MAKING and BREAKING the LAW

VCE Units 3&4

Jules Aldous Rebecca Irvine Tony Kuc
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VCTA Victorian Commercial Teachers Association

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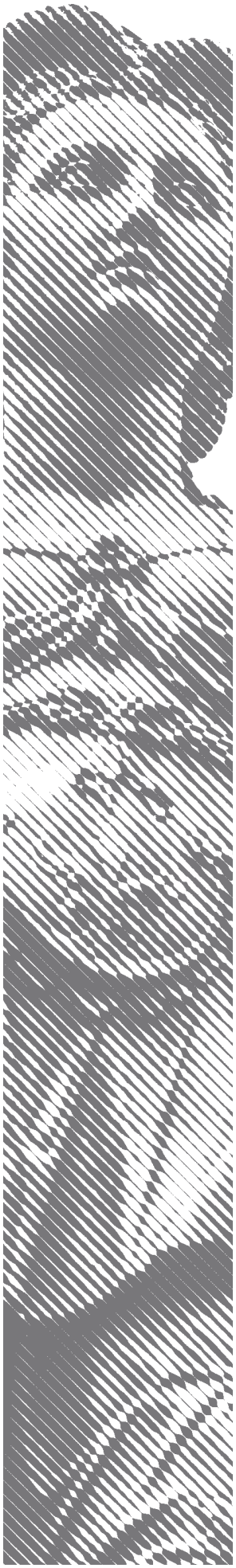

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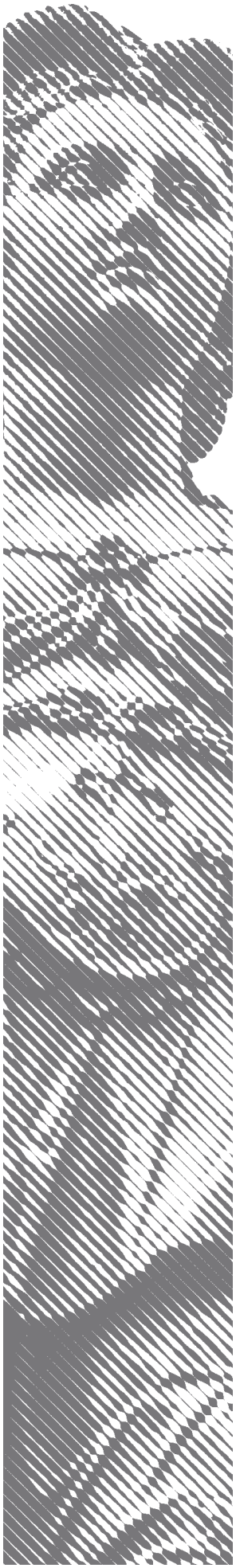

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UNIT 3
RIGHTS AND JUSTICE

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CHAPTER 1
LAW AND JUSTICE: AN INTRODUCTION

In contemporary Australian society there is a range of laws that exist to protect the rights of individuals and to achieve social cohesion. This chapter provides an introduction to the sources of rules and laws. We will examine the difference between legal and non-legal rules. We will also look at the classification of laws as criminal or civil, statute or common law. This chapter also examines the concept of justice – fairness, equality and access.

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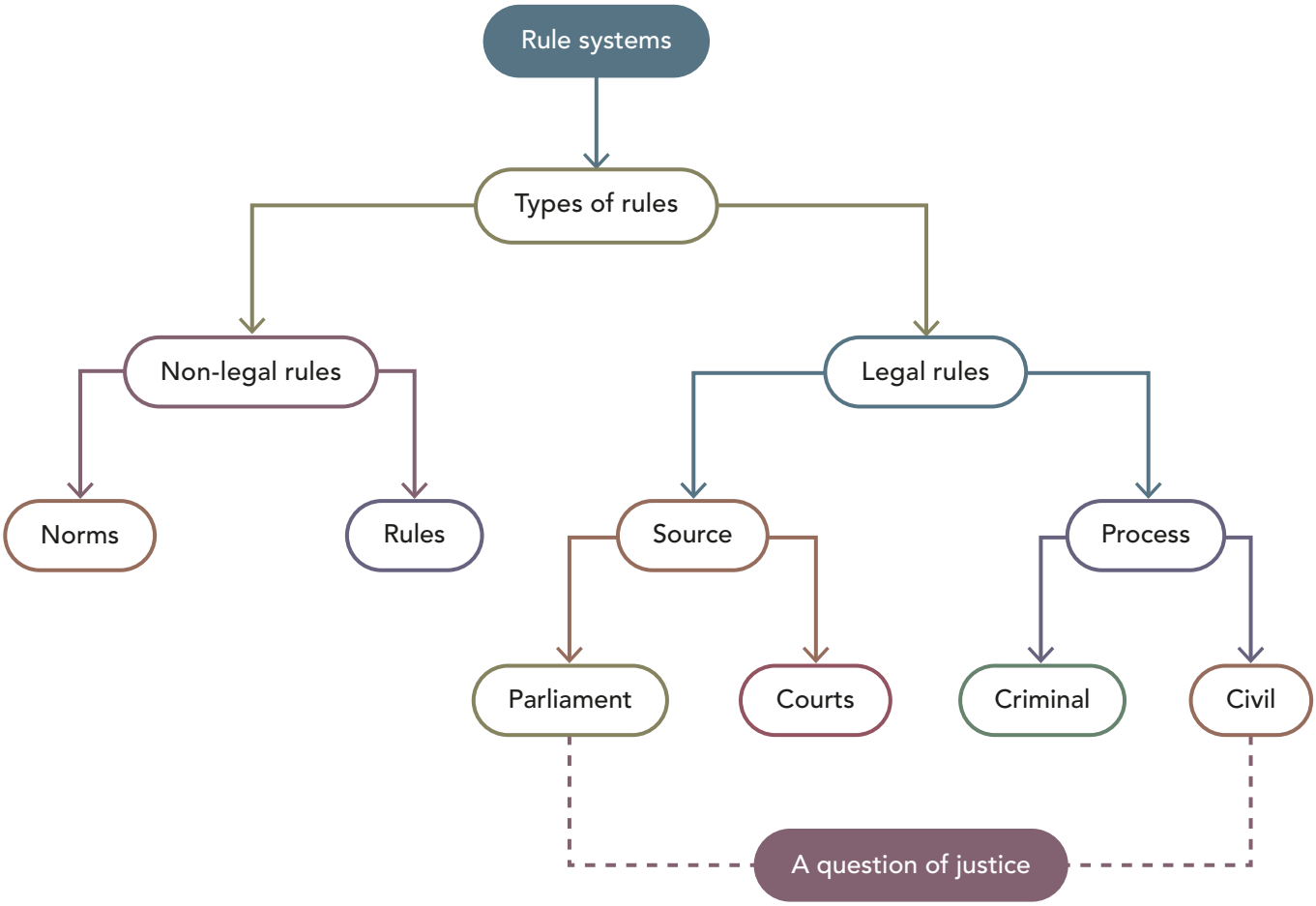

Key terms

civil law laws regulating the behaviour of private individuals

contract a legally enforceable agreement

criminal law laws concerned not only with the rights of the individuals directly involved but also with the welfare of society as a whole

judge-made law the development of legal principles through the declaration of common law or the interpretation of statutes

legal rules laws created by institutions within the legal system and enforced by the legal system

legislation an Act of Parliament or piece of delegated legislation

non-legal rules rules established within a group but not generally enforceable in the community

norms social expectations within social groups

statute law Acts of Parliament

tort a civil wrong that amounts to an act or failure to act that infringes on the rights of an individual; for example, negligence, trespass and nuisance

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1.1 Rules and laws

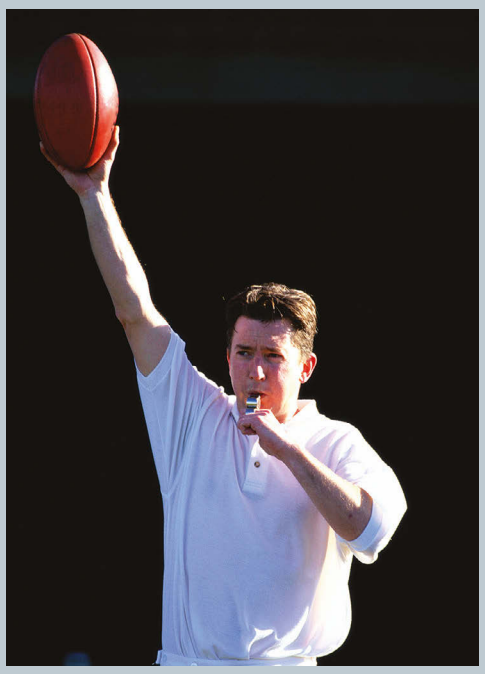
Law consists of rules that establish modes of behaviour and procedures. However, not all rules are laws. As members of the community, we are subject to a range of rules, non-legal and legal, which determine our relationship with other members of society. Not all the rules that govern our actions have the same effect, importance or repercussions.

Non-legal rules

Rules can be legal rules or non-legal rules.

Not all rules are legal. Groups within society have rules to set out how they interact, and to establish the rights and responsibilities of individual members of those groups. They are known as **non-legal rules** and they help reduce conflict within that particular group. These rules are not found in the law. They are established by **norms,** which are other sorts of rules.

For instance, within our families we are bound by rules of behaviour that set out the rights and responsibilities of each member. In a family the rules are clearly communicated, but not usually written. Clubs, sporting associations and schools also require rules to function smoothly. Such rules may be more formally stated than norms and may impose sanctions (penalties) on members who break them.



ARE RULES IN SPORT LAWS?

The players in the Australian Football League are subject to complex rules. However, these rules are not legal rules. Although they are binding on all members of the league, they are not binding on the rest of us. If you decide to play football with the AFL you agree to abide by their rules. If you do not agree with these rules, you cannot play AFL football.

If an AFL player is charged with violating the rules of the game, there is an AFL tribunal to settle the dispute. If a player is found guilty, they are punished, either by being suspended from playing for a specific length of time or by being fined.

These rules provide us with a guide to our interaction with other members of our 'group'. The nature of the rules will alter from group to group. You cannot be made to join a particular group, and therefore cannot be made to abide by its rules.

Non-legal rules apply to a group but not to the community as a whole.

In many cases, rules are not formally stated or formally learnt. They are instilled in us by conditioning – this is what makes them norms. For example, there is no law stating that we must respect our parents; however, most of us do. We have learnt to behave in this manner since we were young. The value has been instilled in us by verbal and behavioural messages from our families, and perhaps by our religious beliefs.

Legal rules

Legal rules are laws that apply to the whole community.

Legal rules are known as laws. These laws set out our rights as members of the community. For instance, Human Rights and Equal Opportunity legislation establishes the right of all individuals to be treated equally. The law also establishes our responsibilities to other members of the community or to the community as a whole. For example, laws about the use of motor vehicles place responsibilities on all owners and drivers of motor vehicles.

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In any society it is inevitable that there will be conflicts. The law gives us ways of settling these disputes peacefully. In Australia, the law provides a range of dispute settlement institutions and processes. For instance, courts have been established to resolve disputes. The Victorian Civil and Administrative Tribunal (VCAT) was established to resolve disputes between individuals. VCAT and the courts resolve disputes using a range of processes. We will look at these processes in more detail later.

For laws to be established in a community, and to operate effectively, the authority of those laws must be recognised by that community. This recognition is generally granted because the law reflects the collective needs and values of society. In Australia, the individual is encouraged to take an active role in the development of the legal system through a number of democratic processes: the electoral system, the provision of representative and responsible government, and the jury system.

In summary, the basic features of a law are that it:

- specifies a particular behaviour or type of behaviour (it usually either prohibits or regulates that behaviour)
- provides a sanction (penalty) or remedy against anyone who violates the law
- is formed by an authority recognised by the community.

For example, the **criminal law** establishes expected behaviour by prohibiting certain actions. The criminal law is made by parliament, which is recognised by the community as having the authority to make the law for the community as a whole. If a person does something that has been prohibited by the criminal law, they will be punished by either having their liberty restricted or a fine imposed.

SPORT – DEFINING LEGAL AND NON-LEGAL RULES

Some actions are only permitted within legally recognised games. For instance, the sport of boxing is strictly regulated and recognised organisations control boxing events. In a boxing match, punches are thrown with the intention of physical contact that may result in harm. Outside the boxing ring these same actions would come under legal rules, in particular the law of assault.

A boxer who agrees to take part in a legally recognised boxing match consents to actions that would otherwise be considered assault – provided that the match is conducted according to the rules of the sport of boxing. However, if a boxer were to continue the fight after the end of the match, that person would be acting outside the rules of the sport. In this case, the boxer may be subject to the legal rules of assault.

There can sometimes be a fine line between legal and non-legal rules. For instance, the AFL requires all players to agree to abide by the AFL rules (non-legal rules). However, the agreements made by professional players to play AFL football are contractual agreements (legal rules). Sometimes conflicts may arise between how the AFL Tribunal applies the AFL rules and the principles of natural justice. In such cases, the courts may be asked to review decisions made by the AFL Tribunal.

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1.2 A legal system

Legal rules differ from non-legal rules in that legal rules apply to the community as a whole. The legal system establishes procedures and institutions to make, administer, adjudicate and enforce the law in the community.

In our legal system, law-making is primarily the responsibility of the Commonwealth parliament and the State parliaments. Courts (judges and magistrates) are responsible for interpreting the law and resolving disputes when it is claimed that the law has been breached (adjudicating).

A variety of bodies have been established to enforce the law. For instance, the police have the power to impose on-the-spot fines and to arrest people suspected of having broken the law. The Department of Justice and Regulation is a government department responsible for the administration of justice. Individuals who need legal help use solicitors and barristers, who advise them and may represent them in their dealings with the legal system.

1.3 Types of laws

Laws can be classified according to the source or the type of behaviour regulated.

The types of laws we have can be classified in a number of ways. Whatever method we use, it is necessary to remember that, in a developed society such as ours, the law is complex and constantly changing. New areas of law, which may not neatly fit into existing categories, develop. No one method of classification can cover all aspects of our law.

By looking at the different ways of classifying the law we can start to appreciate the complexity of our legal system. The methods used to classify our laws include:

- criminal or civil law (classifying according to type of behaviour)
- statute or common law (classifying according to the sources of law).

In Unit 3 we look at dispute settlement processes and procedures, and so we may want to classify the law according to the processes used to resolve disputes. Also, the dispute settlement processes and procedures differ according to whether they are for criminal or civil cases (or according to the type of behaviour involved). In Unit 4 we look at the law-making process. For the purpose of our study in this section, we might want to classify the law according to the different processes used to make the law, or according to the sources of law.

In some cases, a wrongful act may involve more than one area of law. It may involve both the rights of individuals and the relationship between the individual and the state.

This is often the case in car accidents. For instance, a speeding driver who fails to stop at a red light is guilty of a criminal offence. This behaviour constitutes a danger to the community as a whole. While driving through the red light the driver collides with another car. As a result of the collision, the second car has been damaged. The rights of the owner of the second car have been infringed. The driver of the second car could recover this loss through civil law by suing the other driver.

Criminal or civil law

Laws can be classified as either criminal or civil.

Laws can be classified as either criminal or civil. Criminal law is concerned with behaviour that affects not only the individuals directly involved but also the welfare of society as a whole. Criminal law aims to regulate the behaviour of individuals as members of the community and to protect the interests of society. Civil law is concerned with behaviour between one individual and another individual. It includes **contract** law and the law of **torts**.

Types of criminal laws

Criminal law is generally concerned with behaviour that is disruptive to the society as a whole. Some of the types of criminal offences are set out in the table on the following page.

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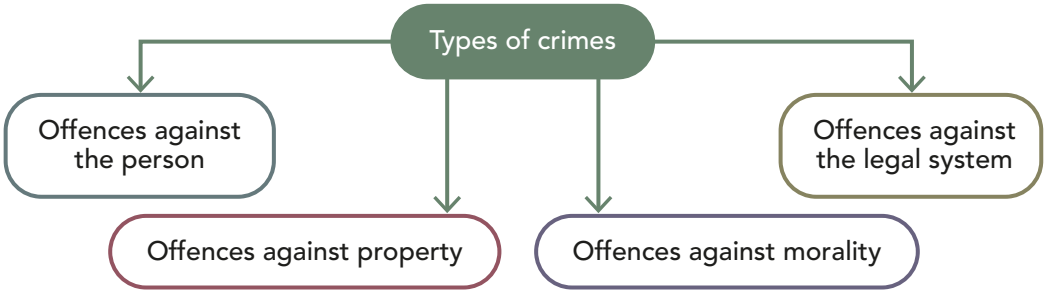
Table 1.1 Types of crimes

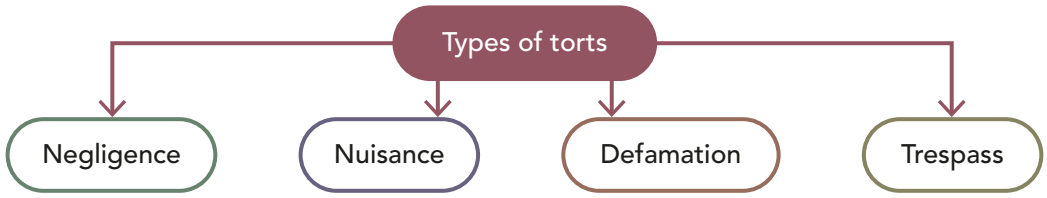


Types of crimes	Examples
Offences against the person	Offences relating to action that results in some form of personal injury, such as murder, assault, rape or kidnapping
Offences against property	Offences involving conduct that results in damage to or loss of property, such as theft or acts of vandalism
Offences against morality	Offences concerned with maintaining certain values in our society, including incest, street prostitution and bigamy
Offences against the legal system	Offences regarding our responsibility to participate as responsible citizens in the administration of justice – these include offences such as perjury or failure to appear for jury service

Types of civil laws

Civil law includes contract law and the law of torts. Contract law is concerned with legally enforceable agreements made between individuals (a company, legally, is an individual, so this includes agreements made between one person and a company). Torts are concerned with the wrongful actions of one individual towards another individual. Some of the types of torts are set out in the following table.

Table 1.2 Types of torts



Types of torts	Definitions
Negligence	Where the actions of an individual who has failed to exercise reasonable care adversely affects another individual
Nuisance	Where an individual interferes with another's enjoyment of their rights
Defamation	Where an individual damages the good name or reputation of another through false or misleading statements
Trespass	Where an individual physically interferes with another person, their goods or their land

It is important to understand the difference between the two types of behaviour. Criminal law and civil law are dealt with by different procedures and have different consequences for the individuals involved. Criminal law is enforced by the police, the courts and Corrections Victoria. An individual who has been charged with a criminal offence will be prosecuted by the state, not by the individual who has been harmed, and, if found guilty of an offence, will be sanctioned. Sanctions are generally a fine, a community correction order or imprisonment.

Civil law is concerned with the enforcement of an individual's rights. In civil law, the individual affected by a breach of their legal rights is responsible for taking the case to court. If their case is successful, the court may award monetary compensation or issue a court order to stop any further infringement.

Criminal law and civil law are dealt with using different procedures.

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NewsReport 1.1

One assault, two actions

A FIGHT OUTSIDE A SOUTH MELBOURNE NIGHTCLUB may lead to two actions – one criminal, the other civil.

Branimir Lakic pleaded guilty in a Magistrates' Court to recklessly causing serious injury. He was jailed for 3 months with a 12-month Community Corrections Order (CCO) to start on his release. The CCO was for 100 hours of unpaid work plus treatment and rehabilitation.

Lakic appealed to the County Court – he was appealing the sentence, which he considered too harsh. Judge Philip Misso heard the appeal.

Defence barrister Philip Dunn QC relied on the judgment in *Boulton v Queen* [2014] VSCA 342, a case that went to the Victorian Supreme Court on appeal. The decision in that case was that even very serious offences can be appropriately punished by CCOs.

In the appeal, prosecutor Jennifer Croxford said that she did not object to a CCO that was longer. She said Lakic, who had handed himself into police, told the authorities that he acted in self-defence when Harris took a 'fighting stance'. Mr Dunn said that a psychologist found that Lakic had an 'exaggerated startle response' to something abrupt that he perceived as dangerous.

