:

- engaging expert witnesses and mediators
- filing and hearing fees
- using a jury (if a party requests one).

On top of those costs is the possibility of having to pay some of the other side's costs if the claim or defence is unsuccessful.

Costs are one of the reasons for the increase in **self-represented parties** in the courts. While VCAT encourages self-representation, it is not suitable for everyone. Many people need some assistance to help them navigate the system. In particular, if one of the parties is poorly represented, or not represented at all, this can have a negative impact on their ability to make out their case.

Furthermore, most civil parties are not able to access **legal aid**, because most of the legal aid funding is spent on aid for criminal and family law cases rather than civil disputes. As a result, some people pursuing civil disputes are forced to settle or withdraw their claims because of the costs involved in taking a matter to trial, and some are not able to initiate a claim at all.

**self-represented party**
a person before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

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

## Extract

### The cost of legal representation

The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.

Source: Chief Justice Wayne Martin, 'Creative a Just Future by Improving Access to Justice' (Address delivered at the Community Legal Centres Association WA Annual Conference 2012, Perth, 24 October 2012).

Justice Bell recognised in *Tomasevic v Travaglini* that judges may need to explain matters to self-represented parties to ensure a fair hearing. This was recognised again in the 2016 case of *Loftus v Australia and New Zealand Banking Group Ltd*, outlined in the scenario below.

## Actual scenario

### Appeal granted

The appellant applied for leave to appeal against a decision which granted the bank possession of his mortgaged property. The parties agreed that the appeal should be allowed, but the Court of Appeal requested the parties to file a joint memorandum so it could be satisfied that a new trial was necessary, given the costs and time involved.

One of the key issues was that the appellant, Loftus, was unrepresented at trial, and the bank was represented. Loftus argued that the trial judge failed to explain certain matters to him, including the consequence of not calling a particular witness to give evidence at trial, not explaining to him his right to object to certain evidence, and restricting his cross-examination of a certain witness. He argued that because he was self-represented, the Court had a greater role to play in ensuring the trial was fair, and it failed to do so.

The Court of Appeal stated that the judge has an overriding duty to ensure a fair trial, which includes ensuring that a self-represented litigant understands and is able to vindicate their rights (i.e. show or prove themselves to be right, reasonable or justified). The Court of Appeal agreed that in this instance the judge did not explain the legal issues sufficiently, and the appeal was therefore allowed.




**Source 2** The Court of Appeal held that a judge has an overriding duty to ensure a fair trial, which includes ensuring that a self-represented litigant understands their rights.

*Loftus v Australia and New Zealand Banking Group Ltd [No 2]* [2016] VSCA 308 (8 December 2016)

The assistance given by the courts or tribunals to self-represented parties can help overcome some of the issues faced by a party who is not able to pay for private legal representation and is not eligible for legal aid. However, the assistance does not completely overcome the issues faced by a self-represented party. The assistance given to a self-represented party cannot extend to a person advocating (arguing) for that party.

## Measures to address costs

Some measures have been put in place to try to address the issue of costs in the civil justice system.

For example, alternative dispute resolution methods such as mediation and conciliation can avoid a final hearing or trial in courts or at VCAT, and therefore avoid the significant costs that may be incurred in a civil case. In particular, the availability of a range of dispute resolution methods has helped with the costs involved in a civil dispute in two ways:

1. The earlier a dispute is resolved, the more money is saved. Parties avoid the significant costs involved with pre-trial procedures and trial procedures. The settlement of a dispute before trial also saves a party having to pay the winning side's costs, which may be substantial.
2. The costs saved by resolving a matter before trial or hearing means a saving for the court or VCAT, and therefore a saving for the entire civil justice system. The more that is spent on trials and hearings, the more funding is required for our dispute resolution bodies. Resolving matters through dispute resolution methods such as mediation can therefore save the time and costs of the courts and tribunals.

In addition, the following measures can help to reduce costs:

- the use of Consumer Affairs Victoria (CAV) and VCAT to help resolve disputes without the need to go to court. These bodies provide no or low-cost dispute resolution services and assistance, and legal representation is not generally required (and is often discouraged)
- the use of case management powers in court to try to narrow the issues in dispute and ensure a cost-effective resolution to the dispute. For example, a judge may narrow discovery or require the parties to attend mediation early, which can help to reduce costs
- a number of bodies and organisations in Victoria provide **pro bono** assistance to individuals. For example, Justice Connect is an organisation that assists vulnerable people in the community. The Victorian Bar also has a committee that oversees pro bono assistance.

**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)

# Time

Quick and efficient hearings are often the fairest. If a dispute takes a long time to be heard – or the hearing itself is very lengthy – it can become increasingly unfair to one or both parties.

The time it takes for courts and VCAT to resolve disputes can vary greatly depending on the complexity of the case, the type of claim, the number of parties involved, and where the claim was issued.

In particular, the following factors can impact on how long it takes for a case to be heard:

- **backlogs** – while delays in having cases listed for hearing or trial (that is, obtaining a hearing date) have improved in recent years, it largely depends on the court or the VCAT list
- **pre-trial procedures** – pre-trial steps can be complex and lengthy. Most criticised is the process of discovery, which can take months. Courts that use case management processes often make orders about discovery and other pre-trial steps to streamline the process.
- **evidence gathering and preparation** – the time it takes for the parties to get a case ready for hearing (including gathering evidence and preparing for the hearing).

Delays have an impact on parties to a civil dispute. Some people choose not to pursue a legal claim because it would take too long to resolve. Delays in getting an outcome can cause stress, wasted time

and inconvenience. Delays can also add to the costs. They can result in a plaintiff settling their claim for less than what it is worth, or withdrawing their claim entirely.




**Source 3** Delays can impact on the principles of justice.

## Backlogs

At times, a backlog of cases in court or at VCAT will need to be resolved and determined (i.e. cases that are 'in line' for a hearing or trial). Following the COVID-19 pandemic, there has been an increase in this backlog, particularly at VCAT. In its 2021–22 annual report, VCAT noted that the backlog was one of its most significant challenges, particularly in the Residential Tenancies List. In the past a hearing in this list would be held within two to four weeks of an application being made. In 2021–22, this increased to 22 weeks. The issue of VCAT delays is explored in the article below.

**Actual scenario**

### People waiting years to have cases heard at state's 'timely and efficient' legal tribunal'.

Clay Lucas, *The Age*, 27 December 2022

Waiting times to have a dispute heard at the Victorian legal tribunal – which is tasked with being 'timely and efficient' – have stretched to months and, in the worst cases, years.

Renters were hit particularly hard by delays at the Victorian Civil and Administrative Tribunal in 2022, with disputes between landlords and tenants taking months to be heard rather than a few weeks, as was once the case.

...

A tribunal spokeswoman said the increase in time taken to hear cases was largely driven by more people using the tribunal due to improved accessibility through online hearings. More people taking part via online hearings also extended the length of cases, she said.

Tribunal president Justice Michelle Quigley and chief executive Mary Amiridis confirmed case backlogs had worsened in the past year and said in the report this was driven by large numbers of members retiring 'and longer hearing times for cases arising from legislative changes'.

Disputes over rental properties heard at the tribunal mostly relate to tenant bonds not being returned or compensation sought by landlords for damage done to homes.

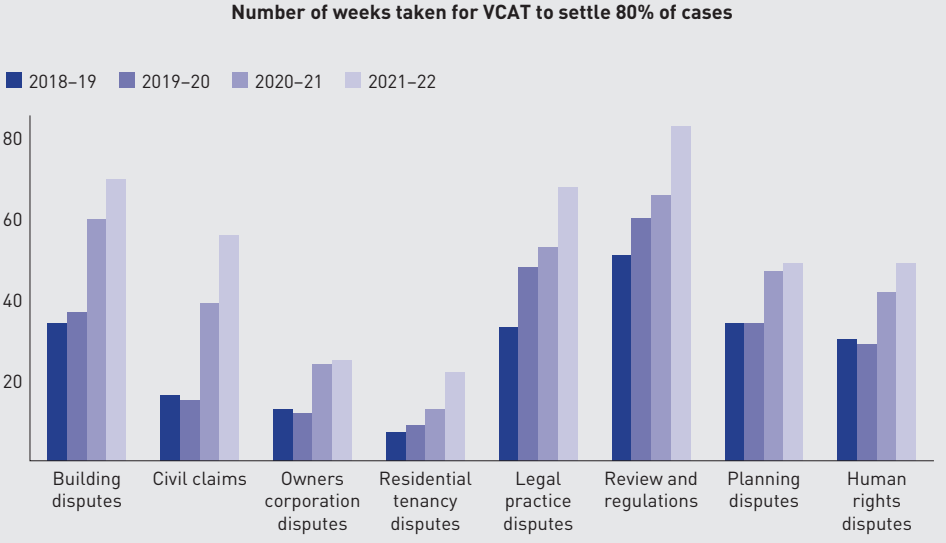
'We recognise the financial impact and the stress of waiting to have these cases heard,' the tribunal spokeswoman said.

The rental dispute hearings list is the tribunal's highest-volume area, and it recorded a 37 per cent increase in unheard cases on the previous financial year.

The spokeswoman said there was a focus on reducing case numbers in the rental dispute area. 'We know [the delay] seriously impacts many Victorian renters and landlords,' she said.

Housing cases involving issues of safety, homelessness and urgent repairs were being prioritised "as are other case types including, for example, applications for possession for unpaid rent", she added.

...




Source: VCAT 2021–22 annual report

**Source 4** VCAT has experienced delays in some lists in recent years.

## Measures to reduce delays

One of the ways that delays in a case can be managed is the use of case management powers.

Case management powers are used widely across the courts and tribunals in Victoria and elsewhere in Australia, and can result in a significant modification of procedure rules, as well as modification of rules relating to **pleadings**, discovery and evidence preparation.

**pleadings**
(in civil cases) a pretrial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

Giving the courts greater control over cases ensures that disputes are resolved in a more timely and cost-effective manner. The courts can, for example:

- order that the parties attend mediation or some other form of dispute resolution method
- limit the scope of discovery to ensure that it does not take too long
- order that no pleadings are required
- restrict the time for final hearings, including limiting the number of witnesses and the time to make submissions or cross-examine witnesses.

It is widely seen that case management procedures reduce delays, and a pro-active judge will help parties narrow the issues in dispute, undertake only those steps that are relevant, and keep to the timelines set by the court. Judges achieve this by making orders along the way and requiring them to be complied with.

Other measures that seek to reduce delays or backlogs are as follows:

- VCAT has established dedicated programs to manage delays. This includes a pilot program with the County Court under which judges would hear and determine complex building disputes waiting in the Building and Property List, and a backlog recovery program to deal with the significant backlogs in the Residential Tenancies List.
- Some matters are now dealt with 'on the papers', avoiding the need for a hearing. For example, in VCAT some cases are now decided based solely on written documents provided by the parties, which results in faster decisions made without the need for parties to present their case at a hearing.
- The courts are increasingly using online methods to resolve disputes, including holding hearings and even mediations online. This can help the courts be more efficient (by avoiding the need to physically attend court) as well as providing opportunities to access hearings remotely when parties may not otherwise be able to attend in person.

# Summary

Source 5 below sets out a summary of the impact of costs and time on the civil justice system. The summary points will allow you to engage in a discussion on the impact of each of the factors on the civil justice system.

| Factor | Summary |
|---|---|
| **Costs** | • The costs associated with civil disputes include costs of legal representation, and disbursements such as expenses associated with engaging expert witnesses, filing and hearing fees, and jury fees (if there is one and the party requests it).<br>• The nature of the court system generally relies on legal representation. Legal practitioners can maximise a person's chance of succeeding and getting a just outcome.<br>• The amount of legal costs depends on the nature of the dispute and the way the case needs to be resolved. For example, costs associated with court cases are generally higher than VCAT cases.<br>• Although people are entitled to representation, many people cannot afford a lawyer, and may be deterred from initiating a claim. Alternatively, some people may decide to represent themselves. If one or both parties are poorly represented, this can have a negative impact on their ability to receive a just outcome. Self-represented litigants do not have the same objectivity as a party who is represented by an experienced legal practitioner and may not be able to make the right decisions in the case because they are too emotionally invested.<br>• Legal aid is very difficult to obtain for a civil matter, with most funding directed to criminal and family law matters.<br>• A court's duty to ensure a fair trial and a judge's responsibility to assist a self-represented party can help ensure fairness, but self-represented litigants may still struggle to understand legal issues or procedures.<br>• Some measures are in place to seek to reduce the costs, such as the use of alternative dispute resolution methods, the use of case management, and pro bono bodies and schemes. |

| Factor | Summary |
|---|---|
| Time | • Quick and efficient hearings are better hearings. The delay in resolving a dispute can affect the reliability of evidence, jeopardising a fair outcome. Previous cases have found that extraordinary or significant delays can impact on procedural fairness.<br>• Delays can have a serious impact on more vulnerable parties is an injured person, or somebody with little or no money).<br>• Delays can also affect parties who are generally not familiar with litigation and can be stressed by the inconvenience of court processes (unlike larger businesses).<br>• Delays may force parties to settle or withdraw their claim, frustrated by the loss of time or unable to continue without settlement. This can reduce genuine access to the civil justice system.<br>• In recent times, there has been a significant backlog of cases in VCAT which is identified as being one of its biggest challenges.<br>• VCAT has put in place some programs to seek to address the issue of delays. In addition, measures such as case management powers and the use of alternative dispute resolution methods can also help reduce backlog, as can online hearings. |

**Source 5** A summary of costs and time

# 7.12 Check your learning

## Remember and understand

1 **Provide** two reasons why there are sometimes delays in having a case heard by a judge or magistrate.

2 **Explain** what case management means and **describe** two ways judges can manage a civil dispute.

3 **How** can VCAT delays affect a party pursuing a civil claim?

4 **Describe** three types of costs that a party may have to pay in a civil dispute.

5 **How** can the increased use of mediation address costs and time?

## Examine and apply

6 Read the scenario 'Appeal granted'.

- **a** **What** was the nature of this dispute?
- **b** **Why** did the appellant seek leave to appeal?
- **c** The parties already agreed between themselves that the appeal should be allowed. **Why** did the Court of Appeal feel the need to consider the appeal anyway?
- **d** **Explain** some of the matters that were not explained to the applicant at trial. For each, **describe** why they would have affected the ability to achieve a fair trial.
- **e** **Explain** how this legal case shows how each of the principles of justice were upheld in the Court of Appeal allowing the appeal.

7 Draw a maze (you can do this on paper or using a digital drawing tool). In the maze, show some of the hurdles or issues that a party in a civil case will confront in relation to costs. Put them in the order that you think the party is likely to confront them. Think of as many costs as you can.

8 Use the current annual report for VCAT (a link is provided on your obook pro) to access current waiting times for each of the VCAT lists. Has there been an increase or decrease in the waiting times? **Provide** a summary of your analysis.

Weblink
Current VCAT annual report

## Reflect and evaluate

9 Do you think that delays have more of an impact on certain groups or individuals in society, or do they affect all parties equally? Give reasons for your answer.

10 'The parties should be forced to go to mediation as soon as a statement of claim is issued in court. This will save the parties and the court money.' **Discuss** the extent to which you agree with this statement.

Chapter

7

# Review

## Top exam tips from Chapter 7

1 Although there are many facts and figures in this chapter, you do not need to know them all to do well in your assessments. For example, you do not need to know the exact cost of a court filing fee, or how many jury trials there are in the County Court. Those figures are there to help you understand the content – knowing them is a bonus, but it is not critical.

2 You are expected to be able to discuss the appropriateness of all the institutions and methods you have studied in this chapter – this includes CAV, VCAT, courts, class actions, mediation, conciliation and arbitration. And remember that whether an institution or method is appropriate depends on the facts of the case – the more you read cases and scenarios, the better you will get at pinpointing features which point to an institution or method being appropriate or not.

3 Don't forget the key skills of having to compare the key personnel in a criminal trial and in a civil trial. A 'compare' question requires both similarities and differences. The tables in this chapter will help you develop that 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 (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at 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 Describe **one** reason for a court hierarchy in resolving civil disputes.

(3 marks)

**Difficulty: medium**

2 Compare the role of the jury in a criminal trial and a civil trial.

(5 marks)

**Difficulty: high**

3 Discuss the extent to which the costs of legal representation impact on the ability of the civil justice system to achieve the principles of fairness and access.

(10 marks)



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# Practice assessment task

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

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

## Chloe and her laptop

Chloe is a Year 12 student. She purchased a laptop from Jenner Laptops in September 2021. After two weeks, the laptop cord started to spark and caused the laptop to burn and break down. Chloe has not been able to turn on the laptop since. She took it to a repair store who, after two days, confirmed that the laptop was broken and that Chloe had lost all of her data and documents on the laptop, including her photos, school assignments, exam revision notes and practice examinations.

Chloe has contacted the owner of Jenner Laptops, Courtney. Courtney Jenner looked at the terms and conditions of Chloe's contract and pointed out that it states that any repairs are to be undertaken by Jenner Laptops. Courtney told Chloe that because Chloe used a third party to repair the laptop, this had voided any guarantees and Chloe was not entitled to a refund or any compensation.

Since that visit, Chloe has sent several emails to Courtney. Courtney has politely declined to meet with Chloe and has said that her attention is on promoting Jenner Laptops through social media and at a large international expo for boutique IT stores.

Chloe has been told she should abandon her claim, but she is upset. She has not slept since it happened, and she has suffered sleepless nights as a result of her VCE exams that are coming up. She has tried to piece together as much as she could of her exam notes and school assignments.

Chloe goes to see a friend of hers who is studying law. Her friend tells her that she should issue a claim in the Magistrates' Court as it is a small claim, and the Magistrates' Court can make a binding decision without much cost to Chloe.

# Practice assessment task questions

**1** Referring to the Magistrates' Court and its civil jurisdiction, outline **one** reason for a court hierarchy.
(2 marks)

**2** Would a jury be used at all in this case? Justify your response.
(3 marks)

**3** Describe **one** dispute resolution method that the following institutions may use to resolve Chloe's dispute. You must choose a different dispute resolution method for each.

**a** Magistrates' Court

**b** Consumer Affairs Victoria

**c** Victorian Civil and Administrative Tribunal
(9 marks)

**4** Chloe now wants to issue a class action. Explain to Chloe **two** reasons why a class action would be inappropriate.
(5 marks)

**5** Chloe decides to issue the claim in the Magistrates' Court with the help of a lawyer. Discuss the need for a legal practitioner in Chloe's case.
(6 marks)

**6** Discuss the extent to which each of Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the Magistrates' Court could assist in achieving the principle of fairness in resolving Chloe's dispute.
(10 marks)

Total: 35 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 7.1. |
| • The purposes and appropriateness of methods used to resolve civil disputes, including mediation, conciliation and arbitration. | ☐ | ☐ | Go back to Topic 7.2. |
| • The reasons for the Victorian court hierarchy in determining civil disputes, including administrative convenience and appeals. | ☐ | ☐ | Go back to Topic 7.3. |
| • The roles of key personnel in a civil dispute, including the judge or magistrate (including the role of case management). | ☐ | ☐ | Go back to Topic 7.4. |
| • The roles of key personnel in a civil dispute, including the jury. | ☐ | ☐ | Go back to Topic 7.5. |
| • The roles of key personnel in a civil dispute, including the parties. | ☐ | ☐ | Go back to Topic 7.6. |
| • The need for legal practitioners in a civil dispute. | ☐ | ☐ | Go back to Topic 7.7. |
| • The use of class actions to resolve civil disputes. | ☐ | ☐ | Go back to Topic 7.8. |
| • The purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria. | ☐ | ☐ | Go back to Topic 7.9. |
| • The purposes and appropriateness of institutions used to resolve disputes, including the Victorian Civil and Administrative Tribunal. | ☐ | ☐ | Go back to Topic 7.10. |
| • The purposes and appropriateness of institutions used to resolve disputes, including the courts. | ☐ | ☐ | Go back to Topic 7.11. |
| • The impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute. | ☐ | ☐ | Go back to Topic 7.12. |

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

- **Chapter 7** Chapter review quiz
- **Revision questions** Chapter 7
- **Chapter summary** Chapter 7
- **Quizlet** Revise key legal terms from this chapter.

Chapter

# 8

# Remedies



Source 1 A remedy is the legal means by which a wrong can be 'righted'. Types of remedies include damages (an amount of money to be paid by one party to another) and an injunction (an order requiring someone to do, or not do, something). For example, injunctions have been given in the past to stop logging in forests unless measures are put in place to protect species such as the yellow-bellied glider (pictured).

## Outcome

By the end of **Unit 3 – Area of Study 2** (i.e. Chapters 6, 7 and 8), you should be able to explain the key principles in the civil justice system, discuss the ability of remedies to achieve their purposes and evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute.

## Key knowledge

In this chapter, you will learn about:

- damages and injunctions, and their specific purposes.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss the ability of remedies to achieve their purposes.
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

## Key legal terms

**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

**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

**contemptuous damages** a very small amount of money awarded to show that even though the plaintiff's claim succeeded legally, the court (or tribunal) disapproves of it in moral terms

**damages** an amount of money that a court (or tribunal) orders one party to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

**exemplary damages** a very large amount of money awarded to show strong disapproval of the defendant's conduct; also called punitive (punishing) damages

**general damages** an amount of money one party is ordered to pay to another party to compensate for losses that are not easily quantifiable (e.g. pain and suffering)

**injunction** a remedy in the form of an 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

**loss of amenity** removal of a person's ability to enjoy or benefit from something they used to have

**mandatory injunction** an order requiring someone to do something, or take active steps to prevent harm (or further harm) to the plaintiff

**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

**remedy** any order made by a court (or tribunal) 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

**restrictive injunction** an order that someone stop (or refrain from) doing something that is harming (or will harm) the plaintiff; also called a prohibitive injunction

**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)

## Key legal cases

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

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**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 key legal terms in this chapter by working individually or in teams.

# 8.1 Introduction to remedies

**remedy**
any order made by a court (or a tribunal) 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

A **remedy** is the way a court recognises a plaintiff's right. It is what the plaintiff will seek, and what a court or tribunal may award if the plaintiff is successful in proving their claim. Generally, a plaintiff will set out in the statement of claim the remedy or remedies sought.

Remedies can be awarded by a court or a tribunal such as the Victorian Civil and Administrative Tribunal (VCAT). Alternatively, the parties may agree between themselves an appropriate remedy that will seek to 'right' the wrong suffered by the plaintiff.

Unlike sentencing, there is no single statute that sets out all the remedies available, as many of them depend on the nature of the claim.

## Types of remedies

Source 2 provides a brief description of the two types of remedies you will study in this chapter: damages and injunctions. The type of remedy sought depends on the nature of the claim and the area of civil law. Unlike sentencing, there is no 'more severe' remedy or 'less severe' remedy.

| Remedy | Description |
|---|---|
| Damages | An amount of money awarded by the courts to compensate the plaintiff for loss or injury caused by the wrongful acts of the defendant. There are different types of damages, some of which are more easily quantifiable (calculated) than others. |
| Injunction | A court order directing a person to undertake a specific action, or to stop (cease) a specific action. It is normally ordered to prevent harm, or further harm, to the plaintiff. |

**Source 1** Two types of remedies that a plaintiff may seek are damages and injunctions.

## 8.1 Check your learning

### Remember and understand

1 **Define** the term 'remedy'.
2 **Identify** two bodies that could award a remedy to a plaintiff.
3 **Explain** when a remedy may be awarded to a defendant.

### Examine and apply

4 In each of the following scenarios, **identify** one type of remedy the plaintiff may seek. **Justify** each response.
   **a** August is a photographer. He took photos of a secret finale of a reality TV show and sold the photos to a media company to publish before the finale was aired.
   **b** Edie used to work at a company. She left and took with her some intellectual property, including a list of clients. About 50 per cent of the clients have now gone to Edie's new business.
   **c** Eleanor was walking in her local supermarket and slipped on some grapes and broke her arm. The grapes had been left there for some time.
5 Write down as many possible types of losses or harm that may be suffered by a plaintiff (e.g. physical loss, or loss of past wages) as you can. In small groups or as a class, create a poster of the types of losses. Refer back to the poster when you explore the next two topics on damages and injunctions to consider the ability of those two remedies to address each type of loss.

# 8.2 Damages

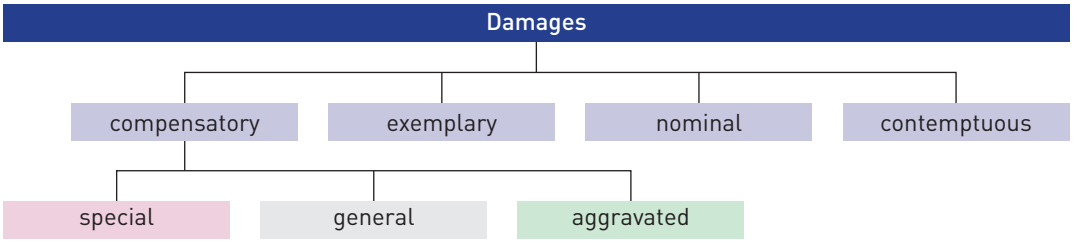
## Key knowledge

**In this topic, you will learn about:**

- damages and their specific purposes.

Damages of various kinds is the most common remedy sought in civil claims. They are amounts of money awarded to the plaintiff, to be paid by the defendant. The main purpose of damages is to return the plaintiff to the position they were in before the wrong occurred.

Different types of damages can be sought, including compensatory, exemplary, nominal and contemptuous damages. Each has its own specific purposes.




**Source 1** Types of damages include compensatory, exemplary, nominal and contemptuous 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

**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)

**general damages** an amount of money that one party is ordered to pay to another party to compensate for losses that are not easily quantifiable (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

**loss of amenity** removal of a person's ability to enjoy or benefit from something they used to have

## Compensatory damages

**Compensatory damages** are the most common damages sought. The aim of compensatory damages is to restore the party whose rights have been infringed as far as possible to the position they were in before the infringement occurred. However, it may not be possible to do this where there has been physical loss – for example, if a person has been left with a permanent injury – but damages can be given to compensate the person for their losses, and to make up for the fact that the person will suffer in the future.

Compensatory damages can be **special damages** (also referred to as specific damages), **general damages** and **aggravated damages**. These are set out in Source 2.

| Type of damages | Explanation | Examples of types of losses |
|---|---|---|
| Special damages | Also known as specific damages, special damages aim to compensate the plaintiff for losses that are quantifiable (i.e. have a precise monetary value and can be easily calculated). | • Medical expenses (past and future)<br>• Loss of wages<br>• Property damage<br>• Loss of profits<br>• Loss of assets or other property (e.g. personal goods) |
| General damages | General damages aim to compensate for losses that are not easily quantifiable and will be calculated by the court based on evidence. | • Pain and suffering (past and future)<br>• Long-term job prospects<br>• **Loss of amenity**<br>• Physical impairment or disfigurement<br>• Mental health or psychological injuries |

| Type of damages | Explanation | Examples of types of losses |
|---|---|---|
| Aggravated damages | Aggravated damages are awarded where the court believes the plaintiff suffered humiliation, embarrassment or insult because of the defendant's conduct (e.g. where the conduct has been cruel). | • Humiliation, distress, embarrassment or insult |

**Source 2** Types of compensatory damages include special damages, general damages and aggravated damages

# Exemplary damages

**exemplary damages** a very large amount of money awarded to show strong disapproval of the defendant's conduct; also called punitive (punishing) damages

**Exemplary damages** are the only consequence of a civil action that in some way aims to punish the defendant for an extreme infringement of rights, and deter others from undertaking the same type of actions. Exemplary damages are also known as punitive damages. The purpose of exemplary damages is to punish and deter the defendant where conduct is malicious, violent, cruel, insolent or in scornful disregard of the plaintiff's rights. Exemplary damages cannot be awarded to a plaintiff for defamation.

In the case below, both compensatory damages and exemplary damages were sought by the plaintiff in relation to noise coming from a neighbouring wind farm.

**Actual scenario**

## Nuisance claim

Nuisance claims can be made where a person's quiet enjoyment of their land is interfered with. Nuisances can be caused by factors such as noise, smells, smoke, dust or even obstruction of light.

In 2020, twelve plaintiffs commenced a proceeding in the Supreme Court of Victoria against a company that operated a wind farm on neighbouring land. The neighbours alleged there was excessive noise coming from the wind turbines, which disturbed their sleep and reduced the value of their properties. Many of the plaintiffs resolved their claims against the defendant before the trial of the proceeding, and there were two plaintiffs left by the time the case went to trial.

One of the plaintiffs gave evidence that he was unable to sleep at all on some nights, and he had slept in his car at a beach to escape the noise. The other plaintiff gave evidence that he could sometimes be awake all night, and that the noise had given him headaches.

The plaintiffs sought remedies, including damages, because of the alleged nuisance. They also sought an injunction to restrain the defendant from continuing the nuisance.



**Source 3** Damages were awarded in relation to a wind farm that generated excessive noise

The Supreme Court found in favour of the plaintiffs and ordered the operator to pay:

- $46 000 in damages to the first plaintiff and $84 000 in damages to the second plaintiff for past loss of amenity. Loss of amenity is suffered when a person loses the ability to enjoy their life because of what has occurred. It is compensated through general damages.
- $46 000 in aggravated damages to the first plaintiff and $84 000 in aggravated damages to the second plaintiff. Aggravated damages can be awarded when the harm caused by the defendant was made worse by the way it was done. Here, the Court described the operator's conduct in dealing with the plaintiffs' complaints as 'high-handed', which 'doubled' the impact of the loss of amenity suffered by them.

The Court disagreed that the operator acted in conscious wrongdoing or acted in contumelious (insulting) disregard of the plaintiffs' right to sleep, and therefore did not award exemplary damages. It held that the operator had sought and relied on the advice of acoustic experts in relation to the noise, and that the operator should not be punished for relying on that advice.

*Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145 (25 March 2022)

# Nominal damages

When **nominal damages** are awarded, a small amount of money is paid by way of damages. This may be where the plaintiff has proved that they have been wronged, but no injury, loss or damage was suffered. Therefore, the purpose of nominal damages is to uphold the plaintiff's rights without awarding any substantial damages. For example, in a case involving breach of contract, nominal damages may be awarded where the contract was breached, but no loss or damage was ultimately suffered because of that breach.

**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

In the following case, nominal damages were awarded in relation to a copyright claim.

Actual scenario

## Pokémon awarded $1 in damages

This was a Federal Court case, but it demonstrates how nominal damages may be awarded.

Media company The Pokémon Company International sought damages against retail site Redbubble. Pokémon has created more than 800 characters, including its most famous, Pikachu. Redbubble allows artists to set up online shops and sell merchandise or designs containing the artist's images. When an order is placed on the site, Redbubble arranges for the design to be manufactured with the artist-supplied image on it, and it is then shipped to the customer.

In this case, a number of unauthorised images of Pokémon characters were being used by Redbubble artists, and designs were being sold with those characters on them. Redbubble argued it was not liable.

The Federal Court held that there had been an infringement of Pokémon's copyright over the images because Redbubble was still responsible for the website and making the images and designs available to customers. It had also authorised manufacturers to reproduce the images. However, in relation to damages, the Court awarded Pokémon nominal damages only. It found there was not enough evidence to support the view that the sale of items on Redbubble's website had impacted on Pokémon's own sales, and that the types of designs and merchandise available on Redbubble's website were not available through Pokémon. It awarded $1 in damages. It also ordered that Redbubble pay 70 per cent of Pokémon's costs.

*Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 (19 December 2017)

# Contemptuous damages

A court or tribunal might feel that the plaintiff has a legal right to damages but does not have a moral right – that is, the plaintiff does not really deserve to be paid damages. In such a situation, the aim of awarding a small amount of damages is to show contempt for the claim that is made, while admitting the plaintiff's right to make the claim. **Contemptuous damages** are rarely awarded, but were awarded in the case in the following scenario.

**contemptuous damages**
a very small amount of money awarded by a court to show that even though the plaintiff's claim succeeded legally, the court disapproves of it in moral terms

## Actual scenario

### Assault leads to contemptuous damages

The plaintiff sued another man alleging that on 17 May 2002 in the Melbourne suburb of Black Rock, the defendant assaulted him. The plaintiff claimed aggravated damages, alleging he was humiliated because the assault took place in a public place. Both the plaintiff and the defendant were self-represented at trial.

Her Honour Judge Hogan of the County Court, in her reasons for judgment, stated that she found the plaintiff to be a volatile personality on the hearing of the dispute, that he often shouted and talked over other witnesses, was prone to exaggeration and inconsistent in his evidence, and went from being loud and bullying in his manner to being apologetic to the Court. Her Honour said that her overall impression of the plaintiff was that he would 'say whatever he thought might help his situation at any given time'. On the other hand, Her Honour found the defendant to be courteous and measured.



**Source 4** Her Honour ordered the defendant to pay the plaintiff the sum of five cents as contemptuous damages.

After considering all of the evidence, Her Honour found that the proceeding was maliciously brought, and should never have been made. To show the Court's disapproval of the plaintiff's conduct, she awarded him contemptuous damages. She stated:

> These damages are appropriate to indicate a technical victory in that the plaintiff has proved that he has been assaulted by being fleetingly put in fear and that, technically, he was the subject of a battery by the defendant placing his hands on the plaintiff's waist, but no injury, loss or damage has flowed from the assault or battery.

Her Honour ordered that the defendant pay to the plaintiff the sum of five cents. She did not award the plaintiff any costs.

*Medic v Kandetzki* [2006] VCC 705 (13 June 2006)

# Restrictions on damages

Certain types of claims and certain types of loss have restrictions imposed on damages. For example:

- for personal injury claims made under the *Wrongs Act 1958* (Vic) (such as personal injuries suffered from a negligent act), and claims for non-economic loss, being pain and suffering and loss of quality of life, are limited year by year to an amount fixed by parliament
- in defamation claims, damages for non-economic loss (generally, pain and suffering) are also limited to $250 000 (though in some circumstances this can be increased).

***Did you know?***

In 2013, the lead plaintiff in a Victorian class action sought compensation for the loss and damage she and more than 5000 other group members suffered as a result of a large bushfire that destroyed lives and property. Prior to the judge's final decision, the parties agreed to settle the claim for more than $494 million.

# Ability of damages to achieve their purposes

Source 5 below sets out the main purpose of each type of damages (except for contemptuous damages, as they are rare) and some factors to consider when assessing the ability of damages to achieve its purpose. Other factors may also be present depending on the circumstances of the civil dispute and the circumstances of the plaintiff.

| Damages and purpose | Factors to consider when assessing the ability of damages to achieve their purposes |
|---|---|
| **Compensatory damages:** depending on the injuries and loss suffered, compensatory damages can *restore the plaintiff to the position they were in before the wrong occurred*. | • *Whether the loss suffered was financial loss only*. If the loss suffered is financial only (e.g. lost property, lost wages), then it is easily calculated, and the plaintiff may be able to be restored to their original position. Loss of wages, medical expenses, and loss of profits are not difficult to calculate and can be compensated by way of special damages.<br>• *Whether the loss suffered was pain and suffering, mental anguish, disfigurement or impairment*. These losses are not easily quantifiable, and in some situations no amount of damages can ever restore a plaintiff to their original position; they can only compensate the plaintiff (e.g. impairment and disfigurement are permanent forms of damages that cannot be removed).<br>• *Whether future loss has been suffered*. Future types of loss may be harder to identify and quantify. If a person has lost their reputation, or they cannot get a job, it may be difficult to predict what they would have earned, or what they have lost, as a result.<br>• *Whether sufficient evidence is before the court about unquantifiable losses*. A court or tribunal can only calculate losses if they have evidence about them, such as evidence about lost earning capacity or about the impairment suffered by the plaintiff. If the court does not have this evidence (e.g. the plaintiff is not represented and does not understand the processes) then the damages awarded may not be accurate.<br>• *Whether the damages are actually paid*. If the damages are not paid, then they will not have returned the plaintiff to the position they were in. For example, this may occur if the defendant is bankrupt or is uncontactable.<br>• *Whether other orders or remedies may be required*. For example, damages do not compensate for costs or interest, so additional remedies (such as an order for costs or an order that interest be paid) may be required. As another example, an injunction may also be required to stop further harm being caused.<br>• *Whether there are caps (or limits) on the amounts that can be awarded*. If there are caps (e.g. under the *Wrongs Act*) this may limit the ability of damages to achieve its purpose. |

| Damages and purpose | Factors to consider when assessing the ability of damages to achieve their purposes |
|---|---|
| **Exemplary damages:** exemplary damages may be awarded to *punish the defendant for an extreme infringement of rights and deter others from undertaking the same type of actions.* | • *The amount of exemplary damages*. If the amount of exemplary damages is small, it may not be sufficient to punish the defendant or act as a deterrent. If the amount is high, it is more likely to punish and deter.<br>• *The ability of the defendant to pay*. Regardless of whether the amount is small or large, the ability of the defendant to pay is important. If the defendant has little money, they may not pay at all and so they may not be punished. Alternatively, if they have significant amounts of money, it may act less as a punishment.<br>• *The extent to which the award of damages is known*. To deter others, the award of exemplary damages must be known to other people. This means it should be publicised in some way.<br>• *Whether there are caps on the amounts that can be awarded*. If there are caps, such as under defamation laws, this may limit the ability of damages to achieve its purpose. |
| **Nominal damages:** nominal damages seek to *uphold the plaintiff's rights without awarding any substantial damages.* | • *Whether the plaintiff suffered loss*. If the plaintiff did in fact suffer loss, but there was no evidence of that loss, or the court was not convinced there was loss, the plaintiff's rights may not be fully upheld.<br>• *The amount of the damages*. If the amount is too small, some people may not view the damages as upholding the plaintiff's rights.<br>• *The costs incurred*. The plaintiff may have incurred significant costs to initiate and conduct the civil claim, which cannot be compensated through nominal damages. Therefore, although nominal damages uphold the plaintiff's rights, the plaintiff may have suffered an additional form of loss through payment of costs. |

**Source 5** The ability of damages to achieve their purposes is based on many factors, including those set out in the table above.

# 8.2 Check your learning

## Remember and understand

1 **Define** the term 'damages'.
2 **Distinguish** between special damages and general damages.
3 **Explain** how the purpose of one type of damages is similar to one purpose of criminal sanctions.
4 **How** are aggravated damages different from exemplary damages?

## Examine and apply

5 Read the scenario 'Nuisance claim'.
   a **Describe** the central facts of this case.
   b **Explain** why a number of neighbours commenced the claim, but there were only two plaintiffs left at trial.
   c **Describe** the remedies awarded in this case.
   d **Provide** two other examples where damages for 'loss of amenity' may be awarded.
6 Read the scenario 'Pokémon awarded $1 in damages'.
   a **Who** was seeking damages in this case?
   b **Why** were damages being sought?
   c **Explain** why nominal damages and not contemptuous damages were awarded in this case.
   d 'A plaintiff should not be able to commence court proceedings only to seek nominal damages.' Discuss this with your classmates.
7 Read the scenario 'Assault leads to contemptuous damages'.
   a **Identify** the plaintiff and the defendant in this case.
   b **What** are the central facts, and why was the plaintiff seeking aggravated damages?
   c Was the defendant found liable in this case? If so, **what** remedy was awarded?
   d **Describe** the purpose of contemptuous damages. Refer to this case in your answer.

## Reflect and evaluate

8 'Remedies can never achieve their purposes because of the cost, stress and time involved in getting a remedy through a court.' Do you agree? **Justify** your answer.
9 Guy Edward Swain was awarded $3.75 million to be paid in compensation by a Sydney council. Swain became a quadriplegic after he dived into the water at Bondi Beach and struck a sandbar. The accident happened between surf lifesaving flags. Can an award of damages achieve its purposes in this case? Discuss with your classmates.

# 8.3 Injunctions

## Key knowledge

**In this topic, you will learn about:**

- injunctions and their specific purposes.

**injunction**
a remedy in the form of an 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 some wrong

**restrictive injunction**
an order that someone stop (or refrain from) doing something that is harming (or will harm) the plaintiff; also called a prohibitive injunction

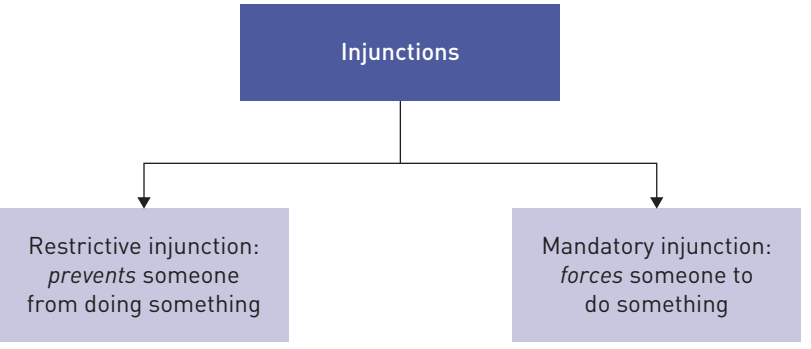
**mandatory injunction**
an order requiring someone to do something, or take active steps to prevent harm (or further harm) to the plaintiff

An **injunction** is a court order directing someone to stop doing a certain act, or compelling someone to do a certain act. The purpose of an injunction is to rectify a situation caused by the person who was found to be in the wrong. It can be either a **restrictive injunction** or a **mandatory injunction**.

An injunction can be interlocutory or final. An interlocutory injunction is a temporary injunction that is awarded quickly and in circumstances where there is an urgent situation and an injunction is needed as soon as possible to avoid further harm.

At the final trial or hearing, the interlocutory injunction can become a final (permanent) injunction, or it can be dismissed (overturned).

A final injunction is a final order, which means that it is the 'final say' on the matter unless one of the parties appeals the order.




**Source 1** There are two types of injunctions: restrictive injunctions and mandatory injunctions.

### *Study tip*

When looking at questions about damages or injunctions, look for plurals: does the question ask about one purpose, or purposes? If it says '*purposes*', make sure you address two purposes.

## Restrictive injunctions

A restrictive injunction, also known as a prohibitory injunction, is a form of remedy that requires a person to refrain from doing something. For example, it might stop them from pulling down a building or constructing a road. This is the most common form of injunction. Its purpose is to prevent harm, or further harm, from being caused to the plaintiff. That harm may be irreparable or permanent, such as knocking down a building.

In the following scenario an injunction was sought by American rapper Ye, formerly known as Kanye West, in relation to a burger business in Melbourne. The case was ultimately abandoned.

Actual scenario

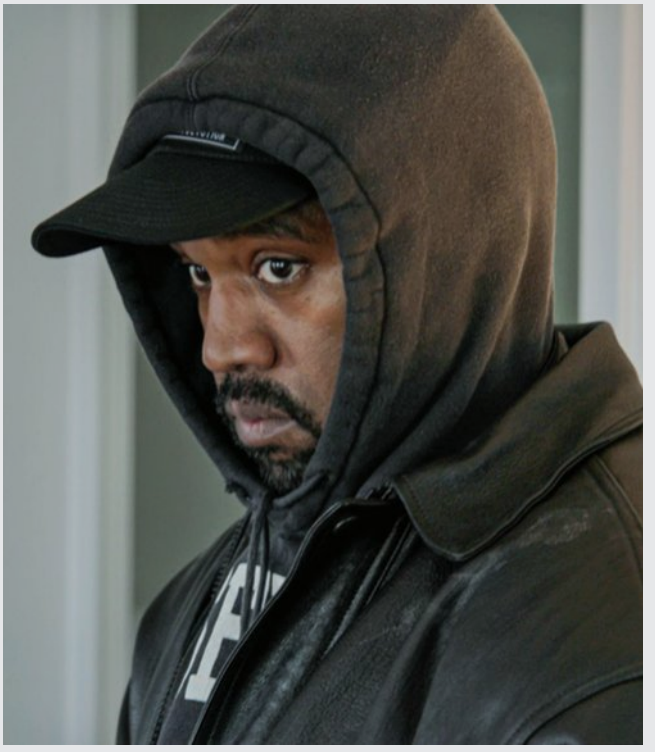
## Federal Court claim by Ye

In late 2022, it was reported that Ye, formerly known as Kanye West, had issued a claim against College Dropout Burgers, a burger shop in the Melbourne suburb of Ivanhoe, for misleading and deceptive conduct. He sought an injunction to stop the shop from representing that its products or restaurant were sponsored by, approved by, or affiliated with Ye.

The shop sells burgers, fries, side dishes and drinks. It previously had menu names that played on Ye's song titles, such as a burger named 'Good Morning'. Its owner indicated that Ye's music and creativity were an inspiration for the burger store.

Ye's lawyers issued a claim in the Federal Court, claiming they had sent numerous letters to the owner to request he stop representing that the shop was associated with Ye. It was reported that Ye was seeking, among other things, an injunction to prevent the owner from representing that the burger shop has anything to do with him. The claim also raised the issue of the restaurant's use of a silhouetted image of a bear inspired by art on Ye's album, The College Dropout.

In March 2023, the Federal Court dismissed the case after Ye failed to take any further steps in the proceeding following its commencement.



**Source 2** Ye (formerly known as Kanye West) commenced a claim in the Federal Court against a burger shop owner, only for the claim to ultimately be dismissed.

# Mandatory injunctions

A mandatory injunction is a form of remedy that orders a person to do a particular act, such as performing their part of a contract they have breached or forcing someone to hand over documents they are holding. The purpose is to require the defendant to take action to prevent further harm from being suffered by the plaintiff or to take action that will remedy the situation. For example, if as part of a contract the defendant agreed to sign a document, and refuses to do so, a mandatory injunction will 'remedy' the situation by requiring the defendant to sign the document and hand it over.

A mandatory injunction will only be awarded if a court is satisfied that the defendant knows exactly what they have to do to fulfil the order of the court. It must also be satisfied that the plaintiff will suffer significant damage if a mandatory injunction is not ordered.

In the case on the next page, a mandatory injunction was obtained to force a person to take down Facebook posts that were defamatory of the three applicants (i.e. the plaintiffs).

Actual scenario

## Mandatory injunction ordered

In this case, the three applicants in a Federal Court proceeding sought damages and injunctions in relation to posts and videos posted on the respondent's Facebook account. The applicants claimed the posts were defamatory (i.e. they were not true and were harmful to their reputation).

One of the applicants was a member of the Commonwealth Parliament. Along with two other applicants, she argued that the respondent, a woman who lived in New Zealand, had posted on her Facebook profile disparaging (critical) posts and videos about the three applicants. They sought an urgent injunction to force the respondent to take the posts down.

The Federal Court judge considered that the publications were vile in nature and contained serious imputations about the three applicants. There had already been extensive views of the posts, and the judge considered that damages might not be enough to address the harm suffered by the applicants.

The Federal Court ordered that the respondent be restrained from publishing the posts or causing them to be published. The Court also ordered that the respondent be restrained from maintaining the posts online – that is, she was required to remove the posts. Ultimately, each of the posts were removed by Facebook, not by the respondent.




**Source 3** Posts on social media sites such as Facebook can be defamatory, and a poster can be subject to a civil claim that can involve a claim for damages and an injunction.

At a final hearing, the applicants were awarded $875 000 in damages in total (each received individual awards of damages, and they included compensatory and aggravated damages).

*Webster v Brewer (No 3)* [2020] FCA 1343 (22 September 2020)

# Ability of injunctions to achieve their purposes

Source 4 below sets out the main purpose of each type of injunction and some factors to consider when assessing the ability of an injunction to achieve its purpose. Other factors may also be present depending on the circumstances of the civil dispute and the circumstances of the plaintiff.

| Injunction and purpose | Factors to consider when assessing the ability of injunctions to achieve their purposes |
|---|---|
| **Restrictive injunction:** a restrictive injunction aims to *prevent harm, or further harm, from being caused to the plaintiff* by ordering someone to refrain from taking steps (or any further steps). | • *Whether the defendant will comply*. If the defendant does not comply with the injunction, it may not prevent further harm. For example, a person may ignore a court's order to take down defamatory posts, in which case the plaintiff may continue to suffer harm.<br>• *Whether harm has already been suffered*. If the plaintiff has already suffered loss or damage, an injunction alone may not be able to address that harm. In this case, damages may also be required.<br>• *Whether a restrictive injunction alone is sufficient*. In some situations, a mandatory injunction may also be required. For instance, the defendant may have posted information online. A restrictive injunction may stop the defendant from posting any further, but a mandatory injunction may also be required to force the defendant to take the posts down.<br>• *Whether there are other orders that may be required*. Injunctions do not address the costs, stress and inconvenience involved in taking the action, so they do not fully address all the harm that may have been suffered. |

| Injunction and purpose | Factors to consider when assessing the ability of injunctions to achieve their purposes |
|---|---|
| **Mandatory injunction:** a mandatory injunction requires a person to take certain steps or do a particular act, *which will prevent further harm from being suffered by the plaintiff, or to remedy the situation caused by the defendant not taking certain actions.* | • *Whether the defendant will do what is ordered*. The defendant may ignore the order and not do anything, in which case the purpose will not be achieved. Alternatively, the defendant may take some steps, but not others, in which case the situation may not be fully remedied.<br>• *Whether harm has already been suffered*. If the plaintiff has already suffered loss or damage, an injunction alone may not be able to address that harm. In this case, damages may also be required.<br>• *Whether a mandatory injunction alone is sufficient*. In some situations, a restrictive injunction may also be required. For instance, the defendant may be required to sign a document and hand it over, as well as be restrained from taking steps they were proposing to take.<br>• *Whether there are other orders that may be required*. Injunctions do not address the costs, stress and inconvenience involved in taking the action, so they do not fully address all the harm that may have been suffered. |

**Source 4** The ability of injunctions to achieve their purposes is based on many factors, including those set out in the table above.

## 8.3 Check your learning

### Remember and understand

1 **What** is an injunction, and **what** is one of its purposes?

2 **Distinguish** between a restrictive injunction and a mandatory injunction.

3 **Describe** one situation in which an interlocutory injunction may be required while the parties are waiting for a final hearing.

### Examine and apply

4 Read the scenario 'Federal Court claim by Ye'.
   - **a** **Explain** why Ye was seeking an injunction in this case.
   - **b** Conduct some research and discuss with a classmate what features of the burger shop relate to Ye.
   - **c** **Discuss** the principle of equality in relation to this case.

5 Devise a situation in which damages, a mandatory injunction and a restrictive injunction may all be necessary remedies in a civil claim. Come together as a class to discuss your scenarios.

### Reflect and evaluate

6 Read the scenario 'Mandatory injunction ordered'.
   - **a** **Why** were the applicants seeking the remedies outlined?
   - **b** **Why** was a mandatory injunction necessary in this case?
   - **c** 'The outcome of this case shows that injunctions alone can never achieve their purposes when it involves defamatory material posted online.' **Discuss** the extent to which you agree with this statement.

7 'If a person is successful in obtaining remedies in a court case, 100 per cent of their costs should be paid by the defendant.' Do you agree? **Justify** your answer.

Chapter

# 8

# Review

## Top exam tips from Chapter 8

1 The more you understand the different types of damages and injunctions, the richer your responses will be. The different types will enable you to explore the limitations of certain damages and injunctions, particularly in light of the losses suffered by the plaintiff.

2 You should know two purposes each for both damages and injunctions. One of the purposes can be to restore a plaintiff to the position they were in before the wrong occurred. Another useful purpose (with respect to injunctions) is to stop a defendant from causing further harm.

3 You may be asked to discuss the ability of damages or an injunction to achieve its purposes in a particular scenario. A discussion requires doing more than just explaining damages or injunctions. Your response needs to consider different aspects of the scenario and try to consider why damages or injunctions may achieve their purposes, and why they may not. This consideration is likely to be scenario-specific.

## 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 (including the exam) 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 Describe **two** types of damages that can be awarded to a plaintiff.

(4 marks)

**Difficulty: medium**

2 Compare the ability of damages and injunctions to restore the plaintiff to the position they were in before the wrong occurred.

(6 marks)

**Difficulty: high**

3 A former student posted three posts on Facebook, Instagram and TikTok about his former teacher. The posts were highly offensive, were viewed thousands of times, and reached all corners of Australia. Whenever the teacher entered the school, she was stared at. People in the local area started to treat her differently. The teacher has now stopped working, and has gone to see a lawyer. She cannot sleep or eat, and is now on medication to help her with her mental anguish.

Identify **two** remedies that the teacher may seek, and discuss the ability of both remedies to achieve **one** of their purposes.

(8 marks)

# Practice assessment task

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

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

## Local artists

A local council in Melbourne has created ten small workshops in one of its buildings to provide a space for local artists to create their artwork. Each of the ten workshops is rented out by an individual artist, at a cheap price, to artists who cannot afford to rent or buy their own studios.

The artists sell their artwork online and at community markets. Many are very successful and have their artworks displayed in galleries.

In January 2023, a large water leak occurred in the council's building and the ten artists were ordered to leave their workshops. The council told the artists that they would not be able to use their workshops for two days while workers fixed the leak and repaired the damage that had been caused by the water. However, once the council started to clean up the damage, one of the workers thought there may have been a dangerous material, asbestos, in the walls. The council temporarily closed the workshops. The artists were told that the council needed to investigate whether asbestos was present, and if so remove it before reopening. The council refused to allow the artists back into the workshops.

The artists were furious. They were unable to enter the workshops to retrieve all their art tools and artwork. Some of the artworks were almost completed, ready to be sold. The artists have gone to see a lawyer to take civil action against the council. The artists have been told that the Supreme Court is probably the best court to issue the claim in, and that they should issue a class action.

# Practice assessment task questions

**1** Who has the burden of proof in this case, and what is the standard of proof?

(2 marks)

**2** Referring to the Supreme Court and its civil jurisdiction, describe **one** reason for a court hierarchy.

(3 marks)

**3** Explain **one** dispute resolution method that the Supreme Court may use to resolve this dispute.

(3 marks)

**4** Describe **two** ways in which a class action can achieve the principle of access.

(5 marks)

**5** Discuss the role of the artists' lawyer in achieving fairness in this case.

(6 marks)

**6** Discuss the ability of damages alone to restore the artists to the position they were in before the wrong occurred.

(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 |
|---|---|---|---|
| • Damages and their specific purposes. | ☐ | ☐ | Go back to Topic 8.2. |
| • Injunctions and their specific purposes. | ☐ | ☐ | Go back to Topic 8.3. |

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

**Chapter 8**
Chapter review quiz

**Revision notes**
Chapter 8

**Chapter summary**
Chapter 8

**Quizlet**
Revise key legal terms from this chapter.

Unit 3 Review

# Part A Assessment essentials

Now that you have completed your revision for Unit 3, 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 and the end-of-year examination.

**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 actual exam question below and see how the different items appear in the question and how they are responded to in the sample response.

**Question 1**

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

- 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. ❶

**c** Discuss ❷ the appropriateness of a plea negotiation ❸ in this case.

[5 marks] ❹

❶ Stimulus material

❷ Command term

❸ Content

❹ Mark allocation

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

**A sample response**

There are a number of factors that weigh towards the appropriateness of a plea negotiation. ❶ First, ❸ Ada is concerned about giving evidence as she is distressed. Trials can be very traumatic for victims who have already suffered injuries or trauma like that experienced here. A plea negotiation would avoid a trial and avoid this risk to Ada. ❷ Second, ❸ the trial is expected to last three weeks. This is time, and cost and resources to the criminal justice system which can otherwise be avoided if there is a plea negotiation. ❷

On the other hand, ❸ there are also factors that weigh against a plea negotiation. ❶ First, Bob is unrepresented. The prosecution may consider it inappropriate to negotiate with him without him having the support of and advice from a lawyer. Second, ❸ if the evidence is strong and there is little risk of an acquittal, the prosecution may consider it in the public interest to go to trial, rather than agreeing to accept a lesser charge or withdraw certain charges. ❷

❶ The student has usefully separated out the two 'sides' of the discussion into two paragraphs and used topic sentences at the start of each paragraph (see Tip 3 below).

❷ The student has addressed the command term *discuss* by providing various factors that weigh towards (support) and weigh against the use of a plea negotiation. There is also meaningful use of the stimulus material, drawing on points such as Ada being concerned about giving evidence, Bob being unrepresented and the trial being expected to last three weeks.

❸ Signposts or key words show discussion skills and help guide the reader (or the assessor) to the key points being made (see Tip 2 below).

**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. Instead, 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 analysis 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 actual exam 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 1**

Guy was the victim of an attack by Tom. He suffered significant injuries, including a fractured eye socket and a broken nose. Tom was charged with intentionally causing serious injury, a crime that carries a maximum penalty of 20 years' imprisonment. He pleaded guilty at the committal hearing and was sentenced by the County Court to four years' imprisonment.

Guy's injuries required significant medical treatment, including major surgery. He is now unable to work. Guy wants to take civil action against Tom to recover the cost of his medical treatment and $150000 in loss of earnings. He is unable to afford legal representation and has been researching how to represent himself in court. Guy believes the pre-trial procedures will add to the time it will take to have the case heard. He does not understand why these procedures are needed.

**d** Analyse **two** factors that Guy should consider before initiating civil action against Tom.

(6 marks)

Source: Section B, Question 1d, 2020 VCE Legal Studies Examination, © VCAA

**A sample response**

One factor that Guy should consider is costs. ❶ The cost involved in initiating civil action can be significant. These costs involve legal costs associated with engaging a lawyer; although ❸ in this case Guy may be able to avoid those costs if he is planning to represent himself. In addition ❸ to the legal costs, there are also application and hearing fees. Moreover, ❸ there will likely be fees associated with expert witnesses (for example, Guy may need to engage an expert to demonstrate his physical injuries and the inability to work). Further, ❸ there is the risk of an adverse costs order if Guy loses. Therefore, ❸ Guy should in combination consider all the costs to weigh up whether it is 'worth' pursuing the case, that is, will the costs be more than what he is awarded by way of damages. ❷

Associated with that, another factor that Guy should consider is enforcement issues. ❶ Enforcement issues is about whether Guy will have any problems with actually enforcing any order for damages and can arise where there are risks somebody won't in fact pay. In this case, Guy may have to consider whether Tom will in fact be able to pay. More particularly, ❸ Tom is in jail for at least four years, not earning any money. He may therefore not have any ability to pay any damages amount. Therefore, Guy should also consider this risk of not getting a damages award satisfied – and potentially throwing 'good money after bad'. On the other hand, ❸ it is not clear whether Tom has other assets or funds available to him – Guy may have to do some further investigation to determine whether that is the case. ❷

❶ The student has usefully separated out the two factors into two paragraphs and used topic sentences at the start of each paragraph (see Tip 3 below).

❷ The student has addressed the command term *analyse* by providing more than an explanation of both factors (e.g. they have examined different aspects of costs and enforcement issues). There is also meaningful use of the stimulus material drawing on points such as the possible need for Guy to engage expert witnesses and the possible impact of Tom's imprisonment.

❸ Signposts or key words show analysis skills and help guide the reader (or the assessor) to the key points being made.

**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 your response.
- 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 like '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 actual exam question below and then look at the sample response to see how you might structure your response.

**Question 6**

Compare the role of a criminal jury with that of a civil jury.

[10 marks]

Source: Question 6, 2016 Legal Studies Examination, © VCAA

**A sample response**

One similarity ❸ between the role of a criminal jury and a civil jury is that they are both expected to be impartial in their decision-making. ❶ That is, both juries will be required to listen to the evidence, and make a decision based on facts, not on biases or their own unfounded opinions. ❷ Another similarity ❸ between the two roles is that they listen to the judge's directions and summation. ❶ In both criminal and civil cases, the judge will give directions to the jury about legal principles and will summarise the case before deliberation. The jury's role is to listen to these to ensure they understand the law and the relevant evidence. ❷

On the other hand, one difference ❸ between the two roles is the standard of proof. ❶ In a criminal case, the jury needs to decide guilt beyond reasonable doubt, whereas ❸ in a civil case, the standard of proof is on the balance of probabilities. This means there can be 'some doubt' when deciding liability in a civil case. A further difference ❸ between the two roles is what they decide. ❶ In a criminal case, the jury is deciding whether an accused is guilty, whereas ❸ in a civil case they are deciding on liability. ❷

❶ Topic sentences have been used throughout this answer to help guide the reader (or the assessor) to the key points being made.

❷ The student has usefully separated out the similarities and differences. The command term has been addressed by not providing two explanations of each role, but rather comparing the two roles within the same paragraph.

❸ Signposts or key words show analysis skills and help guide the reader (or the assessor) to the key points being made.

# Think like an assessor

To maximise your marks in the end-of-year examination, it can help to think like an assessor. Carefully read the following two actual exam 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 the question, read the student response. Imagine you are an assessor and use the marking guide checklist to mark the response.

## Exam question

**Question 3**

Zena bought a second-hand dress for $300 for her Year 12 formal. She took it to her local dry-cleaning store, No Guarantees, to get it cleaned before the formal. When Zena went to pick up the dress four days later, she was told that the store did not have any record of her dress.

No Guarantees has refused to answer Zena's calls or emails. Zena shared her story with a local newspaper and, since then, at least 12 other people have come forward with similar stories. Recently, Zena went past the store and noticed that it seemed to be permanently closed.

Zena wants to claim the full cost of her dress from No Guarantees.

Discuss the appropriateness of the Victorian Civil and Administrative Tribunal (VCAT) in resolving the dispute between Zena and No Guarantees.

[5 marks]

Source: Section A, Question 3, 2019 Legal Studies Examination, © VCAA

**A sample response**

*VCAT would be appropriate in resolving this dispute. One of the reasons why VCAT would be appropriate to resolve this dispute is because it is cheaper, costing much less than a court to resolve the dispute. Zena probably does not have a lot of money and so VCAT costing less will be more suitable. In addition, VCAT will be more appropriate as it is generally quick to resolve disputes, and it adopts informal processes which may be more suitable for the parties.*

## Marking guide checklist

To achieve full marks, check whether the response has all the following features.

| Marks | Features for a full-mark response |
|---|---|
| 5 | ☐ The command word has been addressed (e.g. there are arguments for and against the appropriateness of VCAT).<br>☐ There is meaningful and accurate use of the stimulus material.<br>☐ Legal terminology has been correctly used.<br>☐ The discussion is well-developed and detailed.<br>☐ There are no significant errors. |

If any of the above features are missing, identify where the response would sit based on the following performance descriptors.

| Marks | Features of a response |
|---|---|
| 4 | One of the features of a full-mark response is missing. For example:<br>☐ There is limited use of the stimulus material.<br>☐ The discussion is limited in parts.<br>☐ There is an error (for example, legal terminology has been incorrectly used). |
| 3 | A number of features of a full-mark response are missing, or missing to a substantial degree. For example:<br>☐ There is no use of the stimulus material.<br>☐ The command term has not been addressed (for example, it is an explanation only).<br>☐ There are a number of errors. |
| 2 | The response is limited and does not fit into any of the above. For example:<br>☐ There is a brief explanation about VCAT.<br>☐ There are one or two points made about Zena and VCAT. |
| 1 | A very limited response but deserving of 1 mark. |

## 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.

## Exam question

**Question 3**

Section 4(d)(i) of the *Summary Offences Act 1966* (Vic) states, 'Any person who – in a public place – flies a kite to the annoyance of any person shall be guilty of an offence'.

**b** Referring to the section of the *Summary Offences Act 1966* (Vic) provided [above], explain why kite flying is a summary offence rather than an indictable offence.

[3 marks]

Source: Section A, Question 3b, 2021 Legal Studies Examination, © VCAA

**A sample response**

*Kite flying is a summary offence because it is contained in the Summary Offences Act. This is a statute that contains summary offences, such as kite flying, and therefore it is a minor offence heard by a magistrate in the Magistrates' Court.*

## Marking guide checklist

To get full marks, check whether the response has all the following features.

| Marks | Features for a full-mark response |
|---|---|
| 3 | ☐ The command word has been addressed (there is a detailed account of why this is a summary offence rather than an indictable offence).<br>☐ There is reference to kite flying.<br>☐ Legal terminology has been correctly used.<br>☐ There are no significant errors. |

If any of the above features are missing, identify where the response would sit based on the following performance descriptors.

| Marks | Features of a response |
|---|---|
| 2 | One of the features of a full-mark response is missing. For example:<br>☐ There is no reference to the section.<br>☐ There is an explanation of why this is a summary offence, but no explanation of why this is a summary offence rather than (and not) an indictable offence.<br>☐ There is an error (for example, legal terminology has been incorrectly used). |
| 1 | A very limited response but deserving of 1 mark. |

## 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.

# Part B Practice assessment tasks

**For Unit 3 – Area of Study 1**

## Horace Hurrah and his criminal history

Horace Hurrah, 45, had a difficult childhood. He suffered from bullying as a child, and from post-traumatic stress disorder after he lost the love of his life in a car accident at the age of 16. He turned to drugs and alcohol to cope with his difficulties and was regularly caught for drink driving, petty theft and property damage. He has served five prison sentences. His last term of imprisonment was four years in Barwon Prison for robbery. During that term, Horace actively participated in a drug and alcohol program which saw him recover from his addiction.

Since then, Horace has been living with his partner, Farnaz. However, recently Farnaz has been acting erratically. She missed a number of days at work, which got her fired, and is regularly out late at night. Horace has had good support from his family throughout his life.

One day Horace got home from work early and saw Farnaz doing drugs. Horace was outraged, particularly given his attempts to recover from his past addictions. He and Farnaz got into a fight. Horace became violent towards Farnaz, resulting in her being hospitalised. Horace has since been charged with various indictable offences, including family violence offences. Horace has been refused bail and pleaded not guilty. He wants to negotiate with the prosecutor to reduce the charges and for him to be found not guilty. Farnaz does not like the idea of negotiations.

## Practice assessment task questions

**1** Identify who has the burden of proof in this case.
(1 mark)

**2** Farnaz is a witness for the prosecution. Describe **one** way in which Farnaz may be able to give evidence in this case.
(3 marks)

**3** Discuss the appropriateness of plea negotiations in this case.
(5 marks)

**4** Describe the relationship between the judge and the jury in a criminal trial.
(5 marks)

**5** Explain how delays may affect the ability of the criminal justice system to achieve fairness in this case.
(4 marks)

**6** Describe **one** sanction that may be imposed on Horace, and **one** of its purposes in this case.
(6 marks)

**7** Provide **four** factors that may be considered in sentencing Horace, and comment on how they may affect the sentence imposed if Horace is found guilty.
(8 marks)

**8** Discuss the ability of the criminal justice system to ensure a fair trial in this case.
(8 marks)

Total: 40 marks

## Report on the civil justice system

Your Legal Studies teacher informs your class that your school is being sued by a former student. The former student believes the school was negligent in failing to ensure that she got good grades. She has sent several letters of demand, arguing that the school knew she had certain needs but failed to address those needs. As a result, the student claims she failed to get into her choice of university and choice of degree, and has suffered loss and damage including anxiety, depression, and the cost of having to undertake a different degree to eventually transfer to her degree of choice. The former student is also threatening to sue some of the school's employees, including the counsellor and two of her teachers. The total damages the student is claiming is $1.5 million.

Your Legal Studies teacher thinks this is a good opportunity for each of the class members to demonstrate their knowledge of the civil justice system. She tells your class to imagine that you have to write a paper to the principal, who has no understanding of the civil justice system, so that the principal can understand the basic issues that may be involved in the dispute. She says the paper needs to be prepared in plain English and be easily understood by somebody who has little knowledge of legal concepts.

## Practice assessment task questions

Your teacher has said the format is up to you, but your paper needs to address the following matters.

1 The likely parties in the case.
(2 marks)

2 Who has to prove the facts, and why.
(2 marks)

3 Whether a jury will be involved, and your reason for your answer.
(3 marks)

4 **Two** factors that may be relevant to whether the plaintiff initiates a claim, and why.
(5 marks)

5 What options, if any, are available to the school now to prevent the plaintiff from issuing a claim, and your reasons.
(5 marks)

6 The likely dispute resolution body used to resolve the dispute, and your reason for your answer.
(4 marks)

7 The roles of **two** key personnel in the civil dispute.
(6 marks)

8 The possible costs that may be incurred by the school.
(3 marks)

9 Whether the matter is likely to go to trial and, if not, what may avoid the need for trial.
(5 marks)

10 How the school should measure whether justice has been achieved in this particular case, addressing each of the principles of justice.
(10 marks)

Total: 45 marks



# Unit 4
# The people, the law and reform

Source 1 The Australian Constitution established the Australian parliamentary system. Parliament is the supreme law-making body, and the Commonwealth Parliament meets at Parliament House in Canberra (pictured). In Unit 4 of VCE Legal Studies, you will explore the relationship between the Australian people and the Australian Constitution (including the ways the Constitution protects the people by acting as a check on parliament in law-making). You will also learn about law-making bodies and law reform in Australia and ways people can influence change in the law and changes to the Australian Constitution.

# Unit 4 – The people, the law and reform

## Area of Study 1 – The people and the law-makers

### Outcome 1

On completion of this unit, you should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making.

Unit 4 – Area of Study 1
The people and the law-makers

| Chapter | Title | Key knowledge |
|---|---|---|
| Chapter 10 | Law-making powers | • the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making<br>• the law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers<br>• the significance of section 109 of the Australian Constitution<br>• one High Court case which has had an impact on state and Commonwealth law-making powers |
| Chapter 11 | The people, the parliament and the Constitution | • factors that affect the ability of parliament to make law, including:<br>– the bicameral structure of parliament<br>– international pressures<br>– the representative nature of parliament<br>• the means by which the Australian Constitution acts as a check on parliament in law-making, including:<br>– the role of the High Court in protecting the principle of representative government<br>– the separation of the legislative, executive and judicial powers<br>– the express protection of rights |
| Chapter 12 | The courts | • the reasons for, and effects of, statutory interpretation<br>• features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing, and disapproving of precedent<br>• factors that affect the ability of courts to make law, including:<br>– the doctrine of precedent<br>– judicial conservatism and judicial activism<br>– costs and time in bringing a case to court<br>– the requirement for standing<br>• features of the relationship between courts and parliament in law-making, including:<br>– the supremacy of parliament<br>– the ability of courts to influence parliament<br>– the codification of common law<br>– the abrogation of common law. |

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# Area of Study 2 – The people and reform

## Outcome 2

On completion of this unit, you should be able to explain the reasons for law reform and constitutional reform, discuss the ability of individuals to change the Australian Constitution and influence a change in the law, and evaluate the ability of law reform bodies to influence a change in the law.

| | Chapter | Title | Key knowledge |
|---|---|---|---|
| Unit 4 – Area of Study 2 The people and reform | Chapter 13 | Law reform | • reasons for law reform<br>• the means by which individuals or groups can influence law reform including through petitions, demonstrations and the use of the courts<br>• the role of the media, including social media, in law reform<br>• the role of the Victorian Law Reform Commission and its ability to influence law reform<br>• one recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system<br>• the role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform<br>• one recent Royal Commission inquiry or one recent parliamentary committee inquiry. |
| | Chapter 14 | Constitutional reform | • reasons for constitutional reform<br>• the requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum<br>• factors affecting the success of a referendum<br>• the significance of the 1967 referendum about First Nations people<br>• possible future constitutional reform, including reform to establish a First Nations Voice in the Australian Constitution. |

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Chapter

# 9

# Introduction to Unit 4 – The people, the law and reform




Source 1 Parliament House in Melbourne is the meeting place of the Parliament of Victoria. The building was built in 1856.

## Aim

The aim of this chapter is to introduce you to some of the topics covered in Unit 4 of the VCE Legal Studies course, as well as provide an overview of the rule of law, which underpins many of the topics in Unit 4.

## Topics covered

This chapter provides an overview of the following topics:

- the Federation of Australia
- Australia's parliamentary system
- law-making by parliament and courts
- the meaning of the rule of law.

## 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*

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

**constitutional monarchy** a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

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

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

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

**judiciary** a legal term used to describe judges as a group (i.e. judicial officers who have the power to apply and interpret the law) as well as the courts as an institution (i.e. one of the three branches of government)

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

**legislature** a legal term used to describe the body having the primary power to make law (i.e. parliament)

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

**representative democracy** a system of government in which all eligible citizens vote to elect people who will represent them in parliament, make laws and govern on their behalf

**responsible government** a legal principle which requires the government to be answerable to elected representatives of the people for its actions and which requires the government to maintain the confidence of the majority of the lower house

**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

**separation of powers** a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate

**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

**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 the people, the law and reform before you start.

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

# 9.1 The Federation of Australia

Throughout Unit 4, you will learn about the **Australian Constitution**, including:

- how it establishes the Australian parliamentary system
- how it protects the Australian people
- the ability of the Australian people to influence the Constitution.

To understand the Australian Constitution and why it was created, you need to understand how Australia became a unified country. This unification process is known as the **Federation** of Australia.

**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*

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

At least 65 000 years before the 1788 British colonisation of Australia, First Nations peoples had developed their own systems of law and well-established rights, responsibilities and codes of behaviour, some of which are still observed today. First Nations cultures in Australia are the oldest living cultures in the world.

The first colony established by the British was New South Wales, in 1788. By the end of the nineteenth century, the British had established six separate colonies, each with the power to make its own laws for the people of that colony.




**Source 1** This souvenir booklet was published for Federation Day on 1 January 1901.

During the 1870s and 1880s British people living in the colonies became increasingly concerned about the arrival of non-British immigrants and the lack of a common immigration policy. They realised that there was a need for a central government that could make laws on matters such as these, which could apply to the whole of Australia. The colonies saw the advantage of having consistent laws in the national interest – for example, to strengthen Australia's defence and to simplify immigration, rail transport, tariffs and trade issues.

By the 1880s each of the six colonies had begun formal discussions to consider federating. They needed to agree on which laws they would allow a central **parliament** to make and which areas of law-making power they would keep as individual colonies.

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

In the 1890s each colony sent a group of representatives to special meetings (called constitutional conventions). At the conventions it was decided that a new central Commonwealth Parliament would be created. A draft Federal Constitution Bill was prepared and submitted to the Australian people for voting in 1898 and 1899. In each colony a majority of voters approved the bill.

The result of the constitutional conventions and the voting on the bill was the Federation of Australia. With the approval of Britain, the separate colonies became states with their own parliaments and a central body, the Commonwealth Parliament, was formed. The *Commonwealth of Australia Constitution Act* is the formal document by which the process of federation was achieved. It came into force on 1 January 1901. The Australian Constitution is contained in this Act.

As you learnt in Chapter 2, Australia is a **constitutional monarchy**, meaning it has a monarch (i.e. the King) as the head of state and a **constitution** that sets out the rules for how Australia is governed and the framework for our current parliamentary system.

Australia is also a **representative democracy** because the people elect representatives to parliaments to make law and change the law, and govern, on their behalf.

**constitutional monarchy**
a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

**constitution**
a set of rules and principles that guide the way a country or state is run. Some countries have unwritten constitutions; others have formal written constitutions

**representative democracy**
a system of government in which all eligible citizens vote to elect people who will represent them in parliament, make laws and govern on their behalf

## 9.1 Check your learning

### Remember and understand

1 **Explain** why, in the late 1800s, many people living in the six British colonies wanted to unite to form a federation (of Australia).

### Examine and apply

2 In a small group, research the constitutional conventions held in the late 1890s.
   - **a** **Identify** three key people involved.
   - **b** During the constitutional conventions, representatives from the colonies disagreed about what changes should take place at Federation. **Outline** three areas or matters that caused disagreement between the colonies. **Provide** reasons for your answer.
   - **c** Was there any involvement of First Nations peoples in the conventions? Discuss as a class.

3 **Explain** why Australia is referred to as both a constitutional monarchy and a representative democracy.



**Source 2** In the tens of thousands of years before the British colonisation of Australia, First Nations peoples had developed systems of law and established rights, responsibilities and codes of behaviour. Colonisation imposed extreme generational hardship on First Nations peoples, including being dispossessed of land and denied basic human rights.

# 9.2 An overview of Australia's parliamentary system

Australia's parliamentary system was established by the Australian Constitution, which came into operation on 1 January 1901, the date of Federation. The Australian Constitution established a federal parliamentary system that consists of:

- one national (or federal) parliament (called the Commonwealth Parliament), which has the power to makes laws that concern, and that apply to, the whole of Australia
- six state parliaments, which have the power to make laws that concern, and apply within the boundaries of, their state.

Australia has two mainland territories that have their own elected parliament to make laws that apply within the territory.

Therefore, there are nine parliaments in Australia:

- the Commonwealth Parliament (the central or federal parliament)
- six state parliaments (Victoria, New South Wales, Queensland, South Australia, Tasmania, and Western Australia)
- two territory parliaments (Australian Capital Territory and the Northern Territory).

In addition to creating the Commonwealth (or federal) Parliament, the Australian Constitution also set out its structure and law-making powers and established principles and mechanisms to ensure the parliament does not make law beyond these powers.



**Source 1** The Commonwealth Parliament consists of two houses.

For example, the Australian Constitution established the **High Court** of Australia to interpret and resolve disputes over the meaning of the Constitution. As you have learnt in Unit 3, the High Court is also the final court of appeal in Australia.

In accordance with the Australian Constitution, the High Court and other federal courts are independent of the parliament and the government. This concept of an independent judiciary (or court system) is a feature of Britain's parliamentary system, called the **Westminster system**, upon which the Australia parliamentary system is based. Two features of the Westminster system are:

- the principle of **responsible government**, which means the government (or executive), which is responsible for administering and carrying out the laws, is accountable for its actions and answerable to the parliament. Direct elections ensure a level of accountability because a government (or member of parliament) who does not act in the best interest of the majority of the people will risk not being elected again
- the principle of the '**separation of powers**', which ensures that no single body – that is, the parliament, the executive or **government**, or the court – can hold all three of the main law-making powers:
  - the power to make the law
  - the power to administer or carry out the law
  - the power to interpret how the law is to be applied.