Lakic was spared jail but had his community correction order increased from 12 months to two years following the appeal.

The victim, nightclub promoter Michael Harris, said he would consider taking civil action. In his victim impact statement, Harris said that he had suffered physical and psychological harm, and had spent about $15,000 on treatment that included dentistry and hypnotherapy. He was also off work for six weeks.

The fight left Harris with a broken nose, jaw and cheek. He was in hospital for two weeks.

Harris commented: 'It definitely made me feel that the legal system needs to be looked at quite closely in terms of the way that they're dealing with these cases. I feel like I've been hard done by. The guy's almost killed me.'

Branimir Lakic (right) was charged with the assault of Michael Harris. His friend Milan Jovic (left) gave evidence in the Melbourne Magistrates' Court.

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Statute or common law

There are two sources of law in Australia.

- Parliaments are responsible for making statute law. **Statute law** is also referred to as **legislation** – Acts of Parliament. Parliaments may also delegate their law-making powers to other bodies, known as 'subordinate authorities'. The rules made by these bodies are known as 'regulations', 'orders-in-council' and 'local laws'.
- Courts also have responsibility for the development of the law, either through the process of interpreting the meaning of statutes as they apply to individual cases or through the declaration of common law. This is sometimes known as **judge-made law**.

Australia's two sources of law are parliament and the courts.

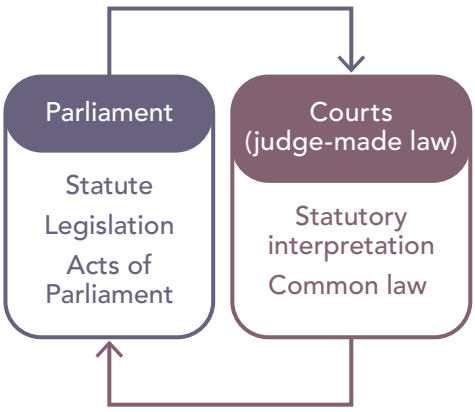

Figure 1.1 Sources of law

We discuss these two sources of law in more detail in Unit 4.

1.4 Why do we need laws?

The main function of law is to enable individuals to live peacefully together. Laws allow individuals to work cooperatively towards meeting their needs for the benefit of all members of the community. This is a concept known as social cohesion. The term 'cohesion' means the act of uniting or sticking together. Laws aim to 'unite' or 'stick' society together.

Laws provide for social cohesion in our community.

To achieve social cohesion the law needs to be recognised or acknowledged by the community. The community will recognise the authority of the law if it:

- sets out the expected behaviour of individual members
- provides a means by which disputes can be resolved
- reflects the values of the majority of the community
- provides a means for changing the law.

Establishing expected behaviour

The law helps keep society together by prohibiting conduct that is disruptive. Prohibitions include laws about aggressive behaviour, the use of property and the use of roads. These matters are all regulated by the criminal law. To ensure that members of society abide by its rules, society imposes punishments (sanctions) on those who violate them. We look at this in more detail in Chapter 4.

We need laws to establish expected behaviour.

The rights of individuals are contained in the civil law. For example, the tort of negligence protects the rights of individuals to be free from harm that may result from the careless actions of others. Where the rights of individuals have been violated, the law provides for a range of remedies: the aim is generally to restore the individual to their original position.

There is an array of remedies, because monetary compensation is not appropriate in all circumstances. For example, the law provides for court injunctions or orders that require an individual to behave in a particular manner. Remedies provided in civil cases are examined in more detail in Chapter 5.

By stating the rights and responsibilities of individuals and society, the law makes explicit the boundaries of behaviour. So each individual can know what is expected and how to plan their interactions with other members of society.

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Resolving disputes

We need laws to resolve disputes.

The law is necessary to provide for peaceful dispute resolution. Life in society would be impossible if each individual was free to resolve a dispute by any method. The law establishes a range of dispute settlement bodies to deal with disputes that may arise in the community. These dispute settlement bodies include courts and tribunals.

Reflecting values

We need laws that reflect the shared values of the community.

One common element in all legal systems is the reliance of law on a set of values that are shared by that society. These values are a collection of beliefs and attitudes about what is right or good. The values that are shared by the community form the basis of what is right or good in law. These values form the basis of the principles of justice.

Throughout the world, religious beliefs have strongly influenced the development of law. Australia is a diverse community consisting of numerous religious, cultural and ethnic groups. While there are some different values in different groups, there are some values that are shared. For example, the value that we place on human life is upheld by the majority of people in our community. The law upholds this value by making it an offence to take another person's life (murder). The law also recognises that there are some circumstances in which it may be excusable to take another's life. The right of each individual to use reasonable force for self-protection is recognised by the laws relating to self-defence.

AUSTRALIA – A LAND OF MANY HISTORIES

Australia is a land of many histories. There is the first history of its occupation by its Indigenous people, which stretches back 40,000 to 60,000 years. That occupation is reflected in the art, the songs, the stories and ceremonies, the laws and traditions and the language of the people themselves which created and conveyed, from generation to generation, knowledge about the country and the way in which members of Indigenous societies should deal with each other.

The second history is that of the British colonisers, dating back to the late 18th century, and their successors, who brought with them the common law of England and the concept of the Rule of Law, developed the legal systems of the colonies and, ultimately, the Commonwealth Constitution and the legal institutions which are part of our contemporary societal infrastructure today.

The third of our histories is that of the migrants who have come to Australia over the past 50 years or so, creating a multi-ethnic society composed of people from 180 different countries. Something like 46% of all Australians today were either born overseas or have at least one parent born overseas.

The history of Australia's first people looms over the other two.

Justice French, speaking at the National Indigenous Legal Conference

Traditional law forms a part of the complex system of rules that govern the rights and responsibilities of Indigenous people in Australia. The Aboriginal system of law – customary or traditional law – contains some sophisticated elements. For instance, it allows informality in dispute settlement, conciliation procedures, and participation in the administration of justice, and stresses the rehabilitation of offenders.

Such dispute settlement methods are still evolving in more developed legal systems. Although European contact has lessened their influence in many regions, some Indigenous groups in isolated areas still follow the traditional way of life. Aboriginal law is both sacred and secular. Sacred law is considered the more important, and involves many secret rites. Sacred law is linked to the Aboriginal concept of the Dreamtime, and many aspects of this have not been revealed to non-Aboriginal people. Secular law is the body of rules members of an Indigenous community are expected to comply with.

Traditional Indigenous groups have lawmen who are responsible for the interpretation of the sacred law. Sacred law imposes additional sanctions in matters such as theft, assault and adultery. The Elders of the community have considerable authority, and the council of elders is the community's leadership group. The Pitjantjatjara are one such community, consisting of about 4000 people spread over the Northern Territory, Western Australia and South Australia. They believe that their sacred law has always existed and will exist until the end of time.

The strength of the Aboriginal legal system can be seen in the fact that it has bound the many Aboriginal peoples, as separate groups and together, and maintained a stable lifestyle for more than 40,000 years.

There has been ongoing debate about the extent to which traditional or customary law should be recognised.

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It is difficult for the law to preserve the values of all members of society. In order for us to live together as a group, it is necessary for the law to uphold the values that are dominant. For example, the rules on marriage vary from one religion to another. However, the *Marriage Act 1961* (Cth) defines marriage as the union of one man and one woman. In Australia, only monogamous, heterosexual marriages are legally binding. This does not necessarily reflect the values of all groups or individuals. Many people strongly disagree with the idea that marriage can exist only between one man and one woman and have called for the law to change.

In 2017 the Marriage Law Postal Survey asked Australians for their views on same-sex marriage. This may lead to a debate in parliament and change in the law.

The law reflects a variety of values such as,:

- the way in which members of society relate to others (social values)
- the fundamental beliefs about right and wrong (moral values)
- the rights of individuals in the economic system (economic values)
- the rights of individuals in the organisation of our legal system (political values).

How a country interprets these values will vary.

NewsReport 1.2

Indigenous customary law

WHILE THE AUSTRALIAN LAW REFORM COMMISSION'S 1986 REPORT ON THE USE of customary law for Aboriginal people was a great initiative, it was, in hindsight, a notion well before its time. Although 30 years have elapsed since the report was published, its recommendations have, by and large, been ignored.

Few in Australia understand the context and true meaning of customary law. Denials of its validity are often based on ignorance or on specific examples devoid of context; the severity of 'spearing', for example, as being contrary to human rights norms.

This is akin to rejecting the common law based solely on, say, the use of lethal injections to execute prisoners in the United States.

AJ Wood, from www.theconversation.com

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NewsReport 1.3

Burkinis caught up in French law

INVENTED IN 2004, THE BURKINI (THE NAME IS A mix of the words 'burka' and 'bikini') is a swimsuit covering everything except the hands, feet and face. It is similar to a wetsuit. But to the Mayor of Cannes, on the French Riviera, it is 'the uniform of extremist Islamism' and French Prime Minister Manuel Valls said that burkinis are 'a symbol of the enslavement of women'.

With Cannes banning the burkini on public beaches, 30 municipalities followed.

However, France's highest administrative court, the Council of State, overturned the ban and ruled that mayors do not have the right to ban burkinis.

The Australian woman credited with creating the garment, Aheda Zanetti, said the swimwear represents freedom and healthy living, not oppression (she owns the trademarks to the words 'burqini' and 'burkini').

The full-face veil and hijab have become divisive symbols in some European countries. Britain, like Australia, values multiculturalism. In Australia, public servants who are Muslim are free to wear headscarves. Similarly, Jewish public servants can wear Jewish caps, known as kippas.

Burkinis are marketed to Muslim women as a way for them to swim in public while adhering to strict modesty edicts.

The French bans referred to religious clothing, and as they were loosely phrased, came to be understood to include full-length clothing and head coverings worn on the beach – not just burkini swimsuits.

A law banning the wearing of face-covering headgear, including masks, helmets, balaclavas, hijabs and other veils covering the face in public places (except under specified circumstances) was introduced in France in 2011. It was introduced because the face coverings prevent the clear

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identification of people. Those breaking this law face a fine and/or citizenship education.

A ban on hijabs in France's public schools was adopted in the 2003–04 school year. President Jacques Chirac said such a law was needed to protect the French principle of secularism. The French believe that secularism, or the separation of church and state, is the cornerstone of the modern French state. So important is this principle that it is guaranteed by the French Constitution (Article 1):

> *France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.*

Given that the French Constitution also guarantees respect for all beliefs, it may be surprising to discover that France banned the wearing of religious apparel and signs that 'conspicuously show' a student's religious affiliation. While Jewish kippas and large Christian crosses would also be banned, the law was more directly aimed at removing Islamic hijabs from classrooms in state-run public schools. The Council of State, France's highest administrative body, said hijabs should be banned only when they are of an 'ostentatious character'. The judgment as to when a hijab is 'ostentatious in character' is left to the school.

The same rules apply to the kippa and Christian crucifix. There have been no reported cases where schools have questioned the wearing of kippas or 'ostentatious' crosses, but every year there are about 150 complaints involving hijabs. These complaints are heard by mediators and, if unresolved, can lead to expulsion of the student/s. These laws do not apply to private schools.

This approach to defining secularism in France is not new. Since 1905, France has enforced a legal separation of church and state. A century ago, in the name of secularism, France removed crucifixes hanging in its classrooms. Crosses were even forbidden on coffins during funeral processions. The removal of crucifixes was seen as necessary, as it symbolised the separation of the state from the Roman Catholic Church.

There has been growing concern in France over other demands seen to challenge the notion of the secular state. Muslim groups have been seeking segregated classrooms for boys and girls and the recognition of Muslim holy days in school calendars, and some students have refused to take oral exams with examiners of the opposite sex.

How the law defines religious freedoms within a secular state is an issue faced in many democracies. In September 2016 Bulgaria banned women from wearing full-face veils in public. In the same year Switzerland enforced a ban on the full-face veil and women wearing a burka could face a fine of almost €10,000. In 2015 The Netherlands approved a partial ban on the full-face veil. Full veils cannot be worn in schools, hospitals or on public transport. Since 2011 Belgium has banned the full-face veil. In contrast, Syria lifted a ban on teachers wearing the Islamic veil in 2011.

In Great Britain and Sweden, value is placed on multiculturalism (becoming British, or Swedish, but also maintaining the cultural traditions of the lands you came from, or your family came from) rather than assimilation (becoming British or Swedish by, in part, giving up the cultural traditions of one's homeland, or one's family's homeland). This is similar to the approach taken in Australia.

WHAT FRENCH LAW SAYS ON SECULARISM AND RELIGIOUS CLOTHING

- In 2010, France became the first European country to ban the full-face veil in public.
- A 2004 law forbids the wearing of religious emblems in schools and colleges. This includes Islamic headscarves (known as hijabs), Jewish caps (known as kippas) and large Christian crosses.
- In 1905, a law was passed that aimed to separate church and state. That law of separation guaranteed freedom of religion, and built on earlier laws enshrining secularism in education. No reference was made to clothing.

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Providing for change

The legal system provides ways to change the law.

The law must be able to deal with the changing needs of the community. To do this the legal system provides ways in which the law may be changed. We look at the role of law-making bodies in Unit 4. In Chapter 4 we look at the ways in which individuals, groups and institutions in the community can influence the law-making process.

1.5 What are the principles of justice?

'Justice' is a difficult term to define. It comes from the Latin term 'jus' meaning right or law. Often justice is defined in the community in terms of what is right, good or ethical.

Justice can be viewed in two ways:

- Social justice – based on the concepts of human rights and equality, and fairness in the distribution of wealth and opportunities
- Procedural justice – fairness in the processes used to resolve disputes, and access to dispute resolution processes.

WHAT ARE THE SYMBOLS OF JUSTICE?

Justice has been symbolised by the figure of a woman holding scales in one hand and a sword in the other. This image can be traced back to the ancient Roman images of Justice. She was often portrayed carrying scales, a sword, and wearing a blindfold.

The Blindfold

The blindfold is a symbol of 'blind justice'. This represents the concept that justice must include equality, which means treating all people equally.

The Scales

The scales of justice represent the fact that justice must balance the needs of the individual against the needs of society. Justice must also balance the interests of one individual against those of another. The scales of justice symbolise fairness.

The Sword

The sword of justice is a symbol of power and authority. It is a double-edged sword, meaning that it can be wielded either for or against each party.

'Justice' describes a set of values or principles. Throughout history there have been different opinions as to what these values or principles are. However, common principles have been identified. These common principles include concepts such as fairness, equality and the ability to access the legal system.

The legal system can only operate effectively if it has the support of the majority of people in the community. People will support the legal system if they believe that it will provide justice.

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Fairness

The concept of fair play is essential to justice.

The principle of a fair and unbiased hearing is based on the idea of 'fair play' and has been developed by the courts through common law. There are two key ideas. First, 'no person may be a judge in his own cause'. In other words, a person cannot make a decision when they have a financial, or other, interest in the outcome, or any known bias that might affect their impartiality. Second, we should always 'hear the other side'. In other words, the person directly affected by a decision must be given a fair opportunity to state their case and to know the allegations against them. In Chapter 3 we will discuss the processes and procedures we use to ensure fairness in criminal cases. In Chapter 5 we explore the processes and procedures for fairness in civil disputes.

Equality

The justice system endeavours to provide equal treatment for all individuals.

The principle of equality is considered fundamental to the achievement of justice in a democracy. The justice system strives to achieve equality by treating all individuals equally. This does not mean that all individuals are treated in exactly the same manner. It means that the system recognises the value, ability and merit of all individuals. A justice system that provides for equal treatment is a justice system that is even-handed or balanced in its treatment of all people.

The law recognises that there are differences between individuals. It acknowledges these differences, and provides all individuals with an equal opportunity to exercise their rights. This means that it is sometimes necessary to establish special procedures or facilities to help particular individuals. For example, the law provides for special procedures to allow vulnerable witnesses to give evidence in criminal cases.

WHAT IS EQUALITY?

There is a close relationship between the principle of equality and the ideal of justice. However, the principle of equality can be interpreted in many ways. Listed below are eight different interpretations of the term 'equality'.

'TO EACH THE SAME THING'
This means that every person in society gets an identical or equal share.

'TO EACH ACCORDING TO HIS MERITS'
A person who is deserving of praise should receive better recognition and advancement in life.

'TO EACH ACCORDING TO HIS WORKS'
Those who work harder for the benefit of society, or the advancement of the collective wealth, should receive more.

'TO EACH ACCORDING TO HIS NEEDS'
Society ought to distribute benefits according to the individual needs of each person.

'TO EACH ACCORDING TO HIS RANK'
The recognition of rank and position is important to a society.

'TO EACH ACCORDING TO HIS LEGAL ENTITLEMENT'
The law of the community lays down our entitlement to benefits and privileges.

'TO EACH ACCORDING TO HIS FITNESS'
The benefits that each individual receives should be decided according to their abilities.

'TO EACH ACCORDING TO HIS POSITION'
Benefits cannot be distributed equally to all people. This principle would justify the proposition of first come, first served.

Based on Invitation to Law *by C.G. Weeramantry*

ISBN 978-1-316-64754-7

Access

Access to the law and legal institutions is essential if justice is to be achieved. Access includes being able to get appropriate legal advice, assistance and legal representation. It also means that there are processes and procedures for the determination of criminal cases or civil claims and legal institutions such as courts and tribunals for those processes to occur in.

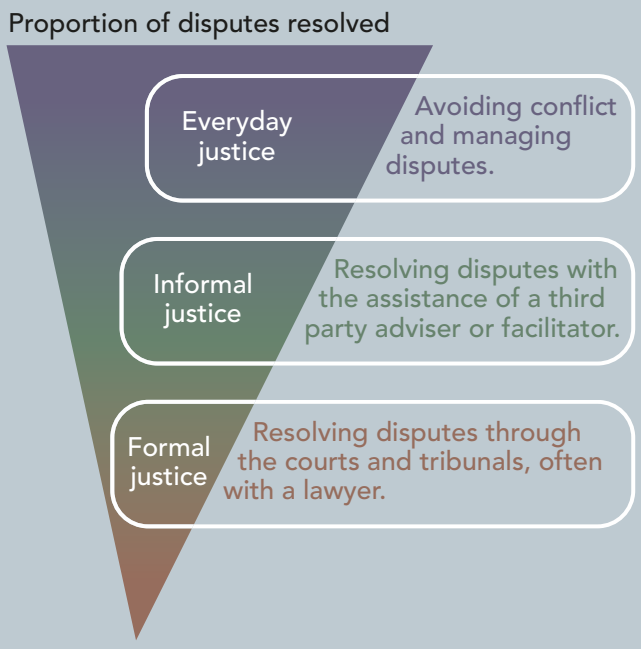
ACCESSING JUSTICE

Access to justice goes beyond courts and lawyers (although these are important). It incorporates everything people do to try to resolve the disputes they have, including accessing information and support to prevent, identify and resolve disputes.

This broad view of access to justice recognises that many people resolve disputes without going to court, and sometimes without seeking professional assistance.

There are three levels of justice:

1 Most disputes are resolved using everyday justice: by avoiding conflict and managing disputes.
2 The second most common form of resolving a dispute is through informal justice – such as using a third party adviser or facilitator.
3 The least common form of resolving a dispute is through the formal justice system, including courts and tribunals, often with a lawyer.



from the website of the Australian Attorney General's Department

A broader interpretation of the term 'access to justice' may include:

- the equal ability of all people in the community to access the processes to enforce existing rights or laws
- equal access for all minority groups in the community to all the legal rights enjoyed by the majority of people in the community.

Justice Anne Ferguson was appointed Chief Justice of Victoria following the retirement of Hon Marilyn Warren in 2017.

THE CONCEPT OF JUSTICE

There are many interpretations of the word 'justice'. Here are just a few.

> Justice is conscience; not a personal conscience but the conscience of the whole of humanity.
>
> *Alexander Solzhenitsyn, Russian author and Nobel Prize winner*

> What justice requires can only be worked out over time with careful thought and patient negotiation on a basis of equality and mutual respect.
>
> *From a published statement by a number of eminent Australians, including retired judges, after the High Court decision on Mabo*

> … justice is not a captive of the criminal law. It is a concept that applies and arises just as much in civil disputes, albeit a little more quietly and less obviously. What is fair and just is often a key point of contention in civil cases.
>
> *Hon Marilyn Warren AC, former Chief Justice of Victoria*

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Legal brief 1.1

What does 'justice' mean?

As a supreme interpreter of justice in the legal system, the Chief Justice of Victoria, the Hon. Marilyn Warren AC, in her 2014 Newman lecture, explored the question 'What is justice?' She believes that for different people at different times, justice means different things:

> To the ordinary person, 'justice' will often mean due punishment when a criminal is sentenced for a crime.
>
> To the popular media, 'justice' will generally mean harsh punishment, primarily focused on a strong retribution and deterrence.
>
> Then there is a notion of social justice to be compared with legal justice … In this sense, the concept of justice is merged with factors of equality, opportunity and equity.

She added:

> Justice is not solely about justice between the parties in a court case. It is also about justice to society.

For justice in Australia to function, there must be fairness, equality and access.

Fairness

The principles of justice and fairness can be regarded as the rules of fair play.

Justice Warren says that:

> To the accused person, justice means fairness: a fair hearing, a fair sentence that punishes not too harshly and offers hope …
>
> To the lawyer, justice means the application of the rule of law; that is, the certainty of applying legal rules developed over centuries to resolve disputes between citizens and between the citizen and the state.
>
> To the judge, justice is the application of the rule of law without fear or favour, affection or ill-will.

Equality

For an equitable system, there must be equality. There must be equality of access for the underprivileged. At the same time, we should aim for equality of outcomes, by addressing the barriers faced by those trying to access the judicial system.

In Australia, equal pay, land rights and reconciliation emphasise the role of equality in the legal system. Chief Justice Warren noted:

> It is said to be 'unjust' that some in society are homeless, receive a different standard of education or are unable to access necessary healthcare. In this sense, the concept of justice is merged with factors of equality, opportunity and equity.

She saw the Mabo land rights case as highlighting the importance of equality. The successful fight by women for equal pay is another illustration.

Former Chief Justice Warren

Access

Access to justice means different things to different people. It represents the formal ability to appear in court.

A broader definition of access to justice encompasses the need to advocate for people who cannot afford lawyers, and also focuses on the inadequacies and limitations of the legal aid system.

The Productivity Commission conducted an inquiry into access to justice. The inquiry found:

- widespread concerns that the civil justice system is too slow, too expensive and too adversarial
- that where disputes become intractable, many people are unnecessarily deterred by fears about costs and/or have difficulty in identifying whether and where to seek assistance
- that reforms to professional regulation are needed to ensure that clients are better informed and have more options in terms of selecting the tasks they want assistance with, and how they will be billed
- that more action is needed to reduce court costs and the length of litigation
- that changes to rules governing the conduct of the parties to a case, and of lawyers, and the way costs are awarded, would improve the resolution of disputes
- that disadvantaged people are more susceptible to, and less equipped to deal with, legal disputes: more resources are required to better meet the needs of disadvantaged people, and government-funded legal assistance services generate net benefits to the community
- that in some cases, legal aid funding should be redirected.

The Federal Government adopted a number of the recommendations.

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NewsReport 1.4

What limits justice?

THE LEGAL SYSTEM IS NOT PERFECT. IT REFLECTS the range of individual differences that exist within our community. The effectiveness of the legal system can be limited by economic decisions about the allocation of resources, political decisions about the implementation of social policies, or the ignorance and prejudice of members of the community.

Many believe that the legal system is expensive, plagued by delays and intimidating for the average person. The success of alternative methods of dispute resolution (ADR) illustrates that alternatives that offer a faster, cheaper, simpler resolution to disputes are popular.

A legal system should be just, fair, comprehensible, certain and reasonably expeditious. In criminal matters the law needs to balance the need to protect the innocent (not only from crime but also from wrongful conviction) at the same time as securing convictions.

Limited knowledge

Under the English common law tradition, there is an expectation that all people are treated as equal before the law. Consistent with this is an expectation that courts, tribunals and dispute resolution methods should be equally accessible to all. However, a number of factors limit access to courts and dispute resolution. Most members of the community have limited knowledge of the operation of the legal system and their rights. It is difficult to exercise your rights effectively unless you have some understanding of what those rights may be. The courts can only enforce rights where individuals bring a matter to the court.

Legal costs

There is a generally held view that dispute resolution through the courts is costly and should be avoided. For many people, involvement in a legal case is a once-in-a-lifetime event. In most instances this will be in relation to a minor offence, a minor claim or as a prospective juror.

The tension between access to justice and legal costs is not new. Although we regard justice as a right, it is a right that must be paid for. Legal services are costly. This is not to say that the costs of legal services are unreasonable. The costs charged reflect the costs of offering the service of legal advice, in much the same manner as the service fees charged by a doctor may reflect the costs of running that business.

Limited legal aid

Access to the legal system is essential if the system is to achieve justice. The legal system recognises that costs may prohibit some people from exercising their rights. Legal aid schemes have been established to assist in these cases. However, these schemes have been criticised as leaving only the poorest with representation. It has been suggested that as a consequence it is only the very rich or very poor who have access to the legal system.

Impact of delays

A feature of particular concern to the legal system is delays. Delays can occur for a number of reasons in the stages leading up to a hearing. Such delays are largely in the hands of the parties, although in recent times the courts have taken greater control of the pre-trial exchanges between the parties. Some delays in the hearing of a case may be due not to the actions of the parties, but to a lack of court time or judges.

Delays also occur in the enforcement of criminal law. If an accused person is refused bail and there are delays in the preparation of the case for hearing, then an innocent person may have lost their liberty. Delays in criminal matters have serious consequences in terms of basic civil rights. One-third of those held on remand do not receive a jail sentence. They may be acquitted or granted a non-custodial sentence. However, during the remand period they have had their liberty denied. The right of an individual to be considered innocent until proven guilty is clearly compromised by the need to protect the community from someone who may be an offender.

Difficulties faced by migrant groups

The difficulties faced by individuals in accessing justice are compounded for members of the community who have recently migrated to Australia or who belong to an ethnic minority group. A migrant may be faced with a number of problems in their dealings with the Australian legal system. They may have difficulty in understanding Australian English. Even if they have a good understanding of English, they may find understanding the language of the law particularly difficult. Furthermore, many migrant groups would be unfamiliar with the operation of an English legal system and would therefore find an adversarial trial difficult to understand.

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Activity 1.1 Folio exercise

What is justice?

Read 'What does "justice" mean?' and 'What limits justice?' and complete the following tasks.

1 Design a diagram to identify the key features of justice.
2 Explain the three key features of justice.
3 What problems limit individuals' access to the legal system? Explain.
4 Are all individuals equally affected by the problems that you have identified? Explain.

Activity 1.2 Folio exercise

Reporting on justice

Collect media reports on recent cases and write a report. Describe the extent to which you believe that justice has been achieved in the cases you have selected.

Your report should:

1 define the essential elements of justice
2 describe the facts of the selected cases
3 analyse the factors limiting the achievement of justice in the selected cases.

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Key point summary

Do your notes cover all the following points?

- ❑ Individuals living in the community may be bound by a range of rule systems. Generally these systems can be classified as either:
  - legal rules – laws
  - non-legal rules – rules of games, associations, organisations, churches and other institutions, or the norms of behaviour.
- ❑ Legal rules differ from non-legal rules because:
  - legal rules apply throughout the community
  - legal rules are made by parliaments and courts
  - legal rules are enforceable by courts and tribunals.
- ❑ There are a number of ways in which we can classify laws. For our purposes, the two main ways of classifying laws are:
  - criminal law and civil law
  - statute law and case law.
- ❑ The principles of justice are:
  - fairness
  - equality
  - access.

End-of-chapter questions

Revision questions

1 Describe the different ways in which laws may be classified.

2 What is the difference between statute law and common law?

3 What type of behaviour is regulated by criminal law?

4 What type of behaviour is regulated by civil law?

5 Outline the differences between criminal law and civil law.

6 Describe and explain the significant features of a legal system. Could the legal system operate without one of these features?

7 Write a paragraph outlining the key differences between the legal system and a rule system.

8 Suggest ways in which the features of the legal system provide for:
  - fairness
  - equality
  - access.

9 What does the term 'social cohesion' mean?

10 The law recognises and upholds the principles of justice. Using examples, explain how the law achieves this.

ISBN 978-1-316-64754-7

Current issues folio

The law is constantly changing. To stay up to date you need to follow current events in newspapers and journals, or on television or the internet. The key to maintaining a current issues folio is organisation.

Keep your articles in a document wallet or a plastic pocket in your folder. Annotate each article. This may be done on a separate piece of paper stapled or clipped to the article.

The annotation should include the following points:

- the source and date of the article
- a heading identifying the key legal issue discussed
- a brief summary of the issue
- notes on the relevant legal questions raised.

NewsReport 1.5

Saw red over purple stamp

A MAN CLAIMED THAT HE STABBED HIS SISTER when an argument broke out because her pet guinea pig ate part of his stamp collection. The defendant claimed that when he saw his 1904 6-penny purple KEVII stamp in the guinea pig's mouth 'he just saw red'. He started yelling at his sister and, in the course of the argument, picked up a kitchen knife and struck her.

The man pleaded guilty in the Magistrates' Court to one charge of recklessly causing injury. He was given six months' community correction order.

After the case his sister said, 'A community correction order, it's like he didn't get anything. It has trivialised my experience'.

31 February 2028

M & B Review 31/2/28 ← Source

Sentencing ← Issue

Prosecution for recklessly causing injury ← Criminal law

Are community correction orders effective? ← Legal question

Make a start on your issues folio with the following exercise.

- Collect two articles illustrating aspects of criminal law.
- Collect two articles illustrating aspects of civil law.
- Collect two articles discussing proposed changes to statute law.
- Collect one article discussing an aspect of judge-made law.

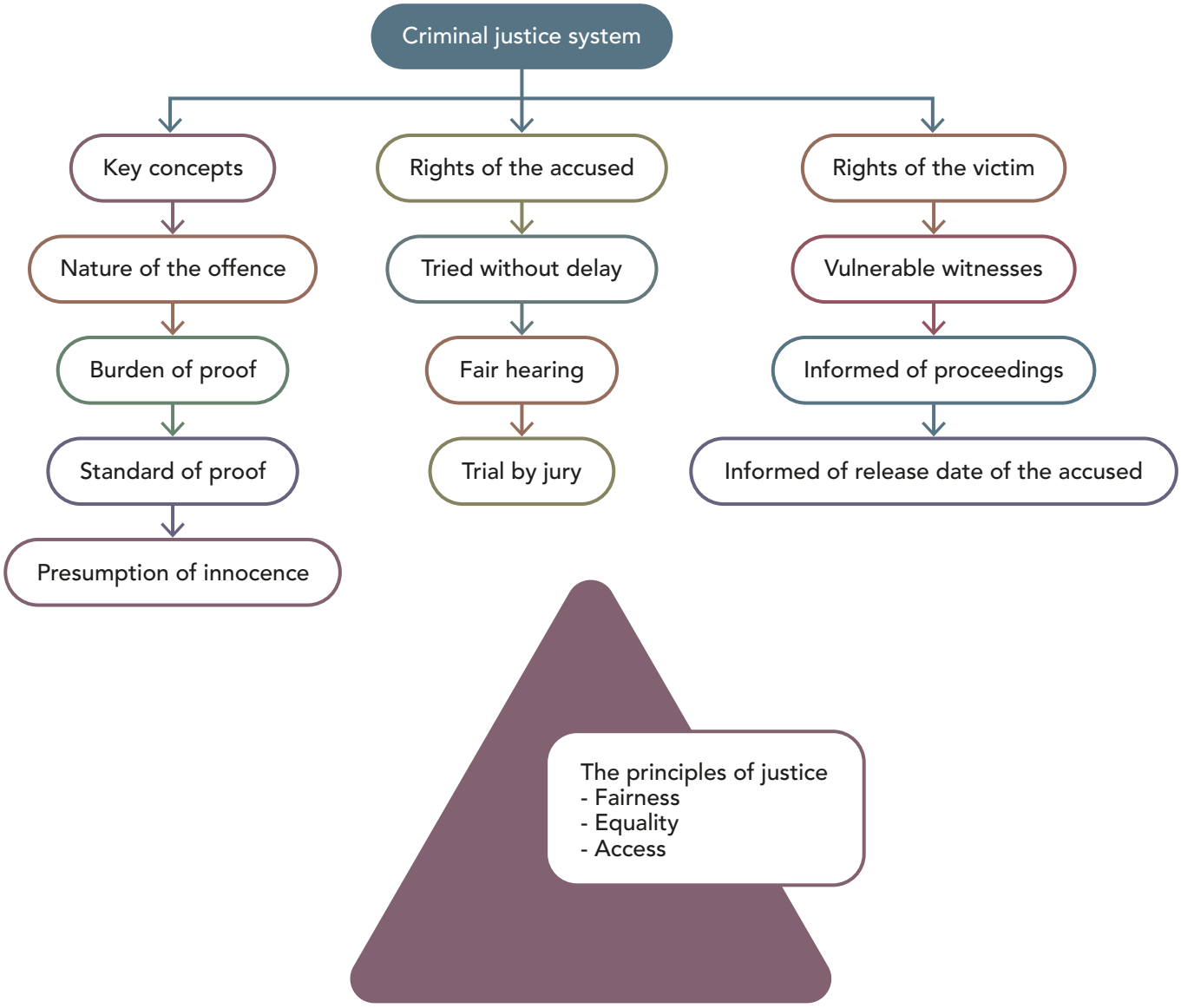
Annotate your articles – as illustrated in the example above.

ISBN 978-1-316-64754-7

CHAPTER 2
CRIMINAL LAW AND JUSTICE

This chapter looks at the way in which the Victorian criminal justice system achieves the principles of justice: fairness, equality and access. It examines concepts including the purposes of criminal law, summary and indictable offences, the burden and standard of proof, and the presumption of innocence. We look at both the rights of the accused, and the rights of victims. Finally, we consider the ability of the criminal justice system to achieve important goals, and the impact of recent and recommended reforms.

ISBN 978-1-316-64754-7



Key terms

accused a person charged with an indictable offence and committed for trial

arraignment the formal reading of the charges against an accused person – this happens in court

bail allows a person to be released into the community while he or she awaits trial or the next hearing; conditions are often attached

burden of proof the party that has the responsibility, or onus, of proving the case: in a criminal matter, the burden of proof rests with the prosecution

defendant in criminal law, a person who has been brought to court charged with a criminal offence

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court: an example is murder

parole the conditional release of a prisoner before the end of the original sentence

presumption of innocence a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law

primary victim the person who directly had a crime committed against them

prosecution bringing a criminal charge, supported by evidence, to court: a prosecution may be initiated by a police prosecutor, or by the Office of Public Prosecutions on behalf of the Crown

remand to hold an accused in custody until their trial or next hearing

standard of proof the level of proof that must be reached in order to determine guilt or liability: in a criminal case, the standard of proof is 'beyond reasonable doubt'

summary offence a less serious crime, heard in the Magistrates' Court; for example, a minor traffic offence

surety a person who provides security (an amount of money) to the court to ensure that the person charged appears at court: if the person fails to appear, the surety loses their money

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2.1 The principles of justice in the criminal justice system

Both the accused and a victim of crime are entitled to justice.

The Victorian criminal justice system seeks to achieve both social justice and procedural justice. Both the **accused** and victims of crime should have a sense that justice has been achieved. We do this in part by ensuring that their human rights are upheld in criminal proceedings. Additionally, the criminal justice system must ensure that the procedures that are followed during pre-trial, trial and post-trial are just for all involved.

The principles of justice in the criminal justice system are fairness, equality and access.

For example, the *Criminal Procedure Act 2009* (Vic) sets out the processes that must be used in criminal cases in the Magistrates' Court, County Court and Supreme Court in Victoria in order to achieve fairness and equality in the running of criminal matters. The principles of justice in the criminal justice system encapsulate notions of fairness, equality and access.

Fairness

Natural justice (or procedural fairness) includes the rule against bias and the right to a fair hearing.

As discussed in Chapter 1, fairness is based upon the concept of 'fair play'. In the Victorian criminal justice system, it is important that the principle of natural justice (also known as procedural fairness) is upheld. Natural justice includes the rule against bias and the right to a fair hearing.

The rule against bias

A judge or magistrate cannot allow actual bias, or an apprehension of bias, to impact upon any decision.

In a criminal matter, the judge or magistrate presiding over the hearing or trial must not make a decision that is the result of either actual bias or an apprehension (suspicion) of bias.

Actual bias

Actual bias is when there is *evidence* that bias has affected a decision.

Actual bias means that there is evidence that the judge or magistrate prejudged the matter or that prejudice affected their decision-making.

In criminal pre-trial procedures (such as a **bail** application or committal proceedings), during a criminal hearing or trial, or post-trial (such as at sentencing), a judge or magistrate must rely only upon the evidence at hand in their decision-making role and not prejudge the matter. A judge or magistrate cannot allow a personal prejudice or opinion to affect their decision (such as whether the accused is guilty or not guilty).

Apprehension of bias

An apprehension of bias is when it *appears* that bias has occurred.

An apprehension of bias means that it looks as if the decision-maker has allowed a bias to affect their decision. That is, there is an appearance of bias, rather than evidence of bias.

A finding of apprehended bias means that a fair and objective observer might reasonably conclude that the judge or magistrate did not approach the matter with an open mind (if it appears that the judge or magistrate had already made up his or her mind about the length of a prison sentence, without listening to the mitigating factors presented in court, for instance).

Apprehended bias is easier to establish than actual bias, because it is focused upon appearances. Tests for both kinds of bias have developed through the common law.

The hearing rule

The hearing rule ensures that a party is given the chance to present their side of the case.

The hearing rule achieves fairness by ensuring that the judge or magistrate informs the person of the case against them and gives them an opportunity to be heard.

It would be unfair for the court to give the prosecution the opportunity to present their case against the accused, but to not allow the accused to respond to the allegations. The hearing rule has mostly developed through the common law.

In a criminal trial, the accused is able to present their case through their defence team: they can present evidence and call witnesses and use examination in chief, cross-examination and re-examination.

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Equality

The criminal justice system seeks to achieve equality by treating the accused and victims of crime uniformly. Legislation governing criminal procedures and the presentation of evidence, such as the *Criminal Procedure Act 2009* (Vic) and the *Evidence Act 2008* (Vic), are examples of laws that have been enacted in order to provide clear parameters for the running of a criminal hearing or trial in order to ensure that participants are treated equally. The criminal justice system also strives to treat victims equally, through the *Victims' Charter Act 2006* (Vic).

The criminal justice system seeks to achieve equality by treating participants uniformly.

Vulnerable participants

Not all individuals enter the criminal justice system on an equal footing. Sometimes, the criminal justice system needs to use specialised procedures and facilities to ensure that people are adequately assisted. For example, the treatment of victims sometimes needs to be tailored to address the specific characteristics of certain types of victims. Victims who are classified as vulnerable witnesses (such as children, people with a cognitive impairment, victims of sexual assault, and victims of family violence) may be able to give their evidence under special conditions in order to minimise the additional distress that they may feel in a court situation.

Victims also generally have the right to be informed of the status of proceedings, but this is assessed on a case-by-case basis.

Some participants in the criminal justice system need to be assisted with specialised procedures and facilities.

Cultural differences

Cultural differences also need to be addressed by the criminal justice system. Indigenous offenders, for example, may qualify to have their matter heard in a Koori Court, depending upon a number of factors. This aims to redress the inequality that some Indigenous people feel when facing a criminal justice system that does not include the involvement of an Indigenous elder. For further information on the operation of the Koori Court, see Chapter 3.

Additional services, such as the Victorian Aboriginal Legal Service, are also available to address the specific needs of accused Indigenous persons. For more information on the Victorian Aboriginal Legal Service, see Chapter 3.

Inequalities between different cultural groups in society often need to be addressed by the criminal justice system.

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Access

Access to the criminal justice system involves two key perspectives. Individuals charged with an offence may be significantly disadvantaged if they do not have access to legal representation and advice. Such representation and advice is costly, so access to financial assistance is essential to achieving justice. Second, both an accused and the victim need access to information.

Access to financial assistance

The high cost of the criminal justice system can affect an individual's ability to gain proper access.