Under this principle the courts can independently interpret how the law is to be applied, and are not subject to political or government pressure.

In Australia, parliaments consist of one or two houses. Under the Australian Constitution, the Commonwealth Parliament must consist of two houses. However, the state and territory parliaments have their own constitutions which outline their structure. Currently in Australia, all the state parliaments except Queensland consist of two houses; Queensland has one house. The Northern Territory and Australian Capital Territory parliaments also only have one house.

You will learn about the key features of the Australian Constitution and the way it acts as a check on the parliament in law-making, and more, in Chapters 10 and 11.

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

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

**responsible government**
a legal principle which requires the government to be answerable to elected representatives of the people for its actions and which requires the government to maintain the confidence of the majority of the lower house

**separation of powers**
a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate

**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

## 9.2 Check your learning

### Remember and understand

1 How many states and territories are there in Australia? How many parliaments are there in Australia? **Explain** why these numbers differ.

2 **Explain** why Australia is referred to as a federal parliamentary system.

3 **Suggest** one reason why it is important for the courts to be independent from the parliament and the government.

4 With reference to the separation of powers, **suggest** why members of the police force and members of the Victorian parliament are ineligible (not able) to serve on a jury in Victoria.

# 9.3 Law-making by parliament and courts

Throughout Unit 4 you will examine the way laws are made and changed, including the ways individuals, groups and law reform bodies can influence change in the law. In Australia, the two main bodies that make and change the law are parliament and the courts.

## Parliament

**legislature**
a legal term used to describe the body having the primary power to make law (i.e. parliament)

**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)

**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)

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

**judiciary**
a legal term used to describe judges as a group (i.e. judicial officers who have the power to apply and interpret the law) as well as the courts as an institution (i.e. one of the three branches of government)

**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)

The main role of parliament (also referred to as the **legislature**) is to make laws on behalf of the people. A proposal for a law introduced to the parliament is called a **bill**. The law that is made by parliament and has received **royal assent** is called **statute law** (a statute is an Act of Parliament or legislation). Any of the parliaments can make laws for their own state and the Commonwealth Parliament can make laws for the entire country. You will learn more about parliament as a law-making body in Chapters 10 and 11.

Although parliament is the supreme law-making body (meaning it can make and change any law within its constitutional power), the courts can also make and change the law.

## Courts

In contrast to the parliament, the main role of the courts (also referred to as the **judiciary**) is to apply existing law (i.e. existing statute law and legal principles established by judges) to resolve disputes and hear cases. As well, judges in superior courts (the Supreme Court and the High Court) can make and change law when deciding cases that have been brought before the court. In this way, the courts have a complementary role to the parliament in law making. Law made by the courts or judges is called **common law** (or case law).



**Source 1** Senior Government Ministers form a body, known as Cabinet, that determines government policy and considers proposed changes to the law.

In simple terms, judges in superior courts can, in certain circumstances, make law by establishing new legal principles when resolving cases. They can also make law by clarifying the meaning of words and phrases in a statute (or Act of Parliament) so it can be applied to resolve the dispute before the court. This is called **statutory interpretation**. The courts also have the power to declare any law made beyond or outside their law-making power as invalid. You will examine the role of the courts in law-making in Chapter 12.

**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

# The need for law reform

One of the main aims of laws is to protect our society and enable it to function in an orderly and peaceful way. Laws can achieve this by providing guidelines of acceptable behaviour to prevent or minimise conflict within the community. To be effective, laws must, among other things, be relevant and acceptable to the majority of the people. Otherwise, people will not respect and obey the law. This means as community views and values change over time, so must our laws.

The process of changing the law is referred to as **law reform**. Laws may also need to change to reflect and keep pace with technological advancements and changes in living conditions, and to better protect the community. Throughout Unit 4 you will explore some ways individuals and groups can influence law reform, including by participating in demonstrations, signing petitions and taking court action to challenge an unjust law. You will also examine how the media and specific law reform bodies can influence a change in the law and the role of the Australian people in changing the Australian Constitution.

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

## 9.3 Check your learning




Weblink
Victorian Legislation

### Remember and understand

1 **Distinguish** between the following terms:
   - **a** the legislature and the judiciary
   - **b** statute law and common law
   - **c** parliaments and courts.

### Examine and apply

2 The Victorian Legislation website has information on current proposals for laws (bills) being considered by the Parliament, as well as Acts of Parliament. Go to this website (a link is provided on your obook pro) and select 'Bills in Parliament' from the menu to see a list of the current Bills before the parliament.
   - **a** **Identify** one bill that is currently being considered by the Victorian Parliament.
   - **b** **State** the name of the house in which the bill was initiated and the member of parliament who introduced the bill.
   - **c** **Outline** the main purpose of the bill. In your answer **suggest** at least one reason for the proposed change in the law. You will be able to discover this by clicking on the 'second reading speech' link and reading the speech.

3 As a class, **list** all the ways that you think individuals (like yourselves) or groups can influence a change in the law. Discuss whether each of these ways is likely to be effective in influencing a law change. You or some of your classmates may have already taken some direct action to influence a change in the law. If so, you may wish to share your experiences with the class.

# 9.4

# The meaning of the rule of law

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

The **rule of law** underpins many of the topics in Units 3 & 4. The rule of law is not only upheld in our criminal and civil justice systems, but is also upheld through the Australian Constitution, the parliament, the courts and law reform.

The rule of law means that everyone – individuals, groups and the government – is bound by and must adhere to 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 4 you will explore a number of principles that seek to uphold the rule of law, including:

- the Australian Constitution acts as a check (restraint) on parliament in law-making so that parliament does not have unlimited power
- judges interpret the law free from the pressure of government and are independent of government and parliament
- the laws made by parliament are subject to open and free criticism, and people can seek to influence a change in the law
- people are free to associate and assemble without fear, which includes demonstrating against laws they see as unfair
- people can use the courts to challenge laws made by parliament
- judges are able to interpret laws made by parliament when a case comes before them that requires the meaning of the law to be clarified.

The scenario below is an example of the way the rule of law operates in practice and sends a message that nobody is above the law, regardless of their occupation or status.

**Actual scenario**

## 'No one is above the law'

In 2020, a County Court jury found a police officer (aged 51 years) guilty, under section 8 of the *Crimes Act 1958* (Vic), of one charge of recklessly causing injury after he 'unnecessarily' kicked a man during an arrest.

The incident occurred after the police officer and his partner were called to respond to a complaint that an alcohol-affected, and possibly drug-affected, man was involved in a verbal dispute with his partner and was refusing to leave a house. Shortly after their arrival, the two police officers attempted to arrest the man. During the arrest, the police officers used capsicum spray and struck the man twice in his legs with a baton to stop him from walking away. Once the man was arrested and placed in handcuffs, he was kicked in the lower back by the offending police officer, causing him to fall to the ground. The entire incident was captured on a closed-circuit TV system.

While the sentencing judge noted the arrested man had behaved in a way that was frustrating to the police officers and the offending police officer had 'lived an honourable life and had an exemplary career', he also emphasised that police officers are in a special position and 'must exercise restraint and patience in often very difficult circumstances', and act lawfully. The police officer was sentenced to a $10 000 fine, without a conviction being recorded. The maximum penalty for recklessly causing injury is 5 years' imprisonment.

*DPP v Fowler* [2020] VCC 738 (5 June 2020)



**Source 1** One of the principles of the rule of law is that laws made by parliament are subject to open and free criticism. The media plays an important role in upholding this principle.

## 9.4 Check your learning

### Remember and understand

1 **Define** the term 'rule of law' and **describe** two principles of the rule of law.

### Examine and apply

2 Read the scenario 'No one is above the law'.
   - **a** **Describe** the facts of the case.
   - **b** **Explain** how this case illustrates the rule of law.
   - **c** **Identify** one mitigating factor that may have been considered by the judge when determining the sentence in this case.
   - **d** **Explain** why it is important that judges are kept separate and independent of the parliament and government.

3 Clause 5 of the *Commonwealth of Australia Constitution Act* states:

'This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth…'.

**Explain** the relevance of this statement to the application of the rule of law in Australia.

Chapter

# 10

# Law-making powers




Source 1 In 1983, the High Court heard a dispute about whether the Commonwealth could stop the construction of a dam in south-west Tasmania. Many people objected to the dam because of concerns about damage to the environment. The dispute resulted in one of the more significant decisions of the High Court in our history. In this chapter, you will learn about parliament, the law-making powers of parliament, and how the intervention of the High Court may be required to resolve disputes about whether a parliament has the power to make certain laws (such as in the *Tasmanian Dam* case).

## Outcome

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10, 11 and 12), you should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making.

## Key knowledge

In the chapter, you will learn about:

*Parliament and the Australian Constitution*

- the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making
- the law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers
- the significance of section 109 of the Australian Constitution
- one High Court case which has had an impact on state and Commonwealth law-making powers.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the law-making powers of the state and Commonwealth parliaments, using examples
- explain the significance of section 109 of the Australian Constitution
- discuss the significance of one High Court case which has had an impact on state and Commonwealth law-making powers
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

## 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*

**concurrent powers** powers in the Australian Constitution that may be exercised by both the Commonwealth and the states (as opposed to residual powers and exclusive powers)

**exclusive powers** powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

**Governor** the King's representative at the state level

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

**House of Representatives** the lower house of the Commonwealth Parliament

**Legislative Assembly** the lower house of the Victorian Parliament

**Legislative Council** the upper house of the Victorian Parliament

**legislative power** the power to make laws, which resides with the parliament

**residual powers** powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain solely with the states (as opposed to concurrent powers and exclusive powers)

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

**Senate** the upper house of the Commonwealth Parliament

**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)

## Key legal cases

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

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**Please note**

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 law-making powers before you start.

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

# 10.1 Introduction to the Australian Constitution

**constitution**
a set of rules and principles that guide the way a country or state is run. Some countries have unwritten constitutions; others have formal written constitutions

**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*

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

**House of Representatives**
the lower house of the Commonwealth Parliament

**Senate**
the upper house of the Commonwealth Parliament

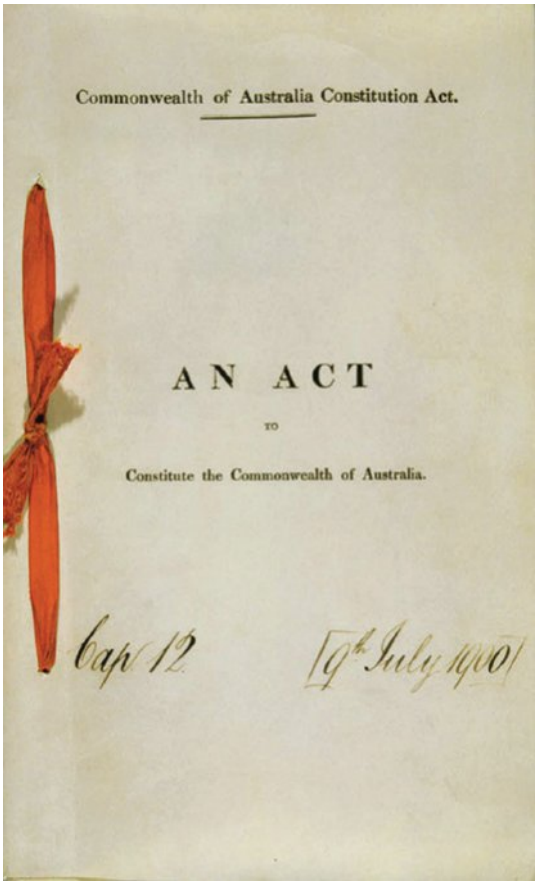
**referendum**
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australian people in a public vote by a double majority

**bill of rights**
a document that sets out the most important rights and/or freedoms of the citizens in a particular state or country (also known as a charter of rights)

A **constitution** is a set of rules and principles that establish the nature, functions and limits of government, and determine the powers and duties of the government. Many countries (such as Canada, India, New Zealand, the United States and the United Kingdom) have constitutions.

Australia has a formal written constitution. It is commonly known as the **Australian Constitution** or the Commonwealth Constitution. It is contained in the *Commonwealth of Australia Constitution Act*. It came into effect on 1 January 1901 after the citizens in each of the separate colonies voted in favour of federating as one united body (details about Federation are in Chapter 9).

In comparison with other documents, the Australian Constitution is short, especially considering it is an important legal and political document that affects the lives of all Australians.


Commonwealth of Australia Constitution Act.

AN ACT

TO

Constitute the Commonwealth of Australia.

63 & 64 Vict. Cap. 12 [9th July 1900]

**Source 1** The front cover of the Australian Constitution. The original is now held at the National Archives of Australia in Canberra after it was loaned to Australia by the United Kingdom in 1988. In 1990 it was formally gifted to the Australian people.

## Features of the Australian Constitution

Although the Australian Constitution does not cover all aspects of how Australia is governed (e.g. the Prime Minister is not mentioned), it contains the key features of Australia's system of government. Some of those features are as follows:

- it establishes the Commonwealth **Parliament** and outlines its structure, including how its two houses, the **House of Representatives** and the **Senate**, are to be composed
- it establishes the High Court of Australia and gives it powers to interpret the Constitution
- it sets out matters relating to the states. For example, the Constitution provides that state laws will continue in force in the state that made them unless they are altered or repealed
- it establishes the law-making powers held by the Commonwealth Parliament
- it provides a mechanism by which the wording of the Australian Constitution can be changed – i.e. by **referendum**.

You will learn about all of the above features in Unit 4.

Some other countries' constitutions include a **bill of rights**, but the Australian Constitution does not. A bill of rights is a statement or document that protects basic human rights (such as freedom of speech). Although our Constitution does not contain a bill of rights, it does protect a limited number of rights, such as the right to a trial by jury for indictable Commonwealth offences (as described in Chapter 3).

The Australian Constitution also provides a series of protections (also known as checks) to ensure that all areas of government operate in a manner that is consistent with key principles that underpin a democracy such as ours. These checks are explored in Chapter 11.

It is only because of the Australian Constitution that the central systems and foundations of our political and legal systems, such as the Commonwealth Parliament, the High Court of Australia, the referendum process, and the division of law-making powers, exist in Australia. You will explore and develop an appreciation of these features of the Australian Constitution in Unit 4.



**Source 2** In June 2022, Linda Burney MP, of the Australian Labor Party (ALP), became Minister for Indigenous Australians. Burney is a proud member of the Wiradjuri nation, and has been a vocal supporter of a First Nations Voice to Parliament (see Chapter 14).

***Study tip***

Download a PDF of the Australian Constitution (see weblink on your obook pro) and bookmark the sections discussed in Unit 4. This will help you understand key constitutional concepts in greater depth.

**Weblink**
The Australian Constitution

## 10.1 Check your learning

### Remember and understand

1 **Define** the term 'constitution'.

2 **Identify** three bodies or features of Australia's legal and political systems that only exist because of the Australian Constitution.

### Examine and apply

3 Imagine the year is 1895 and you live in one of the Australian colonies. **Describe** two benefits to the colonies uniting to create a federal system.

4 Imagine that the year is 1895 and you live in one of the smaller colonies such as Tasmania or South Australia. **Explain** how two concerns you may have held about the introduction of the new parliamentary system in Australia might be addressed in the proposed new constitution.

### Reflect and evaluate

5 Constitution survey

- **a** Conduct a survey of five people who do not study any law-related course. Ask them the following questions:
  - **i** When did the Australian Constitution come into effect?
  - **ii** Name two roles played by the Australian Constitution in Australian society.
  - **iii** How can the Australian Constitution be changed?
- **b** Prepare a short summary of each person's responses.
- **c** Using your summary as a reference, take part in a class discussion about the following statement: 'Most people are unaware of the role played by the Australian Constitution in Australia's legal and political systems.'

# 10.2 The Commonwealth Parliament

## Key knowledge

**In this topic, you will learn about:**

- **the role of the Commonwealth Houses of Parliament in law-making.**

The Parliament of Australia (also known as the Commonwealth Parliament or the federal parliament) consists of:

- the King (represented by the **Governor-General** of Australia)
- the Senate (the upper house)
- the House of Representatives (the lower house).

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

Two key roles of the Commonwealth Parliament are to make laws, and to represent the people of Australia. The idea of having two 'houses' is that there are effectively two 'groups' of people who form parliament. It ensures that the power to make law is not held by one single 'group' of people. Instead, the two houses or 'groups' can consider and decide whether a law should be made.




**Source 1** The Parliament of Australia consists of the King (represented by the Governor-General), the House of Representatives and the Senate.

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

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

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

**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

## The House of Representatives

The lower house is the House of Representatives. There are 151 members in the House of Representatives, with each member representing one of Australia's 151 electorates (a geographical area of Australia). The voters in each electorate vote in a federal election to say who they want their representative to be in the lower house. The elected member is expected to represent the views and interests of the people in their electorate. The House of Representatives is often referred to as 'the people's house'.

Federal elections are held every three years. In Australia, voting in an election is compulsory. To be eligible to vote, a person must be 18 years old and registered to vote (by being registered on the national electoral roll).

The **political party** (or **coalition** of parties) that achieves the majority of members elected to the House of Representatives becomes the government of the day. It is therefore referred to as 'the house of government'. The leader of that political party becomes the prime minister of Australia, who then appoints government **ministers** to look after certain areas (portfolios), such as health, education and defence. Most ministers sit in the House of Representatives.

The party (or coalition of parties) with the next greatest number of elected members becomes the **opposition**. The party is recognised as an 'alternative government', meaning that it would form government if the existing government were to lose the confidence of the people of Australia.

The leader of the opposition appoints shadow ministers. The role of shadow ministers is to keep a check on the activities and responsibilities of the corresponding government minister, and to act as the opposition spokesperson for their particular portfolio. For example, while there is a Minister for Defence in the Commonwealth Government, there is also a Shadow Minister for Defence – an opposition member whose job is to scrutinise the decisions made by the Minister and ensure they are accountable to the parliament.

## The role of the House of Representatives in law-making

As noted above, one of the main roles of parliament is to make laws. A **bill** is a proposed law. A bill is initiated in one of the houses and must go through both houses of parliament to become a statute (also known as an Act of Parliament or legislation). A majority vote of the members of both houses is always required for a bill to pass, and the bill must be passed by both houses in identical form for it to become law.

Within each house, there are various stages that the bill must go through, which provide opportunities for the bill to be debated and scrutinised, and for amendments to be proposed to the bill. Once the bill passes both houses, it then goes to the Governor-General for royal assent (the signing and approval of the proposed law by the Crown's representative).

While any member of parliament can introduce a bill, and bills can be introduced in both houses, most bills are initiated in the House of Representatives. This is because government ministers usually introduce bills that reflect government policy, and most ministers sit in the lower house. A bill that is introduced without the authority of the **Cabinet** is known as a **private member's bill**. Such bills will generally not reflect the policy of the government of the day.

The House of Representatives has several roles in law-making:

- **Initiate and make laws** – the main function of the House of Representatives is to initiate new laws, and as noted above, most bills are introduced in this house. This is the role that takes up much of its time, as the process of passing and debating bills (including bills that amend or change existing laws) is a long and considered process, and there are often many new laws and changes to laws required to ensure a functioning society. As part of this process, bills are debated, and a bill may be scrutinised and considered by a parliamentary committee.
- **Determine the government** – after an election, the political party (or coalition of parties) that has the most members in the House of Representatives forms government; or, in the case of a **hung parliament**, has the support of independents and/or another party so that they can form government. As most legislation is initiated in the lower house by government ministers, government policy and mandates are reflected in the legislation introduced.
- **Act as a house of review** – if a bill has been initiated and passed through the Senate, the House of Representatives will be the 'second house' to consider whether the bill should become law, and it will therefore act as a house of review. If the House of Representatives passes the bill, it is sent to the Governor-General and made into law on a nominated date.
- **Control government expenditure** – a bill must be passed through both houses of parliament before a government can collect taxes or spend money, but only the House of Representatives can introduce **money bills**.
- **Represent the people** – the House of Representatives plays a role in upholding **representative government**. Members are elected to represent the people and are given authority to act on behalf of the people. The proposed laws should therefore reflect the views and values of the majority of the electorate that the member represents.

**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)

**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 introduced into parliament

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

**hung parliament**
a situation in which neither major political party wins a majority of seats in the lower house of parliament after an election

**money bill**
a proposed law (bill) that imposes taxes and collects revenue; also known as an appropriation bill

**representative government**
a political system in which the people elect members of parliament to represent them in government

- **Scrutinise government administration** – ministers must be members of parliament and are expected to be answerable and accountable for their decisions, policies and actions. This is referred to as **responsible government**. One way that responsible government is upheld is by enabling members to question ministers about their policies and legislative mandate during question time (a period of time set aside when ministers are asked questions). Government decisions and policies can also be investigated and scrutinised through committees.

**responsible government**
a legal principle which requires the government to be answerable to elected representatives of the people for its actions and which requires the government to maintain the confidence of the majority of the lower house

**election**
the process used where eligible people vote to choose a person to hold a position in a body or organisation (for example, a member of a house of parliament)

**committee system**
a system used by federal, state and territory parliaments in Australia that involves use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

**parliamentary committee**
a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

# The Senate

The Senate consists of 76 elected members, called senators. Each state elects 12 representatives, regardless of the population of that state. There are also two representatives elected from each mainland territory.

Each senator represents the interests of their state or territory; therefore, the Senate is often referred to as the states' house. Senators are elected for a six-year term. Half of them are elected every three years, and the changeover takes place on 1 July in the year following a general **election**.

## The role of the Senate in law-making

The Senate's main role is to make laws. Its law-making powers are equal to those of the House of Representatives in that it can initiate proposed laws (bills). The Senate, however, cannot initiate money bills (which includes any bill that collects revenue). It is also not able to amend money bills, but it can request the House of Representatives to make amendments.

The Senate debates the proposed laws and has a large and active **committee system** that enables senators to inquire into policy issues in depth and to scrutinise bills before they become law. You will learn more about **parliamentary committees** in Chapter 13.

The main roles of the Senate in law-making are as follows:

- **Act as a house of review** – most bills are initiated in the lower house, so the Senate (the upper house) reviews the bills already passed through the lower house. The Senate may pass a bill




**Source 2** Zoe Daniel MP (left) was elected to the House of Representatives as an independent Member of Parliament in the 2022 federal election. As an independent member, she sits on the 'crossbench' with other MPs who are not members of either the government or the opposition.

without amendment, pass it with amendments (or, in the case of a money bill, request amendments before passing it) or reject it. The Senate can also insist on changes to proposed laws before they are passed into law. The Senate can, therefore, act as an important check on government in law-making, particularly if the government does not have a majority in the Senate. You will learn more about this in Chapter 11.

- **Allow for equal representation of the states** – at the time of the creation of the Commonwealth Parliament, the states (which were separate colonies before Federation) were afraid to give up too much power. This was especially important to the smaller colonies, which did not want the more populated colonies to hold the power in the Commonwealth Parliament. To overcome this, section 7 of the Constitution provides that the Senate should have equal representation from each state, regardless of its size or population, to protect the interests of the states – particularly the smaller ones.
- **Initiate bills** – similar to the House of Representatives, the Senate can initiate bills (other than money bills). Although most bills are initiated in the House of Representatives, a bill may be introduced in the Senate when, for example, a minister is a senator and is in charge of a bill.
- **Scrutinise bills and government administration** – the Senate has a number of committees that can scrutinise legislation or particular government activities, legislation or policy, as well as government expenditure. This includes the Senate Standing Committee for the Scrutiny of Bills, whose role is to assess legislative proposals to determine what effect the proposals would have on individual rights, freedoms and obligations, as well as the **rule of law**. Question time can also be used by senators to ask questions about government administration.

An example of the role of the houses in law-making is described in the following scenario.

### *Did you know?*

If you ever take a trip to Parliament House in Canberra, look out for 'Shawn the Prawn', a fossilised piece of coral embedded in the floor in the foyer. Shawn is approximately 345 million years old.

**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

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

**balance of power**
(between political parties) a situation where no single party has a majority of seats in one or both houses of parliament, meaning the power to reject or approve bills is held by a small number of people (e.g. members of minor parties and independent members)

**crossbenchers**
members of Parliament who are not members of either government or opposition (i.e. independent members or members of minor parties). They are named after the set of seats provided in parliament for them, called the 'crossbench'

Actual scenario

## Crossbench support in the Senate allows for caps on gas prices

In 2022, there was a dramatic increase in the price of gas. This was due to many factors, including the impact on the global supply of energy as a result of Russia's war in Ukraine. The increase in prices was especially difficult for Australian households and businesses.

The Commonwealth Parliament passed the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022* (Cth), which contained a plan to temporarily limit wholesale gas prices in certain situations.

At the time, the Australian Labor Party (ALP), which had formed government in the lower house, did not have a majority in the Senate. Rather, the minor parties (including the Australian Greens) and one **independent** (Senator David Pocock) held the **balance of power** in the Senate. To pass the legislation, the government needed either the support of the opposition (the Liberal-National Coalition) or the support of the **crossbenchers** (including the Australian Greens). This is because all bills need the support of a majority in both houses to become law.

The Australian Greens supported the legislation but only in exchange for the government developing a financial assistance package to help households transition away from gas appliances. The government also obtained the support of Senator Pocock. As a result, the government did not require the opposition's support.



**Source 3** The war in Ukraine that began in 2022 had an impact on energy supply across the globe. International factors such as these can drive the need for law reform in Australia.

## 10.2 Check your learning

Weblink
Australian Parliament: Watch, Read, Listen

### Remember and understand

1 **Outline** the structure of the Commonwealth Parliament.
2 Other than introducing bills, **describe** two roles of the House of Representatives in law-making.
3 **Explain** why the Senate is referred to as the 'states' house' and the House of Representatives is referred to as the 'people's house'.

### Examine and apply

4 Conduct some research and **describe** the current composition of the Senate in terms of the number of seats held by political parties and independent members.
   **a** Which members hold the balance of power when bills are being considered?
   **b** If the current government had the support of only independent senators, not members of opposition parties, would a bill be able to be passed? **Justify** your response.
5 Access the Australian Parliament website and go to the 'Watch, Read, Listen' link (see weblink on your obook pro). Choose a live video of one of the Houses (if Parliament is sitting) or an archived video. Make notes on the following:
   **a** the names and roles of three members of Parliament who feature in the footage shown
   **b** two bills that are being discussed and an outline of the purpose of one of those bills.

### Reflect and evaluate

6 **Discuss** the ability of the government to implement its own policies. In your response, refer to the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022* (Cth).

# 10.3 The Victorian Parliament

## Key knowledge

**In this topic, you will learn about:**

- **the role of the Victorian Houses of Parliament in law-making.**

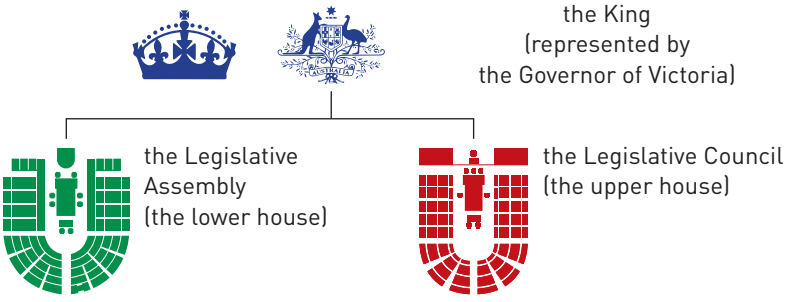
Like the Parliament of Australia, the Parliament of Victoria (also known as the Victorian Parliament) is a bicameral parliament. The Parliament of Victoria consists of:

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

**governor**
the King's representative at the state level

**Legislative Council**
the upper house of the Victorian Parliament

**Legislative Assembly**
the lower house of the Victorian Parliament




**Source 1** The Parliament of Victoria consists of the King (represented by the Governor of Victoria), the Legislative Assembly and the Legislative Council.

### *Study tip*

It is easy to remember the names of the houses because they go in alphabetical order from lower (Legislative Assembly) to upper (Legislative Council).

**Weblink**
Victorian electorates: interactive map

## The Legislative Assembly

There are 88 members of the Legislative Assembly. For the purposes of state elections, Victoria is divided into 88 electoral districts. The voters in each district vote in a state election for who they want to be their representative to be in the lower house. The member is expected to represent the interests of the people in their district, and will remain in office for four years. Elections are held in Victoria every four years on the last Saturday in November.

The political party (or coalition of parties) that wins the majority of seats in the Legislative Assembly forms government. The leader of the government is known as the Premier of Victoria.

Like the Commonwealth Parliament, the party with the next highest number of elected members becomes the opposition. The leader of the opposition appoints shadow ministers, whose role is to keep a check on the activities and responsibilities of the corresponding government minister.

### The role of the Legislative Assembly in law-making

Like the Commonwealth Parliament, the main role of the Victorian Parliament is to make laws. The process of passing a bill in the Victorian Parliament is similar to that of the Commonwealth Parliament, in that it must go through specific stages in both houses of parliament, and it must be passed by a majority in both houses in identical form. The bill must then receive royal assent from the Governor of Victoria before it becomes a **statute**.

**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)

The role of the Legislative Assembly in law-making is to:

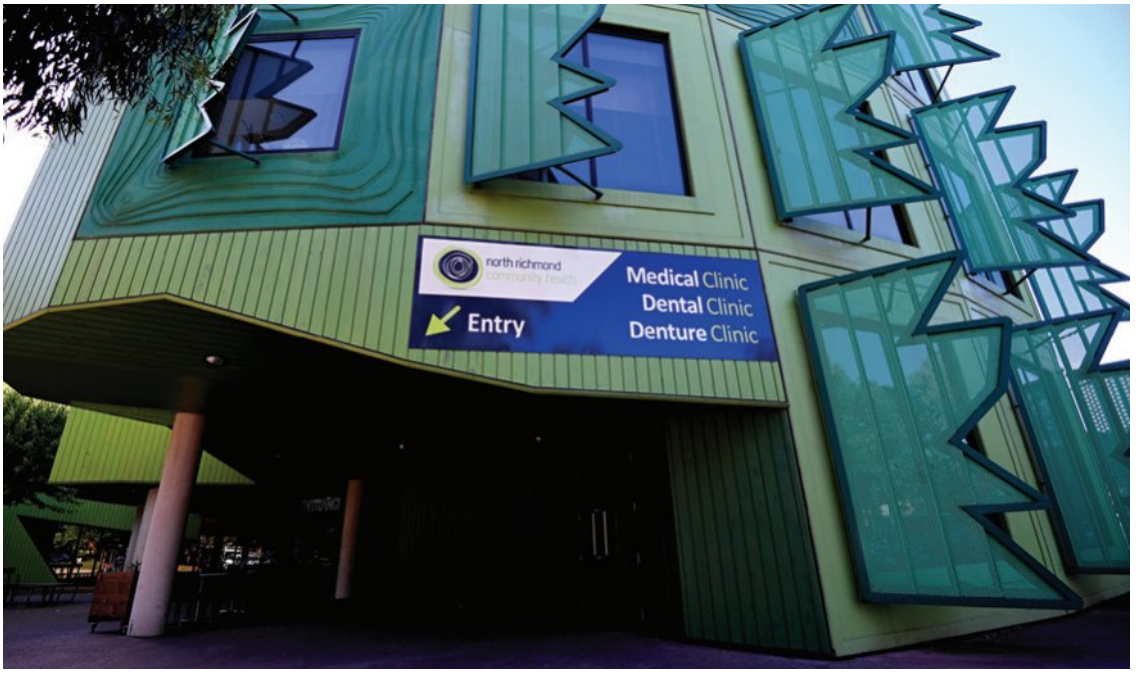
- **Initiate and pass bills** – the main function of the Legislative Assembly is to initiate new laws. These are usually introduced to the Legislative Assembly by a government minister, although any member may introduce a bill. This takes up much of the Legislative Assembly's work, as the consideration and debate of a bill can take a long time.

- **Form government** – the political party that has the most members in the Legislative Assembly forms government. Most bills are initiated in the Legislative Assembly in the form of government bills, reflecting the policies laid down by the Premier of Victoria and senior ministers.
- **Scrutinise government administration** – ministers must be members of parliament, and are expected to be answerable and accountable for their actions. Ministers can be questioned by opposition members about their policies and proposed legislation during question time, and government decisions and legislative proposals are subject to parliamentary scrutiny (including through the committee system).
- **Represent the people** – members of the Legislative Assembly are elected to represent the interests of the people. Their actions in law-making should reflect the views and values of the people. If not, they are at risk of being voted out at the next election.
- **Act as a house of review** – the Legislative Assembly acts as a house of review in the law-making process when a bill has been initiated in and passed by the Legislative Council.
- **Control government expenditure** – for taxes to be collected or money to be spent, the bill must be introduced in the Legislative Assembly. Therefore, the Legislative Assembly controls government expenditure as only it can initiate money bills.

## The Legislative Council

There are 40 members in the Legislative Council. For the purposes of electing these members, Victoria is divided into eight regions, each consisting of 11 electoral districts. Five members of the Legislative Council are elected for each region, and they are elected to serve a fixed four-year term.

The primary role of the Legislative Council is to act as a house of review. That is, it will review bills that have already been passed by the Legislative Assembly, and can scrutinise, debate and reject proposed legislation. This is an important part of the checking process in law-making.




**Source 2** In 2017, legislation passed to allow for a medically supervised injecting room (MSIR) in Richmond, Victoria, on a trial period. In 2023, legislation was passed to make the MSIR permanent. The MSIR is opposed by some, including local residents and traders. The Reason Party had initially introduced legislation in support of an MSIR.

## The role of the Legislative Council in law-making

The role of the Legislative Council in law-making is to:

- **Act as a house of review** – the role of the Legislative Council is similar to that of the Senate. It acts as a house of review for a bill that has been passed by the Legislative Assembly. It does this by scrutinising, debating and, on occasion, amending or rejecting legislation that has been initiated by the government. By performing these functions, the upper house can apply many of the important checks and balances in the law-making process.
- **Initiate and pass bills** – bills can be initiated in the Legislative Council but it is less common than in the Legislative Assembly. The Legislative Council, like the Senate, is not able to introduce money bills. These bills must be debated and passed in the Legislative Assembly first.
- **Scrutinise government administration** – ministers who are members of the upper house can be questioned by opposition members about their policies and proposed legislation during question time, and government decisions can be scrutinised in the committee process.

***Did you know?***

Women could be elected as members of the Legislative Council from 1923. However, it wasn't until 1979, with the election of Gracia Baylor and Joan Coxsedge, that a woman was elected to the House.

# 10.3 Check your learning

### Remember and understand

1 **Outline** two roles of the Legislative Assembly in law-making.

2 If you were elected to a seat in the Legislative Council, how many years would you serve before the next election?

### Examine and apply

3 **Compare** the roles of the Legislative Assembly and the House of Representatives in law-making.

4 Your friend keeps confusing the names of the houses of parliament, the structure of both parliaments and who each house represents. Devise a creative way for your friend to remember this detail. It could be a poem, song, rap or visual diagram.

5 **Construct** a table that shows the roles of the houses in law-making. Make sure each role is specifically linked to 'law-making'.

### Reflect and evaluate

6 Conduct research to find out the current composition of the Legislative Council in terms of the number of seats held by political parties and independent members.

- **a** With reference to the current composition, **explain** whether the government has a majority of members in this house.
- **b** **Discuss** the extent to which law-making is more effective if the government does not have a majority in the upper house.

# 10.4 The Crown

## Key knowledge

**In this topic, you will learn about:**

- **the role of the Crown in law-making.**

The Crown (the British monarch) is part of the system of government in Australia and is represented by:

- one Governor-General (at a federal level)
- six governors (at a state level).

The Governor-General is appointed by the Crown on the advice of the Prime Minister of Australia. The governors of each state are also appointed by the Crown, on the advice of the premier of each state.

The main responsibility of the Crown's representatives in Australia is to ensure that the democratic system operates effectively. This requires an effective electoral system, parliament, government and courts. It is also essential that the majority of people are confident that their community functions as a democracy.

The roles of the Crown in law-making are:

- granting royal assent
- withholding royal assent
- appointing the Executive Council.

## Granting royal assent

The Crown's representative in both the Commonwealth Parliament (the Governor-General) and the Victorian Parliament (the Governor of Victoria) is required to approve bills before they can become law. This is known as **royal assent**. Royal assent is normally given as a matter of course on the advice of the Prime Minister or ministers at the Commonwealth level, and on the advice of the Premier of Victoria or ministers at the Victorian level.

**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)

## Withholding royal assent

The Crown's representative has the power to withhold royal assent (that is, refuse to approve a bill in order to make it an Act of Parliament). However, this rarely occurs, and the ordinary course is that the Crown's representative will approve bills on advice of the Prime Minister, Premier or ministers.

At a federal level, the Australian Constitution specifies the circumstances in which the Governor-General can withhold royal assent. The Australian Constitution does not specify the process at a Victorian level, but it is accepted that the Governor of Victoria acts on the advice of the executive when giving royal assent.

**Executive Council**
a group consisting of the prime minister and senior ministers (at the Commonwealth level) or premier and senior ministers (at the state level) that is responsible for administering and implementing the law by giving advice about the government and government departments

## Appointing the Executive Council

The Governor-General (or governor of each state) is responsible for appointing the **Executive Council**, which comprises:

- the leader of the government (the prime minister at the federal level and premiers at the state level)
- senior ministers
- assistant ministers.

The role of the Executive Council is to give advice to the Crown's representative on matters such as whether to approve regulations. For example, the *Environment Protection Amendment (Banning Single-Use Plastic Items Regulations 2022* (Vic) was made under the advice of the Executive Council. These regulations specify what single-use plastic items are now banned from being used or sold by businesses, such as drinking straws, cutlery, cotton buds and drink stirrers.

In reality the Crown's representative acts on the advice of the prime minister or premier when approving regulations.



**Source 1** Margaret Gardner, the former Vice-Chancellor of Monash University, was sworn in as the Governor of Victoria in August 2023.

**Weblink**
Australasian Legal Information Institute (AustLII)

**Weblink**
Legislation Register

## 10.4 Check your learning

### Remember and understand

1 **Define** the term 'royal assent'.
2 **Explain** whether the King's representative has the power to stop a bill from being passed.

### Examine and apply

3 Access this year's Commonwealth Regulations online on either the Australasian Legal Information Institute (AustLII) website or the Legislation Register website. Links to these websites are provided on your obook pro. Find a regulation that has been made by the Governor-General and answer the following questions.
   a **State** the name of the regulation.
   b **Identify** when the Governor-General made the regulation.
   c **Name** the Act of Parliament under which this regulation was made.
4 Conduct some research.
   a **Name** the current Governor-General.
   b **Name** Victoria's current governor.
   c **Define** the term 'reserve powers' and **describe** its relevance to law-making.
   d **Describe** the role of the King's representative in relation to elections.

### Reflect and evaluate

5 'Given that royal assent is almost always granted, the Crown does not really play a role in law-making.' Do you agree? **Justify** your answer.

# 10.5 The division of law-making powers

## Key knowledge

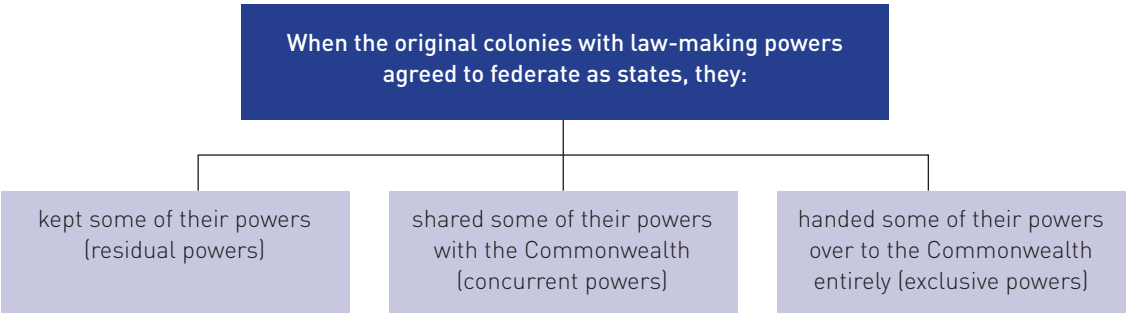
**In this topic, you will learn about:**

- **the law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers.**

### *Study tip*

The *VCE Legal Studies Study Design* requires you to explain the law-making powers of the state and Commonwealth parliaments, using examples. Make sure you know two examples for each power.

Before Federation, Australia was a collection of six colonies which created their own laws for their own residents. To allow for Federation, the colonies had to give up some of their powers to the new Commonwealth Parliament. When the colonies became states they kept some powers, shared others with the new Commonwealth Parliament, and gave up some completely, as shown in Source 1.




**Source 1** Prior to Federation, the colonies (now known as the states) agreed to allow some of their powers to be handed to the newly formed Commonwealth Parliament. The states retained power over some significant areas that they had traditionally controlled.

Law-making powers are powers or authority given to parliament to make laws in certain areas. Those powers are exercisable by parliament, which is the supreme law-making body in Australia. This means parliament has the ultimate authority to make laws and can change laws whenever it wants to, so long as it is acting within its powers. There are a significant number of areas in which laws need to be made in Australia. These areas include roads, education, tax, currency, marriage, trade and crime.

When the Commonwealth Parliament was established, it was necessary for the Australian Constitution to specify which powers were to be given to that parliament, and which powers were to be left with the states. The colonies agreed on the areas where the Commonwealth Parliament was to make laws, and the areas where the state parliaments would retain their power to make laws.

In particular, the Australian Constitution divides the law-making powers into:

- **residual powers** – law-making powers that were left with the states. The Commonwealth Parliament generally has no authority to make laws in these areas
- **exclusive powers** – law-making powers that are held only by the Commonwealth Parliament, and only that parliament can create laws in these areas (the states cannot create law in those areas)
- **concurrent powers** – law-making powers that are shared by the Commonwealth and the state parliaments.

**residual powers** powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain solely with the states (as opposed to concurrent powers and exclusive powers)

**exclusive powers** powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

**concurrent powers** powers in the Australian Constitution that may be exercised by both the Commonwealth and the states (as opposed to residual powers and exclusive powers)

## Residual powers

Residual powers are law-making powers left with the states at the time of Federation. They are not listed in the Australian Constitution. Before the Federation of Australia and the forming of the Commonwealth Parliament, the states, as separate colonies, had power to make laws on all areas

that affected their colony. At the time of Federation, some powers were given to the Commonwealth Parliament, but many powers were left with the states.

Specific sections of the Constitution protect the continuing power of the states to create law in areas that were not given to the Commonwealth, or preserve state laws. These include sections 106, 107 and 108 of the Australian Constitution, set out in the extract below. In particular, section 107 is a key section that preserves state power.

## Extract

### The Australian Constitution

#### Section 106 Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

#### Section 107 Saving of Power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

#### Section 108 Saving of State laws

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.



**Source 2** State governments have the power to make laws about public transport and related infrastructure. The Melbourne Metro Tunnel and Suburban Rail Loop projects are examples of the exercise of such powers by the Victorian Parliament.

Areas of law-making such as criminal law, medical procedures (including *in vitro* fertilisation), road laws, education and public transport are not mentioned in the Constitution. They therefore remain as areas of residual power that belong to the states. This means that in these areas of law, the states' laws may differ. For example, as you may recall from Unit 3 – Area of Study 1, crime is an area of law-making that is held by the states, therefore each state has its own courts, its own laws which establish crimes and sanctions, and its own police force.

## Exclusive powers

Most of the law-making powers of the Commonwealth Parliament are set out in section 51 of the Australian Constitution and are referred to as 'heads of power'. These key powers of the Commonwealth are either exclusive powers or concurrent powers.

An exclusive power is a power which can only be exercised (that is, exclusively or solely) by the Commonwealth Parliament. This means that only the Commonwealth Parliament can make laws in these areas. Examples of exclusive powers include:

- defence (the Australian Defence Force including the army, navy and air force)
- currency (printing and coining money)
- customs and border protection (immigration, controls on imports and exports, and border security).

Some powers that are held by the Commonwealth are made exclusive by particular sections of the Constitution. For example, section 51(xii) gives power to the Commonwealth Parliament to make laws relating to coining money and section 115 provides that a state shall not coin money, thereby making this an exclusive power of the Commonwealth.



**Source 3** The deployment of Australian troops as peacekeepers in countries such as Solomon Islands is an example of the Commonwealth's exercise of its defence power under the Constitution.

| Law-making power given to the Commonwealth | Section of the Constitution that makes the power exclusive |
|---|---|
| **Section 51(iii)** gives power to the Commonwealth Parliament to make laws regarding customs and excise. | **Section 90** states that this power is exclusive to the Commonwealth Parliament. |
| **Section 51(vi)** gives power to the Commonwealth Parliament to make laws relating to naval and military forces. | **Section 114** provides that the states shall not raise naval or military forces, making this exclusive to the Commonwealth Parliament. |
| **Section 51(xii)** gives power to the Commonwealth Parliament over currency, coinage and legal tender. | **Section 115** provides that the states shall not coin money. Coining money is therefore an exclusive power of the Commonwealth Parliament. |

**Source 4** An example of powers in section 51 that are made exclusive by other sections of the Australian Constitution

Other powers held by the Commonwealth are exclusive by their nature. For example, section 51(xix) gives power to the Commonwealth to make laws relating to naturalisation (becoming an Australian citizen). Powers that are exclusive by nature are set out in Source 5 below.

| Section | Power |
|---|---|
| 51(iv) | Borrowing money on the public credit of the Commonwealth |
| 51(xix) | Naturalisation (becoming an Australian citizen) |
| 51(xxv) | Recognition throughout the Commonwealth of state laws and records |
| 51(xxxii) | Control of railways for defence purposes |
| 51(xxxiii) | Acquisition of state railways with the consent of the state concerned |

**Source 5** Powers given to the Commonwealth Parliament that are, by their nature, exclusive

In addition, as shown in the following extract, section 52 of the Australian Constitution contains a small list of powers that are exclusive powers of the Commonwealth Parliament.

## Extract

### The Australian Constitution

#### Section 52 Exclusive powers of the Parliament

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

(i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

(ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;

(iii) other matters declared by this Constitution to be within the exclusive power of the Parliament.

## Commonwealth territories

Sections 111 and 122 give exclusive power to the Commonwealth with respect to Commonwealth territories (e.g. the Northern Territory and the Australian Capital Territory).



**Source 6** Under section 51(v) of the Constitution, the Commonwealth has power to make laws with respect to postal services. The Commonwealth has used this power since 1901 to have some postal services managed by government-owned authorities.

## Concurrent powers

Concurrent powers are law-making powers that both the Commonwealth and the state parliaments share. Many of the powers given to the Commonwealth Parliament in the Australian Constitution are concurrent powers. In fact, all those powers that are not exclusive to the Commonwealth Parliament are concurrent powers. Examples of concurrent powers include:

- **trade** – both the Commonwealth and the states can make law with regard to trade. Under the Constitution, no unreasonable limitations can be made by any parliament, Commonwealth or state, on freedom of trade between states
- **taxation** – the power to make laws about taxation is given to the Commonwealth Parliament but state parliaments can also make laws about taxes. Commonwealth taxes include income tax and GST (goods and services tax). State taxes include stamp duty and payroll tax
- **marriage and divorce** – both the Commonwealth Parliament and state parliaments have the power to make laws on marriage and divorce
- **postal, telegraphic, telephonic and similar services** – communication services may be legislated on by both the Commonwealth and the state parliaments.

## 10.5 Check your learning

Weblink
Australian Constitution: Section 51

### Remember and understand

1 **Identify** the three different types of law-making powers.
2 Using two examples, **define** the term 'concurrent powers'.

### Examine and apply

3 **Identify** two examples of exclusive powers and provide reasons why the original writers of the Constitution may have decided to deny the states law-making powers over these areas.
4 For each of the following, **identify** the parliament that has the power to make the law. You may need to access the Constitution to answer some of these.
   **a** signing a contract with the United States to supply nuclear submarines to Australia
   **b** building a new school
   **c** abolishing five- and ten-cent coins in Australia
   **d** banning the use of vape products in public places
   **e** ordering Australian troops to assist with a natural disaster in Tonga
   **f** imposing a new tax to address a natural disaster in rural Victoria
   **g** overturning a law made by a territory that is deemed inappropriate.

### Reflect and evaluate

5 'Residual powers creates inconsistency in laws across Australia, such as road rules. There should be only exclusive powers, with the Commonwealth Parliament creating laws on all areas for the entire nation.'
**Discuss** the extent to which you agree with this statement.

# 10.6 Section 109

## Key knowledge

**In this topic, you will learn about:**

- **the significance of section 109 of the Australian Constitution.**

*Study tip*

Sections of the Constitution that are specifically identified in the *VCE Legal Studies Study Design*, such as section 109, are examinable. You should become familiar with those sections. A good way to do this is to record yourself reading the sections. That way, you can listen to them while you are exercising, or on the commute to and from school.

Section 109 of the Australian Constitution is designed to help resolve conflicts and inconsistencies between state and Commonwealth laws. These inconsistencies sometimes arise when concurrent powers are exercised by the Commonwealth Parliament and one or more state parliaments. For example, if the Commonwealth Parliament and a state parliament make a law in the same area, and the state law is inconsistent with the federal law, there may be a conflict between the state and Commonwealth legislation that needs to be resolved.

Under section 109 of the Australian Constitution, if there is a conflict between state and Commonwealth laws, the Commonwealth law will prevail to the extent of the inconsistency between the two pieces of legislation. State law provisions that are inconsistent with the Commonwealth law will therefore be invalid and unenforceable.

**Extract**

### The Australian Constitution

#### Section 109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

For example, if the Commonwealth law prohibits a specific form of conduct which the state law allows, then the state law will be inoperable where those laws are inconsistent. Or, if the Commonwealth law states that you must do X and the state law states that you must *not* do X, then that section of the state law will become inoperable if challenged before a court. You cannot obey both laws at the same time, so the inconsistent part of the state law is invalid.

## Example: Inconsistency in laws relating to marital status

An area of concurrent law-making where there has been inconsistency between laws is marital status. The case of *McBain v State of Victoria* discussed in the following scenario found that certain provisions of the former *Infertility Treatment Act 1995* (Vic) were invalid because they were inconsistent with the Commonwealth's *Sex Discrimination Act 1984* (Cth).

**Actual scenario**

### Discrimination in infertility treatment services

The *Infertility Treatment Act* was passed by the Victorian Parliament to establish the Victorian Infertility Treatment Authority and the *in vitro* fertilisation (IVF) program. The program assisted infertile couples to have children using their own donor sperm or ova. Section 8 of the *Infertility Treatment Act* stated that, to receive treatment, a woman must be:

- married and living with her husband on a genuine domestic basis or

- living with a man in a de facto relationship.

Access to the program could be denied if the marital status requirement was not met.

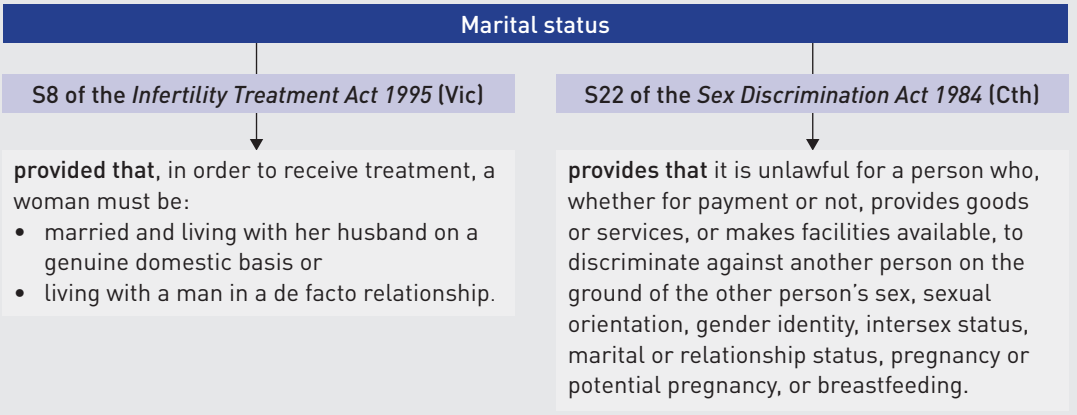
Separately, section 22 of the *Sex Discrimination Act*, passed by the Commonwealth Parliament, made it unlawful for a person to refuse to provide a service to another person on the grounds of the latter person's marital status. Marital status, under the *Sex Discrimination Act*, was defined to mean:

> the status or condition of being single, married, married but living separately and apart from one's spouse, divorced, widowed or the de facto spouse of another person.

The provision of IVF is a 'service' under the *Sex Discrimination Act*. Therefore, under this Act it was unlawful to refuse to provide the IVF service on the grounds that the person was not married or living in a de facto relationship.

This was tested through the courts. Dr John McBain, a specialist IVF doctor, was directly affected by the inconsistency in the legislation. By denying patients access to the IVF program based on their marital status, he was meeting the requirements of the Victorian *Infertility Treatment Act* but, at the same time, contravening the Commonwealth *Sex Discrimination Act*, which made it an offence to discriminate against a person on the basis of areas such as marital status.

To establish the inconsistency, Dr McBain was required to show that a specific patient was being denied the service; in this case, this was Leesa Meldrum, a single woman who wished to conceive through IVF using donor sperm. The Federal Court upheld Dr McBain's argument that the Victorian marital status requirement was inconsistent with the Commonwealth provision and that, on the basis of section 109 of the Australian Constitution, the Commonwealth law should prevail. The Victorian law was invalid to the extent of the inconsistency. The effect of this decision was that couples could not be denied IVF services on the basis of marital status and therefore unmarried patients were allowed access to the services.




**Source 1** The *McBain* case highlights the significance of section 109 of the Australian Constitution. The Victorian Act was later repealed and replaced by the *Assisted Reproductive Treatment Act 2008* (Vic).

*McBain v State of Victoria* (2000) 99 FCR 116

## The significance of section 109

Section 109 can act as a restriction on the states in implementing their legislative programs and mandates. As you have learnt, it states that if a state parliament passes a law in an area where there is a Commonwealth law, the federal law will prevail over the state law to the extent of any inconsistency. That means that a state parliament may recognise that it is not able to pass a law in this particular area, if a Commonwealth law already exists.

For example, marriage is an area of concurrent power. The Commonwealth Parliament has already passed legislation dealing with marriage, namely the *Marriage Act 1961* (Cth). That Act states that the marriageable age is 18 years. People aged 16 and 17 can only marry in exceptional circumstances and with the approval of a court. The state parliaments will recognise that any law passed by them which contradicts this law will, if challenged, be invalid.

However, section 109 does not automatically operate so that the states are denied the power to pass an inconsistent law, or such that a law is automatically invalid when it is passed. The law needs to be challenged first before it is declared to be invalid (that is, the court will need to determine whether the two laws are inconsistent). This is what occurred in the *McBain* case. Second, if at some time in the future the Commonwealth law is abrogated or changed, and the state law continues to be in existence, then the state law will be in force and have effect. That is, the state law will have no practical effect only for as long as the Commonwealth law remains in force.



**Source 2** Marriage is an example of an area of concurrent power.

Even if two laws do not appear to be in conflict, the High Court has held that a state law will be inconsistent with a Commonwealth law if the Commonwealth law is intended to 'cover the field'; that is, if the Commonwealth law is intended to be a complete statement of law on a particular subject matter or area. If that is the case, then there is effectively no role or room for state laws. In other situations, the Commonwealth law might expressly state that state laws continue to operate. For example, sometimes the law states that the law 'does not affect any law of a state').

Deciding whether two laws are inconsistent, or whether a Commonwealth law is intended to 'cover the field' is not straightforward. Rather, it is a complex area of law that often requires the intervention of the High Court to determine whether there is, in fact, a conflict.

## 10.6 Check your learning

### Remember and understand

1 **Explain** whether section 109 of the Australian Constitution is relevant to:
   - **a** inconsistencies between Commonwealth laws and territory laws
   - **b** inconsistencies between different state laws.

   Give reasons for your answers.

2 **Describe** the significance of section 109 in relation to the division of law-making power between the Commonwealth and state parliaments.

### Examine and apply

3 **Outline** two reasons why the original writers of the Constitution may have included section 109 in the Constitution.

4 Read the scenario 'Discrimination in infertility treatment services'.
   - **a** **What** were the two statutes that were said to be in conflict?
   - **b** **How** were they in conflict?
   - **c** **How** was Dr McBain affected by this potential inconsistency?
   - **d** **Why** was Leesa Meldrum relevant to the case?
   - **e** **What** was the decision of the Federal Court?

### Reflect and evaluate

5 If Victoria passed a law which allowed for a 15-year-old to marry, would this law be operable? **Discuss**.

6 **To what extent** does section 109 of the Australian Constitution restrict the state parliaments in law-making? Give reasons for your answer.

# 10.7 The High Court and the division of law-making powers

## Key knowledge



In this topic, you will learn about:

- one High Court case which has had an impact on state and Commonwealth law-making powers.

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

The High Court has **jurisdiction** under section 75 of the Australian Constitution to hear and determine cases involving disputes:

- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party
- between states, or between residents of different states, or between a state and a resident of another state.

*Study tip*

You need to know one High Court case which has had an impact on the division of law-making powers. Make sure you can discuss the **significance of the case**. Try to avoid describing unnecessary facts. Focus instead on the actual judgment in the case and how it has impacted the state and Commonwealth law-making powers.

The High Court has heard significant cases involving disputes over law-making powers between the Commonwealth and the states. The decisions in some of these cases have affected the division of powers between the parliaments in Australia, with High Court judgments since 1920 being more inclined to grant additional powers to the Commonwealth, with reduced law-making powers for the states. This chapter explores two cases: the *Brislan* case and the *Tasmanian Dam* case. In both cases, the High Court adopted a broad reading of words in the Constitution, where words were read in such a way as to expand the range of issues on which the Commonwealth can legislate. You are expected to know about the significance of one of these cases.

## The *Brislan* case

A 1930s case involving a wireless set (an early type of radio common in homes before the invention of television) provides a useful example of how the High Court can change the division of law-making powers.

**Actual scenario**

### The *Brislan* case: Exploring Commonwealth control over electronic communications

Section 51(v) of the Australian Constitution provides the Commonwealth power to legislate on *postal, telegraphic, telephonic and other like services*. The Commonwealth Parliament had passed the *Wireless Telegraphy Act 1905* (Cth) requiring all owners of wireless sets (radios) to hold a licence. The defendant (Dulcie Williams) was convicted and fined for owning a wireless set without holding a licence.

The defendant challenged the validity of the *Wireless Telegraphy Act* in the High Court, arguing that the Constitution gave no power to the Commonwealth Parliament to make laws in relation to radio broadcasting, and therefore the *Wireless Telegraphy Act* was made beyond the Commonwealth's law-making power. In particular, the defendant argued that broadcasting to a wireless set was NOT a service in the sense in which that term is used in section 51(v). Therefore, the defendant submitted that the section of the *Wireless Telegraphy Act* requiring people who had a wireless set to have a licence was invalid. If this had

been found to be the case, the Act would be invalid because the Commonwealth would be acting beyond its law-making powers and it would be up to the states to legislate in this area.

### Decision of the High Court

The majority of the High Court judges held that broadcasting to a wireless set was a form of telephonic service, and therefore fell within the scope of section 51(v) of the Australian Constitution. As a result, this judgment changed the division of law-making powers by extending the Commonwealth Parliament's power to include broadcasting to a wireless set – i.e. an additional form of communication service.

Justice Dixon dissented (did not agree) and was not prepared to accept that section 51(v) extended to radio broadcasting, as it did not provide for inter-communication like the other services in section 51(v).

In his judgment, Chief Justice Latham also considered whether broadcasting to a wireless set could fall within the ambit of 'other like services'. He said:

> The common characteristic of postal, telegraphic and telephonic services, which is relevant in this connection is, in my opinion, to be found in the function which they perform. They are, each of them, communication services. This is also the characteristic of a broadcasting service in all its forms, which is therefore, in my opinion, a 'like service' within the meaning of section 51(v) of the Constitution. If a new form of communication should be discovered, it too might be made the subject of legislation as a 'like service'.



**Source 1** Wireless sets like this were common in homes during the 1930s in Australia.

The anticipated reach of section 51(v) was also explored by Justices Rich and Evatt, who noted that a 'wide operation' should be given to the Commonwealth to regulate this area:

> [Section 51(v)] is a constitutional power intended to provide for the future and bearing upon its face an attempt to cover unknown and unforeseen developments. A wide operation should be given to such a power. In the next place the description 'telegraphic and telephonic' carries with it, not by derivation, but by use, a reference to electrical means of transmission of signals and speech.
>
> *R v Brislan; Ex parte Williams* (1935) 54 CLR 262

## The significance of the *Brislan* case

The High Court's interpretation of section 51(v) resulted in a shift in the division of law-making powers from the states to the Commonwealth. After this decision, the Commonwealth Parliament had the power to make laws with respect to broadcasting to wireless sets. If a state parliament passed a law in this area, and there was a conflict between the state law and the Commonwealth law, the Commonwealth law would prevail in accordance with section 109 of the Australian Constitution. It therefore somewhat reduced the states' power, as it is now an area of concurrent power, rather than a power only held by the states.

In a case that followed the *Brislan* case, *Jones v Commonwealth (No 2)* (1965) 112 CLR 206, the High Court held that the Commonwealth had power under the Constitution to make laws in relation to television broadcasts. Like the term 'wireless sets', 'television broadcasts' is not included in the Constitution. However, the High Court held that television broadcasts also fell within the scope of section 51(v) of the Constitution. It was noted that the *Brislan* case showed that a radio broadcasting

***Did you know?***

In the past, people have referred to Brislan as the person who was charged. In fact, 'Brislan' is a reference to Roy Vincent Brislan, the wireless inspector who fined Williams.




**Source 2** The *Interactive Gambling Amendment (National Self-exclusion Register) Act 2019* (Cth) allows people to exclude themselves from all interactive wagering. The Register is a key reform under the Commonwealth's policy to reduce harm caused by online gambling. The authority to create this law can be traced back to the broad principles in the *Brislan* case.

system is a telegraphic, telephonic or other like service, and therefore it followed that a television broadcasting system was the same, as it was a means by which a person may transmit communications.

These cases may have significance for future types of communications and technological advances. For example, communications over the internet could arguably be covered by section 51(v). These types of communications have brought significant benefits, but also challenges such as interactive gambling and privacy issues. The internet was not invented or even contemplated at the time the Constitution was drafted, so that word is not included in the Act. However, given the comments made by the High Court judges in the *Brislan* case, and in particular that the phrase 'other like services' was designed to cover new developments, it is arguable that the Commonwealth has the power to regulate the use of the internet.

An example of this is interactive gambling, which refers to gambling activities that occur on broadcasting, datacasting and online platforms. The *Interactive Gambling Act 2001* (Cth) regulates the advertising and promotion of live sports wagering over the internet. The Act makes it illegal to provide interactive gambling activities such as online casinos offering gaming such as roulette, poker and blackjack. These offences apply to all interactive gambling providers, regardless of whether they are based in Australia or offshore.



**Source 3** Television was invented in the 1930s, long after Federation. As a result, the High Court has been called upon to decide whether the Constitution gives the Commonwealth Parliament the power to make law in this area.

It is likely that the Commonwealth has relied on section 51(v), and other sections, of the Australian Constitution in support of its power to regulate the internet and pass laws such as the *Interactive Gambling Act*. However, the ability to regulate the internet is not limited to gambling activities. It could potentially extend to all types of activities that take place on the internet.

Given the High Court has not yet had to decide on more recent technological advancements such as the internet, there is a real question as to whether section 51(v) (or other sections) allows the Commonwealth to regulate online content or activities, or other technological advancements (even those not yet contemplated or invented). The reality is that technology moves much more rapidly than the legal system. Where new forms of technology arise, a case may need to be brought to the High Court to decide whether the Commonwealth has authority in that area.

# Summary

As part of this key knowledge, you are expected to be able to discuss the significance of the *Brislan* case. The table in Source 4 will help you develop your discussion.

| Summary: The *Brislan* case |
|---|
| • The key issue was the High Court's interpretation of section 51(v), which gives power to the Commonwealth to legislate on 'postal, telegraphic, telephonic and other like services'.<br>• In this case, Williams was charged with owning a wireless set without holding a licence, an offence under Commonwealth law. She argued section 51(v) did not give the Commonwealth the power to make laws in relation to radio broadcasting.<br>• The majority of the High Court held that broadcasting to a wireless set was a form of telephonic service, and therefore fell within the scope of section 51(v). This therefore broadened the Commonwealth's power at the expense of the states.<br>• Chief Justice Latham also noted it could fall within the scope of 'other like services', and that each of the services in section 51(v) is a communication service. He noted that if a new form of communication should be discovered, it too might be the subject of legislation as a 'like service'.<br>• New technology or forms of communication could be captured by section 51(v). Since the *Brislan* case, the High Court has extended the interpretation of section 51(v) to television broadcasting.<br>• The *Brislan* case, although itself limited, could have significance for future types of communications and technological advances. For example, the internet and activities that occur using the internet could fall under section 51(v).<br>• Given the rapid development of communications technology, this power could potentially be a significant one within which the Commonwealth could make laws. |

**Source 4** Summary of the significance of the *Brislan* case

# The *Tasmanian Dam* case

In the case of *Commonwealth v Tasmania*, the High Court was required to interpret the words 'external affairs' in section 51(xxix) of the Constitution.

The 'external affairs' power has generally been used by the Commonwealth to make laws in relation to matters that are 'external' to Australia, or in relation to matters of 'international concern'. This includes making laws to give effect to international treaties.

## International treaties

An **international treaty** (or convention) is a binding agreement between countries and is governed by international law. Australia is an active member of the international community and has signed many international treaties, including treaties in relation to trade, human rights and the environment. Many countries and organisations recognise that in our globalised world, there needs to be international cooperation and agreement about certain matters that affect all countries. Treaties are an important way to ensure that cooperation.

**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)

An international treaty is not Australian law. It can only apply in Australia if the parliament passes a statute that includes the provisions set out in the treaty.

The Commonwealth has signed a number of treaties. The High Court has held that the term 'external affairs' gives power to the Commonwealth Parliament to fulfil obligations or rights under international treaties. This became an issue in the *Tasmanian Dam* case, explored on the following page.

Actual scenario

## The *Tasmanian Dam* case

The Tasmanian Government intended to build a dam on the Gordon River to create a source of hydroelectricity for the state's power needs. This was a domestic issue for Tasmania that was within its law-making power (that is, a residual power). The Tasmanian Parliament passed the *Gordon River Hydro-Electric Power Development Act 1982* (Tas) to set up the hydroelectric power scheme and the Franklin Dam.

Australia-wide protests occurred as a result of the Tasmanian Government's intention to build a dam. The area covered by the proposed dam was nominated in 1981 for the World Heritage List; UNESCO included the area on the List in 1982. The state of Tasmania maintained, however, that it had the right to make laws concerning the dam.

### Intervention by the Commonwealth Parliament

The Commonwealth Parliament passed the *World Heritage Properties Conservation Act 1983* (Cth) to prohibit construction of the proposed dam. This legislation was based on the core principles of an international treaty, the World Heritage Convention. This treaty sought to protect World Heritage areas, and imposed obligations on countries to conserve and protect their national heritage.

In response, the Tasmanian Government argued that the Commonwealth Parliament had passed law in an area of state responsibility and the Commonwealth law was unconstitutional. The Commonwealth claimed that it had the power to intervene because its 'external affairs' power under the Australian Constitution extended to allowing the Commonwealth to implement obligations under an international treaty. In this case, the treaty was the World Heritage Convention. The matter was brought before the High Court.

### Decision of the High Court

The majority of judges in the High Court (4:3) held that the Commonwealth Parliament could create laws to fulfil its obligations under an international treaty. Because the legislation was passed to give effect to its obligations under the World Heritage Convention, and the area in Tasmania was declared as world heritage, then the law was valid. This decision interpreted the words 'external affairs' to include any area covered by an international treaty.

As a result of this decision there was inconsistency between the *World Heritage Properties Conservation Act* (made by the Commonwealth) and the *Gordon River Hydro-Electric Power Development Act* (made by the Tasmanian Parliament). Under section 109, the Commonwealth Act prevailed and the *Gordon River Hydro-Electric Power Development Act* was made inoperable as far as the building of the dam was concerned because the Act was in conflict with the Commonwealth Act.

*Commonwealth v Tasmania* (1983) 158 CLR 1

## The significance of the *Tasmanian Dam* case

Through the High Court's interpretation of section 51(xxix) of the Constitution, the Commonwealth Parliament was able to move into a law-making area previously considered to be a residual power and was able to intervene in a state matter. This has been at the expense of the states. In particular:

- The external affairs power can be used to implement obligations under treaties, even if the Commonwealth Parliament otherwise has no express constitutional power to make laws in relation to the subject matter of the treaty. For example, environment is an area of residual power, but the Commonwealth can legislate in this area if it were to give effect to international treaty obligations, as it did in the *Tasmanian Dam* case. This can potentially broaden the Commonwealth's power to areas that were previously in the domain of the states.
- The decision in this case has been affirmed since, including in cases such as *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261, known as the *Lemonthyme Forest* case, which upheld

the decision of the High Court in the *Tasmanian Dam* case.

- The external affairs power has been used by the Commonwealth to make laws in a number of areas. For example, in 1994 the Commonwealth passed the *Human Rights (Sexual Conduct) Act 1994* (Cth), which held that sexual conduct involving consenting adults in private was not to be subject to any interference. The legislation sought to uphold Article 17 of the International Covenant on Civil and Political Rights, an international treaty. At the time, this conflicted with a Tasmanian law that made consensual sexual conduct between homosexual adults a crime. Therefore, in this case, the Commonwealth was effectively able to make laws with respect to what constituted criminal conduct, a power generally held by the states. Tasmania ultimately changed its laws.


The Examiner

Geelong won't trouble NTFA, says Withers — Back Page

Doorknock appeal tomorrow

NO DAM!

"There is almost no aspect of life which . . . may not be the . . . possible subject of Commonwealth legislative power." — Sir Harry Gibbs

"I want to reassure Tasmanians that the Commonwealth will not in any sense retract from any of its commitments." — Mr Hawke

". . . a sad, sad day for Tasmania, but the decision stands and we must accept it." — Mr Gray

Landmark ruling expands Federal powers

CANBERRA — The High Court has ruled that the Gordon-below-Franklin dam will not go ahead, in a landmark decision which represents a significant expansion of Federal powers.

But the Prime Minister, Mr Hawke, moved quickly to assure the States that his Government would not rush into new areas as a result of the decision.

"That would be totally at odds with our consensus-building approach to government," Mr Hawke said.

DAM SITE

GORDON

'No vendetta' — PM

The Prime Minister, Mr Hawke, yesterday pledged to heal the wounds caused Tasmania by the long-running dams debate.

The Examiner

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**Source 5** The front page of *The Examiner*, a daily newspaper in Tasmania, 2 July 1983

- The High Court has held that the Commonwealth cannot make laws that expand beyond what is in the treaty. That is, the law must conform to the treaty.
- The power does not enable the Commonwealth to make laws that infringe on **express rights** (which you will learn about in Chapter 11). If legislation was passed by the Commonwealth which did infringe on an express right, such as the limited right to freedom of religion, the legislation is likely to be found invalid.
- The treaty must be *bona fide* or genuine (though it is very unlikely that an international treaty would not be genuine or real, and so this issue is unlikely to arise).
- The Commonwealth's ability to make laws in relation to residual areas of power does not take those powers away from the state entirely. The states retain their law-making power, such as in relation to the environment, but their use will be limited where, for example, the Commonwealth legislates in that area in relation to a treaty obligation.

Concerns have been expressed about the scope of the power, and some have even suggested that the Australian Constitution should be changed to narrow or reduce the power so that it limits the power of the Commonwealth. In particular, there have been concerns that the use of the external affairs power almost gives the Commonwealth unlimited, unfettered power to make laws in any areas it wants to, as long as the laws give effect to international treaties.

There are, however, limitations on the ability of the Commonwealth to make laws in relation to the external affairs power:

## *Did you know?*

The area that was to be flooded for the construction of the dam is now a world-renowned tourist attraction, bringing millions of dollars annually to the local economy.

**express rights** rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

# Summary

As part of this key knowledge, you are expected to be able to discuss the significance of the *Tasmanian Dam* case. The table on the next page will help you develop your discussion.

**Summary: The *Tasmanian Dam* case**

- The key issue was the High Court's interpretation of section 51(xxix), which gives power to the Commonwealth to legislate in relation to 'external affairs'.
- In this case, the Tasmanian Government sought to build a dam, which was within their residual law-making power. The dam raised environmental concerns and was in an area that was ultimately included in the World Heritage List. The Commonwealth intervened, passing legislation to prohibit construction of the proposed dam. The legislation gave effect to the Commonwealth's obligations under the World Heritage Convention to protect national heritage.
- The majority of the High Court held that external affairs power extends to the Commonwealth's power to pass laws to give effect to international treaties. This therefore broadened the Commonwealth's power as it allowed it to make laws in any area to give effect to treaty obligations, at the expense of the states.
- The interpretation is significant for both Commonwealth and states: it substantially increases the power of the Commonwealth to move into a law-making area previously considered to be a residual power. This means it can intervene in state matters if the intervention is required to give effect to international treaties. This could occur even if the subject-matter of the treaty is not otherwise within the Commonwealth's power.
- The decision has been affirmed since, and the Commonwealth has relied on its external affairs power to make laws in other areas, such as in relation to sexual conduct involving consenting adults in private.
- Concerns have been raised about the scope of power, with some suggesting it should be narrowed or reduced.
- There are, however, limitations on the power:
  - the laws must give effect to the international treaty
  - the treaty must be genuine
  - the power does not allow the Commonwealth to infringe on express rights
  - the states otherwise maintain their residual area of power.

**Source 6** Summary of the significance of the *Tasmanian Dam* case

# 10.7 Check your learning

## Remember and understand

1 **Describe** the purpose of section 75 of the Australian Constitution.

2 **Outline** one reason why the laws of the Commonwealth might come into conflict with laws made by the states.

## Examine and apply

3 Write a summary of either the *Brislan* case or the *Tasmanian Dam* case. Make sure you include:
- the names of the parties
- the key facts of the case
- the issues in dispute
- the High Court's decision
- the impact of the decision on law-making powers.

4 'The division of law-making powers can be changed, but only if someone is prepared to challenge a law.' **Explain** what this statement means.

## Reflect and evaluate

5 The following activity will help you understand how to respond to different task words in relation to a specific case.

Choose either the *Brislan* case or the *Tasmanian Dam* case, and answer each of the questions below. When responding to each question, highlight the key features in each response and how your response changed in light of the change to the question.

**a** **Identify** one High Court case that has had an impact on the law-making powers of the Commonwealth and states.

**b** **Describe** one High Court case that has had an impact on the law-making powers of the Commonwealth and states.

**c** **Describe** the significance of one High Court case that has had an impact on the law-making powers of the Commonwealth and states.

**d** **Discuss** the significance of one High Court case that has had an impact on the law-making powers of the Commonwealth and states.

**e** **Discuss** the extent to which the High Court can change the division of law-making powers. In your answer, refer to one High Court case.

Chapter

# 10

# Review

## Top exam tips from Chapter 10

1 There is no need to write the full citation of High Court cases or legislation in your answers. In fact, writing 'external affairs power' is enough; you do not need to know the specific section of the Constitution for this power. Similarly, you do not need to know the full citation of the *Tasmanian Dam* case – writing '*Tasmanian Dam* case' is sufficient!

2 You need to know one High Court case about the division of law-making powers, but you also need to discuss its significance in terms of its impact on both state and Commonwealth law-making powers. A discussion requires a consideration of limitations, restrictions, benefits, and weaknesses. Use the language of discussion in your answer, such as *however, on the other hand* and *while*.

3 You are expected to explain the significance of section 109. Know the specific words of section 109 and avoid generalising or simplifying it. But more importantly, you need to explain its significance. Why is it important? What impact has it had?

## 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 (including the exam) 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 Describe **one** role of each of the following in law-making:
   **a** House of Representatives
   **b** Legislative Council
   **c** Governor of Victoria.

(6 marks)

**Difficulty: medium**

2 Explain how section 109 of the Australian Constitution limits the law-making powers of the states.

(5 marks)

**Difficulty: high**

3 Discuss the significance of **one** High Court case which has had an impact on both the state and Commonwealth law-making powers.

(6 marks)

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# Practice assessment task

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

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

## Practice assessment task questions

**Section A** (10 marks)

1 Explain how section 109 of the Australian Constitution can impact on a law made by the Victorian Parliament.

(4 marks)

2 Discuss the significance of **one** High Court case that has impacted on the law-making powers of the state and Commonwealth parliaments.

(6 marks)




**Source 1** During the COVID-19 pandemic, many businesses were affected by government restrictions.

**Section B** (15 marks)

### Law-making powers exercised during COVID-19 pandemic

The *Biosecurity Act 2015* (Cth) gives powers to the Commonwealth Minister for Health to make orders during a biosecurity emergency to protect Australia from potential disaster caused by diseases such as COVID-19. This is an exclusive power of the Commonwealth under its quarantine powers. One of the decisions made during the COVID-19 pandemic was the closure of Australia's border to China in March 2020. The Commonwealth Parliament also approved economic packages to support individuals and businesses, and to stimulate the economy.

At the same time, each state has its own public health legislation to deal with emergencies such as a pandemic. During the COVID-19 pandemic, the states imposed curfews and lockdowns, banned mass gatherings, and closed schools, libraries and public facilities. There were differences between states in how they exercised their public health powers, which are residual powers.