Access to the criminal justice system can be particularly problematic for those who cannot afford the escalating financial costs of legal assistance. In a criminal matter, it can be very costly to obtain legal advice and to maintain legal representation throughout the hearing or trial. Access to legal advice and assistance can be especially difficult for an accused charged with an indictable offence, as the pre-trial, trial, and post-trial procedures take considerable time, which means increased costs.

Victoria Legal Aid aims to help those who qualify to gain better access to legal advice and legal representation within the criminal justice system.

Victoria Legal Aid's (VLA's) role is to help accused persons achieve justice by providing legal representation to those who qualify. Persons charged with a crime who apply to Victoria Legal Aid need to meet relatively strict means and merits tests in order to obtain assistance. This ensures that the limited resources of VLA, who are funded by the government, are directed to and utilised by those who are most in need. For more information about VLA see Chapter 3.

Access to information

Access to information is important for participants in the criminal justice system.

More broadly, access to information is important to both an accused and a victim of crime. For an accused, it is important to have access to the details of the case that the prosecution is making.

For example, before committal proceedings, the accused and his or her legal representative need to have access to a copy of the hand-up brief. A hand-up brief contains details of the allegation, including witness statements and the defendant's record of interview. This ensures that the defendant is aware of the allegations. The rights of an accused are discussed in more detail later in this chapter.

It is also important that a victim of crime feels a sense of justice, and having access to certain information is part of that. A victim has a general right to access information about the status of an investigation, subject to the progress and needs of the investigation, and to obtain certain details about the offender, such as their release date. Victims who qualify can receive additional access to information about the offender from the victims' register. The rights of victims are discussed in more detail later in this chapter.

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2.2 Key concepts in the criminal justice system

Broadly defined, a crime is an act or omission committed against the community at large that is punishable by the law. A person suspected of committing a criminal offence is prosecuted by the state. There are generally two elements that need to be present before an act or omission can be called a crime: a guilty act (*actus reus*) and a guilty mind (*mens rea*). An exception to this is a 'strict liability' crime: where the wrongful act alone establishes the crime – speeding is an example of a strict liability crime.

Most crimes require two elements to be established: the *mens rea* and the *actus reus*.

The purposes of criminal law

The purposes of criminal law include punishing the offender and protecting the community. Offenders convicted of a crime are punished by a sanction which is given by the court. These purposes need to be balanced with upholding the rights of the accused.

Types of criminal offences

There are two main types of criminal offences: **summary offences** and **indictable offences**. Summary offences are less serious crimes, such as traffic offences. These are heard in the Magistrates' Court before a magistrate. Indictable offences are more serious offences, such as murder. These are heard in the County Court or Supreme Court by a judge and 12 jurors.

Criminal offences are either summary offences or indictable offences. Some indictable offences can be tried summarily.

Some indictable offences can be tried summarily. This means that a magistrate in the Magistrates' Court can hear and determine some indictable offences, such as theft and burglary, if the accused gives his or her consent. There are Magistrates' Courts in numerous metropolitan and country locations.

Speeding is a summary offence

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Section 13 Persons found drunk

Any person found drunk in a public place shall be guilty of an offence.

Penalty: 8 penalty units

(A penalty unit is currently $155.46.)

Section 46 Destruction of homing pigeons

A person other than the owner shall not kill, wound or in any way injure, destroy, ensnare, catch or take a homing pigeon.

Penalty: 1 penalty unit

Section 42 Tattooing of juveniles

(1AA) In this section –

'beading' means the cutting of the skin of a person and the insertion of an object beneath the skin to produce a lump;

'branding' means the application of heat, cold or a substance to the skin of a person to produce scar tissue;

'like process' includes scarification, tongue splitting, branding and beading;

'person' means a living human being;

'scarification' means the cutting of the skin of a person to create scar tissue;

'tongue splitting' means the cutting of the tongue of a person to divide the tongue, or part of the tongue; into 2 or more segments.

(1) Any person who performs any tattooing or like process on any person under the age of eighteen years shall be guilty of an offence.

Penalty: 60 penalty units

(2) Nothing in this Division shall apply to any tattooing or other like process performed by or at the written request of a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student).

Figure 2.1 Extracts from the *Summary Offences Act 1966* (Vic)

Section 6 Infanticide

(1) If a woman carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of –

(a) her not having fully recovered from the effect of giving birth to that child within the preceding 2 years; or

(b) a disorder consequent on her giving birth to that child within the preceding 2 years –

she is guilty of infanticide, and not of murder, and liable to level 6 imprisonment (5 years maximum).

(2) On an indictment for murder, a woman found not guilty of murder may be found guilty of infanticide.

…

(3) Nothing in this Act affects the power of the jury on a charge of murder of a child to return a verdict of not guilty because of mental impairment.

Section 75 Robbery

(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, he uses force on any person or puts or seeks to put any person in fear that he or another person will be then and there subjected to force.

(2) A person guilty of robbery, or of an assault with intent to rob, is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

Section 20 Threats to kill

A person who, without lawful excuse, makes to another person a threat to kill that other person or any other person –

(a) intending that that other person would fear the threat would be carried out; or

(b) being reckless as to whether or not that other person would fear the threat would be carried out –

is guilty of an indictable offence.

Penalty: Level 5 imprisonment (10 years maximum).

Figure 2.2 Extracts from the *Crimes Act 1958* (Vic)

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Indictable offences heard and determined summarily

Section 28 of the *Criminal Procedure Act 2009* (Vic) directs readers to Schedule 2 of the Act for a list of the types of statutory indictable offences that can be heard summarily. They include: causing serious injury recklessly, assault with intent to commit a sexual offence, and a charge of robbery, burglary, or theft if the amount involved does not exceed $100,000.

Indictable offences that can be heard summarily by a magistrate must be a level 5 or level 6 offence, punishable by a level 5 or level 6 imprisonment or fine or both, or an offence punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both (1200 penalty units is $186,552.00).

Section 29 of the *Criminal Procedure Act 2009* (Vic) states the circumstances in which an indictable offence may be heard and determined summarily. The court will consider:

- the seriousness of the offence
- the adequacy of the sentences available to the court
- whether a co-accused is charged with the same offence
- any other matter of relevance to the court.

If a matter is to be heard and determine summarily, rather than in a County or Supreme Court with a jury, the accused must consent to this. An accused will usually seek legal advice as to whether his or her particular case is better determined summarily. Relevant factors include: cost, efficiency, sentencing options, and whether or not forgoing a trial by jury is a benefit.

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CRIMINAL PROCEDURES

Criminal procedures must be followed at the pre-trial, trial, and post-trial stages.

Once a crime has been committed, a range of processes and procedures may be used to investigate, prosecute and sanction an offender. These can be classified as:

- **pre-trial procedures** – these procedures aim to balance civil liberties with the need for policing authorities to investigate crime.
- **trial procedures** – the procedures used by the courts in hearing a criminal offence: the procedures used for hearing a summary offence differ from those used in the hearing of an indictable offence.
- **post-trial procedures** – these include the procedures used to determine an appropriate sanction.

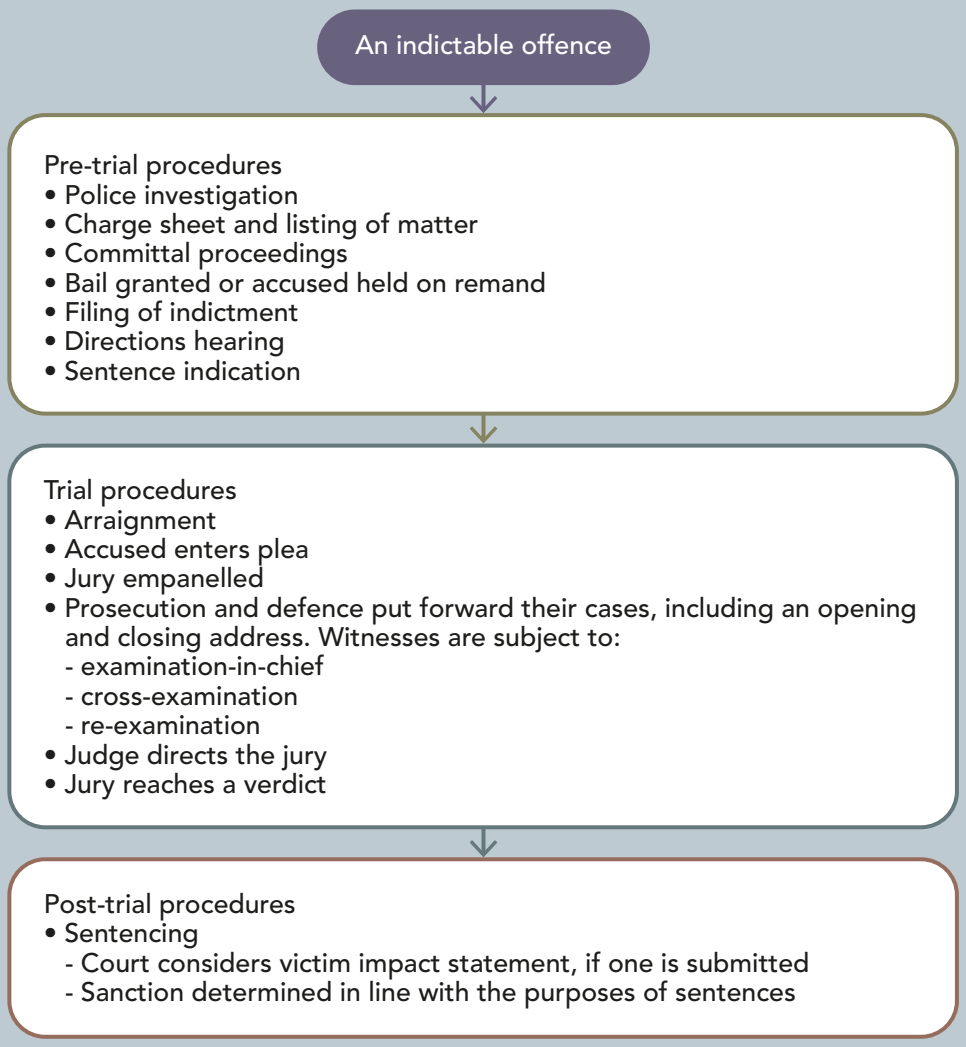

Figure 2.3 Sample procedures for an indictable offence

The burden and standard of proof

Burden of proof

In a criminal matter, the burden of proof generally rests with the prosecution.

In criminal cases, the **prosecution** generally has the responsibility of proving the case against the **defendant**. This is known as the **burden of proof**. The burden of proof (or onus of proof) rests with the prosecution in a criminal case. This is thought to be fair, because the party making the allegations should have to prove them.

Although it is rare, some Acts of Parliament reverse the burden of proof and place the onus on the defendant. Examples at the Commonwealth level include some terrorism and drug offences. Some argue that reversing the burden of proof undermines the principle of the presumption of innocence.

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NEWSREPORT 2.1

Golden thread questioned

IN AUSTRALIA, IT HAS BEEN CALLED 'A CARDINAL principle of our system of justice'. In the UK, it is referred to as 'the golden thread of English criminal law'. It is the burden of proof (the degree of evidence that is required to prove a case), where the prosecution in criminal trials – even traffic offences – has to prove the cases 'beyond reasonable doubt'. It is common law, centring around the right to a fair trial.

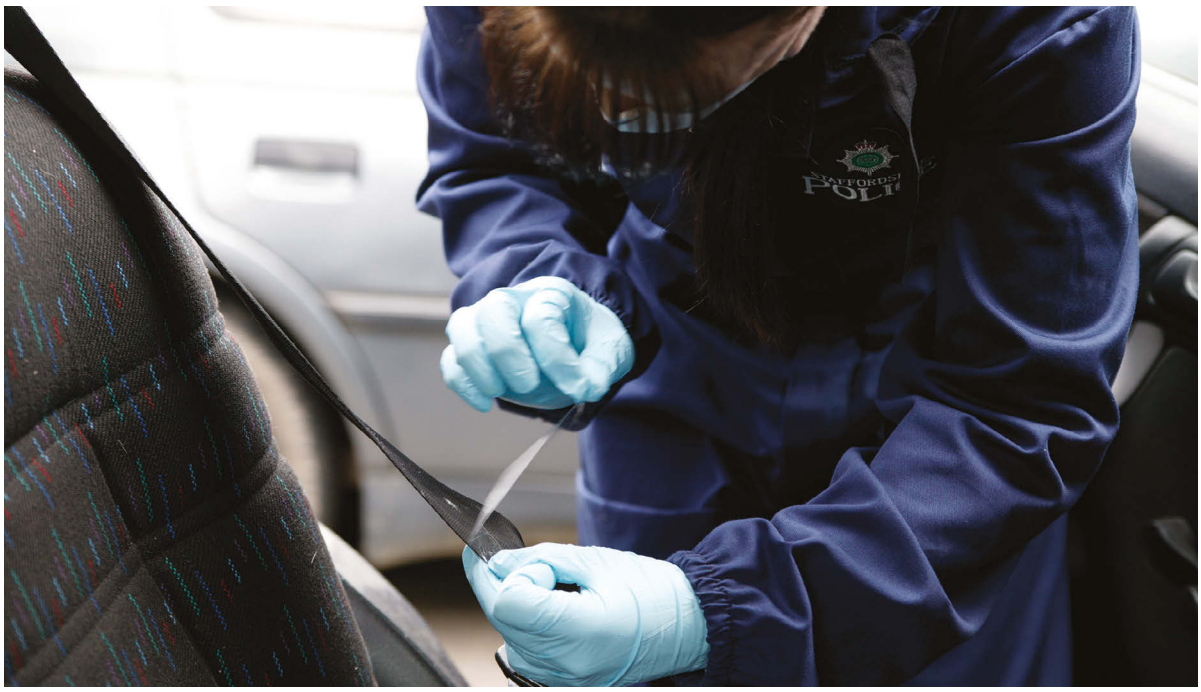
The prosecution usually bears the legal burden of proving the alleged crime – and disproving any defence. However, the burden of proof can be reversed in trials concerning terrorism, drug offences, child sex offenders, unmarked plastic explosives, copyright, taxation offences, and other matters such as bail.

With drug offences, the *Criminal Code* contains deeming provisions. These include when a person is found to be dealing with a threshold 'trafficable' quantity of a controlled drug: in this situation the person is deemed or presumed to have either the intention to traffic or cultivate for a commercial purpose, or the intention to commercially manufacture.

The main reason for these laws is to make it easier to prosecute certain types of cases. However, some argue that such reversals of the burden of proof weaken the principle of innocent until proven guilty. Civil Liberties Australia opposes such laws, saying they are dangerous. There is the potential for the reversal of the burden of proof to lead to people who are innocent being found guilty. This is especially true for those who are most disadvantaged and unlikely to be able to either afford or access legal advice.

In 2014 the Federal Government asked the Australian Law Reform Commission to look at Commonwealth laws dealing with onus of proof. The Commission found that some burden of proof laws, including deeming provisions for serious drug offences,

> may warrant further review. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.



Activity 2.1 Folio exercise

The burden of proof

1 Identify the party who usually bears the burden of proof in a criminal trial.

2 Explain why some might argue that it is appropriate to reverse the burden of proof for drug possession charges.

3 'Reversing the burden of proof in a criminal trial will always lead to an injustice for the accused.' To what extent do you agree? Justify your position.

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Standard of proof

In a criminal matter, the standard of proof is 'beyond reasonable doubt'.

In criminal law, the **standard of proof** is the level of proof that must be satisfied in order to find the accused guilty. The standard of proof that must be met in a criminal case is 'beyond reasonable doubt'. In common law, a judge should not expand on the meaning of 'beyond reasonable doubt'. The *Juries Direction Act 2015* provides that a judge may give a jury directions clarifying the meaning of 'beyond reasonable doubt' if the jury asks the trial judge:

- a direct question about the meaning of the phrase
- a question that indirectly raises the meaning of the phrase.

However, determining what this means, and how the standard applies to a case, is up to each individual juror.

The presumption of innocence

A person has the right to be presumed innocent until proven guilty.

The **presumption of innocence** means that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law. The presumption of innocence emerged through the common law. In *Woolmington v DPP* [1935] AC 1, the UK House of Lords established that '[t]hroughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner's guilt'. More recently, in Australia, French CJ of the High Court stated, in *Momcilovic v The Queen* (2011) 245 CLR 1, that the '"presumption of innocence" in criminal proceedings is an important incident of the liberty of the subject'.

WOOLMINGTON V DPP

Reginald Woolmington was a 21-year-old farm labourer from Castleton near Sherbourne, England. In August 1934, he married 17-year-old Violet Kathleen. In October Violet Kathleen gave birth to a son. Three months after their marriage, Violet left Reginald and returned to live with her mother.

On 10 December 1934, Reginald stole a shotgun and cartridges. He went to his mother-in-law's home and confronted Violet. He claimed that he wanted to frighten his wife into returning to him by threatening to shoot himself. During the confrontation, the gun discharged and Violet was shot through the heart.

Reginald was charged with murder. He claimed that the death was an accident.

The first trial lasted one day and the jury could not agree on a verdict. At the second trial the judge directed the jury that all homicide is presumed to be malicious and murder and that the defendant must prove that it was an accident. In an hour, the jury returned a guilty verdict.

The case went on appeal to the House of Lords and the conviction was quashed. Reginald Woolmington was released three days before he was due to be executed.

The presumption of innocence is included in the ICCPR and the Victorian Charter of Human Rights and responsiblilities.

This presumption of innocence is established through the common law. Australia is also a party to the International Covenant on Civil and Political Rights (ICCPR), which protects the presumption of innocence in Article 14(2).

In Victoria, the presumption of innocence is also stated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 25(1).

PRESUMPTION OF INNOCENCE

ICCPR – Article 14(2)

Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Section 25 Rights in criminal proceedings

1 A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

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2.3 The rights of an accused

The accused is the person against whom a criminal case is brought. An accused person has not yet been found guilty of a crime and he or she is entitled to the presumption of innocence. The accused person also has a number of other rights.

A person accused of a crime has certain rights.

The right to be tried without unreasonable delay

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires a person who is arrested or detained on a criminal charge to be promptly brought before a court (section 21(5)(a)) and be brought to trial without unreasonable delay (sections 21(5)(b) and 25(2)(c)).

A person accused of and charged with a crime must be brought to trial promptly and without unreasonable delay.

Justice Kellam considered this right in the context of a bail application in *Mokbel v DPP (No. 3)* [2002] VSC 393, stating that 'the community will not tolerate the indefinite detention of persons awaiting trial'. In this case, the accused man, Antonius ('Tony') Mokbel, was held in custody awaiting trial for serious drug-related charges. Due to concerns surrounding the delays in committal proceedings and trial, bail was granted. Subsequently, Mokbel breached his bail conditions and fled to Greece. He was discovered and extradited back to Australia 15 months later.

The *Criminal Procedure Act 2009* (Vic) creates time limits for the start of trials. If an accused is charged with a sexual offence, the trial must commence within three months of the day on which the person is committed for trial. If an accused is charged with an offence other than a sexual offence, the trial must start within 12 months of the day on which the person is committed for trial. These time requirements underline the importance of the concept of bail, and therefore of bail rules and procedures.

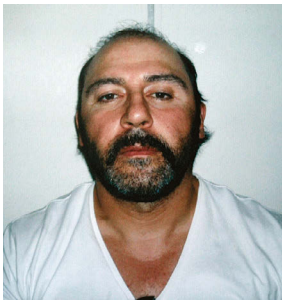

Figure 2.4 Tony Mokbel

The right to a fair and unbiased hearing

Pre-trial procedures

Criminal pre-trial procedures aim to provide individuals with a fair and unbiased hearing. Police investigations must be carried out in a fair manner. The police are required to caution suspects before questioning so that suspects are aware of their rights. Individuals being questioned have the right to remain silent or say 'no comment', but an individual is required to give his or her name and address. This recognises that all individuals have the right to be considered innocent until proven guilty. It also protects individuals against self-incrimination.

An accused must be cautioned by police and he or she has the right to remain silent.

The process of bail further protects the rights of individuals to be treated fairly. Bail allows a person to be released into the community while he or she awaits trial or the next hearing, on the undertaking that they will appear in court on the date set. Bail is part of recognising that all people are considered innocent until proven guilty: a person who is accused of a crime but has not yet been convicted, is, in most cases, entitled to his or her liberty.