1 Describe **one** role of the Crown in law-making in the Victorian Parliament.

(3 marks)

2 Using an example of each, describe **one** law-making power of each of the state and Commonwealth Parliaments.

(6 marks)

3 Outline the structure of the Commonwealth Parliament. In your answer, describe **one** role of the lower house of the Commonwealth Parliament.

(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 role of the Commonwealth Houses of Parliament in law-making. | ☐ | ☐ | Go back to Topic 10.2. |
| • The role of the Victorian Houses of Parliament in law-making. | ☐ | ☐ | Go back to Topic 10.3. |
| • The role of the Crown in law-making. | ☐ | ☐ | Go back to Topic 10.4. |
| • The law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers. | ☐ | ☐ | Go back to Topic 10.5. |
| • The significance of section 109 of the Australian Constitution. | ☐ | ☐ | Go back to Topic 10.6. |
| • One High Court case which has had an impact on state and Commonwealth law-making powers. | ☐ | ☐ | Go back to Topic 10.7. |

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

- **Chapter 10** Chapter review quiz
- **Revision notes** Chapter 10
- **Chapter summary** Chapter 10
- **Quizlet** Revise key legal terms from this chapter.

Chapter

# 11

# Parliament and the Constitution



Source 1 One of the roles of parliament is to represent the people in law-making. Australia is a very diverse country, but our parliaments do not always reflect this diversity. Following the May 2022 federal election, a record number of First Nations people were elected to the Commonwealth Parliament. Nine of the eleven people are shown in this image. In this chapter, you will learn about three factors that affect the ability of parliament to make law (including the representative nature of parliament), and three means by which the Australian Constitution acts as a check on parliament in law-making.

## Outcome

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10, 11 and 12), you should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making.

## Key knowledge

In the chapter, you will learn about:

- factors that affect the ability of parliament to make law, including:
  - the bicameral structure of parliament
  - international pressures
  - the representative nature of parliament
- the means by which the Australian Constitution acts as a check on parliament in law-making, including:
  - the role of the High Court in protecting the principle of representative government
  - the separation of the legislative, executive and judicial powers
  - the express protection of rights.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss the ability of parliament to make law
- evaluate the means by which the Australian Constitution acts as a check on parliament in law-making
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

## Key legal terms

**balance of power** (between political parties) a situation where no single party has a majority of seats in one or both houses of parliament, meaning the power to reject or approve bills is held by a small number of people (e.g. members of minor parties and independent members)

**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)

**executive power** the power to administer the laws and manage the business of government, which is vested in the Governor-General as the Queen's representative

**express rights** rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

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

**implied rights** rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

**international pressures** demands made on parliaments, from within Australia or beyond, to make (or not make) laws that address matters of international concern

**judicial power** the power given to courts and tribunals to enforce the law and settle disputes

**legislative power** the power to make laws, which resides with the parliament

**representative government** a political system in which the people elect members of parliament to represent them in government

**separation of powers** a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate

***ultra vires*** a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

## Key legal cases

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

Extracts from the *VCE Legal Studies Study Design* (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:** pro

**Warm up!**
Check what you know about the people, the parliament and the Constitution before you start.

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

# 11.1 The bicameral structure of parliament

## Key knowledge

In this topic, you will learn about:

- factors that affect the ability of parliament to make law, including the bicameral structure of parliament.

**legislature**
a legal term used to describe the body having the primary power to make law (i.e. parliament)

The main role of parliament (also referred to as the **legislature**) is to make and change law. Parliament is the supreme law-making body, which means it can make and change any law within its power.

Parliament has many different features, structures and processes to make sure it is an effective law-making body. For example, it is made up of members who are elected by the people to make laws on their behalf. If these members fail to make laws that reflect the views and values of the people, the members may not be re-elected. However, while parliament is an effective law-making body, it does have limitations, or there may be factors that means it can be restrained in its ability to make law. There may also be factors that allow or pressure parliament to make law.

Several factors can affect the ability of parliament to make law. Three of these factors, which you will explore in this topic and in the next two topics, are:

- the bicameral structure of parliament (Topic 11.1)
- international pressures (Topic 11.2)
- the representative nature of parliament (Topic 11.3).

## Introduction to the bicameral structure of parliament

**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)

Both the Commonwealth and Victoria have a **bicameral parliament**, which means they have two houses (chambers). The requirement for the Commonwealth Parliament to be bicameral is contained in the Australian Constitution, as set out in the extract below.

### Extract

#### The Australian Constitution – section 1

##### Legislative Power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

The requirement for the Victorian Parliament to be bicameral is contained in the *Constitution Act 1975* (Vic) as set out in the extract on the next page. The Constitution Act is known as the Victorian Constitution, which provides the framework for how the Victorian Parliament operates.

## Extract

### *Constitution Act 1975* (Vic) – section 15

#### Parliament

The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria.





**Source 1** The lower house of the Victorian Parliament has green decor, and the upper house has red decor, as shown in the above pictures. This is a tradition borrowed from the UK Parliament.

A bicameral structure of parliament means that a **bill** needs to be passed in identical form by a majority of members in both houses of parliament for it to become law. The requirement for two different groups of people to agree on a law being made is a form of 'quality control' on a bill in two ways:

- the second house double-checks the bill and may suggest amendments
- the second house reviews the proposed law to ensure there is no misuse of law-making power by the other house.

This requirement for the two houses to pass a bill can both enable and limit the ability of parliament to make law. In this topic, you will look at how the composition (make-up) of the upper house and the parliamentary law-making process, both features of the bicameral structure, can influence the effectiveness of parliament as a law-maker.

**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)

## The composition of the upper house

The political party (or **coalition** of parties) with the majority of seats in the lower house forms government. Most bills are introduced in the lower house of parliament, as most government ministers are members of the lower house. This then increases the importance of the second house, which is normally the upper house (i.e. the Senate in the Commonwealth Parliament and the Legislative Council in the Victorian Parliament), in the law-making process.

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

Since all bills must be passed by both houses of parliament before they can become law, the composition of the upper house becomes important as to whether parliament is able to make laws. In particular:

- if there is no government majority in the upper house (i.e. it has a minority of seats), legislation may be more readily amended or rejected by those who have the balance of power, possibly for political gain
- if the government has a majority of members in the upper house, it can pass bills easily, although the review process may be limited. This is known as 'rubber stamping' bills.

Both these compositions are explored further below.

## No government majority in the upper house

Although the government usually has the majority of seats in the lower house, it does not always have the majority of seats in the upper house. It is more common that the governing party holds some seats in the upper house, the opposition holds other seats, and the remaining seats are held by some combination of members of a **minor party** and independents. Members who are independents and are from minor parties are known as the **crossbenchers** (the name taken from where they sit in the house, between government and opposition).

**minor party**
a political party that can pressure the government on specific issues to bring about law reform, despite not having enough members or electoral support to win government

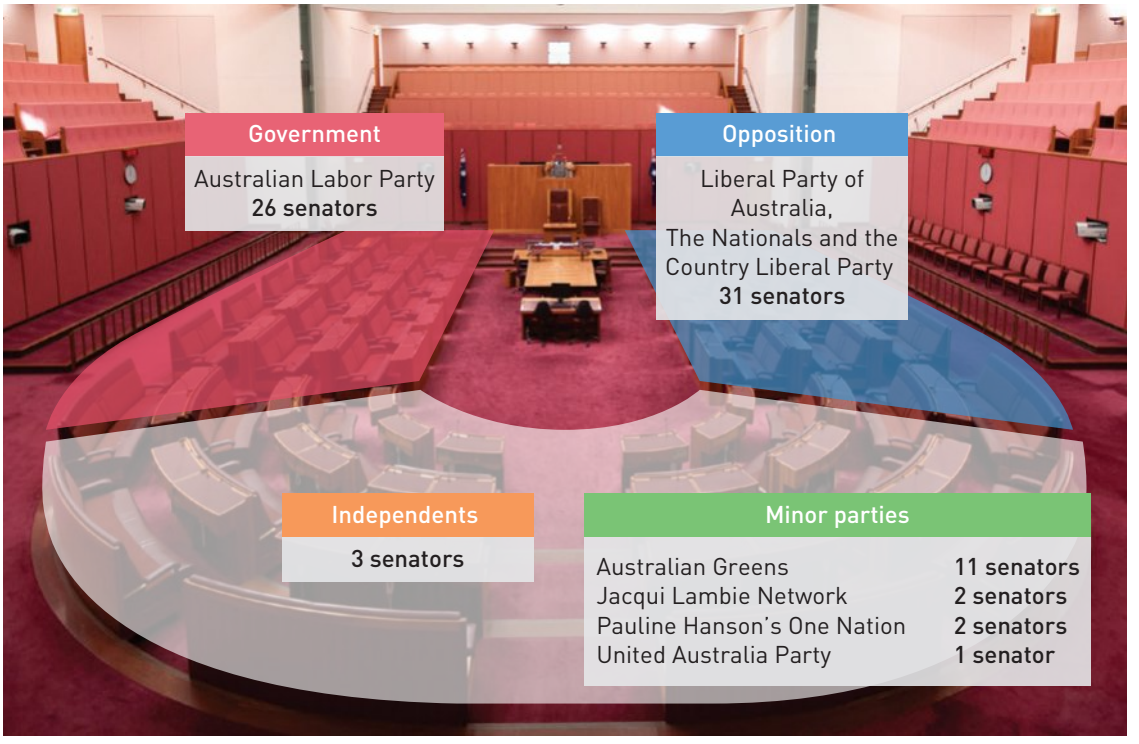
**crossbenchers**
members of Parliament who are not members of either government or opposition (i.e. independent members or members of minor parties). They are named after the set of seats provided in parliament for them, called the 'crossbench'

In this situation, the **balance of power** is likely to be held by members of the crossbench. The government will therefore need the support of either the opposition or some or all of the crossbenchers (depending on the composition) to get bills passed through the upper house. This occurred in the 47th Commonwealth Parliament. The composition of the Senate as at June 2023 (during the 47th Parliament) is seen in Source 2 below.

**balance of power**
(between political parties) a situation where no single party has a majority of seats in one or both houses of parliament, meaning the power to reject or approve bills is held by a small number of people (e.g. members of minor parties and independent members)

A situation where the government does not hold the majority in the upper house is sometimes called a **hostile upper house**. Some people question the use of the word 'hostile' to describe this situation, as it does not necessarily mean the upper house is 'hostile' or 'unfriendly' and that it is not effectively doing its job.

**hostile upper house**
a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed




**Source 2** After the 2022 federal election, the Australian Labor Party (ALP) had formed government at a federal level but did not have a majority of seats in the upper house. It therefore required the support of either the opposition or members of the crossbench (including the Australian Greens) for bills to pass. This image shows the composition of the Senate in June 2023.

If the government does not hold a majority in the upper house, it can face difficulties implementing its legislative policy agenda, because the crossbench can force the government to make changes (amendments) to their bills or can reject government bills entirely by voting with the opposition.

At the Commonwealth level, the government often does not have a majority of seats in the Senate. While this may mean more thorough debate and scrutiny of bills, it can also prevent or obstruct the ability of the government to implement **law reform**. For example, in 2022, the Australian Labor Party (ALP) had formed government after the May 2022 election but did not have a majority of seats in the Senate. To pass its bills, it required the support of the opposition, or the support of the crossbench, including the Australian Greens. It was reported in late 2022 that the Australian Greens had threatened to block the government's climate change reforms unless further measures were introduced to protect the environment, and that it was in discussions with government about the proposed reforms. The Australian Greens were able to use its numbers in the Senate to engage in such discussions.

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

A diverse upper house can be seen as an opportunity for a more effective parliament and more effective law-making. The government may be forced to consider a wider range of views and, in the process, better reflect community interests. Over the past two decades, support for minor parties and independents has increased. For example, at the 2022 federal election, 11 independent candidates who were elected to parliament were funded by Climate 200, a community crowdfunding initiative that supported independents who sought to advance climate change policies. This included Senator David Pocock, the Australian Capital Territory's first independent senator.

*Study tip*

Senate committee hearings are shown live on TV and can also be accessed on the Parliament House website. This gives great insight into the role of the Senate as a house of scrutiny.

On the other hand, when the government does not have a majority in the upper house, it can allow a small group of independent members or members of a minor party to hold a disproportionately high level of power compared to the size of their voter base. This happens especially if members are placed in a position where they can vote with the opposition to block government bills, or they have the power to negotiate directly with the government to make specific amendments or even implement their own policies.



**Source 3** Crossbench senators Tammy Tyrrell and Jacqui Lambie from the Jacqui Lambie Network, and independent David Pocock

A further consideration is whether minor parties and independents who hold the balance of power in the upper house represent the views and values of the majority of the community. They may focus on a relatively narrow range of policy issues without having a detailed plan or stance on a broad policy platform. Over the years, high profile independents and members of minor parties, such as Senator Pauline Hanson (the leader of the minor political party Pauline Hanson's One Nation), have faced criticism for having narrow policy agendas. Some argue that these politicians may not address the complexities of issues such as taxation and spending on the military, preferring to appeal to kneejerk reactions from voters.

The impact that minor parties and independents can have on law-making is demonstrated in the scenario below, which focuses on the Victorian Parliament.

**Actual scenario**

## Marathon debate in the Legislative Council

In November 2021, the Victorian ALP Government (led by Premier Daniel Andrews) did not have a majority of seats in the Legislative Council. The Government had introduced legislation in the lower house that would provide for increased powers to ensure the effective management of pandemics, including at the time the COVID-19 pandemic. The legislation was considered by some to be controversial and by others to be necessary.

A 21-hour 'marathon debate' took place in the upper house, with house members sitting through the night to debate the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic). Amendments were made to the bill through negotiations with crossbench MPs such as Rod Barton of the Transport Matters Party. Once the government accepted Barton's amendments, the legislation was returned to the Legislative Assembly for final approval.

One of the key changes to the bill was to establish an independent panel that would have the power to review detention orders imposed during a pandemic. A joint **parliamentary committee** would also be established, which would have the power to review public health orders.

In total, the support of four crossbench MPs was needed to secure the passage of the bill, each of which made demands on the government to amend the legislation. The Opposition (Liberal and National parties) had proposed 18 amendments to the bill, none of which was accepted by the government, which instead negotiated with the crossbench MPs.



**Source 4** In the Victorian Parliament, the review process of legislation is most likely to occur in the Legislative Council. The image above was captured at the end of a marathon debate in the upper house in late 2021. In this photo, the crossbenchers, including former MP Fiona Patten, are celebrating the agreement they reached with the government.

**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

# 'Rubber stamp' upper house

It is possible that the government can hold a majority of seats in both the upper house and the lower house. In this situation, the upper house can become what is known as a '**rubber stamp**', meaning that it merely confirms the decisions made by the government in the lower house. This is because, as we have seen, members of the government usually vote according to the directives of their party (along party lines). Therefore, if the government holds a majority of seats in both houses, government bills will inevitably be passed with a majority of government members in both houses voting in favour.

**rubber stamp**
a term used to describe a situation in which the upper house of parliament automatically approves decisions made in the lower house because the government holds a majority of seats in both houses and members of the government generally vote along party lines

Some may argue that a 'rubber stamp' parliament is an effective way to make laws, as it allows the government to introduce whatever bills it likes and implement all its legislative program. Only public pressure and the risk of not being re-elected may prevent it from doing so.

However, this can prevent the upper house from adequately fulfilling its role as a 'house of review' or representing the broader interests of the community. This is because, as noted above, members usually vote along party lines, and members of the upper house may vote for bills even if they are not in the interests of the community.

Having a majority in both houses can also mean bills may not be adequately debated in the upper house. This threatens the ability of the upper house to be a true 'house of review', given there is almost a guarantee that bills will be passed. It also enables the government to reject bills without debate when they have been introduced by a **private member**.

**private member**
a member of parliament who is not a government minister

An example of the Federal Government holding a majority of seats in both houses is described in the scenario below.

Actual scenario

## WorkChoices reform

In the 2004 federal election, the Howard Government (a Liberal-National Coalition led by John Howard), was re-elected, winning 39 seats in the Senate. In 2005, the parliament passed the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which was broadly known as WorkChoices legislation or WorkChoices reform.

Many groups and individuals were against the introduction of WorkChoices. One of the more controversial aspects of the WorkChoices laws was that claims against a workplace for unfair dismissal could not be made if the workplace employed fewer than 100 employees. The figure of 100 employees included any part-time and casual workers who had been engaged on a regular basis in the previous 12 months.

The primary aim of WorkChoices was to give employers greater flexibility in the terms and conditions on which they could employ workers and to make it more difficult for unions to make claims against employers for unfair dismissal.

Many social welfare and union groups claimed that the WorkChoices laws attacked the rights of low-income earners, who could be dismissed without any protections under the law if they worked in a small business. In spite of this strong opposition, the legislation was passed by the Senate, assisted by the fact that the government had a majority in the Senate. It is possible that, had the government not controlled the Senate when the bill was being debated, changes may have been made which could have addressed the concerns, or the bill may not have passed at all.

***Did you know?***

Since 1981, the Commonwealth government has only once controlled the Senate. This occurred following the 2004 election, when the Howard government won 39 seats in the Senate, giving it a majority.

In the lead-up to the 2007 federal election, WorkChoices was a major issue for debate. The laws were opposed by the ALP and the trade union movement, which conducted an intensive media campaign under the banner 'Your Rights at Work'. There were also public demonstrations attacking what the unions regarded as the unfair consequences of the law to low-income earners. The election was won by the ALP and, according to some experts, WorkChoices was a key reason behind the decision of some voters.




**Source 5** The WorkChoices legislation passed by the Commonwealth Parliament was unpopular in some sections of the community and is seen as a factor in the Liberal–National Coalition losing the 2007 federal election.

# Law-making process

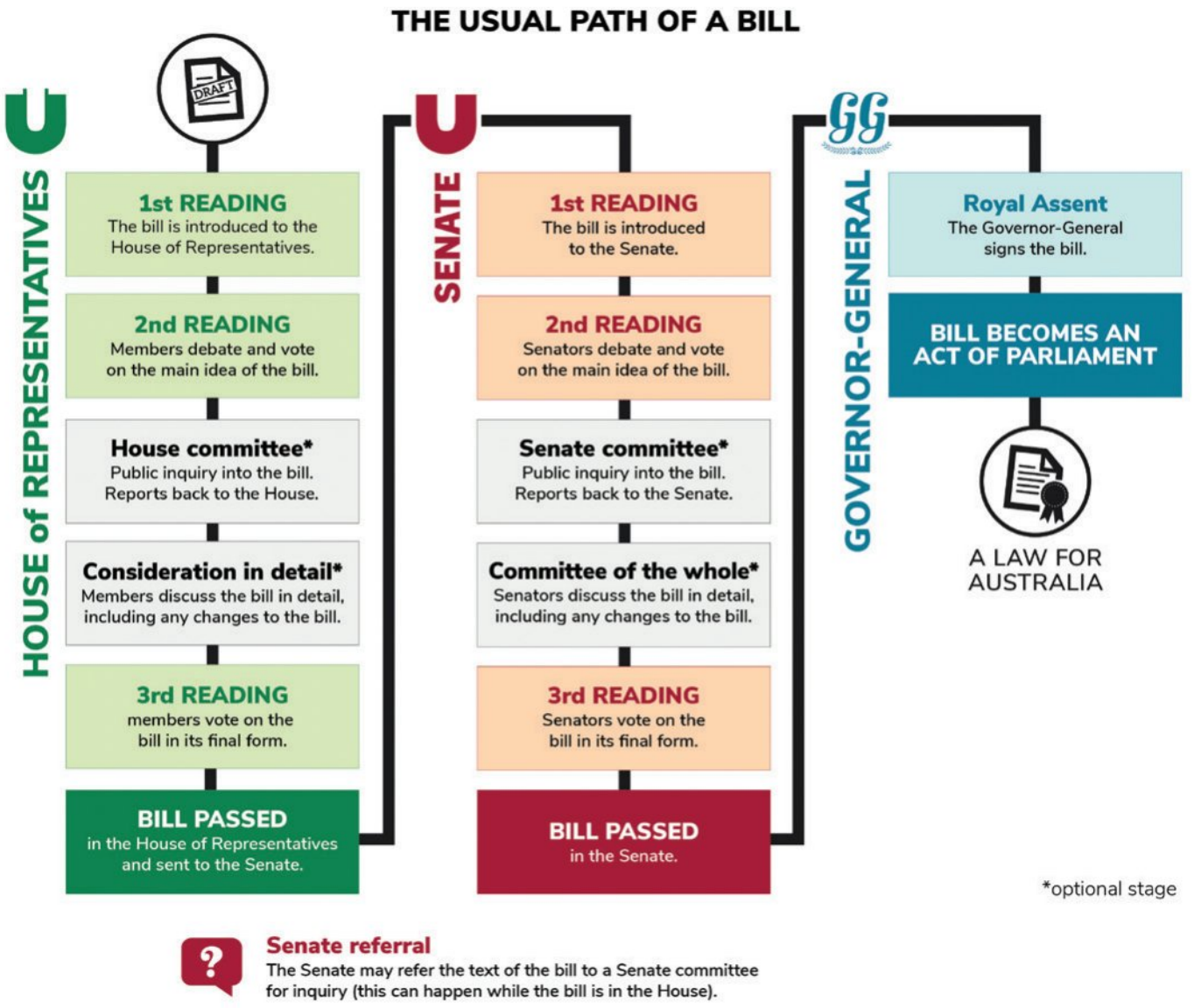
A significant number of bills are introduced into parliaments each year. In recent years, an average of 200 bills per year have been introduced in the Commonwealth Parliament.

A bill needs to be passed by both houses, following which it will be sent to the King's representative for royal assent. The typical legislative process is that a bill is introduced into one House of Parliament, passed by that house, and then will generally follow the same stages in the second house.

There are several stages in the passage of a bill, which means that the law-making process can be slow at times. In addition, the number of sitting days in parliament means that the law-making process does not happen all the time. These two issues are explored further below.

## Stages of a bill

The bicameral system allows for the passage of legislation through both houses, at which amendments can occur. The usual path of a bill in the Commonwealth Parliament is shown in Source 6.




**Source 6** The usual path of a bill in the Commonwealth Parliament. The process in the Victorian Parliament is similar.

Parliament is often criticised for being slow to pass laws, which is often because of the complexity of the processes shown in Source 6 and the number of opportunities for members to debate a bill. However, how long a bill takes to pass depends on the bill itself, and the composition of parliament. Non-controversial bills will often be passed quickly. More controversial bills will take longer and may result in lengthy debates.

As is demonstrated in the scenario on the next page, in which the Victorian Parliament swiftly passed a bill during the COVID-19 pandemic, parliament can act with speed when required. Both the Victorian Parliament and the Commonwealth Parliament were able to pass laws quickly during the COVID-19 pandemic to respond to the growing need and urgency for legislation to deal with the issues arising from the pandemic.

Actual scenario

## Victorian Parliament temporarily allows judge-only trials

During the COVID-19 pandemic, government 'social distancing' restrictions on the number of people that could gather in one place affected many businesses and services, including the courts.

In April 2020, the Victorian Parliament passed the COVID-19 Omnibus (Emergency Measures) Bill 2020 (Vic), which introduced several temporary emergency measures to manage the issues raised by the pandemic and to ensure basic government services were able to continue functioning.

To ensure the courts could continue hearing indictable offences in light of social distancing measures, the legislation inserted a new provision into the *Criminal Procedure Act 2009* (Vic) that temporarily allowed for criminal trials by judge alone in the County and Supreme Courts, provided the prosecution was consulted and the accused had given their consent. Before making the order to allow the judge-only trial, the court had to be satisfied that the accused had obtained legal advice on whether to consent and consider that it was in the interests of justice to order a judge-only trial. The change was only temporary as the inclusion of a 'sunset clause' required the new laws to expire after six months. Any judge-only trials that had commenced within the six-month period were permitted to continue after the six months came to an end.

The Bill passed through the Parliament in one day, demonstrating the ability of the government, opposition and crossbench to work together to rapidly pass legislation when necessary to deal with a global crisis.

Two years after the pandemic began, the *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic) re-inserted Chapter 9 into the *Criminal Procedure Act* to temporarily provide for criminal trials by judge alone while a pandemic declaration remains in force.



**Source 7** Judge alone trials were able to be held in Victoria following the passing of legislation in 2020. Shortly thereafter, Judge Gaynor of the County Court was the first judge in Victoria to oversee a judge-only criminal trial.

## Sitting days

One of the factors that affects the ability of parliament to make laws is the number of days during which the houses sit. On a sitting day, members meet at parliament house, and it is only then that bills can be debated and passed. Some of the day is also dedicated to other parliamentary business, such as question time and debates.

Parliament does not sit every day or every week. For example, in the 2022 calendar year:

- the House of Representatives sat for 64 days and the Senate sat 51 days. Since 1901, the House of Representatives has sat on average for 67 days each year, with the House of Representatives sitting on more days than the Senate.
- the Legislative Assembly in the Victorian Parliament sat for around 40 days, though given the 2022 November election it did not sit during October and November.

The reason for the relatively few sitting days is that members of parliament need to also spend time in the community so that they remain aware of the needs of the people that they represent. In addition, the parliamentary committees continue their work while the houses are not sitting, which may include holding public hearings and meetings. Therefore, the work associated with law-making (such as committee work and gauging the interests of the community) continues outside of sitting days.

The limited number of sitting days has been criticised by some as a 'waste of time', on the grounds that it reduces the time and opportunities to pass essential legislation. Therefore, parliaments may rely on processes or structures put in place to maximise their sitting days, such as using committees to allow for detailed and proper debate and consideration of legislation.

In addition, **secondary legislation** can be used effectively so that parliament does not have to debate highly technical or detailed areas of law. That is, parliament can delegate its law-making so that it does not have to pass every single law that is necessary for society to continue to function. For example, parliament can pass legislation to allow specific individuals and bodies (such as local councils and government ministers) to make and implement regulations, rules and orders without unnecessary delay. This can be particularly useful in areas where regulations and rules may need frequent changes or updates.

**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)

# Summary

As part of this key knowledge, you are expected to be able to discuss the bicameral structure of parliament as a factor that can affect the ability of parliament to make law. The table in Source 8 will help you develop your discussion, showing the explanation points you can make, and the points that will extend your explanation to a discussion. These are not the only points you can make; other points may be relevant depending on a particular scenario.

| Application and reflection | Points on the bicameral structure of parliament |
|---|---|
| **Explanation points** | • The existence of two houses allows for review of legislation by the second house. This review process acts as a 'quality control' to ensure bills can be double-checked and debated, and amendments can be suggested. It also provides for checks against any misuse of law-making power.<br>• If the government does not have a majority in the upper house (which is almost always the case), this can increase the ability of the upper house to act as a check on parliament in law-making. It means there is no guarantee of the bill passing both houses, particularly more controversial bills, and can result in robust discussion and amendments to satisfy minor parties or independents, thus enhancing the parliament's effectiveness.<br>• The detailed and complex process of getting a bill through parliament ensures there are several opportunities for bills to be considered, debated and voted on. Parliament can also act swiftly when needed, which was demonstrated during the COVID-19 pandemic when parliaments were able to pass laws quickly. |

| Application and reflection | Points on the bicameral structure of parliament |
|---|---|
| **Discussion points** | • Where the government controls the upper house, it tends to be a 'rubber stamp', confirming the decisions about legislation that were made in the lower house. This can dilute the role of the upper house in law-making in scrutinising and debating legislation. In this situation, the government can pass bills readily, but the legislation may be less effective or representative of community given the lack of scrutiny and review.<br>• If the upper house is not controlled by government, this allows for more rigorous scrutiny and debate, but it could mean that members of the crossbench have a disproportionately high level of power compared to the size of their voter base. There may also be questions as to whether they represent the views and values of the majority of the community, either in the way they vote or in the amendments they propose.<br>• The law-making process can slow down the legislative process, given the number of stages and the opportunities for debates. However, this depends on the bill. Less controversial bills will likely take less time to pass. The detailed law-making process is also necessary to ensure proper and rigorous consideration of laws.<br>• The many duties of members of parliament outside of the actual law-making process means there are relatively few sitting days. This can affect the pace of law reform. On the other hand, there are other opportunities for law-making to be effective, through the use of secondary legislation or committee systems to debate legislation. In addition, history tells us that the parliament is effective in passing necessary laws, often quickly, with parliaments able to pass a huge number of bills each year. |

**Source 8** A summary of the bicameral structure of parliament and its impact on law-making

# 11.1 Check your learning

## Remember and understand

1 **Define** the following terms, using an example for each:
   - **a** hostile upper house
   - **b** independents
   - **c** minor party.

## Examine and apply

2 **Explain** how the Senate as a rubber stamp may detract from the effectiveness of the bicameral structure of parliament in law-making.

3 Conduct some research on the current composition of the Senate and the Legislative Council.
   - **a** Prepare an infographic or table of the current composition, showing the numbers held by each political party and independents. Make sure you identify which political party is in government, and which political party is in opposition.
   - **b** **Identify** the ways in which a bill can achieve the support of a majority of members in the upper house, and one limitation of the current composition in terms of the ability of each parliament to make laws.

4 Visit the Victorian Parliament website and access legislation passed this year (a link is provided on your obook pro). Find one Act of Parliament that was passed within one to two months of being introduced in the first house. **Explain** why you think the law was passed so quickly.

Weblink
Parliament of Victoria

5 Read the scenario 'Marathon debate in the Legislative Council'.
   - **a** **Describe** the role played by the crossbenchers in this case.
   - **b** **Explain** how the role of the crossbenchers in this scenario highlights both the benefits and the challenges of the bicameral system in law-making.

## Reflect and evaluate

6 **Discuss** the extent to which having a bicameral system of parliament is a positive factor in law-making. In your response, refer to the WorkChoices reforms and the reforms relating to judge-only trials.

# 11.2 International pressures

## Key knowledge

In this topic, you will learn about:

- factors that affect the ability of parliament to make law, including international pressures.

**United Nations (UN)** a major international organisation established after the Second World War to maintain international peace, security and cooperation among nations

**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)

**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

**international pressures** demands made on parliaments, from within Australia or beyond, to make (or not make) laws that address matters of international concern

**petition** a formal, written request to the parliament to take some action or implement law reform

Australia is an active member of the global community, and often works with international organisations and other countries to find solutions to global concerns. It is a founding member of the **United Nations (UN)**, the international organisation founded in 1945, which now has 193 member states. The UN aims to maintain international peace and security, achieve international cooperation and develop friendly relations among nations.

Australia is also a signatory to several **international treaties** and has passed legislation to formally recognise its commitments under those treaties, including:

- the *Convention on the Rights of the Child* (1989)
- the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (1984).

Because Australia is an active participant in the global community, and because it is a signatory to or has **ratified** international treaties, sometimes our governments are subjected to international pressures, which can impact on the ability of parliament to make law.

## Introduction to international pressures

**International pressures** are demands or forces applied to parliaments to persuade them to make (or not make) law to address matters of international concern. Over the past 20 years, these pressures have included:

- the need to prevent terrorist attacks and address the emergence of radical terrorist groups
- the increased risk of cyber-attacks and hacking of major corporations and organisations to illegally access and sell data by foreign entities
- the increased challenges of climate change, including the pressure to reduce greenhouse gas emissions
- the need to protect the rights of vulnerable or minority groups, including asylum seekers, First Peoples, young people and the LGBTQIA+ community
- increasing the age of criminal responsibility
- addressing global pandemics, natural disasters and wars.

### Sources of international political pressure

International pressures can come from a variety of forces or groups. For example, pressure can be generated at a local or national level based on international concerns, or pressure can come at an international level.

Some of the sources of pressure are as follows:

- local activists who organise **petitions** for change
- international activists who seek to generate change across the globe. For example, Greta Thunberg is a Swedish environmental activist who challenges countries and world leaders to do more to tackle climate change

- other countries, which may urge Australia to change its laws or which may criticise Australia in relation to its legislative reform. For example, in the past the United States has encouraged Australia to address issues arising out of China's influence in the region
- the UN or one of its bodies, such as the Economic and Social Council. For example, the UN has in the past criticised the Australian Government with respect to the treatment of asylum seekers
- **non-government organisations (NGOs)** such as Amnesty International and Human Rights Watch. For example, Human Rights Watch releases an annual report that looks at global human rights issues and practices around the globe. In the past it has criticised Australia in relation to the protection of rights, such as protecting the rights of children
- large **transnational corporations (TNCs)** including Meta (which operates Facebook) and Google. For example, Meta ran a public campaign against proposed laws that would make those companies pay news publishers for displaying their content.

**non-government organisation (NGO)** an organisation, generally not-for-profit, that functions independently of any government; NGOs often do humanitarian work abroad and receive government funding

**transnational corporation (TNC)** a company that operates globally, across international boundaries

Many of these pressures are intended to force governments to implement changes, such as demanding that Australia do more to address issues such as protecting human rights. In other cases, they may pressure governments not to implement changes, such as where the laws may negatively impact on those who are placing the pressure (e.g. in the case of Meta).

### *Did you know?*

In February 2021, Meta temporarily restricted publishers and people in Australia from sharing or viewing Australian and international news content on its Facebook platform to protest against the government's proposed media laws. This drew a global backlash, given that the platform was also used for warnings about natural disasters such as bushfires.



**Source 1** Large transnational corporations such as Meta, operated by Mark Zuckerberg, can put pressure on governments if they seek to implement legislative reform that impacts on them.

It is helpful to look at the types of pressures that can be placed on parliaments to change or not to change the law through two examples:

- climate change
- the age of criminal responsibility.

# Example: climate change

Climate change is the name given to the long-term shifts in temperature and weather patterns. While these changes can be natural, human activities since the 1800s have caused a change in global climate patterns, including an increase in the temperature of the Earth's atmosphere.

One of the drivers behind the increase in temperature is the burning of fossil fuels such as coal, oil and gas. This has led to an increase in the levels of certain gases in the Earth's atmosphere. These gases trap the Sun's heat, causing temperatures to rise.

The changes in weather patterns have resulted in changes such as rising sea levels, shrinking mountain glaciers and melting ice, the loss of coral reefs, and threats of extinction of some species. Climate change has already started to impact on the way we live, with increasing extreme weather events such as flooding and more intense heat waves. In addition, people who live near the water face the prospect of having to relocate due to rising sea levels.

Climate scientists argue that, in an effort to reduce the levels of greenhouse gases in the atmosphere, all countries should reduce reliance on fossil fuels and shift to renewable energy sources, such as solar power and wind turbines.

There is growing pressure on countries, organisations, groups and individuals to act on climate change, especially with regard to greenhouse gas emissions. At an international level, there has been an attempt to pressure countries to take action to reduce emissions. One of the key international agreements was the 2015 Paris Agreement, formally known as the Paris Agreement under the United Nations Framework Convention on Climate Change. This requires countries to commit to targets to reduce their emissions. Australia is a signatory to the Paris Agreement.

In the past, while Australia has set targets to reduce emissions, those targets have been criticised for being too low. For example, while many other countries had aimed for between 30 and 35 per cent reduction by 2030, Australia's target until 2022 was 26 to 28 per cent.

There may also be pressure, particularly from industry groups or some members of parliament, not to act, with some emphasising the role that coal, gas and oil have in our economy. Coal remains one of Australia's largest biggest exports, and the coal industry employs about 36 000 people. It was estimated that the total amount of revenue generated from the export of coal in 2021-22 was $45 billion.

***Did you know?***

In 2016, scientists announced that a small mammal, the Bramble Cay Melomys, was the world's first mammal to become extinct due to climate change. The mammal existed only on one island near the Great Barrier Reef.



**Source 2** Climate change can result in more extreme events such as powerful storms and flooding.

## Pressure to act on climate change

Pressure can come from various sources to act on climate change. Some of them are set out in Source 3 below.

| Source of pressure | Explanation |
|---|---|
| The United Nations (UN) | The United Nations has described climate change as a global emergency that requires drastic action today. In the past, the UN called on Australia to do more to act on climate change. For example, in early 2022, the United Nations Secretary-General criticised Australia for not doing more to strengthen its 2030 emissions reduction target, calling Australia a 'holdout'. |
| Organisations and groups | Hundreds of international and national organisations and groups are concerned about climate change. These include:<br>• Greenpeace, a longstanding environmental organisation that seeks to protect people from the effects of climate crises and environmental impacts. It has previously run media campaigns and creates petitions to seek to pressure government to act.<br>• 1 Million Women, an organisation for women to get involved in climate change action. It not only helps people take action to address climate change, but also encourages people to vote for politicians who will put climate action at the top of their agenda.<br>• Climate 200, an Australian crowdfunding initiative that supports community-backed independents to stand for election to parliament on a platform of addressing climate change. Climate 200 was successful at the 2022 federal election, supporting pro-climate candidates in seats such as Goldstein and Higgins, defeating prominent members of parliament such as Josh Frydenberg. |
| Other countries | Other countries can place pressure on Australia to act. For example:<br>• Australia has been criticised in the past by countries such as the US for not doing enough to commit to reducing emissions.<br>• Other countries may be making changes to their economies to address climate change, which may pressure Australia to do the same. For example, the United Kingdom intends to ban the sale of new petrol and diesel-powered cars by 2030. This has resulted in a push for Australia to do the same. The ACT has already confirmed that it will ban petrol and diesel cars from 2035.<br>• Leaders of countries in the Pacific region, such as Tonga, Fiji and Solomon Islands, have put pressure on Australia to act, given its presence in the region and given those countries are particularly vulnerable to the threats posed by climate change, such as rising sea levels. |
| Individuals | Individual activists or influential people can also put pressures on governments to act. These include:<br>• Activists such as Greta Thunberg and Vanessa Nakate.<br>• Independent members of parliament. The 2022 Australian federal election saw the emergence of a group of independent candidates, who were known as the 'teals' because of the colour of their campaign branding. At the May 2022 election, 10 'teal' candidates were elected to the House of Representatives while one, Senator David Pocock, was elected to the Senate. Supported by the Climate 200 campaign, which is explained above, their main policy focus was a climate reduction target of 43 per cent by 2030 and the gradual closure of coal and gas energy resources in Australia.<br>• Influential business leaders or shareholders. For example, Mike Cannon-Brookes, an Australian billionaire and co-founder of software company Atlassian, has sought to force AGL, the country's largest carbon emitter, to convert to renewables quickly. |

**Source 3** Some of the types of pressures put on governments to act on climate change




**Source 4** The Australian Youth Climate Coalition encourages young people to be involved in finding solutions to the climate crisis.

## Pressure not to act on climate change

There may also be pressure on Australia not to act on climate change, or to take into account the potential impact of climate change action on the coal industry. For example:

- Industry organisations such as coal and mining organisations can place pressure on parliament not to impact on coal communities and jobs in the industry.
- Certain political parties or members of parliament may have different policies or views about how to address climate change challenges. For example, the National Party, which generally represents regional communities and farmers, has pressured the government of the day to tackle climate change so that the natural environment can 'coexist' with resources and agricultural industries. Other political parties, such as Pauline Hanson's One Nation, dispute the science behind climate change and disagree with any proposed changes to law to address climate change.
- There are workers in 'coal communities' across states such as Queensland and Western Australia who are more affected by transition to renewable energy than people in Melbourne and Sydney. As a result, these 'coal communities' may pressure governments to protect their jobs, demanding a careful strategy that allows these workers to be trained for the emerging green power industries.

## Current government responses to climate change

In 2022, following the election of the Australian Labor Party (ALP), the Commonwealth Parliament passed the *Climate Change Act 2022* (Cth), which enshrined into law:

- an emissions reduction target of 43 per cent from 2005 levels by 2030
- net-zero emissions by 2050.

The law came into effect on 14 September 2022. The legislation was the result of consultation with business, industry, unions, farmers, the community and conservation groups such as Greenpeace. These groups had urged the Parliament to put Australia on the path to net-zero emissions, consistent with UN goals.

The legislation also ensures accountability through an annual update to Parliament by the Climate Change Minister on the progress being made towards the target. It also empowers the Climate Change Authority to provide advice to Government on future targets.

State governments such as Victoria and New South Wales have also set aggressive targets to cut carbon emissions. Victoria, for example, has committed to new emissions reduction targets, which includes reducing emissions by 75 to 80 per cent by 2034, and net zero by 2045.

***Study tip***

This part of the course is ever-changing. An easy way to track changes is to subscribe to online resources such as Human Rights Watch and Greenpeace. Their materials are accessible and interesting.

# Example: the age of criminal responsibility

The age of criminal responsibility is the age at which a child is deemed to be capable of forming the intention to commit an offence under criminal law, and therefore can be found guilty of committing a crime. In Victoria, the age of criminal responsibility is 10. That is, a child must be at least 10 years old before they can be charged with committing a crime. In Victoria, there is also the principle of ***doli incapax***, which is the presumption that between the ages of 10 and 14, a child does not possess the necessary knowledge required to have criminal intent, but this can be reputed or disproved if there is evidence to show that a child knew their actions were morally wrong. As of 2023, the law regarding the age of criminal responsibility at the Commonwealth, state and territory levels was under close review, and in some jurisdictions, proposed to change.

***doli incapax***
the presumption that a child aged between 10 and 14 does not have criminal intent; this can be rebutted with evidence

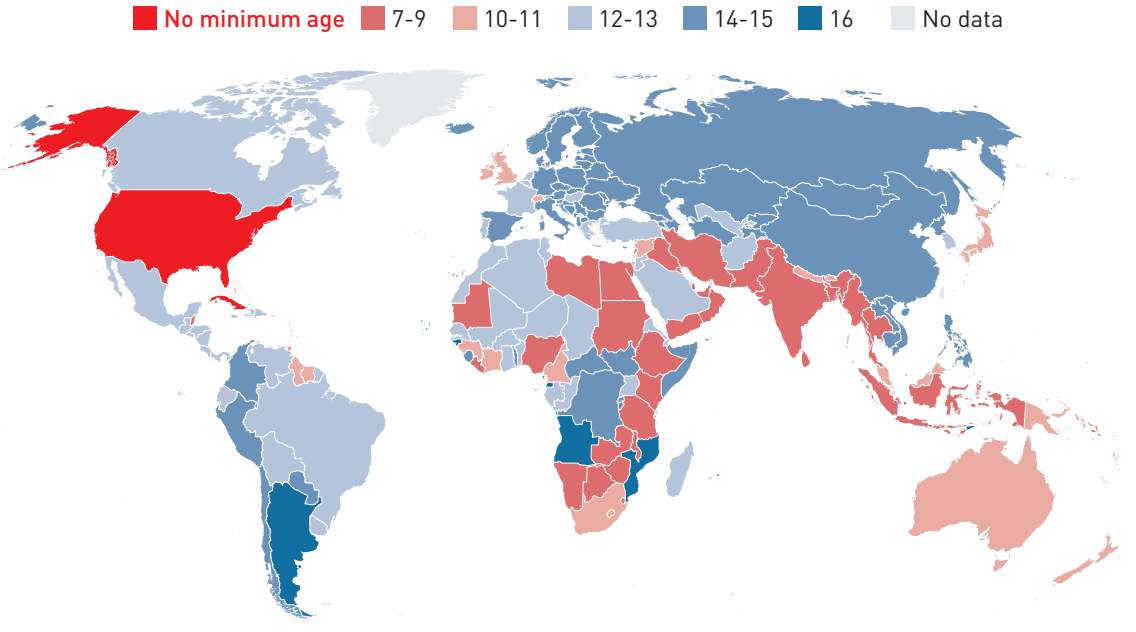
Setting the age at which a person can be charged with committing a crime is one of the more difficult and complex areas of criminal justice policy. The United Nations has nominated 14 years of age as the absolute minimum age of criminal responsibility. As shown in Source 5 below, Australia has a low age of criminal responsibility compared with other countries.

The pressure for Australia to increase the age of criminal responsibility has been for a number of reasons:

- some have highlighted that the low age results in an overrepresentation of First Nations people in detention, with data indicating that First Nations youth are detained at a rate 17 times higher than that of non-Indigenous young people
- many young people come from disadvantaged backgrounds and have special and complex needs that may be better addressed outside, rather than inside, the criminal justice system
- young people have difficulty engaging with the criminal justice system, which could result in additional problems or trauma. In particular, there are concerns that the negative effects of custody can be long-lasting and can result in a 'life of crime' for a young person who is jailed.

**Juvenile justice**

**Minimum age of criminal responsibility, years, November 2019**




Source: Child Rights International Network

**Source 5** Although 196 countries have signed the United Nations Convention on the Rights of the Child, there remains a diverse range of ages of responsibility across the world. The Convention on the Rights of the Child is the most rapidly ratified human rights treaty in history.

## Pressure to change the age of criminal responsibility

Pressure to change the age of criminal responsibility comes from various sources. Some of them are set out in Source 6 below.

| Source of pressure | Explanation |
|---|---|
| The United Nations (UN) | Australia has been criticised in the past by the UN about this issue. In 2017, the UN sought a response as to why Australia was 'out of step' with the rest of the world. In 2019, the UN Committee on the Rights of the Child noted its serious concern about the age in Australia and called on it to act to ensure the age was at an internationally accepted level. The Committee encouraged Australia to invest in early intervention regarding juvenile offenders, focusing on the prevention and rehabilitation of children. In addition, UN member countries have noted the age of criminal responsibility as a key issue of concern. The Universal Period Review is a UN Human Rights Council peer-review process in which member states consider the human rights record of other member states, including Australia. In the 2021 review, 31 countries recommended that Australia raise its age of criminal responsibility. |
| Organisations and groups | Various medical, legal and human rights organisations and groups support an increase in the age:<br>• The Law Council of Australia, the peak representative body of the Australian legal profession (which includes solicitors and barristers), has called for the age to be raised to 14, and said that children between the ages of 10 and 13 should have access to services to reduce the risk of interaction with the criminal justice system.<br>• Several First Nations-led organisations, including the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) and Victorian organisations, have spoken out strongly about this issue. For example, the Victorian Aboriginal Legal Service (VALS) has indicated that Aboriginal children are disproportionately affected by the age. It has referred to medical and criminological evidence in favour of raising the age, including the need to recognise that children have complex needs, which are better addressed outside the criminal justice system. VALS identified these complex needs as mental health concerns, cognitive and/or physical disabilities, lack of housing, behavioural difficulties, drug or alcohol use, involvement in child protection, experiences of trauma and/or violence, and social isolation.<br>• The #RaiseTheAge campaign was created by organisations such as the Human Rights Law Centre, the Australian Indigenous Doctors' Association, the Public Health Association of Australia, NATSILS and the Law Council of Australia. This campaign seeks to influence change by lobbying politicians and running social media campaigns. |
| Non-government organisations (NGOs) | NGOs such as Amnesty International and Human Rights Watch have expressed concerns about the effects of criminalisation on children, especially young First Nations people who are disproportionately represented in prison statistics. |

**Source 6** Some of the types of pressures put on governments in relation to the age of criminal responsibility




**Source 7** The hashtag #raisetheage has been used to generate discussion online, particularly on social media, about the age of criminal responsibility.

## Pressure not to change the age of criminal responsibility

Not everybody supports changing the age of criminal responsibility. For example, in a draft report released in 2022 (referred to later in this topic) it was noted that the Western Australian Office of the Public Prosecutions submitted that the age should remain at 10 years. It noted that children aged 10 to 14 years are rarely charged with minor crimes unless they regularly commit them, and therefore only the most serious offenders end up in the court process. The draft report also noted that the South Australia Police indicated they were not supportive, noting that young people can benefit from departmental supervision and changing the age potentially sends a wrong message to young people.




**Source 8** In 2019, at the age of 12, Dujuan Hoosan, an Arrente and Garrwa boy, gave a speech to the UN Human Rights Council on behalf of the Human Rights Law Centre about the experience of being a young First Nations person in Australia and how he was 'nearly locked up in jail'. One of the things Dujuan said he wanted to see changed was 'I want adults to stop cruelling [putting] 10 year old kids in jail'.

## Current responses to the age of criminal responsibility issue

The Commonwealth and state and territory Attorneys-General meet quarterly as part of the Standing Council of Attorneys-General. In 2018, the Council agreed to establish a working group to examine whether to raise the age of criminal responsibility.

The working group prepared a draft report (2020 Draft Report).

In November 2021, state Attorneys-General supported the development of a proposal to increase the minimum age from 10 to 12 subject to certain requirements.

In December 2022, the 2020 Draft Report was released, but it was still a draft and had not been agreed to by all jurisdictions. One recommendation was that all governments should raise the minimum age of criminal responsibility to 14 years of age, without exception.

However, the Draft Report also noted that before implementing this change, consideration had to be given to what programs were available to support prevention of youth crime and provide support for young children, their families and the community.

In November 2022, the Northern Territory government passed a bill to raise the minimum age of criminal responsibility to 12. The ACT government has indicated that it will introduce legislation in 2023 that will gradually increase the age to 14 years by 2027.

In April 2023, the Victorian Attorney-General announced that by the end of 2024, children aged 10 and 11 will not be held criminally responsible for their actions in Victoria. The government also announced that it would raise the age of criminal responsibility to 14 by 2027. There would be exclusions for children who are accused of more serious crimes.

# Summary

You are expected to be able to discuss international pressures as a factor that can affect the ability of parliament to make law. The table below will help you develop your discussion, showing the explanation points you can make, and points that will extend your explanation to a discussion. These are not the only points you can make; others may be relevant depending on a particular scenario.

| Application and reflection | Points on international pressures |
|---|---|
| **Explanation points** | • Australia is part of the global community and plays a key role in addressing global concerns. It is often a signatory to international agreements and has passed legislation to formally recognise its commitments under treaties.<br>• As an active participant in the global community, Australia can sometimes be subjected to international pressures to change the law, or not change the law. This can include laws relating to terrorism, climate change or human rights.<br>• Pressures can come from international sources, such as the UN and Amnesty International, or from local sources, such as individuals and local bodies and organisations.<br>• Examples in the past have included putting pressure on parliament to address the growing concern of climate change, and to change the age of criminal responsibility. |
| **Discussion points** | • Whether the pressure impacts on governments and their willingness to act may depend on the issue, where the pressure is coming from, and how supportive people are of the change. For example, the need to address climate change has gained support over the years to the point where it would be difficult for governments to 'refuse' to act.<br>• On a particular issue, governments may be faced with competing pressures or views. For example, in relation to climate change, the need to address the growing concern of raising temperatures and reducing emissions needs to be considered against Australia's reliance on coal and energy as a source of revenue. As another example, the pressure to increase the age of criminal responsibility needs to be balanced against the need to ensure proper frameworks are put in place for young people who may need to be supported or deterred from offending.<br>• Powerful bodies or organisations can have an impact on the way people vote. For example, hashtags such as #raisetheage, or school student climate protests, may influence voters or the way they think about an issue.<br>• Law reform in areas where there is international pressure must also be balanced against law reform in other, more pressing areas, such as immediately dealing with pandemics or natural disasters. There must also be a consideration of the financial impact of making law reform (i.e. whether the change comes at a cost). |

**Source 9** A summary of international pressures and their impact on law-making

# 11.2 Check your learning

## Remember and understand

1 **Define** the term 'international pressures'.

2 **Describe** two ways in which climate change activists can persuade governments to make laws. Use examples in your response.

3 **Explain** how the signing and ratifying of international treaties can place pressure on the Australian Government to change the law.

## Examine and apply

4 Conduct some research and find an example of an NGO or pressure group that is seeking to influence the Commonwealth Parliament to change the law. You must choose an international issue other than climate change or the age of criminal responsibility. Suggested areas for research are refugee law, human rights or the acquisition by Australia of weapons and military hardware such as submarines.

   a **What** law is the group hoping to see implemented or changed?

   b **What** is the view of the international community, including the UN, on that area?

   c **What** activities are these groups undertaking to place pressure on members of parliament and the government to implement or change the law?

5 Conduct some research and find an example of an individual who is seeking to influence a change in the law. You must choose someone other than an individual identified in this topic. Come together as a class to discuss your findings. You may wish to prepare a mural showing each of the individuals with a short explanation of the issue they are concerned about.




**Source 10** People gathered at the opening of Parliament in Melbourne in 2023 to protest coal seam gas mining and its impact on climate change.

# 11.3 The representative nature of parliament

## Key knowledge

In this topic, you will learn about:

- factors that affect the ability of parliament to make law, including the representative nature of parliament.

In addition to the roles of the houses of parliament and political pressures, the representative nature of parliament is another factor that can affect parliament's effectiveness as a law-making body.

## Introduction to the representative nature of parliament

Australia's parliamentary system is expected to be representative of the people. This means that at both Commonwealth and state levels, parliament and government consist of members who are elected by the people to make laws on their behalf. If these members fail to make laws that reflect the views and values of the people, or fail to address the needs of the community, they will jeopardise their chance of being re-elected.

This essential parliamentary principle is the basis of our democratic system. It ensures that members of parliament engage with and listen to the views and concerns of the electorate.

In this topic you will explore the following in relation to the representative nature of parliament:

- the diversity of parliament
- the willingness of parliament to act in accordance with the views of the majority
- regular elections.

| | |
|---|---|
| **Birthplace** | • 27.6% of the Australian population (more than 7 million people) were born overseas |
| **First Nations people** | • 3.2% of the Australian population (812 828 people) identified as being of Aboriginal and/or Torres Strait Islander origin |
| **Language** | • 22.8% of the Australian population (5.8 million people) reported using a language other than English at home |
| **Religion** | • 43.8% of the Australian population (11.1 million people) identified as Christian<br>• 10% of the Australian population (2.5 million people) identified as having another religion<br>• 38.9% of the Australian population (9.8 million people) identified as having no religion |
| **Sex and age** | • 50.7 per cent of the Australian population were female, with a median age of 39 years<br>• 49.3 per cent of the Australian population were male, with a median age of 37 years |

**Source 1** Statistics from the ABS Census (2021). In relation to sex, approximately 10 per cent of respondents selected both the non-binary sex category and female; and another 7 per cent selected the non-binary sex category and male. However, the ABS assigned a binary sex value to those persons (meaning they were either categorised as female or male). It noted that the approach was not supported by all stakeholders or by all members of the community.

# The diversity of parliament

Australia is a diverse country. The data collected in the latest Australian Bureau of Statistics (ABS) census conducted in 2021 demonstrated this diversity, as shown in Source 1.

Despite our diverse communities, Australia's parliaments have not generally reflected this diversity. While female representation is increasing across all parliaments in Australia, the proportion of First Nations members of parliament or those who have non-European backgrounds remains well below the general population.

In relation to law-making, some have argued that because of a lack of diversity, certain groups of people or their interests are not represented well enough. Professor Tim Soutphommasane, from the University of Sydney, was quoted in the *Sydney Morning Herald* in 2021 as saying: 'If you don't have cultural diversity in our politics, you don't have politics that's representative. That's a pretty basic problem.'

On the other hand, some argue that the diversity of parliaments does not affect their ability to represent people in parliament, and that there are means by which members of parliament can understand the needs and interests of their communities. For example:

- individuals and communities can communicate with their local members of parliament or use methods such as petitions and **demonstrations** to put forward their views (you will consider these in Chapter 13)
- parliaments can rely on formal law reform bodies to gauge the views of communities to help ensure those views are represented in law making. These include bodies such as parliamentary committees and the **Victorian Law Reform Commission (VLRC)**, which you will explore in Chapter 13
- members of parliament may argue that this has not prevented them in the past from introducing and implementing important legislative reform that has protected and promoted the interests of minority groups; for example, vilification laws and laws relating to the LGBTQIA+ community.

**demonstration**
a gathering of people to protest or express their common concern or dissatisfaction with an existing law as a means of influencing law reform

**Victorian Law Reform Commission (VLRC)**
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws



**Source 2** The 2021 Census conducted by the Australian Bureau of Statistics found that almost half of Australians have a parent born overseas (48.2 per cent) with 27.6 per cent reporting a birthplace overseas. The Census also shows that Australia welcomed more than one million people into Australia between 2017 and 2021.

# Willingness to act in accordance with the views of the majority

The representative nature of parliament encourages members of parliament to listen to the views of the community and make laws in accordance with these views. When people see the need for a change in the law, they may undertake a range of activities, such as forming a petition, organising a demonstration, using social media or contacting their local member of parliament, to express their view and indicate to government that there is a need for law reform. The fact that our parliament and government is representative of the people means that these activities can often be influential in promoting law reform.

While it is sometimes difficult to assess the majority view, some demands for law reform are expressed through the media. Such an example occurred in Victoria in response to incidents where the Hakenkreuz (commonly known as the Nazi swastika symbol) was displayed. This is explored in the scenario below.

**Actual scenario**

## Ban on Nazi symbols

In January 2020, a flag displaying the Hakenkreuz and other Nazi symbols was flown over a home in Victoria's north-west. News of this resulted in condemnation and calls for the display of such symbols to be made illegal. In a separate incident, in April 2021, it was reported that a car with a Hakenkreuz sticker was seen in Bendigo. At the time, Anti-Defamation Commission chair Dr Dvir Abramovich said that this was not unusual, and that the Commission received pictures of such displays on a daily basis.

In March 2021, a Victorian parliamentary committee, the Legal and Social Issues Committee, made up of members of various political parties, released a report into anti-vilification laws. 'Vilification' is a term used to describe public acts that incite hatred towards, severe ridicule of, or serious contempt for a person or group because of their race, religion, gender identity or sexuality. One of the recommendations it made was that the Victorian Government establish a criminal offence that prohibits the display of symbols of Nazi ideology, including the Hakenkreuz. It also encouraged the government to 'monitor the public display of other hateful symbols to determine whether a broad-based offence should be established'.

In June 2022, Victoria became the first Australian state to ban the public display of the Nazi symbols. The *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic) makes it a criminal offence for a person to intentionally display the Nazi symbol (the Hakenkreuz) in public. Anyone who intentionally displays the Nazi symbol in public will face penalties in excess of $20 000 (120 penalty units), 12 months' imprisonment or both. There are exceptions, such as where the symbol is being displayed for genuine educational, scientific or artistic purposes.




**Source 3** For many years, the Anti-Defamation Commission chair, Dr Dvir Abramovich, has campaigned for a ban on the Hakenkreuz. He said that the passage of the *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic) was a triumph for Holocaust victims.

It may not always be the case, however, that making law based on the views of the majority is always a good thing. In an attempt to be re-elected, members of parliament may introduce and support laws that are popular with voters rather than passing laws that may be necessary, but are unpopular with voters.

For example, in the build-up to the 2022 federal election, the ALP campaigned heavily for a national independent commission to investigate corruption in government and the public service. Research shows that this resonated strongly with voters who were concerned about the need for transparency, but others may feel there are more pressing issues.

Some argue that governments may introduce popular laws to win votes rather than introducing more necessary or practical laws. For example, governments may promote tax cuts to win the support of voters when it may not necessarily be in the best interests of the country. Similarly, governments may introduce harsher penalties for crimes in an attempt to win votes by demonstrating they are 'tough on crime', but academic studies show that harsher sentences generally do little to reduce crime and do not address the underlying reasons for crime. Taking a longer-term view, some of the money spent on keeping more people in prison might be better spent on alternatives to reduce the risk of reoffending.

It can also be difficult for members of parliament and governments to assess the view of the majority of people in areas where there are conflicting societal views on controversial issues. These include decriminalising drug use, allowing 16-year-olds to vote and imposing gender quotas (requirements that a certain percentage of women are represented, such as at a board level).

Similarly, while parliament also has the power to make laws to cover future circumstances, it can be difficult for governments to accurately predict the future views and needs of the community and make laws to provide for them. For example, successive Australian Governments have found it difficult to anticipate the effects of medical advancements in areas such as assisted reproductive treatment and genome testing (to identify genetic disorders). This means the law in these areas can lag behind technological advancements.

Where predictions seem to be easier to make, an effective government will be proactive, rather than responding only after problems arise. For example, it can be expected that more individuals will undertake genome testing in the coming years. Governments may therefore need to consider laws to protect people from being discriminated against by potential employers.

***Study tip***

It is a good idea to use examples to demonstrate how the representative nature of parliament can assist or detract from the ability of the parliament to make law. For example, it took many years for the Commonwealth Parliament to legislate for marriage equality because both major political parties would not commit to changing the marriage law until they were certain the change had the support of a large majority of voters.

## Regular elections

To achieve representative government, regular elections must be held so the people can vote for politicians to represent them in parliament. If the government does not represent the needs of the majority of the people during its term in office, it is likely to be voted out of office at the next election.

It is compulsory to vote. Some critics claim compulsory voting undermines the principle of representative government because it forces those who are not interested to cast vote that may be ill-informed.

By contrast, those who support compulsory voting suggest that it helps ensure our parliaments and governments have the support of the majority of people and not just those who bother to vote. It also forces candidates and political parties to consider the needs of the entire society when formulating their policies.

In Australia, elections for the Commonwealth Parliament are held every three years, while elections for the Victorian Parliament are held every four years, on the last Saturday in November.

A criticism of the federal electoral system made by some political analysts and members of the community is that federal elections are not held on a fixed date. The government can call an early election when the political climate might best suit them. For example, a government might call an early election if they fear a looming slow-down in the economy, which may cause them to lose popularity.

At the federal level, a change of election timing to extend the election term would require a **referendum**, since section 28 of the Constitution provides that a term must last no longer than three years (but can be shortened).

Four-year terms might encourage governments to be more willing to introduce law reforms that have a longer-term benefit because they will be less concerned about any short-term negative impacts associated with the reform. Increasing the term of government would also give voters more certainty and allow businesses to be more confident about investment. Businesses often delay making important decisions prior to an election in anticipation that the government might change.




**Source 4** In Australia, it is compulsory to vote.

# Summary

You are expected to be able to discuss the representative nature of parliament as a factor that can affect the ability of parliament to make law. The table below will help you develop your discussion, showing the explanation points you can make, and points that will extend your explanation to a discussion. These are not the only points you can make; others may be relevant depending on a particular scenario.

| Application and reflection | Points on the representative nature of parliament |
|---|---|
| **Explanation points** | • Parliament is elected by the people and can make laws that reflect the views and values of the community. If members fail to make laws to reflect those views and values, they can jeopardise their chances of being re-elected.<br>• Australia is a diverse country, and some expect Australia's parliaments to reflect the broader make-up of our communities. However, across all parliaments in Australia, while female representation is increasing, the number of First Nations members of parliament or those who have non-European backgrounds are below the general population. Some have argued that this means some groups and their interests are not well represented.<br>• The representative nature of parliament encourages members of parliament to listen to the views of the community. Social media is a powerful way for parliament to gauge community views.<br>• The requirement under the Constitution to hold elections allows the public to vote out of office a government that fails to act in the interests of the majority or one that breaks its promises.<br>• Fixed-term elections, such as in Victoria, give parliaments a specified period to implement their programs and there is certainty for voters as to when the next election is held. |

**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

| Application and reflection | Points on the representative nature of parliament |
|---|---|
| **Discussion points** | • Although parliamentary diversity does not generally reflect the diversity of our communities, some may argue that individuals, pressure groups, and law reform bodies can have an impact on law reform so that the views of minority groups are considered by parliament when passing legislation.<br>• The need for parliament to reflect the views of the public may see governments support populist law reform to win voter support while avoiding contentious issues, especially before an election.<br>• Government may not initiate law reform in areas where there is opposition from well organised and vocal minority groups.<br>• It can be difficult for parliament to assess majority views where there are conflicting views on controversial issues. It can also be difficult to predict future views and needs.<br>• Whilst there is compulsory voting, a criticism of the federal system is that elections are not held on a fixed date, which means that early elections can be held. |

**Source 5** A summary of the representative nature of parliament and its impact on law-making

## 11.3 Check your learning

### Remember and understand

1 **Define** the term 'the representative nature of parliament'.

2 **Describe** two features of our parliamentary system that help to ensure it is representative of the people.

### Examine and apply

3 **Explain** two ways in which the under representation of cultural and ethnic groups affects the ability of the parliament to be representative in law-making.

4 Conduct research to complete the following questions.

- **a** **Identify** one law at a federal level or state level that has not yet been introduced, but which you believe the majority of people might support.
- **b** **Identify** two reasons why this law may have majority support.
- **c** **Why** do you think the new law has not been introduced?
- **d** Do you think that opposition (including minor) parties and independent members would support the law? Give reasons.

### Reflect and evaluate

5 After the May 2022 federal election, a record number of women took their seats in the House of Representatives and the Senate. To what extent do you agree with the idea that there should be a 50/50 gender quota in parliament? **Discuss**.

6 Write two arguments for and against the statement: 'Voting in federal and state elections in Australia should not be compulsory'. When everyone has completed this task, hold a class debate on the topic.

# 11.4 The High Court and representative government

## Key knowledge

In this topic, you will learn about:

- the means by which the Australian Constitution acts as a check on parliament in law-making, including the role of the High Court in protecting the principle of representative government.

*Study tip*

Each of the three means by which the Australian Constitution acts as a check on parliament in law-making is listed separately in the *VCE Legal Studies Study Design*. This makes each of them specifically examinable. You should be able to evaluate each of the means.

Although parliament is the supreme law-making body in Australia, it does not have absolute power. The Australian Constitution prevents parliament from having absolute power by providing 'checks' on parliament. A 'check' on parliament is a process or structure designed to reduce the potential for the abuse of power, such as parliaments making laws that exceed the powers given to them.

There are many means by which the Australian Constitution acts as a check on parliament in law-making. Three of the means, which you will explore in this and the next two topics, are:

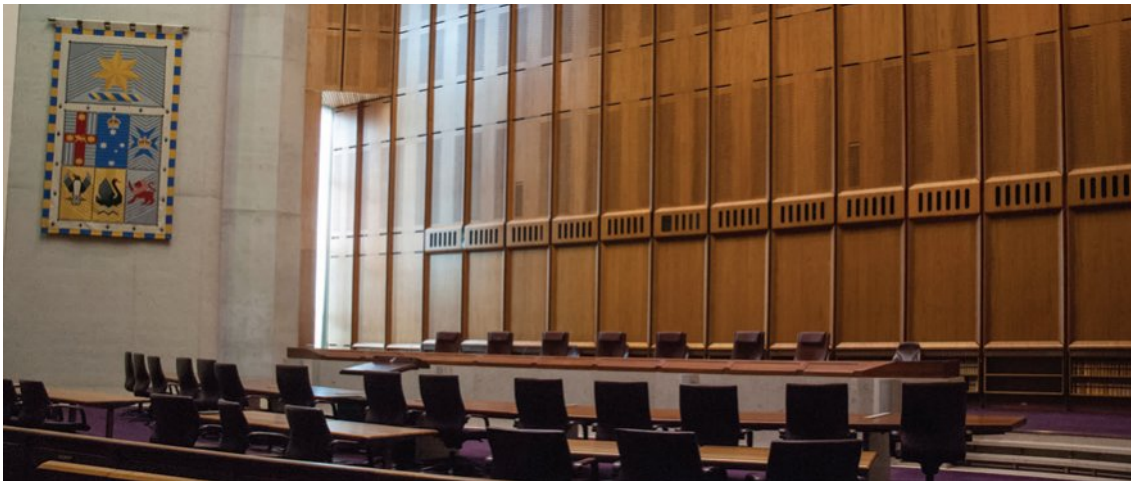
- the role of the High Court in protecting the principle of representative government (Topic 11.4)
- the separation of the legislative, executive and judicial powers (Topic 11.5)
- the express protection of rights (Topic 11.6).

## Introduction to the High Court

One of the ways the Australian Constitution seeks to prevent any misuse of law-making power is through the existence of the High Court. The High Court was established under section 71 of the Australian Constitution. Section 71 provides the High Court with **jurisdiction** to hear certain matters, including matters arising under treaties, matters in which the Commonwealth is a party, and disputes between states.

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

In addition, section 76 gives the High Court the power to hear disputes arising under the Constitution or involving its interpretation. This means that if there is a question about what the Constitution means, such as whether it gives the Commonwealth Parliament the power to make certain laws (as occurred in the *Brislan* case and the *Tasmanian Dam* case, described in Chapter 10), then the High Court can decide how the Constitution should be interpreted. The High Court cannot change the words of the Constitution, but it can change what those words mean.



**Source 1** The High Court was established by the Australian Constitution and is an important check on parliament and government in law-making.

# The principle of representative government

As you have already learnt in this chapter, Australia's parliamentary system is based on the principle of representative government. Parliament and government consist of members who are elected by the people to make laws on their behalf. This is an essential part of democracy; if government and parliament do not represent the views and values of a majority of people, they may be voted out of office at the next election.

The principle of representative government is enshrined in the Australian Constitution. Section 7 sets out matters related to the Senate and section 24 sets out matters related to the House of Representatives. Both sections require the Commonwealth Houses of Parliament to be directly chosen by the people. In the High Court case of *Rowe v Electoral Commissioner* (2010) 243 CLR 1, the requirement that members of the Commonwealth Parliament must be 'directly chosen by the people' was said to be a 'constitutional bedrock'.

**Extract**

## The Australian Constitution – sections 7 and 24

### 7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate …

### 24 The House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators …

At times, the High Court has been called on to determine the meaning of sections 7 and 24 of the Australian Constitution. In doing so, the High Court has been seen to have acted as a 'guardian' of the Constitution by protecting the principle of representative government in the following ways:

- restricting the ability of Commonwealth Parliament to make laws that infringe on the rights of people to vote in elections, so that they can choose the members of parliament
- protecting the ability of people to freely communicate on political matters, so they can cast effective and informed votes when choosing their members of parliament.

These two ways in which the principle of representative government has been protected, and the limitations of the High Court in protecting the principle, are explored further below.

# Protecting voting in elections

The High Court has made it clear that when passing law, the Commonwealth Parliament cannot unnecessarily interfere with people's capacity to engage in the political process. In a series of judgments, the High Court has found that a law that interferes unreasonably with the ability to vote at elections is likely to be declared invalid. The High Court considered this issue in the case of *Roach v Electoral Commissioner*. This is explored in the scenario on the next page.

Actual scenario

## Clarifying which prisoners can vote

In 2006 the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), which banned all convicted and sentenced prisoners from voting in elections. Vickie Lee Roach, who was serving a six-year term of imprisonment for five offences, was enrolled to vote in the seat of Kooyong, Victoria. Under the previous Act made in 2004, prisoners who were serving sentences longer than three years were banned from voting; the 2006 Act extended this ban so that no sentenced prisoners could vote. At the time, there were about 20 000 prisoners in Australia who would be affected by the Act. Roach challenged the constitutional validity of both Acts in the High Court.

The High Court held that the 2006 Act was inconsistent with the system of representative democracy established by the Constitution. It found that the Act was unconstitutional because sections 7 and 24 of the Australian Constitution, which require that parliament be chosen 'directly by the people', legally protect the right of the people to choose the members of parliament.

The principle of representative government, which protects the right of the people to directly choose the parliament, gives people a right to vote for those who govern the country, so the parliament should only be able to restrict a person's right to vote if it is necessary to preserve representative government. Good enough reasons might include unsoundness of mind, conviction of treason, or committing serious criminal misconduct. In the High Court ruling, Chief Justice Gleeson stated that the right to vote could be removed for serious criminal misconduct (such as for prisoners serving a sentence of more than three years) but could not be removed for prisoners who had been sentenced for less serious criminal offences.

The High Court ruled that while the 2004 legislation (banning prisoners serving three years or more from voting) was valid, it was unconstitutional for all sentenced prisoners to be denied the right to vote. People serving short-term sentences were generally not involved in serious criminal misconduct; therefore, this section of the Act was declared invalid by the High Court.

Interestingly, as Roach was sentenced to a six-year term of imprisonment, she still did not have the right to vote after the High Court decision.

*Roach v Electoral Commissioner* (2007) 233 CLR 162



**Source 2** Vickie Lee Roach, a Yuin woman, obtained a master's degree while serving her final prison sentence, and now speaks out against imprisonment, advocating for a focus on healing rather than punishing.

The decision in the *Roach* case upholds the fundamental requirement that members of the Commonwealth Parliament must be directly chosen by the people, and that the Commonwealth can only restrict the right of people to vote for a 'substantial reason'. The judgment has been confirmed in subsequent High Court cases, which have confirmed the principles established in the *Roach* case. That is, the Commonwealth Parliament cannot place substantial and unnecessary burdens on the right of the people to choose the members of parliament.

# Protecting freedom of political communication

**implied rights**
rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

In two cases in 1992, the High Court found there was an implied freedom of political communication in the Australian Constitution, otherwise known as an **implied right**. These cases were the *Australian Capital Television Pty Ltd v Commonwealth* and *Nationwide News Pty Ltd v Willis*.

The *Australian Capital Television v Commonwealth* case dealt with Commonwealth legislation that banned all political advertising on radio and television during election periods (the *Political Broadcasts and Political Disclosures Act 1991* (Cth)). This legislation allowed some free advertising to those political parties that already had members of parliament. However, it did not allow either free or paid time on television and radio to anyone else who had a political comment they wanted publicised. The High Court held that the legislation was invalid because it overrode an implied constitutional freedom of political communication.

The reasons for the decision varied among the justices, but in general terms it was linked to the notion of representative government. The justices all indicated that the Constitution established a system of representative government, and that representative government could only operate properly if there was freedom for people to communicate about political issues. Otherwise, people would not be fully informed when making choices about who should be elected to government.

Several cases have confirmed the existence of the freedom of political communication. The case of *Theophanous v Herald and Weekly Times* (1994) extended the implied freedom to allow comments about members of parliament and their suitability for office. The *Lange* case went further, saying there was a permanent freedom of political communication. This is explored in the scenario below.

Since the *Lange* case, the test for establishing whether a law infringes on the implied freedom has since been developed and is now a three-stage test:

1. Does the law effectively burden the implied freedom in its terms, operations or effect?
2. If 'yes' to question 1, is the purpose of the law *legitimate* in that it is compatible with the maintenance of representative and responsible government?
3. If 'yes' to questions 1 and 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner consistent with the maintenance of representative and responsible government?

**Actual scenario**

## Developing the implied freedom of political communication

The former Prime Minister of New Zealand, David Lange, was featured in a report on the ABC program, *Four Corners*. The program suggested that his government was under the influence of large corporations through political donations that had been made to the party. Lange sued the ABC, arguing that the program had suggested that he was corrupt in his dealings as prime minister. This was a claim of defamation (where the plaintiff claims that someone has made a statement which is harmful to their reputation).

In its judgment, the High Court discussed previous decisions about the implied freedom of



**Source 3** David Lange, former Prime Minister of New Zealand, sued the ABC in a case that would confirm the capacity of parliament to place reasonable limits on political communication.

political communication and examined its effect on defamation laws. The *Lange* case confirmed and extended the freedom of political communication, which exists by reason of sections 7 and 24 of the Constitution. The High Court said that state, territory and Commonwealth legislation and common law must allow for the freedom of political communication implied in the Constitution.

In Lange's case, the High Court developed a two-stage test to determine whether a law infringes the implied freedom of political communication. That two-stage test has now been further developed into a three-stage test, as described below.

Importantly, the freedom of political communication is not considered to be a general freedom to communicate. Instead, it operates as a negative right, in that it prevents us from being exposed to laws that stop communication on matters relating to politics and government. The High Court emphasised that the implied freedom is central to our system of representative government in the Constitution. The justices noted that sections 7 and 24 of the Constitution say members of parliament are 'directly chosen by the people', and that is the basis for this freedom.

*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

However, the implied freedom of political communication is *not* always guaranteed, because it is not expressly stated in the Australian Constitution. Therefore, if a future High Court disagrees with previous interpretations about the Constitution, then this freedom could be changed or limited in the future. For example, in a 2021 case, Justice Steward of the High Court made comments in his judgment which suggested that the freedom issue was such an important one that it should be reconsidered.

## Limitations on the ability of the High Court to protect the principle of representative government

There are a number of limitations on the ability of the High Court to protect the principle of representative government and therefore act as a check on parliament:

- first, the High Court is limited to interpreting the words and phrases of the Australian Constitution. It cannot 'add' new words or phrases, or expressly provide for a right to vote. For example, the principle of representative government does not extend to guaranteeing a right to vote for everybody; there can be reasonable limitations imposed on the right of people to directly choose the members of the houses
- second, the High Court can only intervene and protect the principle of representative government if a person challenges a law. This requires a person with **standing**, costs and time to do so. You will learn more about these factors in Chapter 12
- third, the interpretation of the High Court will depend on its composition. Some justices are more conservative in their approach and may be reluctant to adopt a liberal approach when protecting the principle of representative government. You will learn more about judicial conservatism in Chapter 12.

**standing**
the requirement of a party to be directly affected by the issues or matters involved in a case, for the court to be able to hear and determine that case

### *Did you know?*

Although the High Court of Australia was established in 1901, the first sitting did not take place until 1903 (when the Court sat in the Banco Court in the Supreme Court building in Melbourne). In 1980, Queen Elizabeth opened the High Court building on Lake Burley Griffin in Canberra.

## Strengths and weaknesses

Source 4 on the next page sets out the strengths and weakness of the High Court's role in protecting the principle of representative government and therefore acting as a check on parliament in law-making.

| Strengths | Weaknesses |
|---|---|
| Judges are independent of the executive and the legislature, and decisions are based on appropriate legal principles rather than political pressure. The Court can seek to uphold processes that promote representative government, even if they are contrary to the will of the parliament (e.g. where parliament is seeking to restrict who can vote). | Judges can only rule on the facts of the case brought before them. They cannot create general principles of law outside the immediate case, which limits the Court's ability to protect the principle of representative government more broadly if the case does not address issues relating to that principle. |
| The existence of the High Court allows individuals who have an interest in the case to bring the matter to court and have a law overturned. This reinforces that members of parliament are not above the law and the judges are able to overturn laws, including those that do not uphold the principle of representative government. | High Court judges cannot protect the principle of representative government unless a case is brought before them. Such cases are often complex and expensive for the ordinary person, and standing is required. Unless cases are brought, a law that does not uphold representative government may remain. |
| The judges of the High Court are experienced in making decisions and have available to them a wide range of legal resources, ensuring that decisions are appropriate. | The decision of the High Court may depend on the composition of the Court. Some justices are more conservative in their approach to the Constitution and may be reluctant to adopt a liberal approach to interpreting the Constitution. |
| Both the High Court and the principle of representative government are contained in the Constitution and therefore can only be abolished if there is a referendum. | The interpretation of the scope of the principle, such as the ability of people to vote in elections and the extent of the freedom of political communication, could be subject to further change if a future High Court interprets the Constitution differently. |

**Source 4** Strengths and weaknesses of the role of the High Court in protecting the principle of representative government and therefore acting as a check on parliament in law-making

## 11.4 Check your learning

### Remember and understand

1 a **Describe** the purpose of sections 7 and 24 of the Australian Constitution.

b In your own words, **explain** what the phrase 'directly chosen by the people' means.

### Examine and apply

2 Using the three-stage test that has been developed by the High Court to determine whether a law infringes the implied freedom of political communication, **provide** two circumstances where it may be considered reasonable for a law to restrict freedom of political communication.

### Reflect and evaluate

3 Read the scenario 'Clarifying which prisoners can vote'.

a **Outline** the key facts of the case.

b **Describe** the significance of the decision reached by the High Court in this case. In your answer, refer to sections 7 and 24 of the Australian Constitution.

c **Discuss** one limitation on the High Court in protecting the principle of representative government in this case.

# 11.5 The separation of powers

## Key knowledge



In this topic, you will learn about:

- the means by which the Australian Constitution acts as a check on parliament in law-making, including the separation of the legislative, executive and judicial powers.

The Australian Constitution establishes three separate types of powers in our parliamentary system. At a federal level, it requires all three powers to operate independently of each other. This is referred to as the **separation of powers**. The purpose of the separation of powers is to ensure that no one body has absolute power or control over the functions of the political and legal systems. It is one of the core principles of the rule of law.

**separation of powers** a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate

The three powers are:

- **executive power**
- **legislative power**
- **judicial power**.

The following information describes the separation of powers at a federal level. This is because the Australian Constitution specifically requires the powers at a federal level to be separated. However, the separation of powers also exists at a state level.

**executive power** the power to administer the laws and manage the business of government, which is vested in the Governor-General as the King's representative

**legislative power** the power to make laws, which resides with the parliament

**judicial power** the power given to courts and tribunals to enforce the law and settle disputes

## Executive power

Executive power is the power to administer the laws and manage the business of government. At a Commonwealth level, this power is vested in the Governor-General under Chapter II of the Australian Constitution. At a state level, this power is vested in the Governor as the King's representative. Specifically, section 61 of the Australian Constitution states that the executive power of the Commonwealth is vested in 'the Queen' (which is now taken to be the King), and exercisable by the Governor-General.

In practice, the executive power is carried out by the prime minister (or premier at a state level), senior ministers and government departments (explained further below).

**Extract**

### The Australian Constitution – section 61

#### Executive power

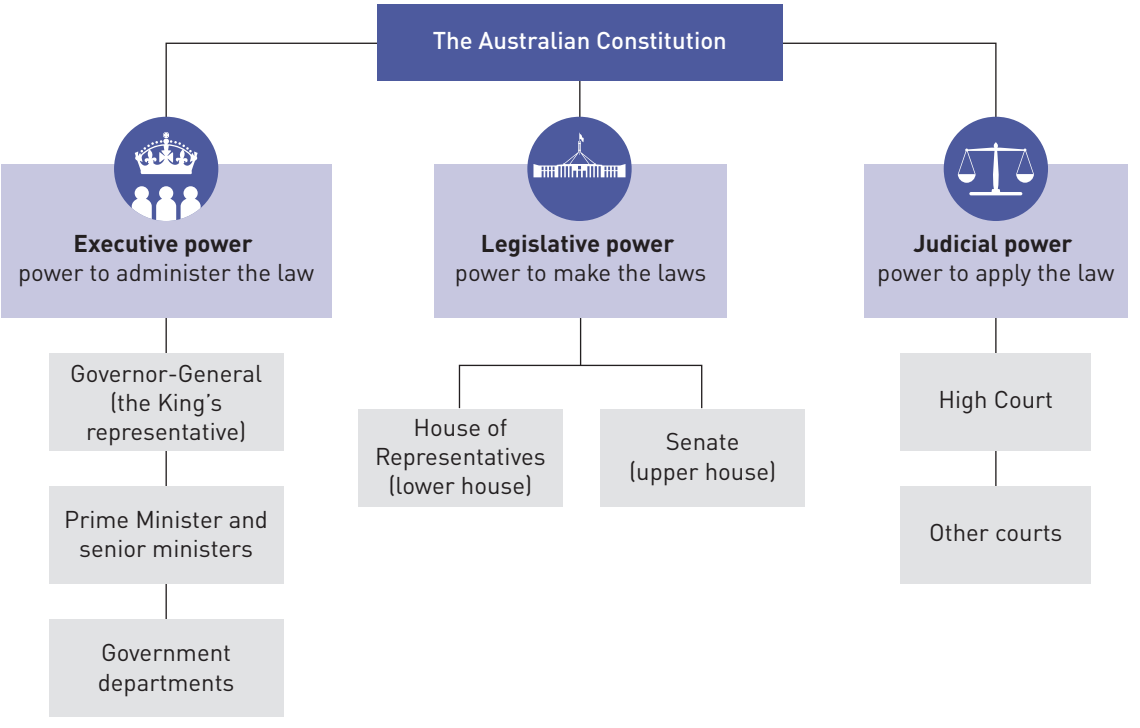
The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

***Did you know?***

The 'Queen' referred to in section 61 of the Constitution is not Queen Elizabeth II, but Queen Victoria, who was the reigning monarch in 1901. The word 'Queen' remains entrenched in the Constitution even though King Charles III is on the throne.

## Legislative power

Legislative power is the power to make laws. This power resides with the parliament under Chapter I of the Australian Constitution. Specifically, section 1 of the Australian Constitution states that the legislative power of the Commonwealth shall be vested in the federal parliament. At a state level, the legislative power is vested in each of the state parliaments.




**Source 1** The Australian Constitution requires the legislative, executive and judicial powers at a federal level to be separate, though in reality the legislative and executive powers are combined.

**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 introduced into parliament

In Australia, the legislative power and the executive power are combined. That is, in practice, the power to administer the law and carry out the business of government (the executive power) is placed in the hands of the **Cabinet** rather than the executive. The Cabinet consists of the prime minister and senior ministers (or the premier and ministers at a state level), whose main role is to decide on general government policy and formulate proposed laws to be introduced to parliament. The head of the executive, in practice, is the prime minister, not the monarch or the monarch's representative.

The executive power and the legislative power are also closely linked by the fact that laws passed by parliament must receive royal assent from the King's representative to become law. There are also many Acts of Parliament that give the Executive Council the right to make regulations, but parliament retains the right to disallow or reject these regulations.

# Judicial power

Judicial power is the power given to courts and tribunals to enforce the law and settle disputes. At a federal level, it is provided for under Chapter III of the Australian Constitution, and is vested in the High Court and other federal courts (as well as courts that are vested with federal jurisdiction). Section 71, in particular, states that the judicial power of the Commonwealth shall be vested in the courts.

## Extract

### The Australian Constitution – section 71

#### Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

The legislative power and the judicial power must be kept separate. Only a court or tribunal has the power to decide if a law (made by parliament) has been contravened. It is the role of the High Court to decide disputes on issues involving the Constitution although, as a secondary role, the courts have the power to make law (explored further in Chapter 12).

Although the state and federal governments appoint judges, the courts are independent of political influence. This safeguards citizens against misuse of political power or corruption in the resolution of disputes. The impartiality of judges is protected by the fact that federal judges, for example, are appointed until the age of 70 and cannot be removed unless there is proven bad conduct and parliament approves their removal. This includes judges appointed to the High Court.



**Source 2** Judicial power is the power given to courts to enforce the law and settle disputes.

***Did you know?***

In the United States federal judges are appointed, then confirmed in a Senate hearing. State judges are elected. This system has been criticised in Australia because it makes the role of the judge political, bringing them under pressure to please voters.

## Reasons for the separation of powers

The principle of separation of powers prevents power from being concentrated in one set of hands and helps to protect individual rights by providing checks and balances on the power of the parliament. No one body can make law, administer law and also rule on its legality.

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

**judiciary**
a legal term used to describe the courts (as well as judicial officers such as judges), which have the power to apply and interpret the law

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

The importance of the separation of powers between the government and the judiciary is explored in the scenario below.

**Actual scenario**

### Ministers apologise for comments made

In June 2017 three federal ministers who were serving in the government at the time were forced to apologise for comments they made about sentencing in the Supreme Court of Victoria in the cases of *Besim* and '*M H K*'. The comments were seen by some people as threatening the separation of powers.

The ministers were commenting on the sentence given by the court to offenders in a terrorist-related trial. At trial each offender pleaded guilty to certain terrorist offences and was sentenced to a term of imprisonment. However, the Commonwealth Director of Public Prosecutions appealed both sentences, arguing they were too lenient.

The Victorian Court of Appeal heard the appeals on 9 June 2017. They were conducted in the standard way, which included the judges, in the ordinary course of the hearing, asking the lawyers questions. Once the hearings were concluded, the Court reserved its judgment (that is, the decision on the appeal was to be handed down on a later date).

On 13 June *The Australian* newspaper published an article about one of the cases, titled 'Victorian judiciary "light on terrorism"'. The article stated that senior ministers had claimed the Victorian judiciary was 'advocating lighter sentences for terrorists'. Health Minister Greg Hunt had 'blasted' the Victorian court system for 'becoming a forum for "ideological experiments"'. Human Services Minister Alan Tudge and Assistant Treasurer Michael Sukkar were also said to have made statements, including that the judiciary should focus more on safety and victims, and that judges seemed more concerned about the welfare of the terrorists. The article was published after the appeal hearings, but before judgment was handed down.

The Court of Appeal released a statement on 16 June 2017 about the cases and the article. As part of the statement, it said:

> Given that the court's decisions in both cases were pending, the court is concerned that the attributed statements were impermissible at law and improperly made in an attempt to influence the court in its decision or decisions. Further, the court is concerned that some of the statements purported to scandalise the court. That is by being calculated to improperly undermine public confidence in the administration of justice in this state in respect of the disposition of the appeals that the court has presently under consideration.

It also said the statements on their face had failed to respect the separation of powers, and reflected a

lack of proper understanding of the importance of the independence of the judiciary from government.

The Court's Judicial Registrar wrote to the three ministers and the publisher, editor and journalist about the article, asking them to appear before the Court to explain why they should not be referred to the DPP for contempt of court.

The three ministers ultimately made an unconditional apology to the Supreme Court, stating that they were wrong to have made the statements. They apologised after they had watched the hearing and reviewed the transcripts. Fiona McLeod SC, then president of the Law Council of Australia, said that the apology showed 'respect for the separation of powers and the rule of law'.

On 23 June 2017, the Court of Appeal handed down its decisions in the two cases. The appeal was allowed in both cases, and the prison sentences for both offenders were increased.

*DPP (Cth) v Besim* [2017] VSCA 158 (23 June 2017) and *DPP (Cth) v M H K (a Pseudonym)* [2017] VSCA 157 (23 June 2017)

# Strengths and weaknesses

Source 3 below sets out the strengths and weakness in the way the separation of powers acts as a check on parliament in law-making.

| Strengths | Weaknesses |
|---|---|
| While parliament is the supreme law-makng body, the judiciary (courts) have the power to invalidate, strike down or declare void a statute that has been passed by parliament beyond its law-making power. | In reality, the legislative power and the executive power are combined. This can decrease the ability of the separation of powers to act as an ongoing check. The power to administer the law through government departments is carried out by ministers (members of Cabinet), who are drawn from the executive. |
| The judiciary is independent of the legislature and executive. This independence is vital, especially when the Commonwealth is a party in a case before the Court. It also ensures decision about the application of law can be made without the fear of electoral backlash as judges are not aligned with political parties. | Judges are appointed by the executive. This may result in the perception that the executive seeks to influence judicial benches. The government can choose which judges they want to serve on the Court and some people believe that these choices are influenced by their progressive or conservative views. |
| Despite the overlap between the executive and legislative branches of government, there are still some measures in place to ensure the executive is independent from the legislature. For example, certain government employees at a Commonwealth level cannot be members of parliament, thus avoiding executive influence and power over parliament in law-making. | The ability of the judiciary to act as a check on parliament is dependent on people's willingness to challenge laws. That is, the courts can only act as a check on parliament when there is a case before them, and that requires someone willing and able to initiate such a case. |
| The separation of powers is specifically provided for in the Australian Constitution, therefore cannot be abolished without a referendum. | The separation of powers in the Australian Constitution does not extend to states, although the states separately provide for separation of powers in state constitutions or statutes. |

**Source 3** The strengths and weaknesses of the separation of powers acting as a check on parliament in law-making

***Did you know?***

In 2017 the Judicial Commission of Victoria was established as an independent body to hear complaints about the conduct of judicial officers and VCAT members. The Commission can hear complaints from the public or members of the legal profession regarding delays in judgments and courtroom demeanour. The most serious complaints may be referred to a special panel with coercive powers.

# 11.5 Check your learning

## Remember and understand

1 **Identify** the three types of powers set out in the Australian Constitution, and briefly describe each of them.

2 **Describe** two reasons for the separation of powers in the Australian parliamentary system.

3 **Explain** how the legislative and the executive powers overlap.

## Examine and apply

4 Read the scenario 'Ministers apologise for comments made'.

- **a** **Outline** the key facts of the case.
- **b** **Why** did the Court of Appeal ask the relevant ministers to appear in Court?
- **c** **Why** did the ministers apologise?
- **d** Do you think the ministers should have made the comments in relation to these cases? Give reasons.

## Reflect and evaluate

5 **Discuss** the extent to which the overlap between the executive and the legislative powers of government decreases the ability of the separation of powers to act as a check on parliament in law-making.

6 Should the executive appoint judges to the High Court?

- **a** Write a brief statement expressing your view.
- **b** Discuss as a class.



**Source 4** The High Court is critical in ensuring the separation of powers.

# 11.6 The express protection of rights

## Key knowledge

**In this topic, you will learn about:**

- **the means by which the Australian Constitution acts as a check on parliament in law-making, including the express protection of rights.**

**express rights**
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

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

An **express right** (also known as an explicit right or an entrenched right) is a right that is specifically listed in a document or constitution.

The Australian Constitution contains five express rights. These express rights are entrenched in the Constitution, meaning that they can only be removed from the Constitution by amending it using the referendum procedure established by section 128. Express rights operate as an explicit check on the power of parliaments. Any law made by parliament that infringes an express right can be declared invalid by the High Court. By comparison, rights that exist at **common law** and rights created by legislation can be abolished at any time by the Commonwealth Parliament legislating to override them.

The five express rights in the Australian Constitution are:

- the right to freedom of religion by preventing the Commonwealth from making laws establishing a religion, imposing any form of religious ceremony or worship and prohibiting the exercise of any religion (section 116)
- the right to free interstate trade and commerce (section 92)
- the right to receive 'just terms' when property is acquired by the Commonwealth (section 51(xxxi))
- the right to trial by jury for indictable Commonwealth offences (section 80)
- the right not to be discriminated against on the basis of the state where you reside (section 117).

These rights tend to be expressed as limitations on the Commonwealth Parliament in law-making, rather than as positive rights for individuals.

***Study tip***

The focus on this key knowledge is how the express protection of rights acts as a check on parliament in law-making. Your notes and answers should therefore be about checks on parliament, not on the scope of the right itself.

## Religion

Section 116 of the Australian Constitution states that the Commonwealth Parliament cannot make a law which:

- establishes a state religion (that is, declares a particular religion as the official national religion)
- imposes any religious observance
- prohibits the free exercise of any religion (that is, prevents people from practising their religion) – although this can be limited because of national security or to ensure that people follow the laws of the country, as established in *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth*
- requires a religious test as a requirement for holding any Commonwealth office.

**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 restricts the powers of the Commonwealth Parliament but it does not apply to the states.

The High Court has interpreted 'religion' widely. Chief Justice Latham of the High Court held in *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* that section 116 also protects non-believers by providing for the right of a person 'to have no religion'. However, the High Court has interpreted other parts of section 116 narrowly. As shown in the following scenario, the Commonwealth Government was able to provide funding to religious schools.

**Actual scenario**

## Challenging chaplaincy funding

In this case Ronald Williams challenged the Commonwealth Government's power to fund a chaplaincy service that was running in his children's government primary school in Queensland. The Commonwealth Government had entered into a funding agreement with Scripture Union Queensland to provide chaplaincy services such as 'general religious and personal advice to those seeking it, [and] comfort and support to students and staff, such as during times of grief'. The chaplain was not to seek to 'impose any religious beliefs or persuade an individual toward a particular set of religious beliefs'.

Williams argued that the funding agreement was invalid because it was beyond the executive power of the Commonwealth under section 61 of the Constitution and/or prohibited by section 116 of the Constitution. Section 116 states that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. Williams argued that the school chaplain is an 'office ... under the Commonwealth' and, further, that there is a religious test to hold such an office.



**Source 1** Ronald Williams, who challenged the Federal Government's power to spend taxpayers' money on the national school chaplaincy program

The High Court unanimously dismissed the challenge under section 116 relating to a 'religious test' because the chaplains were not employees of the Commonwealth. The High Court did, however, find that in the absence of statutory authority, section 61 did not empower the Commonwealth to enter into the funding agreement to make the payments for the school chaplaincy program. In other words, because there was no Act giving authority for the funding agreement, the agreement was invalid. The executive power of the Commonwealth did not extend to making such arrangements without authorising legislation.

Immediately following the High Court's decision, the parliament passed legislation (the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth)) to allow the chaplaincy program and other similar programs to be funded by the Commonwealth. Williams challenged the constitutional validity of this Act and the funding arrangements. The High Court found in favour of Williams, declaring that the legislation was invalid in relation to the school chaplaincy program because it was not made pursuant to a Commonwealth law-making power.

*Williams v Commonwealth* (2012) 248 CLR 156

# Trade within the Commonwealth

Under section 92 of the Constitution, interstate trade and commerce must be free (whether it be by means of road or sea). This right prevents parliament from treating interstate trade differently from trade within a state. It provides freedom of movement between states, without burden or hindrance. For example, it restricts taxes on goods moving from one state to another from being imposed.

Extract

## The Australian Constitution – section 92

### Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

This right mainly refers to trade and commerce, but it can also refer to movement of people between states.

The scope of section 92 was limited by *Cole v Whitfield* (1988) 165 CLR 360. This case related to the importation of undersized crayfish from South Australia to Tasmania. In this case the High Court decided that although the states are restricted from making laws that interfere with free trade within the Commonwealth, some restrictions are acceptable as long as they do not impose a burden on interstate trade, or discriminate against interstate trade.

The operation of section 92 was considered in the scenario below.

Actual scenario

## Challenging anti-gambling, anti-competitive laws

In this case a challenge was made to legislation passed by the Western Australian Parliament to prohibit certain types of betting.

The company involved in this case, Betfair, is incorporated in Tasmania and operates a national agency.

Amendments to the *Betting Control Act 1954* (WA) prevented Betfair from participating in a segment of the wagering market that was largely controlled by Western Australian bookmakers and gambling agencies. The Western Australian Government argued that the type of gambling offered by Betfair, where a punter could place bets on a horse to lose a race, was not appropriate. Betfair challenged the validity of the legislation in the High Court, arguing that it was inconsistent with section 92 of the Australian Constitution, which provides that trade and commerce between the states must be free.

In a unanimous decision, the High Court found that the Western Australian legislation was discriminatory against a company that was incorporated outside of that state, so was therefore invalid.

*Betfair Pty Limited v Western Australia* (2008) 234 CLR 418

# Acquisition of property on just terms

Under section 51(xxxi) of the Australian Constitution, the Commonwealth must provide just terms when acquiring property (that is, the Commonwealth must pay fair and reasonable compensation for property that is compulsorily acquired). The High Court has held that property includes both tangible and intangible property, and real (immovable property such as land) and personal (movable property such as goods) property. The Commonwealth is only able to acquire property for a purpose or area for which it has the power to make laws; for example, airports and national parks.

***Did you know?***

The Australian movie *The Castle* focused on whether the acquisition of the Kerrigans' treasured family home was on 'just terms'.

## Extract

### The Australian Constitution – section 51(xxxi)

#### Acquisition of property on just terms

The Parliament shall ... have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ...

This section applies only to the Commonwealth Parliament and not the states. However, the High Court has found that section 51(xxxi) can apply to state legislation that is passed under a Commonwealth funding agreement.

The constitutional validity of the *Tobacco Plain Packaging Act 2011* (Cth) was challenged in the legal case of *JT International SA v Commonwealth* which involved a consideration of section 51(xxxi).

## Actual scenario

### Plain packaging for tobacco products

This case involved a challenge to the constitutional validity of the *Tobacco Plain Packaging Act*, which imposed a requirement for plain packaging tobacco laws. The Act restricts the colour, shape and finish of retail packaging for tobacco products, requires that distinguishing marks be removed from packaging, and allows a brand or business name to be included only in a limited way. The plaintiffs, a group of tobacco companies, argued that under the Act the Commonwealth had acquired their intellectual property rights (such as trademarks and copyright images) and this was not on just terms.




**Source 2** Plain packaging of tobacco boxes was the subject of a High Court case relating to the acquisition of property on just terms.

The High Court held that there was no acquisition of property by the Commonwealth. The Court recognised that the Act regulated the plaintiff's intellectual property rights and restricted the plaintiff's enjoyment of their rights, but it did not give a proprietary benefit or interest to the Commonwealth or any other person. The High Court distinguished between **taking rights** and **acquiring rights**. The Court stated that to engage section 51(xxxi) of the Australian Constitution an acquisition must involve somebody gaining a proprietary benefit or interest. Thus, the Act was found to be valid as it did not acquire property.

*JT International SA v Commonwealth* (2012) 250 CLR 1

# Jury trial

Under section 80 of the Australian Constitution, there must be a jury trial for indictable Commonwealth offences under the criminal law. The High Court has found that a decision of a jury in such a trial must be unanimous. However, section 80 provides only a limited right to trial by jury for two reasons:

- most indictable offences are crimes under state law, and this section only applies to Commonwealth offences
- the High Court has ruled that indictable means 'crimes tried on indictment'. Therefore, the operation of section 80 only extends to those most serious offences. The Commonwealth Parliament decides whether a crime is tried 'on indictment' or not.

## Extract

### The Australian Constitution – section 80

#### Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

An example of the High Court interpreting section 80 is outlined in the scenario below.

## Actual scenario

### Interpreting section 80 in the twenty-first century

In 2016, in *Alqudsi v The Queen*, the High Court considered section 80 in relation to a trial for terrorism recruitment offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). This legislation makes it an offence for a person to give money, goods or services for the purpose of supporting or promoting an attack in a foreign country.

An application was made by one of the accused to be tried by a judge alone pursuant to the *Criminal Procedure Act 1986* (NSW). The prosecution also supported the use of trial by judge alone.

Years earlier, in the 1986 case of *Brown v The Queen*, a similar question arose as to whether an accused person charged with a Commonwealth indictable offence could elect a trial by judge alone. The prosecution did not support this request. In that case, the High Court's decision was clear: a jury trial




**Source 3** In 2016, Sydney man Hamdi Alqudsi was sentenced to eight years' jail for assisting young Australians to travel to Syria to assist terrorist groups. Charged under Commonwealth law, he was unsuccessful in his High Court challenge for a trial by judge alone, rather than a jury as required by section 80 of the Constitution.

could not be avoided in an indictable offence trial under the Commonwealth law.

In legal argument in the *Alqudsi* case, the Commonwealth Attorney-General stated that the express right under section 80 should be interpreted in light of its late-nineteenth century historical context and other developments since Federation. All state Attorneys-General, except South Australia's, supported the applicant's request for trial by judge alone. In a 6–1 decision, however, the High Court rejected the applicant's arguments. They stressed the importance of the role of trial by jury and found that contemporary trial judges have the capacity to address any concerns posed by pre-trial publicity in a case such as those involving terror-related offences. In his judgment, Justice Gageler noted that there was no flexibility in the application of section 80 once the Commonwealth Parliament decides that an offence is against a law of the Commonwealth:

> It is for the Commonwealth Parliament to determine whether an offence against a law of the Commonwealth is to be tried on indictment. Once that choice is made, s 80 is engaged and imposes limitations on the exercise of the legislative and judicial power of the Commonwealth. Those limitations cannot be avoided by granting to the States the flexibility of enacting provisions which permit trial by judge alone in certain circumstances.

The dissenting (minority) judge in this case was Chief Justice French AC. In delivering the dissenting judgment, His Honour stated:

> In my opinion the decision in *Brown* should be reopened. For the reasons which I have given, that does not involve any suggestion that the formal ruling in Brown was wrong. However, the principle which underpinned that ruling was too broad, imposing an unwarranted rigidity upon the construction of s 80. On that basis the decision should not be followed.

*Alqudsi v The Queen* (2016) 258 CLR 203

# Discrimination on the basis of state residence

***Study tip***

You should be careful not to write that section 80 provides a 'right to trial by jury'. It is only for Commonwealth indictable offences tried on indictment, and not for state indictable offences.

Under section 117 of the Constitution, it is unlawful for state and Commonwealth governments to discriminate against someone on the basis of the state in which that person resides. This means, for example, that a resident of New South Wales living in Victoria cannot be subject to a Victorian law that would place them in a worse position than if they were born in Victoria. However, the High Court has said that states can favour their own residents in limited circumstances, such as the right for only residents of a state to vote in elections for that state.

## Extract

### The Constitution – section 117

#### Rights of residents in States

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

An example of the High Court interpreting section 117 is provided in the scenario below.

**Actual scenario**

## Challenge to Queensland barrister rules successful

In this case, Alexander Street challenged the Bar Admission Rules in Queensland, which at that time required that applicants for admission to the bar (to become a barrister) must have resided in Queensland for at least 12 months and ceased practising law elsewhere. Mr Street was a resident of New South Wales and was also admitted to practise as a barrister in Victoria, South Australia and the Australian Capital Territory. Mr Street had been refused admission as a barrister of the Supreme Court of Queensland based on his failure to comply with the Bar rules. Mr Street intended to remain a resident of New South Wales and he did not intend to cease practising law in other places of Australia where he had been admitted.

In argument before the High Court, Mr Street claimed he was unable to comply with the rules in Queensland without foregoing his place of residence in Sydney and his practice as a barrister in New South Wales. On this basis, he contended that the Bar rules in Queensland were in contravention of both sections 92 and 117 of the Australian Constitution.

The High Court agreed with Mr Street's arguments and declared that the Queensland Bar rules requiring an intention to be a resident of Queensland were invalid. After Mr Street had commenced his proceedings, the rules were amended to provide that an applicant must declare that he or she intended to practise principally in Queensland after admission. This change would not have prevented Mr Street from living in New South Wales and appearing as a barrister in other states.

*Street v Queensland Bar Association* (1989) 168 CLR 461



**Source 4** The Queensland Bar Association was established in 1903 as the professional body representing the interests of barristers practising in Queensland.

# Strengths and weaknesses

Source 5 sets out the strengths and weakness in the means by which express rights act as a check on parliament in law-making.

| Strengths | Weaknesses |
|---|---|
| Express rights impose limits on parliament when making law in certain areas. For example, section 116 prohibits the Commonwealth Parliament from making a law that restricts the free exercise of any religion. This protects the public against the parliament being able to make any laws it wants to. | The rights that are protected are limited in scope. For example, some express rights only apply to the Commonwealth and not the state parliaments, and some rights are narrow, such as the right to trial by jury. This limits the restrictions that are imposed on the Commonwealth Parliament. |

| Strengths | Weaknesses |
|---|---|
| Express rights are entrenched and cannot be removed or amended without a successful referendum. Referendums are difficult to pass (see Chapter 14), so this means that the express rights will continue to act as a check on parliament without any risk of being removed. | Given referendums are so difficult to pass, the express rights in the Constitution have not increased in number or been amended since Federation. This reduces the checks on government because there is unlikely to be any additional rights added to act as a check on parliament in the future. |
| When a matter is brought before it, the High Court can act swiftly in declaring a law to be beyond parliament's power (*ultra vires*) and thus invalid. | For the High Court to hear a challenge against actions of parliament regarding express rights, a case must be brought to court. The court is reactive. Litigation is an expensive and time-consuming process and the person bringing the matter to Court must have standing in the case. |
| The High Court is independent and will make decisions protecting the express rights even if they are contrary to the views or preferences of governments. | The express protection of rights does not prevent the Commonwealth Parliament from passing the law. It will require the law to be challenged in court for the law to be declared invalid. |

**Source 5** The strengths and weaknesses of the separation of powers acting as a check on parliament in law-making

## 11.6 Check your learning

### Remember and understand

1 **Define** the term 'express rights'.

2 **Outline** three express rights that exist under the Australian Constitution. For each, **identify** a particular law that the Commonwealth Parliament could not create.

### Examine and apply

3 For each of the following cases, **state**:
- how the case highlights the role of express rights in providing a check on the exercise of authority by the legislature
- the outcome of the case, if available
- the significance of the case.

**a** *Alqudsi v The Queen*

**b** *Street v Queensland Bar Association*

**c** *Betfair Pty Limited v Western Australia*

4 Read the scenario 'Plain packaging for tobacco products'.

**a** **Outline** the section of the Constitution that relates to this case.

**b** **What** was the property that was the subject of the case?

**c** **Explain** why no property was deemed to be 'acquired' in this case.

**d** In what way did this case involve a check on the authority of the Commonwealth?

### Reflect and evaluate

5 'Express rights contained in the Constitution are few, as well as being limited in scope. They do not act as an effective check on parliament in ensuring our freedoms are protected.' **Discuss** the extent to which you agree with this statement.

6 'The checks on parliament do not work without the High Court.' **Discuss** this statement.

Chapter

# 11

# Review

## Top exam tips from Chapter 11

1 The Study Design requires you to know three factors that affect the ability of parliament to make law. These factors can either enhance or limit the effectiveness of parliament, so you should not limit yourself to the 'negative' elements of each factor.

2 By now, you should be starting to see some themes within each of the key knowledge dot points. For example, the 'representative nature' of parliament features as both a factor that can affect the ability of parliament to make law, and as part of one of the checks on parliament in law-making. The more you can start to see those connections and consider how a question could combine the two key knowledge areas, the better your understanding of the course will be.

3 You do not need to know each of the cases or even each of the express rights or section numbers contained in this chapter, but you should have knowledge of at least two express rights, as the Study Design uses the plural 'rights'.

## 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 (including the exam) 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 Explain how international pressures can discourage parliament from making laws.

(3 marks)

**Difficulty: medium**

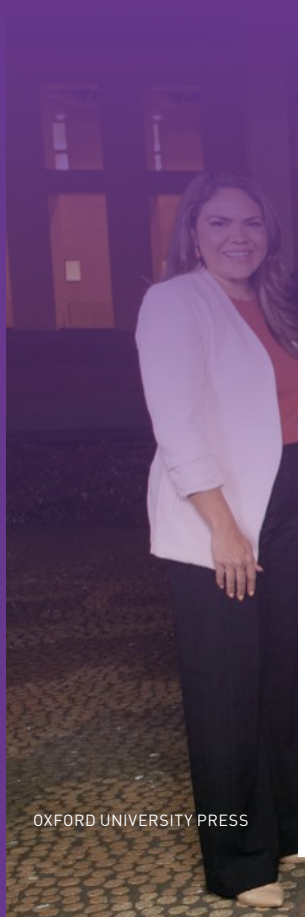
2 Describe **two** reasons why the Commonwealth Parliament may not act in accordance with the views of the majority.

(4 marks)

**Difficulty: high**

3 Evaluate **two** means by which the Australian Constitution acts as a check on parliament in law-making.

(8 marks)



# Practice assessment task

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

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

## High Court challenge over duck hunting

In the 1997 High Court case of *Levy v State of Victoria*, Levy challenged the constitutional validity of a Victorian regulation in relation to duck hunting. The regulation prohibited people who did not have a valid licence from entering into certain duck shooting areas during certain hours at the opening of the duck shooting season. Levy did not have a valid licence and was charged under the regulations. Levy claimed he had entered the hunting area to gather evidence of the cruelty of duck hunting and then draw attention to the issue so that people could make informed judgments about issues around duck shooting.

The High Court analysed the principles in the *Lange case* and the principle of representative government. While the Court accepted that the law prevented political protests, it also found that the law was reasonably appropriate to protect the safety of persons in hunting areas. Levy's claim was dismissed.

In 2023, the Victorian government shortened the duck hunting season, which angered shooters, while animal rights activists called for complete bans on hunting as of 2024. There was also a bag limit of four birds per day and hunting of endangered birds such as the blue-winged shoveler and hardhead ducks was banned. The government also established an upper house committee to examine the future of native bird hunting.

*Levy v Victoria* (1997) 189 CLR 579

# Practice assessment task questions

**1** Describe the relationship between international pressures and law-making in parliament.

(3 marks)

**2** Explain how the judiciary can act as a check on parliament in law-making.

(4 marks)

**3** Discuss the following statement.

'If legislation were introduced in the Victorian Parliament to ban duck hunting, the bicameral structure of parliament would ensure the views and values of the people are represented in that law-making process.'

(6 marks)

**4** Evaluate the ability of the High Court to protect the principle of representative government. In your answer, refer to sections 7 and 24 of the Constitution.

(7 marks)

Total: 20 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 |
|---|---|---|---|
| • Factors that affect the ability of parliament to make law, including the bicameral structure of parliament. | ☐ | ☐ | Go back to Topic 11.1. |
| • Factors that affect the ability of parliament to make law, including international pressures. | ☐ | ☐ | Go back to Topic 11.2. |
| • Factors that affect the ability of parliament to make law, including the representative nature of parliament. | ☐ | ☐ | Go back to Topic 11.3. |
| • The means by which the Australian Constitution acts as a check on parliament in law-making, including the role of the High Court in protecting the principle of representative government. | ☐ | ☐ | Go back to Topic 11.4. |
| • The means by which the Australian Constitution acts as a check on parliament in law-making, including the separation of the legislative, executive and judicial powers. | ☐ | ☐ | Go back to Topic 11.5. |
| • The means by which the Australian Constitution acts as a check on parliament in law-making, including the express protection of rights. | ☐ | ☐ | Go back to Topic 11.6. |

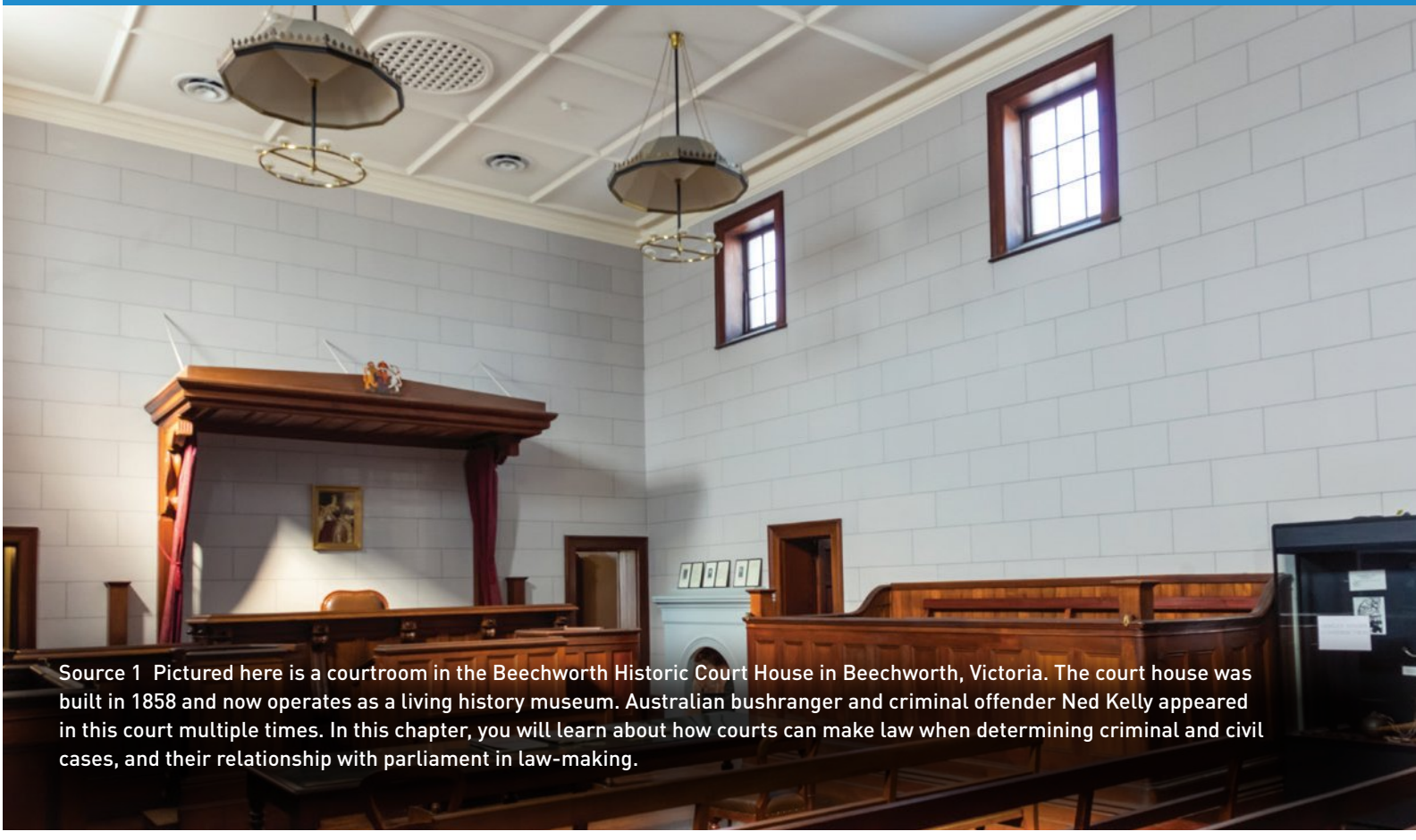
**Check your obook pro for these additional resources and more:** pro

- **Chapter 11** Chapter review quiz
- **Revision notes** Chapter 11
- **Chapter summary** Chapter 11
- **Quizlet** Revise key legal terms from this chapter

Chapter

# 12

# The courts



Source 1 Pictured here is a courtroom in the Beechworth Historic Court House in Beechworth, Victoria. The court house was built in 1858 and now operates as a living history museum. Australian bushranger and criminal offender Ned Kelly appeared in this court multiple times. In this chapter, you will learn about how courts can make law when determining criminal and civil cases, and their relationship with parliament in law-making.

## Outcome

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10, 11 and 12) you should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making.

## Key knowledge

In this chapter, you will learn about:

- the reasons for, and effects of, statutory interpretation
- features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing and disapproving of precedent
- factors that affect the ability of courts to make law, including:
  - the doctrine of precedent
  - judicial conservatism and judicial activism
  - costs and time in bringing a case to court
  - the requirement for standing
- features of the relationship between courts and parliament in law-making, including:
  - the supremacy of parliament
  - the ability of courts to influence parliament
  - the codification of common law
  - the abrogation of common law.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- analyse the relationship between parliament and courts
- discuss the ability of the courts to make law
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

## Key legal terms

**abrogate (abrogation)** to abolish or cancel or court-made law (for example, the cancellation of common law by passing an Act of Parliament)

**binding precedent** the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

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

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

**doctrine of precedent** the 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

**judicial activism** an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

**judicial conservatism** an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by their own political beliefs or the views of the community)

**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

**standing** the requirement that a party must be directly affected by the issues or matters involved in a case for the court to be able to hear and determine it

**statutory interpretation** the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve the case before them

## Key legal cases

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

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 the courts 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 the courts

The Australian legal system consists of laws, procedures and bodies (or institutions) that make and enforce the laws. The two main bodies that make law are parliament and the courts. Law made by the parliament is called statute law (or legislation) and law made by judges or the courts is called **common law** (or case 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)

The main role of parliament (also referred to as the legislature) is to make and change the law on behalf of the people. Parliament is known as the supreme law-making body, which means it can make and change any law within its constitutional power.

By contrast, the main role of the courts (also referred to as the judiciary) is to resolve criminal and civil cases. It does this by applying and interpreting existing statute law (made by the parliament) and previously established legal principles (established by judges) to then decide the case. In deciding these cases, judges in superior courts (the Supreme Court and the High Court) can also make *new* law. In simple terms, judges in superior courts can make law in two ways:

- by interpreting the meaning of words and phrases in an existing statute so its meaning is clarified, and the statute can be applied to resolve the dispute before the court; this process is called **statutory interpretation**
- by establishing a new principle of law when resolving a dispute in which there is no existing applicable law; that is, no existing statute law (legislation) or principle of law that can be applied to resolve the case before the court

In this way, the courts have a complementary, but more limited, role in law-making.

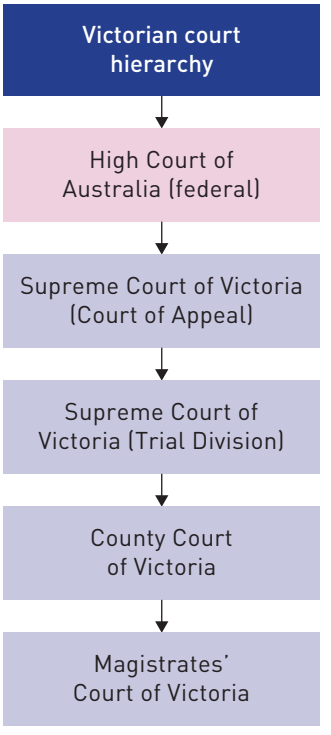
**statutory interpretation**
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve the case before them

## The Australian court system

As you learnt in Chapter 4, the Australian legal system includes a range of different courts; some are federal courts and some are state and territory courts. The Victorian court hierarchy is shown in Source 1.

The High Court of Australia is the highest judicial law-making authority in Australia. While it is a federal court, it has the authority to hear matters on appeal from each of the state and territory Courts of Appeal, where leave (permission) has been granted. The High Court also has the authority to hear and determine disputes arising under the Australian Constitution. For example, if an individual, organisation or state or territory government believes the Commonwealth Parliament has made a law beyond or outside its power, it can challenge the legislative authority of the Commonwealth Parliament by taking the case to the High Court. If the High Court declares the Commonwealth has made a law ***ultra vires*** (or beyond its constitutional power) it can declare the law invalid or void. While other courts also have the ability to hear and determine disputes involving the Australian Constitution (including the Federal Court and the Supreme Court of Victoria), most constitutional disputes, particularly the more significant ones, are determined by the High Court.

***ultra vires***
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament




**Source 1** The Victorian court hierarchy, including the High Court (which is a federal court)

In accordance with the principles of the **separation of powers** and the rule of law, all courts in Australia are independent from the parliament and the government. This means judges can decide cases and establish legal principles without pressure or influence from the parliament or government of the day. Being appointed by government and not elected by the people, judges are also able to make independent and impartial decisions without being subject to political pressure from voters, influential individuals, groups and organisations, and the media.

In this chapter, you will learn how courts can make laws by establishing legal principles and interpreting statutes when resolving disputes. You will also examine the factors that affect the ability of courts to make law and the relationship between parliament and courts in law-making.

**separation of powers** a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate



**Source 2** Inside one of the courtrooms in the High Court of Australia – Australia's highest court, which has the power to hear appeals from all state supreme courts, as well as the power to resolve constitutional matters

## 12.1 Check your learning

### Remember and understand

1 **Distinguish** between statute law and common law.
2 **Define** the terms 'legislature' and 'judiciary'.

### Examine and apply

3 **Suggest** two benefits associated with judges making law, compared with parliament making law.
4 Using your knowledge from Chapter 10, **outline** three types of issues that could be dealt with by the state and territory courts and three types of issues that could be dealt with by a federal court.

### Reflect and evaluate

5 **Discuss** which body has the 'final say' on laws: the Commonwealth Parliament or the High Court of Australia.

# 12.2 Statutory interpretation

### Key knowledge

In this topic, you will learn about:

- the reasons for, and effects of, statutory interpretation.

*Study tip*

The *VCE Legal Studies Study Design* requires you to know reasons for, and effects of, statutory interpretation. Make sure you know at least two reasons and at least two effects.

As part of their role of applying existing law to resolve disputes and hear cases, courts or judges can also make law. In particular, judges can make law when required to interpret the meaning of a statute (known as an Act of Parliament or legislation) to resolve a case – a process referred to as statutory interpretation. Judges can also make law by establishing principles of law or **precedents** that are used as guidance or followed by judges when deciding future cases. Making law in this way, commonly referred to as making law thorough the **doctrine of precedent**, is examined in Topic 12.3.

**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 be either binding or persuasive

**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

## Introduction to statutory interpretation

Judges can make law when interpreting the meaning of a statute to resolve a case. This occurs when there is a dispute over the meaning of the words and phrases contained in an Act of Parliament and the case is brought before the courts to be resolved. For example, in a criminal case involving an allegation that an offence occurred in a 'public place', the court may be required to interpret the words 'public place' to determine whether the offence did in fact occur in public.

By giving meaning to the unclear words and phrases, judges clarify what the statute means so it can be applied to resolve the dispute before them. When doing so, judges can broaden or narrow its meaning. However, the judge's interpretation of a statute provides only a statement about the meaning and application of the statute. It does not change the *actual* words or phrases in the statute itself.

Depending on the superiority of the court, the legal reasoning behind the judge's interpretation may set a legal principle (or precedent) that can be followed in future similar cases (that is, when other judges are interpreting the meaning of those words or phrases in the same Act of Parliament). The newly established precedent becomes a part of the law and will be read along with the statute in future cases.

## Reasons for statutory interpretation

There are many reasons why courts are required to interpret legislation. These reasons can be divided into two broad categories:

- to resolve problems that occur during the drafting process
- to resolve problems that occur when a court is applying the Act of Parliament to resolve a case.

### Resolving problems that occur during the drafting process

**parliamentary counsel**
lawyers who are responsible for drafting bills in accordance with the policies and instructions of a member of parliament

Drafting bills can be a complex task. **Parliamentary counsel** must gain information from a range documents and work with government agencies and departments to clarify policy proposals and draft effective legislation. The complexities involved in drafting legislation mean that inevitably some terms and phrases used will be unclear and in need of interpretation before they can be applied to resolve the case before the courts.

The reasons why a statute may need to be interpreted because of problems that may occur during the drafting process are set out on the following page.

- **The bill might not have taken future circumstances into account**. For example, in the 2021 case of *Australian Federal Police v Luppino*, a dispute arose about whether a police officer could access a person's mobile phone. The relevant statute in this case allowed police to access data held in, or accessible from, a *computer* or *data storage device*. There was a dispute about whether the mobile phone was a 'computer' or 'data storage device'. When the statute was introduced in 2001, mobile phones had very few computer abilities and it is possible the drafters did not consider the possibility of a mobile phone being able to act as a computer or data storage device.
- **The intention of the bill might not have been clearly expressed**. Sometimes a policy or instructions regarding the purpose of a proposed law may not be clearly expressed. This can lead to confusion about how it should be interpreted.




**Source 1** Judges are often required to interpret the meaning of words and phrases in Acts of Parliament so they can be applied to resolve the dispute before court.

- **Mistakes in the drafting of a bill**. Mistakes may be made when drafting a bill, which may be minor or more technical in nature. Words may have been missed in the text, a heading may not have been properly included, or there may be an issue with punctuation (a High Court case once had to consider the inclusion of a comma in a clause to then determine what the clause meant to say). As another example, gender-specific words or pronouns may have been used (such as 'his or her') when gender-neutral words or pronouns should have been used.

The hypothetical scenario below provides an example of why the drafting process of a bill is a complex task and why issues may later arise in a case about what the statute means.

***Did you know?***

In one California case, a Court held that bees are fish – at least for the purposes of some legislation about endangered species.

Hypothetical scenario

## What does 'supply' mean?

Imagine a parliamentary counsel has been instructed by the government to draft a proposed law banning one individual from 'supplying illegal drugs to another'. The everyday meaning of the word 'supply' is relatively clear. It means to hand over or deliver an item or service and suggests the item or service that is wanted by, or meets the needs of, another person. But upon further examination, and when applied to different circumstances, the meaning of the word 'supply' may not be so clear.

For example, if Ethan leaves illegal drugs in his friend Petrea's car, and Petrea returns the drugs, is Petrea 'supplying' drugs and therefore committing a crime according to the proposed legislation? Can returning the drugs to Ethan be regarded as Petrea 'supplying' drugs? Similarly, could Max, a courier who is employed by Ethan, to deliver drugs to Petrea be charged with 'supplying' drugs, or would Ethan be the 'supplier'? If Ethan places the drugs in a bank deposit box for safekeeping does this mean that the bank has been 'supplied' with drugs?

## Resolving problems that occur during the application of statutes

Problems that could occur when a court is applying a statute to a particular court case are described below.

- **Most legislation is drafted in general terms**. This is so it can cover a wide range of circumstances. However sometimes the terms used are so broad that they need to be interpreted before they can be applied to specific circumstances. For example, in the case of *Deing v Tarola* (see pages 387–388) the court had to determine if wearing a studded belt was an offence under the *Control of Weapons Act 1990* (Vic) which banned the carrying of a 'regulated weapon'. As another example, a person needs to establish they have suffered 'serious harm' if they wish to make a claim for defamation, but those words are broad and are not otherwise defined.
- **The act may have become out of date and no longer reflect community views and values**. For example, while each state has laws banning the use of obscene and indecent language in a public place, what is considered offensive and indecent language changes over time, as is demonstrated in the following scenario.

Actual scenario

### Activist charged with offensive behaviour

In 2019, a 75-year-old activist was found not guilty of offensive behaviour in a public place after he was charged for wearing a billboard containing a jumbled set of letters to indicate a commonly considered 'swear word'. During the hearing, the activist's lawyer argued that his client intended his billboard to be thought-provoking and fun rather than offensive, and likened the use of the jumbled letters to the advertising campaign used by the global clothing store French Connection UK. In dismissing the charges, the magistrate commented that a reasonable person would not be so easily offended by the 'provocative and cheeky' billboard.

In 2022, police once again attempted to arrest the activist in NSW for failing to comply with directions to 'move on' after he failed to leave a shopping centre while wearing a similarly provocative sign. The arrest was discontinued after the elderly man suffered a facial injury.




**Source 2** The use of language on some of this activist's 'human billboards' forced a court to examine what constitutes 'offensive' behaviour.

- **The meaning of the words may be ambiguous**. The words and phrases used in a statute attempt to cover a broad range of issues. As a result, the meaning of some words might be ambiguous. It is therefore necessary for the courts to interpret the words or phrases to determine their meaning according to the intention of the statute. For example, in the case of *Davies v Waldron* on page 395, the Supreme Court judge was required to interpret the phrases 'in charge of a motor vehicle' and 'start to drive', as stated in the *Road Safety Act 1986* (Vic). The judge had to determine whether an intoxicated driver, who was sitting in the front seat of his parked car while the engine was running, was guilty of being 'in charge' of his motor vehicle with more than the prescribed concentration of alcohol in his blood, as defined and prohibited by the *Road Safety Act*.
- **The act might be silent on an issue and the courts may need to fill gaps in the legislation**. A statute tries to cover all situations that might arise in relation to the issues covered in the statute. This may not be possible as some situations may arise that were not foreseen, or gaps may have been left in legislation. An Act of Parliament may therefore be silent on an issue that comes before the courts. For example, would legislation that prohibits the possession of firearms (guns) and imitation firearms cover all possible types of fake or replica firearms, even those that are considered toys, such as water blasters and water pistols? As another example, does the word 'distribution' in relation to a document include 'distribution' over the internet?
- **The meaning of words can change over time**. For example, words such as 'vehicle', 'mental illness', 'document' and 'consent' have changed over time as society has changed. As another example, the word 'currency' or 'money' may now need to extend to digital currency.

The following scenario demonstrates the need for statutory interpretation and how judges make law through statutory interpretation.

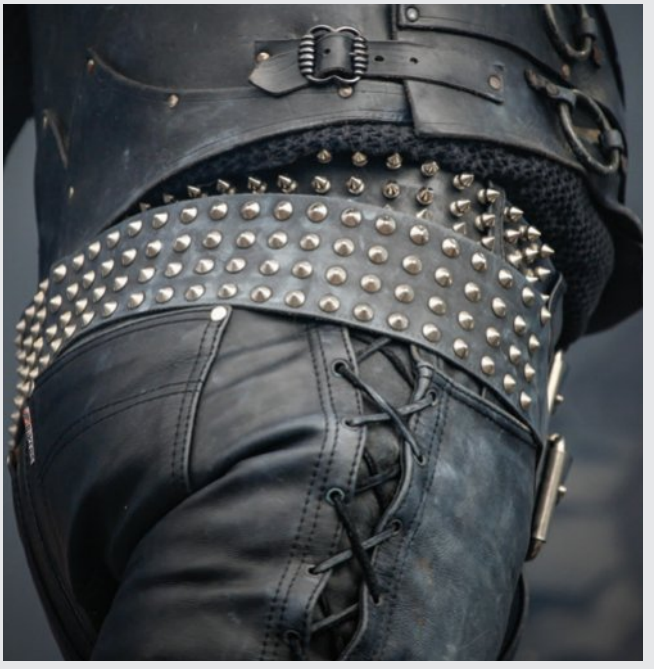
Actual scenario

## Is a studded belt a weapon?

In this case a 20-year-old man was charged with unlawfully 'possessing a regulated weapon', an offence under the *Control of Weapons Act 1990* (Vic). The man was charged because he was wearing a black leather belt with raised silver studs to hold up his pants. He had purchased the belt from a local market just prior to being arrested at a fast food restaurant. Under section 6 of the *Control of Weapons Act*, it is an offence to 'possess, carry or use any regulated weapon without lawful excuse'.

Section 5 of the *Control of Weapons Regulations* contained a long list of weapons included under the term 'regulated'. This list included 'any article fitted with raised pointed studs which is designed to be worn as an article of clothing'.

To determine whether the accused man was guilty of the offence, the Court was required to interpret the words 'regulated weapon' as found in the *Control of Weapons Act* and the *Control of Weapons Regulations*, and then decide if regulated weapons included studded belts.



**Source 3** In a well-known 1993 case, the Supreme Court was required to decide on appeal whether wearing a studded belt could be interpreted as carrying a weapon.

In the original hearing, the magistrate decided that a studded belt was a 'regulated weapon' as it fitted the description of one of the weapons listed in the *Control of Weapons Regulations*.

The man appealed against the decision to the Supreme Court on the basis that the magistrate had made an error when interpreting the law. The Supreme Court allowed the appeal and held that the studded belt was not a regulated weapon.

In interpreting the meaning of 'regulated weapon', Supreme Court Justice Beach looked to a range of sources including noting the literal meaning of the word 'weapon' in the Oxford English Dictionary as 'an instrument of any kind used in warfare or in combat to attack and overcome an enemy', and stated that if this definition was used by the courts, 'weapon' could include any number of things such as pieces of timber or lengths of pipe.

In his judgment, Justice Beach also referred to other previous cases that had interpreted the words 'offensive weapon'.

Justice Beach decided that under the *Control of Weapons Act*, a regulated weapon should be defined as 'anything that is not in common use for any other purpose but that of a weapon'. For example, a pair of stockings or tights can be used as a weapon to strangle someone, but it is not common or normal to use them in this way, therefore they could not be classed as a regulated weapon under the *Control of Weapons Act*.

The Supreme Court's ruling established a legal principle (or precedent) that items that are not in common use as a weapon cannot be classed as a weapon under the *Control of Weapons Act*.

*Deing v Tarola* [1993] 2 VR 163

# The effects of statutory interpretation

Through their ability to interpret statutes, the courts play an important role in law-making. The effects of statutory interpretation are listed below.

- **The word or phrases contained in the disputed legislation are given meaning**. This is so that the relevant statute can be applied to resolve the case before the court. The meaning of the legislation as determined by the court will also provide guidance for parties involved in a dispute in relation to the same word or phrase.
- **The court's decision on the meaning of the legislation is binding on the parties**. Once a court has reached a decision on the meaning of a statute, the parties to the case are bound by (or must follow) that decision until one of the parties lodges a successful appeal against the decision (that is, the appeal court reverses it).
- **A precedent may be set for future cases to follow**. If the interpretation of the words and phrases in legislation is made by a superior court (e.g. the Supreme Court or High Court), the reason for the decision forms a precedent that is then read together with the Act of Parliament to determine the outcome of future cases. The case will remain as precedent unless it is changed by a higher court on appeal or **abrogated** (cancelled) by an Act of Parliament – although parliament cannot abrogate (cancel) a High Court decision involving constitutional matters.
- **The meaning of the legislation (law) can be restricted or expanded**. If a court interprets a word or phrase narrowly, this could restrict the scope of the law. For example, the decision in *Deing v Tarola* restricted the definition of a regulated weapon to items likely to be used for an offensive or aggressive purpose only. Similarly, a broad interpretation of a word or phrase in a statute can extend the meaning of legislation to cover a wider range of circumstances or new area of law. For example, the decision in the *Tasmanian Dam* case extended the interpretation and

**abrogate (abrogation)** to abolish or cancel a law (for example, the cancellation of common law by passing an Act of Parliament)

meaning of the phrase 'external affairs' in the Australian Constitution to include areas covered by international treaties – thus allowing the Commonwealth Parliament to make laws in any area covered by an international treaty. See Chapter 10 (pages 321–324) for a detailed description of the *Tasmanian Dam* case.

The following scenario illustrates the need for and effects of statutory interpretation by exploring a case that considered whether a product was a bread or biscuit.

**Actual scenario**

## Bread or biscuit?

In 2011, a business owner took the Australian Taxation Office (ATO) to court over an ATO ruling that his product – known as a 'Mini Ciabatte' – was a biscuit (cracker), not bread. The product was described on its packaging as 'Italian flat bread' and was imported from Italy. If the product was bread, it attracted no Goods and Service Tax (GST). If it was a biscuit, the business owner would be required to pay GST and he would owe money to the ATO. Examples of GST-free bakery items include plain bread and rolls, plain (unfilled) focaccia, unfilled tortillas, unfilled pita bread and wraps, Lebanese and lavash bread, grissini breadsticks and Italian bread.

The relevant legislation stated that a product was subject to GST if it was food 'of a kind' specified in a table in the legislation. In the table, one of the categories of food was biscuit goods, which was described as 'food that is, or consists principally of, biscuits, cookies, crackers, pretzels, cones or wafers'.

Arguments were made by the business owner that the Mini Ciabatte belonged in the bread category, which included breadsticks and focaccia. Various evidence was given to support the owner's argument that the product was bread, including details about the manufacturing process of the product, its ingredients, and how it was served.

During the hearing, the ciabatta was broken to see if it cracked like a biscuit (or cracker). Justice Sunberg of the Federal Court said: 'In my view the Mini Ciabatte is a cracker. Its ingredients are substantially the same as those of a cracker … I have concluded that the ratio of ingredients in the two products is substantially the same… the supermarkets … treat it and sell it either as a cracker or in the company of crackers and biscuits.'

The Federal Court found in favour of the ATO. The product was treated as a cracker and the plaintiff was therefore liable to pay GST.

The business owner appealed to the Full Federal Court. In dismissing the appeal, the Federal Court judges that they were satisfied that the Mini Ciabatte was 'of a kind' of cracker.

*Lansell House Pty Ltd v Commissioner of Taxation* (2011) 190 FCR 354



**Source 4** Mini Ciabatte – bread or biscuit?

# 12.2 Check your learning

## Remember and understand

1 **Define** 'statutory interpretation'.

2 **Explain** how judges make law when they are interpreting an Act of Parliament.

3 **Describe** how a word you know has changed its meaning over time.

4 **Explain** what it means to say an Act of Parliament is 'silent on an issue'.

## Examine and apply

5 In the case of *R v Pink*, Justice Beyonce was required to interpret whether or not Pink had used 'offensive language in a public place' in accordance with the *Summary Offences Act 1966* (Vic).

- a **Describe** one reason why statutory interpretation may be necessary in this case.
- b **Suggest** two possible effects of Justice Beyonce's interpretation of the *Summary Offences Act*.

6 Read the scenario 'Is a studded belt a weapon?'.

- a **Identify** the charge against the accused in this case.
- b **Explain** the finding of the Magistrates' Court. Why was the studded belt seen as a weapon?
- c **Describe** the decision made by Justice Beach in the Supreme Court appeal.
- d **Explain** the reasons for Justice Beach's decision. In your explanation, comment on the dictionary meaning of the word 'weapon'.

7 Read the scenario 'Bread or biscuit?'.

- a **Outline** why it was important to know whether the product was a bread or a biscuit (cracker).
- b Conduct some more research on the Mini Ciabatte. In your opinion, is it a bread or a biscuit? **Explain** whether or not you agree with the decision in this case.

8 Search online for a summary of a court judgment that interpreted a statute. Write a report on the case. Include in the report:

- the name of the court hearing the case
- the title of the case
- a brief summary of the facts
- the name of the statute
- the section of the statute that was interpreted
- whether any precedent is being referred to and if so, the title of the case.

## Reflect and evaluate

9 'Courts should be able to interpret statutes as and when the need arises to meet the changing needs of the community.' **Discuss** the extent to which you agree with this statement.



**Source 5** In the *Tasmanian Dam* case over the battle to prevent a dam being built on the Gordon River, the High Court was required to interpret the meaning of the term 'external affairs' in the Australian Constitution.

# 12.3 Features of the doctrine of precedent

## Key knowledge

In this topic, you will learn about:

- features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing, and disapproving of precedent.

In addition to making law through statutory interpretation, judges can also make law by establishing precedents when determining cases. This can occur when there is no existing applicable law (that is, no existing statute law or precedent that can be applied to resolve the case). For example, a judge might be required to make a decision on a totally new issue that has not previously been brought before the court, or be required to expand on an existing principle of law so it can be applied to a new situation.

## Introduction to the doctrine of precedent

Courts or judges make law by establishing precedents. A precedent is the reasoning behind a court's decision. It establishes a legal principle or legal rule which can be used by judges to provide guidance when deciding future cases. A precedent established by a superior court in the same court hierarchy must be followed by judges and magistrates in lower courts when they are deciding future cases with similar **material facts**. The process of judges following the legal reasoning behind the decisions of higher courts is referred to as the doctrine of precedent.

**material facts**
the key facts or details in a legal case that were critical to the court's decision

The doctrine of precedent depends on the courts being organised or ranked in a hierarchy from lowest to highest, according to the seriousness and complexity of the cases they have authority to resolve. Only superior courts (usually those that have the power to decide cases on appeal) are able to set precedents and make law. The superior courts in the Victorian court hierarchy are the Supreme Court (Trial Division), the Supreme Court (Court of Appeal) and the High Court.

The High Court is the highest-ranked court in Australia. A decision made by the High Court on appeal is binding on courts in all states and territories.



**Source 1**
Barristers and solicitors refer to earlier judgments or precedents when they give advice. They also need to put their arguments to the court based on the precedents that apply to their case.

*Study tip*

Understanding the doctrine of precedent and how it operates is one of the more complex topics of the Legal Studies course. Consider trying to teach a family member or a friend (who does not also study Legal Studies) about how the doctrine of precedent works – this will help you to determine where there may be gaps in your understanding.

## Reasons for precedent

The application of precedents to current cases helps ensure common law (or law made by the courts) is consistent and predictable. It is one of the ways in which the rule of law is upheld, providing some certainty in the way that laws are applied.

Having lower courts follow the legal principles established by higher courts in the same hierarchy, in cases where the material facts are similar, ensures that:

- like cases are decided in a like manner. This enables the parties in a dispute to look back to previous cases to gain some idea of how a court might determine their case
- legal representatives are able to give advice on the likely outcome of a case, as they will have some understanding as to how the court may decide the case
- judges have some guidance, as they can refer back to previous cases and decide accordingly
- decisions made by more experienced judges in higher courts are followed in lower courts
- the same point is not being decided over and over again, which would be a waste of resources.

# Key features of the doctrine of precedent

There are a number of key features of the doctrine of precedent, including:

- binding precedents
- persuasive precedents
- ways to develop and avoid precedents such as the reversing, overruling, distinguishing, and disapproving of precedent.

## Binding precedents

**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

**court judgment** a statement by the judge that outlines the decision of the court and the legal reasoning behind the decision

***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

A **binding precedent** is a precedent that has been established in the superior courts and must be followed by lower courts in the same hierarchy when resolving disputes with similar material facts. If a judge or magistrate is bound by an existing precedent, they are obliged to follow it, regardless of whether they agree with the legal reasoning behind the decision of the superior court.

For a precedent to be binding on a particular case, it must be established by a superior court from within the same court hierarchy. For example, with reference to the Victorian court hierarchy, in cases where the facts are similar:

- the Magistrates' Court and County Court are bound to follow precedents set by the Supreme Court of Victoria (Trial Division or Court of Appeal) or the High Court of Australia
- the Supreme Court (Trial Division) is bound to follow precedents set by the Supreme Court of Appeal or the High Court of Australia
- as it is the highest court in Australia, the High Court is not bound by precedents set by any Australian state or territory court.

### *Ratio decidendi*

The binding part of a **court judgment** is commonly referred to using the Latin phrase ***ratio decidendi***, meaning 'the reason for the decision'. A court judgment is a statement by the judge that outlines the decision and the legal reasoning behind the decision. The *ratio decidendi* is not the decision itself, or the sanction or remedy given. It is the legal reasoning behind the decision or statement of law to be followed in the future.

### The principle of *stare decisis*

The principle of ***stare decisis*** is another way of describing the process of lower courts following the reasons for the decisions of higher courts. *Stare decisis* is a Latin phrase meaning 'to stand by what has

been decided'. Where appropriate and required, judges should stand by previous decisions to ensure common law is consistent and predictable.

## Persuasive precedents

**Persuasive precedents** are precedents that are *not* binding on a court but may still be considered by a judge and used to influence their decision. It may be an important legal principle which is relevant to the case before the court, highly regarded by the judge and used to guide or sway their decision. Persuasive precedents may be:

- set by courts in another court hierarchy, such as a court in another state, territory or country
- set by lower courts in the same court hierarchy (e.g. the Victorian Supreme Court of Appeal or High Court of Australia may consider a precedent set by the Trial Division of the Supreme Court of Victoria to be persuasive)
- set by courts of the same standing (that is, on the same level) within the same court hierarchy. Although these precedents are not binding, in reality to maintain consistency, judges will almost inevitably follow them. One exception to this is the High Court. While the High Court will also usually follow its previous decisions in an attempt to maintain consistency, it will not do so if it no longer considers the precedent to be good law (e.g. the justices consider the law to be outdated due to changes in community attitudes, technologies or other circumstances that occur over time).

**persuasive precedent** the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence or followed) even though it is not binding (*see* binding precedent)

### *Obiter dictum*

Statements made as ***obiter dictum*** contained in court judgments from the same or another court hierarchy may also be considered as persuasive. *Obiter dictum* (also called just *obiter*, or its plural *obiter dicta*) is a Latin term meaning 'a thing said by the way'. It refers to those statements or comments made by a judge that are not an actual part of the reason for the decision (and are therefore not binding), but are still important and may be considered as persuasive in future cases. Rather than being an essential part of the reason for the decision, comments made as *obiter dictum* can be a matter the judge contemplated and reflected upon when making their decision and forms part of their considered opinion.

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

## Developing and avoiding precedents

When deciding cases, judges will consider precedents established in earlier cases. If a judge is not bound to follow the earlier precedent, they may decide to:

- adopt the precedent (follow or apply the precedent, in which case the precedent will be affirmed or have been considered favourably)
- choose not to follow the existing precedent.

In cases where judges are not bound to follow an existing precedent, they may also be able to create new precedents. This allows a degree of flexibility in the common law; that is, it allows precedents and the common law to change and develop over time.

Apart from following a precedent (whether binding or persuasive), there are four other ways that judges can treat previous precedents:

- reversing
- overruling
- distinguishing
- disapproving.

### *Study tip*

The *VCE Legal Studies Study Design* requires you to know the features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing, and disapproving of precedent. You might be asked specifically about any of these features, so make sure you understand each one.

**reversing a precedent**
when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

**overruling a precedent**
when a superior court changes a previous precedent, established by a lower court in a different and later case, thereby creating a new precedent which overrules the earlier precedent

**distinguishing a precedent**
the process by which a lower court decides that the material facts of a case are sufficiently different from those of a case in which a precedent was established by a superior court so that they are not bound to follow it

**disapproving a precedent**
when a court expresses dissatisfaction with an existing precedent but is still bound to follow it

*Study tip*

VCAA Legal Studies Examination Reports have indicated that in the past some students have incorrectly explained what disapproving of precedent means. Remember that disapproving allows the court to express their disagreement or dissatisfaction with an existing precedent, but it does not allow a court to avoid following that precedent.

These different ways of treating a precedent are set out in Source 2.

| | |
|---|---|
| Reversing a precedent (in the same case on appeal) | • When hearing a case on appeal from a lower court, a judge in a superior court may disagree with and decide to change the previously established precedent set by the lower court. This is called **reversing a precedent**.<br>• When a court reverses an earlier decision or precedent, in the same case on appeal, a new precedent is created by the superior court's decision. This new precedent becomes the one to follow in future cases. |
| Overruling a precedent (in a different and later case) | • A judge in a superior court may decide not to follow a previously established precedent set by a lower court in a different and earlier case. This is called **overruling a precedent**. When a court overrules a precedent, a new precedent is created by the superior court that makes the earlier precedent inapplicable.<br>• Overruling a precedent is similar to reversing a precedent, except that reversing applies when a judge changes an existing precedent set in a lower court in the *same* case on appeal, whereas overruling applies to changing a precedent in *a different and later* case. So, for example, a precedent set by the Victorian Supreme Court (Trial Division) in 'Case A' can be overruled by the Victorian Supreme Court of Appeal in 'Case B'. |
| Distinguishing a precedent | • A judge may be able to avoid following an existing binding precedent if they can find a difference between the material facts of the case they are deciding and the material facts in the case in which the existing precedent was set. This is known as **distinguishing a precedent**.<br>• A court can decide to distinguish a precedent, and not follow it, because a precedent set by a superior court in the same hierarchy is only binding on a lower court in cases where the material facts are similar. |
| Disapproving a precedent | • Judges and magistrates in lower courts who are bound to follow precedents set by superior courts in the same hierarchy may express their dissatisfaction with the precedent. This is called **disapproving a precedent**. While this statement of discontent *does not* allow the lower court to avoid following the precedent, it may be used during an appeal to indicate the original judge's dissatisfaction with the precedent or encourage parliament to change the law.<br>• Judges in courts of the same standing (who by convention rarely overrule precedents set by their own court) and judges in superior courts may also express their disapproval of an existing precedent rather than overruling it, preferring a more superior court or the parliament to change the law. |

**Source 2** There are four other ways that judges can treat previous precedents.

The following scenario is an example of a judge distinguishing a previous precedent because there was a difference in the material facts of the case.

**Actual scenario**

## Distinguishing a case

In this case (*Davies v Waldron*) the accused was found guilty of being in charge of a motor vehicle while having a blood alcohol concentration over the legal limit (i.e. while being intoxicated). The police gave evidence that the accused was seen sitting in the driver's seat of his car, with the seat belt on, and starting the engine. The car then moved approximately 15 cm and stopped as if it stalled.

The accused claimed that one of his friends was driving his car when it stalled, and the friend was unable to restart the car. When the accused was discovered by the police in the driver's seat of his car, he was not intending to drive the car but was simply checking whether it could be started.

The defence counsel urged the judge to be persuaded by the previous decision in *Gillard v Wenborn*, arguing that it was a similar case in which an accused was found not guilty of being in charge of his car while intoxicated. In *Gillard v Wenborn* the accused had fallen asleep in the back seat of his car while intoxicated, and after waking the next morning, moved into the front seat to call for assistance on his car phone. He turned on the engine to turn the heater on and then fell asleep again. He was found by police at 6 am, asleep in the front seat of his car with the engine running.

When making his decision in the *Davies v Waldron* case as to what constitutes being 'in charge' of the car while intoxicated, the judge was required to consider whether the accused had or was attempting to 'start to drive' the car. In deciding this, the judge said it was necessary to link the intoxicated person in charge of the car with a risk that he would drive the car when in an unfit state. On this basis the judge distinguished between the two cases stating the accused in *Davies v Waldron* had attempted and succeeded in starting the engine of the car and was at risk of driving the car, whereas the accused in *Gillard v Wenborn* was found asleep in the driver's seat with the engine running, and was not at risk of driving. Therefore, the accused remained guilty of the offence.

*Davies v Waldron* [1989] VR 449



**Source 3** In this case, the judge found that the accused had been 'in charge' of the car while having a blood alcohol concentration over the legal limit. In Victoria, it is an offence to drive a motor vehicle if your blood alcohol concentration is higher than 0.05%.

The following scenario illustrates two ways the Victorian courts can treat a precedent. It shows:

- a lower court (i.e. the County Court) *disapproving* a precedent set by a higher court (i.e. the Supreme Court of Appeal)
- the subsequent *overruling* of that precedent by a court of the same standing because it was no longer considered to be good law.

The scenario also illustrates some of the strengths and weaknesses associated with making law through the doctrine of precedent. For example, it demonstrates the way lower courts are bound to follow precedents set by higher courts in cases with similar facts, even if they consider the precedent not good law, as well as the ability of parties to appeal a decision so it can be re-considered by a higher court.

**Actual scenario**

## Disapproving and overruling a precedent

In March 2020, a woman pleaded guilty in the County Court of Victoria to four charges of arson (i.e. destroying and damaging property by fire) and various other charges. At the time of offending, the accused was aged 18 years and the maximum penalty for one charge of arson was 15 years' imprisonment.

During the sentencing hearing, the County Court heard expert evidence from a forensic psychiatrist who believed, based on clear and logical evidence, that the offender suffered from a 'severe personality disorder' which affected her mental functioning (i.e. the 'way she thinks') and strongly contributed to (or caused) all of her offending. As a result of this diagnosis, the woman's lawyer argued that the Court should apply the legal 'Verdins principles' which, in simple terms, would have required the judge to consider the woman's impaired (or diminished) mental functioning as a **mitigating factor** when sentencing.

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

The Verdins principles, established by the Victorian Court of Appeal in the 2007 case of *R v Verdins*, set out a number of ways in which an offender's impaired mental functioning may be relevant when determining their sentence. For example, in a case where there is a serious risk of imprisonment having a significant adverse (or negative) effect on the offender's mental health, this will be considered a mitigating factor when sentencing.

The prosecution, on the other hand, argued the Verdins principles were not relevant to this case and should not be applied. To support this argument, the prosecution relied on a precedent established by the Victorian Supreme Court of Appeal in 2015 in *DPP v O'Neill*, which stated that the Verdins principles did *not* apply to 'personality disorders'.

During the sentencing hearing, two psychologists also gave evidence about personality disorders and the way they can impact upon and harm mental and cognitive functioning (i.e. the 'way people think'). These psychologists criticised the precedent set in *DPP v O'Neill* and said it should be reconsidered so the Verdins principles could be applied to cases involving severe personality disorders which can result in impaired mental functioning.

In sentencing the offender, Judge Taft emphasised that he was bound to follow the precedent set in *DPP v O'Neill* that, broadly, the Verdins principles could not be applied to personality disorders. That meant that the personality disorder could not be a mitigating factor in sentencing. He sentenced the offender to 18 months' imprisonment. Judge Taft did, however, mention that had he not been bound to follow the precedent set in *DPP v O'Neill*, he would have given very considerable weight to the Verdins principles when sentencing the offender.

In his judgment, Judge Taft also remarked that he realised the case would 'find its way into the Court of Appeal' so the precedent established in *DPP v O'Neill*, in relation to the Verdins principles not applying to personality disorders, could be reviewed by a higher court. He also indicated that he was 'most sympathetic to the proposition that O'Neill should be looked at again'.

The accused woman lodged an appeal against the sentence imposed by Judge Taft. Her principal argument was that the Court of Appeal should find that the precedent set in *DPP v O'Neill* was wrong and that the Verdins principles should apply to 'personality disorders' so they may be considered as a mitigating factor.

In August 2020, after hearing arguments from both parties, the Court of Appeal upheld the woman's appeal by ruling that an offender diagnosed with a personality disorder should not be treated any differently to any other offender who sought to rely on an 'impairment of mental functioning' as mitigating a sentence. In its ruling, the Court of Appeal specifically commented that '... the statements in O'Neill about the inapplicability of Verdins to personality disorders should no longer be followed'. The Court re-sentenced the woman, imposing a reduced custodial sentence of 507 days' imprisonment.

*DPP v Brown* [2020] VCC 196 (3 March 2020) and *Brown v The Queen* [2020] VSCA 212 (25 August 2020)

| | |
|---|---|
| ***R v Verdins* (2007)**<br>**COURT OF APPEAL** | • The Court of Appeal established six ways in which 'impaired mental functioning' may be relevant to sentencing. |
| ***DPP v O'Neill* (2015)**<br>**COURT OF APPEAL** | • The Court of Appeal held that 'personality disorders' do not constitute an 'impairment of mental functioning' and so should not be considered as mitigating a sentence. |
| ***DPP v Brown* (2020)**<br>**COUNTY COURT** | • The County Court was required to sentence an offender who had pleaded guilty to four charges of arson and various other offences.<br>• The Court accepted the offender suffered from 'severe personality disorder', which affected her mental functioning and strongly contributed to all her offending.<br>• While the judge acknowledged he was bound by the decision in *DPP v O'Neill*, he expressed his disapproval of the precedent set in the case. |
| ***Brown v The Queen* (2020)**<br>**COURT OF APPEAL** | • The offender's appeal was upheld.<br>• The Court of Appeal ruled that the decision in *DPP v O'Neill* that the Verdins principles should not apply to 'personality disorders', was wrong and should no longer be followed.<br>• The Court re-sentenced the offender by imposing a reduced custodial sentence. |

**Source 4** A brief summary of the cases relevant in *DPP v Brown*

The scenario below is an example of a case progressing through the Victorian Supreme Court and finally being resolved by the High Court. It illustrates some key features of the doctrine of precedent including binding precedents, persuasive precedents and the courts reversing a precedent.