Bail is decided by the court on a case-by-case basis. The court will hear evidence from the accused who seeks bail, or their legal representative, and may hear evidence from those opposing bail (often the police). In many cases a person will be released on bail on their own undertaking to appear in court. Sometimes the court may impose conditions. Common conditions are:

- not contacting the victim/s or other witnesses
- having counselling or medical treatment
- living at a particular address
- regularly reporting to a police station.

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A person will be held on remand if bail is refused or has not been applied for.

If bail is not granted, an alleged offender will be held on **remand** (in custody). A alleged offender will be held on remand if:

- he or she has not applied for bail,
- bail has been refused,
- bail cannot be met or a **surety** cannot be provided,
- the alleged offender is unwilling or unable to meet bail conditions.

People are held on remand if it is thought that they might:

- not attend a future court date
- commit another offence while on bail
- be a threat to the community
- interfere with witnesses
- otherwise obstruct the course of justice.

This is a balancing act: the individual's right to continue to live in the community is balanced by the community's right to be protected from the accused.

Trial

A trial or hearing must be heard by an impartial judge or magistrate who follows the rules of evidence and procedure.

A person accused of a criminal offence has their case heard before an independent and impartial body. In the case of a summary offence, the case is heard by a magistrate. For indictable offences, where the accused pleads not guilty, the case is heard before a judge and jury. The rules of evidence and procedure used in the trial ensure that the prosecution and the defence have an equal opportunity to present their case. The use of the jury means that the final decision is made by unbiased and impartial representatives of the community.

NEWSREPORT 2.2

The impact of social media on court proceedings

A JUDICIAL SYSTEM MUST BE OPEN AND transparent, and social media can affect and disrupt the work of courts.

Courts trust juries to do the right thing. But jurors are human – they are saturated with information. Take the Gable Tostee murder trial in Queensland. Tostee was found not guilty of killing his Tinder date Warriena Wright, who fell to her death from his 14th-floor Surfers Paradise apartment balcony. A juror almost caused a mistrial due to multiple posts on social media during deliberations. On the fourth day of deliberations, shortly before the verdict was handed down, the defence applied for a mistrial in response to the juror's multiple Instagram posts. The posts included a photo of a coffee cup and comments relating to the difficulty of the case and its high-profile nature. Two hours after the defence application, Justice John Byrne found the comments did not jeopardise a fair trial.

In another case, a Yahoo 7 reporter filed an online report on a Melbourne murder trial that contained prejudicial material. Because of fears that the Facebook post could risk causing an unfair trial, that trial was aborted. The reporter, Krystal Johnson, and her employer, website Yahoo 7, appeared before Justice Lasry and were found guilty of contempt of court.

In Britain a juror on a child abduction and sexual assault case wasn't sure whether the accused was guilty or not guilty. She asked her friends on Facebook for advice. The court discovered this. The juror was removed and the trial continued.

In another UK case, a juror was approached – on Facebook – by a man sitting in the court. Upon learning of this, the judge found that it was an attempt to jury-tamper and discharged the jury. In another English case, two brothers, who pleaded guilty to supplying drugs, each received two-year suspended sentences. Upon leaving court, they each lampooned the judge on Facebook. She called them back to court, lifted the suspensions, and had them immediately jailed.

In New Zealand a judge made an accused read out a Facebook comment about him (the judge). The judge sentenced the man to 300 hours community service. But on appeal to the High Court, the sentence was reduced to 200 hours. The High Court said the judge was diverted from a relevant analysis of the facts to what was said on Facebook.

Following the murder of ABC Melbourne employee Jill Meagher, a Facebook hate group against the accused attracted more than 18,000 'likes'. Victoria Police posted a message on its Facebook page warning users of their legal responsibilities in posting, saying 'It is inappropriate to post speculation or comments about matters before the courts'.

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The right to silence

The right to silence is an important safeguard of a defendant's right to a fair and unbiased hearing. At trial, a defendant can remain silent or give evidence. If the defendant gives evidence, he or she may be cross-examined. The *Charter of Human Rights and Responsibilities Act 2006* (Vic), as well as protecting the right to silence, gives an accused person the right to not be compelled to testify against him or herself or confess guilt in a criminal trial (section 25(2)(k)).

A defendant can choose to exercise his or her right to silence at trial.

The Victorian Charter of Human Rights and Responsibilities

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of an accused to a fair and unbiased hearing. Section 24 of the Charter protects the right to a fair hearing and section 25 provides for a number of rights in criminal proceedings.

The Victorian Charter protects the right to a fair hearing.

Table 2.1 Victorian Charter of Human Rights and Responsibilities

Fair hearing – section 24	A person charged with a criminal offence has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
Rights in criminal proceedings – section 25	1 A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. 2 A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees: a to be informed properly and in detail of the nature and reason for the charge in language or, if necessary, a type of communication that he or she speaks or understands b to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer c to be tried without unreasonable delay d to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid e to be told about the right, if eligible, to Victoria Legal Aid f to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria g to examine, or have examined, witnesses against him or her h to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution i to have the free assistance of an interpreter if he or she cannot understand or speak English j to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance k to not be compelled to testify against himself or herself to confess guilt.
Right to liberty and security of person – section 21	This section ensures that an accused person is not subject to arbitrary arrest or detention and is not deprived of his or her liberty unless this is allowed under law.
Humane treatment when deprived of liberty – section 22	If a person is deprived of their liberty, he or she must be treated with humanity and with respect. If an accused person is held without charge, such as when an accused is held on remand, he or she must be segregated from persons who have been convicted of offences and treated in a way which is appropriate for a person who has not been convicted.
Retrospective criminal laws – section 27	A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence at the time of the offence.

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The right to a trial by jury

Trial by jury is a feature of a democratic society.

It is widely accepted that the right to trial by jury is important in a democratic society. This is because:

- randomly selected jurors are likely, as a group, to represent community views and values in their verdict
- the jury system gives an opportunity for the community to participate in the justice system
- the jury can protect against any government corruption by acting as a 'buffer' – an independent fact-finding body that is not subject to government influence.

Right to trial by jury – Commonwealth

Section 80 of the Commonwealth Constitution establishes the right to trial by jury for a Commonwealth indictable offence.

Section 80 of the Commonwealth Constitution gives a person accused of a Commonwealth indictable offence the right to a trial by jury. It states: 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury.' The section was based on a provision contained in the US Constitution – people charged with serious offences are entitled to have their guilt or innocence determined by the judgment of their peers. The Commonwealth Constitution does not give a right to a trial by jury for summary offences.

Section 4G of the *Crimes Act 1914* (Cth) states that Commonwealth offences that are punishable by imprisonment for 12 months or more are indictable offences. Commonwealth offences which are likely to be classified as indictable offences include treason, child sex tourism and piracy.

Decisions of the High Court of Australia have interpreted section 80 of the Commonwealth Constitution as allowing the Commonwealth parliament to decide whether an offence is an indictable offence or a summary offence. So as the Commonwealth parliament has control over how a Commonwealth offence is classified, it also has control over whether or not an accused has a right to a trial by jury.

Right to trial by jury – Victoria

In Victoria, indictable offences are heard before a judge or magistrate and a jury of 12 citizens.

In Victoria, all indictable offences tried in the County Court and Supreme Court (Trial Division) are heard before a jury of 12 randomly selected citizens.

In New South Wales, Queensland, Western Australia, South Australia and the ACT, it is possible to apply to have a trial heard by a judge alone, without a jury, when charged with an indictable offence under State legislation. Such an application might be made if an accused and his or her legal representative are concerned about pre-trial publicity hindering a fair hearing or if the jury does not approach the case impartially.

Jurors must be impartial and reach a verdict based upon the evidence presented at trial.

The Victorian Charter of Human Rights and Responsibilities emphasises the importance of impartiality by stating that a person charged with a criminal offence has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing (section 24(1)). In a jury trial, impartiality is achieved by empanelling jury members who do not come to the trial with preconceptions about the case, or personal biases.

Activity 2.2 Structured questions

The impact of social media on court proceedings

1 Read NewsReport 2.2 on page 34 and explain why Victoria Police might have warned Facebook users that it is inappropriate to speculate upon a matter before the courts.

2 In your opinion, should a juror who misuses social media during a trial be given a sanction? Justify your response.

3 'The growing concerns about the misuse of social media by jurors show that trial by jury should be abolished in order to have a fair and unbiased hearing.' Discuss the extent to which you agree with this statement.

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Legal brief 2.1

Can you waive your right to a trial by jury?

Alqudsi v The Queen [2016] HCA 24

Jury must hear terrorist case – High Court

This High Court case concerned a NSW trial for terrorism recruitment offences. Hamdi Alqudsi, a disability pensioner from Sydney's southwest, was charged with seven offences against the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). The Act makes it an offence for a person to give money, goods or services to a person or body for the purpose of supporting or promoting the commission of an incursion into a foreign country to engage in hostilities. Alqudsi made a motion to the High Court to be tried by a judge only. However, the High Court dismissed the motion. In its published reasons for the decision, the 'Court held that provisions of the *Criminal Procedure Act 1986* (NSW), which provided for trial by a judge without a jury, were not capable of being applied to the applicant's trial because their application would be inconsistent with section 80 of the Constitution'.

The court, in its majority decision (Chief Justice Robert French dissented), upheld the view that section 80 cannot be interpreted to allow judge-only trials in any circumstances: 'a trial on indictment for an offence against a law of the Commonwealth does … have to be before a jury'.

Following the High Court decision, Alqudsi was found guilty in the NSW Supreme Court. He will be eligible for release in 2022, after serving a non-parole period of six years. He was the first person to be prosecuted for helping Australians fight in the Syrian conflict. At least 11 Australians have been convicted under the Act since 1978, mostly mercenaries who took part in conflicts in Yugoslavia, the Comoros Islands and West Papua.

Hamdi Alqudsi

Activity 2.3 Essay

'A person charged with a Commonwealth indictable offence should be able to decide to have their trial heard by a judge alone in the absence of a jury.'

Discuss the extent to which you agree with this statement.

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2.4 The rights of victims

Victims of crime can be affected both physically and emotionally.

Victims of crime can experience many different physical and emotional effects. The Victims' Charter, which came into effect on 1 November 2006, sets out principles on how the Victorian criminal justice system should best respond to victims of crime.

The criminal justice system should treat victims fairly.

Victims of crime should be treated fairly by all the parties involved in the case, such as police, the prosecution, and victims' services providers.

The police are required to keep the victim informed of certain aspects of the case.

There are many things that the police should inform a victim, or witness, about. They include the police telling the victim:

- about his or her rights and the services that are available
- how they are progressing with the case, as much as they can
- if a person has been charged with the crime
- any court dates and times, and if the victim will be required as a witness
- if an accused has received bail, and what steps have been taken, or will be taken, to keep the victim safe.

Additionally, the victim should be informed:

- by the prosecutors about how the court system works, including what needs to happen if the victim is called as a witness
- about his or her right to be kept safe in court
- of the right to tell the judge or magistrate about how the crime affected him or her through a Victim Impact Statement, if the accused is found guilty
- of the right to seek compensation from the person who committed the crime and to apply for financial assistance from the government
- that he or she can receive information about an offender sent to prison for a violent crime from the victims' register.

Victim Impact Statements

A Victim Impact Statement is an opportunity for the victim to tell the court how he or she was affected by the crime.

The Victims' Charter enables a victim of an offence to make a statement to the court to help the court determine the sentence of the person found guilty of the offence. Victim Impact Statements are optional. Their purpose is not to describe the events of the crime – this would be covered in the statement made to police. A Victim Impact Statement is about explaining how the crime has personally affected the victim. It could include:

- the *emotional impact* of the crime, such as the victim's general feelings and enjoyment of life
- the *physical impact* of the crime, such as how any injuries from the crime have affected the victim's life
- the *financial impact* of the crime, such as any loss of earnings or expenses caused by the crime
- the *social impact* of the crime, such as how the crime has affected the victim's social life.

Persons other than the **primary victim**, such as family members and friends, can also be classed as victims of the crime and can also be eligible to make a Victim Impact Statement.

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THE VICTIMS OF CRIME ASSISTANCE TRIBUNAL (VOCAT)

The Victims of Crimes Assistance Tribunal was established by the *Victims of Crimes Assistance Act 1996* (Vic). The tribunal operates in every Magistrates' Court of Victoria. VOCAT makes decisions about applications for financial assistance by victims of violent crime that have been committed in Victoria. The money given is designed to help reimburse the victim for the expenses that they have faced as a direct result of the crime.

The Victims of Crime Assistance Tribunal (VOCAT) https://www.vocat.vic.gov.au/.

THE VICTIMS OF CRIME COMMISSIONER (VOCC)

The role of the Victims of Crime Commissioner was established by the *Victims of Crime Commissioner Act 2015* (Vic). The main functions of the Commissioner are to advocate for those who are victims of crime, and to investigate issues that might affect victims of crime when dealing with the criminal justice system and/or government agencies. The Victims of Crime Commissioner undertakes his or her role independently of the Victorian government.

Specifically, the Commissioner has the power to:

- advocate for the recognition, inclusion, participation and respect of victims of crime by government departments, Victoria Police and agencies conducting criminal prosecutions
- inquire into issues that victims may experience with the processes of government departments, agencies, victims' services providers and the justice system
- report to the Attorney-General on issues that are likely to be ongoing and that apply to many victims of crime
- advise the Attorney-General and government bodies on improving the justice system to meet victims' needs.

Currently, the Commissioner is limited to assisting victims of violent crime where the issues are likely to be ongoing and affect many victims of crime.

The current, and inaugural, Victims of Crime Commissioner is Greg Davies APM. He is a former member of Victoria Police and was formally appointed to the role in March 2016.

The Victims of Crime Commissioner (VoCC) https://www.victimsofcrimecommissioner.vic.gov.au/.

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The right to give evidence as a vulnerable witness

Vulnerable witnesses include children, people with a cognitive impairment, victims of sexual assault, and victims of family violence.

Giving evidence in a criminal trial can be particularly distressing for vulnerable witnesses. Vulnerable witnesses include children, people with a cognitive impairment, victims of sexual assault, and victims of family violence.

The *Criminal Procedure Act 2009* (Vic) allows a court to make alternative arrangements for the giving of evidence by vulnerable witnesses in certain circumstances. These arrangements are designed to make the giving of evidence less intimidating.

Vulnerable witnesses are able to give evidence through alternative arrangements, as approven by the court, to help limit the distress that may be felt.

The court may allow a vulnerable witness to give evidence from a place other than the courtroom by using CCTV. This is often used for a witness (and/or victim) of a sexual offence so that he or she does not have to see the accused in person. If the witness attends the courtroom to give evidence, screens can be used to block the witness' view of the accused. The court can also allow the witness to have a person approved by the court beside them to provide emotional support while they give evidence. The court can also:

- specify that only particular people can be in the courtroom while the witness gives evidence
- require legal practitioners not to wear robes
- require legal practitioners to be seated when examining or cross-examining the witness.

Under s 41 *Evidence Act 2008* (Vic), a court may disallow an improper question put to a vulnerable witness.

In addition to these rights, child victims and victims with a cognitive impairment may also be able to give their evidence at a special hearing. The special hearing is an audiovisual recording of all the evidence, including cross-examination and re-examination of the witness. This recording is then played to the jury at the trial. The purpose of a special hearing is to limit the number of times that a vulnerable witness gives evidence.

The right to be informed about the proceedings

A victim must be kept reasonably informed about the progress of a criminal investigation.

Section 8 of the Victims' Charter requires an investigating agency to inform a victim, at reasonable intervals, about the progress of an investigation into a criminal offence unless the victim requests not to be given information, or if disclosure may harm the investigation.

The Victims' Charter requires victims to be provided with certain information from the prosecution.

A victim is to be provided with the following information from the prosecution:

- the charges against the person accused of the criminal offence
- if there are no charges against any person, the reason for this
- any decisions to substantially modify charges, not proceed with some or all of the charges, or to accept a plea of guilty to a lesser charge
- how to find out the date, time and place of the hearing, or the charges against the accused person
- the outcome of the criminal proceeding against the accused person, including any sentence imposed
- details of an appeal if one is initiated.

A victim must also be informed of the court processes and his or her right to attend relevant court proceedings. However, section 336A of the *Criminal Procedure Act 2009* (Vic) states that the court may order the victim to leave the courtroom until they are required to give evidence if the victim is also a witness in the proceeding.

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

Victims who qualify under the *Corrections Act 1986* (Vic) – the offender must have been convicted of a criminal act of violence – are able to apply to receive information about the offender if they are on the victims' register, which has its own set of eligibility criteria (section 17(1) *Victims' Charter Act 2006* (Vic)). Victims who are placed on the register are able to learn of:

The victims' register provides victims with certain information about the offender, including the offender's parole status and their earliest release date.

- the length of the offender's sentence
- the offender's earliest possible release date
- if the length of the offender's sentence changes
- the offender's parole status and conditions
- an offender's transfer to another State of Australia
- an offender's escape from prison
- an offender's death during his or her sentence.

A victim who has been included on the victims' register is able to write a victim submission to the Adult Parole Board. In this submission, the victim is able to express how he or she might be affected by the offender's possible release on **parole**, and ask that the offender does not initiate any contact or be present in the suburbs where the victim lives or works.

Activity 2.4 Folio exercise

The rights of victims

1 Identify two aspects of a case that police should inform a victim about.
2 Describe two impacts of a crime that a victim could describe in a Victim Impact Statement.
3 Explain how the court can aim to make giving evidence less intimidating for a vulnerable witness.
4 Why does the Victims' Charter require the victim to be provided with particular details about the offender? Justify your opinion.

2.5 Factors that affect the achievement of justice

In order for the criminal justice system to operate effectively for both those accused of a crime and the victims of a crime, a sense of justice must be achieved. Despite the best aims of the criminal justice system, factors such as costs, time, and cultural differences can mean that not all parties feel that they have been treated in a just manner.

Cost

The financial cost of accessing the criminal justice system impacts upon our ability to achieve justice. The costs of court fees and legal representation can be prohibitive for many, meaning that access to justice is limited or denied in many cases. These costs rise for indictable offences heard in higher courts, due to the length and complexity of trials.

Court fees and legal representation are too expensive for many people.

The costs of an appeal, if there are grounds of appeal, are an additional expense in achieving justice. VLA is a service that attempts to address this factor, but there are limits on who can qualify for Legal Aid assistance.

Victoria Legal Aid (VLA) can provide legal assistance to those who qualify.

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Time

Victoria Legal Aid https://www.legalaid.vic.gov.au/.

Delays and the backlog of cases also impact upon the criminal justice system's ability to achieve justice for both the accused and the victims of crime.

Criminal pre-trial procedures, particularly committal proceedings, aim to provide a timely resolution of criminal disputes. Committal proceedings, used for indictable offences, aim to ensure that a prima facie case is established before proceeding to trial. This means that a magistrate is satisfied that there is sufficient evidence to support a conviction at trial by a jury. This process is designed to filter out weaker cases, and to resolve more minor issues and administrative matters before the trial. However, some argue that committal hearings in fact add to the length of the matter, particularly for cases that are strong. For more information about committal proceedings, see Chapter 3.

Criminal pre-trial procedures, such as committal hearings, are designed to reduce delays in the criminal justice system.

Additionally, the current overcrowding in Victoria's prisons has been reported to be causing delays in matters being heard. Corrections Victoria is responsible for the transportation of prisoners to court hearings. The increase in prisoner numbers, particularly remand prisoners, has placed increased demand on these services. As a consequence, some prisoners have not been transported to courts in a timely fashion and have missed hearings. These delays in transporting prisoners to court hearings result in cases being delayed, which reduces the criminal justice system's ability to achieve justice for the accused and victims – justice delayed is justice denied.

Cultural differences

Some groups in the community have particular difficulty accessing the criminal justice system. Cultural differences can be a factor affecting the ability of the criminal justice system to achieve justice for an accused, and for victims of crime.

Indigenous Australians

Indigenous Australians have often experienced disadvantage in the criminal justice system.