**Actual scenario**

## Reversing a precedent

In 2004, a Melbourne lawyer, who consistently maintained his innocence, was charged with conspiring to murder three men. The case was widely reported in the media. The following year, however, the Director of Public Prosecutions withdrew the charges. The case never proceeded to trial.

More than a decade later, in 2016, the lawyer discovered that an internet search of his name on Google contained a hyperlink to an old media article, published back in 2004, which he believed harmed his reputation. In 2020, after Google refused to remove the hyperlink from their search results, the lawyer successfully sued the internet company in the Supreme Court of Victoria for publishing defamatory material by providing a hyperlink in their search results. He was awarded $40 000 in damages plus interest and costs.

In 2022, however, after an unsuccessful appeal in the Victorian Court of Appeal, Google won the right to have the case reviewed by the High Court of Australia.

When determining the case, the High Court justices considered a number of past cases from within the Australian court system and overseas. For example, the Court considered its own ruling in a 2021 case, which found three media companies were liable for defamatory remarks posted in the 'comments section' of their public Facebook page. The High Court, however, distinguished between the cases on the basis that the media companies in the 2021 case provided and assisted the ability for people to comment on the defamatory articles, whereas in the lawyer's case Google only provided access to the original defamatory article.

Ultimately, the High Court ruled in Google's favour and reversed the decision of the Supreme Court of Appeal. In a majority 5-2 ruling, the High Court found that while Google assisted access to the article by providing a hyperlink in the 'search result', it was not liable as a publisher of the article. In simple terms, the Court ruled that Google did not write the original defamatory article or help the media company communicate the defamatory material in the article, and the search result itself had no defamatory content. The lawyer was ordered to pay the costs of Google's appeal.

The High Court's ruling has set a binding precedent that must be followed by all state and territory courts when determining future cases with similar material facts. Like all High Court precedents, it remains law until it is overruled by the High Court itself or abrogated (overridden) by parliament.

*Google LLC v Defteros* [2022] HCA 27 (17 August 2022)




**Source 5** The laws relating to publication of potentially defamatory material on the internet continue to develop and change over time.

While the High Court is not bound to follow its own previous decisions, in an attempt to maintain consistency, it will usually do so unless the justices consider a past precedent to no longer be a good law. The following scenario is an example of the High Court overruling its own previous precedent.

**Actual scenario**

## High Court overrules its own previous precedent

In this case, Mr Imbree, a fully licensed driver, allowed Mr McNeilly, a 16-year-old who had just obtained his learner driver permit, to drive his car while on a trip to the Northern Territory. While driving, McNeilly swerved to avoid the remains of an old tyre on the road, causing the vehicle to roll over and Imbree to sustain severe injuries. Imbree sued McNeilly for damages in the New South Wales Supreme Court.

While the Supreme Court, and in the subsequent appeal case the NSW Supreme Court of Appeal, found in favour of Imbree, the amount of damages awarded was significantly reduced due to the courts being bound by a precedent. The High Court in *Cook v Cook* (1986) had held that an inexperienced learner driver owed a lower standard of care to a passenger who was supervising their driving than that owed by an experienced, fully licensed driver. As a result of this precedent, it was held that McNeilly, as an inexperienced learner driver, had a reduced liability for the injuries sustained by Imbree.

Imbree was granted leave to appeal his case to the High Court, where six justices overruled the precedent set in *Cook v Cook* on the basis that it was not good law. The justices held that the standard of care owed by a learner driver should be the same as that owed by other fully licenced drivers. That is, a learner driver must take reasonable care to avoid driving in a manner that will cause injury to others and the standard of care they owe to passengers is not lowered because they are an inexperienced driver.

*Imbree v McNeilly* (2008) 236 CLR 510



**Source 6** Under a High Court ruling, a learner driver owes the same standard of care as a fully licensed driver.

## Applying earlier precedents

Most often, when resolving a case brought before them, the courts will be required to consider and apply precedents set in previous cases. Even if they do not distinguish, overrule, reverse or disapprove of past decisions, they may still need to refine the law and make it clearer as they apply a precedent to a new case. This allows the law to expand and develop over time.

When applying previous precedents, courts will sometimes be required to interpret the meaning of the words and phrases used in the past precedents. This may result in their meaning being broadened or narrowed by future courts. This is one reason why it is often said that a precedent set by a court is never a final statement of the law, because circumstances always change.

Over time, through reversing, overruling, distinguishing and disapproving, precedents have been changed and developed to allow a gradual expansion of common law. In fact, some whole areas of the law, such as the law of negligence, have developed through the courts in this way, piece by piece.

## Courts making law and juries

As you have learnt, precedents are established by judges, and law-making through the courts generally occurs when a court is hearing an appeal (so there is no jury) or in a case where there is no jury. A verdict given by a jury cannot create a precedent (or establish a legal principle) because juries determine only the facts of the case. They do not decide on points of law – that is left to judges. Juries also do not give reasons for their decisions. By contrast, when judges resolve a dispute they must give reasons for their decision. It is this legal reasoning behind the decision that forms the precedent.

**Key features of the doctrine of precedent**

**binding precedents**

- superior court decisions are binding on inferior courts
- similar material facts
- a decision of a superior court remains law until it is overruled by a higher court or the law is altered by an Act of Parliament

**persuasive precedents**

- precedents from another hierarchy are not binding but are a valuable source of legal reasoning and can be influential on decisions of other courts
- *obiter dictum* (plural is *obiter dicta*); a statement made by the judge that is not directly relevant to the point of law in question, but can have a persuasive influence on future cases

**precedents can be developed or avoided through**

- reversing
- distinguishing
- overruling
- disapproving.

**Source 7** Key features of the doctrine of precedent




**Source 8** The High Court building, opened by Queen Elizabeth II in May 1980. The High Court was established in 1903 but it sat in Melbourne initially, then in Sydney, before the government authorised its removal to Canberra in 1968.

# 12.3 Check your learning

## Remember and understand

1 **Explain** why courts usually only make law when determining cases on appeal.

2 **Explain** how the doctrine of precedent provides for consistency in common law.

3 **State** two reasons why it may be difficult to identify the legal reasoning behind a decision (i.e. the *ratio decidendi*) in a judgment.

4 **Explain** why some precedents are binding and some precedents are persuasive. In your explanation, **identify** the factors a judge must consider when deciding if a precedent is binding, and **describe** what constitutes a persuasive precedent.

5 **Explain** how lower courts can avoid following a binding precedent.

## Examine and apply

6 Read the scenario 'Distinguishing a case'.
- **a** **Identify** the ambiguous words or phrases that required interpretation in this case.
- **b** **Explain** how these words or phrases were interpreted by the Supreme Court.
- **c** **Explain** why the judge distinguished between facts in this case (i.e. *Davies v Waldron*) and *Gillard v Wenborn*.

7 Read the scenario 'Reversing a precedent'.
- **a** **Why** did the aggrieved man initiate a civil action against the internet company in 2020 and what was the outcome of this case?
- **b** **Why** was the case ultimately heard by the High Court?
- **c** Using the High Court appeal case to support your answer, **explain** what is meant by distinguishing a precedent and reversing a precedent.

8 Read the scenario 'High Court overrules its own previous precedent'.
- **a** **Outline** the key facts in this case.
- **b** **Explain** why the NSW Supreme Court and the NSW Supreme Court of Appeal found in favour of Imbree, but reduced the amount of damages he was awarded.
- **c** **Explain** why the precedent set in *Cook v Cook* is referred to as being overruled, rather than reversed, by the High Court in *Imbree v McNeilly*.
- **d** Do you agree with the precedent set in *Cook v Cook* or *Imbree v McNeilly*? **Justify** your response.

9 Read the scenario 'Disapproving and overruling a precedent'.
- **a** **Identify** the main charges for which the offender was being sentenced in this case.
- **b** **Explain** why the offender's lawyers argued their client should receive a lesser sentence. Briefly **outline** the purpose of the Verdins principles in your answer.
- **c** **Explain** why the prosecution argued the offender's personality disorder should not have been considered as a mitigating factor in sentencing.
- **d** **Explain** why the offender lodged an appeal against the sentence imposed by Judge Taft.
- **e** Using the scenario, **explain:**
  - **i** the purpose of disapproving a precedent
  - **ii** one reason for the existence of the Victorian Court hierarchy.
- **f** **Describe** the outcome of the offender's appeal (in August 2020) and **discuss** the extent to which the Supreme Court of Appeal's decision is a final statement in law.

## Reflect and evaluate

10 **Discuss** the ability of judges to change the law.

# 12.4 The way precedent affects law-making

## Key knowledge

**In this topic, you will learn about:**

- **factors that affect the ability of courts to make law, including the doctrine of precedent.**

As you have learnt, the main role of the courts is to resolve disputes, but courts also have an important role to play in law-making because they are able to make case law (common law) when deciding cases. However, their ability to do so is limited.

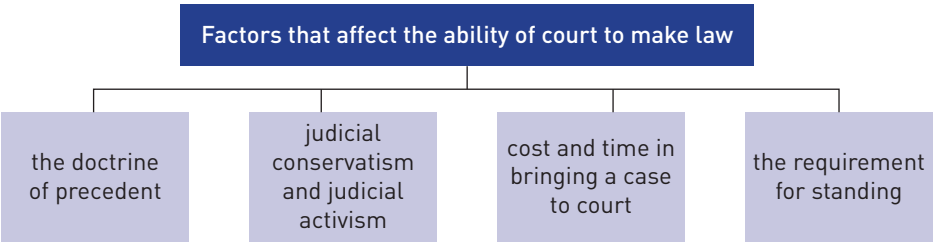
In Topic 12.3 you explored the main features of the doctrine of precedent. This topic covers the way the doctrine of precedent may both enable and restrict the ability of courts to make laws. The next three topics cover three other factors that affect the ability of courts to make law:

- judicial conservatism and judicial activism (Topic 12.5)
- costs and time in bringing a case to court (Topic 12.6)
- the requirement for standing (Topic 12.7).

Source 1 provides an overview of these four factors. Topic 12.8 then looks at the relationship between the courts and parliament.

*Study tip*

The *VCE Legal Studies Study Design* requires you to know four factors that affect the ability of courts to make law: the doctrine of precedent, judicial conservatism and judicial activism, the costs and time in bringing a case to court, and the requirement for standing. You could be asked a specific questions about each of these four factors.




**Source 1** Factors that affect the ability of the courts to make law

## Consistency and predictability

The doctrine of precedent creates consistency and predictability. A party that takes a case to court can look at past cases and anticipate how the law may apply to their situation. This gives them some idea of the outcome, because similar cases are decided in a similar manner. Legal representatives can then give advice to their clients on how a court may decide their case, as there may be similar cases with similar facts where a court has ruled a particular way.

However, while the doctrine of precedent helps ensure consistency and predictability, there are limitations, including:

- **the difficulty and cost involved in locating relevant precedents**. While parties and judges can refer to earlier precedents for guidance, it can be difficult to locate precedents relevant to a particular case, due to the large number of cases that may have previously been decided in the particular area of law involved in the case. The large volume of existing precedents also means that finding a relevant precedent can be time-consuming and costly. Adding to this, judgments can be written in technical language, and are often long without the use of sub-headings, and judges may give more than one reason for their decision

- **the difficulty in identifying the legal reasoning behind a decision.** Identifying the legal reasoning behind a decision (*ratio decidendi*) can be difficult when the precedent has been established in a court of appeal with three or more judges. In these cases, lawyers must look at the decisions from judges who decided in a similar way and formed the majority. Judges who do not agree with the majority are referred to as dissenting judges. Further, in some instances there may be conflicting authorities. This means there will be more than one judgment on a particular issue, and most likely differences in their reasons for the decisions. If this occurs, the judge needs to decide which precedent is most appropriate to the set of circumstances before the court.
- **the difficulty in predicting future developments**. As you have learnt, precedents are able to be overruled later by a higher court. Particularly for older precedents, it may be difficult to predict how the High Court or Court of Appeal may treat the precedent in a new case.




**Source 2** One of the more well-known High Court judges in history is the Hon Michael Kirby AC CMG. Some call him 'The Great Dissenter' as he often dissented (disagreed with) the other High Court judges when deciding cases.

## Flexibility

The courts are able to make laws because the doctrine of precedent allows for some flexibility. Through the process of reversing, overruling, distinguishing and disapproving, precedents change and develop over time to allow the gradual expansion of common law. For example, superior courts can reverse (on appeal) or overrule previous precedents in a later case. Judges can also avoid following an existing precedent by distinguishing between the material facts of the case before the court and the material facts of the case in which the precedent was set.

Even if judges do not distinguish, overrule, reverse or disapprove of past decisions, they may still need to interpret the meaning of the words and phrases used in the past precedents and refine the law and make it clearer as they apply a precedent to a new case. This also allows the law to expand and develop over time.

However, while the doctrine of precedent allows for flexibility and the development of common law, the extent to which this can be achieved is limited due to a number of factors. These factors are outlined below.

- **The doctrine of precedent restricts the ability of the lower courts to change the law in cases where they are bound to follow a previous precedent established by a higher court.** This may lead to an unjust outcome if courts are bound to follow an 'outdated precedent' and the affected party cannot afford to pursue an appeal to a higher court. However, lower courts can express their disapproval of a binding precedent, which may encourage a dissatisfied party to pursue an appeal to a higher court, and be used to indicate to a higher court that the lower court believed the precedent needed to be reconsidered.



**Source 3** Justice Jayne Jagot, who was appointed as a High Court judge in 2022. The High Court is not bound to follow its own past decisions.

- **Judges in superior courts may be reluctant to reverse or overrule existing precedents**. For example, the Supreme Court of Appeal or High Court may be hesitant to reverse or overrule an existing precedent for many reasons, including a preference to leave the law-making to parliament, which can investigate the need for law reform and reflect community views and values.
- **While not being technically bound by their own court's previous decisions, judges in courts of the same standing consider these precedents to be highly persuasive and rarely overrule them**. This is with the exception of the High Court, which may overrule its own decisions to allow the law to develop over time. Judges are not, however, bound to follow precedents from other court hierarchies (such as interstate and overseas) or from lower courts in the same hierarchy.

## Other ways the doctrine of precedent limits the ability of the courts to make law

*Study tip*

You must be able to specifically discuss how the doctrine of precedent affects the ability of the courts to make law. This means you must be able to provide reasoned arguments about the way the doctrine and operation of precedent can assist, and limit or restrict, the ability of judges to make law. You can provide strengths and weaknesses if applicable. You can also give your opinion and should do so if the question asks.

***ex post facto***
a Latin term meaning 'out of the aftermath'. A legal term used to describe a law that is established in relation to an event that has already taken place

There are a number of ways that the doctrine of precedent limits the ability of the courts to make law. These are outlined below.

- Judges must wait for a relevant case to be brought before them and only the superior courts (the Victorian Supreme Court or higher) can make law. This means that the courts are reliant on parties being aware of their right to pursue a matter in the courts, being willing and able to afford to bring a case before the courts, and being determined to see the action through the appeals process (which is also costly and time-consuming).
- Judges in superior courts are restricted to making law that is needed to clarify some issue or matter raised in the case before them. Any thoughtful or considered comments made 'by the way' are *obiter dictum* and do not form a part of the precedent and law.
- Judges make law ***ex post facto***. As the doctrine of precedent only permits courts to make law when a dispute is brought before them, courts make and clarify the law retrospectively, after the event (*ex post facto*). If the court is interpreting a statute, or considering a precedent, it can only clarify the meaning of the statute or change precedent after the dispute has come before the court.
- While judges can make law through the establishment of precedents and have the power to clarify and expand or limit the meaning of legislation (via statutory interpretation) so it can be applied to resolve the dispute before the court, parliament can always legislate to abrogate (cancel) common law. (The exception is High Court decisions in constitutional matters.) This is because parliament is our supreme law-making body. This limits the ability of judges to make and change the law.

## Summary of the doctrine of precedent

As part of this key knowledge, you are expected to be able to discuss the doctrine of precedent as a factor that can affect the ability of courts to make law. The table on the next page will help you develop your discussion, showing the explanation points you can make, and the points which will extend your explanation to a discussion. These are not the only points you can make; other points may be relevant depending on a particular scenario.

| Application and reflection | Points on the effects of the doctrine of precedent |
|---|---|
| **Explanation points** | • In deciding cases, judges can make law, known as common law. When interpreting existing statutes, determining a case where there is no existing applicable law, or where the law does not cover the particular situation, judges can establish precedents. Precedents can either be binding or persuasive on courts, depending on where they sit on the court hierarchy.<br>• The principle of *stare decisis* ensures consistency in common law because lower courts must follow precedents set by superior courts in cases with similar material facts.<br>• The principle of *stare decisis* can ensure predictability in common law because parties can anticipate how the law is likely to be applied to resolve their dispute by examining past cases.<br>• Common law is flexible because judges in superior courts can overrule and reverse precedents and lower courts can avoid them through distinguishing material facts. Courts can also signal their disapproval of a precedent, which may result in a party appealing the case so the precedent can be overruled (or the case getting the attention of parliament).<br>• By setting precedents, courts can make law to complement legislation. |
| **Discussion points** | • Lower courts must follow a binding precedent even though they may consider it to be outdated or inappropriate.<br>• Judges in superior courts may be reluctant to change an existing precedent, preferring parliament, as the supreme law-making body, to change the law. Similarly, with the exception of the High Court, courts of the same standing, by convention, rarely overrule their own precedents.<br>• Judges can only interpret legislation and establish precedents when an appropriate case is brought before a superior court, which is generally reliant on parties being willing to pursue a dispute through the appeals process.<br>• Courts can only clarify the meaning of legislation after a dispute over its meaning has arisen (i.e. *ex post facto*).<br>• Parliament is able to abrogate common law, unless it involves constitutional interpretation. |

**Source 4** A summary of the points that can be made when discussing ways in which the doctrine of precedent affects the ability of the courts to make law

## 12.4 Check your learning

### Remember and understand

1 **Explain** how a binding precedent made in the Supreme Court (Trial Division) can restrict the ability of the lower courts to make law.

2 **Outline** the main reason why parliament is generally able to pass legislation to override court decisions.

3 **Explain** what is meant by the meaning of the phrase 'courts make law *ex post facto*'. Comment on whether this assists or limits the ability of the courts to make law.

### Examine and apply

4 For each of the following scenarios, **explain** how the doctrine of precedent will both assist and restrict the courts in making or developing law.

**a** Josiah has sued the state of Victoria in the Supreme Court of Victoria. An old precedent established in that same court has previously been disapproved by lower courts, and it does not work in Josiah's favour.

**b** Leandra is suing her local supermarket in the County Court of Victoria after she slipped on a grape while buying groceries. She has been advised that some of the facts in her case are similar to the facts in a precedent established in the High Court, but some facts are different.

**c** Turner has lost their Supreme Court case as a result of an old precedent established in the High Court. Their lawyers are encouraging them to appeal.

### Reflect and evaluate

5 'The doctrine of precedent always restricts the ability of the lower courts to make law.' **Discuss** this statement.

6 To what extent does the doctrine of precedent enable the High Court to make law? **Provide** reasons.

# 12.5 Judicial conservatism and judicial activism

## Key knowledge



In this topic, you will learn about:

- factors that affect the ability of courts to make law, including judicial conservatism and judicial activism.

Judges can hold different views about the way they should interpret the law and differ in the way they exercise their role in deciding cases. The 'style' or approach adopted by judges when interpreting the law and making decisions can influence the ability of the courts to make law. Two broad judicial approaches are **judicial conservatism** and **judicial activism**.

**judicial conservatism** an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by their own political beliefs or the views of the community)

**judicial activism** an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

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

## Judicial conservatism

Judicial conservatism refers to the idea that the courts should show restraint or caution when making decisions and rulings that could lead to significant changes in the law. Judicial conservatism influences the ability of the courts to make law, because judges who take a conservative approach to the way they interpret statutes will not go very far beyond the established law.

Parliament is the supreme law-making body, consisting of members who are elected by the people to make laws on their behalf. It is therefore generally accepted that the parliament has more authority for implementing major **law reform** than judges, who are not elected by the people. Judges should interpret the law, not rewrite it.

An important feature of judicial conservatism is the belief that judges should ensure their decisions are not based on their own views or political opinions. They should also not base their decisions on what they perceive to be the community's view on a given issue. Rather, they should base their decisions solely on legal considerations. They are not expected to assume to know or assess the community's views on a particular issue.

This traditional view is opposite to the concept of judicial activism, or the idea that judges should consider a range of social and political factors, like the views and values of the community and the need to protect the rights of the people, when interpreting Acts of Parliament and making decisions.

Over the years the High Court has exercised both judicial conservatism and judicial activism when resolving disputes and establishing precedents. For example, High Court justices have adopted a conservative approach when resolving a number of constitutional disputes, upholding the view that the courts should limit their role as law-makers when determining constitutional disputes, and be reluctant to declare Acts of Parliament invalid unless they are obviously unconstitutional. The reasoning behind this approach is that the main purpose of judicial interpretation is to give effect to what parliament intended when it passed the statute that is being interpreted.

In 2020, the appointments of two new High Court justices were announced by the Prime Minister at the time, Scott Morrison. As expected, the appointments generated speculation about whether the High Court would be more 'conservative' or 'active'.

Actual scenario

## The appointment of High Court judges

High Court judges (referred to as justices) are appointed by the Governor-General on the advice of the Australian Government. In reality, this means the judges are chosen by the government of the day; that is, the Prime Minister (most likely on the recommendation of the Attorney-General – who is the government minister responsible for maintaining and improving Australia's legal system) – and other senior ministers. Australia's High Court **full bench** consists of seven justices.

In October 2020, the Prime Minister at the time, Scott Morrison, announced the appointment of two new High Court judges to replace two judges (Justices Virginia Bell and Geoffrey Nettle) who were both retiring prior to reaching 70 years of age, as is required by the Australian Constitution. The new appointees were Justice Jacqueline Gleeson and Justice Simon Steward.

The appointments were the first made by the Liberal-National Coalition under Scott Morrison's leadership. Like all High Court appointments, they were important given the Court's ability to influence Australian law. For example, legal principles established by the High Court are binding on all other Australian courts, and its rulings in constitutional matters can impact upon the rights of the Australian people and the law-making authority of the Commonwealth Parliament. Given this, the general 'style' of the judges, in regard to their willingness to adopt a more conservative or more activist approach, is often commented on.

The two new appointments were generally considered by legal experts and commentators to have reflected the Liberal-National Coalition's more conservative ideology. Justice Steward, aged 51 at the time of his appointment, is considered by some as holding a more conservative judicial approach, being known for favouring a more 'literal interpretation of the law'. Similarly, Justice Gleeson, is regarded as having a more conventional approach. In fact, one media article described her as a judge who has avoided any 'adventurism on the bench'.

Regardless of people's views about their judicial approach, like all of Australia's High Court judges, Justices Steward and Gleeson are highly qualified legal professionals with vast legal experience, including being former Federal Court judges. Some observers criticise the labels 'conservative' and 'active', claiming such classification is too simplistic and demonstrates a lack of understanding about the role of the judge.



**Source 1** Justice Jacqueline Gleeson was sworn in as a High Court in March 2021. Interestingly, her father is the former High Court Chief Justice Murray Gleeson.

**full bench**
all seven justices of the High Court sitting to determine a case

### *Did you know?*

The first woman to be appointed to the High Court was Justice Mary Gaudron (in 1987). At the age of 8, listening to a speech by H. V. Evatt, Leader of the Opposition and later Justice Evatt of the High Court, she asked him, 'Please sir, what's a constitution?'

As mentioned earlier in this chapter, judges may also be conservative in circumstances where their interpretation of legislation may potentially lead to a major or controversial change in the law. They may prefer parliament to investigate and make contentious law reform. While parliaments are able to investigate the need for law reform, through a range of methods including **parliamentary committees** and specialist bodies like the Victorian Law Reform Commission (VLRC), the courts are not able to investigate the views of the public and are limited to examining the resources they have available in the court, with the exception of being able to consult **extrinsic material** when interpreting statutes. Courts are also limited to making law on issues or the part of the law that is the subject of the case before them, whereas parliament can make laws on whole areas and in anticipation of future circumstances. The role of parliamentary committees and the VLRC is examined in Chapter 13.

**parliamentary committee**
a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

**extrinsic material**
material (i.e. information) that is not part of an Act of Parliament, but may assist a judge to interpret the meaning of the Act

# Judicial activism

Over the years, 'judicial activism' has been defined in many ways and there is no one clear definition. The term was first used in the United States back in the 1940s by an academic historian, Arthur Schlesinger Jr. He used it to refer to US Supreme Court judges who were willing to broadly interpret the rights protected in the US Constitution and make decisions to declare legislation that breached the civil rights of the American people invalid. The meaning of judicial activism then expanded to refer to judges who were willing to make rulings against the more politically conservative, or traditional mainstream, view in an attempt to protect the interests or rights of a minority party or group.

In recent years, the term 'judicial activism' has been used to refer to the willingness of judges to consider a range of social and political factors, including community views and values and the rights of the people, when interpreting the law and making decisions. Those who disapprove of judges taking a more active role in determining and creating law have negatively defined judicial activism as judges making decisions arguably outside their legislative or constitutional power; for example, interpreting a statute in a way that expands its meaning beyond the original intention of the parliament in an attempt to influence a change in the law. People who approve of judges taking a more active role use less negative terms such as 'progressive' rather than 'activist'. They also note that the capacity for a judge to be 'active' or 'creative' is limited, given the nature of the courts' role in interpreting existing laws and deciding within the confines of the case.

One of the first major Australian cases that was considered 'progressive' was the *Mabo* case described below.

***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

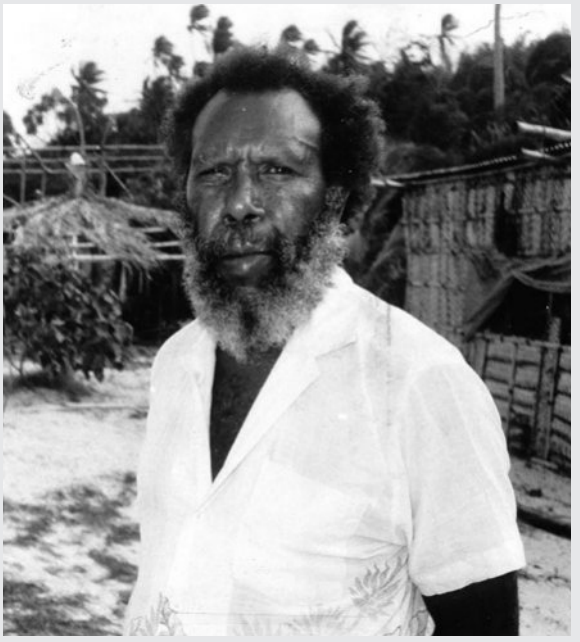
**native title**
the legal recognition of the right of First Nations people to be the owners of land and waters based on their traditional ownership of the land (which existed thousands of years before the British colonisation of Australia)

**Actual scenario**

## The *Mabo* case

In 1992 the justices of the High Court (6:1 in favour) made a significant ruling to give Aboriginal and Torres Strait Islander people land rights. More specifically, the High Court justices overturned the longstanding but false legal principle that Australia was an 'empty land belonging to no one' (referred to as the principle of ***terra nullius***) before British colonisation in the late 1700s. The Court legally recognised the right of First Nations Australians to make claims over their traditional land and be granted **native title** to land. The case, which became known as the *Mabo* case, commenced in 1982, when five men who were members of the Meriam people – Eddie Koiki Mabo, Sam Passi,

David Passi, Celuia Mapo Salee and James Rice – joined together to have their traditional ownership of the island of Mer in the Torres Strait legally recognised. The Meriam men, led by Eddie Mabo, lodged a test case against the Queensland Government and the Commonwealth of Australia in the High Court to determine the legal rights of the First Nations Meriam people.



**Source 2** Eddie Mabo, whose successful High Court challenge saw the legal recognition of native title land rights for First Nations peoples

On 3 June 1992, after a 10-year struggle, the High Court handed down its ruling in the *Mabo* case, finding in favour of Mabo by deciding that the Murray Islanders of the Torres Strait were entitled, as against the whole world, to possession, occupation and enjoyment of the lands of the Murray Islands. The High Court's ruling was seen to be an example of judicial activism in that the Court broadly interpreted the law to protect the rights of the Meriam people. The Court boldly overruled the common law principle of *terra nullius*, which had existed since colonisation, and set a precedent that established the right of First Nations people to claim, and in certain circumstances be granted, native title of their land. The Court's recognition of native title land rights for First Nations peoples justified the efforts of the many First Nations people who supported and fought alongside Eddie Mabo and the four other Meriam men who lodged the initial legal action.

*Mabo v Queensland (No. 2)* (1992) 175 CLR 1

In 1993 following the *Mabo* decision in the High Court, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth), to establish procedures for dealing with and settling native title claims.

At the time of the *Mabo* decision some critics viewed it as a very clear example of improper judicial activism. They said the High Court was exercising excessive judicial creativity by establishing a law based on the political and social desire to establish land rights and recognise the rights of First Nations people. Some even went so far as to say the ruling diminished the objectivity of the court. Many others, by contrast, including First Nations people who had long fought for land rights and the Federal Government of the day, celebrated the ruling and praised the High Court justices for acting with impartiality and courageously overruling the outdated and false legal principle of *terra nullius*.

The extent to which judges should be progressive (or activist) when making decisions and establishing precedents is controversial and largely depends on the circumstances of the case before the court. While some people may consider judicial activism and the willingness of judges to consider the need to uphold rights and recognise community values when making law as judges overstepping their role as independent law–makers, others view it as a legitimate obligation of the court that must be exercised by judges to ensure justice is achieved.

### *Did you know?*

As at October 2021, 539 native title determinations had been made, with 444 resulting in upholding the existence, or partial existence, of native title in the area claimed. In fact, native title has been recognised on more than 32 per cent of Australia's land mass. However, most of the successful land claims have been over land located in very remote areas of Australia, with very limited or no infrastructure.

In the scenario that follows, the High Court was seen to have exercised judicial activism by ruling against the Federal Government.

Actual scenario

## High Court rules on deportation of First Nations people

In a 2020 landmark case, the High Court of Australia clarified and expanded the rights of First Nations Australians by ruling that they have a sense of identity and belonging to Australia that cannot be changed or denied by the Commonwealth Parliament. In having an undeniable connection to the land, First Nations Australians 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 Indigenous men, who had been convicted of serious (indictable) offences, faced being deported from Australia by the Australian Government. This was because, although they were Indigenous 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.

However, the two men challenged the Australian Government's decision to deport them on the basis that, despite being born overseas, they were Indigenous Australians and therefore could not be considered to be immigrants (or 'aliens', being the term used in the Australian Constitution). Therefore, they argued that they could not be deported.

Four of the seven High Court justices agreed that First Nations Australians cannot be considered to be 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.



**Source 3** In a landmark case, the High Court reinforced the rights of First Nations Australians by ruling that Indigenous 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, Gunggari woman Jenny Thomas, was one of the men who faced deportation.

In 2021, however, the former Liberal-National Australian 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. In this 2021 case, the Federal Court was required to decide whether the Australian Government's decision to cancel a man's visa (i.e. permission to live in Australia), 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 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 he self-identified as an Indigenous Australian man and was recognised as such by the Mununjali people, having been raised on Country (the traditional lands of First Nations people) and in accordance with traditional laws and customs. By contrast, the Australian Government argued he was not a First Nations Australian because he had no biological Aboriginal ancestry.

In ruling in favour of the man, the Federal Court followed the precedent set by the High Court in 2020 that Indigenous Australians cannot be considered as immigrants and subject to Commonwealth immigration laws (such as the *Migration Act*). As such, the Government did not have the authority to cancel the man's visa or hold him in immigration detention.

The Federal Government was granted special leave to appeal the decision of the Federal Court to the High Court, and in April 2022 arguments were presented to the High Court. However, the newly elected Labor Federal Government abandoned the case in July 2022.

*Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (11 February 2020)

*Attorney-General of the Commonwealth v Montgomery & Ors* [2021] FCA 1423 (15 November 2021)

# Summary of judicial conservatism and judicial activism

As part of this key knowledge, you are expected to be able to discuss judicial conservatism and judicial activism as a factor that can affect the ability of courts to make law. The table below will help you develop your discussion, showing the explanation points you can make and the points which will extend your explanation to a discussion. These are not the only points you can make; other points may be relevant depending on a particular scenario.

| Application and reflection | Points on the effects of judicial conservatism |
|---|---|
| **Explanation points** | • Judicial conservatism reflects the idea that courts should show restraint when making decisions that could lead to significant changes in the law.<br>• Judges exercising conservatism helps maintain stability in the law because judges are cautious and show restraint when making decisions that could lead to significant changes in the law.<br>• Conservatism could lessen the possibility of appeals on a question of law.<br>• It allows the parliament, which has the ability to reflect community views and values, to make the more significant and controversial changes in the law. |
| **Discussion points** | • Judicial conservatism restricts the ability of the courts to make major and controversial changes in the law.<br>• Judges may not consider a range of social and political factors when making law.<br>• It may be seen by some as not being progressive enough and not factoring in twenty-first century views or values when deciding cases. |

**Source 4** A summary of the points that can be considered when discussing the way judicial conservatism may affect the ability of judges to make law

### *Study tip*

You must be able to specifically discuss how judicial conservatism and judicial activism affect the ability of the courts to make law. This means you must be able to provide reasoned arguments about the way judicial conservatism and judicial activism can assist, and limit or restrict, the ability of judges to make law. You can provide strengths and weaknesses if applicable. You can also give your opinion and should do so if the question asks.

| Application and reflection | Points on the effects of judicial activism |
|---|---|
| **Judicial activism explanation points** | • Judicial activism, broadly, refers to the willingness of judges to consider a range of social and political factors when interpreting the law and making decisions.<br>• It allows judges to broadly interpret statutes in a way that recognises the rights of the people and may lead to more fair judgments.<br>• It allows judges to be more creative when making decisions and making significant legal change (as occurred in the *Mabo* case). |
| **Judicial activism discussion points** | • Judicial activism can lead to courts making more radical changes in the law that do not reflect the community values or are beyond the community's level of comfort.<br>• It may lead to more appeals on a question of law.<br>• Judges are limited in being 'progressive' or 'active' given the nature of their role in deciding cases within the confines of the case and in light of existing law.<br>• Parliament is the supreme law-making body; it can abrogate any decisions it does not agree with. |

**Source 5** A summary of the points that can be considered when discussing the way judicial activism may affect the ability of judges to make law

## 12.5 Check your learning

### Remember and understand

1 **Define** the terms 'judicial conservatism' and 'judicial activism'.

2 **Explain** how judicial conservatism can affect the way a statute is interpreted.

### Examine and apply

3 Read the scenario 'The appointment of High Court judges'.
   - **a** **Who** decides the appointment of High Court judges?
   - **b** **Suggest** one impact a more conservative High Court full bench might have on Australian society.
   - **c** Conduct some research to discover who was the last judge appointed to the High Court. **State** the name of the judge and indicate whether they are broadly considered to have a more conservative or activist approach. Give reasons for your answer.

4 Read the scenario 'The *Mabo* case'.
   - **a** **Describe** the basic facts of the *Mabo* case.
   - **b** **Explain** why the High Court's decision was regarded as an example of judicial activism.

5 Read the scenario 'High Court rules on deportation of First Nations people'.
   - **a** **Describe** the basic facts of the 2020 High Court case.
   - **b** **Explain** why the case is viewed by some legal commentators as one of the most significant cases since the *Mabo* case.
   - **c** **Identify** the judicial approach adopted by the High Court when determining the case. **Justify** your choice.
   - **d** **Describe** the facts of the 2021 Federal Court case and **explain** why the Australian Government appealed the court's decision in this case.

### Reflect and evaluate

6 **Discuss** two strengths associated with judges taking a more activist approach when resolving cases.

7 **Evaluate** the extent to which a conservative approach limits the ability of courts to make law.

8 'Labelling judges as conservative or activist is too simplistic and demonstrates a lack of understanding about the role of judges.' **Discuss** the extent to which you agree with this statement.

# 12.6 Costs and time

## Key knowledge

In this topic, you will learn about:

- factors that affect the ability of courts to make law, including the costs and time in bringing a case to court.

As explored in Chapters 4 and 7, the costs and time involved in taking a case to court can affect the ability of the legal system to achieve the principles of justice, being fairness, equality and access.

These factors can also limit the law-making ability of the courts. As we know, the courts cannot make law until a case is brought before them, which is dependent upon **litigants** not only being aware of their right to pursue a matter through the courts, but also being willing and able to afford to bring a case before the courts. Furthermore, as precedents are generally established by appeal courts, litigants must be able and determined to see the action through the often costly and time-consuming appeals process.

**litigant**
a person who takes a matter to court to have it resolved

## Costs of taking a case to court

Taking a case to court can be costly and may deter those litigants who cannot afford these costs and who do not qualify for **legal aid** from pursuing their case and any subsequent appeals. As mentioned in Chapters 4 and 7, two of the main costs involved in taking a case to court are the cost of legal representation and court fees.

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

### The cost of legal representation

To ensure a party has the best chance of winning a case they generally need to engage legal representation to ensure their case is prepared and presented in the best possible manner. For example, lawyers and barristers need to conduct research into the case (including researching previously established relevant precedents that may be either binding or persuasive on a court), analyse evidence and documents, interview and prepare witnesses, and present legal arguments and evidence to the court in accordance with the strict rules of evidence and procedure. A party that is unrepresented will be at a distinct disadvantage and the high cost of legal representation can particularly discourage people who wish to take a civil issue to court, in which precedents can be established and changed. At the same time, however, the costs involved can discourage people who have frivolous or trivial claims from using the courts to pursue those claims.

### Court fees

*Study tip*

Before including examples and cases, you should make sure that they are relevant and will improve or enhance your response.

Lodging a civil case with a court incurs a number of costs including filing fees, hearing fees and jury costs. These costs can be expensive. For example, from 1 July 2023 a standard application (i.e. for an 'ordinary' person, not a corporate or concession application) for leave to appeal to the Victorian Supreme Court of Appeal costs $2423.20, and hearing fees cost $896.80 for every day or part day, after the first day. If a party requests a jury in the Supreme Court, it will cost $1636.00 for the first day, $303.60 per day for days two to six, and $543.60 per day from day seven onwards. These fees increase on a yearly basis.

*Study tip*

You must be able to specifically discuss how costs and time in bringing a case to court affect the ability of the courts to make law. This means you must be able to provide reasoned arguments about the way costs and time can assist, and limit or restrict, the ability of judges to make law. You can provide strengths and weaknesses if applicable. You can also give your opinion and should do so if the question asks.

# Time involved in bringing a case to court

One of the strengths associated with courts making law is that the courts have the ability to make law relatively quickly once a dispute has been brought before them.

For example, once a case is brought before a superior court, where precedents are set, the matter must continue until a decision has been made and the dispute resolved. Furthermore, judges are not required to follow lengthy procedures like those involved in the process of developing, drafting and passing a bill through parliament, including the bill being examined in general terms and great detail by both houses of parliament. Judges can, by contrast, make decisions relatively quickly to resolve a case and create law, although judges in appeal courts, where most precedents are established, can take months to hear and determine more complex cases.

The following scenario is an example of how the complexity of a dispute can lead to lengthy delays in a resolution being reached.

**Actual scenario**

## Eleven-year legal battle over failed mining project

The events in this case began in 2002, when Chris Wallen and Ken Talbot (now deceased) made an agreement to develop a coal mine in Monto, Queensland. Mr Wallen, a billionaire mining entrepreneur and owner of mining company Sanrus, made the agreement with Mr Talbot, the founder of Macarthur Coal.

According to Mr Wallen, Mr Talbot began to reconsider the agreement. By 2003 Macarthur Coal, which owned a 51 per cent share of the coal mine project, suspended the development, leaving Sanrus unable to continue the venture.

In October 2007 Sanrus (and two other companies) sued Macarthur Coal (and its subsidiary companies including Monto Coal) for $1.1 billion in damages to compensate for lost earnings associated with the failure to develop the mine and the lost opportunity to sell their share of the project at the price it would have been worth should the coal mine have been developed.

In 2008 Mr Wallen commenced a civil action against Macarthur Coal. Mr Wallen claimed Macarthur Coal was responsible for Sanrus losing more than $1 billion after it pulled out of an agreement to develop the coal mine.

In April 2019, 11 years after the civil action was initiated, the case finally proceeded to trial in the Queensland Supreme Court. In the 11 years during the pre-trial stage, the Court convened 62 times and approximately 400 files were lodged with the Court's registry. The trial was also complex, with multiple rulings being made regarding the disclosure of documents and admissibility of evidence.

In November 2019, after months of hearings, the Supreme Court ruled in favour of Macarthur Coal. Following this ruling, in January 2020, Sanrus (and the other plaintiffs) informed the Court that they had reached an undisclosed settlement with Macarthur Coal, and its subsidiary companies, and so no order was made by the Court for costs.

*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 11)* [2020] QSC 5 (31 January 2020)



**Source 1** A breach of contract dispute between two mining companies took nearly 12 years to resolve.

# Summary of costs and time factors

As part of this key knowledge, you are expected to be able to discuss costs and time as a factor that can affect the ability of courts to make law. The table below will help you develop your discussion, showing the explanation points you can make, and the points which will extend your explanation to a discussion. These are not the only points you can make; other points may be relevant depending on a particular scenario.

| Application and reflection | Points on the effects of costs and time factors |
|---|---|
| **Costs factors explanation points** | • The costs involved in bringing a case to court include costs of legal representation and filing and hearing fees.<br>• The courts are able to manage disputes to narrow the issues in dispute, possibly saving the parties costs and allowing them to proceed all the way to trial for a final determination.<br>• The high costs may mean that only meritorious and legitimate claims are pursued all the way to appeal courts. |
| **Costs factors discussion points** | • High costs can deter litigants who cannot afford these costs, and who do not qualify for legal aid, from pursuing their case and their rights in court.<br>• High costs can deter parties from pursing the appeals process.<br>• The prohibitive nature of costs may mean that old or 'bad' precedents are never challenged or brought to the court for review. |
| **Time factors explanation points** | • Courts can make law relatively quickly once a dispute has been brought before them and cases must continue until a decision has been made to resolve the dispute.<br>• Courts are not required to follow lengthy processes like those involved in the process of developing, drafting and passing a bill through parliament when deciding cases. |
| **Time factors discussion points** | • Some courts, particularly appeal courts where most precedents are established, can take months to hear and determine more complex cases.<br>• Parties can be delayed in getting a case ready for trial. |

**Source 2** A summary of the points that can be considered when discussing the way costs and time factors may affect the ability of judges to make law

## 12.6 Check your learning

### Remember and understand

1 **Outline** two factors that limit the ability of the courts to make law in a relatively speedy manner.

2 **Describe** two types of costs that may prevent a party from pursuing a case.

3 Do costs and delays affect plaintiffs just as much as defendants? **Justify** your answer.

### Examine and apply

4 Read the scenario 'Eleven-year legal battle over failed mining project'.

**a** **Identify** the plaintiff and the defendant in this case.

**b** **Suggest** two reasons why this dispute may have taken so long to resolve.

**c** **List** some of the costs that would have been incurred by the plaintiff in pursuing this legal action.

**d** **Suggest** two benefits of resolving a civil dispute in a timely manner.

### Reflect and evaluate

5 'Courts are able to make law relatively quickly.' **Discuss** the extent to which you agree with this statement. Use two cases you have studied to support your response.

# 12.7 The requirement for standing

## Key knowledge

**In this topic, you will learn about:**

- **factors that affect the ability of courts to make law, including the requirement for standing.**

Courts must wait until a party decides to pursue a case before they can create precedent and make law. A party cannot take a case to a court unless a court has the authority or jurisdiction to hear the case or matter.

**standing**
the requirement that a party must be directly affected by the issues or matters involved in a case for the court to be able to hear and determine it

In addition, the party initiating the case must have **standing** (sometimes referred to as *locus standi*) in the case to be able to pursue it. That is, the party must be directly affected by the issues or matters involved in the case to have the right to commence a legal proceeding in court.

Anyone who wishes to bring a case to court must have standing, regardless of the court. However, the issue of standing is particularly important in the High Court in cases that involve challenging a Commonwealth law. This is because the High Court generally only hears cases where a person has a 'special interest' – meaning they are more affected than other members of the general public. They must show they are more affected by the law and will gain a greater material advantage (more than just winning) if the action succeeds, or will suffer a greater material disadvantage (more than just losing) if the action fails, than a member of the general public.

The main purpose of the requirement for standing is to ensure cases are only pursued through the courts by people who are genuinely affected by an issue or matter. This prevents waste of court resources (time, money and personnel) on cases in which the plaintiff is not directly affected by the matter and outcome of the case. It can also help ensure cases brought before the courts have merit and it discourages frivolous actions.

By contrast, however, the need for parties to show they have standing can prevent plaintiffs who have a general interest in a case from pursuing the matter on behalf of another person or in the interest of




**Source 1** Standing is especially important in the High Court where cases involve challenging a Commonwealth law.

the general public. For example, the requirement prevents a person from taking court action in a case where legislation potentially might breach their rights or the rights of other individuals. It also might prevent a person who may have greater financial capacity, time, oral skills and confidence from pursuing a matter on behalf of another party, less able and willing, who has directly had their rights breached.

The scenario below is an example of a case where the High Court refused to make a ruling on the basis that the plaintiff had no 'special interest' and was not explicitly affected by the law.

**Actual scenario**

## Are anti-bikie laws a breach of human rights?

In 2014 a member of the Gold Coast Hells Angels' Motorcycle club, Stefan Kuczborski, launched a test case in the High Court of Australia on behalf of 17 'outlawed' motorcycle clubs. The case challenged the constitutional validity of a range of 'anti-bikie' laws introduced by the Queensland Government in September 2013.

Kuczborski believed that a range of laws, including the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLAD) and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) breached basic human rights (such as the right to freedom of movement and association). These laws were introduced by the Queensland Government to protect the community from members of criminal organisations who commit serious crimes.

The laws aimed to make it difficult for 'declared criminal organisations' (which included more than 25 bikie clubs such as the Bandidos, Finks, Hells Angels and Rebels) to organise criminal activities and recruit new members by banning three or more of these individuals from meeting in a public place.

Kuczborski lost his case because the High Court refused to make a ruling on the grounds that he had 'no standing' in the case and therefore no right to challenge the laws through the Court. The High Court held that because Kuczborski had not been charged with any crimes under the new 'anti-bikie' laws, he had no 'special interest' in the subject matter of the case and as such the Court could not rule on whether the laws breached his legal rights.

While the ruling potentially allowed for another person who was ultimately charged under the new laws (and therefore deemed to have a standing in the case) to mount another legal challenge, it demonstrated the difficulty and limited ability of individuals to challenge the validity of a law if they believed it breached their basic rights and freedoms.




**Source 2** The High Court challenge of Queensland's 'anti-bikie' laws failed because the Court ruled the plaintiff (pictured here on the right) did not have standing in the case.

Interestingly, in April 2016 the newly elected Queensland Government set up a task force to examine the anti-bikie laws, and many of them were abolished and replaced with more general laws such as banning 'people convicted of crimes' from meeting together.

*Kuczborski v State of Queensland* (2014) 254 CLR 51

The outcome of the *Kuczborski v State of Queensland* case has similarities with the following scenario because, in this case, the bishops did not have any legal, financial or special interest in the case. However, they were given 'standing' by the Commonwealth Attorney-General to conduct the proceeding in the Attorney-General's name.

**Actual scenario**

## Bishops against IVF

Dr McBain provided infertility treatments to single women. In 2000, the Federal Court (in *McBain v Victoria*) made a ruling which, in effect, gave single women in Victoria the right to access *in vitro* fertilisation (IVF). Some individuals and groups disagreed with this ruling, including The Australian Catholic Bishops Conference (comprising Catholic bishops).

The bishops wished to challenge the Federal Court decision, but they had no standing to do so. To enable the bishops to take the action, the Commonwealth Attorney-General granted the bishops consent to initiate a High Court challenge in the Attorney-General's name to enforce or protect a public right, where those persons cannot do so in their own name. This is called a 'fiat', which is rarely granted.

The bishops failed in their challenge. In handing down their judgment, two justices noted that the Attorney-General should not freely be able to initiate cases to 'disrupt settled outcomes in earlier cases, so as to rid the law reports of what are considered unsatisfactory decisions respecting constitutional law.'

*Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372

***Study tip***

You must be able to specifically discuss how the requirement for standing affects the ability of the courts to make law. This means you must be able to provide reasoned arguments about the way the requirement for standing can assist, and limit or restrict, the ability of judges to make law. You can provide strengths and weaknesses if applicable. You can also give your opinion and should do so if the question asks.

# Summary

As part of this key knowledge, you are expected to be able to discuss standing as a factor that can affect the ability of courts to make law. The table below will help you develop your discussion, showing the explanation points you can make, and the points which will extend your explanation to a discussion. These are not the only points you can make; other points may be relevant depending on a particular scenario.

| Application and reflection | Points on the effect of standing |
|---|---|
| **Standing explanation points** | • In a court case, the party initiating it must have standing; that is, be directly affected by the issues or matters involved to have the right to commence a legal proceeding.<br>• In the High Court, a person must have a 'special interest'; meaning they are more affected than other members of the general public.<br>• The requirement for standing ensures cases are only brought to court by people who are genuinely affected by an issue or matter rather than wasting valuable court time and resources on listening to people who are not affected by a matter.<br>• It encourages people not directly affected by an issue or matter to seek other avenues of redress (e.g. lobbying members of parliament, petitioning or demonstrating) rather than going to court. |
| **Standing discussion points** | • The requirement for standing means that people who have a general interest in a case (e.g. where legislation potentially breaches individual rights) have no right to pursue a legal challenge on behalf of public interest or the common good.<br>• It means that potential improvements to the law that could have been made by listening to those with only intellectual interest in the case are lost. |

**Source 3** A summary of the way the requirement for standing affects the ability of courts to make law

# 12.7 Check your learning

## Remember and understand

1 **Explain** what is meant by the term 'standing'.

2 **Explain** what is meant by having a special interest in a case.

## Examine and apply

3 Read the scenario 'Are anti-bikie laws a breach of human rights?'

- **a** **Explain** why Stefan Kuczborski launched a case in the High Court.
- **b** **Explain** the High Court's ruling in the case.
- **c** **Outline** one difficulty associated with challenging the constitutional validity of a law that was highlighted in this case.

4 Read the scenario 'Bishops against IVF'.

- **a** **Describe** the ruling made by the Federal Court in *McBain v Victoria*.
- **b** **Explain** why the bishops were not able to initiate a challenge without the assistance of the Attorney-General.
- **c** **Explain** what is meant by the statement made by two justices referred to in the scenario.

5 For each of the following scenarios, **identify** the parties that are likely to have standing, and those that are not. Provide reasons for your answer.

- **a** Shari was on a school camp. While riding a bike as one of the camp activities she fell into a large ditch and suffered injuries to her left leg. A girl who watched the injury has suffered anxiety and depression as a result. Shari's teachers are furious at the camp organisers.
- **b** Tiffany is a mother of three children who attend a public high school. The Commonwealth Government has just provided funding to all the public high schools in Victoria to organise morning prayers. Tiffany has challenged it on the basis that it imposes a practice of religion. Kurt, who has no children, also wishes to challenge it as he believes it is contrary to freedom of religion.
- **c** Mackenzie and her friend Bodhi intend to sue a power company after a faulty powerline caused a fire that destroyed their house. Their neighbours Mila and Renzi also wish to sue as they witnessed the fire and worried it would also destroy their house.

## Reflect and evaluate

6 **Discuss** the extent to which the High Court's decision in the case *Re McBain; Ex Parte Australian Catholic Bishops Conference* is a final statement in law.

7 **Discuss** how the concept of standing can impact on the court's ability to make laws.

# 12.8 The relationship between parliament and the courts

## Key knowledge



In this topic, you will learn about:

- features of the relationship between courts and parliament in law-making, including the supremacy of parliament, the ability of courts to influence parliament, the codification of common law and the abrogation of common law.

*Study tip*

In accordance with the *VCE Legal Studies Study Design*, you are required to know and be able to analyse the relationship between parliament and the courts in law-making. To analyse the relationship, identify its parts (including, the supremacy of parliament, the ability of courts to influence parliament and the codification and the abrogation of common law) and show how they can relate to one another. You could be asked a specific question about each of these four features.

Courts and parliaments have an interconnected role in law-making. They must work together so that the law is flexible and can be applied to any situation that might arise. As we have seen throughout this chapter, parliament is the supreme law-making body, but courts have a complementary role to parliament in making laws. The courts' role is to resolve disputes and, in doing so, it is sometimes necessary for judges to interpret statutes made by parliament and develop law where none exists. By interpreting statutes, judges can not only clarify the meaning of legislation so it can be applied to resolve the dispute before them, they can also broaden or narrow its meaning. The High Court of Australia also has the constitutional authority to interpret the meaning of the Australian Constitution and, in doing so, can alter the division of law-making power between the Commonwealth Parliament and state parliaments.

On the other hand, parliament, as the supreme law-making body, has the power to confirm, add to or change the common law and override court decisions, with the exception of those involving constitutional matters resolved by the High Court. As such, the courts and parliament have an interconnected relationship.

The four main features of the relationship between courts and parliament in law-making are:

- the supremacy of parliament
- the ability of courts to influence parliament
- the codification of common law
- the abrogation of common law.

## The supremacy of parliament

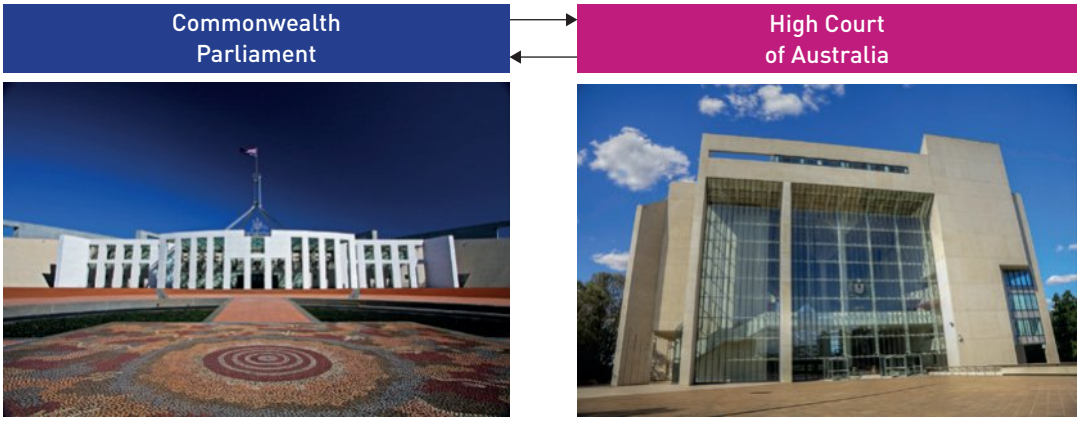
Parliament is the supreme law-making body with the ability to make and change any law within its constitutional power. It therefore has the power to pass legislation to either confirm or abrogate (cancel) decisions made by the courts (or common law), with the exception of High Court decisions on constitutional matters.

As the supreme law-making body, parliament is also responsible for passing legislation to create the courts and determine their jurisdictional power (i.e. their power to hear cases). For example, the Victorian Parliament passed the *Magistrates' Court Act 1989* (Vic) to establish the Magistrates' Court and its divisions and powers – although this Act replaced the previous statute that originally established this court.

Parliament can also pass legislation to change the jurisdiction of courts so that the types and severity of cases heard by the court can be changed. For example, the *Magistrates' Court Act* has been amended several times since it was passed, including amendments to create its specialist lists (like the Sexual Offences List) and divisions (like the **Koori Court** Division, the Drug Court Division and the Family Violence Court Division).

**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

Similarly, the *Justice Legislation Amendment (Drug Court and Other Matters) Act 2020* (Vic) amended the *County Court Act 1958* (Vic) and the *Sentencing Act 1991* (Vic) to create a new division of the County Court of Victoria, the Drug and Alcohol Treatment Court.




**Source 1** The parliament and the courts have a complementary relationship in law-making.

As the supreme law-making body, parliament is also able to pass Acts of Parliament that restrict the ability of the courts to make decisions with respect to certain matters. However, in accordance with the principle of the separation of powers (as outlined in the Australian Constitution), parliament must ensure that it allows the courts to remain independent and retain the power to determine if the parliament has passed laws beyond its law-making authority. For example, the courts are restricted in the sentences they can impose on an offender by the maximum sentences prescribed in legislation.

An example of the Victorian Government introducing legislation which restricted the ability of the courts to make decisions regarding the sentencing of offenders is explored in the scenario below.

## Actual scenario

# Mandatory minimum sentences

In September 2018 the Victorian Government passed the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic). The Act restricted the ability of judges when imposing sentences for injuring an emergency worker (including police, paramedics, firefighters, doctors and nurses delivering or supporting emergency care and prison officers) by mandating or making it compulsory for judges to impose a term of imprisonment (referred to as a custodial sentence) on convicted offenders. The legislation means that judges are not able to impose a non-custodial sanction, such as a community correction order, on offenders unless special circumstances exist, such as where the offender has a mental impairment.

Legislation that imposes mandatory sentencing is seen to be controversial as it removes the ability of the judge, to a certain extent, to consider a range of factors when imposing the sentence. In July 2022, the Victorian Court of Appeal ruled that the mandatory sentencing provisions had 'compelled' a judge to sentence a young offender to a minimum term of 3 years' imprisonment. The evidence before the Court showed that the offender was immature and would be vulnerable in prison. In handing down its decision, the Court said that 'mandatory minimum sentences are wrong in principle' and that 'sentencing courts are much better equipped, and much better placed, than legislators to determine what type and length of sentence will satisfy the sentencing objectives in a particular case'.




**Source 2** The *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) restricted the ability of judges when imposing sentences for injuring an emergency worker, such as paramedics.

# The ability of courts to influence parliament

Courts can indirectly influence parliament to make and change the law. Judges may make comments when handing down judgments, either as part of the reasons for their decision or as *obiter dicta*, that inspire or encourage parliament to initiate law reform. Parliament can also be influenced to change the law if a lower court, bound by previous precedent, makes a decision that creates an injustice, or if a court acts in accordance with the principle of judicial conservatism and is unwilling to overrule or reverse a previous precedent that is considered by the community to be bad law.

A court's decision may also highlight a problem or even cause public outcry that can lead to the parliament changing the law. For example, in 2014 in response to an increase in the incidence of 'one-punch' killings in Victoria and the perceived dissatisfaction with the sentences being imposed by the courts on offenders, the Victorian Parliament introduced 'one-punch' laws requiring those found guilty of a fatal one-punch attack to serve a minimum of 10 years in jail before being eligible for parole.

Similarly, in 2019 the perceived community dissatisfaction with the sentence imposed in the *Ristevski* case increased pressure on the Victoria Government to change the law, as highlighted in the scenario below.

**Actual scenario**

## Sentencing reform for domestic violence-related crime

In 2019 various members of the community, including victim support groups (such as Domestic Violence Victoria) and the state opposition, placed pressure on the Victorian Government to investigate the need to reform Victoria's sentencing laws for domestic violence-related offences.

This call came after a 55-year-old man was sentenced to nine years' imprisonment with a minimum non-parole period of seven years, after he pleaded guilty to the manslaughter of his wife. While the offender's sentence was increased by the Supreme Court of Appeal from nine to 13 years' imprisonment with a non-parole period of 10 years, it was perceived by many individuals and community groups as being inadequate and the Government remained under pressure to change the law.

In June 2020, the Victorian Parliament passed the Crimes Amendment (Manslaughter and Related Offences) Bill 2020 to increase the maximum penalty for manslaughter, including child homicide and workplace manslaughter, from 20 years' imprisonment to 25 years' imprisonment.



**Source 3** The brother (pictured) of a woman who was killed by her husband expressed great dissatisfaction with the original sentence imposed by the court.

As we examined earlier in this chapter, judicial activism can also influence parliament to change the law. For example, the High Court took an activist approach when determining the *Mabo* case. It decided

to overrule a long-established common law principle that Australia was *terra nullius* ('empty land') when it was colonised by the British. In doing so it recognised the right of First Nations peoples to have native title over their traditional lands. Following the High Court's decision, the Commonwealth Parliament passed the *Native Title Act*, to confirm and enshrine the decision in legislation and establish procedures for dealing with and settling native title claims.

## The codification of common law

Being the supreme law-making body, the parliament has the power to pass an Act of Parliament that assembles (or pulls together) all the relevant law in a particular area, both common law and statute law, in an attempt to create one all-encompassing law. This is referred to as **codification**. Codification of common law also allows the parliament to pass legislation that reinforces or endorses the principles established in court rulings. It also gives the parliament the opportunity to clarify, expand on or reform the relevant area of law.

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

Over the years, some areas of law that have been codified, or partially codified, by the Australian federal, state and territory parliaments include taxation law, consumer law, negligence law and some criminal law. For example, up until 2005 the law in relation to self-defence (a defence that can be used by accused people to defend certain offences) was contained in common law. In 2005, the Victorian Parliament amended the *Crimes Act 1958* (Vic) to codify the common law relating to self-defence, and in doing so, also abolished the common law. Therefore, the laws relating to self-defence are now fully contained in (or codified in) statute law.

### *Study tip*

Defining and using key legal terminology is an important skill you need to master. Use the words 'codification' and 'abrogation' specifically in your answers to questions, and make sure you know what these words mean.

## The abrogation of common law

Parliament has the power to pass legislation that abrogates (or cancels) decisions made through the courts (or common law), with the exception of High Court decisions made on constitutional matters. This may become necessary in situations where the parliament believes the courts have interpreted the meaning of the words or phrases in a statute in a way that was not the intention of parliament, or in a way that does not reflect the current meaning of the Act of Parliament. Similarly, courts could potentially interpret the common law in a way that is no longer considered appropriate.

On the other hand, it can be argued that the power to abrogate common law, with the exception of High Court decisions on constitutional matters, could lead to an unjust law if the parliament overrides a valid legal principle or court decision that has been established and considered by multiple independent judges with considerable legal expertise, to suit a short-term or populist political agenda.

The scenario below is an example of legislation that was provoked by public outrage over the offensive use of social media.

**Actual scenario**

### Common law offence of outraging public decency

In 2020, a horrific crash on a freeway resulted in the deaths of four police officers. After the incident a person took and shared graphic photos, which caused outrage in the community. In response, the Victorian Parliament passed legislation to introduce a new offence of engaging in conduct that is grossly offensive to community standards of behaviour. In doing so, it abolished the old common law offence of 'outraging public decency', which was seen to be old-fashioned and unclear, had no clear maximum penalty and was rarely used to charge offenders.

# Summary

A summary of some of the points you can make when you are asked to analyse the relationship between the parliament and the courts in law-making is set out in Source 4 below.

| Feature | Summary |
|---|---|
| Supremacy of parliament | • Parliament, as the supreme law-making body, can make and change any law within its constitutional power. It can pass legislation to abrogate (cancel) law made by courts (except for High Court decisions on constitutional matters) and codify common law. Parliament is also responsible for passing legislation to create most courts and determine their jurisdictional power.<br>• While parliament is the supreme law-making body, the High Court can resolve disputes involving the Australian Constitution and may declare legislation made beyond the parliament's law-making power invalid, and alter the division of law-making power between the Commonwealth Parliament and state parliaments. |
| The ability of courts to influence parliament | • Courts can indirectly influence parliament to make and change the law by making comments when handing down judgments that inspire or encourage parliament to initiate law reform. A court's decision may also highlight a legal problem, or cause public outcry, that places pressure on the parliament to change the law.<br>• Judges in superior courts can only do this when a case is brought before them and in relation to the issues involved in the case. This relies on an aggrieved party having standing in the case, and the financial means and willingness to pursue a potentially lengthy and stressful case.<br>• The court's ability to influence parliament is also limited by the parliament's supremacy role and in particular its willingness to change the law. |
| The codification of common law | • As the supreme law-making power, parliament can pass legislation to codify common law, which means to assemble (or pull together) all the relevant law in a particular area to create one all-encompassing law. Parliament can also pass legislation that endorses principles established by courts, or clarify or expand on them.<br>• Over the years, some areas of law have been codified or partially codified, which may mean some areas of law are established by common law as well as statute law.<br>• Codification is limited by parliament's supremacy role and whether it is willing to pass legislation to codify law. This also means that it is dependent on factors that limit or restrict the ability of parliament to make law (such as the composition of parliament). |
| The abrogation of common law | • Parliament has the power to pass legislation that abrogates (cancels) decisions made through the courts, with the exception of decisions on the Australian Constitution.<br>• The abrogation of common law could potentially lead to an unjust law if the parliament overrides a valid legal principle (that has been established and considered by multiple independent and experienced judges), to suit a short-term or populist political agenda.<br>• The willingness of parliament to abrogate common law depends on parliament's willingness to do so. Parliament may be limited or unwilling to abrogate law, even bad law. |

**Source 4** A summary of the points that can be made when analysing the relationship between parliament and the courts in law-making

## 12.8 Check your learning

### Remember and understand

1 **Explain** why parliament may be dependent on the courts in law-making.
2 **Suggest** two reasons why parliament might decide to abrogate court-made law.
3 **Explain** how courts can influence the parliament to change the law. Use one case to illustrate your response.

### Examine and apply

4 **Describe** the relationship between the supremacy of parliament and abrogation of common law.

### Reflect and evaluate

5 **Analyse** two features of the relationship between parliament and courts.

Chapter

# 12

# Review

## Top exam tips from Chapter 12

1 While there are many factors that affect the ability of parliament to make law, make sure you can discuss the four listed in the Study Design (i.e. the doctrine of precedent, judicial conservatism and judicial activism, costs and time involved in bringing a case to court, and the requirement for standing). You could be asked a specific question about each of these four factors.

2 The doctrine of precedent is one of the most complex parts of Unit 4 Legal Studies, and is often where students struggle on the final examination. It's worth spending a bit of extra time on your revision of this topic.

3 You must be able to analyse the relationship between parliament and courts. This means you must be able to identify the components or features of the relationship and show how they establish a link or relationship between the parliament and the courts. Make sure you can explain the significance of the four features of the relationship between the parliament and the courts that are listed in the Study Design (i.e. the supremacy of parliament, the ability of the courts to influence parliament, the codification of common law, and the abrogation of common law).

## 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 (including the exam) 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 The Victorian Supreme Court of Appeal has resolved a dispute by interpreting an Act of Parliament. Describe **one** possible effect of the Court's decision.

(3 marks)

**Difficulty: medium**

2 Examine **two** features of the relationship between courts and parliament in law-making.

(5 marks)

**Difficulty: high**

3 Discuss the extent to which the doctrine of precedent and judicial conservatism restrict the ability of the courts in law-making.

(8 marks)

# Practice assessment task

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

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

### 'Kevin and Jennifer's' case: *Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 172 FLR 300

Kevin was born and registered at birth as female. In 1995 Kevin began hormone treatment to better align his body with being male (including deepening his voice and creating coarse facial and body hair). In 1997 Kevin commenced full gender reassignment surgery.

Two years later, Kevin and Jennifer (both pseudonyms) married and subsequently had two children conceived through the *in vitro* fertilisation process. At the time of their marriage in 1999, the Commonwealth Parliament had not passed legislation to allow for marriage equality (same-sex marriage) and so it was largely accepted, under the *Marriage Act 1961* (Cth), that a lawful marriage could only take place between a man and a woman. Given this, in October 1999 Kevin and Jennifer applied to the Family Court of Australia to validate their marriage. Although the Family Court confirmed the validity of their marriage, this decision was challenged by the federal Attorney-General (in the Full Court of the Family Court) on the basis that Kevin, despite undergoing successful gender reassignment surgery prior to their marriage, was not a man for the purposes of the *Marriage Act*. A successful appeal would have had the effect of making Kevin and Jennifer's marriage void.

The Full Court of the Family Court was called on to interpret the meaning of the words 'man' and 'marriage' as used in the *Marriage Act*.

When deciding on the meaning of 'marriage', the Court considered, but ultimately did not follow, the English case *Corbett v Corbett* [1970] 2 All ER 33, in which the court ruled that a marriage between a woman and a man who had undergone a sex change was invalid. The Court also looked back to the parliamentary debates that took place when the *Marriage Act* was passed, to try to determine the intention of parliament at the time. During these debates, the Attorney-General commented that it was up to the courts to define marriage.

Ultimately, the Full Court of the Family Court dismissed the appeal and upheld the initial decision of the Family Court given by Justice Chisholm who, at the time of his ruling, said the question of whether someone was a man or a woman should be determined at the date of the marriage.

## Practice assessment task questions

1 Describe **one** reason for statutory interpretation. (3 marks)

2 What role, if any, could the High Court have had in this case? (2 marks)

3 With reference to the above case, explain the term 'persuasive precedent'. (4 marks)

4 In your view, did the Full Court adopt a conservative or activist approach in this case? Justify your answer. (3 marks)

5 Evaluate the ability of the courts to change the *Marriage Act*. (8 marks)

Total: 20 marks

# 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 reasons for, and effects of, statutory interpretation. | ☐ | ☐ | Go back to Topic 12.2. |
| • Features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing, and disapproving of precedent. | ☐ | ☐ | Go back to Topic 12.3. |
| • Factors that affect the ability of courts to make law, including the doctrine of precedent. | ☐ | ☐ | Go back to Topic 12.4. |
| • Factors that affect the ability of courts to make law, including judicial conservatism and judicial activism. | ☐ | ☐ | Go back to Topic 12.5. |
| • Factors that affect the ability of courts to make law, including costs and time in bringing a case to court. | ☐ | ☐ | Go back to Topic 12.6. |
| • Factors that affect the ability of courts to make law, including the requirement for standing. | ☐ | ☐ | Go back to Topic 12.7. |
| • Features of the relationship between courts and parliament in law-making, including the supremacy of parliament, the ability of courts to influence parliament, the codification of common law and the abrogation of common law. | ☐ | ☐ | Go back to Topic 12.8. |

**Check your Student obook pro for these digital 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

# Law reform




Source 1 Law reform is the process of constantly updating and changing the law so that it remains relevant and effective. One way people can influence law reform is by participating in demonstrations. Each year, thousands of people attend demonstrations in Melbourne (Naarm) and regional Victoria as part of the global movement known as 'School Strike 4 Climate'. In this chapter, you will explore the means by which individuals and groups can influence law reform, including through demonstrations, petitions and the use of the courts, as well as the role of the media and law reform bodies in law reform.

## Outcome

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 13 and 14), you should be able to explain the reasons for law reform and constitutional reform, discuss the ability of individuals to change the Australian Constitution and influence a change in the law, and evaluate the ability of law reform bodies to influence a change in the law.

## Key knowledge

In the chapter, you will learn about:

*Law reform*

- reasons for law reform
- the means by which individuals or groups can influence law reform including through petitions, demonstrations and the use of the courts
- the role of the media, including social media, in law reform
- the role of the Victorian Law Reform Commission and its ability to influence law reform
- one recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system
- the role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform
- one recent Royal Commission inquiry or one recent parliamentary committee inquiry.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the reasons for law reform using examples
- analyse the role of the media in law reform using examples
- discuss the means by which individuals or groups can influence law reform, using examples
- evaluate the ability of law reform bodies to influence a change in the law, using recent examples
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

## Key legal terms

**committee system** a system in federal, state and territory parliaments in Australia that involves the of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

**demonstration** a gathering of people to protest or express their common concern or dissatisfaction with an existing law as a means of influencing law reform

**law reform bodies** organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

**parliamentary committee** a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

**petition** a formal, written request to the parliament to take some action or implement law reform

**Royal Commission** the highest form of inquiry into matters of public concern and importance. Royal Commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

**terms of reference** instructions given to a formal body (e.g. a law reform body or Royal Commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

**Victorian Law Reform Commission (VLRC)** Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

## Key legal cases

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

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 law reform before you start.

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

# 13.1 Reasons for law reform

## Key knowledge

**In this topic, you will learn about:**

- reasons for law reform.

**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

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

Laws have many purposes, including to protect society and our safety, and to establish and protect basic human rights. Laws also aim to achieve **social cohesion** by providing guidelines of acceptable behaviour to prevent or minimise conflict within society. Given that conflict will inevitably arise, laws must also provide ways to resolve disputes.

To be effective, laws need to reflect society's values, so they are acceptable to individuals and the wider community. They also need to be enforceable, known by the community, and clear and easily understood.

The process of changing the law is referred to as **law reform**. Law reform must continually take place to ensure our laws remain relevant and effective. There are various reasons why law may need to change, which include to address:

- changes in beliefs, values and attitudes
- changes in living conditions
- advances in technology
- a greater need for protection of the community.

Each of these is described in detail below.

## Changes in beliefs, values and attitudes

*Study tip*

The *VCE Legal Studies Study Design* expects you to explain the reasons for law reform, using examples. You should create a folder and start collecting examples of law reform. For each example you should:

- describe the law reform
- outline the reasons for the law reform
- examine the benefits and limitations (pros and cons) of the law reform.

You should also keep a list of proposed changes in the law.

In any society, beliefs, values and attitudes change over time. If the law is to remain relevant and acceptable to the majority of people, it must keep up with – and reflect – these changes. On the other hand, rapid changes to the law, which impose change before the community is ready to accept it, may be met with resistance. While most people in our community are generally law-abiding citizens, they will be reluctant to believe in – and obey – laws that do not reflect their basic beliefs and standards.

Sometimes community values change as knowledge increases and society becomes more educated and aware. For example, once society became aware of the health risks associated with smoking, attitudes towards smoking and the tobacco industry changed and a range of anti-smoking laws were introduced throughout Australia. In 2007, Victoria introduced a law to prohibit smoking in enclosed public spaces (such as restaurants and office buildings), followed by other laws to regulate and discourage smoking. These included a ban on smoking in outdoor dining areas and public spaces (such as sports venues, public swimming pools and between the lifesaving flags at patrolled beaches) and within the grounds and four metres from the entrance of all schools, childcare centres, hospitals, courts and police stations.

While these laws restricted the rights of individuals to smoke anywhere they chose, they were implemented to improve public health and to benefit the whole community. At first many people complained, but over time they adjusted to the new laws and the incidence of smoking in Victoria decreased. In this way, law reform encouraged a change in community values.

Similarly, the creation, aggressive marketing and rapid uptake of e-cigarettes (or vaping products), especially by children and teenagers, with their potential to encourage nicotine addiction, has led to law reform in this area, including:

- an extension of the laws originally drawn up for tobacco smoking so that they now apply also to vaping products
- a ban on the sale, possession or use of nicotine e-cigarettes and vaping products without a prescription from a medical doctor
- a ban on the sale of all e-cigarettes and vaping products to people aged under 18 years, even those products that do not contain nicotine.

The hope is that these recent restrictions on e-cigarettes will encourage a change in community attitudes and discourage individuals, particularly young people, from vaping.

Similarly, society's increasing awareness of and attitudes to animal welfare issues has resulted in Australian laws being changed to help prevent animal cruelty, as set out in the scenario below.

**Actual scenario**

## Protecting animal welfare

In recent decades, public awareness of animal welfare issues in Australia has increased and people have become more concerned with protecting animal rights. As a result of these changing attitudes, our laws have also changed to reduce cruelty to animals and offer them legal protection. For example, in 2018 after the Victorian Parliament passed the *Domestic Animals Amendment (Puppy Farms and Pet Shops) Act 2017* (Vic), it became illegal to sell dogs and cats in pet shops unless the pets are obtained from rescue shelters or pounds (i.e. local council facilities that hold stray or surrendered pets). Similarly, since July 2019 any person wishing to sell or give away dogs and cats in Victoria, including breeders, is required to enrol on the Pet Exchange Register. This allows local councils to monitor sellers, and members of the public to check they are obtaining their pet from a registered and legitimate seller.

In 2022, *the Domestic Animals Amendment (Reuniting Pets and Other Matters) Act 2022* (Vic) was passed to help ensure lost pets are returned to their owners as quickly as possible. Under this law a person who finds a dog or cat must take it to a participating veterinary clinic (vet), a registered animal shelter or the local council, and these bodies must make a reasonable effort to identify and contact the owner.





**Source 1** 'Oscar's Law' is an ongoing national campaign to improve animal welfare. The campaign is named after Oscar (pictured above) who was rescued from a 'puppy factory' (a place where puppies are bred in large numbers and poor conditions so they can be sold at a profit) in a state of neglect. Oscar was treated by a vet and adopted by a loving carer.

As another example, in the past, the right to equal treatment before the law did not extend to LGBTQIA+ people. This gradually changed as state, territory and federal parliaments introduced legislation to support equality and legally recognise the rights of LGBTQIA+ people.

This has followed changes in people's general attitudes and beliefs towards LGBTQIA+ people and ensuring they are treated equally before the law. This is highlighted in the following scenario.