Indigenous Australians are one group who may experience disadvantage in the criminal justice system. This is due to the discrimination and prejudice that has been experienced by many members of the Indigenous community, including in their dealings with the criminal justice system. These difficulties have been addressed, to some degree, through initiatives such as the Koori Court and the Aboriginal Community Liaison Officer (ACLO) Program offered by Victoria Police. The impact of cultural differences on the ability of the criminal justice system to achieve justice for Indigenous Australians is discussed in more detail in Chapter 3.

Non-English speakers

Parties with limited proficiency in the English language can experience disadvantage.

Cultural and linguistic differences can reduce the ability of the criminal justice system to achieve justice for an offender and/or victims. Some migrants who speak a language other than English, and English speakers with a low proficiency in the English language, may find it difficult to access legal services, understand their rights or give evidence in court. To address this, to at least some degree, the Magistrates' Court provides interpreters, free of charge, for an accused in a criminal matter.

2.6 Recent reforms

Recent changes have been made to try to improve the criminal justice system.

In order to ensure that the criminal justice system achieves the principles of justice, and addresses current issues and demands, reforms need to be made from time to time. Changes made to improve the criminal justice system may come from members of the community, the media, police, the courts, parliament and other stakeholders in the criminal justice system.

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Increasing access

One recent reform that has impacted on the ability of the criminal justice system to achieve justice is the change to VLA's means testing. This recent reform affords more people the right to a fair and unbiased hearing.

More people qualify for legal assistance now that VLA have lifted their thresholds.

In order to qualify for VLA assistance, an applicant must be means-tested. This means that the person applying for legal assistance has his or her income and the value of their assets assessed. This is to ensure that funding goes to those in the greatest financial need (along with other considerations).

As of 1 March 2016, VLA raised the amounts for the criterion of financial eligibility for legal assistance. For example, the amount that has been set as the maximum net income (what a person has left over from their pay after paying their expenses for the week) is $360 per week. Before the change, the amount was $255 per week. This reform, along with the other criteria, means that more people will qualify for legal assistance. Without this reform, those who did not qualify may have put themselves into significant debt or gone without legal advice.

It is reported that this reform will help an extra 700 people annually and cost $5 million over 5 years.

2.7 Recommended reforms

Recommended reforms to the criminal justice system differ from recent reforms, as recommended reforms have not yet resulted in change. These calls for change can, like recent reforms, originate from a range of different stakeholders in the criminal justice system.

Recommended reforms are suggestions to improve the criminal justice system that have not yet been adopted.

Avoiding unreasonable delays

Due to an increase in the number of people being held on remand, significant delays in the transport of prisoners was reported in early 2016. This resulted in a backlog of cases, particularly in the Magistrates' Court. The backlog created unreasonable delays for those charged with criminal offences and being held in remand. To address this backlog, some magistrates released lower-risk offenders on bail, hoping that this would make it more likely that those people would be able to turn up to their court appearances on time. One recommended reform to address this problem was to use video links between the courts and prisons.

NewsReport 2.3

Get me to court on time?

A MEMBER OF A MOTORCYCLE GANG DID NOT APPEAR IN THE Magistrates' Court because Corrections Victoria failed to take him there from Port Phillip Prison. His lawyer asked the Supreme Court to order the authority to get him to court that afternoon. The judge agreed, saying that the man should be taken to court when he was ordered to appear there. The defendant appeared in court that afternoon.

In June 2016, it was reported that Corrections Victoria had been fined in more than 650 cases where prisoners missed criminal proceedings. In the same year the *Justice Legislation (Evidence and Other Acts) Amendment Act 2016* (Vic) was passed. This Act allows for Magistrates' Court hearings involving remand prisoners to be conducted via video link.

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Legal brief 2.2

Does cultural diversity impact on justice?

There are more than 275 cultural and ethnic groups recognised in Australia. Each of these groups has its own unique history – linguistic, ethnic, cultural and religious. People who are culturally and linguistically diverse (CALD) may be disadvantaged in their dealings with the Australian legal system. Studies indicate that fear of crime is disproportionately experienced by CALD communities, and that these fears are linked to hate crimes.

CALD women may arrive in Australia as refugees, immigrants, international students or as unaccompanied minors. Refugee and immigrant women may come from countries where the laws or culture do not recognise the rights of women in relation to domestic violence or sexual offences in the same way as Australian law. In some cultures women who have been the victims of these offences may experience significant shame and guilt.

Migrant and refugee women and the justice system

CALD women, particularly those who are newly arrived, face additional barriers within the justice system. These barriers operate on two levels. First, they face barriers in being able to access the justice system: they just don't know how to go about getting help. Second, they face barriers going through the legal processes and accessing the support services available to victims of crime: again, they may not know that there are services available, and even if they do, they may not be able to use them or be willing to use them.

The consequences of these barriers are that CALD women are:

- less likely to report violence
- less likely to take a complaint to the legal system
- intimidated by the legal processes and procedures
- more likely to disengage with the support services offered.

There is also a tendency for CALD women to under-report crimes committed against them. This may be due to a lack of knowledge of their rights, a lack of knowledge about how to access legal assistance, a negative perception of the role of authority figures in the legal system or not understanding that certain types of behaviour, such as family violence, are criminal offences. These difficulties are further complicated by a lack of understanding of English, reliance on the provision of appropriate interpreters, and a lack of familiarity with court processes and procedures.

Difficulties experienced either in their country of origin or as a refugee can also have a negative impact. These women may have come from countries with limited legal, financial or social support systems. Unaware of the support services that might assist them, they can experience significant isolation within our community. This leaves many women highly vulnerable to abuse by partners, and less likely to report domestic violence or to recognise domestic violence as a criminal offence.

Difficulties accessing the justice system

Studies have indicated a reluctance by CALD women to report cases of domestic violence. They may not necessarily recognise that family violence includes stalking, threatening violence, physical assault and economic abuse, and that these actions are considered criminal offences in Australia. Additionally, some cultures do not see some forms of violence within marriage as a crime. It has also been suggested that a lack of knowledge about legal rights and the overall operation of the legal system make women less likely to access legal services. For instance, some CALD women are reluctant to report a crime because they fear that doing so may mean they need to leave the family home. However, the *Family Violence Protection Act 2008* (Vic) allows victims of domestic violence to remain in the home. A fear of homelessness may lead CALD women to be reluctant to report a crime.

A study funded by inTouch – Multicultural Centre Against Family Violence and by the Victorian Law Foundation, *'I lived in fear because I know nothing'*, noted:

> Women's lack of knowledge about their rights and the way the system works was compounded by illiteracy, low socio-economic status and a lack of accessible information, especially in their own language.

This lack of information makes women vulnerable to anxiety about how legal authorities will respond. Many of these women experience significant social isolation: they avoid confiding in their families because they fear ostracism by their families.

An additional difficulty for some CALD women may be seeing themselves as dependent on their husbands – they have to stay with their husband in order to maintain their residency in Australia. Women on dependent spouse visas may be reluctant to report domestic violence for fear of losing their visa status. Changes in visa status can have serious consequences in terms of access to public housing and income support. These women may fear that reporting offences will result in being deported.

Sometimes reluctance to engage with the legal system may be a consequence of experiences with the law in another country. Women from a CALD background may have negative perceptions of police based on past experiences in their country of origin.

Barriers to going through the justice system

Communication is a major barrier for CALD women going through the legal system. Giving evidence of

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family violence and sexual offending is particularly stressful. In addition to language barriers, court processes present a significant challenge. The '*I lived in fear because I knew nothing*' report noted:

> There was evidence that women often lacked proper knowledge of the proceedings in court, and had insufficient emotional support to protect them from the intimidating aspects of court. Being unprepared for the lengthy delays, which are expected in court, and confused by the processes, which are never explained to them in detail, CALD women can easily become discouraged by the experience and withdraw prematurely.

A number of problems relating to the use of interpreters have been identified. These include:

- engaging inappropriate interpreters
- engaging interpreters with the wrong language or dialect
- a failure to consider the impact of the gender of the interpreter.

Recommendations for change and recent changes

The Victorian Law Reform Commission (VLRC) and the Royal Commission into Family Violence have looked at issues limiting access to justice for CALD women.

Victorian Law Reform Commission

The VLRC completed their report on victims of crime in 2016. That report recommended that the *Victims' Charter Act 2006* (Vic) be amended to require prosecuting agencies to offer conferences before and after important court dates for specific groups, including victims whose first language is not English. Important court dates included committal hearings, trials and retrials, sentencing hearings in the Supreme Court and County Court and appeals to the Court of Appeal.

In 2016, the State government announced that it would provide $330,000 for specialist family violence responses for CALD victims and perpetrators in the corrections system.

Royal Commission into Family Violence

Following the report of the Royal Commission into Family Violence, the Commonwealth government announced immediate measures to improve support and services for women. This included $15 million to establish specialised domestic violence units to provide access to coordinated legal, social work and cultural liaison services for women in a single location, and allowing legal services to work with local hospitals, including for women from CALD communities.

Judicial Council on Cultural Diversity

The Judicial Council on Cultural Diversity is composed of members of the judiciary, with select representation from legal and community bodies. In 2016, the Council released its consultation report – 'The Path to Justice: Migrant and Refugee Women'. Recommendations in the report included:

- The provision of joint community education forums for migrant and refugee communities.
- Magistrates' Courts should provide education sessions for women applying for intervention orders.
- All courts should introduce Court Cultural Liaison Officers.
- Courts should invest in comprehensive cultural training for all court staff.
- Courts should improve signage and information available upon arrival at court.
- All courts should have court interpreter policies that are publicly available and easily accessible, including:
  - who is responsible for arranging and paying for an interpreter;
  - procedures to identify when an interpreter is needed; and
  - procedures for ensuring that appropriate interpreters are used.

Victoria Legal Aid

VLA produces legal resources in a range of community languages. In 2017 VLA released an education kit: 'Australian law in orientation'. The kit is designed to help educators, teachers and community workers teach people who have been in Australia for less than 6 months, and/or who have little or no English, and/or very basic legal literacy.

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Activity 2.5 Case study

Cultural diversity and justice

Carefully read 'Does cultural diversity impact on justice?'. Evaluate the ability of the criminal justice system to achieve justice for women from CALD backgrounds. Prepare a case study report that addresses the following issues:

1 What are the rights of victims of crime?
2 List the difficulties that a woman from a CALD background may experience in exercising her rights as a victim of crime.
3 What are the principles of justice? How do the cultural differences of women from CALD backgrounds limit the ability of the criminal justice system to achieve these principles for them if they are victims of crime?
4 Discuss one recent change and one recommendation for change that will, or would, enhance the ability of the criminal justice system to achieve the principles of justice for women from a CALD background.

Activity 2.6 Research report

Victims of crime

On 22 November 2016, the Victorian Law Reform Commission (VLRC) report 'The Role of Victims of Crime in the Criminal Trial Process' was tabled in the Victorian parliament. (For more information on the role of the VLRC and this report see Chapter 10.) Go to the Report.

The Victorian Law Reform Commission's report: 'The Role of Victims of Crime in the Criminal Trial Process' http://lawreform.vic.gov.au/projects/victims-crime-criminal-trial-process/victims-crime-criminal-trial-process-pdf.

Select **one** of the following chapters of the report:

Chapter 5: Respect	• The Victims' Charter principle • Respect in the courtroom
Chapter 6: Information and support	• Relationship between victims and the prosecution • Legal advice and assistance for victims
Chapter 7: Participation	• Consultation throughout the criminal trial process • Participation and substantive rights in court • Equal participation in the court process • Participation in restorative processes
Chapter 8: Protection	• Victims as witnesses: reducing trauma and intimidation • Victims privacy: protection from unjustified interference

Choose one recommendation made by the VLRC in the selected chapter and prepare a case study addressing the following questions:

1 Why do you think this recommendation is important?
2 To what extent does the recommendation seek to improve the rights of victims?
3 To what extent will the implementation of this recommendation improve the ability of the justice system to achieve justice for victims?

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Key point summary

Do your notes cover all the following points?

- ❏ The principles of justice and how they relate to criminal law
  - Fairness – In the Victorian criminal justice system, natural justice (or procedural fairness) needs to be upheld. This includes the rule against bias and the right to a fair hearing.
  - Equality – The criminal justice system seeks to achieve equality by treating the accused and victims of crime uniformly. It is recognised that certain participants in the criminal justice system need to be assisted with specialised procedures and facilities.
  - Access – Affording the cost of the criminal justice can be difficult for many, and it affects their ability to access the system. VLA aims to overcome this barrier, for those who qualify for assistance. Access to information is also important for those accessing the criminal justice system.
- ❏ Key concepts of the criminal justice system
  - The distinction between summary and indictable offences
    - A crime is an act or omission committed against the community at large that is punishable by law. Criminal offences are summary offences, indictable offences, or indictable offences tried summarily.
    - The purposes of criminal law include punishing the offender and protecting the community.
    - There are numerous procedures that need to be followed in a criminal law matter. There are pre-trial procedures, trial procedures, and post-trial procedures.
  - The burden and standard of proof in a criminal trial. The burden of proof is usually held by the prosecution in a criminal trial, but in some circumstances the burden can be reversed onto the plaintiff. The standard of proof in a criminal trial is 'beyond reasonable doubt'.
  - The presumption of innocence. A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.
- ❏ Rights of the accused
  - The right to be tried without unreasonable delay.
  - The right to a fair and unbiased hearing in pre-trial hearings and at trial.
  - The rights of the accused are protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
  - There is a right to a trial by jury for Commonwealth and Victorian indictable offences.
- ❏ Rights of victims
  - The principles of the *Victims' Charter Act 2006* (Vic).
  - Things that a victim should generally be informed of include:
    - his or her rights
    - services available
    - the progress made on the case
    - if a person has been charged with a crime
    - court dates and times
    - whether he or she will be required as a witness
    - if the accused has received bail and, if so, the steps taken to keep the victim safe
    - the operations of the court system
    - the right to be kept safe in court
    - the right to provide a Victim Impact Statement if an offender has been convicted
    - the right to seek compensation
    - the right to receive information from the victims' register about an offender sent to prison for a violent crime.

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- The role of the following in relation to the rights of victims
  - Victim Impact Statements
  - Victims of Crime Assistance Tribunal
  - Victims of Crime Commissioner
  - the right to give evidence as a vulnerable witness
  - the right to be informed of the status of proceedings
  - the right to be informed of the release date of the accused
  - the victims' register.
- Factors that impact on the ability of the criminal justice system to achieve justice: fairness, equality and access include:
  - costs
  - time
  - cultural differences.
- Some recent reforms aim to overcome factors that reduce the ability of the criminal justice system to achieve justice: equality and fairness
- Recommended reforms to overcome factors that reduce the ability of the criminal justice system to achieve justice: equality and fairness

End-of-chapter questions

Revision questions

1 What are the two elements of a crime?

2 What is a strict liability offence? Provide one example.

3 Outline one purpose of criminal law.

4 When can an indictable offence be heard summarily?

5 How does the burden of proof differ from the standard of proof?

6 The presumption of innocence is the most important right of an accused. Do you agree? Explain.

7 Explain how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of an accused.

8 Why is a right to a trial by jury thought to be essential in achieving justice?

9 Explain how the *Victims' Charter Act 2006* (Vic) protects the rights of a victim.

10 What can be included in a Victim Impact Statement?

11 Outline the role of the Victims of Crime Assistance Tribunal (VOCAT).

12 How does the *Criminal Procedure Act 2009* (Vic) give rights to vulnerable witnesses?

13 What information can be obtained from the victims' register?

Practice exam questions

1 Identify the standard of proof in a criminal trial. [1 mark]

2 Define 'jury'. [1 mark]

3 Explain the difference between a summary offence and an indictable offence. [2 marks]

4 Explain the right to a trial by jury. [4 marks]

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5 Outline the source or sources of two rights of an accused and two rights of victims. [8 marks]

6 The following statement contains errors. Identify three errors and outline why each is incorrect. [6 marks]

Shannon has been charged with a minor traffic offence. His lawyer, Sam, advises him that because it is a summary offence, his case will be determined by a judge and jury. Shannon is nervous, because he knows that he has the burden of proof to prove his innocence. During the hearing, despite Sam's best efforts, the judge refused to listen to any of the arguments or read any of the evidence, stating: 'I've already made up my mind just by looking at you! You're guilty. The law doesn't require me to give you a fair hearing if I feel that it's a waste of my time!'

7 Using examples, explain what is meant by the term 'vulnerable witness'. [4 marks]

8 To what extent are the rights of vulnerable witnesses protected in the criminal justice system? Justify your response. [6 marks]

9 Explain how the presumption of innocence is protected in the criminal justice system. [4 marks]

10 Describe how a victim of crime could influence how the court determines the sanction and/or sentence of an accused. In your opinion, do you believe that this is fair for the accused? Justify your position. [8 marks]

11 'The rights of victims are always more important than the rights of the accused.' Discuss the extent to which you agree with this statement. In your response, explain the right of a victim to be informed of the status of proceedings. [8 marks]

12 'The criminal justice system often fails to achieve justice because of its failure to account for the cultural differences of the accused.' Discuss this statement. In your response, outline one reform to the criminal justice system that affects the accused. [8 marks]

13 Discuss the extent to which one recommended reform could overcome one factor relating to the rights of the accused. In your response, explain one recent reform that has enhanced the ability of the criminal justice system to achieve the principles of justice. [10 marks]

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CHAPTER 3
DETERMINING A CRIMINAL CASE

Victoria is a society of social, economic and cultural diversity, and like all such societies, needs a range of institutions and personnel who are involved in, or provide assistance to those involved in, the criminal justice system. This chapter looks at the procedures that have been introduced to try to ensure justice in Victoria's criminal system. Criminal pre-trial procedures are addressed, including plea negotiations and sentencing indications. The role of the court system is explored, along with recent reforms and recommendations for change.