Actual scenario

## Equality for LGBTQIA+ people

Over the years society has become more aware of the difficulties faced by members of our community who are lesbian, gay, bisexual, transgender, queer, intersex and asexual (i.e. LGBTQIA+ people) as a result of inequalities in the law, and the need for the greater recognition and acceptance of LGBTQIA+ people. As a result, state, territory and Commonwealth parliaments have introduced law reform to ensure all people, regardless of their sexuality, are treated equally by the law. For example, in December 2017 after many unsuccessful attempts to change marriage laws which had previously banned same-sex marriage, the Commonwealth Parliament passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) to allow marriage equality throughout Australia.

The Victorian Parliament has also introduced and amended laws over the past decade to improve equality for LGBTQIA+ people. For example, in 2015 the Victorian Parliament passed the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) to allow LGBTQIA+ couples to apply to lawfully adopt children in Victoria. This amendment was made, in part, to reflect changing community views and increasing acceptance that a person's sexual orientation or gender identity does not affect their ability to be a loving and caring parent.

In 2019 the Victorian Parliament passed the *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic) to allow transgender Victorians (people who self-identify as a different gender to their gender at birth) to be able to choose their gender (i.e. as being male, female or non-specific) on their birth certificates without having to undergo gender reassignment surgery.

In June 2022, the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) came into effect to strengthen legal protections for LGBTQIA+ people by making it unlawful for religious organisations and schools to terminate the employment of individuals, or refuse to hire people, based on their sexuality, gender identity or marital status. Some exceptions exist, however, including in circumstances where the organisation's religious beliefs are considered integral (or essential) to the job (as may be the case for a religious studies teacher).

To achieve such changes in the law, LGBTQIA+ groups and the many people who support equality in the law have continually campaigned to maintain pressure on the government and increase community awareness and support for legislative change.

On the other hand, for some members of society the law is changing faster than they are comfortable with, notwithstanding the changes in beliefs and attitudes of the majority. For example, organisations such as the Australian Christian Lobby and the Coalition for Marriage publicly expressed their disapproval of the marriage equality legislation.



**Source 2** Members of Parliament Warren Entsch and Linda Burney, who were from opposite sides of politics, embrace after the 2017 vote in favour of marriage equality.

# Changes in living conditions

Law reform is a process that never ends. Our laws also need to be continually reformed to make sure they remain relevant and keep up with changes in living conditions such as social, economic and international conditions. Each of these is discussed below.

## Changes in social conditions

As Australia's population grows and changes, some laws need to change to ensure we can live together peacefully and maintain our basic standard of living. Expected changes to our social structure over the next 25 years include that our population will grow to between 34 and 43 million by 2055 and that the average life expectancy of a baby born during that year will be 87 years. This has implications for law reform in many areas including health care, taxation, welfare payments (including aged pensions) and the environment. An increasing population can lead to increased crime and the need for improved law enforcement infrastructure or agencies (including the police, courts and prisons) and more effective procedures within those agencies.

Some examples of other social changes that have prompted law reform include:

- increases in reported domestic violence
- binge drinking
- gang-related crime
- **online gambling**.

**online gambling** using the internet to place bets; including websites, apps, online games and poker machines (pokies) and sports betting

The scenario below provides an example of whether changes to the law are needed to address increasing health issues arising from what we eat, including sugar.

Actual scenario

### Should Australia have a 'sugar tax'?

Statistics from the 2017-2018 Australian Bureau of Statistics National Health Survey indicate that 47 per cent of Australians had one or more chronic health conditions, and 14.7 per cent of Australians reported being in fair or poor health. Chronic health conditions experienced in Australia during that time included diabetes, and heart, stroke and vascular (blood vessel) disease. In addition, approximately two-thirds of Australian adults and one-quarter of Australian children (aged between 5 and 17 years) are categorised as being overweight or obese (meaning, for an adult, they have a Body Mass Index of 30 or above).

Health issues can have an economic impact on the wider community. For example, some economic costs associated with people with health issues may include increasing demand for medical and hospital services, rising costs of healthcare and impacts on people's ability to work (e.g. increased sick leave or absenteeism).

For these reasons and others, there has been pressure to introduce legislation to address consumption of certain foods. For example, various individuals and health organisations and professionals believe the Commonwealth Parliament should introduce legislation to ban the advertising of junk food (i.e. food that is high in fat and sugar and has little nutritional value), particularly advertising that is directed at young people or appears on television, billboards, public transport or at events. There is also a push to introduce a tax on sugar-sweetened drinks, such as non-diet soft drinks, energy drinks and sport drinks, as well as sugary foods. The purpose of such a



**Source 3** The introduction of legislation to impose a tax on sugary drinks could help address health risks associated with consuming large amounts of sugar.

tax is to increase the price of these items to discourage their consumption.

By 2023, at least 85 countries (including the United Kingdom, France, South Africa and Portugal) had implemented legislation to impose some type of tax on sugar-sweetened drinks, but the Australian Government has so far resisted. Research indicates that this 'sugar tax' has been successful in reducing the consumption of sugary drinks and promoting better health, as high consumption of sugary drinks can increase the risk of weight gain, heart disease, type 2 diabetes and dental (tooth) erosion.

Despite the associated health benefits, politicians would inevitably face great pressure not to introduce a sugar tax from businesses within the fast food and packaged food industries. Critics of sugar taxes also argue that they impose a greater tax burden on low-income earners compared with high-income earners. Others oppose the tax on the basis that the government should not control the personal choices of individuals.

## Changes in economic conditions

Australia's economy is continually changing. In particular, technology and globalisation create issues that need to be addressed by the law. Governments need to monitor and change laws that regulate the buying, selling and production of goods and services across different areas of the economy such as banking and finance, mining, manufacturing and agriculture.

In recent years, there have been significant changes in the workforce (such as increasing part-time and casual employment and female participation, and the changing ways in how and where people work, particularly following the COVID-19 pandemic) and in consumer trends (such as an increase in online shopping). These developments have necessitated changes in industrial relations law (i.e. the law regulating wages and workplace conditions), consumer protection and banking law (e.g. laws regulating the enforcement of banking products such as credit cards, loans and guarantees) and international trading law (laws that regulate importing and exporting goods).

The following scenario highlights law reform to improve the terms and employment conditions of Australian workers.

**Actual scenario**

### Reforming Australia's industrial relations laws

In December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) was passed by the Commonwealth Parliament to reform Australia's industrial relations laws and improve terms and conditions of employment for Australian workers. In simple terms, the Act increases the ability of workers and unions to negotiate better terms and work conditions and promotes improved and more flexible work conditions in a range of circumstances. For example, the Act allows pregnant employees and those

experiencing family and domestic violence to request flexible work arrangements (such as altered rosters and working from home) and to only have these requests denied on reasonable business grounds. It also strengthens employment laws so people cannot be discriminated against because of their gender identity or intersex status and whether they are breastfeeding.

Among other changes, the Act aims to close the gender pay gap (i.e. the difference between the average earnings of women and men in the Australian workforce which, in 2022, indicated that men earned an average of $263 a week more than women) by banning pay secrecy clauses in employment contracts that forbid an employee from discussing their pay and work conditions with other workers.

The Commonwealth Government believes the Act will help increase wages growth in Australia by improving the ability of workers to negotiate wages and addressing some of the sources of inequalities in the workforce. The Liberal-National Coalition opposed the bill, largely due to complaints by business groups that the changes give too much power to workers and unions and will increase the complexity, length and cost of workplace negotiations and industrial action (such as strikes).



**Source 4** A copy of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, which was passed by the Commonwealth Parliament in December 2022 after significant discussion and amendments

## Changes in international conditions

Changing international circumstances or global events often influence law reform. One example is increasing global violence and the threat of terrorist attacks. Another is international conflict; wars cause a rise in global refugees, and can place pressure on global supply of goods such as oil. The Commonwealth Government monitors both so it can alter laws if necessary, such as anti-terrorism and migration laws. The following scenario explains the Government's approach to changing counter-terrorism laws to address changing circumstances across the world.

**Actual scenario**

### Strengthening counter-terrorism laws

Over the past decade, the Commonwealth Parliament has passed legislation to strengthen Australia's counter-terrorism laws and protect the Australian community from the threat of terrorism. For example, in 2019 the Parliament passed the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth) to make it more difficult for individuals who have previously been charged with or convicted of terrorism offences to be granted **bail** when charged with another Commonwealth offence. The Act achieves this by denying these individuals the presumption of being granted bail. In addition, individuals who have been convicted of terrorism offences are not able to presume they will be released on parole after they have completed serving their sentence. Instead, the courts may issue an order (called a 'continuing detention order') for the offender to be held in custody for a longer period of time.

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

Similarly, in 2021, the Commonwealth Parliament passed the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) to create an 'extended supervision scheme' to ensure that terrorist offenders who are released from prison after serving their sentence can be closely supervised depending on the security threat they present to the community.

While such laws are considered necessary to prevent terrorist attacks within Australia and provide for community safety, they can impede one of the basic principles of our criminal justice system: the right to a presumption of innocence.

## Advances in technology

Technology is constantly improving and opening up possibilities that have not previously been imagined. As it improves, our laws need to be altered and updated. Some laws will control and regulate new inventions and opportunities. Others will reduce the likelihood of people being harmed or exploited. For example, the increasing range and use of mobile devices and equipment (such as laptops, smartphones, smart watches and drones) have created new problems that the law needs to address. These include cyber-bullying, cyber-stalking, online scams, invasion of privacy and noise pollution caused by remotely piloted aircraft (drones). In other situations, technology has made it easier for us to work or collaborate, which brings on different challenges. As an example, the emergence of platforms such as ChatGPT could result in the need for legislative reform to control and regulate the use of artificial intelligence.

Technology also makes it easier for cyber-criminals to access, disclose (or pass on) or delete personal information from a database without the individual's permission. Such data breaches invade the right to privacy and can cause individuals and businesses significant financial loss and stress, especially when the breach involves the disclosure of sensitive information (like health and financial records) and personal information (like mobile phone, driver's licence and passport numbers). It has sometimes resulted in 'identity theft', which can cause significant issues for the person whose identity has been stolen.

Cyber-crime therefore creates the need for better laws to regulate how businesses manage the data they collect from individuals and the way they act when a breach has occurred. This includes promptly notifying affected people of the security or data breach. The following scenario highlights law reform designed to encourage businesses to improve their data security.



**Source 5** Recent advances in technology and cyber-crime have created the need for new laws to encourage businesses to protect consumer data and privacy.

Actual scenario

## Tougher penalties for data security breaches

In November 2022, the Commonwealth Parliament passed the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth) to increase the sanctions that can be imposed on an individual or company for serious or repeated privacy breaches. The new law was introduced into parliament after two major cyber-security attacks occurred in Australia. In September 2022, a major Australia telecommunications company became the victim of a cyber-security and data breach that resulted in the personal information of more than 2 million customers being exposed. Weeks later, a major Australian health insurer became the victim of a security breach and approximately 9.7 million former and current customers had their personal details accessed, and some released on the dark web.

Under the new law, severe financial penalties will be available to the courts for breaches of the *Privacy Act 1988* (Cth) including a maximum fine of approximately $50 million or three times the value of the benefit gained by the misuse of the stolen data, whichever is greater. The new penalties aim to encourage companies to improve their data security by ensuring they effectively manage and safely store the personal data they collect from customers.

It is, however, difficult for companies and law-makers to keep pace with rapidly developing cyber-threats designed by criminals to access, steal and use other peoples' personal information. Individuals can also unintentionally release their data to cyber-criminals or fall victim to online scams such as phishing, where cyber-criminals send emails and texts that falsely appear to be from a reputable business (such as a bank or telecommunication company) to lure (or induce) individuals into providing their confidential personal information (such as banking details).

Scientific and medical advances also create the need for law reform. Developments in genomics and genetic research have enabled scientists to use genetic data from individuals to identify the cause and risk of developing various illnesses and develop new medical treatments. However, they have also created a new area of science and medicine that needs to be regulated by law.

Over the years, disputes have arisen over the ownership of 'genes' and 'genetic discoveries'. In one Australian case, the High Court was required to determine whether a company could take out a patent to own a genetic mutation or 'discovery'. The company had spent millions of dollars on research and development to identify a genetic mutation (or change in one or more genes) that increases a person's risk developing of ovarian and breast cancer. The company's right to patent the genetic mutation was challenged because it could potentially limit the ability of an individual to use their genetic information without the company's permission. The Court's ruling that the company could not own the genetic mutation because the genetic material already existed in nature (and therefore was not a 'newly invented product' that could be patented) created Australian law regulating the ownership of genes.



**Source 6** Some people in our community, such as children, have specific needs and rights that must be protected, especially if they are unable to protect themselves.

# Greater need for protection of the community

Law reform must continually occur to make sure individuals and different groups within our community are protected and feel safe. One of the major roles of the law is to protect individuals from harm. 'Harm' can include physical harm (such as broken bones from violent assault), emotional harm (such as the destruction of self-esteem and depression that can come from bullying, sexual harassment or neglect) or economic harm or financial damage (such as exploitation because of unfair workplace and trading practices).

Some people in our community also have specific needs and rights that must be protected, especially if they are unable to protect themselves (e.g. children, vulnerable workers, consumers, people with disabilities and those who may suffer discrimination because of attributes such as race, religion, gender identity or sexuality). Even animals and the environment need protection. Laws are therefore needed to make unlawful those actions that may harm individual members of the community, specific groups within our community, and the community as a whole. As new situations arise, new laws are required.

**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)

Some examples of law reform that protects specific groups are set out in Source 7 below.

| New law | Purpose of the law |
|---|---|
| The *Crimes Legislation Amendment Act 2022* (Vic) was created by the Victorian Parliament to, among other reforms, create a new statutory offence of 'engaging in conduct that is grossly offensive to community standards of behaviour'. | • The new offence was created after a man who used his mobile phone to record the scene of a tragic motor vehicle collision (in which four police officers died) was charged with the outdated and rarely used **common law** offence of 'committing an act that outrages public decency', which had no set minimum penalty.<br>• The new law aims to provide greater protection of the community by clarifying the law on grossly offensive behaviour so it meets the expectations of the community, and by setting a maximum penalty (5 years' imprisonment) for convicted offenders. |
| The *Education and Training Reform Amendment (Protection of School Communities) Act 2021* (Vic) was created by the Victorian Parliament to allow appropriate decision makers in schools (e.g. school principals) to make orders to protect school staff and other members of their school community from harmful, abusive, threatening or disruptive behaviour. | This law reform aims to protect school staff and other members of school communities and ensure schools are safe working and learning environments by allowing authorised school personnel to make orders against adults (e.g. parents or carers) who act in a harmful, abusive, threatening or disruptive way. An order may include banning a parent or carer from entering, remaining on or being within 25 metres of the school or a school activity, or approaching, calling or sending a message to a staff member. |
| The *Livestock Management Amendment (Animal Activism) Act 2021* (Vic) was created by the Victorian Parliament to ban animal activists from trespassing on Victorian farms; it creates fines for offenders. | This law reform aims to protect Victorian farmers by deterring animal activists from unlawfully entering and remaining on farms to protest or conduct demonstrations. It also protects farm owners and the general public from the biosecurity threat (including the increased risk of the spread of disease) that can occur from unlawful and unsupervised entry to farms. |

**Source 7** Examples of law reform that protects specific groups within our community

# 13.1 Check your learning

## Remember and understand

1 **Identify** two reasons for law reform.

2 **Identify** one minority or vulnerable group in Australia, and **explain** one reason why law reform may be necessary for that group.

3 **Describe** the relationship between animals and one reason for law reform. In your answer, **identify** one legislative change that has been made in relation to animals.

## Examine and apply

4 Read the scenario 'Equality for LGBTQIA+ people'.
   - **a** **Describe** one legislative change that has been made to improve equality in the law for LGBTQIA+ people.
   - **b** Between 2010 and 2017, four bills were introduced into the Commonwealth Parliament to change the law to allow marriage equality throughout Australia, but each was defeated. **Suggest** reasons why it took so many years for the Parliament to pass marriage equality laws.
   - **c** **Explain** why it was left to the Commonwealth Parliament, and not the Victorian or state parliaments, to change the law in relation to marriage equality.
   - **d** **Suggest** one reason why Victoria's birth registration laws were changed in 2019.
   - **e** **Describe** the purpose of the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) and **suggest** one reason why it may be difficult to enforce.

5 Read the scenario 'Strengthening counter-terrorism laws'.
   - **a** **Describe** one change made to Australia's counter-terrorism laws since 2019.
   - **b** **Outline** the purpose of this reform.
   - **c** **Describe** how this legislation might impact the rights of an accused person or offender and **explain** whether you believe this impact is justified.

6 Read the scenario 'Tougher penalties for data security breaches'.
   - **a** **What** is a data breach?
   - **b** **Describe** the relationship between technological advancements and the introduction of the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth).
   - **c** Do you think the Act will improve cyber-safety? **Justify** your answer.

7 Select one law reform from Source 7. **Explain** why the law reform was introduced and whether you support the reform.

## Reflect and evaluate

8 Read the scenario 'Should Australia have a "sugar tax"?' and discuss in a small group whether you think the Commonwealth Parliament should impose a tax on sugary drinks and/or other high-sugar and low-nutrient products.

9 'The government should introduce law reform with the aim of encouraging a change in community views.' **Discuss** the extent to which you agreement with this statement.

# 13.2 Petitions

## Key knowledge

In this topic, you will learn about:

- the means by which individuals or groups can influence law reform, including through petitions.

***Did you know?***

A famous petition to the Commonwealth Parliament was presented on paper surrounded by bark paintings. It was submitted on behalf of the Yolngu people of Yirrkala, NT. Their traditional land was under threat from mining. The Parliament responded by setting up a select committee to investigate.

Parliament has many features and structures to ensure laws are changed when necessary, such as members of parliament speaking to people in their electorates or regions to gauge community values. However, at times, individuals and groups may see the need to influence legislative reform. This may be because they feel that parliament has not responded to the need for a change in the law, or there is a new issue or problem and they want to make parliament aware of it.

Individuals and groups can influence a change in the law in a number of ways, and often they use more than one way or method to try to influence parliament to change the law. Three of the ways in which individuals or groups can change the law, which you will explore in this topic and in the next topics are:

- petitions (this topic)
- demonstrations (Topic 13.3)
- the use of the courts (Topic 13.4).

## Introduction to petitions

**petition**
a formal, written request to the parliament to take some action or implement law reform

A common way individuals and groups raise awareness of the need for law reform and influence change is by preparing a **petition** to be presented directly to the parliament. In fact, petitions are the only way an individual can directly put their concerns or complaints before the parliament.

A petition is a request to the parliament to act on a matter. For example, a petition might request the parliament to introduce a new law, amend an existing law or take a particular course of action in relation to a policy matter or complaint. A petition may be either on paper or electronic (an e-petititon).

### Petition rules

For a petition to be accepted for consideration by the parliament it must be prepared in a particular format. This format varies depending on whether the petition is presented to one of the state or territory parliaments or the Commonwealth Parliament, and the house in which it is to be presented.

For example, the rules may require that the petition:

- is addressed to the house in which it is being presented
- clearly states the action being requested (e.g. the desired change in the law) and the reasons for the petition
- is limited by words (e.g. the House of Representatives has a 250-word limit)

**principal petitioner**
the person who initiates or organises a petition, and whose name and contact details must be provided on the first page of the petition

- contains the details of the person who initiates or organises the petition (the **principal petitioner**)
- is legible and does not contain any offensive or disrespectful language
- has at least one signature
- is an original document (i.e. not a photocopy of a petition) or, in the case of e-petitions, can be created directly on the parliament's website using its e-petition system. This means petitions created on sites like Change.org cannot be directly presented to the parliament.

In the House of Representatives, if the petition meets the rules, it will be certified and presented in the House. Alternatively, a member of parliament may be willing to present the petition on behalf of

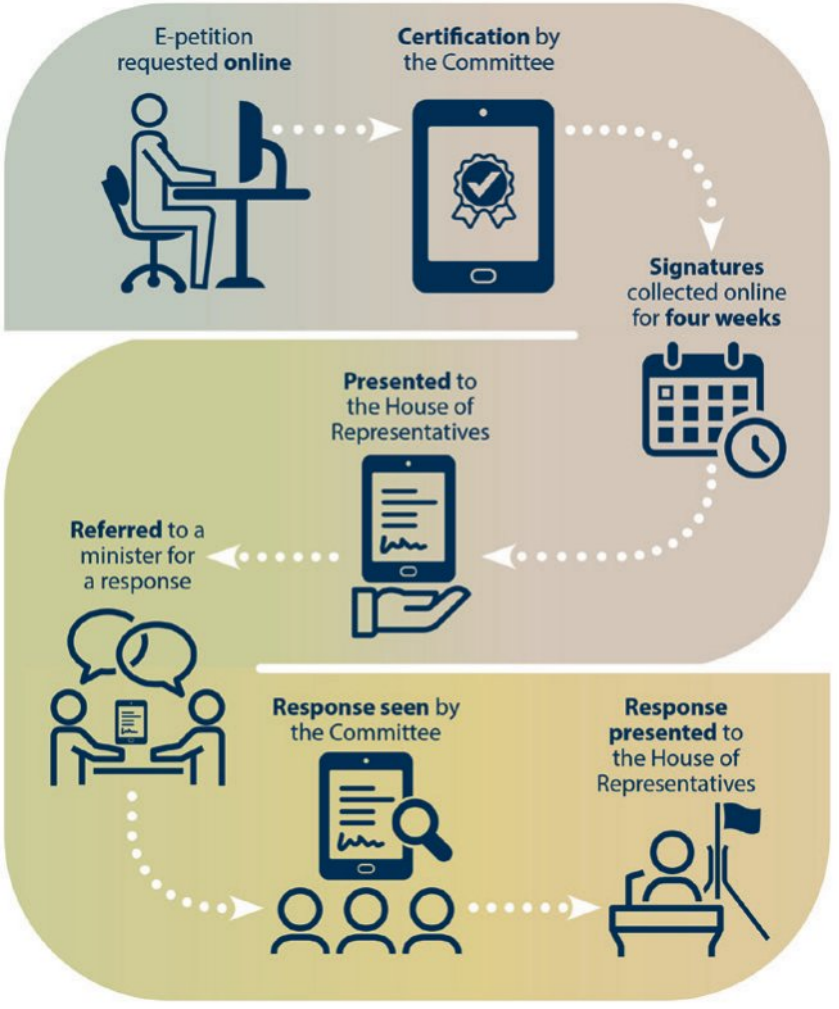
the principal petitioner. Once the petition has been presented it becomes part of the parliament's official records. The minister will then have a certain time to respond. The response will be seen by the House Standing Committee on Petitions (which receives and processes petitions) and will then be presented in the House of Representatives.

In the Victorian Parliament, all petitions must be sponsored by a member of parliament, who will table the petition in parliament, which means the petition will be officially recorded and will become part of public record.

## Examples of petitions

Each year the state, territory and Commonwealth parliaments receive hundreds of petitions. The petitions may be in relation to an issue of general community interest (such as preventing logging in certain forests, banning live animal exports or banning the release of helium balloons) or an issue relevant to a specific group of people (such as funding for a health centre in a particular community, or to establish a new supervised school crossing in a local area). The parliaments may even be presented with several petitions on the same subject. For example, since 2020, the federal, state and territory parliaments have received dozens of petitions relating to Australia's response to the COVID-19 pandemic, including petitions related to mandatory vaccinations for certain workers and the removal of mandatory mask wearing in indoor public spaces (such as public transport).

Some examples of recent petitions are set out in Source 2 on the next page.




**Source 1** The path of an e-petition in the House of Representatives shows the various stages of a petition.

| Petition | Details |
|---|---|
| A 2019 e-petition to the Commonwealth Parliament (House of Representatives) that the House of Representatives declare a climate emergency in Australia and introduce legislation to immediately and directly reduce the causes of human-made climate change. | • This petition, tabled by an independent member of parliament, Zali Steggall, was one of the largest petitions presented to the House of Representatives, gaining 404 538 signatures in a four-week period.<br>• The principal petitioner, Noah Bell, a 23-year-old Australian citizen, spoke at a press conference with members of the federal crossbench (independents and minor parties) when presenting the petition to Ms Steggall.<br>• After the petition was tabled in the Parliament, the then Minister for Energy and Emissions Reduction responded to the petition by outlining the Federal Government's plan to reduce emissions and greenhouse gases by 2030 while ensuring a strong economy. |
| A 2020 e-petition to the Commonwealth Parliament (House of Representatives) for a Royal Commission be established to investigate media diversity in Australia. | • This petition was created by former Australian Prime Minister Kevin Rudd, who raised concerns about the lack of diversity and independence in the Australian media and the effect this can have on our democracy. For example, some argued that Australia has one of the most concentrated newspaper markets in the world, with only two media organisations holding a large portion of the print media market by readership. Mr Rudd and many other people believe this enables potentially inaccurate and politically biased reporting about social, legal and political issues.<br>• At the time the petition was tabled by Australian Labor Party (ALP) member Andrew Leigh, it was the largest e-petition, and the third largest petition, ever to be presented to the Commonwealth Parliament, with more than 500 000 signatures.<br>• While a Royal Commission was not established, in November 2020 a parliamentary inquiry was set up to investigate the state of media diversity, independence and reliability in Australia. |
| A 2022 petition to place pressure on the Commonwealth, state and territory governments to raise the age of criminal responsibility from 10 to 14 years of age. | • In 2020, a group of First Nations organisations and legal and human rights organisations joined together to create a national *#raisetheage* campaign. The campaign aimed to raise community awareness of the need to increase the age of criminal responsibility in Australia and pressure federal, state and territory governments to introduce law reform (see Chapter 11 for more details). As part of this campaign, the *#raisetheage* e-petition was created.<br>• By July 2022, the e-petition had been signed by over 211 000 people, including 65 799 Victorians. While the e-petition was not created on the Victorian Parliament's website and therefore could not be directly tabled in the Parliament, it was received by former Legislative Council member and the Leader of the Reason Party, Fiona Patten, who used it to generate media interest in the issue and sought to raise the issue in parliament (e.g. Ms Patten referred to the petition during question time). |

**Source 2** Examples of petitions in recent years

# Are petitions effective?

The ability of a petition to influence law reform depends on various factors including, most obviously, the number of people who show their support by signing the petition. A petition with a large number of signatures will appear more representative of the community and indicate a high level of community support for the requested action. This is important because members of parliament, in accordance with the principle of **representative government**, will be more likely to make laws that reflect the views and values of the majority of people rather than a few individuals. On the other hand, a petition with very few signatures may not get the attention necessary for it to generate interest, particularly given the number of petitions parliament receives each year.

**representative government**
a political system in which the people elect members of parliament to represent them in government

Other factors that affect the ability of a petition to impact law reform include the passion and profile of the presenting member of parliament and whether the petition is supported by additional pressure (e.g. an effective media campaign). Similarly, only e-petitions that are created on a parliamentary website can be tabled in parliament. This means, contrary to popular opinion, not all e-petitions are presented to the parliament, which may reduce their effectiveness.

Source 3 sets out points you can make to discuss the use of petitions to influence law reform, including some points for and against their use. These are not the only points you can make; there may be other relevant points depending on a particular petition or scenario.

| Application and reflection | Points on the effectiveness of petitions |
|---|---|
| **Explanation points** | • Petitions are formal documents, signed by one or more people, requesting parliament to take action or change the law. It is a direct way in which individuals can make known to the parliament their desire for changes to the law.<br>• Each parliament will have rules or requirements for a petition to be accepted. The process will ordinarily involve the petition being presented in parliament (sometimes by a member of the house), after which it will be on the public record.<br>• Petitions are a relatively simple, easy and inexpensive way for people to express support for a change in the law; e-petitions are particularly easy to set up, sign and monitor (in terms of progress).<br>• In an attempt to make laws that reflect the views of the majority of the community, members of parliament are more likely to consider a petition for law reform that contains many signatures demonstrating strong support within the community.<br>• The act of creating a petition and gathering signatures can generate public awareness of an issue and support for the desired legislative change.<br>• Even if a petition is not initially successful in generating law reform, its tabling can help gain the attention of other members of parliament and the media, which can then generate further community support. |

## *Study tip*

The *VCE Legal Studies Study Design* requires you to discuss the means by which individuals or groups can influence law reform, using examples. This means you need to be able to provide a reasoned argument as to why petitions, demonstrations and the use of the courts may or may not be able to influence law reform. This can include the benefits (strengths), limitations, weaknesses or restrictions of using petitions to influence change in the law. You can also give your opinion (and should do so if directed in the question).

| Application and reflection | Points on the effectiveness of petitions |
|---|---|
| **Discussion points** | • For privacy reasons, some people are reluctant to put their name, residential address or email address on a petition. Therefore, while they may support the change, they may not be prepared to demonstrate that support by signing a petition.<br>• To be presented in the parliament, petitions must adhere to certain rules. For example, there may be a word limit, or the petition may have to be tabled by a member of parliament (as in the Victorian Parliament). Petitions that do not adhere to rules are unlikely to be accepted and therefore may not ever be presented or get any attention.<br>• Petitions in the Victorian Parliament must be tabled by a member of parliament. The ability of a petition to effect change may depend on whether a member is willing to table it, who tables it, and their influence within parliament.<br>• Parliaments receive hundreds of petitions each year and there is no guarantee or compulsion for the suggested law reform to be adopted.<br>• Many petitions do not gain public and media attention after being tabled, especially if there is no other source of community pressure beyond the petition. This means valuable requests for law reform may be overlooked.<br>• Opposing petitions (putting opposite points of view) and multiple petitions on the same topic can also reduce the impact of a petition. |

**Source 3** Points to consider when discussing the use of petitions to influence law reform

# 13.2 Check your learning

## Remember and understand

1 Using an example, **define** the term 'petition'.

2 **Describe** two requirements that most likely need to be met before a petition can be presented to the parliament.

## Examine and apply

3 Go to the Parliament of Victoria website (see the link on your obook pro). Select the 'Sign a petition' hyperlink.
   - **a** **Who** can sign a petition that is to be presented to the Victorian Parliament?
   - **b** **What** information must a person provide when signing a petition (both a paper and e-petition) for the Victorian Parliament?

4 **Investigate** two other petitions that have been presented to the Commonwealth Parliament or the Victorian Parliament or are currently open to sign. Use the Parliament of Australia or Parliament of Victoria websites (links are provided on your obook pro). On the Parliament of Victoria website, select 'Search Hansard' from the 'Parliamentary activity' menu. Select 'Quick Search' (from the left side menu) and type 'petitions' in the 'debate text' box and search. **State** the name and purpose of each of your selected petitions and **explain** what you think the parliament's response to each petition should be.

**Weblink**
Parliament of Victoria: Petitions

**Weblink**
Parliament of Australia: Petitions

## Reflect and evaluate

5 'Petitions are not an effective way for individuals and groups to influence change in the law.' **Discuss** the extent to which you agree with this statement. Use one example from Source 2, or your own example, to support your response.

# 13.3 Demonstrations

## Key knowledge

**In this topic, you will learn about:**

- **the means by which individuals or groups can influence law reform, including through demonstrations.**

**demonstration**
a gathering of people to protest or express their common concern or dissatisfaction with an existing law as a means of influencing law reform

Other than petitions, one of the common ways individuals and groups can influence a change in the law is by organising or participating in a public **demonstration**.

## Introduction to demonstrations

Demonstrations (also referred to as protests or rallies) occur when a group of people gather together to express their common concern or dissatisfaction with an existing law or other issue. They can be an effective way for individuals and groups to influence law reform by alerting the government to the need for a change in the law. They can also raise awareness of the need for legislative change within the community, which generates further support for the change.

Demonstrations can take different forms, but they all aim to bring an issue to the attention of the community and lawmakers with the objective of influencing a change in the law. One example includes the growing number of people who demonstrate on 26 January, the day designated as Australia Day.

**Actual scenario**

### 'Change the date' movement

On 26 January each year, demonstrations take place across Australia to protest the Australia Day celebrations held on the anniversary of the arrival of the British, and the colonisation of Australia. For some Australians, particularly many First Nations people, holding a celebration of Australia on this date is considered inappropriate and offensive, because it commemorates a day of sorrow when First Nations people lost their independence and sovereign right to control their land, culture and families. Australia Day is therefore sometimes referred to as 'Invasion Day' or 'Survival Day'.

Each year demonstrations take place to raise community awareness of the suffering that colonisation caused First Nations peoples. The demonstrations also seek to influence law reform to address the human rights problems facing First Nations people in Australia.

First Nations peoples have different views on how or whether Australia Day should be recognised, including:

- changing the date of Australia Day to a more appropriate and inclusive date
- abolishing the notion of Australia Day entirely
- renaming and reframing Australia Day, to recognise and acknowledge the contributions of First Nations peoples and what 26 January 1788 meant for them.




**Source 1** While many Australians celebrate Australia Day on 26 January each year, more and more people are now beginning to call it 'Invasion Day' because it commemorates the arrival of European colonisers and the loss of rights and freedoms for First Nations Australians. Each year tens of thousands of people gather in Melbourne's CBD for an 'Invasion Day' or 'Survival Day' rally.

# Examples of demonstrations

Over recent years many people have joined demonstrations to draw attention to their desire for the parliament to introduce a change in the law.

**social media**
a range of digital tools, applications and websites used to share information in real time between large groups of people (e.g. Facebook, YouTube, WhatsApp and Instagram)

More recently, global movements or strikes have been organised, aided by more immediate methods of communicating around the world through **social media** platforms. For example, as part of the global movement 'School Strike 4 Climate' (as shown in the picture on the opening to this chapter), school students from around the world 'skip' classes on a particular day or week to join rallies to demand that leaders act on climate change. The movement was inspired by Greta Thunberg, a young climate change activist. One of the largest climate strikes in history occurred on 20 September 2019, when an estimated 4 million people around the world took part. Approximately 100 000 people attended the strike in Melbourne.

While many demonstrations are peaceful, some have caused public inconvenience and created controversy. Other demonstrations have focused on particular methods of drawing attention to the movement. Some examples of groups that have organised demonstrations are set out in Source 2.

| Group | Details |
|---|---|
| Extinction Rebellion (XR) Australia is part of a global movement that uses non-violent civil disobedience to 'disrupt business as usual' to raise community awareness and demand governments act on climate change. Each year XR activists take part in a range of demonstrations or 'disruptive civil disobedience rebellions'. | • In October 2022, one month before the Victorian state election, XR Victoria began a two-week series of demonstrations (called the 'Spring rebellion') to demand the end of fossil fuel (gas, coal and oil) projects and logging in Victoria. XR climate activists took part in several demonstrations and activities throughout Melbourne and regional Victoria, including:<br>– a demonstration at the National Gallery of Victoria where two activists glued their hands to a painting by world-renowned artist Pablo Picasso. The painting was protected by a hard plastic covering and was not damaged, but the controversial action resulted in police arrests and gained national and global media attention<br>– a demonstration in the Melbourne CBD, during the 5.00 pm peak hour, where hundreds of XR activists, and activists from other climate action groups, marched together for climate justice<br>– activists taking part in the Melbourne Fringe Festival with a float that included a 'burnt koala' puppet, saying they represented the koalas and other animals destroyed in the 2019–20 bushfires. |
| Each year animal rights activists, including concerned individuals and groups (such as Vegan Rising and Justice for Captives) undertake a number of protests and demonstrations throughout Australia to draw attention to animal cruelty. | • In 2022, animal activists demonstrated outside the Victorian Parliament to protest the passing of the *Livestock Management Amendment (Animal Activism) Act 2021* (Vic). The Act bans animal activists from entering Victorian farms and businesses involved in the production of animal products (without the permission of the owners) to photograph and record livestock farm practices and protest, and creates fines for offenders. While this type of action can generate community awareness, entering private property without permission is an invasion of the property owners' rights. During the demonstration, some activists taped their mouths shut and held dead animals to try to raise awareness of the alleged animal abuse involved in the production of animal products.<br>• In another demonstration, activists gathered in the meat section of a Melbourne supermarket to raise community awareness and place pressure on state and federal parliaments to strengthen laws in relation to alleged animal abuse, including a total ban on sow stalls (small enclosures for pregnant pigs). During the Sunday trading period at the supermarket, the activists held images and played audio of pigs being mistreated. |

**Source 2** Examples of two groups who have organised demonstrations in the past few years



**Source 3** Extinction Rebellion activists were arrested after they glued their hands to a famous Picasso painting in the National Gallery of Victoria to highlight the climate crisis.

## Are demonstrations effective?

The effectiveness of demonstrations as a means by which individuals and groups can influence law reform largely depends on their ability to attract the attention of the media and public. If successful, demonstrations can alert and educate members of the community about social, economic, political and legal injustice and the need for law change. The greater the community support for law reform, the more likely it is that members of parliament, who are reliant on the electoral support of the public, will respond to the need for change.

On the other hand, certain factors and circumstances can impact on the ability of demonstrations to be effective. Violent or inconvenient demonstrations, or those attended by very few people, can have less impact. Disorganised demonstrations, or demonstrations that do not have a central message or call for action, can also be less effective.

Source 4 sets out some points you can make to discuss the use of demonstrations to influence law reform, including some points for and against their use. These are not the only points you can make; there may be other relevant points depending on a particular demonstration or scenario.

| Application and reflection | Points on the effectiveness of demonstrations |
|---|---|
| **Explanation points** | • Demonstrations are public rallies or protests, where groups of people gather together at a central location or locations to express their common concern or dissatisfaction with an existing law.<br>• Demonstrations can be effective in generating an awareness for a need to change the law. For example, large, peaceful demonstrations attended by thousands or hundreds of thousands of people may demonstrate to parliament that the majority of people support a change in the law. This has happened in the past in relation to climate change and gender equality. |

| Application and reflection | Points on the effectiveness of demonstrations |
|---|---|
| | • Demonstrations that attract large numbers of participants often attract media attention, which can generate further public support for the desired law reform. This is important because, in an attempt to make laws that reflect the views of the majority of the community, members of parliament are more likely to consider law reform that has strong support within the community.<br>• Demonstrations can gain the support of members of parliament who want to 'adopt a cause' – particularly ones that might improve their public profile or image.<br>• Demonstrations can alert and educate members of the community about social, economic, political and legal injustice and the need for law change. This can bring change over time. |
| **Discussion points** | • The number of people who attend a demonstration may affect its ability to influence law reform. For example, demonstrations with only a few participants may not generate any interest or awareness, or media attention. However, this may depend on the nature of the demonstration. For example, an original, creative, ongoing or controversial 'small' protest may gain the attention of the media.<br>• The ability of a demonstration to influence law change may depend on the type or nature of the demonstration. For example:<br>– demonstrations that cause public inconvenience, become violent or lead to breaches of the law may be less effective in generating positive media attention and the support of the community and members of parliament (who may prefer to associate themselves with positive campaigns, rather than ones that cause conflict, public inconvenience or violence). However, disruptive non-violent demonstrations that involve civil disobedience (e.g. forming a human blockade to prevent logging) may generate media attention and discussion, and persuade members of the community to consider various injustices and the need for law reform<br>– demonstrations that are single events may not generate ongoing support for the desired law reform.<br>• Demonstrations may focus on an injustice or issue that cannot be changed by parliament (e.g. a human rights issue in a country over which Australia has no authority or little influence), although they may attract global attention and have a longer-term influence.<br>• Disorganised demonstrations, or demonstrations that have no clear call for action or messaging, may be less effective. Organised demonstrations, particularly those where there is a global movement or messaging, may have more of an impact. |

**Source 4** Points to consider when discussing the use of demonstrations to influence law reform




**Source 5** Animal activists demonstrating for veganism, which excludes all animal products from a person's diet. Similar protests have been held to protest animal cruelty, including protests against meat being sold in Melbourne supermarkets.

## 13.3 Check your learning

### Remember and understand

1 Using an example, **define** the term 'demonstration'.

2 **Describe** one similarity and one difference in the ability of petitions and demonstrations to influence a change in the law.

### Examine and apply

3 Read Source 2 and look at the image in Source 3.

- **a** **What** is Extinction Rebellion Australia? Using one example, **explain** why their demonstrations are often considered controversial.
- **b** **Outline** why animal activists protested outside the Victorian Parliament building in 2022.
- **c** In a small groups, discuss the possible benefits and limitations associated with using 'shock tactics' (like animal activists holding dead animals and using graphic images) during demonstrations to influence a change in the law.

4 Conduct online research into two recent demonstrations that have taken place in Melbourne or regional Victoria.

- **a** **Describe** the approximate size of the demonstration, its location and any other relevant information (such as any particular features of the demonstration).
- **b** **Outline** the main purpose of the demonstration.
- **c** **Discuss** the extent to which you believe the demonstration was effective in achieving its purpose.

### Reflect and evaluate

5 **Discuss** the ability of a demonstration to be a successful method of influencing law reform.

# 13.4 The use of the courts

## Key knowledge

In this topic, you will learn about:

- the means by which individuals or groups can influence law reform, including through the use of the courts.

As you have seen, people in our community can influence a change in the law in many ways. Petitions and demonstrations can be relatively effective in trying to influence a change in the law. Another way that individuals can try to raise awareness of the need for law reform is by using the courts.

## Introduction to the use of the courts

Individuals can be instrumental in bringing about a change in the law by taking a matter to court. For example, an individual may be involved in a dispute, or even a criminal case, which highlights the need for a change in the law. In taking the case to court, while the individual may be trying to prove their own claim rather than trying to change the law, an unclear area of law may be clarified or identified in the process, meaning their case has played a part in changing the law. For example, through statutory interpretation, a court can add to the meaning of law, as explored in Chapter 12.

In addition, if parliament has passed a law that is unclear or unfair, an individual may challenge the legislation through the court system in the hope that a judge will interpret and clarify the meaning of the law in their favour, or it may highlight to parliament the need to change the law (e.g. by the courts identifying an ambiguity in the law, or suggesting a law is unworkable). However, except for High Court rulings in constitutional disputes, parliament can always pass legislation to override a court decision.

The role of the courts in influencing a change in the law can also be limited in some ways. First, the courts can only decide a point of law or case (and in doing so change the law) when resolving a dispute that has been brought before them. This is reliant on people being prepared to challenge an existing law in the courts. People can be discouraged from taking a case to court by the high costs involved (such as the cost of engaging legal representatives and court fees), the amount of time the case may take to resolve and the uncertainty of the outcome. A party must also have **standing** to be able to initiate a court action.

**standing**
the requirement that a party must be directly affected by the issues or matters involved in a case for the court to be able to hear and determine it

Second, the courts can only rule on the issues directly involved in the case before them.

## Examples of individuals using the courts

The landmark human rights case below is an example of an individual who sought to influence a change by challenging a law in the courts.

**Actual scenario**

### Gender recognition laws

An individual who does not identify as being either male or female undertook court action against the decision of the New South Wales Registry of Births, Deaths and Marriages to not allow them to register as being of 'non-specific' sex. The Registry claimed that in accordance with the *Births, Deaths and Marriages Registration Act 1995* (NSW), it only had the power to change a person's sex from male to female or vice versa.

The case was ultimately resolved by the High Court which ruled that the Registry did have the power to record the individual's sex in a gender-neutral way.

While this was a NSW case, it generated national attention including the attention of the Victorian Parliament. Five years after this case, the Victorian Parliament passed the *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic) to change the law to allow people who do not identify as being either male or female to change their sex on their birth certificate without having to undergo surgery to affirm their sex.

While the Act had the support of various organisations including the Australian Human Rights Commission and gender diversity activists, it was opposed by the Liberal Party, which took the stance that a birth certificate is a record of a person's biological sex, which is different from gender identification.

Australian Senator Janet Rice expressed public support for the Act by sharing her personal story. Senator Rice's spouse, renowned Nobel Prize-winning climate scientist Dr Penny Whetton, transitioned from male to female 14 years into their 30-year marriage. At the time of her transition, Dr Whetton was not able to change the gender on her Victorian birth certificate from male to female while she remained married to Senator Rice. This was despite being granted an Australian passport that identified her as female.

Sadly, Dr Whetton – a role model and highly respected champion of LGBTQIA+ rights – died within months of this legislation being passed.



**Source 1** Senator Janet Rice (right) and her spouse, the late Dr Penny Whetton, faced legal difficulties after Dr Whetton transitioned from male to female during their marriage.

*NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] 250 CLR 490

As you saw in Chapters 11 and 12, individuals may also challenge existing legislation in the courts in the hope that a judge might rule the legislation has been made ***ultra vires*** or beyond the power of the parliament and declared invalid. Similarly, an individual may challenge existing state legislation on the basis that it conflicts with federal legislation and, in accordance with section 109 of the Australian Constitution, should be declared unconstitutional and invalid.

***ultra vires***
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

The following scenario is an example of the High Court resolving a dispute by interpreting the meaning of state and federal legislation to determine the meaning of the word 'parent'. In making its decision, the Court declared the relevant state legislation to be invalid.

**Actual scenario**

## Sperm donation case sets precedent in High Court

In the case of *Masson v Parsons*, a man (referred to by the pseudonym Robert Masson) who agreed to be a sperm donor for his female friend (referred to by the pseudonym Susan Parsons) and her wife in the belief that he would be involved in the child's life undertook court action in an attempt to be legally recognised as the father of the child. The case went all the way to the High Court, where Mr Masson was successful in having his parental rights recognised.

Mr Masson and Ms Parsons had been friends for many years when, in 2006, Mr Masson agreed to donate his sperm to Ms Parsons so that she could have a child. Mr Masson believed he would be involved, as the biological father, in the care and support of their child. Once the child was born, she lived with Ms Parsons and her partner. Mr Masson, who was named as the child's father on her birth certificate, maintained a strong relationship with the child and financially contributed to her care.

In 2014 Ms Parsons and her partner decided to move to New Zealand to fulfil a long-held desire. Ms Parsons was originally from New Zealand. By then the couple had also had another child, using a different sperm donor. In 2015 Mr Masson commenced legal proceedings in the Family Court to stop the couple from moving to New Zealand so his child would remain in Australia. A key issue for the Court to determine was whether Mr Masson was legally considered the child's parent and, as such, had any parental authority to prevent the relocation of the child.

The Family Court found in favour of Mr Masson, but the decision was reversed on appeal when the justices of the Full Court of the Family Court ruled, in a majority verdict, to apply state legislation (the *NSW Status of Children Act 1996* (NSW)) which clearly stated that a man who donated sperm to a woman who was not his wife was not considered the father of the resulting child.

Dissatisfied with this verdict, Mr Masson lodged a successful appeal to the High Court which resulted in him being recognised as a legal parent. The High Court ruled that the NSW state legislation was inconsistent with the *Family Law Act 1975* (Cth), which had been interpreted by the judge in the original Family Court trial as including a broader definition of a 'parent'. In accordance with section 109 of the Australian Constitution, the Commonwealth law prevailed.

The High Court's ruling set a precedent that a sperm donor who has been actively involved in his child's life may be recognised as a parent and have parental rights, including the right to have his child remain living in Australia despite the mother's wish to relocate overseas. It has been reported that Ms Parsons and her partner incurred in excess of $800 000 in legal costs.

*Masson v Parsons* [2019] HCA 21 (19 June 2019)

## Is using the courts effective?

The ability to use the courts to change the law depends on various factors including, particularly, whether someone is willing and able to challenge the law in the courts. If someone is prepared to challenge the law in the courts, then it could highlight to parliament an issue with the law, or it can result in the court ruling the law as being made *ultra vires* or otherwise void.

While challenging the law in the courts can lead to a change in the law, it can be an expensive and time-consuming way for an individual to influence law reform and there is no certainty in the outcome of any case. Standing is also a requirement, which means that not everyone can use this method to influence a change in the law.

Source 2 sets out points you can make to discuss the use of the court to influence law reform, including some points for and against their use.

| Application and reflection | Points on the effectiveness of the use of the courts |
|---|---|
| **Explanation points** | • Individuals and groups can influence a change in the law by challenging the validity, meaning or fairness of an existing law in the courts. A judge's decision can lead to a change in the law or clarify the meaning of the law.<br>• Challenging an existing law (either common law or statute law) in a superior court can clarify a vague or unclear law. For example, courts can expand or limit the meaning of legislation through statutory interpretation. Even if a court challenge is unsuccessful, it may gain significant media coverage that may generate community interest in the decision and the possible need to change a law.<br>• Judges can rule that legislation made outside the power of the parliament (*ultra vires*) is invalid.<br>• Judges' decisions and comments made in court can encourage parliament to change the law.<br>• Judges are politically independent and determine cases based on the facts and merit rather than for electoral concerns (i.e. the need to gain voter support). |
| **Discussion points** | • Courts are limited in their ability to change the law because they can only do so when a case is brought before them and only in relation to the issues in the case. This relies on individuals being willing to mount a court challenge – which requires them to have standing and be willing to pursue costly, time-consuming and stressful cases, with no guarantee of success.<br>• With the exception of High Court disputes involving the interpretation of the Constitution, a judge-made law can be **abrogated** (cancelled) by parliament.<br>• Judges must wait for a party to challenge the authority of parliament to legislate before they can make a ruling and declare legislation invalid. That party must also have standing.<br>• Judges are unelected and their decisions and comments may not necessarily represent community views and values. |

**Source 2** Points to consider when discussing the use of the courts to influence law reform

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

## 13.4 Check your learning

### Remember and understand

1 **Explain** how an individual can influence law reform through the courts.

2 **Provide** two examples of individuals seeking to reform the law by using the courts.

### Examine and apply

3 Read the scenario 'Gender recognition laws' and **explain** why the individual challenged the relevant law through the courts.

4 Read the scenario 'Sperm donation case sets precedent in High Court'.

- **a** **Outline** why Mr Masson initiated legal action against Ms Parsons.
- **b** Mr Masson could not have pursued court action without standing. **What** is standing and **why** is a plaintiff required to have standing to undertake a court action?
- **c** **What** was the original ruling of the Family Court and **why** was it reversed on appeal by the Full Court of the Family Court?
- **d** Use your knowledge from Chapter 12 to **explain** whether the High Court reversed or overruled the decision of the Full Court of the Family Court.
- **e** With reference to section 109 of the Australian Constitution, **explain** why the High Court found in Mr Masson's favour.
- **f** **Discuss** the extent to which this decision is a final statement in law.

### Reflect and evaluate

5 Using one example to support your response, **discuss** the effectiveness of challenging a law in the courts to bring about a change in the law.

# 13.5 The media and law reform

## Key knowledge

**In this topic, you will learn about:**

- **the role of the media, including social media, in law reform.**

The media plays an important role in law reform. In particular, the rapid uptake of social media in Australia and globally has allowed individuals and groups to generate interest in, and awareness of, issues on a local, domestic and global scale.

## What is media?

**media**
the way information is communicated to the public, including print media (e.g. newspapers and magazines), broadcast media (e.g. film, television, radio) and digital media, which includes media distributed through the internet and electronic devices (e.g. websites, emails and text messages, video games) and social media (e.g. online platforms and applications like Facebook, YouTube and Instagram)

In broad terms, **media** refers to the way information is communicated to the public. Three common types of media are:

- print media, which refers to printed publications such as newspapers and magazines, but may also include other printed publications such as journals, books, brochures and billboards
- broadcast media, which generally refers to the transmission of information through television and radio
- digital media, which generally refers to the distribution of information through the internet and electronic devices (such as computers, laptops, mobile phones and tablets) including websites, e-books and podcasts, live video streaming, virtual reality and social media (e.g. online platforms and applications such as TikTok, Snapchat, Instagram, YouTube and Facebook).

Over the years, advances in technology have created new types of media and changed the way people access information. As media has gradually transitioned from more traditional forms (such as newspapers, television and radio) to digital media, people now access their news content in a range of ways beyond reading the daily newspaper or listening to the nightly news program.

## The role of media in law reform

Given its ability to communicate information to vast numbers of people, the media can play many roles in law reform, including:

- **informing and raising awareness**: the media can inform people about social, political and legal issues and the need for law reform, and can also generate interest in, and awareness of, those issues or need
- **assessing levels of community support**: the media can assist the parliament, government and political parties to assess the level of community support for law reform
- **influencing community opinion on a change in the law**: the media can influence community views and opinions about social, political and legal issues and the need for law reform.

Each of these roles is described below. You will notice that the roles overlap. For example, in informing people about a legal issue, the media may also be influencing community opinion about the need to change the law.

### Inform and raise awareness

The media can inform people about social, political and legal issues and injustices, as well as the need for law reform. It can also provide a platform for parliament, government and political parties to explain to the community the need for law reform or their law reform agenda. In doing so, the media can potentially reach huge numbers of the population. For example:

- approximately 83 per cent of the Australian population have active social media accounts, and Australians spend on average nearly 2 hours per day on social media (e.g. TikTok, YouTube, Facebook, WhatsApp, Instagram and LinkedIn). This means individuals, groups and organisations (including members of parliament, political parties and governments) can communicate information (with little restriction or censorship) about the need for law reform to potentially huge numbers of people. This information is instantly received and can be quickly disseminated and shared
- it is estimated that 97 per cent of the population read some form of newspaper every week (in either digital or print)
- radio also continues to be popular, with breakfast, morning and afternoon radio shows often used by journalists, presenters or politicians to speak about law reform. It is estimated that some popular breakfast shows, hosted by prominent journalists and presenters, have more than 120 000 listeners each morning.

At times, media organisations can use their platforms in more deliberate or direct ways to inform people, generate interest in, or even themselves seek to influence legislative reform. The scenario below is an example of what was described as a rare show of unity for media organisations in joining together to raise awareness about certain legislative reforms.

**Actual scenario**

## Rare show of unity by media organisations

On Monday 21 October 2019, Australia's biggest newspapers ran front pages that were 'redacted' or 'blacked out' in a protest against a series of legislation that media organisations believed sought to restrict media freedom. The action was taken as part of the 'Right to Know' campaign, formed by a group of Australia's leading media organisations and industry groups to protect the public's 'right to know' about matters or issues that concerned them.

The redacting of the front pages was a coordinated effort by media organisations to campaign against legislation introduced at a federal level which they believed placing unreasonable restraints on media organisations, and risked journalists going to jail for reporting on government matters. For example, in June of that year, authorities had raided the home of a journalist as part of an investigation into an alleged publishing of classified information after the journalist had published a story about plans to expand the powers of a particular national agency.

The media organisations considered that successive laws that had been passed over time resulted in a culture of secrecy and a threat to democracy. The Prime Minister at the time, Scott Morrison, defended the actions taken.




**Source 1** The front pages of Australian newspapers on 21 October 2019, which showed a unified message by media outlets that campaigned against proposed laws to restrict media.

The actions taken by the media organisations generated significant media attention around the globe. They became a talking point for the community, with much discussion generated about why the newspapers had taken the action they did, and raising awareness about an issue the community may not have otherwise known about.

## Assess levels of community support

Media can also be used to assist parliament, government and political parties, or even voters themselves, to determine the level of community support for law reform.

The most traditional way this can occur is through media polls (surveys). Polls are used to gauge what readers, viewers and listeners think about a particular social, legal or political issue, or which issues are concerning them the most. The results are often published in the media with additional commentary about what those results mean. This can potentially be used by parliament, government or political parties to assess the people's support for or against a political issue.

For example, Ipsos Issues Monitor is an ongoing survey that determines which issues are of most concern for Australians. Topics include crime, healthcare, transport and cost of living. A survey conducted by Ipsos Issues Monitor in December 2022, for example, showed that cost of living is a key concern for people. This may result in governments seeking to introduce legislation to help relieve the daily costs of living.




**Source 2** The Ipsos Issues Monitor conducted in December 2022 showed that cost of living was the issue of greatest concern for Australians. Previously, COVID-19 restrictions rated highly.

***Did you know?***

Print media is still influential. In 2022 approximately 42 per cent of Australians gained their news from television, whereas only 25 per cent accessed their news from social media sites. Only 6 per cent gained their news from print media (e.g. daily newspapers). While this appears a small percentage, in 2022, approximately 10.2 million Victorians read content from the *Herald Sun* and *The Age* newspapers, in print and online, every month.

Other ways the media can gauge (or measure) public opinion include:

- using powerful data analytics (tools to track online behaviour, such as the number of times a post, article or page is read or clicked on) to understand what may be concerning or of interest to the community
- monitoring 'letters to the editor', which are published in newspapers, or comments posted on digital newspapers in relation to a particular issue
- measuring the number of likes, shares, retweets and quotes of a particular Tweet on Twitter or posts on social media platforms such as Facebook.

## Influence community opinion

Given the high profile of many media organisations, media can at times influence community opinion. For example, radio broadcasters who have a large number of listeners each week can influence the way people think on a particular issue, or area of law, particularly if those listeners do not obtain information elsewhere on the issue.

The media itself can investigate local, national and global events and circumstances. These investigations may not only seek to inform and generate interest in an issue but also try to influence community opinion about it, or even influence governments to take action as a result.

The following scenario contains examples of documentary films and television programs that have highlighted social, political and legal injustices to generate interest in, and potentially support for, law reform. It also illustrates the ability of the media to scrutinise government policy.

Actual scenario

## Broadcast media influencing change

Over recent years, hundreds of documentaries have been made to raise community awareness of injustices and influence a change in the law. For example, Documentary Australia, a not-for-profit organisation that supports filmmakers to make documentaries for positive social change, has assisted in the production of more than 600 documentaries since it was established in 2008. Two notable examples are:

- *KaChing! Pokie Nation* (estimated to have been seen by more than 1.5 million people), which highlights the addictive nature of, and harm caused by, poker machines and reasons why Australia's gambling laws need reform
- *Blue* (estimated to have been seen by 3 million people), which highlights the harm caused to Australia's oceans and the Great Barrier Reef by pollution and overfishing, and the need to strengthen laws to protect the environment and more carefully manage our marine resources.

*Dominion* is another award-winning Australian documentary film that, together with its digital platforms (e.g. website, Facebook and Instagram accounts), raises awareness of animal abuse in Australia and encourages viewers to take action to demand stronger laws to protect animals from cruelty. The film contains images of animal cruelty that takes place during the production of food, clothing and entertainment in Australia. Because of this, it is classified for viewing by a mature audience aged 15 years and over. In 2019, after animal activist demonstrations occurred throughout Australia, the documentary was viewed 55 000 times in a 48-hour period.

Australian television programs, such as the Australian Broadcasting Commission (ABC)'s *Four Corners* and the Nine Network's *60 Minutes,* have also influenced changes in the law. For example, in 2018 the Commonwealth Government announced a Royal Commission to investigate the quality of services provided in aged care facilities just one day before the ABC broadcast the first of a two-part *Four Corners* program (titled 'Who Cares?'), which highlighted the poor treatment of elderly people in some aged care facilities.




**Source 3** Australian award-winning film *Blue* highlights the need to strengthen laws to protect Australia's oceans and marine resources.

The first instalment of the program, viewed by an estimated 755 000 people in Australia, contained footage from hidden cameras, and stories of neglect, poor quality food, inadequate personal care and intense loneliness from personal carers who worked in aged care facilities, families of residents and health care professionals.



**Source 4** Cota Victoria, an organisation which represents the interests of people aged over 50 years, encouraged elderly Victorians to make submissions to the Royal Commission into Aged Care Quality and Safety.

# Issues or limitations in the role of the media

While the media has a role to play in law reform, some issues or limitations affect that role. Three of these are:

- media concentration
- the risk of spread of misinformation
- the use of algorithms online.

## Media concentration

Media concentration generally refers to the ownership of the mass media by very few individuals or groups. It is widely accepted that Australia has one of the most concentrated news media markets in the world, with the ownership of traditional print media, TV and radio networks and online media owned by very few individuals and corporations. While there are many brands, networks or newspapers in Australia, some of these are owned by the same individual or organisation. Former Prime Minister Kevin Rudd has been vocal about the issue of media ownership, starting a petition on this very issue (see Topic 13.2).

As you have seen, media organisations can influence community views on legal, social and political issues by determining the type of information and content they print or broadcast. In Australia, two of the biggest and most influential media organisations, News Corp and Nine Entertainment Co, dominate print ownership in Australia, owning approximately 82 per cent of Australia's metropolitan and national print media markets by readership. The Australian Broadcasting Corporation (ABC) has an extensive network of television and radio stations that broadcast to almost all areas of Australia. These three media organisations have faced criticism for allegedly showing political bias. For example, News Corp Australia, which publishes the Herald Sun in Victoria, is perceived to have a 'right/conservative' bias, tending to support the Liberal-National Coalition, while the ABC has been criticised for having a 'left bias'.

## The risk of spread of misinformation

Digital platforms are a key source of news and information, and information from documentaries, films and television programs is often shared and spread online. This means that social and online media often reproduce content so that it is spread across Australia and the globe. However, a significant concern is the spread of misinformation on digital platforms. The sharing of misinformation is widespread because the online environment is not regulated in the same way as more traditional media




**Source 5** At times, newspapers have used their front pages to comment strongly on law reform or how people should vote in elections. The front page from 5 August 2013 (left) was criticised for showing political bias one month prior to a federal election. The front page on the right was also criticised for showing political bias against the Victorian Government during the COVID-19 pandemic.

organisations, and anyone can share 'news'. This includes those who are not journalists and do not have to follow any codes of ethics. Misinformation can erode people's trust in professional sources of information (e.g. healthcare or science experts), and generate debate about whether law reform is needed, but in a way that is misinformed or not representative of the facts. Misinformation can also create distrust in governments and organisations.

Examples of this have been in relation to:

- COVID-19, when significant information was spread that contradicted the views of public health experts about the pandemic and how to manage the associated risks
- climate change, when people spread misinformation about the science behind climate change.

## The use of algorithms

Finally, the emerging use of platforms such as Facebook and Google to deliver news has changed the way in which people consume and read information, as have their algorithms. An algorithm is a set of instructions that tells a computer what to do. For example, a social media site may use an algorithm that learns from individual user behaviour; users are then shown content that the site predicts the user will read or enjoy, thus making them stay on the site longer. This can then also influence what people read, and what information they are getting about a particular issue.

While in some ways this will help people get news and content that is relevant and engaging to them, it may also mean that readers are not reading news that they 'should' read, or might not push them to consider alternative views. It is possible that readers will not even be aware of a particular issue or injustice because they are only presented with other types of news or information based on what they have previously read.

This may impact on people's ability to be informed about, and develop an appreciation of, the need for law reform. It can also potentially limit the content people read on a particular issue, though much is still unknown about how algorithms are used, and whether they may ultimately be useful in delivering news content.

### *Study tip*

The *VCE Legal Studies Study Design* requires you to analyse the role of the media in law reform. This means you need to examine the media in more detail, more than just explaining its role. Try to identify parts or components of the role or functions of the media in law reform (e.g. in assisting, promoting, restricting or limiting potential change in the law) and try to provide some more detailed commentary on those parts.

# Summary

Source 6 provides a summary of the role of media, including social media, in law reform, including the benefits and limitations of the media's role in influencing change in the law.

| Type of media | Summary |
|---|---|
| **Social media** | • Social media refers to a range of digital tools, applications and websites used to share information in real time between large groups of people.<br>• Social media can create interest in social, political and legal issues, and generate awareness of, and support for, the need for law reform, on a massive scale. It can also be used to gauge community support, and influence community views and opinions about a particular issue.<br>• Social media and mobile devices allow people to capture and broadcast images and videos and livestream events to potentially huge audiences, and in real time. For example, footage of crime, cruelty to live export animals and conditions in detention centres for asylum seekers have all been posted on social media to gain support for law reform in these areas.<br>• Social media connects people around the world and can be used to generate interest and awareness in global issues requiring law reform (such as climate change and the global refugee crisis) at a domestic level.<br>• Social media can give individuals, groups and organisations direct access to political parties and local members of parliament to gain insight into their views on legal issues and receive up-to-date information, which can in turn increase accountability for political entities' actions.<br>• Law-makers themselves, particularly parliamentarians and government departments and bodies, can monitor social (and traditional) media coverage, including remarks in online comment forums, to gauge public opinion and public responses to recent events and proposed law reform.<br>• Information on social media can be unreliable and can result in confusion about the need for law reform. For example:<br>– people who post information, opinions, images and videos on social media do not generally follow codes of ethics that are followed by reputable media organisations and journalists. This means information on social media may not be accurate, authenticated or impartial<br>– social media platforms are highly visual and can include graphic images and livestreams that portray complex legal issues in a simplistic way and may evoke emotional responses based on limited facts and knowledge. This means individuals may make decisions about law reform without having a basic understanding of the issue involved<br>– owners of social media platforms have struggled to stop the spread of harmful or inaccurate stories in the past, given how fast they can be shared.<br>• The above issues can impact on people's support for law reform.<br>• Excessive exposure to graphic or vivid images may cause people to feel overwhelmed and become desensitised to social, political and legal injustices.<br>• The use of algorithms can influence what people are reading and from whom. This can sway people's views on areas of law reform or limit the number of opinions or viewpoints they are reading on an issue. |
| **Print and broadcast media** | • Print and broadcast media include more traditional forms of media, such as newspapers, television and radio.<br>• Print and broadcast media can influence law reform through their ability to investigate, report, discuss and inform people about social, political and legal issues, injustices and possible changes to the law. For example, newspapers, television and radio are still a major source of news within our community, and are accessed by millions of readers, viewers and listeners each week.<br>• Print and broadcast media can assist the parliament, government and political parties in determining whether there is sufficient community support for a change in the law. This includes through surveys conducted by newspapers.<br>• Print and broadcast media can also be used to influence community support about a particular issue. They can also conduct investigations and report on them in news stories or TV programs. This can then prompt governments to act, or encourage people to pressure governments to act. |

| Type of media | Summary |
|---|---|
| | • Some have questioned whether print and broadcast media always present information in an unbiased and independent manner. For example, more broadcasting time can be given to individuals, groups and parliamentarians who support the views held by the owners of print and broadcast media organisations. Alternatively, at times direct messaging can be used, often on front pages of newspapers, in an attempt to change community's perception on a particular or even on the way they vote.<br>• The high concentration of media ownership, particularly print media, gives the largest media organisations (like News Corp and Nine Entertainment) significant power to influence community views on the need for law reform, particularly if people are not getting news from other sources.<br>• At the same time, other factors can influence what people are reading beyond print and broadcast media. For example, social and online media have a large role to play in what people are reading, and arguably have a more powerful impact on generating awareness of law reform, given the instantaneous nature of online and social media, and the large volumes of people who use it. |

**Source 6** Points you can make when analysing the role of the media in law reform

# 13.5 Check your learning

## Remember and understand

1 **Distinguish** between the terms 'media' and 'social media'.

2 **Explain** how social media can be used to influence a change in the law. Provide two examples to support your response.

3 **Describe** three ways that broadcast media can be used to influence the government to initiate a change in the law. Provide one example to support each of the three ways.

## Examine and apply

4 Select one current law reform issue and follow its progress.
   - **a** **Identify** the methods being used by those who are agitating for change to gain support.
   - **b** **Comment** on the amount and type of coverage the proposed law reform is receiving in the media, including social media. For example, in your opinion, is the media coverage narrow or widespread, and positive or negative? **Justify** your view.

   You may wish to examine proposed law reform relating to climate action; end-of-life choices; medically supervised injecting rooms; decriminalising personal use of illicit drugs; animal cruelty; or asylum seekers.

5 Select one law reform that you believe the Victorian or Commonwealth Government should introduce.
   - **a** **Describe** the law reform and **explain** why you think it should be introduced.
   - **b** **Outline** possible objections to the proposed law reform.
   - **c** Imagine you had to design a campaign to increase community awareness and support for the proposed law reform. What would you do? What methods would you use to influence a change in the law?
   - **d** Write an email to the editor of a daily Victorian newspaper to convince other readers to support the proposed law reform. Your email cannot be more than 250 words.

**Weblink**
Australian Electoral Commission: Register of political parties

6 Select one Australian political party or independent member of parliament and **investigate** the way they use the media to generate support for their or their party's law reform agenda. A list of registered political parties is available on the Australian Electoral Commission website (a link is provided on your obook pro).

## Reflect and evaluate

7 As a class, gather together front pages of newspapers from the past 10 years that you consider to be provocative, or forceful, about a legal or political issue. Find as many as you can.
   - **a** Group the front pages in themes; for example, for or against a particular political party, or showing a conservative or more progressive approach to the legal issue.
   - **b** Come together as a group and discuss any findings or observations.
   - **c** As a class, discuss: 'The media should only be used to explain facts, and nothing more.'

8 **Analyse** the role of the Australian media in law reform. Provide two recent examples to support your response.

# 13.6 The Victorian Law Reform Commission (VLRC)

## Key knowledge

In this topic, you will learn about:

- the role of the Victorian Law Reform Commission and its ability to influence law reform
- one recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system.

Members of parliament often lack the time and resources to undertake a thorough investigation of an issue. In situations like this, parliaments may pass the investigation of the need for law reform to an independent law reform body that can conduct its own investigations and make recommendations for changes to the law.

Formal **law reform bodies** are organisations established by the Commonwealth, state and territory governments to inform them of changes in society that may require a change in the law. They aim to give impartial advice and make recommendations that are practical and able to be implemented. Parliament is not bound to follow the recommendations of formal law reform bodies, although the government is often influenced by the reports of these organisations when considering changes in the law.

The **Victorian Law Reform Commission (VLRC)** is Victoria's leading independent law reform organisation, which reviews, researches and makes recommendations to the Victorian Parliament about possible changes to Victoria's laws.

**law reform bodies**
organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

**Victorian Law Reform Commission (VLRC)**
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

**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)

## Introduction to the VLRC

The Victorian Parliament established the VLRC in 2001 by passing the *Victorian Law Reform Commission Act 2000* (Vic). The VLRC was therefore created by **statute** and obtains its powers and functions through that statute.

The VLRC aims to assist the Victorian Government in continuing to provide a fair, inclusive and accessible legal system by investigating the need for change in Victorian laws and providing the government with impartial advice and recommendations for change.

**Source 1** The logo of the Victorian Law Reform Commission

While the VLRC was created and is funded by the Victorian Government, it is an independent organisation that is not involved in the political process or influenced by the policies of the government or political parties.

In general terms, the VLRC monitors and coordinates law reform activity in Victoria and investigates and advises the Victorian Government on ways to update and improve Victorian law. When conducting its investigations, the VLRC engages in community-wide consultation and debate to ensure its recommendations for changes to the law meet the needs and desires of the Victorian community. For example, the VLRC will respond to issues and concerns raised by individuals and pressure groups, and consider newly emerging rights and responsibilities.

## Functions of the VLRC

Section 5 of the *Victorian Law Reform Commission Act* sets out the specific roles of the VLRC, four of which are as follows:

- **major inquiry** – to examine and report on any proposal or matter referred to it by the Victorian Attorney-General and make recommendations to the Attorney-General for law reform. This includes conducting research, consulting with the community and reporting on law reform projects
- **community inquiry** – to investigate any relatively minor legal issues that the VLRC believes are of general concern within the community and report back to the Attorney-General with suggestions for law reform. This means that in addition to its main role of examining legal issues and matters referred by the Attorney-General, the VLRC can also examine minor matters or areas of law reform without a reference, provided the review will not consume too many of its resources. These investigations are called community law reform projects
- **monitoring** – to monitor and coordinate law reform activity in Victoria, including making suggestions to the Attorney-General that they refer a legal issue or matter relating to law reform to it for investigation. In other words, after consultation with various groups and other law-reform bodies, the VLRC may suggest to the Attorney-General new references relating to areas where law reform would be desirable
- **education** – to undertake educational programs and inform the community on any area of the law relevant to its investigations or references. This means the VLRC delivers programs to help inform the community about its work. One way the VLRC achieves this is by visiting schools throughout Victoria to talk to students about its role and past and current projects. It also provides a vast range of information about its investigations and references on its website.

In this topic, you will primarily be looking at the first two functions above, namely the role of the VLRC when it has been asked to look into a matter referred to it by the Attorney-General, and when it investigates a relatively minor legal issue of community concern.

*Study tip*

The VLRC website provides information on all their law reform projects. It also has an excellent student resource section containing a booklet that examines the VLRC's role and the way it works, case studies and a poster. A link to the website is provided on your obook pro.

**Weblink**
VLRC: Education resources

# Processes used by the VLRC in law reform

Before conducting an inquiry, the VLRC first needs to have **terms of reference**. These will either be received from the Attorney-General, or will be drafted by the VLRC about a matter it identifies as a relatively minor legal issue that is of general community concern. The terms of reference set out the matters that the VLRC is to inquire about. They also set out the date by which the VLRC is to complete its inquiry.

**terms of reference** instructions given to a formal body (e.g. a law reform body or royal Commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

In assessing the need for change in the law, the VLRC consults with expert bodies in the area under review and the general community. The other processes it uses will depend on the nature of the inquiry, but the VLRC may:

- **undertake initial research and consult experts** in the law under review to identify the most important issues
- **establish an expert panel or committee** to provide advice to the VLRC about the subject matter of the inquiry
- **publish a consultation paper** (or issues paper) which explains the key issues in the area under review and poses questions about what aspects of the law should be changed, and how, for community consideration
- **hold consultations and discussions with, and invite submissions from**, parties who are affected by the area under review and members of the Victorian community. Submissions can be made in writing, online or by speaking to a Commission staff member. Members of the community may include interested individuals, groups and organisations. In particular, the VLRC will seek

the views and opinions of people from marginalised groups such as those from non-English-speaking backgrounds, people with disabilities, Fist Nations people and people living in remote communities.

- **publish a final report** with recommendations for changes in the law. Depending on the requirements in the terms of reference, the VLRC may also publish an interim report during their inquiry which may focus on one particular aspect or area of the inquiry
- **present the final report to the Attorney-General,** who will then table it in the Victorian Parliament within 14 sitting days. The government may decide to implement some or all of the VLRC's recommendations by incorporating them into a bill, but it is not bound (compelled) to do so, and there is no timeline for the government to respond.

# Recent VLRC projects

Since its creation in 2001 the VLRC has conducted numerous investigations and made hundreds of recommendations to help ensure Victoria's laws remain relevant and fair. The VLRC has completed more than 38 inquiries referred from the Victorian Attorney-General and undertaken at least another nine minor community law reform projects, with the government adopting all or most of the VLRC's recommendations in approximately 75 per cent of the completed inquiries. The VLRC website contains information on each of these completed and current projects.

**stalking**
following or monitoring an individual in a way that is intrusive or creates distress, anxiety or fear of harm (e.g. maintaining close physical proximity to the victim or repeatedly contacting them by post, telephone, texts, emails or other information and communication technology referred to as online stalking or cyber-stalking).

Some completed projects include an examination of:

- Victoria's committal and pre-trial procedures in indictable criminal matters (2020)
- improving the way the Victorian justice system responds to sexual offences (2021)
- making Victorian juries more inclusive (2022)
- improving Victoria's stalking laws (2022)
- the meaning of 'recklessness' in the Victorian criminal law (2023).

Two of these projects, on stalking laws and inclusive juries, are explored further in the two scenarios that follow.

The following scenario looks at an inquiry into stalking laws undertaken by the VLRC on reference from the Attorney-General.

**Actual scenario**

## Investigating Victoria's stalking laws

In 2022, the VLRC completed an inquiry into Victoria's laws on stalking, harassment and similar conduct. It undertook the inquiry after receiving terms of reference from the Attorney-General asking it to consider:

- how laws could be strengthened to promote and enhance victim safety and wellbeing
- barriers to reporting for victims of stalking
- sentencing practices and sentencing options.

**Stalking** is a criminal offence in Victoria and, in accordance with section 21A of *Crimes Act 1958* (Vic), offenders can be sentenced to a maximum of 10 years' imprisonment. Stalking generally refers to following or monitoring an individual in a way that is intrusive or creates distress, anxiety or fear of harm. It can involve a range of behaviours that might include the offender:

- maintaining close physical proximity to the victim
- contacting the victim by post, telephone, texts, emails or other information and communication technology (referred to as online stalking or cyber-stalking)
- keeping the victim or another under surveillance and giving offensive material to the victim (or leaving it where it can be found by the victim).

'Family violence' stalking refers to stalking by a family member such as a spouse or partner (or ex-spouse/partner). Given that a relatively detailed approach to family violence stalking had already been developed, the VLRC's inquiry into stalking

laws mainly focused on, and recommended ways to improve, non-family violence stalking laws.

## Reasons for the inquiry

Reasons for the establishment of the VLRC inquiry into stalking laws included:

- the prevalence of non-family violence stalking within the community (stalking is estimated to affect one in six women and one in fifteen men)
- the intimidating and frightening nature of stalking, which makes it difficult to identify and escape
- the lack of community awareness surrounding stalking as a crime
- the difficulty associated with seeking assistance through the criminal justice system, which can be a time-consuming, frustrating and extremely stressful process.

## The inquiry process

During the inquiry, the VLRC received 115 submissions from interested individuals (many of whom chose to remain anonymous), groups and organisations including a number of legal and civil liberties organisations such as Victoria Police, the Law Institute of Victoria, the Victims of Crime Commissioner, the Federation of Community Legal Centres and the Victorian Pride Lobby.

The VLRC also held 36 consultations with organisations that have expertise and experience in dealing with stalking, including the Victorian Children's, Magistrates' and County Courts, the Sexual Assault Service Network and the Judicial College of Victoria. The VLRC also held several small group meetings and 'round-table' discussions to gain input from specific groups of people who have been, and continue to be, affected by stalking, including young people, people with disabilities, and multicultural and multifaith community organisations. Views expressed within the consultations and submissions highlighted the mental harm and trauma that can be caused by stalking, and the need for victims to be able to get practical, timely and ongoing support.

In addition to receiving submissions and holding consultations, the VLRC also received 254 responses to its online survey, which allowed members of the public to convey their experiences of stalking.




**Source 2** The VLRC Final Report into Stalking made 45 recommendations to strengthen the laws surrounding non-family stalking and cyber-stalking.

## Recommendations

The stalking terms of reference required the VLRC to prepare an interim report by 31 December 2021 and a final report by 30 July 2022. The interim report specifically focused on ways to improve the ability of Victoria Police to identify and respond to stalking (i.e. the response to stalking *after* it has occurred). By contrast, the final report generally focused on ways to prevent stalking *before* it occurs including addressing the conduct of those who undertake stalking.

The interim report made a number of recommendations to improve the way Victoria Police responds to stalking including:

- making it easier for victims to report stalking to Victoria Police at the earliest opportunity
- improving the way Victoria Police records incidents and reports of stalking made by victims (e.g. by recording all reports of stalking on a central information management system)
- requiring Victoria Police to refer complex stalking cases to specialist police in criminal investigation units, and victims of stalking to appropriate external services (for support and assistance).

The final report, which was tabled in the Victorian Parliament by the Attorney-General in September

2022, made 45 recommendations for law reform including that:

- victims are able to more easily obtain financial and practical support to improve their ability to report stalking and access support services (including being provided with technology to prevent cyber-stalking and independent expert advocates to support them through the criminal process)
- the Victorian Government funds and supports ongoing public education about non-family stalking and cyber-stalking, so the community is more informed about how to identify stalking, the different forms stalking can take, the harm it can cause and ways for victims and offenders to seek help and support
- the *Crimes Act 1958* be amended to clarify the stalking offence so that it is easier for people to understand and apply (e.g. modernise and simplify the language used in the Act)
- the Government funds the training of magistrates, judges and other court personnel so they are better able to respond in stalking cases.

The final report also reaffirmed recommendations made in the interim report that the Victorian Government ensure Victoria Police is given adequate training so it can improve the way it identifies, investigates and responds to non-family violence stalking.

**Weblink**
VLRC: Stalking inquiry

The following scenario is about the VLRC's inquiry into inclusive juries, which was a project initiated by the VLRC.

**Actual scenario**

## Investigating more inclusive juries

In March 2020, the VLRC commenced a community law reform project to investigate the need to change the law to make juries more inclusive and accessible for people who are deaf, hard of hearing, blind or have low vision and wish to undertake jury service.

### Reasons for the inquiry

Under the *Juries Act 2000* (Vic), all jurors need to be capable of 'performing the duties of jury service', which include being able to understand and communicate, pay attention to the evidence and follow the judge's instructions. People who are deaf, hard of hearing, blind or have low vision are technically not prevented from being on a jury . However, restrictions on allowing interpreters and other support persons to assist people with hearing and vision impairments to overcome communication barriers mean that, in practice, some of these people are actually prevented from serving on a jury.

More specifically, a common law rule (referred to as the '13th person rule') that no more than 12 jurors (in a criminal trial) can be present during jury deliberations prevents a support person from being present in the jury room. In practical terms, this limits the ability of people who are deaf, hard of hearing, blind or have low vision to serve on a criminal or civil jury. That is because they are not allowed to have an interpreter or guide with them, and may therefore not be able to fully participate in the jury processes.

The VLRC initiated the project (or inquiry) itself. The terms of reference for the inquiry provided that the VLRC would consider what changes to legislation and practices should be made to enhance access for people who are deaf, hard of hearing, blind or have low vision who wish to serve as jurors in Victoria. In doing so, the VLRC would also consider whether there are specific circumstances in which jury service should be limited.

Other reasons for the 'Inclusive juries' inquiry included ensuring the laws relating to jury service

reflect contemporary community standards and do not discriminate against potential jurors on the basis of their personal characteristics. Having legal structures and laws that, in reality, limit the ability of people who are able to perform the duties of a juror from serving on a jury because they have a hearing or vision impairment, discriminates against this group of people by denying them the ability to fulfil one of their civic responsibilities. It also does not reflect modern community values about the need for society to be inclusive and limits the ability of the jury to be a representative cross-section of the community.

### The inquiry process

As a part of its inquiry, the VLRC undertook extensive research and investigation. It received 14 submissions from, and held 29 consultations with, a range of interested individuals, groups and organisations including legal bodies (such as the Law Institute of Victoria, Victoria Legal Aid, the Supreme Court of Victoria and Juries Victoria) and various support providers and services (such as Vision Australia and Youth Disability Advocacy Service). The VLRC also prepared an online survey to enable interested individuals share their experiences and views.

### Recommendations

The VLRC's final report was tabled in Victorian Parliament and published in May 2023. The final report included 51 recommendations to improve the inclusiveness of juries including:

- requiring judges to direct reasonable adjustments to be provided in cases where they consider these adjustments would enable a person who is deaf, hard of hearing, blind or has low vision to serve as a juror. Possible adjustments should include the provision of Auslan interpreters, support persons, an assistance animal and disability and technical aids (such as speech-to-text software and screen reading programs).
- altering the '13th person rule' so that interpreters or support persons are allowed into the jury room, as directed by the court.

The VLRC did not make any recommendations on whether people who are currently ineligible to serve on a jury because they 'cannot understand or communicate English' should be able to serve on juries because this issue was not included in the 'Inclusive juries' terms of reference.



**Source 3** The restrictions on allowing interpreters and other support people into the jury room limits the ability of people who have a disability to serve on a criminal or civil jury.

**Weblink**
VLRC: Inclusive Juries inquiry

## The ability of the VLRC to influence law reform

The VLRC has an important role in reviewing Victorian law. It makes sure the Victorian Parliament is provided with independent advice and recommendations for law change. However, it has limited scope to investigate major issues other than those referred by the Attorney-General. The Victorian Parliament is not required to introduce any of its final recommendations.

### Study tip

The *VCE Legal Studies Study Design* requires you to evaluate the ability of law reform bodies to influence a change in the law. This means you need to assess the ability of the Victorian Law Reform Commission (VLRC) to bring about a change in the law by considering (or examining) its strengths as a law reform body and weaknesses, and provide a concluding statement about the Commission's overall value in influencing law reform.

### Study tip

The *VCE Legal Studies Study Design* states that you should know one recent Victorian Law Reform Commission (VLRC) inquiry that specifically relates to law reform in the civil or criminal justice system. Remember, a recent inquiry is one that has occurred within the last four years. You should review the VCAA advice (available on its website) about the use of one recent inquiry.

The strengths and weaknesses of the VLRC in being able to influence law reform are set out in Source 4.

| Strengths | Weaknesses |
|---|---|
| As the Victorian Government asks the VLRC to investigate the need for law change in specific areas, the government may be more likely or willing to act on the VLRC's report and recommendations. | While the Government may support the VLRC's recommendations, it may need the support of the crossbench to pass law reform through the Parliament, particularly if the government does not have a majority in the upper house. In addition, as noted in Chapter 11, the law-making process is not always quick, so the recommendations may not be immediately implemented. |
| The VLRC also has the power to investigate and make recommendations on minor matters or areas of law reform without a reference from the Attorney-General, which can lead to important law reform. | The VLRC is limited by how many projects it can undertake at a time, and can only initiate investigations without a reference if it will not consume too many resources (e.g. money, staff and time). Therefore, its ability to investigate issues without a reference from the Attorney-General is limited. |
| The VLRC can measure community views on areas of investigation by holding consultations and receiving public submissions, and then reflect them in its recommendations. This should increase the likelihood of the government implementing its recommendations, because, to maintain and increase voter support, governments generally implement law reforms that reflect the views of the people. | The VLRC's investigations can be time-consuming. For example, inquiries may take 12 to 24 months. |
| The VLRC can also investigate an area comprehensively so the government can initiate new legislation that covers a whole issue. | While investigations can be comprehensive, they are limited to the terms of the reference, meaning the VLRC can only investigate and make recommendations for law reform on areas included in the reference even if it considers there are other areas of reform required in that particular matter. |
| As the VLRC is independent of parliament and political parties, it can remain objective and unbiased in making its recommendations. | The Victorian Parliament is not obliged (or compelled) to support or adopt any of the VLRC's recommendations for law reform. |
| Statistics suggest that the VLRC can be highly influential on the Victorian Parliament. All or most of its recommendations have been adopted in approximately 75 per cent of completed inquiries. | The VLRC can only recommend changes to Victorian law, not Commonwealth law. If certain areas of its investigations are governed by a Commonwealth law, the VLRC cannot directly recommend that the Victorian Parliament change this law as that Parliament has no ability to do so. |

**Source 4** The strengths and weaknesses of the VLRC in influencing law reform

# 13.6 Check your learning

## Remember and understand

1 When and how was the VLRC established?

2 **Describe** two functions of the VLRC.

## Examine and apply

3 Read the scenario 'Investigating Victoria's stalking laws'.

- a **What** is stalking?
- b **Explain** why the VLRC commenced an inquiry into Victoria's stalking laws. In your answer **identify** who issued the terms of reference for the inquiry.
- c **State** how long the VLRC took to complete its investigation.
- d i **State** how many written submissions the VLRC received during its investigations and **identify** the names of three organisations that made submissions.
  - ii **Describe** two other ways the VLRC gained input from members of the community about their views on changing Victoria's stalking laws.
- e **Describe** two of the main recommendations for law reform made by the VLRC.
- f **Suggest** two reasons why the Victorian Government would be willing to adopt the VLRC's recommendations for reforming Victoria's stalking laws.

4 Read the scenario 'Investigating more inclusive juries'.

- a **Explain** why the VLRC was able to investigate ways to make Victorian juries more inclusive when the matter was not referred by the Attorney-General.
- b **Explain** why, despite being eligible for jury service, some people who are deaf, hard of hearing, blind or have low vision are, in reality, not able to undertake jury service.
- c **Outline** two reasons why Victorian juries need to be more inclusive and provide support so that people with disabilities are able to perform jury service.
- d **Describe** one main recommendation for law reform made by the VLRC and **explain** whether you support the recommendation.

5 Visit the VLRC website and click on the 'All Projects' menu (a link is provided on your obook pro). Complete the following tasks:

- a **Investigate** one current project being undertaken by the VLRC relating to the criminal or civil justice system and prepare a summary that:
  - **identifies** the name of the inquiry and the date the Commission received the reference
  - **outlines** the areas or matters under review
  - **identifies** and **describes** the stage which the Commission is currently working on in terms of the progress of the reference.
- b **Investigate** and prepare a summary of one recently completed project related to the criminal or civil justice system. Your summary should include: the name and completion date of the project, names of three interested parties, three recommendations made, three recommendations adopted by the Government, and a comment explaining whether you agree with the recommendations and changes.

Weblink
VLRC: All projects

## Reflect and evaluate

6 Using one recent example, **evaluate** the ability of the VLRC to influence change in the law.

7 'The Commission aims to make a significant contribution to maintaining and further developing a just, inclusive and accessible legal system for all Victorians.' (VLRC Annual Report 2021–2022).

**Discuss** the extent to which you believe the VLRC is able to achieve its aims as outlined in the statement above.

# 13.7 Parliamentary committees

## Key knowledge



In this topic, you will learn about:

- the role of parliamentary committees in law reform and their ability to influence law reform
- one recent parliamentary committee inquiry.

**committee system**
a system in federal, state and territory parliaments in Australia that involves the of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

**parliamentary committee**
a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

As you have learnt, Australia's parliamentary system is based on various principles, and works in a way to ensure our federal, state and territory parliaments can effectively perform their main role: to make and change the law.

For example, our parliamentary system is based on the principle of representative government, which ensures that our members of parliament make laws on behalf of the voters and which reflect the prevailing views and values of the majority of society (or they risk not being re-elected).

Likewise, having a bicameral system of parliament ensures that any proposed changes to the law (i.e. bills) are thoroughly discussed and debated by both houses of parliament before becoming law.

Another important feature of the Australian parliamentary system is that it includes a **committee system**, meaning the federal, state and territory parliaments have an extensive range of committees that can investigate a wide range of legal, social and political issues and concerns and report back to the parliament about the need for law reform.

## Introduction to parliamentary committees

A **parliamentary committee** is a group of government and non-government members of parliament who are given the responsibility of investigating a specific issue, policy or proposed law (bill) and reporting their findings and recommendations back to the entire parliament. They are often established so an issue of state or territory community interest or national interest can be examined more efficiently (i.e. more quickly, more economically and in greater detail) than it could if all members of parliament were involved in the investigation.

The committee system is an important feature of our parliamentary system because it allows members of parliament to examine and evaluate the need for law reform. It also provides a way for members of the community to give input into the issues being investigated and have their views considered in the parliamentary decision-making process. Unlike the Victorian Law Reform Commission, the committee is made up of members of parliament.

When a parliamentary committee investigates a specific issue or matter, one of its main roles is to consult with and consider the views of the community, including interested individuals and experts, groups, business groups and organisations and government departments. Having this ability enables committees to gain and measure an extensive range of views on an issue.

Another benefit of parliamentary committees is that their final reports enable the parliament to be more informed before making important decisions like determining whether to support a bill. Parliamentary committees can also be established to provide a check on the government's activities because they have the power to call individuals, experts and people who work in government departments to give evidence and answer questions in relation to the specific area under investigation.

### *Study tip*

The *VCE Legal Studies Study Design* requires you to know the role of *either* Royal Commissions *or* parliamentary committees in law reform and their ability to influence law reform. You are not required to examine both. In addition to evaluating the ability of the VLRC to influence a change in the law, you are also required to evaluate the ability of one recent Royal Commission inquiry *or* one parliamentary committee, not both. In this topic you will look at parliamentary committees, and in the next topic you will look at Royal Commissions, but you can only be assessed on one.

There are many different types of parliamentary committees throughout the federal, state and territory parliaments. For example, committees can consist of members from both houses of parliament or just one house, and may be an ongoing committee, or a temporary one to investigate one specific issue. Committees may also vary in size, though Victorian parliamentary committees usually consist of six to ten members of parliament plus a number of parliamentary employees, called a secretariat, who provide administrative support and help run hearings. At the federal level, committees generally range from seven to 32 members. At the state level, participation is considered one of the duties of an elected member of parliament.

# Processes used by parliamentary committees

While there are different types of parliamentary committees, with each performing specific tasks and functions, most committees have similar processes and procedures. In general, parliamentary committees follow the processes listed below.

- **Receives the terms of reference** that specify the precise purpose of the inquiry, the specific issues that must be investigated and the date by which the final report must be completed.
- **Publicises its terms of reference and seeks input** from interested individuals, experts, groups and organisations within the community, via written submissions. This includes advertising in broadcast media such as newspapers, and using digital media, including social media.
- **Undertakes public (or on occasion private) hearings.** This involves the committee inviting a range of people (e.g. experts in the matter under review and representatives from different interested groups and organisations) to provide their input, give evidence relating to the matter under investigation and answer specific questions from committee members. Most committees have the power to call or require certain individuals and experts, like people who work in government departments, to give evidence, answer specific questions and explain their actions. If a person who is called to give evidence to a committee refuses to attend or answer specific questions, they can receive a formal reprimand or some other form of penalty.
- **Prepares a written report** once all the submissions have been received and considered, and all hearings have concluded. The report will contain recommendations for law reform or actions and will be presented to the parliament for consideration. Generally all written submissions and hearings are published in **Hansard** and made public on the parliament's website.

**Hansard**
the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1776–1833), who printed the first parliamentary transcript

# Specific committees and recent inquiries

The four main types of parliamentary committees in both the Victorian and Commonwealth parliaments are:

- standing committees
- select committees
- joint investigatory committees
- domestic committees.

These are described in Source 1. Examples of federal and Victorian parliamentary committees are explored further in this topic under 'Inquiry into anti-vilification protection' and 'Inquiry into online gambling'.

***Study tip***

The *VCE Legal Studies Study Design* requires you to know one **recent** Royal Commission inquiry *or* one **recent** parliamentary committee. The term 'recent' means an inquiry that has occurred within the last four years.

| Types of parliamentary committees | Description |
|---|---|
| Standing committees | Parliamentary committees appointed for the life of a parliament (then usually re-established in successive parliaments) to investigate a range of specific issues and provide an ongoing check on government activities. They are ongoing, not temporary, committees. Standing committees can be set up solely within each house, or they can be joint committees with members from both houses. For example, the Victorian Standing Committee on Legal and Social Issues is an ongoing Victorian parliamentary committee that inquires into and reports on any proposal or matter concerned with community services, education, gaming, health, and law and justice. |
| Select committees | Parliamentary committees appointed to investigate a specific issue as the need arises. Once the inquiry is completed the committee ceases to exist. Select committees are made up of members from only one house of parliament. |
| Joint investigatory committees | Parliamentary committees appointed each parliamentary term to examine a range of different issues or matters. They are, as the name suggests, made up of members of parliament from both houses. In Victoria a number of joint investigatory committees are appointed under the *Parliamentary Committees Act 1968* (Vic). Joint committees are usually longstanding committees (i.e. standing committees) that investigate issues on behalf of parliament. They can also be select committees to investigate a particular issue. Examples of joint investigatory committees of the Victorian Parliament include the:<br>• Scrutiny of Acts and Regulations Committee<br>• Integrity and Oversight Committee<br>• Public Accounts and Estimates Committee. |
| Domestic committees | Parliamentary committees appointed to specifically examine issues and matters that relate to the internal operations and practices of parliament, including administrative and procedural matters. They are made up of members of one house. For example, the Legislative Assembly has a Privileges Committee that meets when required to investigate complaints relating to breaches of parliamentary privilege in the lower house of the Victorian Parliament. |

**Source 1** The main types of parliamentary committees

The following scenario examines an inquiry into anti-vilification protection conducted by a Victorian Legislative Assembly standing committee.

Actual scenario

# Inquiry into anti-vilification protection

The Legislative Assembly Legal and Social Issues Committee (the Committee) is a Victorian parliamentary standing committee which can examine any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

In September 2019, the Committee received terms of reference from the Legislative Assembly to undertake an inquiry into Victoria's anti-vilification laws. The purpose of the inquiry was to examine the effectiveness of the anti-vilification laws and consider whether they should be extended to offer greater protection to groups (or classes) of people who were not covered by existing statute law; that is, the *Racial and Religious Tolerance Act 2001* (Vic). Among other requirements, the terms of reference also directed the Committee to consider whether vilification and hate conduct was increasing in Victoria and the effectiveness of law enforcement agencies, such as Victoria Police, in addressing online vilification.

The *Racial and Religious Tolerance Act 2021* (Vic) (RRTA) aims to protect particular classes of people, including First Nations Victorians and members of various multifaith and multicultural communities, from racial and religious vilification and provide ways for people to resolve vilification complaints. In simple terms, the RRTA:

- bans vilification which, according to the RRTA, is conduct that 'incites hatred against, serious contempt for, or revulsion or severe ridicule of' a person on the basis of their race or religion
- makes it an offence to victimise a person, or treat them unfairly, because they have made a complaint about being subjected to racial or religious vilification.

However, some argued that sections of the RRTA had become outdated and failed to protect Victorians from vilification. For example, the Committee suggested that the definition of vilification provided in the RRTA differs from the way people who experience vilification describe it and, as such, does not adequately reflect their experience of hate speech, cyber-bullying and trolling.

## The inquiry process

After receiving the terms of reference, the Committee invited members of the public, including interested individuals and organisations, to make submissions regarding any area of the terms of reference and share their stories. The Committee received 73 submissions from individuals and organisations including Lifeline Australia, the Victorian Gay and Lesbian Rights Lobby, the Jewish Community Council of Victoria, Gender Equity Victoria, and various multifaith and legal organisations (like the Law Institute of Victoria, the Victorian Aboriginal Legal Service and Victoria Legal Aid). The Committee also held seven days of public hearings to give individuals and organisations who made submissions the opportunity to share their experiences, views and/or suggestions for law reform in greater detail.

## Recommendations

The Legal and Social Issues Committee released its report in March 2021. The report included 36 recommendations to strengthen Victoria's anti-vilification laws including that the Victorian Government should:

- extend anti-vilification provisions to cover a wider range of attributes, that is: race and religion, gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status, disability, HIV/AIDs status and personal association
- fund ongoing research into why people engage in vilification conduct and effective strategies to prevent this behaviour
- implement education programs in primary schools to strengthen respect, diversity and cohesion among all students, and community education campaigns to create awareness of vilification laws, hate conduct and online vilification
- reform the law relating to serious vilification offences including reviewing the maximum penalties
- create a new criminal offence that generally bans the public display of symbols of Nazi ideology, including the Nazi Hakenkreuz (which is more commonly known as the Nazi swastika), which is

widely agreed to be a highly offensive symbol of extreme racism and used to convey hatred.

### Government response

In September 2021, the Victorian Government committed to strengthening Victoria's anti-vilification laws, giving its 'support' or 'support in principle' to all but two of the Committee's recommendations. 'Support in principle' means the Government supports the general idea of the recommendation but does not necessarily agree to support the recommendation 'as is'. The Government also indicated it would undertake further community consultation before implementing some of the recommendations.

Significantly, however, in June 2022 the Victorian Parliament passed the *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic) to implement the Committee's recommendation to ban the display of symbols of Nazi ideology (with some exceptions such as when being used for genuine educational purposes). The Act makes it an offence for people to intentionally display a Nazi symbol in public and offenders could receive a fine (of up to 120 penalty units), a maximum of 12 months' imprisonment, or both.

The scenario below examines an inquiry conducted by a Commonwealth House of Representatives standing committee.

**Actual scenario**

## Inquiry into online gambling

In October 2022 the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) was asked by the House of Representatives to conduct an inquiry into, and report on, online gambling and its impact on those experiencing gambling harm. In accordance with the terms of reference, the Committee was required to investigate a range of areas including:

- the impact of and harm caused by online gambling
- the effectiveness of existing protections that aim to reduce the harm caused by online gambling
- the need to change the *Interactive Gambling Act 2001* (Cth), which governs online gambling in Australia, so that it includes a wider range of 'gambling-like' activities such as gambling in online video games via 'loot boxes' and social casino games
- the effectiveness of counselling and support services to address online gambling
- ways to better target programs to address the harm caused by online gambling.

### The inquiry process

The Committee began a consultation process so that interested individuals and organisations could share their experiences of the harm caused by online gambling and offer suggestions to address the issues raised by online gambling as outlined in the terms of reference. As part of this process the Committee received 161 written submissions from interested individuals and groups including community health experts and medical organisations (like the Australian Medical Association), academics, members of parliament, sporting bodies (like Racing Victoria and the Australian Football League) and gambling companies (like Sportsbet). To protect privacy, interested parties could also make submissions in confidence, with names withheld. The Committee

also held 13 days of public hearings to allow individuals and organisations to provide a detailed account of their experiences and suggestions for legal change.

The public hearings also provided the Committee with the opportunity to question organisations, such as the Alliance for Gambling Reform, about their specific recommendations for law reform. For example, the Committee discussed with the Alliance for Gambling Reform its recommendation to ban gambling advertisements in broadcast media (including television and radio) and introduce a national body to regulate gambling.

## Recommendations

After extensive community consultation, the Committee prepared its report for the House of Representatives. The report highlighted the increase in the incidence of online gambling, the harm it can cause and the need for greater protections for consumers. For example, online gambling was noted as being an especially risky form of gambling because it is particularly easy for people to access (e.g. people can play at home and the apps are never 'closed') and players forget they are spending 'real money', as tokens (or gambling credits) are generally purchased using their debit or credit cards. Online gambling apps also encourage gaming by using promotional prompts and notifications.

The report included 31 recommendations to better regulate online gambling and gambling advertising, and reduce online gambling harm. These included the Government banning all forms of online gambling advertising (including advertising of online gambling on social media and online platforms) over a three-year period and establishing an online gambling public education program to increase awareness of online gambling harm and encourage those who are negatively affected by online gambling to seek help. Like other forms of gambling, however, online gambling is a broad and difficult area to regulate. Despite the implementation of increased protections (like the introduction of national restrictions on the advertising of sports betting on television in 2017) and various education programs over the past decade, the easy access to, and addictive nature of, online gambling means the reduction of online gambling harm is an ongoing challenge for federal, state and territory governments and anti-gambling organisations.



**Source 2** In 2022, the Australian Institute of Health and Welfare found that online gambling was the fastest growing gambling sector in Australia, with more than 10 per cent of the community gambling online in a six-month period.

### *Did you know?*

Investigations by the Victorian Responsible Gambling Foundation found that, in 2021, an average of 947 gambling advertisements were aired on Victorian television per day. The gambling industry also spent approximately $287 million in on national advertising in the same year. The largest group of 'sports betters', young men aged between 18 and 24 years, accounted for nearly one third of all Victorian 'sports betters'.

# The ability of parliamentary committees to influence law reform

Although parliamentary committees have some limitations, they have an important role in investigating specific issues, policies and legal matters, reviewing existing law and reporting their findings and recommendations for law reform to the parliament.

The strengths and weaknesses of parliamentary committees in being able to influence law reform are summarised in Source 3.

| Strengths | Weaknesses |
|---|---|
| Committees can investigate a wide range of legal, social and political issues and concerns and report back to the parliament about the need for law reform. | Due to limited resources (e.g. funding and time constraints on members of parliament) a committee cannot be formed to examine all issues and concerns. |
| Parliamentary committees have the power to request that specific individuals and representatives of organisations appear at hearings to give evidence and answer questions, which enables them to gain extensive and valuable information for their consideration. | Committees are restricted to examining matters and issues within the scope of the terms of reference. |
| Committees can examine issues more efficiently (i.e. more quickly, economically and in greater detail) than having the entire parliament involved in the investigation. | Committee investigations can be time-consuming and costly. |
| Committees allow members of parliament to be involved in investigations and gain knowledge, expertise and understanding in the area of suggested law reform. | The large number of committees and the time commitment involved may deter some members of parliament from sitting on committees. |
| Committees provide a way for members of the community to have input into the issues being investigated and have their views considered in the parliamentary decision-making process. | Members of the public may not be aware that a committee inquiry into a specific matter is being undertaken and calls for public submissions have been made. |
| The final reports prepared by committees enable the parliament to be more informed before deciding whether to support a bill. | There is no obligation on parliament to support or introduce law reforms suggested by a committee, although this may be more likely given that committees consist of members of parliament. |

**Source 3** The strengths and weaknesses of parliamentary committees in influencing law reform

# 13.7 Check your learning

## Remember and understand

1 **What** are parliamentary committees?

2 **Provide** one similarity and one difference between the role of the VLRC and a parliamentary committee.

## Examine and apply

3 Prepare a flow chart that describes the basic process followed by a parliamentary committee when undertaking a specific inquiry.

4 Read the scenario 'Inquiry into anti-vilification protection'.

- **a** **Describe** the role of the Legislative Assembly Legal and Social Issues Committee in undertaking the inquiry into Victoria's anti-vilification laws.
- **b** **Provide** two reasons why the Committee had the potential to influence the Victorian Parliament to amend the *Racial and Religious Tolerance Act 2001* (Vic).
- **c** Do you support the ban on the display of symbols of Nazi ideology in Victoria? **Justify** your view.

5 Read the scenario 'Inquiry into online gambling'.

- **a** **Describe** the general purpose of the House of Representatives Standing Committee's Inquiry into online gambling.
- **b** **What** is a public hearing? Use one example from the Inquiry into Online Gambling to support your response.
- **c** Go to the Commonwealth Parliament website page on the inquiry into online gambling (a link is provided on your obook pro). Conduct some research into the inquiry.
  - **i** **List** five organisations that provided submissions or participated in the public hearings.
  - **ii** **Outline** two important recommendations made by the Committee.
  - **iii** Briefly **summarise** the Commonwealth Government's response to the final report.

## Reflect and evaluate

6 Using one recent example, **evaluate** the ability of parliamentary committees to influence a change in the law.

**Weblink**
Parliament of Australia: Inquiry into online gambling

# 13.8 Royal Commissions

## Key knowledge

In this topic, you will learn about:

- the role of Royal Commissions in law reform and their ability to influence law reform
- one recent Royal Commission inquiry.

**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 to investigate and report on an important matter of public concern

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

**governor** the King's representative at the state level

Another type of law reform body is a **Royal Commission**, which is one of the oldest forms of inquiry in Australia. Royal Commissions can be established at both the state and Commonwealth level. They often draw the most media attention given their high-profile nature and the types of matters they inquire about.

## Introduction to Royal Commissions

Royal Commissions are major public inquiries established by the government to investigate an area or matter of public importance or concern in Australia.

These commissions are called 'royal' commissions because they are created by Australia's head of state through their representatives. The inquiry is given terms of reference and asked to report on its findings and make recommendations.

Royal Commissions are given special investigatory powers, including the power to summon (or compel) people to attend hearings, give evidence under oath, and be subject to cross-examination.

### Establishment of Royal Commissions

The power to establish a Royal Commission is provided by statute. At the Commonwealth level, the power is given to the **Governor-General** through the *Royal Commissions Act 1902* (Cth). At the state level, the power is given to the **governor**, acting on the advice of the premier (in Victoria, under the *Inquiries Act 2014* (Vic)).

Royal Commissions are therefore set up by the executive branch of government (i.e. the Governor-General at federal level or the Governor at state level on behalf of the King). However, the King's representative acts on the advice of the government ministers. Therefore, in reality, it is the government that initiates a Royal Commission in response to a major issue of public interest or concern.

For example, in 2019 the Governor-General established the Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability on



**Source 1** Senator Malcolm Roberts (right), One Nation, and Australian Greens Senator Jordon Steele-John (left). Senator Steele-John has fought for the rights of people with disability for many years, strongly supported the need for a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

***Study tip***

The Australian Parliament and Victorian Parliament websites have a list of all of the Royal Commissions that have taken place at the federal and Victorian state level. Links are provided on your obook pro.

**Weblink** Victorian Parliament: Royal commissions

**Weblink** Australian Parliament: Royal commissions

the advice of the Federal Government. This aim of this royal commission was to investigate and expose the violence, abuse, neglect and exploitation suffered by people with disability and recommend law reform to ensure this ill-treatment stops and people with disability are protected.

In addition to advising the Governor-General or state governor on the establishment of a Royal Commission, the government also provides the funding and determines their terms of reference and length.

## Establishing a Royal Commission

As a Royal Commission is a temporary form of inquiry, and can be expensive, they are established on an ad-hoc basis to investigate matters of significant importance, and often matters surrounded by controversy.

The King's representative must first issue a letters patent. The letters patent will specify the person or persons who are appointed to constitute the Royal Commission, as well as which of those persons (if there is more than one) will chair the inquiry. The letters patent must also specify a time by which the Royal Commission is to report on its inquiry and the terms of reference.

The chairperson will then engage people to assist the Royal Commission.

# Processes used by Royal Commissions

Once the inquiry has been established and the letters patent has been issued, the commission conducts an extensive investigation of the matter of public interest or concern by undertaking a range of tasks, such as those listed below.

- **Prepare consultation, research or background papers** to provide information to interested parties and the community and form the basis for discussion and submissions. A consultation (or issues) paper outlines the matter or concern being investigated by the commission poses questions relating to possible reforms that could be implemented to address the areas of concern and seeks and provides guidance for individuals and organisations that wish to make a written submission.
- **Undertake consultation sessions** to gain input, views and opinions from a range of individuals and organisations that have an interest in the area being investigated. These can involve round-table discussions, discussions at a community level, and consultations with experts.
- **Seek community input via submissions** so the commission can gain input and opinions from individuals who may not otherwise attend consultation sessions. In some situations, submissions may be able to be submitted anonymously to allow individuals to tell their story without fear of people knowing they have done so.
- **Obtain documents** that are relevant to the subject matter. Royal Commissions have wide-ranging powers to compel organisations and individuals to produce documents. Those documents may help the commission understand the issues or identify where there has been potential misconduct (in commissions that are focused on issues such as misconduct or abuse).
- **Hold public hearings** to gather evidence relevant to the terms of reference. Royal Commissions have extensive powers to gather evidence at their hearings. For example, they can summons or compel people to attend, give evidence under oath or affirmation and be subject to cross-examination. They can also hold private hearings.

Once an investigation is complete and evidence and submissions have been considered, the Royal Commission will prepare a report on its findings and make recommendations on ways to address the matter under investigation. This might include recommendations for changes in government policy, administrative systems and changes in the law and legal system. The commission also has the power to recommend that an individual be prosecuted for unlawful conduct, although the relevant prosecutor (Commonwealth or state level) is not required to act on these recommendations.

### *Study tip*

The *VCE Legal Studies Study Design* requires you to know the role of *either* Royal Commissions *or* parliamentary committees in law reform and their ability to influence law reform. You are not required to examine both. In addition to evaluating the ability of the VLRC to influence a change in the law, you are also required to evaluate the ability of one recent Royal Commission inquiry *or* one parliamentary committee, not both. In this topic you will look at Royal Commissions and in the next topic you will look at parliamentary committees, but you can only be assessed on one.

### *Did you know?*

The *Royal Commission Act* was amended in 2013 to enable the Royal Commission into Institutional Responses to Child Sexual Abuse to hold private sessions. These types of sessions were unique to this particular royal commission so that commissioners could hear from survivors in private.

*Did you know?*

Australia's first-ever Royal Commission was held in 1902, just one year after the Federation of Australia. It was held in response to a public outcry after 17 Australian soldiers died returning home from the Boer War in South Africa and its purpose was to investigate transport arrangements.

# Examples of Royal Commissions

Over the years, there have been more than 138 Royal Commissions at the Commonwealth level on a range of issues of significant public interest or concern. Some examples of Commonwealth royal commissions over the years include the following:

- Aboriginal Deaths in Custody (1987–91)
- Institutional Responses to Child Sexual Abuse (2016–17)
- Royal Commission into Aged Care Quality and Safety (2018–21)
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2019–22)
- Royal Commission into the Robodebt Scheme (2022–23) (examined on page 483).

Some of the Victorian royal commissions over the years have included inquiries into:

- the collapse of the West Gate Bridge (1971–72)
- the Esso Longford Gas Plant accident (1998–99)
- the 'Black Saturday' Bushfires (2009–10), to inquire into the bushfires in which more than 100 people lost their lives and thousands of properties were destroyed in February 2009
- the Management of Police Informants (2018–2020)
- Victoria's Mental Health System (2018–2021)
- Yoorrook Justice Commission (2021–2025) (examined on the next page).



**Source 2** Royal commissions can hold public hearings to gather evidence to consider when preparing their report and recommendations. Individuals can be compelled to give evidence.

The following scenario examines Victoria's Yoorrook Justice Commission (2021–2025).

Actual scenario

## Yoorrook Justice Commission

In May 2021 the Governor of Victoria established a Royal Commission, called the Yoorrook Justice Commission, to officially hear, record and address the truths about the historical and ongoing injustices experienced by First Nations peoples (First Peoples) in Victoria since colonisation in 1788 to the present time.

The Royal Commission, the first formal truth-telling body for First Peoples in Australia, gave First Peoples the opportunity to give a publicly documented account of the historic and ongoing systematic injustices they have experienced since colonisation, including why they occurred, and continue to occur, and what or who is responsible. Significantly, the Royal Commission also had the power to make recommendations for law reform and changes in government policy, systems and education to address and remedy injustices.

### Terms of reference

The Yoorrook Justice Commission was set up to inquire into and report on a vast range of areas including:

- historical systemic injustices undertaken by government and non-government organisations such as cultural violations and the denial of First Peoples' law; theft and destruction of cultural knowledge and property; massacres, wars, killing and genocide; the forced removal of children from their families (referred to as the Stolen Generation) and other unfair policies and practices relating to child protection, family or welfare matters
- ongoing systemic injustices undertaken by government and non-government organisations in a range of areas including: law enforcement and the criminal justice system (including youth detention), healthcare, housing, education, employment and other areas of economic, social and political life
- the causes and consequences of systemic injustice and how it can be fairly acknowledged and redressed in a culturally appropriate way and make recommendations for law reform and changes in government policy.



**Source 3** The Yoorrook Justice Commission logo, created by Dixon Patten, a proud Gunnai, Gunditjmara and Yorta Yorta man

### The Commissioners

A group of five Commissioners were chosen to manage the Commission. To ensure independence, the Commissioners were appointed by an open and transparent process designed by the First Peoples' Assembly of Victoria and the Victorian Government.

Professor Eleanor Bourke AM (a Wergaia/Wamba Wamba Elder) was appointed as Chair of the Commission. Professor Bourke had extensive experience working in a number of state and federal government agencies and community organisations (including having been the Co-Chair of Reconciliation Victoria and a Board Member for the Victorian Aboriginal Heritage Council).

### The information gathering process

In its first two years, the Royal Commission used a range of methods to gather information and evidence. For example, after setting up an Expert Advisory Committee to provide expert advice, the Commissioners travelled throughout Victoria to meet with First Peoples' Elders to hear their stories, including the experiences of their families and ancestors. They also heard suggestions for addressing and, as far as possible, rectifying systematic injustices. Most of these meetings took place as group 'yarning circles', although some were private meetings if preferred by the Elders.

The Commissioners also participated in a variety of public meetings (at venues including schools, universities, cultural heritage centres, religious organisations, conferences and online) to meet and talk with Elders, other First Peoples and interested

individuals and organisations. In addition, the Commissioners undertook public hearings (called wurrek tyerrang) to hear stories and gather evidence on a range of important First Peoples issues.

The Royal Commission also accepted written and oral (verbal) submissions and First Nations artwork and artefacts. All meetings and hearings were conducted in a culturally appropriate and sensitive way and, as with all Royal Commissions, the Commissioners had the power to ask, and if necessary compel, individuals (e.g. public servants from government agencies) to give evidence at hearings under oath.

Within one year of the Royal Commission being established it had conducted at least 29 Elders' yarning circles and on-Country visits. It also generated extensive media coverage, including in the print (local, state and national newspapers), traditional broadcast (television and radio) and digital (online news and social media) media, which raised awareness of its purpose and the need for law reform.

## Interim report

In its interim report finalised in June 2022, the Commission provided an overview of the progress to date, and its approach to analysing the information it received. It also set out next steps and the path forward, in particular the priority areas for the next phase of its work, including two that had been raised consistently in their work so far:

- the state-sanctioned removal of First Peoples' children from their families
- the continuing injustices experienced by First Peoples in the criminal justice system.

The Commission noted that existing research points to correlations between child removal, justice system inequities and other ongoing areas of justice such as health and wellbeing for First Peoples. It did not otherwise make any substantial recommendations for reform in its first interim report.

**Additional resource**
Updates on the Yoorrook Justice Commission



**Source 4** The Chair of the Yoorrook Justice Commission, Wergaia/Wamba Wamba Elder Professor Eleanor Bourke (left), at the Royal Commission's launch

In 2019, a **class action** against the Commonwealth Government was commenced by victims of a failed government welfare management system. In addition, the Commonwealth Government established the Royal Commission into the Robodebt Scheme (2022–23). The scenario below describes what occurred.

**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

Actual scenario

## Robodebt Royal Commission

In 2016, the Federal Government established a system called Online Compliance Intervention (OCI). The purpose of the system was to help ensure people who received welfare benefits from the government (via a government agency called Centrelink) met the necessary qualifying criteria (which includes an income test). In simple terms, the OCI system automatically compared information about an individual's income (that had been provided by the individual to Centrelink) with 'average income data' provided by the Australian Taxation Office. The aim was to determine if that individual had understated their income and, as such, received an 'overpayment' from Centrelink. In cases where the OCI system determined a welfare overpayment had been made, it automatically sent a debt recovery notice to the individual.

The OCI system was, however, faulty and automatically sent incorrect debt recovery notices (totalling an estimated $721 million) to more than 470 000 individuals. Most of these people were members of vulnerable groups such as people with a disability, aged pensioners, and people living in remote areas (including First Nations people). Hundreds of thousands of people received debt recovery notices, wrongfully demanding they repay a government 'debt' that was never owed, causing severe financial hardship and emotional stress and trauma.

In May 2020, the Government discontinued the defective OCI system, which became known as the Robodebt Scheme, and agreed to reimburse individuals who had 'repaid' wrongfully issued debt recovery notices. In November 2020, just days before the commencement of a class action trial, the Government offered a further $112 million to compensate victims, although the failed Robodebt Scheme had already caused significant harm.

### The purpose of the Royal Commission

In August 2022, the Governor-General established the Royal Commission into the Robodebt Scheme. The general purpose of the inquiry was to examine the Robodebt Scheme including:

- who was responsible for designing and setting up the scheme, why it was implemented and any concerns raised about its legality or fairness
- the use of external (i.e. non-government) debt collectors
- concerns raised after the scheme was implemented
- the intended or actual outcomes of the scheme, including the impacts it had on individuals and their families and the costs of the scheme.

The terms of reference also asked the Royal Commission to recommend ways to prevent any similar failures of government administration in the future.

### The Commissioner

The former Chief Justice of Queensland, Ms Catherine Holmes, was chosen to manage the Robodebt Royal Commission. As a respected member of the judiciary, Ms Holmes' open and transparent appointment aimed to ensure the independence of the Royal Commission.

### The inquiry process

With a budget of $30 million, the 'Robodebt' Royal Commission was given eight months to investigate and prepare its final report, which was delivered to the Governor-General in July 2023. During this time, the Royal Commission used a range of methods to gather information and evidence including accepting

written and oral submissions from members of the public (made through its website or via email, phone or a paper form). The Royal Commission also undertook a series of public hearings where a number of people, including senior government officials and public service workers from government agencies, were called as witnesses to give evidence and answer questions under oath. The Royal Commission also exercised its powers to compel government departments to produce documents relevant to the inquiry. In response, the Commonwealth produced close to 1 million documents.

During the 46 days of hearings, a number of senior members of government were called to answer questions about the creation and implementation of the Robodebt Scheme, including former Prime Minister Scott Morrison, and former Minister for Human Services, Marise Payne. In addition, the Royal Commission also heard from employees in government agencies who had expressed concerns about the Robodebt Scheme and experienced significant stress and anxiety as a result of dealing with, and trying to assist, often distressed individuals who were affected by the scheme. All hearings were broadcast via a livestream (webcast) on the Royal Commission's website and transcripts were made available to the public.

## Recommendations

The Robodebt Scheme highlighted the harm that can be caused by failures of government administration and inadequate government policy. In its final report, the Royal Commission outlined a number of failings in the way the Robodebt Scheme had been set up, implemented and monitored. These included that senior government officials ignored early legal advice that the scheme was likely to be unlawful and allowed it to continue unchecked.

The Royal Commission made a number of recommendations to address these areas and ensure similar failures of government administration do not occur again. In particular, the Royal Commission recommended Services Australia (the department that manages Centrelink) design its policies and processes with a primary emphasis on the recipients it is meant to serve, and that it should ensure they have regard to any vulnerable people who may be affected by any compliance programs when designing such programs. A link to the final report is provided on your obook pro.



**Source 5** Shortly after the Australian Labor Party (ALP) won the 2022 federal election, Prime Minister Anthony Albanese announced a Royal Commission into the former government's Robodebt Scheme.

# The ability of Royal Commissions to influence law reform

As the highest form of inquiry into matters of public concern and importance, royal commissions can (while having limitations) be an effective way to influence law reform. Royal commissions usually generate significant public interest, which places pressure on governments to respond to the findings and recommendations. The strengths and weaknesses of a royal commission as a way to influence law reform are examined in Source 6.

| Strengths | Weaknesses |
|---|---|
| Governments can use the findings and recommendations of royal commissions to justify making changes in the law and government policy. | Royal commissions may lose credibility in situations where the government of the day, which determines the terms of reference, chooses not to include any areas that might be potentially politically damaging for them (i.e. may lead to a loss of voter support), or calls the royal commission on a matter to win voter support. |
| Royal commissions can be important in raising community awareness and interest in a particular area of community concern. They can encourage individuals and groups to not only make submissions to the royal commission, but also undertake their own initiatives (including undertaking petitions and demonstrations and using the media) to influence a change in the law. | The extent to which a royal commission can influence law reform is mixed, and depends on matters such as the subject matter and whether there is bipartisan support for the reform. |
| Because the government asks royal commissions to investigate something important, the government may be more likely to act on the royal commission's report and recommendations. | Royal commissions may be used as a tool against political opponents. They may also be used to avoid addressing more critical issues requiring law reform. |
| Royal commissions can measure community views on areas of investigation by holding consultations and receiving public submissions. | There is no obligation on the part of the parliament to support or introduce legislation which adopts any of the recommendations made by royal commissions. |
| Royal commissions can investigate an area comprehensively so the government can initiate a new law that covers the area inquired about. | Royal commission investigations can be time-consuming and costly. They take, on average, two to four years to complete, and can be expensive (e.g. the 2001 Royal Commission into the Building and Construction Industry cost $60 million). |
| Royal commissions have wide-ranging powers, including the power to call anyone to appear before them to give evidence. | Royal commissions choose how they are to conduct their investigations; therefore it is possible that certain individuals or organisations have relevant information or evidence, but are not called to give evidence or that information is not revealed. |
| Royal commissions are independent of parliament, and more likely to remain objective and unbiased in making their recommendations. | The ability of the royal commission to influence law reform depends on the timing of its reporting and its terms of reference. For example, if it is to report immediately after an election, its influence might be diminished. |

**Source 6** The strengths and weaknesses of royal commissions in influencing law reform

# 13.8 Check your learning

## Remember and understand

1 **What** is a royal commission?

2 **Explain** why royal commissions are considered the most serious and important types of inquiries into matters of public interest or concern.

3 **Describe** two differences between a royal commission and a parliamentary committee.

## Examine and apply

4 Prepare a chart that **describes** the main processes followed by a royal commission.

5 Read the scenario 'Yoorrook Justice Commission'.

- **a** **What** is the Yoorrook Justice Commission?
- **b** Briefly **describe** why the Victorian Government established the Yoorrook Justice Commission.
- **c** **Describe** the main ways the Royal Commission gained information from First Nations peoples.
- **d** **Describe** three areas of injustice the Royal Commission identified as needing urgent reform or three specific recommendations for change. You can go to the Yoorrook Justice Commission website to conduct some research into these areas and/or recommendations. The link is provided on your obook pro.
- **e** With reference to this Royal Commission, **evaluate** two strengths of royal commissions as a means of influencing law reform.

6 Read the scenario 'Robodebt Royal Commission'.

- **a** **Explain** why the Robodebt Royal Commission was established.
- **b** **Outline** two ways the Royal Commission gained information from interested individuals and organisations.
- **c** Go to the Royal Commission into the Robodebt Scheme website to conduct some research on the Commission's recommendations. **Describe** three recommendations for legal change or policy reform. The link is provided on your obook pro.

## Reflect and evaluate

7 Using one recent example, **evaluate** the ability of royal commissions to influence a change in the law.

**Weblink**
Yoorrook Justice Commission

**Weblink**
Robodebt Royal Commission

Chapter

# 13

# Review

## Top exam tips from Chapter 13

1 When providing responses to questions in the final examination, it is not necessary to define key legal terms or organisations (such as parliament, the Victorian Law Reform Commission, parliamentary committee and royal commission), unless the question specifically *asks* for a definition.

2 You must be able to provide examples of the reasons for law reform, the role of the media (including social media) in law reform and the means by which individuals and groups can influence law reform (i.e. through petitions, demonstrations and the courts). Many examples are included in this chapter.

3 You must be able to evaluate the ability of the Victorian Law Reform Commission and either royal commissions or parliamentary committees to influence change in the law. You must provide one recent example of a Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system and one example of either a recent royal commission or parliamentary committee inquiry. Students often confuse which example relates to which law reform body, so make sure you think of a way not to mix them up.

## 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 (including the exam) 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 Describe how the media can be used to influence a change in the law.

(3 marks)

**Difficulty: medium**

2 Compare the role of the Victorian Law Reform Commission (VLRC) in influencing law reform to that of a parliamentary committee **or** a royal commission.

(6 marks)

**Difficulty: high**

3 'Without the Victorian Law Reform Commission, the Victorian Parliament would not be able to make laws that reflect the views of the community.' To what extent do you agree with this statement? Justify your answer.

(8 marks)




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# Practice assessment task

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

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

## Victorian logging laws

In August 2022, the Victorian Parliament passed the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic) to strengthen laws that protect the safe harvesting of timber (logging) in Victorian forests. The new legislation, introduced by the Victorian Labor Government, aims to deter individuals and groups from demonstrating against the logging of Victorian forests by banning the use of dangerous protest tactics in timber harvesting safety zones (areas designated for lawful timber logging). It also gives Victoria Police and other authorised persons greater powers to search vehicles, bags and containers for banned items such as chains, locks and spikes that may be used to immobilise or prevent the use of timber harvesting machinery and tree climbing equipment that may be used by protesters for staging tree 'sit ins' and hanging anti-logging signs.

The new legislation also makes it a criminal offence to obstruct or hinder authorised persons and machinery in a timber harvesting safety zone and increases penalties for offences. For example, a person who is found guilty of obstructing or interfering with timber harvesting in a safety zone now faces a maximum fine of 120 penalty units or 12 months' imprisonment.

Although the legislation was passed by the Parliament with the support of the Liberal-National Coalition, it was not supported by the Victorian Greens and a number of other minor political parties. A wide range of environmental, climate action, human rights and legal groups also opposed the laws, claiming they were unnecessary and undemocratic because they restricted the right of people to protest. For example, the Victorian Forest Alliance, an organisation that aims to protect and restore Victoria's native forests, argued the laws were designed to prevent peaceful protests which have, in the past, helped protect native forests and areas of environmental significance. It urged members of the community to email their local member of parliament to express their objection to the laws.

**1** Describe **one** reason why laws need to be changed.
(3 marks)

**2** Explain how an individual could use the courts to influence a change in the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic).
(3 marks)

**3** Discuss the effectiveness of environmental and climate action groups using demonstrations to influence a change in the law.
(6 marks)

**4** The Victorian Government did not ask the Victorian Law Reform Commission to conduct an inquiry into the need to change the timber harvesting (logging) laws. Discuss the potential benefits that could have been gained by doing so.
(8 marks)
Total: 20 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 |
|---|---|---|---|
| • Reasons for law reform. | ☐ | ☐ | Go back to Topic 13.1. |
| • The means by which individuals or groups can influence law reform, including through petitions. | ☐ | ☐ | Go back to Topic 13.2. |
| • The means by which individuals or groups can influence law reform, including through demonstrations. | ☐ | ☐ | Go back to Topic 13.3. |
| • The means by which individuals or groups can influence law reform, including through the use of the courts. | ☐ | ☐ | Go back to Topic 13.4. |
| • The role of the media, including social media, in law reform. | ☐ | ☐ | Go back to Topic 13.5. |
| • The role of the Victorian Law Reform Commission and its ability to influence law reform.<br>• One recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system. | ☐ | ☐ | Go back to Topic 13.6. |
| • The role of parliamentary committees in law reform and their ability to influence law reform.<br>• One recent parliamentary committee inquiry. | ☐ | ☐ | Go back to Topic 13.7. |
| • The role of Royal Commissions in law reform and their ability to influence law reform.<br>• One recent Royal Commission inquiry. | ☐ | ☐ | Go back to Topic 13.8. |

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

**Chapter 13**
Chapter review quiz

**Revision notes**
Chapter 13

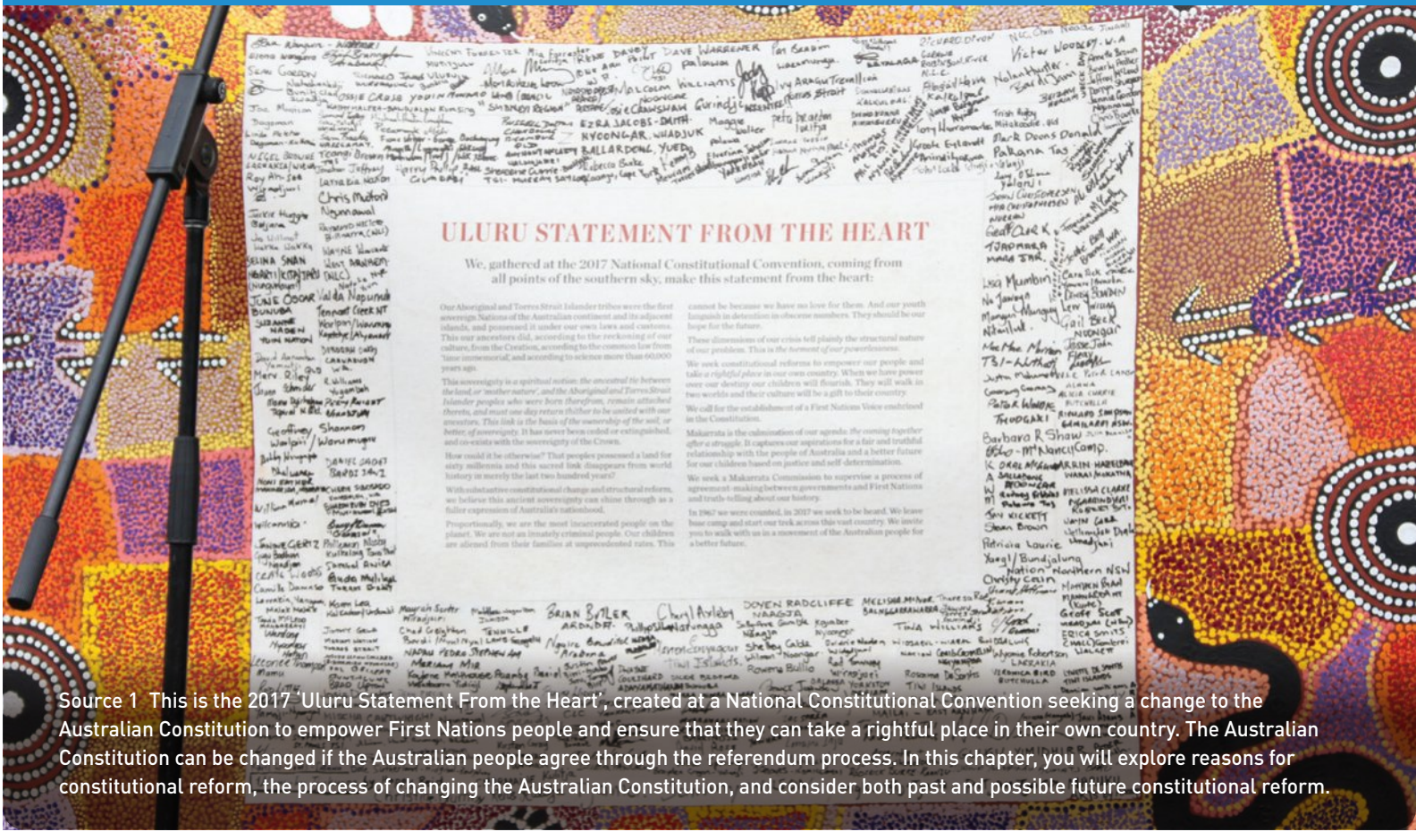
**Chapter summary**
Chapter 13

**Quizlet**
Revise key legal terms from this chapter.

Chapter

# 14

# Constitutional reform




Source 1 This is the 2017 'Uluru Statement From the Heart', created at a National Constitutional Convention seeking a change to the Australian Constitution to empower First Nations people and ensure that they can take a rightful place in their own country. The Australian Constitution can be changed if the Australian people agree through the referendum process. In this chapter, you will explore reasons for constitutional reform, the process of changing the Australian Constitution, and consider both past and possible future constitutional reform.

## Outcome

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 13 and 14), you should be able to explain the reasons for law reform and constitutional reform, discuss the ability of individuals to change the Australian Constitution and influence a change in the law, and evaluate the ability of law reform bodies to influence a change in the law.

## Key knowledge

In this chapter, you will learn about:

- reasons for constitutional reform
- the requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum
- factors affecting the success of a referendum
- the significance of the 1967 referendum about First Nations people
- possible future constitutional reform, including reform to establish a First Nations Voice in the Australian Constitution.

## Key skills

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the reasons for constitutional reform, using examples
- analyse factors affecting the success of a referendum
- discuss the ability of the Australian people to change the Australian Constitution, including in relation to the 1967 referendum about First Nations people and possible future constitutional reform
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

## Key legal terms

**concurrent powers** powers in the Australian Constitution that may be exercised by both the Commonwealth and the states (as opposed to residual powers and exclusive powers)

**constitutional monarchy** a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

**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

**election** the process used where 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)

**express rights** rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

**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

**preamble** the introductory part of a statute that outlines its purpose and aims

**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 be either binding or persuasive

**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

**republic** a form of governance in which the power is held by the people and their representatives, and in which there is an elected head of state rather than a monarch

**residual powers** powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain solely with the states (as opposed to concurrent powers and exclusive powers)

## Key legal cases

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

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**Please note**

First Nations people 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 constitutional reform before you start.

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

# 14.1 Reasons for constitutional reform

## Key knowledge

**In this topic, you will learn about:**

- **reasons for constitutional reform.**

The Australian Constitution was drafted in the late 1800s and came into force on 1 January 1901. While Australia is a stable democracy and the Australian Constitution has established a strong framework upon which our legal system is based, it is broadly accepted that the document is not perfect. It may sometimes need to be changed or updated because it may not be adequate for the changing circumstances and needs of the Australian people. The Constitution sets down a process for its words and phrases to be changed. You will learn about that process later in this chapter.

Between 1901 and early 2023, 44 proposals were put to the Australian people to change the wording of the Australian Constitution. The first was proposed in 1906.

The reasons for constitutional reform include the following:

- to recognise Australia's First Nations people
- to increase the protection of rights
- to change the Commonwealth's law-making powers
- to reform Australia's political system.

Some of these would result in significant changes (such as changing the Australian Constitution so that Australia becomes a **republic**), while others (such as changing the timing of federal elections) are smaller in scale and impact.

**republic**
A form of governance in which the power is held by the people and their representatives, and in which there is an elected head of state rather than a monarch

Each of these four reasons is explored in detail below.



**Source 1** One of the reasons for constitutional reform is to recognise First Nations people in the Australian Constitution.

# Recognise First Nations people

The recognition in the Australian Constitution of First Nations people has been the subject of much debate in the past. There is no mention of Australia's First Nations people in the Constitution, nor is there any recognition of the fact that First Nations people have been living on the continent for at least 65 000 years, long before European colonisation in the late 1700s. In fact, as you will learn later in this chapter, before 1967, the Australian Constitution expressly *did not* recognise First Nations people as part of the Australian population. Instead, it left policies and law-making in relation to Aboriginal and Torres Strait Islander people to the states rather than the Commonwealth. This led to inconsistencies in the laws across individual states.

Over the years, there have been calls for the Australian Constitution to be amended to recognise First Nations Australians. Two of the changes proposed have been:

- to establish a **First Nations Voice** to Parliament. This would be a body enshrined in the Constitution that would allow First Nations people to provide advice to the Commonwealth Parliament on policies or laws that impact directly on First Nations people. The body would be chosen by First Nations people and be representative of First Nations communities, working alongside existing organisations and structures. You will learn more about the First Nations Voice later in this chapter
- to honour and recognise First Nations people in the Constitution. For example, in the 1999 **referendum** (which you will explore later in this chapter), there was a proposed change to insert a '**preamble**' (an introductory statement) to the Constitution. Part of this preamble sought to honour '*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*'. The 1999 referendum was not successful.

**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

**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

**preamble**
the introductory part of a statute that outlines its purpose and aims

# Increase protection of rights

As you learned in Chapter 11, there are five **express rights** in the Australian Constitution. These impose limits or restrictions on what laws the Commonwealth Parliament can make. For example, under section 116 of the Constitution, the Commonwealth cannot prohibit or impose religious practice. This acts as a form of protection of freedom of religion. However, the express rights in the Australian Constitution are better described as restrictions on law making, rather than positive rights or freedoms.

It is broadly accepted that the number of rights protected by the Australian Constitution is limited, with many of the rights themselves being narrow in scope. Most rights in Australia are therefore protected by statute law or common law, rather than by the Australian Constitution. These include freedom of thought, speech, assembly and movement.

There have been calls to change the Australian Constitution to protect basic democratic freedoms, or to clarify or broaden the existing express rights. Some have suggested that Australia should incorporate a bill of rights into the Australian Constitution, which would be a specific list of rights similar to the United States Bill of Rights.

One of the most intense debates in Australia is in relation to the right to freedom of speech, which is explored in the following scenario.

**express rights**
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

Actual scenario

## Freedom of speech

Freedom of speech is not protected by the Australian Constitution, but rather primarily by statute law. The right to freedom of speech, and what limitations should be imposed on that right, is often a source of commentary and news. For example, many companies have codes of conduct or rules that govern what their employees can say both in private and in public. If an employee makes a comment that is not consistent with their company's policy, they could face disciplinary action or even termination of their employment. Some laws impose restrictions on the right to freedom of speech; some people think that these laws infringe too much on the freedom.

For example, on Anzac Day in 2015, former SBS sports reporter Scott McIntyre wrote a series of tweets to his 30 000 Twitter followers, which were described as offensive and wrong. In one of his tweets, he wrote: *'Wonder if the poorly-read, largely white, nationalist drinkers and gamblers pause today to consider the horror that all mankind suffered.'* He was terminated from his employment shortly after posting the tweets and not deleting them. His dismissal ignited debate about freedom of speech in Australia.

In the years before this case, a national debate arose about changes to section 18C of the *Racial Discrimination Act 1975* (Cth), which makes it unlawful for a person to do an act that is reasonably likely to offend, insult, humiliate or intimidate another person or group, and that act is done because of the race, colour or national or ethnic origin of the person or group. The federal government at the time expressed concerns that this unreasonably limited freedom of speech. Legislation was introduced to amend the Act, but it did not pass.

In relation to the debate about whether too many laws restricted freedom of speech, Professor George Williams said in 2014:

> In the longer term, protection for freedom of speech should be inserted into the Constitution. This would provide the strongest form of protection, and allow the High Court to strike down federal laws that infringe the freedom. If we are serious about protecting freedom of speech, it deserves the sort of protection that only the constitution can provide.




**Source 2** Proposed changes to section 18C of the *Racial Discrimination Act* were opposed by many people.

# Change the Commonwealth's law-making powers

As you learned in Chapter 11, law-making powers are given to the Commonwealth and states, which can limit the the ability of parliaments to create law. The Commonwealth Parliament has **exclusive powers** and **concurrent powers**, and the states have concurrent powers and **residual powers**.

In the past, the Commonwealth Parliament has sought to change the Australian Constitution to provide it with more powers, Some of these were in response to High Court decisions which held that the Commonwealth did not have specific power to legislate in relation to certain matters. Listed below are some examples of past referendums where the Commonwealth sought to increase its powers:

- In 1911, the Commonwealth proposed to change the Constitution to extend its power to control companies, labour and employment (including wages and conditions). The Commonwealth argued these were national issues that should be regulated at a federal level. The proposal was not passed. An almost identical reform was also put in 1913, but again, it did not pass.
- In 1919, the Commonwealth sought to alter the Constitution to extend its powers in relation to air navigation and aircraft. Commercial air navigation and aircraft did not exist at the time the Constitution was drafted. The High Court held that the parliament did not have general power over aviation, and so a proposal was put to the people. The proposal did not pass.
- In 1946, a proposal to change the Constitution was put to give the Commonwealth the power to legislate on a wide range of social services. This included in relation to unemployment benefits, medical and dental services, benefits to families and students, and parental leave allowances. This was because a High Court case found that the Commonwealth did not have the power to legislate in relation to these areas, but had already done so despite not having any power. The proposal was successful.

All the above examples are situations where the Commonwealth sought to increase its law-making powers. However, there have also been suggestions to change the Australian Constitution to decrease the Commonwealth's law-making powers. For example, there have been calls to repeal (remove) section 51(xxvi) of the Constitution (known as the race power), which gives the power to the Commonwealth to make laws for the people of any race for whom it is deemed necessary to make special laws. Previously, this power has been identified as potentially allowing the Commonwealth to make laws that negatively discriminate against certain races. If the race power were removed, the Commonwealth's law-making powers would be reduced or decreased.

**exclusive powers**
powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

**concurrent powers**
powers in the Australian Constitution that may be exercised by both the Commonwealth and the states (as opposed to residual powers and exclusive powers)

**residual powers**
powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain solely with the states (as opposed to concurrent powers and exclusive powers)

# Reform Australia's political system

A final reason why there may be a need to change the Australian Constitution is to reform our political system. In particular, there have been suggestions to change the Constitution in relation to the timing of federal elections, to allow more people to be members of the Commonwealth Parliament, and to substantially change our political system so that it becomes a republic.

## Timing of federal elections

Under the Constitution, the term of the House of Representatives is a maximum of three years, but it can be dissolved sooner by the Governor-General. That is, the Constitution only allows for *maximum terms* and the Prime Minister of the day can call elections whenever they choose prior to that maximum term. Other parliaments around the world have longer terms, with one estimate noting that only about 10 per cent of parliaments globally have three-year terms. Members of the Senate are elected for a fixed term of six years.

A referendum held in 1988 tried to change the Constitution to increase the term of the House of Representatives to four years, and to reduce the term of the Senate from six years to four years. The referendum failed.

In 2004, a **parliamentary committee** recommended that the federal parliamentary term for the House of Representatives be extended to four years. Some argue that this would encourage the making

**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

of long-term policy decisions and would enhance business confidence. It would also save resources that are otherwise spent on the number of federal elections that need to be held. Moving to a longer term, and a fixed-year term, may also stop elections being held at a time that is convenient for the federal government, that is, when the political climate suits them to hold an election.

## Allow more people to be eligible to sit in parliament

As you learnt in Chapter 11, Australia is one of the world's most multicultural, multifaith societies. At times, there has been criticism that those who represent the people in parliaments do not reflect the broader composition of our society.



**Source 3** The *áo dài* is the national dress of Vietnam and is worn on special occasions. In this photo, Dai Le MP (right) addresses the House of Representatives after her election to parliament at the 2022 election. Ms Le wore a specially designed *áo dài* as she recounted memories of her boat journey to Australia, fleeing war-torn Vietnam. She spoke with pride about her birth country, Vietnam, and her adopted home, Australia.

One of the key sections of the Constitution that restricts who can sit as a member of the Commonwealth Parliament is section 44(i), which provides that a person cannot sit as a member if they are '*under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power*'. Said another way, section 44 prevents dual citizens or dual nationals (people who have citizenship in Australia and one other country) from being members of the Commonwealth Parliament. Whether a person is a dual national depends on the laws of that particular country. A country could consider a person a national even if the person does not accept it or is not aware of it, such as where the person has a parent who is a national of that other country.

In 2017, the High Court had to determine whether some members of parliament were invalidly elected because of section 44. Indeed, some members of parliament who were involved in the High Court case did not even know they were technically incapable of sitting as a member of parliament. This issue is explored in the scenario on the following page.

There have been calls to change the Australian Constitution to delete section 44(i) or to amend it to clarify its effect. Some have called for it to be clarified to require candidates to be Australian citizens, but to allow parliament to legislate to determine disqualification where a person has foreign allegiance as a result of their ancestry. This could potentially allow more people to be eligible to sit as a member of parliament.

## Becoming a republic

Finally, as you will explore later in this chapter, there have been calls to change our political system to make Australia a republic. This would mean having an Australian person selected as the head of state instead of the British monarch (King).

In 1999, there was a proposal to make Australia a republic. This failed to win majority support in any state of Australia. Despite this, many Australians believe that a modern Australia should formally remove its ties to the monarch. As of 2023, a proposed referendum on a republic was being explored by the federal government.

Actual scenario

## Section 44 of the Constitution

The original aim of section 44(i) (see text on the previous page) of the Australian Constitution was to remove the possibility of 'foreign infiltration' in the Commonwealth Parliament; that is, to ensure that parliament was protected from foreign influences and to ensure national sovereignty. At the time the Constitution was drafted, there was no understanding of dual nationality, which allows Australians to be a citizen of another country.

In 2017, the High Court had to decide whether Barnaby Joyce MP (among other members of parliament) was validly elected in 2016 to the House of Representatives. The case was based on Joyce's ancestry. While he was born in New South Wales, Joyce's father was born in New Zealand and became an Australian citizen in 1978. At that time, he renounced his New Zealand heritage. However, at the time of Joyce's birth, his father was still a New Zealand citizen, and on that basis, by descent so was Barnaby Joyce. Joyce had never applied to become a New Zealand citizen and had not received any benefits or privileges as a citizen of New Zealand. However, in the eyes of the New Zealand government, he was a citizen of New Zealand by descent.

In the High Court, Joyce argued that he had no idea that section 44(i) applied to him. The High Court found that section 44(i) of the Constitution makes no mention of only applying to those who *know* they hold foreign citizenship. That is, the ordinary and natural meaning of the text was that those who were dual citizens, even if they did not know of that fact, were ineligible to sit as a member of parliament.

*Re Canavan* (2017) 263 CLR 284



**Source 4** Barnaby Joyce MP was held to be ineligible to be a member of parliament due to his dual citizenship, of which he was not aware. He later won back his seat in an election.

# 14.1 Check your learning

### Remember and understand

1 Referring to First Nations people, **describe** two reasons why constitutional reform may be necessary.

2 **Explain** why some people believe the 'race power' should be repealed, and how this repeal would decrease the law-making powers of the Commonwealth.

### Examine and apply

3 Conduct some research on past referendums. Other than those explored in this topic, **identify** one referendum in which the Commonwealth sought to increase its law-making powers.
   - **a** **Describe** the proposal for change.
   - **b** **Why** did the Commonwealth want to increase its law-making powers in this area?
   - **c** Was the proposal successful? **Provide** reasons why you think it was or was not successful.

4 Read the scenario 'Section 44 of the Constitution'.
   - **a** **Outline** the purpose of section 44(i) in the Constitution.
   - **b** **Identify** one key argument that may have been made by lawyers representing Barnaby Joyce.
   - **c** In your view, do you think that section 44(i) should be repealed? Give reasons for your answer.

### Reflect and evaluate

5 **Discuss** whether the Constitution should be reformed to make freedom of speech an express right. In your answer, refer to the implied freedom of political communication and the scenario 'Freedom of speech'.

# 14.2 The process to change the Constitution

## Key knowledge

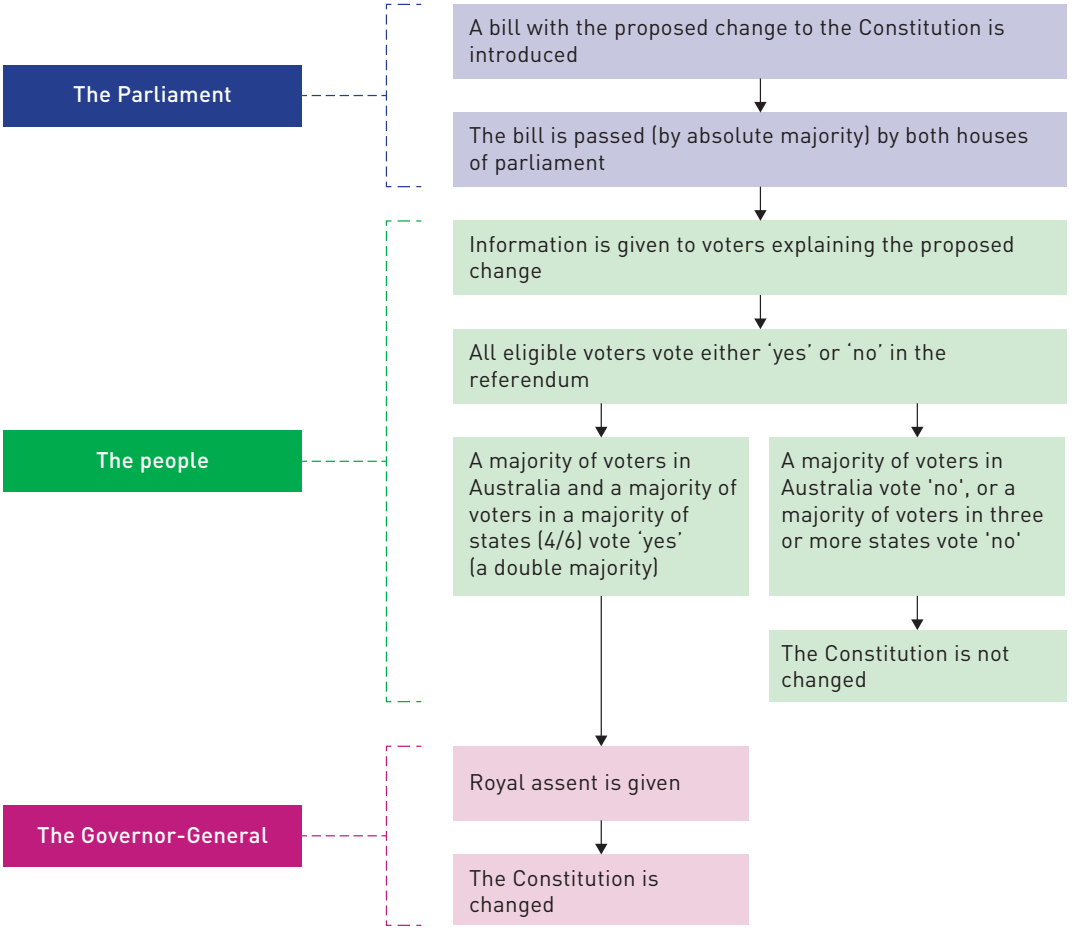
**In this topic, you will learn about:**

- **the requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum.**

As you learnt in the previous topic, there may be times when the Constitution needs to change. The Constitution establishes a process by which its words can be added to, deleted or amended. This process is set out in section 128 of the Constitution and includes the need for a referendum on the proposed change. History has shown that the process of changing the wording of the Constitution is a difficult one, with few proposals for change having been successful.

When the Constitution is changed, the new words will appear in the updated Constitution once the bill containing the proposal has been passed by parliament and given royal assent. In some instances, the change may result in an increase in the Commonwealth's law-making powers, but not always. For example, a referendum in 1977 provided for the compulsory retirement age of 70 years for judges in the federal courts, such as the High Court, but this had no impact on the division of law-making powers.

The procedure for changing the Australian Constitution, as set out in section 128, has three stages: the parliament, the people and the Governor-General.




**Source 1** This diagram shows the stages in process of changing the Constitution

# The Parliament

Any proposed change to the Australian Constitution must first be introduced and passed in the Commonwealth Parliament. Therefore, the Commonwealth Parliament has the overall power to decide whether to introduce a change to the Constitution.

A bill is prepared, which will set out the proposed alteration to the Constitution. It is written as a constitutional alteration bill; for example, the Constitutional Alteration (Rights and Freedoms) 1988 (Cth).

The bill must be passed by an absolute majority of both houses of parliament. If that occurs, between two and six months after the passage of the bill through the House of Representatives, the proposal must be submitted to voters.

If either house passes the bill by an absolute majority (over 50 per cent of the house), and the other house rejects or fails to pass it, after three months the first house can once again pass the bill by an absolute majority. If the bill is again rejected by the other house, the Governor-General may submit the proposed change to voters.


The Canberra Times
ON SUNDAY
No, no, no, no

**Source 2** The 1988 referendum put four questions to voters, including one to increase the rights and freedoms contained in the Australian Constitution. All four proposals were defeated.

# The people

Once the proposal is agreed to in the Commonwealth Parliament, the referendum process occurs, which is a compulsory vote on a proposed change to the wording of the Australian Constitution.

All those who are eligible to vote for the election of members of the House of Representatives must vote in the referendum. Before the referendum is put to the people, the Australian Electoral Commission sends information to every household that explains the proposed change, and provides arguments for and against it. This is often referred to as the 'yes' case and the 'no' case, explaining the reasons why people should vote 'yes' or 'no'.

## Double majority provision

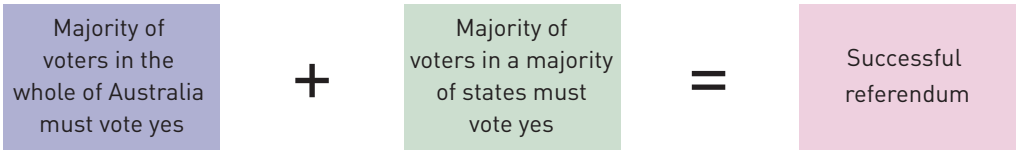
In the referendum, voters are required to answer 'yes' or 'no' to the question asked. For the referendum to be successful, each referendum question must satisfy the **double majority** provision:

- **a majority of voters in the whole of Australia** (including the territories) must vote 'yes'
  AND
- **a majority of voters in a majority of states** must vote 'yes' to the proposed change – that is, the referendum must be approved by a majority of voters in at least four out of the six states before it is accepted. The territories are not counted under this provision. The provision protects the smaller states from being dominated by the larger, more populated states. It means each of the states has an equal voice regardless of its size or population.

**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 Governor-General

If the proposed change receives a 'yes' vote from a majority of voters in a majority of the states as well as a majority of all electors in Australia, it is then presented to the Governor-General for royal assent.




**Source 3** The requirements for a successful referendum

***Study tip***

Students sometimes write the number of states incorrectly, and get answers wrong in relation to the double majority requirement. Make sure you know that there are six states in Australia!

The double majority requirement has proven difficult to achieve, with only eight out of 44 referendums succeeding as of early 2023. For example, in the scenario below, the people rejected a proposed change to the wording of the Australian Constitution following World War II.

Actual scenario

## Banning Communism

In 1950 the Commonwealth Parliament passed the *Communist Party Dissolution Act 1950* (Cth), which had the effect of banning the Communist Party of Australia.

The Communist Party challenged the Act in the High Court. The High Court found that the Parliament had declared the Communist Party guilty of 'sedition' (acts that are considered resistant or rebellious to an authority such as a government), and had authorised the executive to 'declare' individuals or groups of individuals banned.

The majority of the High Court found that the law gave the executive the right to outlaw an organisation without the need to establish a factual connection between that organisation and any seditious acts. The High Court held, however, that the Commonwealth could not assume that a person has engaged in illegal activity merely because they are a member of an organisation such as a political party. It therefore held that the Act was not valid.

Following this decision the Commonwealth Government proposed a referendum that would grant the Commonwealth power to ban the Communist Party. When the issue was debated, the referendum question was opposed by the Communist Party and the Australian Labor Party on the grounds that it would restrict the freedoms of speech and association.