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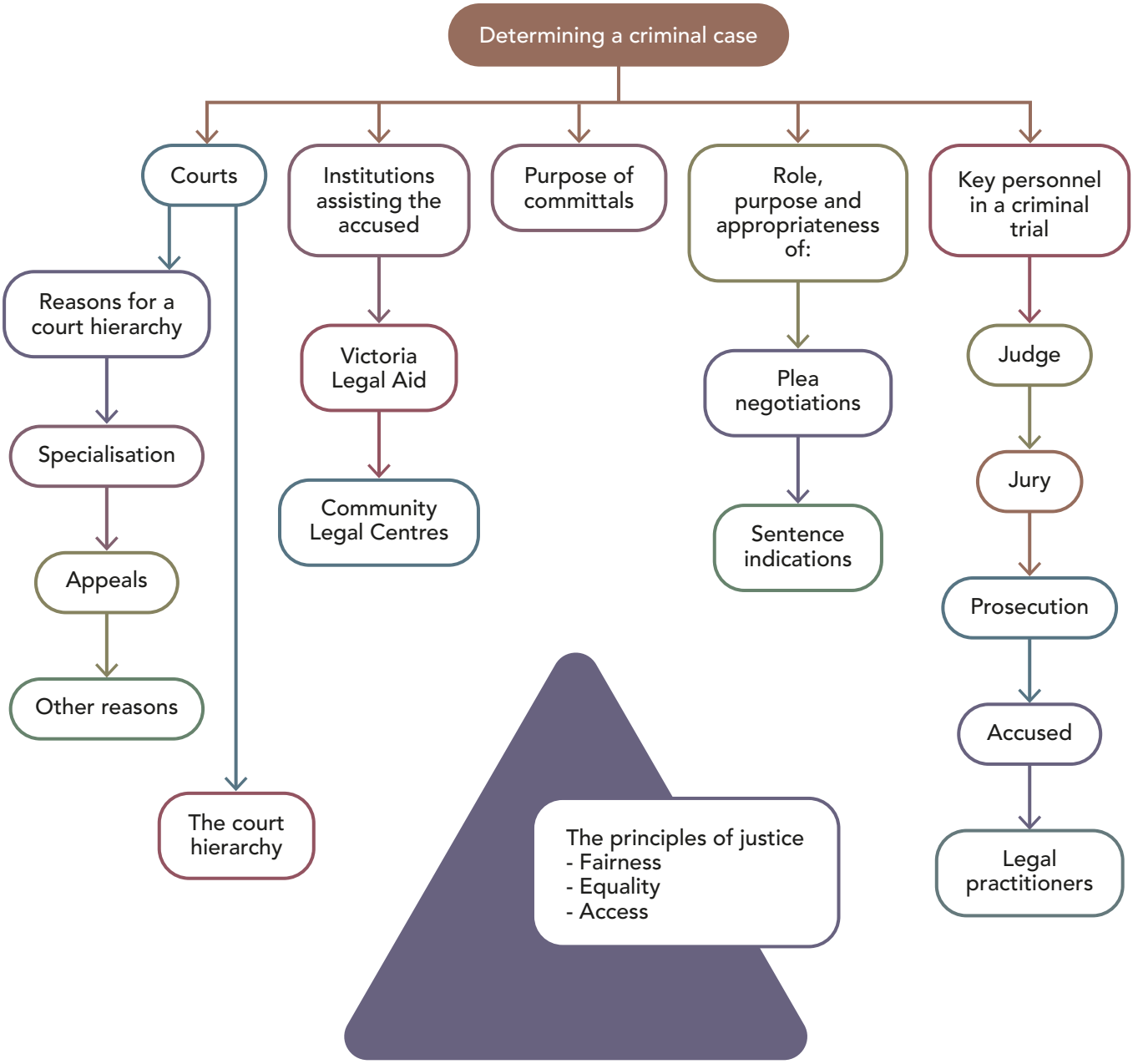

Key terms

accused a person charged with an indictable offence and committed for trial

acquittal when a defendant is found not guilty by a court

appellate jurisdiction a court with the power to hear and determine an appeal

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to commit the accused to trial in a higher court

court hierarchy the ranking of courts from inferior to superior

custodial sentence a sentence handed down by a magistrate or judge that consists of the custody of an accused in a prison or another institution (such as Thomas Embling Hospital)

indictable offence heard summarily an indictable offence that can be tried before a magistrate without a jury

jurisdiction which courts have the power to hear and determine which offences

offender a person who has been convicted of breaching a criminal law

original jurisdiction the authority of a court to hear and determine a case in the first instance

plea negotiation where the defence counsel and prosecutor negotiate as to which charges will stand up in court and/or the defendant's plea

pro bono legal work undertaken for free

sentencing indication where the defence requests a statement from the court as to whether the accused is likely to receive a custodial or a non-custodial sentence; if it is custodial, the indication can include what the sentence is likely to be

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3.1 The criminal justice system

Criminal law sets out the boundaries of acceptable behaviour of individuals in society for the protection and benefit of the community. When a law is broken, the criminal justice system, on behalf of the state, and thus of society as a whole, uses its processes, institutions and personnel to ensure that the correct person is charged and dealt with in a manner that is effective, but also fair and equitable. The **accused** must have access to services to ensure that their side of events is properly heard.

Victoria's criminal justice system is based on the presumption of innocence, meaning that the accused person is presumed innocent until their accuser, the prosecution, proves them guilty 'beyond reasonable doubt' to a magistrate (Magistrates' Court) or a jury (County or Supreme Court). Because the rules of evidence and procedures in our court system are very strict, it is regarded as necessary for the accused to have legal representation. Having the advice of a solicitor and the representation of a barrister in court is important for both pre-trial and trial procedures.

In most instances, offences come to the attention of the police in the normal course of their duties, or are reported by the public.

There are a number of procedures can be used during the investigation of a criminal offence and leading up to a court hearing.

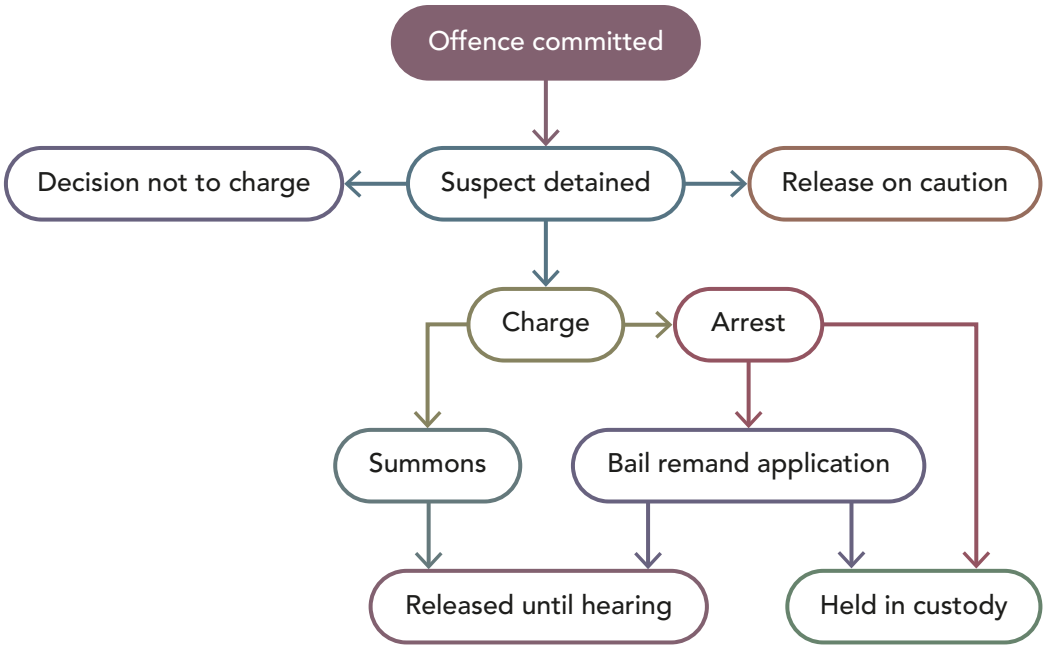

Figure 3.1 Criminal pre-trial procedures

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Types of crimes

How a crime is dealt with and what court it will be heard in depends on the type of crime. There are two main types of offences – summary and indictable offences.

Criminal offences are either summary offences or indictable offences.

There are some indictable offences that, with the consent of the accused, may be heard summarily in a Magistrates' Court. These are referred to as **indictable offences heard summarily.**

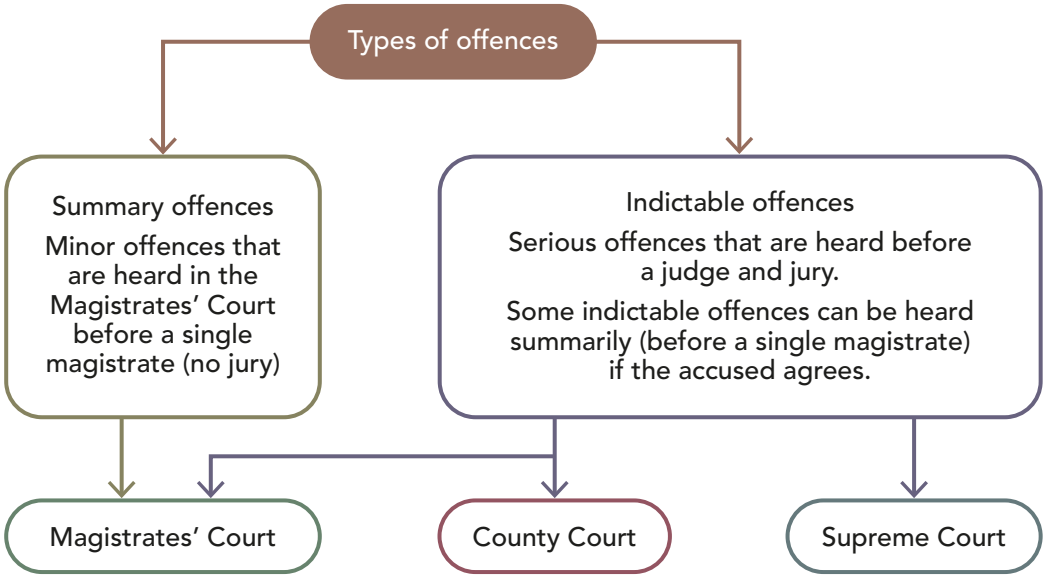

Figure 3.2 Types of offences

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3.2 The Victorian court system

Victorian courts are arranged in a hierarchy. Courts are ranked from inferior to superior based on their **jurisdictions**. This provides a much more efficient process, as each level of court hears similar types of disputes, deals with them in a similar manner and has personnel who are specialists in the particular areas of law that they work in. This plays an important role in reducing delays.

Each State has its own hierarchy of courts that hear and determine matters relating to State law. In addition, there are federal courts that deal with matters that have a federal jurisdiction, such as the Family Court. The High Court of Australia is our highest court. It deals with the most complex disputes, including the interpretation of the Constitution and appeals.

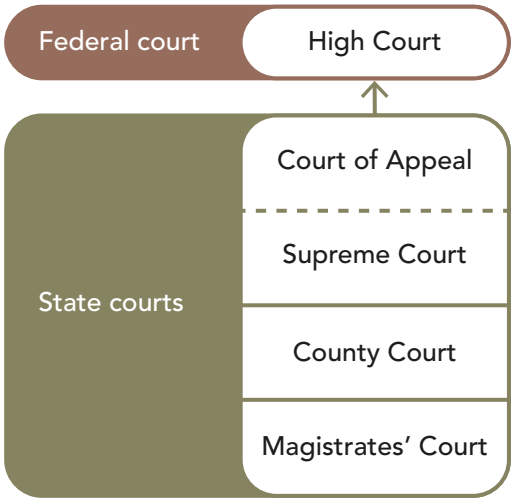

Figure 3.3 Court hierarchy

A court hierarchy is a ranking in order.

There are two main types of jurisdictions:

Original jurisdiction means the areas of law that a court is able to hear and determine a case at first instance (the first time the case is heard). If a person pleads not guilty they will be tried in the court that specialises in that type of offence; for example, the Supreme Court (Trial Division) will hear murder trials.

Original jurisdiction means the areas of law that a court is able to hear and determine a case at first instance (the first time the case is heard).

Appellate jurisdiction is the power of a court to review decisions made by lower courts. If a party is not satisfied the correct decision has been made by a court, they can apply to have an appeal heard by a superior court. These requests will usually be granted if there are suitable grounds.

Appellate jurisdiction is the power of a court to review decisions made by lower courts.

Reasons for a court hierarchy

Two key reasons for the Victorian **court hierarchy** in determining criminal cases are specialisation and to provide avenues for appeal.

Specialisation

A court hierarchy allows each court to develop the skills, expertise and processes to deal with specific types of disputes.

A court hierarchy enables the workload of the courts to be divided. Each court is limited to a specific area of jurisdiction in which it has expertise. The court processes are also streamlined to provide for specialised legal personnel and legal procedures. The judge or magistrate in each court can develop a specialised understanding of the law with respect to the types of cases that are determined in that particular court.

Appeals

The court hierarchy allows for a system of appeals to review the decisions of lower courts.

The right to appeal is fundamental to the concept of justice and fairness. A hierarchy allows an individual to appeal a case to a higher court. This would not be possible without a court hierarchy. People who believe that they have grounds for an appeal have the opportunity to have their case heard again in a superior court by a judge with specialist knowledge and expertise. The judge in the superior court is able to uphold the decision of the inferior court, or reverse the decision of the inferior court – this may create a precedent.

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CHILDREN'S COURT – SPECIALIST COURT

The Children's Court has two divisions: a Criminal Division and a Family Division.

The criminal jurisdiction of the Children's Court is to hear and determine summary and indictable offences committed by persons from the age of 10 years to under 18 years at the time of the offence and under 19 years at the time of the hearing. It does not hear cases of murder, manslaughter, arson causing death, or culpable driving causing death (these are heard in the Supreme Court (Trial Division) or the County Court).

The court has the jurisdiction to also hear and determine committal proceedings for all charges against children for indictable offences, bail applications, and breaches and/or variations of sentencing orders.

The Children's Court also has a Koori Division to hear matters relating to criminal offending by Indigenous children and young people, other than sexual offences. The child must identify as Aboriginal or Torres Strait Islander and must plead guilty or have been found guilty of criminal offences and consent to participate in the process. Two Aboriginal Elders or Respected Persons participate with the presiding judge or magistrate in the sentencing conversation. However, the determination of the sentence remains the judge or magistrate's responsibility.

The President of the Children's Court is appointed from the County Court Bench. Magistrates in the Children's Court are trained and supported by a registrar, counsellors and court liaison officers.

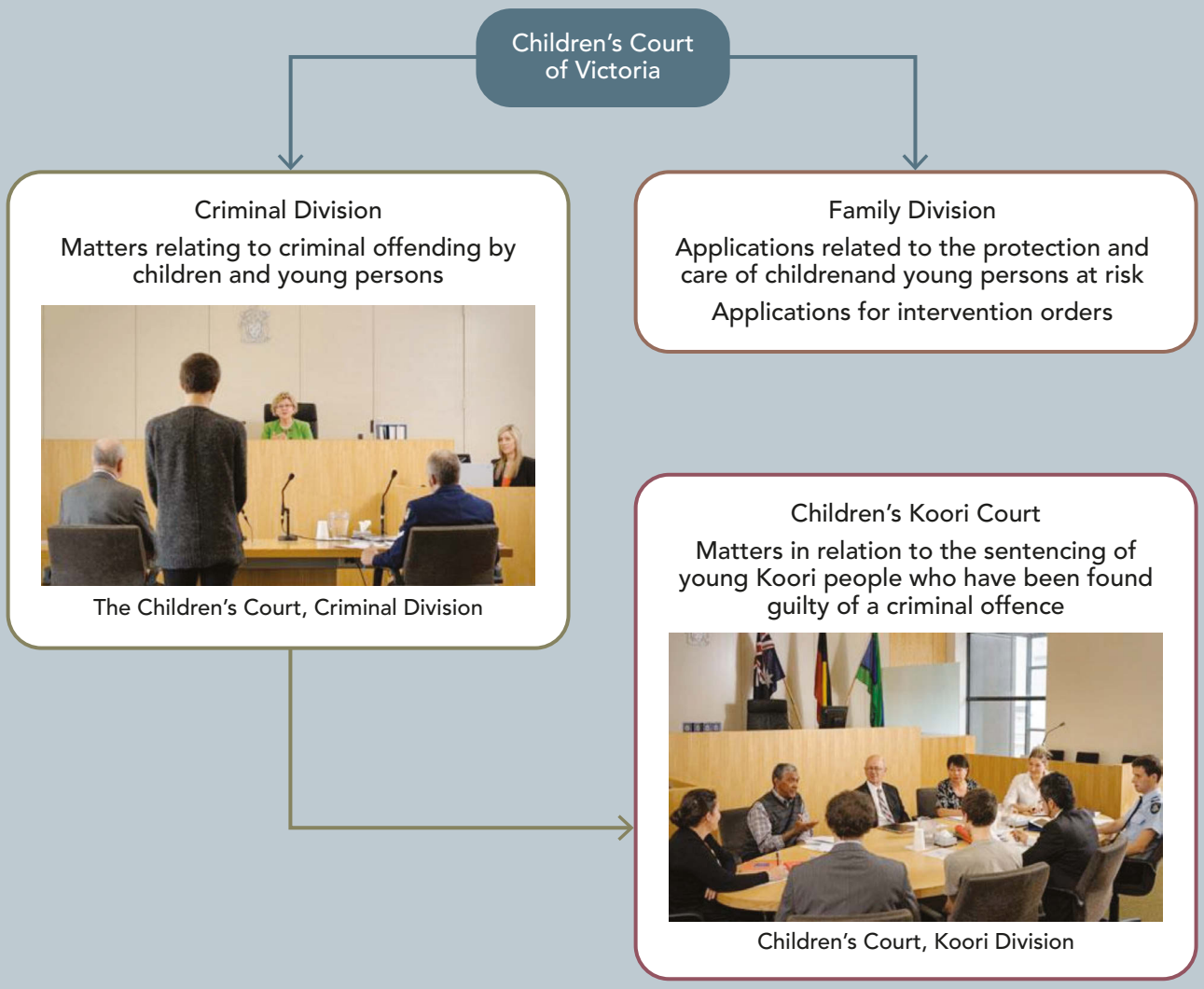

Figure 3.4 Children's Court of Victoria and divisions

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Other reasons for a court hierarchy

Administrative convenience

A court hierarchy provides for the most efficient use of court resources and avoids delays.

A court hierarchy makes efficient use of the limited financial and physical resources available for criminal cases. A hierarchy is administratively convenient because it provides a means of allocating cases quickly, thus reducing the likelihood of delays. Summary offences can be allocated to the Magistrates' Court, where they can be heard relatively quickly. More complex indictable matters generally take longer to hear. These cases are heard in higher courts by judges with the expertise to deal with such matters.

Doctrine of precedent

A court hierarchy is necessary for the doctrine of precedent to operate.

The operation of the doctrine of judicial precedent is dependent on a hierarchy of courts. Precedents are new legal principles established in the superior courts. The decision of a superior court is binding on all courts lower in the hierarchy in cases where the facts are similar. An important advantage of the doctrine of precedent is that it provides for consistency in laws.

Time and money

A court hierarchy allows minor cases to be heard relatively quickly and in a less costly manner.

Determining a criminal case can be a costly and time-consuming process. A court hierarchy enables summary offences to be dealt with relatively quickly and inexpensively in the Magistrates' Court rather than having them determined in the County Court or Supreme Court. A visit to the local Magistrates' Court will illustrate how quickly some cases can be resolved: on any given day, it may hear many more cases than the County Court or Supreme Court could hear in days, weeks, or even months.

Expertise and experience

A court hierarchy allows cases to be allocated to courts with the appropriate expertise and experience.

A court hierarchy enables more serious, difficult, technical or complex cases to be heard by experienced and specially qualified judges. Cases concerning murder are heard in the Supreme Court (Trial Division). Supreme Court judges have many years of experience as lawyers before their appointment. The parties to cases benefit from having highly qualified judges appointed to their case. Appeal cases can be particularly complex. These cases demand an experienced and well-qualified judge.

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Minor matters determined locally

A court hierarchy also allows for the idea of a 'local' court to settle minor disputes. Usually, minor matters are heard in the Magistrates' Court closest to the scene of the alleged offence.

A court hierarchy permits minor cases to be heard in local courts in local areas.

Table 3.1 Criminal jurisdictions of Victoria's courts

Court	Original criminal jurisdiction (and court composition)	Appellate criminal jurisdiction (and court composition)
High Court	Federal matters (one justice)	Appeals from a single justice of the High Court Appeals from the Full Court of State Supreme Courts – in Victoria, appeals from the Court of Appeal (at least two justices)
Supreme Court of Victoria (Court of Appeal)	No original jurisdiction	Appeals from a single judge of the Supreme Court (Trial Division) or County Court
Supreme Court of Victoria (Trial Division)	The most serious indictable offences, such as murder (one justice and, where the plea is 'not guilty', a jury of 12)	An appeal on a point of law from a Magistrates' Court (one justice)
County Court of Victoria	Majority of serious indictable offences (one judge and, where the plea is 'not guilty', a jury of 12)	Appeals on matters of fact or sentence from the decision of a magistrate (one judge)
Magistrates' Court	Summary offences Indictable offences heard summarily Committal proceedings Warrants Bail applications (one magistrate)	No appeals, being the lowest court in the hierarchy

3.3 State courts

Magistrates' Court

The Magistrates' Court is presided over by a single magistrate. In Victoria, the Magistrates' Court is the lowest court in the hierarchy. It has original jurisdiction over criminal matters that are summary offences. The Magistrates' Court is responsible for processing 90% of all criminal cases. There are 10 metropolitan Magistrates' Court and 41 regional Magistrates' Courts in Victoria. Being the lowest court on the hierarchy, the Magistrates' Court cannot hear appeals. (However, in cases where the defendant was not present at the time of the hearing, the defendant can apply to have their case reheard by the court.)

The Magistrates' Court is the lowest court. It has original jurisdiction over criminal matters that are summary offences.

The Magistrates' Court hears the following, in relation to criminal offences:

- summary offences
- indictable offences heard summarily
- committal hearings.

http://www.magistratescourt.vic.gov.au/contact-us will allow you to find your closest court. A virtual tour of the Magistrates' Court is available on the site.

Summary offences

All summary offences are heard in the Magistrates' Court. Summary offences are minor offences, such as:

- traffic offences such as careless driving, unlicensed driving, drink driving
- minor assault
- property damage
- offensive behaviour.

The Magistrates' Court hears summary offences.