When the referendum occurred, the proposal failed, gaining support in only three states and winning 49 per cent of the national vote.




**Source 4** Advertising encouraging 'yes' votes in the 1951 referendum. The public can refuse to support a change in the wording of the Australian Constitution if the change is not considered appropriate.

# 14.2 Check your learning

### Remember and understand

1 **Outline** the role played by parliament in a change to the wording of the Australian Constitution.

2 **Explain** one reason why the Constitution contains the requirement that there must be a majority of voters in a majority of states for the proposal to succeed.

### Examine and apply

3 **Suggest** two reasons why the writers of the Australian Constitution required that the people be involved in deciding whether the wording of the Constitution should be changed.

4 **Describe** the role that each of the following people will have in deciding whether to change the Australian Constitution:

- **a** Brenda from Warrnambool, Victoria
- **b** The Prime Minister
- **c** The Minister for Defence in the Commonwealth Parliament
- **d** Bella from the Northern Territory

### Reflect and evaluate

5 **To what extent** could it be argued that the referendum process gives too much power to the smaller states? Give reasons for your answer.

6 'The outcome of the 1951 referendum highlights the need for the people to decide whether the Constitution should be changed, rather than politicians.' **Discuss** the extent to which you agree with this statement.

# 14.3 Factors affecting referendum success

## Key knowledge

In this topic, you will learn about:

- factors affecting the success of a referendum.

*Study tip*

The Australian National University College of Law has a podcast known as 'The Constitutional'. They describe this as 'conversations about law in a way that is utterly charming and reminds listeners that lawyers are people too.' VCE Legal Studies students should check this out.

Experience tells us that it is difficult to achieve a successful referendum, and that the Australian people are reluctant to agree to a change in the wording of the Constitution.

Some of the key factors affecting the success of a referendum are:

- whether there is bipartisan support for the proposal
- whether the voters themselves are seeking change
- the nature of the proposal
- education about the proposal.

## Bipartisan support

'Bipartisan support' refers to approval by two or more political parties. In Australia, that usually means support from the two major parties: the Australian Labor Party (ALP) and the Liberal Party.

History suggests that the success of a referendum often depends on whether there is support from the major political parties at the Commonwealth and state levels. If the opposition does not agree with the proposed change, they will lead a 'no' campaign, and voters will be faced with two strongly argued, opposing campaigns focusing on 'yes' and 'no'. Many voters do not understand the Constitution and the nature of the change, so people may also look for guidance about how to vote from the political party they support. If their own preferred party supports the change, they may be more inclined to vote yes.

In the 1951 referendum in relation to the Communist Party, the ALP, which was in opposition at the time, campaigned against the change, and the referendum was not successful. On the other hand, there was bipartisan support for the change in the 1967 referendum, and in the absence of a 'no' case, the Australian people were not subjected to arguments and disunity over the proposal.

A referendum vote may also be affected if the premiers of the states urge a 'no' vote. Because majority support is needed in at least four states, the premiers can be influential in the outcome of the referendum. Political parties at a state level can also oppose a proposal, focusing on the interests of the state over the national interest, particularly if there is no benefit afforded to the state or its residents as part of the proposed change.

## Whether voters are seeking change

One factor that can affect the success of a referendum is whether the people themselves support and actively promote the change (known as 'people's ownership'), or whether it is owned and supported by the government itself. If voters themselves are driving the change, they may be more willing to vote 'yes'.

For example, the 1967 referendum was seen to be a 'people's movement', driven by the people. This followed decades of First Nations people agitating against discrimination and unfair treatment, as well as advocacy by some non-Indigenous people.

On the other hand, if the government is driving the change, Australians may be more cautious because of a potential general distrust of politicians. When in doubt, voters tend to maintain the status quo because they become concerned about the change being for the benefit of those pressing for it, rather than for the greater good.

In some situations, Australians may support a change in the lead-up to the referendum, but that support may fall away as the referendum gets closer. In the 1999 referendum on the republic, commentators noted that support for a republic was initially high. However, the referendum ultimately failed, so other factors clearly swayed people's votes. Those factors might have included lack of bipartisan support and confusion about the information provided, which some thought was too complex and lacked clarity.

## The nature of the proposal

One thing that may affect the success of a referendum is whether the proposed change is straightforward and accessible or complex and difficult to understand. If the question being asked is complex or the proposed alterations to the Constitution are difficult to understand or messy, voters may not understand what they are being asked to vote 'yes' to. They may then be more inclined to vote 'no', particularly if there is little public support for the proposed change. Alternatively, if the proposal is clear, sensible and straightforward, the Australian public may be more inclined to say 'yes'.

For example, in 1988 a referendum was held that contained four referendum questions, none of which passed. One of the proposals sought to guarantee a right to vote in the Constitution and to ensure fair elections. The proposal was rejected nationally, gaining only 38 per cent support among all voters. A second proposal was that both the House of Representatives and the Senate be elected for a term of four years. This was widely rejected, drawing support from only 33 per cent of voters nationally. The remaining two proposals were also rejected.

One of the reasons given for the failure of these proposals was that they focused on the mechanics of voting and elections in Australia, and raised complex issues for voters. There is also very little public knowledge of the Australian Constitution and the election mechanisms contained in that document, so it is possible that voters who lacked understanding and interest in the proposed change voted 'no'. In addition, having four questions may have been confusing or overwhelming.

## Education about the proposal

The Australian Constitution is rarely the subject of mainstream media analysis, and the general public has very little knowledge of the Constitution and government and parliament structures. This can create challenges when voters are asked to consider changing something they know very little about.

Therefore, one of the likely success factors is the extent to which there has been a strong information and education campaign in the lead-up to the referendum, setting out the details and explaining the proposal and the need for change. This may require strong and simple messaging that describes the proposed change in simple terms. The booklet sent to all voters needs to include a straightforward explanation of the structures of government and law-making that are the focus of the proposed change, as well as providing a clear explanation of the key elements in the 'yes' and 'no' cases. Strong messaging and education about the proposed change may also be increasingly necessary given the increased use of social media and the potential spread of misinformation.

Some have argued that referendums in the past have failed not because the Australian people are reluctant to change, but rather that they do not receive the necessary information to understand the proposal fully. For example, the information booklet sent prior to the 1999 referendum, on a proposed republic, was seen by some people as raising questions that were not addressed. Also, there was only one proposed model, so beyond saying 'yes' or 'no', there was no opportunity to say 'yes' and then choose

between, say, a directly elected head of state, an indirectly elected one chosen by parliament, or a government-appointed one (like judges, or the Governor-General). The people were asked only whether they wanted a republic 'with the Queen and governor-general being replaced by a president appointed by a two-thirds majority of the members of the Commonwealth Parliament.' No other choice was offered. For those wanting a directly elected president, the default response was 'no'.

In addition, public debate can sometimes be side-tracked by irrelevant issues that serve only to confuse voters. For example, some people urging a 'no' vote claimed that if the referendum succeeded, there would also be changes to Australia's flag and the loss of the public holiday for the monarch's birthday.

On the other hand, the 1967 referendum, in relation to First Nations people, contained a simple, clear message about why change was required. It was therefore immediately appealing, even to those for whom the Constitution is unfamiliar and remote to their lives.




**Source 1** A referendum requires people to vote either 'yes' or 'no' to a question.

The 1999 referendum was held to give Australian voters the opportunity to decide whether Australia should become a republic. That referendum is explored in the scenario below.

## Actual scenario

# The 1999 referendum

In the early 1990s then-Prime Minister Paul Keating (of the ALP) expressed a desire for Australia to become a republic in time for the Centenary of Federation (1 January 2001). The Liberal-National **Coalition**, led by John Howard, won the 1996 election and established a Constitutional Convention. The Constitutional Convention's role was to debate the proposed change to the Constitution, which would remove the monarch as Australia's head of state. A majority of those attending the Convention agreed on a proposal that was put to the people on 6 November 1999.

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

## Proposals put to the people

Two bills were passed by both houses of the Commonwealth Parliament to allow the proposals to be put to the people.

The first bill, the Constitution Alteration (Establishment of Republic) 1999 (Cth), was aimed at making Australia a republic rather than part of the English monarchy. It proposed the following changes to Australia's political system:

- having a president as head of state instead of the Queen's representative
- setting out the mechanism for selecting a president, including a committee to receive and consider nominations
- establishing the powers of the president
- establishing the term of office and power for removal of the president
- removing monarchical references from the Constitution.

### *Study tip*

For this topic, you are required to analyse factors affecting the success of a referendum. An analysis requires a breaking down of the factors and looking at their various components or relationship.

The second bill, the Constitution Alteration (Preamble) 1999 (Cth), was aimed at inserting a new preamble into the Australian Constitution. This change was required to be put to the people, as the preamble forms part of the Australian Constitution and can therefore only be changed by referendum. The proposed preamble was as follows:

## The Australian Constitution – proposed preamble

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this Constitution:

proud that our national unity has been forged by Australians from many ancestries;

never forgetting the sacrifices of all who defended our country and our liberty in time of war;

upholding freedom, tolerance, individual dignity and the rule of law;

honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;

recognising the nation-building contribution of generations of immigrants;

mindful of our responsibility to protect our unique natural environment;

supportive of achievement as well as equality of opportunity for all;

and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

***Did you know?***

After the 1999 referendum failed, Malcolm Turnbull described John Howard as the 'prime minister who broke this nation's heart.' Turnbull would go on to be elected prime minister in 2015. Both men belonged to the Liberal Party.




**Source 2** The 1998 Constitutional Convention was attended by many prominent Australians, who addressed the gathering at Old Parliament House, Canberra. Here, republican supporter and media figure Eddie McGuire is shown about to address the Convention.

Before the 1999 referendum, the Australian Electoral Commission distributed a document to all households where a person who was eligible to vote lived. The document contained an explanation of the process for changing the Constitution, the existing parliamentary system and the proposed republican model, as well as the 'yes' and 'no' explanations.

## Referendum results

The first question, which proposed the establishment of a republic, was rejected by 54.87 per cent of voters nationally and supported by only 45.13 per cent. The first question did not receive majority support in any state. The 'yes' vote of 49.84 per cent in Victoria for the republic was the largest vote in any individual state.

The second question, about inserting a preamble into the Constitution, was only supported by 39.34 per cent of voters nationally, and was rejected by 60.66 per cent of voters. This proposal also failed to gain a majority of support in any Australian state.

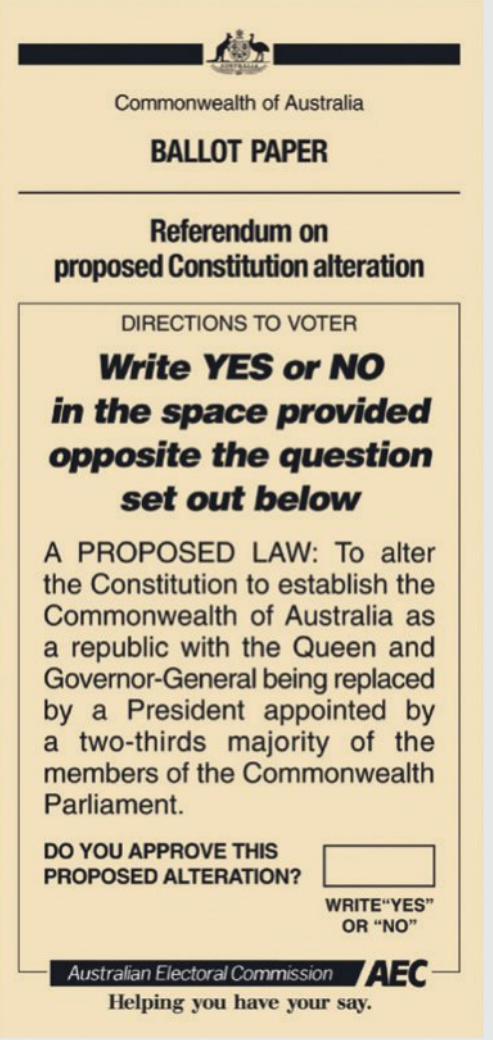
**constitutional monarchy**
a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

The results were surprising to some, as in the lead-up to the referendum, many voters generally supported the move to becoming a republic.

## The reasons for failure of the 1999 referendum

Some of the reasons the referendum failed included:

- Australians are traditionally cautious of constitutional change, and the proposal to have a president elected by the parliament was unfamiliar and caused concern among voters
- public opinion on the introduction of a president varied. Traditional monarchists argued that a **constitutional monarchy** provided stable government, and encouraged those in doubt to maintain the status quo.
- many people who would usually support a republic voted 'no' because they believed that the president should be elected by the people rather than being chosen by the Parliament. Some voters regarded the model put forward to be undemocratic and wanted a choice in the selection of the president
- before the referendum, then Prime Minister John Howard urged a 'no' vote on the grounds of maintaining ties to Britain. This argument swayed some undecided voters to vote 'no', especially those who would normally support the Liberal Party. Some people look to political leaders for guidance when making their decision about a referendum
- the booklet and other material about the proposed change were seen to be confusing, adversarial and unclear, as was the question itself.



Commonwealth of Australia

BALLOT PAPER

Referendum on proposed Constitution alteration

DIRECTIONS TO VOTER

Write YES or NO in the space provided opposite the question set out below

A PROPOSED LAW: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.

DO YOU APPROVE THIS PROPOSED ALTERATION?

WRITE "YES" OR "NO"

Australian Electoral Commission AEC

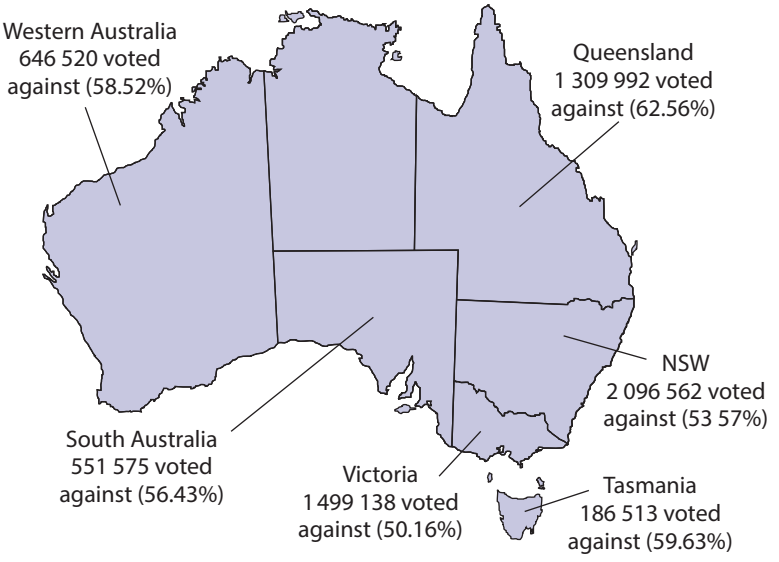
Helping you have your say.

**Source 3** A ballot paper from the 1999 referendum to see whether the people wanted Australia to become a republic

As Source 4 shows, all Australian states voted 'no' at the 1999 referendum, but some states, such as Queensland and Tasmania, were much more conservative than Victoria.

***Did you know?***

In a survey reported in *The Age* in January 2023, support for Australia to become a republic had risen from 36 to 39 per cent in the four months since the passing of Queen Elizabeth II. The number of voters who opposed the change declined from 37 to 31 per cent.




**Source 4** The official results of the vote in the 1999 referendum on a republic (the answer was 'No')

# Summary

Source 5 below sets out a summary of the factors affecting the success of a referendum. The summary points will help you to analyse the factors.

| Factor | Summary |
|---|---|
| Whether there is bipartisan support for the proposal | • Bipartisan support refers to support or approval by two or more political parties; in Australia, it usually means support from the two major political parties.<br>• A referendum is most likely to succeed if it has the support of all major political parties at Commonwealth and state levels. If the opposition leads a 'no' campaign, then voters may be faced with two strong opposing campaigns. Voters may also look to guidance from their preferred political parties.<br>• The position of the state premiers and political parties may also influence voters' views, which can then affect whether the majority of voters in the majority of states vote 'yes'.<br>• The 1999 referendum demonstrates the impact on the vote if there is a strong 'no' case, as opposed to the 1967 referendum, where a formal argument for a 'no vote' was never presented to voters. |
| Whether the voters themselves are seeking change | • The success of any referendum proposal depends on whether the people themselves support and 'own' the change, or whether it is owned and supported by the government itself.<br>• If voters themselves are driving the change, then there may be a greater willingness to vote 'yes'. For example, the 1967 referendum was seen to be a 'people's movement', in that it was driven by the people after decades of First Nations people agitating against discrimination and unfair treatment, as well as advocacy by some non-Indigenous people.<br>• In contrast, if the government itself is owning or driving the change, voters may be more cautious. If the proposal involves an increase in Commonwealth power, the states might encourage the voters in their state to vote 'no'.<br>• There may be a mistrust of politicians, where voters perceive that they are only seeking to reform the Constitution to enhance their own power. |

| Factor | Summary |
|---|---|
| The nature of the proposal | • The nature of the proposal – whether it is simple and straightforward, or complex – can also impact on success.<br>• The double majority provision in the Constitution is difficult to achieve, and the successful changes to the Constitution have been limited to proposals where there is overwhelming public support. These have been non-controversial in nature, such as allowing people in the territories to vote in referendums, and having judges in the federal courts, including the High Court, retire at the age of 70 (1977 referendum). The proposals that have succeeded have generally been straightforward in nature.<br>• Where multiple options for change are debated in the media, the 'yes' vote can be lost because the majority of voters decide to vote 'no' if they prefer an alternative model that has been presented by the 'no' case. |
| Education about the proposal | • The Australian Constitution is rarely the subject of mainstream media analysis, which creates challenges when voters are contemplating change.<br>• A strong education campaign in the lead-up to the referendum is required, with strong messaging about the need for change. The booklet sent out must also be clear and straightforward.<br>• The Commonwealth funds an education program on the arguments for and against the proposal to ensure that voters can make an informed choice.<br>• The booklet for the 1999 referendum was seen by some as difficult to understand; this contrasts with the 1967 referendum, which contained a clear message.<br>• Given the lack of awareness about the Constitution, public debate can sometimes be sidetracked by irrelevant issues that serve only to confuse voters. |

**Source 5** A summary of factors affecting the success of a referendum

## 14.3 Check your learning

### Remember and understand

1 **Define** the term 'bipartisan support'.

2 **Explain** why a strong education campaign is important for a referendum to be successful.

3 **Describe** one reason why the 1967 referendum was successful.

### Examine and apply

4 Read the scenario 'The 1999 referendum'.

- **a** **Outline** the proposals that were put to voters in this referendum.
- **b** **Describe** three reasons why the 1999 referendum failed.
- **c** Conduct some research and **identify** two well-known figures or celebrities who were in favour of a republic in 1999, and two well-known figures or celebrities who were against the proposal. **Explain** what impact the use of well-known figures or celebrities may have on a referendum.

### Reflect and evaluate

5 **Analyse** two factors that can impact on the success of a referendum.

6 'There should be a ban on having a yes and no case. It only serves to make referendums a political issue.' **Discuss** the extent to which you agree with this statement.

# 14.4 The 1967 referendum

## Key knowledge

**In this topic, you will learn about:**

- **the significance of the 1967 referendum about First Nations people.**

The most successful proposal for constitutional change to date occurred in 1967, when more than 90 per cent of voters in Australia voted in favour of a change in relation to Aboriginal and Torres Strait Islander peoples. In this topic you will explore the 1967 referendum, its significance, and the ability of people to change the Australian Constitution.

## Background

Until 1967, the Australian Constitution did not give the Commonwealth the power to legislate for First Nations people or to include First Nations people in national censuses. Rather, the Constitution gave the Commonwealth the power to make laws in relation to any race, *other than* 'the Aboriginal race'. Section 51 (xxvi), known as the 'race power', said as follows:

**Extract**

### The Australian Constitution – section 51(xxvi)

#### Legislative Powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ... the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.'

This meant that law-making in relation to Aboriginal and Torres Strait Islander peoples was left to the states.

In addition, section 127 of the Australian Constitution provided that First Nations peoples were not to be counted in national censuses:

**Extract**

### The Australian Constitution – section 127

#### Aborigines not to be counted in reckoning population

In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

First Nations people and many non-Indigenous people thought these provisions were unfair and a barrier to effective policy making for the Commonwealth Parliament. Pressure grew in the 1960s for there to be greater protection of the rights of Aboriginal people and for the Commonwealth to be able to legislate in relation to Aboriginal and Torres Strait Islander affairs.

In 1967 it was proposed to remove the barriers facing Aboriginal people from the Constitution. The Coalition government of the time, led by Prime Minister Harold Holt, introduced the Commonwealth Alteration (Aboriginals) 1967 (Cth) to the Commonwealth Parliament. It was passed unanimously.

## The 1967 referendum proposal

Two proposals were put to voters for a proposed change in 1967: one in relation to altering the members of the House of Representatives, and the other in relation to Aboriginal people. As to the second proposal, the question that the voters had to vote on was as follows:

> DO YOU APPROVE the proposed law for the alteration of the Constitution entitled— 'An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population'?

In short, answering 'yes' to the question would have resulted in section 51(xxvi) being changed so that the words 'other than the Aboriginal race in any State' were abolished, and to completely repeal (remove) section 127. This referendum, if passed, would have made the power to legislate regarding First Nations people a concurrent power, whereas previously it had been a residual power.

There was no 'no' case put to the Australian people, because the change had support from all political parties, and had passed unanimously through parliament.

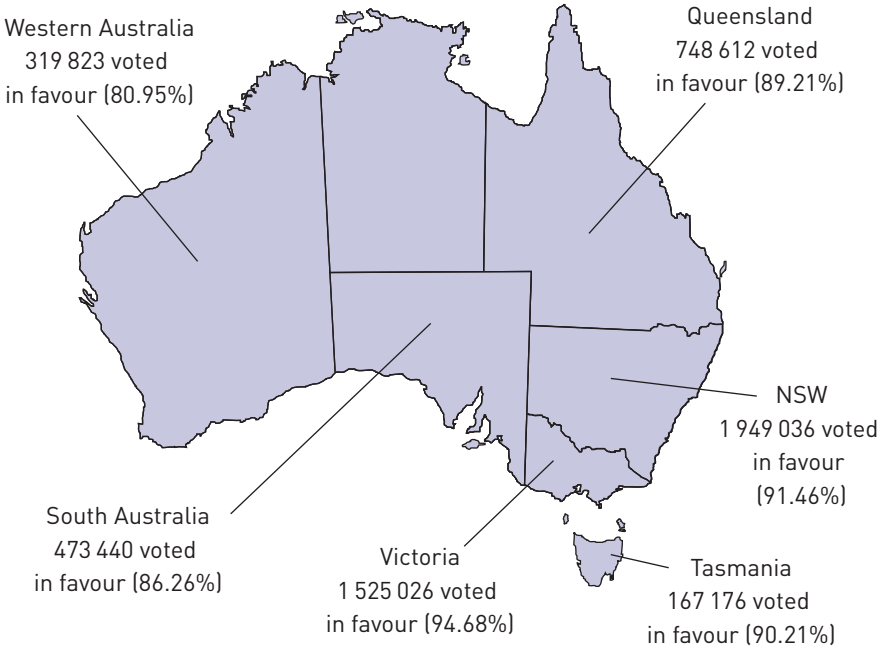
## Referendum results

The majority of voters in Australia voted in favour of the referendum. Across the whole of Australia, 90.77 per cent of voters were in favour and only 9.23 per cent against.

Despite the fact that this referendum was held at the same time as an unsuccessful referendum (about the increase of numbers in the House of Representatives), it was accepted with the highest 'yes' vote to date. This vote was said to have reflected a general community view that it was time to make amends with First Nations peoples, although the state with the largest First Nations population (Western Australia) as a percentage of the population recorded the largest 'no' vote (19.05 per cent). It was also, as noted in the previous topic, a change that was driven by the people.

***Did you know?***

Another referendum proposal was presented to voters in 1967, which was designed to allow for the number of members of the House of Representatives be increased without increasing the number of Senators. It only gained support in one state, New South Wales.




**Source 1** The results of the vote on the 1967 referendum concerning First Nations people (the answer was 'Yes')




**Source 2** There were two proposals put to the people in the 1967 referendum. One was in relation to Aboriginal people.

This referendum gave the Commonwealth Parliament the power to legislate for First Nations people in the states and territories and to include them in national censuses. This amendment altered Section 51(xxvi) of the Constitution and deleted Section 127.

## Extract

### The Australian Constitution

#### Section 51(xxvi) Legislative Powers of the Parliament

#### After the 1967 change

**S51(xxvi)** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to … the people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws;

~~**S127** Aborigines not to be counted in reckoning population~~

~~In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.~~

# The significance of the 1967 referendum

From a law-making perspective, the constitutional reform allowed the Commonwealth Parliament to move into an area that it was previously denied. That is, the Commonwealth was able to specifically legislate in relation to First Nations people by reason of the amendments to the 'race power'. An area of residual power became a concurrent power, therefore it arguably increased the law-making powers of the Commonwealth. It also gave the Commonwealth the ability to direct government spending towards First Nations affairs.

Although the Commonwealth did little in this policy area for the first five years, it was an important step for First Nations people. It gave the Commonwealth the opportunity to become more involved in dealing with First Nations people and their needs. For example:

- the Commonwealth Parliament was able to use its powers to override laws that were racially discriminatory. For example, it passed legislation in 1975 that overrode Queensland laws that treated Aboriginal people differently from others
- it allowed the Commonwealth to legislate in relation to land rights, and eventually led to the passing of the *Native Title Act 1993* (Cth), which allowed First Nations people to claim land rights
- the formal inclusion of First Nations people in the national census enabled the Commonwealth to make informed decisions about policies based on population, and distribute Commonwealth funds based on that population.

Other than law-making, the 1967 referendum is seen as significant because it raised the importance of the rights and welfare of First Nations people, and the need to focus on anti-discrimination, reconciliation, and closing the gap between First Nations people and non-Indigenous people. It was symbolic in terms of its recognition of First Nations peoples, bringing their welfare and affairs to the attention of all Australian voters.

The outcome also highlights the power of the people to decide whether key changes in the wording of the Constitution are to be made, especially those that relate to social and human rights issues. Much of the debate in 1967 focused on the need to recognise First Nations people in the national census, and the benefits of having the Commonwealth legislate for the changing needs of First Nations people. The overwhelming support across all states for these proposals, as well as at the national vote, highlighted the importance of the referendum process in being able to allow the views and values of the public to be reflected in constitutional change.




**Source 3** The 1967 referendum was driven by a people's movement for constitutional change. This picture shows Faith Bandler (right), a leading campaigner for the referendum, preparing to cast her vote.

## The ability of the Australian people to change the Australian Constitution

Source 4 below sets out some of the points that can be made about the ability of the Australian people to change the Constitution in relation to the 1967 referendum. The points will allow you to engage in a discussion of the ability of the people to make change.

| Application and reflection | Points on the ability of Australians to change the Constitution in 1967 |
|---|---|
| **Explanation points** | • In 1967, a referendum was put to the people about whether to change the Australian Constitution in relation to Aboriginal people. More specifically, the change would have resulted in allowing the Commonwealth to make laws about First Nations people (when it otherwise did not have this head of power), and would have allowed First Nations people to be formally counted in the national census.<br>• The proposed change was unanimously passed in the Commonwealth Parliament.<br>• The 1967 referendum achieved the double majority requirement, with an overwhelming number of voters voting in favour, and a majority of voters in all states voting in favour of both proposals for change.<br>• The 1967 referendum outcome led to a key reform that allowed the Commonwealth to legislate in an area that was once a residual power, that is, for First Nations people.<br>• The outcome of the referendum also allowed First Nations people to be formally counted in the national census as part of the population. |
| **Discussion points** | • The overwhelming support for the proposal may have been influenced by the fact that the people 'owned' this proposal; it had resulted from a decades-long battle by First Nations people against the discrimination in these constitutional provisions. However, if there was no 'ownership' of this proposal and it was driven in part by politicians, people may have been less willing to support it based on distrust or a level of cautiousness. |

| Application and reflection | Points on the ability of Australians to change the Constitution in 1967 |
|---|---|
| | • The very high level of support across all states sent a clear message to the Commonwealth that it needed to act to address the inconsistencies in state law in regard to First Nations people. However, the Commonwealth did very little in this policy area for some time – thus suggesting that although the Australian people can *change* the Constitution, they cannot necessarily enforce the Commonwealth to change *laws*.<br>• The unanimous support from parliament ultimately resulted in the case for voting 'no' in the referendum was not presented to voters. This meant that voters were not faced with two strong, opposing campaigns; rather, there was bipartisan support and a unified, simple message about why change was needed. Had there been no bipartisan support, it is possible the results would have looked different.<br>• As a result of the change, the Commonwealth was able to pass important legislation such as the *Native Title Act 1993* (Cth), which enabled First Nations people to claim land rights, as well as pass legislation to override discriminatory state laws.<br>• At the same referendum, there was another proposal that would have allowed for the number of House of Representatives members to be increased without increasing the number of Senators. The failure of this proposal shows that while voters can embrace one proposal, it can reject another on the same day, which suggests that the public can consider multiple issues at the same referendum and arrive at different outcomes. |

**Source 4** The ability of the people to change the Australian Constitution in relation to the 1967 referendum

## 14.4 Check your learning

### Remember and understand

1 **Describe** the two provisions of the Australian Constitution that were relevant to the 1967 referendum.

2 Was the power to legislate in relation to First Nations people before the 1967 referendum an exclusive power, concurrent power or residual power? **Justify** your answer.

3 **Describe** two reasons why the proposals for change in the 1967 referendum were considered important.

### Examine and apply

4 The 1967 referendum represented a major shift in the capacity of the Commonwealth to recognise First Nations people in the Constitution.

**a** **What** percentage of people supported the 1967 referendum? Give two reasons for this high level of national support.

**b** **Why** might the lowest level of support have occurred in Western Australia?

**c** **Explain** how the 1967 referendum changed the division of law-making powers between the states and the Commonwealth.

**d** With reference to issues such as native title, **explain** why it was essential that the Commonwealth have power to create laws regarding First Nations people.

### Reflect and evaluate

5 'The only reason why this referendum was successful was because a "no" case was not put to the people.' **Discuss** the extent to which you agree with this statement.

# 14.5 Future constitutional reform

## Key knowledge

In this topic, you will learn about:

- possible future constitutional reform, including reform to establish a First Nations Voice in the Australian Constitution.

**Note: the information in this topic was correct at the time this textbook went to print, but as the proposal to establish a First Nations Voice to Parliament is an ongoing issue, please see your obook pro for any updates.**

In mid-2023, the last referendum to have been held was in 1999, and the last successful referendum was in 1977. Therefore, by mid-2023, the Australian Constitution had not been changed for 46 years.

Since 1999, there have been various reasons why the Australian Constitution should be changed. For example, some have suggested that local governments should be recognised in the Constitution. Others have suggested abolishing the 'race power' or increasing the term of the Commonwealth Parliament to four years.

In this topic, you will explore the following two possible future reforms to the Constitution:

- establishing a First Nations Voice in the Australian Constitution
- making Australia a republic rather than a constitutional monarchy, which would remove the King of England as Australia's head of state.

At the time of writing this book, a referendum on the First Nations Voice to Parliament was required to be held in late 2023.

## Establishing a First Nations Voice

Additional resource
The latest updates on the First Nations Voice to Parliament

For decades, First Nations people have advocated for the ability to participate in and be consulted about decisions and laws that affect First Nations people and their rights. This has included individuals and groups writing to or petitioning national or state leaders to seek First Nations political representation and participation, such as reserving seats in parliament for First Nations people, or having a national First Nations representative body. Despite this, and despite some commitments made in the past to formally recognise First Nations people, the issue of constitutional recognition had not been resolved.

In 2017, a unified national position of First Nations people was declared following the establishment of the Referendum Council.

### Referendum Council

In December 2015, a 16-member Referendum Council was appointed by then-Prime Minister Malcolm Turnbull and then-Opposition Leader Bill Shorten. The purpose of the Referendum Council was to advise the Prime Minister and the Opposition Leader on the next steps towards a successful referendum to recognise First Nations people in the Australian Constitution. The Council drew on previous work that had been prepared on this issue, including an expert panel in 2012 that considered the issue of constitutional recognition.

As part of its work, the Referendum Council held a series of regional Dialogues around the country between December 2016 and May 2017. The Dialogues were a series of meetings of First Nations people to discuss potential reforms to the Australian Constitution and to give participants a chance to consider the options for change, understand them in detail, and discuss the pros and cons of each.



**Source 1** One of the Dialogues held was at Ross River in northern Queensland; this was one of 12 Dialogues held across Australia in 2016 and 2017.

Attendance at these Dialogues was by invitation only; the meetings were capped at 100 participants, with 60 per cent of places reserved for people from First Nations/traditional owner groups.

Following the Dialogues, the National Constitution Convention was held at Uluru between 23 and 26 May 2017, at which the Uluru Statement from the Heart was declared.

## Uluru Statement from the Heart

For the National Constitutional Convention, the Referendum Council produced a summary of the Dialogues called 'Our Story', which recounted the themes that emerged from the Dialogues. An extract is below.

### Extract

#### Our story

Our First Nations are extraordinarily diverse cultures, living in an astounding array of environments, multi-lingual across many hundreds of languages and dialects. The continent was occupied by our people and the footprints of our ancestors traversed the entire landscape. Our songlines covered vast distances, uniting peoples in shared stories and religion. The entire land and seascape is named, and the cultural memory of our old people is written there.

This rich diversity of our origins was eventually ruptured by colonisation. Violent dispossession and the struggle to survive a relentless inhumanity has marked our common history. The First Nations Regional Dialogues on constitutional reform bore witness to our shared stories.

All stories start with our Law.

The purpose of the National Constitutional Convention was to bring together the outcomes from the Dialogues and arrive at a consensus about what constitutional reform would look like. Ten guiding principles were prepared based on the Dialogues.

As a result of the Convention, the Uluru Statement from the Heart was prepared and released on 26 May 2017. Council member and Cobble Cobble woman, Professor Megan Davis, gave the first reading of the statement at the conclusion of the Convention.

## Uluru Statement from the Heart

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is *a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.

We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

**Source 2** The Uluru Statement from the Heart

The Uluru Statement contains the following two broad objectives:

1 **For there to be a constitutionally entrenched Voice to Parliament**. The Voice to Parliament would be a First Nations representative body that provides advice to the Commonwealth on laws and policies that affect First Nations people. It would be made up of First Nations people, would be separate from Parliament, and would represent communities in remote, rural and urban areas.

2 **To establish a Makarrata Commission** to supervise a process of agreement-making between governments and First Nations, and truth-telling about the history of First Nations people. 'Makarrata' is a word from the language of the Yolngu people in Arnhem Land, and captures the idea of two parties coming together after a struggle, healing the division of the past. The concept embraces the idea of acknowledging that something has been done wrong, and it seeks to make things right. To do this, both a Treaty and truth-telling is sought. A Treaty would be an agreement between the First Nations



**Source 3** Three of the architects of the Statement were Cobble Cobble woman Professor Megan Davis, Alyawarre woman Pat Anderson and Noel Pearson (son of Glen Pearson, from the Bagaarrmugu and Ivy Pearson, from the Guggu Yalanji, and the founder of the Cape York Institute for Policy and Leadership).

people and the governments of Australia to acknowledge and give legal effect to First Nations people's cultural rights and interests. Australia is the only Commonwealth nation *not* to have a treaty with its First Nations people. Truth-telling would be about revealing Australia's true history and its impacts today to further healing and reconciliation.

## Reasons for a Voice to Parliament

The aims of a First Nations Voice to Parliament include the following:

- It would aim to provide a platform for First Nations voices to be heard by parliament to improve the quality of programs and outcomes in First Nations affairs. Although it would be a non-legally binding advisory body, it would ensure that First Nations opinions could be heard on matters of significance, particularly where those matters impact on the wellbeing of First Nations people. While the 1967 referendum empowered the Commonwealth to legislate for First Nations people, it did not grant First Nations people a voice such that they can have impact on laws and policies that affect them. As the Uluru Statement declares: 'In 1967 we were counted, in 2017 we seek to be heard.'
- The reform would have representative legitimacy, so that the voice of the First Nations people can be heard and respected. In particular, it has been recognised that the body must have legitimacy in First Nations communities across Australia, and not be 'handpicked'.
- Enshrining the Voice to Parliament in the Constitution would mean that it cannot be easily dissolved after there are changes in government or political priorities. That is, the Voice would remain a constant, guaranteed voice now and in the future.
- The Voice would empower First Nations people in their communities, allowing for self-determination and a genuine engagement in process.

On 19 June 2023, the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 was passed by both Commonwealth Houses of Parliament. Pursuant to section 128 of the Constitution, the referendum must be held by mid-December 2023 (i.e. within six months). At the referendum, the Australian voters will vote on whether to change the Australian Constitution to include a First Nations Voice. This would be done by inserting a new section 129, as in the extract below.

### Extract

#### Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

##### 129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

**(i)** there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;

**(ii)** the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;

**(iii)** the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

# Becoming a republic

In recent years, the question about whether Australia should become a republic has again been raised at a national level.

In 2022, following the election that saw the Australian Labor Party (ALP) form government at a federal level, the Commonwealth Government appointed an Assistant Minister for the Republic, sparking speculation that Prime Minister Anthony Albanese would push for a referendum on becoming a republic. However, the Prime Minister was clear that any planning for a referendum would only come after a First Nations Voice referendum was conducted.

**Additional resource**
Click here for any updates on proposals for a referendum on becoming a republic.

## The model for a republic

If the government decides to take the proposal for a republic to a referendum, it will need to consider the best model to choose an Australian head of state. While public opinion surveys show that most people would like Australia to become a republic, opinions are divided as to what process should be used to select the preferred candidate.

The Australian Republic Movement (ARM), which was active during the unsuccessful 1999 referendum, has proposed a new model for a republic, which is different to what the voters considered at the 1999 referendum. Under this proposal:

- each state parliament would select a candidate for the role of head of state
- the federal parliament would select a candidate for the role of head of state
- the public would then vote for its preferred representative.

# The ability of the Australian people to change the Australian Constitution

Source 4 below sets out some of the points that can be made about the ability of the Australian people to change the Australian Constitution in relation to possible future constitutional reform. The points will allow you to engage in a discussion of the ability of the people to change the Australian Constitution in the future.

| Application and reflection | Points on the ability of Australians to change the Constitution in the future |
|---|---|
| **Explanation points** | • Possible reform to the Australian Constitution includes establishing a First Nations Voice to Parliament, and becoming a republic.<br>• A Voice to Parliament would be a constitutionally entrenched advisory body that would advise the Commonwealth on matters and laws that affected First Nations people. A Voice to Parliament was recommended voice following the National Constitutional Convention held at Uluru in May 2017. The body would be made up of First Nations people and be separate from Parliament.<br>• Making Australia a republic rather than a constitutional monarchy would result in the removal of the King of England as Australia's head of state. The Australian Government has said this proposal would not take place before a referendum on enshrining a First Nations Voice in the Australian Constitution. |

| Application and reflection | Points on the ability of Australians to change the Constitution in the future |
|---|---|
| **Discussion points** | • While these proposals arguably have merit and support, the actual process under section 128 for changing the wording of the Constitution is difficult to achieve.<br>• History suggests that various factors can impact on whether future constitutional reform is achievable, such as bipartisan support, whether there is a strong 'no' case, whether the movement is a people's movement or a movement driven by politicians, and whether there is a strong education campaign.<br>• The Voice to Parliament is arguably being driven by the people, even though the Referendum Council, which resulted in the Uluru Statement from the Heart, was created by the Prime Minister and Opposition Leader at the time. That is, the Uluru Statement from the Heart was written and created by First Nations people, and has support from non-Indigenous people. Constitutional recognition of First Nations people has long been promised or considered, but not yet achieved.<br>• Australian voters have to wait for the Commonwealth Government to be prepared to move forward with the referendum proposal. For example, in relation to the republic debate, whilst many voters support it, they cannot without government change the Australian Constitution. The Australian people could, however, seek to influence government through means such as petitions to introduce the proposal for change. |

**Source 4** The ability of the people to change the Australian Constitution in relation to possible constitutional reform

## 14.5 Check your learning

### Remember and understand

1 **Identify** one potential future reform to the Australian Constitution.

2 **Explain** why including a constitutional First Nations advisory body would require a change to the Australian Constitution.

### Examine and apply

3 Imagine that you are a politician writing a piece to encourage a 'yes' vote at a referendum to establish a First Nations Voice to Parliament. **Explain** three of your key arguments.

4 Conduct a survey of five people who voted in the 1999 referendum about the republic. Ask each of them the following three questions:

**a** How did you vote in the 1999 referendum?

**b** Do you think you will change your vote if another referendum is held on the issue of a republic before 2030?

**c** Would you be happy for the state and Commonwealth parliaments to nominate candidates, with the public then choosing the successful candidate from that list to be the Head of State?

Compile your responses and be ready for a class discussion on the responses you gathered.

### Reflect and evaluate

5 'If there is a yes case and a no case, any future referendum will fail, even if the people originally supported the proposal'. Do you agree with this statement? Give reasons for your answer.

6 **Discuss** the ability of the Australian people to change the Australian Constitution to recognise First Nations people.

Chapter 14 Review

## Top exam tips from Chapter 14

1 Make sure you know at least two reasons for constitutional reform, and at least two factors affecting the success of a referendum. However, make sure you are also able to spot other reasons and factors in scenarios.

2 This is a dynamic part of the course because it requires you to consider future possible reforms. Make sure you follow debates in the media and listen to law-related podcasts to remain aware of any emerging proposals for constitutional reform and make notes about them. In doing so, consider any factors that may affect their success, such as whether the reform is driven by the people. This will allow you to engage in a deeper discussion about future reforms.

3 The Study Design requires you to not only know the double majority requirement, but also the roles of the Commonwealth houses of parliament in proposing a change to the Australian Constitution. Make sure you know that there can be a situation where only one of the houses agrees to the proposed change, and what circumstances need to exist for that to occur.

## 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 (including the exam) 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 Describe **two** reasons for constitutional reform.

(4 marks)

**Difficulty: medium**

2 'One of the factors that may stop constitutional reform is the lack of bipartisan support.' Explain what this statement means.

(4 marks)

**Difficulty: high**

3 With reference to the 1967 referendum and future constitutional reform, discuss the ability of the Australian people to change the Australian Constitution.

(10 marks)

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## Practice assessment task

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

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

## Practice assessment task questions

**1** Using an example, describe **one** reason for constitutional reform.

(3 marks)

**2** Describe the role of the Senate in constitutional reform.

(3 marks)

**3** **a** Outline the **two** changes made to the Australian Constitution as a result of the 1967 referendum.

(4 marks)

**b** Explain how **one** of the changes has impacted on the Commonwealth's law-making powers.

(4 marks)

**4** 'The lesson of formal constitutional alteration in Australia is that, without affirmative support by the major players in the political debates, there is little or no chance of securing the majorities required to amend the Constitution. Even with such support, there is no guarantee that the electors will agree to the proposal. Especially where the proposal involves politicians and the possible accretion to their powers, the electors of Australia have proved extremely suspicious and reluctant to be wooed.'

**a** Explain what is meant by the word 'majorities' in the above statement.

(3 marks)

**b** '... without affirmative support by the major players in the political debates, there is little or no chance of securing the majorities required to amend the Constitution.'

With reference to both past and future constitutional reform, discuss the extent to which you agree with this statement.

(8 marks)

(25 marks)



**Source 1** Noel Pearson signs the canvas the Uluru Statement from the Heart will be painted on, during the closing ceremony in the Mutitjulu community of the First Nations National Convention, 26 May 2017.

# 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 |
|---|---|---|---|
| • Reasons for constitutional reform. | ☐ | ☐ | Go back to Topic 14.1. |
| • The requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum. | ☐ | ☐ | Go back to Topic 14.2. |
| • Factors affecting the success of a referendum. | ☐ | ☐ | Go back to Topic 14.3. |
| • The significance of the 1967 referendum about First Nations people. | ☐ | ☐ | Go back to Topic 14.4. |
| • Possible future constitutional reform, including reform to establish a First Nations Voice in the Australian Constitution. | ☐ | ☐ | Go back to Topic 14.5. |

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

- **Chapter 14** Chapter review quiz
- **Revision notes** Chapter 14
- **Chapter summary** Chapter 14
- **Quizlet** Revise key legal terms from this chapter.

Unit 4 Review

# Part A Assessment essentials

Now that you have completed your revision for Unit 4, 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 and the end-of-year examination.

**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 actual exam question below and see how the different items appear in the question, and how they are responded to in the sample response.

**Question 4**

The Victorian Law Reform Commission (VLRC) is currently considering changes that could be made to the law to improve access for potential members to serve on a jury. This project is called 'Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision'. The terms of reference for 'Inclusive Juries' direct the VLRC to consider the issue of access for these groups. The changes would enable juries to be more representative of the Victorian community. ❶

**a** Explain ❷ **two** ❸ roles that the VLRC is likely to undertake as part of its work on the 'Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision' law reform project. ❹

[4 marks] ❺

❶ Stimulus material

❷ Command term

❸ Limiting term

❹ Content

❺ Mark allocation

Source: Section A, Question 4a, 2022 VCE Legal Studies examination, © VCAA

**A sample response**

One role the VLRC ❷ is likely to undertake as part of its inquiry would be to hold consultations and discussions with people and organisations who have particular interest in reforming the jury system to make it more inclusive and accessible for people who are deaf, hard of hearing, blind or have low vision. ❶ This could include consulting with experts (such as County and Supreme Court judges and representatives from Vision Australia) and people with hearing or vision impairment who are affected by barriers that limit their ability to serve on a jury. Such consultations would enable the VLRC to consider and reflect the views of the community in its final report. ❸

Another role of the VLRC would be to prepare a final report and make recommendations to the Attorney-General about reforming the jury system to make it more inclusive for people who are deaf, hard of hearing, blind or have low vision. ❶ The final report would include a summary of the VLRC's findings and research and include a list of recommendations, such as changing the law in relation to who can sit on juries. The report would ultimately be tabled in parliament. ❸

❶ The student has usefully separated out the two roles into two paragraphs and used topic sentences at the start of each paragraph (see Tip 3 below).

❷ The student can choose to use the abbreviation VLRC, rather than writing Victorian Law Reform Commission in full, because the abbreviation VLRC has been specifically used in the question.

❸ The student has addressed the command term *explain* by providing a detailed account of **two** roles the VLRC is likely to undertake as part of its work on the 'Inclusive Juries' project. There is also meaningful use of the stimulus material.

**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. Instead, 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 analysis 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 actual exam question on the next page 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**

As at 1 July 2019, the composition of the Commonwealth Parliament was as follows.

| Senate | | | | | |
|---|---|---|---|---|---|
| | Gender | | Age | | |
| | Female | Male | Under 45 | 45 and over | Data not available |
| Total | 37 | 39 | 12 | 50 | 14 |
| **House of Representatives** | | | | | |
| | Gender | | Age | | |
| | Female | Male | Under 45 | 45 and over | Data not available |
| Total | 46 | 105 | 25 | 106 | 20 |

Data: Parliament of Australia, <www.aph.gov.au>

In your view, to what extent does the composition of the Commonwealth Parliament affect its ability to be representative in law-making? Justify your answer with reference to the table above.

[6 marks]

Source: Section A, Question 2, 2019 VCE Legal Studies Examination, © VCAA

**A sample response**

*The composition of the Commonwealth Parliament only moderately* ❶ *affects the ability of the Parliament to be representative in law-making. This is because in accordance with the Australian Constitution, which requires members of the houses to be 'directly chosen by the people', the Parliament is based on the principle of representative government whereby the people elect representatives to make laws on their behalf. Any member of parliament who fails to make law that reflects the views and interests of the majority of people will risk re-election. Similarly,* ❸ *while the table highlights the gender imbalance in the House of Representatives and under representation of people aged under 45 years in both houses,* ❷ *no evidence has been provided to suggest that the composition of the Parliament prevents it from being able to make good law. For example, there is no evidence to suggest that 'male' members of parliament are unable to make good law on behalf of females.*

*Arguably, however,* ❸ *having more women elected to the House of Representatives (which according to the table is predominantly comprised of males aged over 45 years) and more members aged under 45* ❷ *may encourage the Parliament to be more responsive to the interests and needs of these groups. For example, younger members of parliament may be more willing to raise awareness of the need to address issues that particularly concern younger people like housing affordability and mental health care.*

❶ The student has provided a clear contention, stating 'to what extent' the composition of the Parliament affects its ability to be representative in law-making.

❷ The student has made meaningful use of the stimulus material (i.e. they have analysed the information in the table and used it to support their contention).

❸ Signposts or key words show justification skills and help guide the reader (or the assessor) to the key points being made.

**Additional notes**

- As the student claims that composition of the Commonwealth Parliament 'moderately ❶' affects its ability to be representative, they should provide at least one reason why composition affects the representativeness of the Parliament and one reason why it may not.
- This question requires students to directly refer to the stimulus material (i.e. the table) in a meaningful way. ❷ For example, students need to refer to the possible impact of the age and gender of members of the Commonwealth Parliament on its ability to be representative in law-making.

**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 your response.
- 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 like '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 sample exam question below and then look at the sample response to see how you might structure your response.

**Question 6**

Evaluate **one** of the ways in which the Australian Constitution acts as a check on parliament in law-making.

[5 marks]

Source: adapted from Section A, Question 6, 2020 VCE Legal Studies Examination, © VCAA

## A sample response

One way the Australian Constitution acts as a check on parliament in law-making is by establishing three types of power in the Australian parliamentary system (i.e. the legislative power, executive power and judicial power) and requiring each of these powers to operate independently of the other.

One strength ❶ of this separation of powers is that it allows the judiciary to be independent of the legislature and executive. This means that, at a federal level, the High Court is able to impartially determine cases in which a party alleges the Commonwealth Parliament has made law beyond its legislative power or in breach of constitutionally protected rights and declare any such legislation invalid.

The courts must, however ❶, wait for a relevant case to be challenged in the courts before being able to make a ruling to declare any relevant legislation as ultra vires and invalid. This means the ability of the judiciary to act as a check on parliament is dependent on people's willingness to challenge the law and initiate a case. The willingness and ability of a person to pursue such a case can be influenced by the high cost, time and potential stress involved.

Another strength ❶ associated with the separation of powers at a Commonwealth level is that it is protected by the referendum. That is, the parliament cannot unilaterally change the fact that the powers are separated. This would require a proposal to change the Australian Constitution and for the people to vote on whether they agree. Given how difficult it is to achieve a successful referendum, the principle of the separation of powers is unlikely to ever be abolished.

In reality, however ❶, the executive power and the legislative power are combined as the Governor-General, who holds the executive power, acts on the advice of the Prime Minister and senior government ministers (who are also members of the parliament). This overlap of power between the executive and the legislative can decrease the ability of the executive to act as a check on parliament. But despite this weakness ❶, the legislature can be scrutinised in other ways beyond the separation of powers. For example, people can protest against proposed laws or challenge the validity of legislation in court. Undertaking a court challenge indirectly allows the separation of powers to be used as a check on parliament in law-making, as it requires the use of the judiciary to independently consider the laws that are challenged.

In conclusion ❶, despite some limitations, the separation of powers as established in the Australian Constitution acts as an important check on parliament in law-making by providing an independent judiciary and ensuring no one body can make law, administer law and also rule on its legality. ❷

❶ The student has used signposts 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 ways in which the Australian Constitution acts as a check on parliament in law-making, terms such as '**one strength**', '**despite this weakness**' and '**however**' have been used throughout the answer.

❷ As the command term in this question is *evaluate*, the answer must include a concluding judgment about the (overall) benefit or worth of the separation of powers as way in which the Australian Constitution acts as a check on parliament in law-making.

### Additional notes

- This answer uses paragraphs. Each paragraph contains one key point (e.g. a strength or weakness) and commences with a topic sentence that clearly states the main point being made in that paragraph.
- Other ways in which the Australian Constitution acts as a check on parliament in law-making include the role of the High Court in protecting the principle of representative government, and the express protection of rights.

# Think like an assessor

To maximise your marks in the end-of-year examination, it can help to think like an assessor. Carefully read the following two actual exam 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 the question, read the student response. Imagine you are an assessor and use the marking guide checklist to mark the response.

## Exam question

**Question 3**

The table below shows results of two referendums.

**Percentage (%) of 'yes' voters in two referendums**

| Voters | Referendum 1 | Referendum 2 |
|---|---|---|
| New South Wales | 47.25% | 47.17% |
| Queensland | 61.87% | 55.76% |
| South Australia | 40.13% | 47.29% |
| Tasmania | 38.94% | 50.26% |
| Victoria | 65.10% | 48.17% |
| Western Australia | 47.58% | 55.09% |
| **Australia** | **53.56%** | **49.44%** |

Would the proposal for change have been successful in either or both referendums? Provide reasons for your answer with reference to the table.

[4 marks]

Source: Section A, Question 3, 2020 VCE Legal Studies Examination, © VCAA

### A sample response

*The proposal for change would been successful in the first referendum but not the second. The first referendum would have been successful because while it wasn't supported by all of the states, 53.56% of the voters throughout Australia supported it. This means a majority of voters throughout Australia voted 'Yes' and wanted the change.*

*The second referendum would not have been successful because it wasn't supported by all of the states and it also wasn't supported by a majority of Australia. It was only supported by 49.44% of the people which is not a majority of people.*

## Marking guide checklist

To achieve full marks, check whether the response has all the following features.

| Marks | Features for a full-mark response |
|---|---|
| 4 | ☐ The answer states the proposal for change would not have been successful in both referendums.<br>☐ There is meaningful and accurate use of the table.<br>☐ The response provides reasons why each referendum would have been unsuccessful with reference to the double majority requirement (i.e. the requirement that a proposal for constitutional change to be agreed to by a majority of eligible voters in Australia and a majority of voters in at least four of the six states).<br>☐ Legal terminology has been correctly used.<br>☐ There are no significant errors. |

If any of the above features are missing, identify where the response would sit based on the following performance descriptors.

| Marks | Features of a response |
|---|---|
| 3 | One of the features of a full-mark response is missing. For example:<br>☐ There is limited use of the material in the table.<br>☐ The response correctly states that the proposal for change would not have been successful in both referendums, but the justification only refers to one part of the double majority requirement.<br>☐ There is an error (for example, legal terminology has been incorrectly used). |
| 2 | A number of features of a full-mark response is missing, or missing to a substantial degree. For example:<br>☐ The response incorrectly states that one of the referendums would have been successful.<br>☐ The response provides a general explanation of the double majority requirement but does not make any use of the table.<br>☐ There are a number of errors. |
| 1 | ☐ A very limited response but it deserves 1 mark. |

## 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.

## Exam question

**Question 3**

Emiko is a famous actor. Some time ago, a journalist named Flavio Gozip published an online article portraying Emiko as a liar. Emiko claims that she has not been offered any acting work since the publication of the article and that she has suffered pain, humiliation and anxiety.

Emiko has decided to sue Flavio in the Supreme Court of Victoria for damaging her reputation. Emiko's lawyer explains that the Supreme Court of Victoria, when resolving the dispute, may need to act as a law-maker as well as a dispute resolver.

**c** Explain **one** reason why the court may not be able to change the law in this case.

[4 marks]

Source: Section B, Question 3c, 2018 VCE Legal Studies Sample Examination, © VCAA

**A sample response**

*The doctrine of precedent can limit the ability of a lower court to change the law because lower courts must follow the precedents set by higher courts in the same hierarchy in cases where the material facts are similar. This means the court in this case may not be able to change the law because it doesn't have the power to. For example, it may have to follow a precedent set by a higher court in an earlier similar case in the same hierachy. Also, even if the judge has the power to overrule any existing precedent they may not want to because they would rather leave the law-making to the parliament.*

## Marking guide checklist

To achieve full marks, check whether the response has all the following features.

| Marks | Features for a full-mark response |
|---|---|
| 4 | ☐ The command word has been addressed (there is a detailed account one reason why the court may not be able to change the law in Emiko's case).<br>☐ There is meaningful and accurate use of the stimulus material.<br>☐ Legal terminology has been correctly used.<br>☐ There are no significant errors. |

If any of the above features are missing, identify where the response would sit based on the following performance descriptors.

| Marks | Features of a response |
|---|---|
| 3 | One of the features of a full-mark response is missing. For example:<br>☐ There is limited reference to the stimulus material.<br>☐ The explanation is not expansive.<br>☐ There is an error (for example, legal terminology has been incorrectly used). |
| 2 | A number of features of a full-mark response is missing, or missing to a substantial degree. For example:<br>☐ There is no use of the stimulus material.<br>☐ There are a number of errors. |
| 1 | ☐ A very limited response but it deserves 1 mark. |

## 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.

# Part B Practice assessment tasks

**For Unit 4 – Area of Study 1**

## Introduction

In 2018, Victoria's first Medically Supervised Injecting Room (MSIR) opened, on a trial basis, in North Richmond. One of the main aims of the MSIR was to reduce the harm caused by unlawful drug use by providing people who suffer with drug addiction the ability to access onsite medical care and other health and social services. In March 2023 the Victorian Government introduced the Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Bill 2023 to establish the North Richmond MSIR as an ongoing facility. Despite the opposition's objections, and failed proposal that the North Richmond facility be re-located so that it is not situated next to a primary school, the bill was ultimately passed by the upper house on 4 May 2023.

## Source 1

During her second reading speech to the Legislative Council on the Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Bill 2023, the Attorney-General and Minister for Emergency Service Jaclyn Symes outlined some of the findings of an independent review into the operation of the North Richmond Medically Supervised Injecting Room.

> … the review found that the MSIR has succeeded in its central objective: saving lives.
>
> Since the trial's commencement, the MSIR has safely managed almost 6000 overdoses with zero fatalities, taking pressure off local hospitals and reducing ambulance call outs. The service also connected clients to essential services, like general health and housing support…
>
> …The MSIR is an incredibly complex service to deliver, as it seeks not only to prevent overdose deaths, but also engage and connect individuals, who have experienced significant stigma, trauma and shame due to their drug consumption, in support services.

Source: Parliament of Victoria, Hansard, Legislative Council, 02 May 2023, p. 793 (Jaclyn Symes, Attorney-General, Minister for Emergency Services)

## Source 2

**Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act 2023**

**No 7 of 2023**

[Assented to 16 May 2023]

**The Parliament of Victoria enacts:**

**Part 1—Preliminary**

**1 Purpose**

The purpose of this Act is to amend the **Drugs, Poisons and Controlled Substances Act 1981**—

(a) to provide for a licensed medically supervised injecting centre to operate on an ongoing basis by—

Source: *Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act 2023* (Vic), Victorian Legislation website, Victorian Government

## Practice assessment task questions

**1** With reference to the stimulus material, describe the role of the Crown in relation to the passing of the *Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act 2023* (Vic).

(3 marks)

**2** Explain why the power to establish medically supervised injecting rooms is not an exclusive power.

(3 marks)

**3** Describe the role of section 109 of the Australian Constitution if a section of the *Drugs, Poisons and Controlled Substances Amendment* (*Medically Supervised Injecting Centre*) *Act* conflicted with a Commonwealth law.

(4 marks)

**4** Outline **two** reasons why a court may be required to interpret the *Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act*.

(4 marks)

**5** Discuss how the representative nature of parliament could have affected the ability of the Victorian Parliament to pass the *Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act*.

(6 marks)

**6** Suzanne, aged 45, suffered a severe back injury when she fell off a treadmill during a workout session at her local fitness centre. Suzanne claims that as she was jogging on treadmill, it abruptly stopped without warning, causing her to fall to the floor. After she fell, Suzanne heard one of the personal trainers say they believed the owner did not adequately maintain his treadmills and other gym equipment.

Suzanne has initiated a civil negligence action against the owner of the fitness centre in the Supreme Court of Victoria.

**a** In relation to this case, explain the requirement for standing.

(3 marks)

**b** Discuss the extent to which the doctrine of precedent affects the ability of the Supreme Court to make law in this case.

(5 marks)

**7** Evaluate the ability of the constitutional protection of express rights to act as a check on the Commonwealth Parliament in law-making.

(7 marks)

Total: 35 marks

## Practice assessment task questions

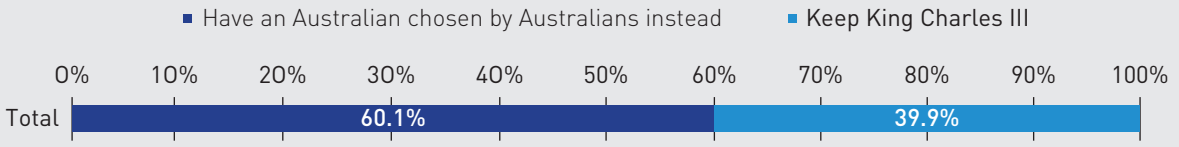
**1** In 2023 the House of Representatives received a petition requesting the House establish a Royal Commission into the national housing crisis including its causes, consequences and the need to establish a National Housing Strategy. The petition, which included the signatures of 14 496 people, also requested that the Royal Commission allow people who were experiencing housing insecurity (which includes an inability to find and afford stable housing) and homelessness to provide statements of their personal lived experience.

**a** Discuss **one** reason why this petition may not have resulted in a Royal Commission being established. (5 marks)

**b** Evaluate **two** strengths of establishing a Royal Commission or parliamentary committee as a means of influencing change in the law. In your answer, refer to **one** recent Royal Commission inquiry or **one** recent parliamentary committee inquiry. (8 marks)

In April 2023, just weeks prior to the coronation of King Charles III (following the death of Queen Elizabeth II, who reigned as the British Monarch for just over 70 years), the Australian Republic Movement organised a national poll to measure public support for a republic. The following is an extract from the poll results:

***DO YOU SUPPORT KEEPING KING CHARLES III AS KING OF AUSTRALIA (OUR HEAD OF STATE), OR SHOULD AUSTRALIA HAVE AN AUSTRALIAN CHOSEN BY AUSTRALIANS TO REPRESENT US INSTEAD?***




Source: Australian Republic Movement, 'Australians Don't Want a King, or Charles', 26 April 2023 <https://republic.org.au>

**2** After the Australian Labor Party was elected to form government at a federal level in May 2022, federal member of parliament Matt Thistlethwaite was appointed as Australia's first Assistant Minister for the Republic. Following his appointment, Mr Thistlethwaite confirmed the Government's desire to seek a referendum on Australia to be a republic rather than a constitutional monarchy. Becoming a republic would require constitutional change to remove the British Monarch, King Charles III, as Australia's head of state.

**a** Describe **two** requirements that would need to be fulfilled to achieve a successful referendum to establish Australia as republic. (4 marks)

**b** Analyse **two** factors that may affect the success of a referendum to establish Australia as a republic. (8 marks)

Total: 25 marks

# Glossary

## A

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

**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

**accused**
a person charged with a criminal offence

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

**adverse costs order**
an order (i.e. legal requirement) that a party pay the other party's costs

**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)

**appellant**
a person who appeals against a decision (i.e. a person who applies to have the decision reviewed or reversed by a higher court)

**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

**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*

## B

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

**balance of power**
(between political parties) a situation where no single party has a majority of seats in one or both houses of parliament, meaning the power to reject or approve bills is held by a small number of people (e.g. members of minor parties and independent members)

**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)

**bill of rights**
a document that sets out the most important rights and/or freedoms of the citizens in a particular state or country (also known as a charter of rights)

**binding precedent**
the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

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

# C

**Cabinet**
the 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)

**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 justice system**
a set of processes, bodies and institutions used to resolve civil disputes

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

**class action**
a legal proceeding in which a group of 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

**committee system**
a system used by federal, state and territory parliaments in Australia that involves the use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

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

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

**community correction order (CCO)**
a 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

**complainant**
a person who makes a formal legal claim that another person has committed a criminal offence against them

**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

**concurrent powers**
powers in the Australian Constitution that may be exercised by both the Commonwealth and the states (as opposed to residual powers and exclusive powers)

**concurrent sentence**
a sanction that is to be served at the same time as one or more other sentences; usually given in relation to two terms of imprisonment

**constitution**
a set of rules and principles that guide the way a country or state is run. Some countries have unwritten constitutions; others have formal written constitutions

**constitutional monarchy**
a system of government in which a monarch is the head of state and a constitution sets out the powers of the parliament

**Consumer Affairs Victoria (CAV)**
The consumer affairs regulator in Victoria, with advisory, information, compliance and enforcement roles

**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

**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 judgment**
a statement by the judge that outlines the decision of the court and the legal reasoning behind the decision

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

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

**crossbenchers**
members of Parliament who are not members of either government or opposition (i.e. independent members or members of minor parties). They are named after the set of seats provided in parliament for them, called the 'crossbench'

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

**cumulative sentence**
where two sentences are imposed, and are to be served one after the other; for example a term of imprisonment is to be commenced after the first term is served

# 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

**defence**
(in a civil case) a document filed by the defendant which sets out a response to each of the claims contained in the plaintiff's statement of claim; part of the pleadings stage of a civil dispute

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

**demonstration**
a gathering of people to protest or express their common concern or dissatisfaction with an existing law as a means of influencing law reform

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

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

**directions**
instructions given by the court or tribunal to the parties about time limits and the way a civil proceeding is to be conducted

**directions hearing**
a pre-trial procedure at which the court gives instructions to the parties about time limits and the way the civil proceeding is to be conducted

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

**disapproving a precedent**
when a court expresses dissatisfaction with an existing precedent but is still bound to follow it

**disbursements**
out-of-pocket expenses or fees (other than legal fees) incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third-party costs such as photocopying costs

**discovery of documents**
a pre-trial procedure which requires the parties to list their documents relevant to the issues in dispute. Copies of the documents are normally provided to the other party

**discrimination**
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

**distinguishing a precedent**
the process by which a lower court decides that the material facts of a case are sufficiently different to that of a case in which a precedent was established by a superior court so that they are not bound to follow it

**doctrine of precedent**
the 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***
the presumption that a child aged between 10 and 14 does not have criminal intent; this can be rebutted with evidence

**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

**duty lawyer**
a VLA lawyer who is at court (on duty, on a particular day) to help people who come to court for a hearing

# E

**election**
the process used where eligible people vote to choose a person to hold a position in a body or organisation (for example, a member of a house of parliament)

**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

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

**exclusive jurisdiction**
the lawful authority or power of a court, tribunal or other dispute resolution body to decide legal cases to the exclusion of all others

**exclusive powers**
powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

**Executive Council**
a group consisting of the prime minister and senior ministers (at the Commonwealth level) or premier and senior ministers (at the state level) that is responsible for administering and implementing the law by giving advice about the government and government departments

**executive power**
the power to administer the laws and manage the business of government, which is vested in the Governor-General as the King's representative

**exemplary damages**
a very large amount of money awarded to show strong disapproval of the defendant's conduct; also called punitive (punishing) damages

**expert evidence**
evidence (testimony) given by an independent expert about an area within their expertise

***ex post facto***
a Latin term meaning 'out of the aftermath'. A legal term used to describe a law that is established in relation to an event that has already taken place

**express rights**
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

**extrinsic material**
material (i.e. information) that is not part of an Act of Parliament, but may assist a judge to interpret the meaning of the Act

# F

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

**fast track mediation and hearing (FMAH)**
a dispute resolution process used for small claims about goods and services in the Civil Claims List at the Victorian Civil and Administrative Tribunal (VCAT). Both the mediation and the hearing will normally be conducted on the same day (if the dispute is not settled at mediation)

**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

**full bench**
all seven justices of the High Court sitting to determine a case

# G

**general damages**
an amount of money that one party is ordered to pay to another party to compensate for losses that are not easily quantifiable (e.g. pain and suffering)

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

**generalist CLC**
a community legal centre that provides a broad range of legal services to people in a particular geographical area of Victoria

**government**
the ruling authority with power to govern, formed by the political party 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

**Hansard**
the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1776–1833), who printed the first parliamentary transcript

**hearsay evidence**
evidence given by a person who did not personally witness the thing that is being stated to the court as true

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

**hostile upper house**
a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed

**House of Representatives**
the lower house of the Commonwealth Parliament

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

**hung parliament**
a situation in which neither major political party wins a majority of seats in the lower house of parliament after an election

# I

**implied rights**
rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

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

**income test**
the test applied by Victoria Legal Aid (VLA) to determine whether a duty lawyer can represent an accused. The test is satisfied when the accused can show they have limited income (e.g. their primary source of income is social welfare provided by government)

**indefinite sentence**
a term of imprisonment that has no fixed end date, usually given to the most serious offenders

**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

**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

**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 pressures**
demands made on parliaments, from within Australia or beyond, to make (or not make) laws that address matters of international concern

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

# J

**judicial activism**
an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

**judicial conservatism**
an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by their own political beliefs or the views of the community)

**judicial power**
the power given to courts and tribunals to enforce the law and settle disputes

**judiciary**
a legal term used to describe judges as a group (i.e. judicial officers who have the power to apply and interpret the law) as well as the courts as an institution (i.e. one of the three branches of government)

**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

# 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 Council of Australia**
the peak national representative body of the Australian legal profession. It advocates on behalf of the legal profession at a national level about issues such as access to justice

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

**law reform bodies**
organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

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

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

**lay evidence**
evidence (testimony) given by a layperson (an ordinary person) about the facts in dispute

**lead plaintiff**
the person who is 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)

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

**Legislative Assembly**
the lower house of the Victorian Parliament

**Legislative Council**
the upper house of the Victorian Parliament

**legislative power**
the power to make laws, which resides with the parliament

**legislature**
a legal term used to describe the body having the primary power to make law (i.e. parliament)

**liability**
legal responsibility for one's acts or omissions

**limitation of actions**
the restriction on bringing a civil law claim after the allowed time

**litigant**
a person who takes a matter to court to be resolved

**litigation funder**
a third party who pays for some or all the costs and expenses associated with initiating a claim in return for a share of the amount recovered. Litigation funders are often involved in class actions

**loss of amenity**
removal of a person's ability to enjoy or benefit from something they used to have

# M

**Magna Carta**
a 'peace treaty' made in England in 1215 between the barons (noblemen who pledged their allegiance to the King) and the King

**majority verdict**
a decision where all but one of the members of the jury agree

**mandatory injunction**
an order requiring someone to do something, or take active steps to prevent harm (or further harm) to the plaintiff

**material facts**
the key facts or details in a legal case that were critical to the court's decision

**means test**
the test applied by Victoria Legal Aid (VLA) to determine whether an applicant qualifies for legal assistance or representation in court (beyond the services of the duty lawyer on the day). It takes into account the applicant's income, assets and expenses

**media**
the main way information is communicated to the public, including print media (e.g. newspapers and magazines), broadcast media (e.g. film, television, radio) and digital media, which includes media distributed through the internet and electronic devices (e.g. websites, emails and text messages, video games) and **social media** (e.g. online platforms and applications like Facebook, YouTube and Instagram)

**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

**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)

**minor party**
a political party that can pressure the government on specific issues to bring about law reform, despite not having enough members or electoral support to win government

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

**money bill**
a proposed law (bill) that imposes taxes and collects revenue; also known as an appropriation bill

# N

**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)

**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-government organisation (NGO)**
an organisation, generally not-for-profit, that functions independently of any government; NGOs often do humanitarian work abroad and receive government funding

**non-parole period**
the minimum term a prisoner must serve before they are can be given parole

# 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

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

**online gambling**
using the internet to place bets (e.g. on websites, apps, and online games and poker machines (pokies) and sports betting)

**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

**original jurisdiction**
the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

**overruling a precedent**
when a superior court changes a previous precedent, established by a lower court in a different and later case, thereby creating a new precedent which overrules the earlier precedent

# P

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

**parliamentary committee**
a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

**parliamentary counsel**
lawyers who are responsible for drafting bills in accordance with the policies and instructions of a member of parliament

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

**party control**
(in relation to criminal and civil cases) a term used to describe the power that each party in a legal case has to decide how they will run their case

**persuasive precedent**
the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered (and therefore used as a source of influence or followed) even though it is not binding (see binding precedent)

**petition**
a formal, written request to the parliament to take some action or implement law reform

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

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

**pleadings**
(in civil cases) a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

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

**preamble**
the introductory part of a statute that outlines its purpose and aims

**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 be either binding or persuasive

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

**principal petitioner**
the person who initiates or organises a petition, and whose name and contact details must be provided on the first page of the petition

**private member**
a member of parliament who is not a government minister

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

**pro bono**
a Latin term meaning 'for the public good'; a term used to describe legal services that are provided for free (or at a reduced rate)

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

**prosecutor**
the person who institutes criminal proceedings on behalf of the Crown

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

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

# R

**ratify (ratification)**
confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires it by law to adopt the various rights and responsibilities set out in the treaty

***ratio decidendi***
a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

**recidivism**
re-offending; returning to crime after already having been convicted and sentenced

**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 breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

**representative democracy**
a system of government in which all eligible citizens vote to elect people who will represent them in parliament, make laws and govern on their behalf

**representative government**
a political system in which the people elect members of parliament to represent them in government

**republic**
a form of governance in which the power is held by the people and their representatives, and in which there is an elected head of state rather than a monarch

**residual powers**
powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain solely with the states (as opposed to concurrent powers and exclusive powers)

**respondent**
the party against whom an appeal is made

**responsible government**
a legal principle which requires the government to be answerable to elected representatives of the people for its actions and which requires the government to maintain the confidence of the majority of the lower house

**restrictive injunction**
an order that someone stop (or refrain from) doing something that is harming (or will harm) the plaintiff; also called a prohibitive injunction

**reversing a precedent**
when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

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

**Royal Commission**
the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

**rubber stamp**
a term used to describe a situation in which the upper house of parliament automatically approves decisions made in the lower house because the government holds a majority of seats in both houses and members of the government generally vote along party lines

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

# S

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

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

**self-represented party**
a person before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

**Senate**
the upper house of the Commonwealth Parliament

**separation of powers**
a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate

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

**social media**
a range of digital tools, applications and websites used to share information in real time between large groups of people (e.g. Facebook, YouTube, WhatsApp and Instagram)

**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 a 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)

**specialist CLC**
a community legal centre that focuses on a particular group of people or area of law (e.g. young people, asylum seekers, domestic violence and animal protection)

**specific deterrence**
one purpose of a sanction, designed to discourage the offender from committing further offences

**stalking**
following or monitoring an individual in a way that is intrusive or creates distress, anxiety or fear of harm. It can involve a range of behaviours including the offender maintaining close physical proximity to the victim or contacti ng the victim by post, telephone, texts, emails or other information and communication technology (referred to as online stalking or cyberstalking)

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

**standing**
the requirement that a party must be directly affected by the issues or matters involved in a case for the court to be able to hear and determine that case

***stare decisis***
a Latin term meaning 'let the decision stand'. The basic principle underlying the doctrine of precedent

**statement of claim**
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

**statute**
a law made by parliament; a bill 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

**sue**
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

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

# T

**terms of reference**
instructions given to a formal body (e.g. a law reform body or royal commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

**terms of settlement**
a document that sets out the terms on which the parties agree to resolve their dispute

***terra nullius***
a Latin term meaning 'empty land'; a false common law principle that was used by the British to declare that Australia belonged to no one when they first arrived in Australia to establish a colony in 1788

**transnational corporation (TNC)**
a company that operates globally, across international boundaries

**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

# V

**vicarious liability**
the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

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

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

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

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

**Victoria Legal Aid (VLA)**
a government agency that provides free legal advice to all members of the community and low-cost or no-cost legal representation to some people who cannot afford a lawyer

**Victorian Civil and Administrative Tribunal (VCAT)**
a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

**Victorian Law Reform Commission (VLRC)**
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

# W

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

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*Personal acknowledgements:*

Lisa would like to thank her husband, André, for his enduring support and encouragement. She would also like to thank her children, Amélie, Eleanor and Josiah, who give her immeasurable joy and inspiration, and who remind her daily of the fundamental importance of the education of children. Lisa would also like to pass on her gratitude to the extraordinary team at OUP, including Anne, Katrina, Trischa and Natasha, and her co-authors Annie and Peter; a formidable group of people who continually impress with their depth of knowledge and level of professionalism.

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*Personal acknowledgements:*

Annie would like to thank all those at Oxford University Press who have contributed to the publication of this text. In particular she thanks Anne McKenna, Katrina Heydon, Trischa Mann and Natasha Broadstock for their support and professionalism. She also sincerely thanks her co-authors, the wonderful Lisa Filippin and Peter Farrar, for graciously sharing their extensive knowledge and expertise and being a joy to work with.

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*Personal acknowledgements:*

The production of textbooks is a complex business and there are numerous people to acknowledge. Firstly, thanks to my wife, Mim, and my children, James, Julia and Pippa, who for many years have been a constant source of support and encouragement. Also, my co-authors, Lisa Filippin and Annie Wilson, have proven once again that they operate at the highest professional standards. The quality of this book also reflects the strong logistical skills of OUP Senior Publisher Anne McKenna, who managed the entire process with humour and close attention to detail. Finally, the editors, Natasha Broadstock and Trischa Mann, immersed themselves in the writing process, offering insights and advice that were invaluable. We trust that the new generation of VCE Legal Studies students will enjoy this text.

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- Unit 3 Rights and justice
- Unit 4 The people, the law and reform.

One of the understandings you will develop is the ways in which individuals and groups are able to influence law reform. This includes through petitions, the use of the courts, and demonstrations. By taking part in public demonstrations, people can alert law-makers to a need for change and also raise awareness of the issue within the community. This picture was taken at an 'Invasion Day' rally in 2022. The demonstration was protesting against the choice of 26 January, which marks the anniversary of British colonisation in this country, to celebrate Australia Day.

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