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Summary offences are listed in Acts of Parliament. In Victoria, these include *Road Safety Act 1986* (Vic), *Summary Offences Act 1966* (Vic), *Firearms Act 1996* (Vic), *Prostitution Regulation Act 1986* (Vic) and the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). There is no right to trial by judge and jury for these offences.

Indictable offences heard summarily

The Magistrates' Court hears indictable offences summarily.

Indictable offences are more serious criminal offences, such as murder, manslaughter and treason. These crimes are listed in the *Crimes Act 1958* (Vic). Every person charged with an indictable offence has the right to a trial by a judge and jury.

However, with the consent of the defendant, some indictable offences may be heard summarily in the Magistrates' Court. The indictable offences that may be heard summarily in a Magistrates' Court are those that are:

- listed in Schedule 2 of the *Criminal Procedure Act 2009* (Vic), including drug offences, robbery, burglary and handling stolen goods
- punishable by terms of imprisonment up to 10 years (level 5) or a maximum fine of $186,552 (level 5) or both.

For an indictable offence to be tried summarily, three elements must be satisfied:

- The prosecutor or the defendant must apply to have the case dealt with summarily (the court can also decide to deal with the matter summarily).
- The court must be satisfied that the matter is suitable to be determined summarily.
- The defendant must consent to the court dealing with the matter summarily: on the day of the hearing, the court will ask the defendant, 'Do you consent that the charge against you shall be tried by us or do you desire that it shall be sent to trial by a jury?'

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WHY HAVE YOUR CASE HEARD IN THE MAGISTRATES' COURT?

The advantages of having a matter prosecuted in the Magistrates' Court include:

- The matter will be dealt with relatively quickly and inexpensively, as compared with being tried in the County Court. This is particularly important if the defendant is remanded in custody until the matter is dealt with by the court.
- If the defendant is found guilty by the court, the maximum penalty that can be issued by a Magistrates' Court is less than the maximum penalty that a judge of the County Court can hand down. A magistrate can sentence up to 2 years per conviction with a total sentence of 5 years.
- The Magistrates' Court is less formal than the County Court. While representation by a lawyer is advisable, it is not absolutely necessary.
- Time delays are generally less when going to the Magistrates' Court than when going to the County Court. This can save costs. Costs can also be saved if your solicitor can also appear for you in the Magistrates' Court; in the Country Court you generally need a barrister as well as your solicitor.

Committal proceedings

More serious indictable offences are prosecuted in the County Court or the Supreme Court, depending on the nature and seriousness of the crime. However, before such a case is brought to trial, a hearing (called a committal hearing) is conducted in the Magistrates' Court. The hearing is to establish whether there is evidence of sufficient weight to support a conviction by a properly instructed jury in the County Court or the Supreme Court.

The Magistrates' Court hears committal proceedings to determine if there is evidence of sufficient weight to support a conviction in a higher court.

If there is not sufficient evidence against the defendant to justify the case being sent to trial in a higher court, the case is dismissed and the defendant is released.

If a magistrate believes there is sufficient evidence to support a conviction, the matter is sent for trial in a higher court. The accused will be remanded in custody or granted bail until the trial.

For further details on committal hearings, see page 77.

Other matters heard in the Magistrates' Court

Bail applications

When a suspect has been taken into custody and charged by the police, he or she can apply for bail. The Magistrates' Court can hear the suspect's application for bail. Applications for bail can be made at various stages in criminal cases, and bail can also be granted at a police station, or by a bail justice. In most instances, a bail justice will decide bail. Judges in the County Court or Supreme Court also can hear bail applications. Following the tragic events in Bourke Street Mall in January 2017 (the alleged offender was out on bail), the system of bail justices was reviewed. If an application for bail is not successful, the suspect will be held in remand.

The Magistrates' Court will hear bail applications.

Warrants

A warrant is a legal document used by the court to authorise a particular act. For instance, an arrest warrant allows a police officer to arrest and detain a suspect. All warrants, other than a search warrant, may be issued by a registrar or a magistrate. A search warrant can only be issued by a magistrate.

The Magistrates' Court can issue warrants.

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WHAT WARRANTS ARE ISSUED BY THE MAGISTRATES' COURT?

The Magistrates' Court has the power to issue the following types of warrants:

- Warrant to arrest
- Remand warrant
- Search warrant
- Warrant to seize property
- Warrant to imprison
- Warrant to detain in a youth training centre
- Penalty enforcement warrant for unpaid fines.

Appeals from the Magistrates' Court

An appeal against conviction or sentence from the Magistrates' Court is heard in the County Court.

An appeal on a point of law in criminal cases decided in the Magistrates' Court is heard in the Supreme Court (Trial Division).

In criminal cases, the County Court can hear appeals against a conviction or against a sentence. An appeal against a sentence is conducted as a rehearing of the case and a 'stay of sentence' applies. In other words, the sentence handed down by the Magistrates' Court is suspended until the case is heard.

The Director of Public Prosecutions (DPP) also has the right to appeal against a decision made by a magistrate. The DPP may, for instance, appeal against the leniency of a sentence handed down by a magistrate.

In hearing an appeal from a Magistrates' Court in a criminal case the County Court may decide to:

- reduce the sentence
- increase the sentence
- set aside the conviction and dismiss the case.

For more information on the Magistrates' Court, go to http://www.magistratescourt.vic.gov.au.

Either party may appeal to the Supreme Court on a point of law. In most instances a single justice of the Supreme Court (not the Court of Appeal) will hear the appeal. The judge in the Supreme Court may decide:

- to discharge the appeal and allow the decision of the magistrate to stand
- that the decision of the magistrate was an error in law and quash or overturn the magistrate's decision
- to send the matter back to the Magistrates' Court, directing the magistrate to apply the law as stated by the Supreme Court.

MAGISTRATES' COURT

Where is the court?

The Magistrates' Court is a local court. There are Magistrates' Courts throughout Victoria, in both metropolitan and regional areas.

What types of criminal cases does it hear?

The Magistrates' Court hears criminal matters: summary offences, indictable offences heard summarily, committal proceedings, bail applications and warrants.

Can the court hear appeals?

No.

Who presides in the court?

Magistrate.

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Legal brief 3.1

What is a 'problem-solving' court?

The Magistrates' Court is known as a 'problem-solving court' as it has a range of specialist courts and court support services. The initiatives used in these specialist courts and support services aim to help all those who come in contact with the court system, including the accused.

It is clear that some offences can be caused by people who are experiencing social or cultural disadvantage – disability, substance abuse, cognitive impairment or mental illness, for example. These issues can lead to offending or other anti-social behaviour. By addressing the underlying issues, the court is seeking a longer-term fix which is more effective than applying sanctions.

There are several reasons why our courts are looking towards a more problem-solving approach. They include:

- increasing frustration on the part of the courts and the public with traditional approaches to case processing
- increasing court workloads
- a growing prison population
- a breakdown in the social and community institutions that have supported individuals in the past
- the difficulties faced by courts and correctional authorities in providing **offenders** with adequate or effective services
- the realisation that reoffending (recidivism) – caused by underlying physical, psychological, social or economic circumstance – is probably more effectively and economically dealt with by social intervention than by harsh sentences.

In dealing with criminal matters, the Magistrates' Court includes, amongst others, the following specialist divisions.

Drug Court

The creation of this specialist court was in response to the failure of traditional criminal justice measures to deal with drug and alcohol offending. It also aimed to improve the safety of the community by focusing on the rehabilitation of offenders and to provide assistance in reintegrating them into society.

The Drug Court (DCV), which sits at the Dandenong Magistrates' Court and the Melbourne Magistrates' Court, is concerned with the sentencing and supervision of the treatment of offenders:

- with drug and/or alcohol dependency
- who have committed an offence under the influence of drugs or alcohol
- who have committed an offence to support a drug or alcohol habit.

The DCV is not available to anyone who has inflicted actual bodily harm or committed any sexual offences. It is a sentencing court, so offenders must plead guilty to the drug-related crimes. The aim of the DCV is to:

- rehabilitate the offender
- reduce the level of criminal activity
- reduce the health risks associated with the offender's dependency.

A drug treatment order can include both treatment with supervision and a **custodial sentence**, although the sentence can be suspended to allow treatment. If the offender receives a treatment and supervision order, there can be specific conditions attached to it that relate to the particular circumstances of the individual and/or case. Other conditions will also be applied. They generally include:

- submitting to drug and/or alcohol testing, detoxification or other treatment
- attending the Drug Court when required
- not committing another offence that is punishable by a prison sentence
- undergoing drug and/or alcohol treatment

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- reporting to, and obeying all lawful directions of, the DCV, Drug Court officers and community corrections officers
- giving notice of a change of address
- not leaving Victoria.

The DCV can also order the offender to attend educational, vocational or employment programs, and can order that they do not associate with particular persons.

How effective is the DCV?

In March 2015 an evaluation carried out by KPMG was released. It confirmed the success of the DCV. The following is a sample of its findings:

- 31% reduction in the rate of reoffending within the first 12 months
- 34% reduction in the rate of reoffending within 24 months
- 67% reduction in the more serious classified offences
- 90% reduction in the number of drug trafficking offences
- 54% decrease in assaults with a weapon
- 70% reduction in burglary and deception offences.

Costs of the Court and program were found to be comparable to other similar services. The DCV was found to be cost-effective compared with putting offenders through the traditional court system, where many would be imprisoned.

The conclusion was that the DCV continues to deliver positive outcomes for the community and participants. In 2016 the government announced the expansion of the Drug Court to Footscray, Northcote, St Kilda, Brunswick and Coburg.

Koori Court

The Koori Court is part of the Victorian government's plans to reduce the overrepresentation of Aboriginal people in the justice system, both as offenders and victims. Koori Court divisions operate in the Magistrates' Court, County Court and the Children's Court. In 2016 a County Koori Court was opened in Mildura.

The Koori Court allows the participation of the Indigenous community in the court process. The magistrate is still in charge of the proceedings and will make the final decision on sentencing, but Elders and Respected Persons, a Koori Court officer, the defendant and their family can all contribute during the court hearing. The victim can also be present. It operates in a less formal setting, usually at a round or oval table that has the accused and their family and lawyers sitting alongside the magistrate, Elders or Respected Persons, and other relevant people. Participants speak in 'plain English' rather than legal jargon. Issues relating to the offence and sentence are discussed as a group. To appear before a Koori Court, the offender must identify as an Aboriginal or Torres Strait Islander and must have pleaded guilty to the charges, because it is a sentencing court. The court does not hear sexual offences.

The Koori Court was established so that the Indigenous community might better engage with the justice system. It aims to help offenders address the causes of their offending and so to prevent them reoffending.

Family Violence Court

The Family Violence Court deals with both the offender and victim. It aims to:

- make access to the court easier
- promote the safety of people affected by violence
- increase the accountability of people who have used violence against family members and encourage them to change their behaviour
- improve the protection of children exposed to family violence
- make the process of applying for an intervention order easier, by having support services available to improve victims' safety and providing assistance to overcome the trauma of family violence.

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The magistrate can also hear related criminal justice matters, including bail applications and pleas, at the same time as hearing intervention order cases.

The Criminal Justice Diversion Program

This program provides mainly first-time offenders with the opportunity to avoid a criminal record by complying with various conditions that benefit the offender, the victim and the community as a whole.

The benefits of the program include:

- appropriate restitution being made to the victim, including letters of apology
- preventing reoffending with assistance from counselling and/or treatment
- avoiding a criminal record and assisting in the offender's rehabilitation
- helping local community and charity projects with voluntary work and donations.

To be eligible:

- the offence must be tried summarily
- the offence must not be subject to a minimum or fixed sentence/penalty (except demerit points)
- the accused must take responsibility for the offence
- the prosecution must consent for the matter to proceed by way of Diversion.

Justice Centres – Neighbourhood Justice Centre

The Neighbourhood Justice Centre (NJC) is a multijurisdictional court for the City of Yarra. It has, in its criminal jurisdiction, a Magistrates' Court, a Children's Court (criminal division) and the Victims of Crime Assistance Tribunal (VOCAT). Its aim is to provide new ways of dealing with crime and other social disorder, disadvantage and conflict in the local area. It works to create a more integrated, responsive and accessible justice system by engaging the local community and addressing the underlying causes of offending.

To use the NJC, the accused must:

- reside within the City of Yarra, or
- be a homeless person who either lives in the area or is alleged to have committed the offence in the area, or
- be an Indigenous person with a close connection to the area and be alleged to have committed the offence in the area.

The NJC runs a unique process called Problem Solving to stop repeat offending by helping people address difficulties with their current matter before the court and helping them generally get 'back on track'. This can involve an out-of-court meeting of the Neighbourhood Justice Officer, the defendant, their legal representative and support person, to discuss the court matters and address the defendant's problems.

The NJC has one magistrate, so any person who reoffends comes before the same magistrate. This benefits the accused, because the court has previous experience as well as knowledge of the individual and their circumstances. The magistrate also speaks directly to the accused, rather than through their legal representative, and the prosecution and defence counsel will often discuss the matter between themselves, rather than through the magistrate, to determine the best way to help the accused overcome his/her difficulties and issues while receiving an appropriate sanction.

Figure 3.5 Neighbourhood Justice Centre, Collingwood

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NewsReport 3.1

The benefits of Koori Courts

VICTORIA'S KOORI COURT HAS BEEN IN OPERATION since 2002, starting under the jurisdiction of the Magistrates' Court, then becoming part of the Children's Court, and finally forming part of the County Court network. Mildura is the latest addition to the County Koori Court network.

The County Koori Court started as a four-year pilot program in 2009. An evaluation found that it provided for culturally relevant and appropriate justice. It was found that the experience of Indigenous defendants is vastly improved by the availability of this court: of the 15 who were interviewed, 14 said that it was more engaging, inclusive and less intimidating than the mainstream court.

These comments show the benefits of the Magistrates' Koori Court. They include:

- **Ownership:** Increases Indigenous ownership of the administration of the law – breaks down the disengagement that Indigenous people have had with courts. Offenders get a system that is far more meaningful to them and a system they can readily engage with. Rather than being adversarial, the process allows Elders and Respected Persons to help get to the cause of criminal behaviour. They can offer advice and address the defendant.
- **Community awareness:** The court is seen as part of the community. They help people address and correct criminal behaviour within local Indigenous communities, and increase awareness about community codes of conduct and standards of behaviour.
- **Breaks the cycle:** Reduces the likelihood of reoffending and entering a criminal career, and reduces the number of breached court orders. Sentencing alternatives can be explored. The role of Elders 'shaming' the offender can be more effective than a prison sentence, but Elders take no part in the sentencing. (Offenders have already pleaded guilty – they are subject to the same penalties as mainstream courts: about 70% receive a custodial sentence.)
- **Personal hearings:** There is no dominance of legal professionals, no hierarchies of traditional courtrooms; all participants are able to fully participate and to speak for themselves. Elders or Respected Persons, the Koori Court officer (who has an integral role in protecting the community), the defendant and family can all contribute to the proceedings.
- **Easy understanding:** There is no legal jargon – just plain English.
- **Offender participation:** Actively encourages the participation of the offender and those who know him or her.
- **Victims:** Offenders cannot shy away from the Victim Impact Statement. They have to sit at the table and have what they did to the victim said to them from a metre or so away. This can be devastating.
- **Racial bias reduced:** Community participation removes racial bias in the court.
- **Embrace:** The justice system, including the police, and the broader local community, has embraced the courts.

Figure 3.6 Indigenous smoking ceremony at the opening of the County Court in Mildura

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Activity 3.1 Folio exercise

Specialist courts – Koori Courts

Investigate the role of Koori Courts in Victoria and complete the following tasks:

1 What does the term 'Koori' mean?

2 Draw up a table with two columns labelled 'Similarities between Koori Courts and mainstream criminal courts' and 'Differences between Koori Courts and mainstream criminal courts'. How many similarities and differences can you think of?

3 a Draw a diagram of a mainstream court. Label where the following personnel sit:
- the magistrate/judge
- the accused
- the prosecution
- the defence counsel
- the defendant.

b Draw a diagram of a Koori Court. Label the same positions in this court as you did in part a. and the positions of other personnel who attend a Koori Court.

c Explain why there are the differences in personnel between the two courts.

4 a Describe the role of the Elders and Respected Persons in a Koori Court. Can this role continue out of the court?

b Outline the role of the magistrate/judge in a Koori Court.

5 Define the term 'recidivism'. Has there been any change in recidivism rates among Victorian Indigenous people since the introduction of the Koori Courts?

6 Investigate the introduction and use of Koori Courts in Victoria.

a Explain the role of the Koori Court in Victoria.

b Provide evidence that supports the success of the Koori Court.

7 Imagine you are sitting around the dinner table with your family and friends when someone makes a comment that the Koori Court is a 'soft option'. Explain why the court exists. Do you agree that the Koori Court is a 'soft option'? Justify your response. In what way/s is the Koori Court more difficult for an offender than a mainstream court?

Activity 3.2 Folio exercise

Magistrates' Court

1 What is a court hierarchy? Why do we have courts in a hierarchical structure?

2 State the position of the Magistrates' Court in Victoria's court hierarchy.

3 Explain how the position of the Magistrates' Court in Victoria's court hierarchy will affect the disputes that it can hear.

4 Why is the Magistrates' Court referred to as a 'problem-solving' court? Suggest reasons for the Magistrates' Court adopting a problem-solving approach.

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The County Court

The County Court hears most indictable offences.

The County Court has original jurisdiction in criminal matters to hear and determine most indictable offences in Victoria, including sexual offences, fraud, armed robbery, serious drug offences and culpable driving. A judge presides over the County Court and in trials where the accused has pleaded not guilty, there will be a jury of 12.

The County Court's appellate jurisdiction hears appeals from the Magistrates' Court on questions of fact relating to sentencing or conviction.

For more information on the County Court, go to www.countycourt.vic.gov.au.

An appeal against the decision of a judge in the County Court in a criminal matter can be heard on the following grounds:

- point of law
- a question of fact (that is, against the conviction)
- the severity or leniency of the sentence.

Appeals from the County Court are heard in the Supreme Court (Court of Appeal).

COUNTY COURT

Where is the court?
The County Court is in Melbourne; sittings are also conducted in major country centres.

What type of cases does it hear?
Its criminal jurisdiction is for all indictable offences except the most serious. Examples include sexual offences, serious drug offences and culpable driving.

Can the court hear appeals in the criminal division?
It hears appeals from the Magistrates' Court involving sentencing or conviction.

Who presides in the court?
A single judge.

www.childrenscourt.vic.gov.au. A criminal case virtual tour of the Children's Court can be found at http://childrenscourt.courtnexus.com/criminal-case-virtual-tour.php. A criminal case video can also be found at http://childrenscourt.courtnexus.com/criminal-case-video.php.

The Supreme Court

For more information on the Supreme Court, go to www.supremecourt.vic.gov.au.

The Supreme Court is the highest Victorian court. It is presided over by a judge referred to as 'Justice'. The Supreme Court has a Trial Division and a Court of Appeal.

Trial Division

The Supreme Court trial division hears the most serious criminal matters. This involves hearing the most serious indictable offences, such as treason, murder, manslaughter and attempted murder. A jury of 12 is empanelled where the accused has pleaded not guilty. The Trial Division will also hear and determine criminal appeals from the Magistrates' Court on points of law (before a single justice). It can also hear applications for bail.

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THE SUPREME COURT

Where is the court?
The Supreme Court is in Melbourne; sittings are also conducted in major country centres.

What type of cases does it hear?
The Supreme Court consists of a Trial Division and a Court of Appeal. In criminal matters, the Trial Division hears the most serious indictable offences such as murder, treason and attempted murder.

The Supreme Court hears the most serious indictable offences.

Can the court hear appeals?
A single judge of the Supreme Court hears appeals from the Magistrates' Court on points of law. Appeals from the County Court and from a single judge of the Supreme Court are heard by the Court of Appeal.

Who presides in the court?
Judge.

Appeals

Supreme Court – single justice
A single justice of the Supreme Court will hear appeals from the Magistrates' Court on a point of law in a criminal matter.

A single justice of the Supreme Court hears appeals from the Magistrates' Court.

Court of Appeal
The Court of Appeal is part of the Supreme Court. The Chief Justice is a member of both courts. Judges in the Court of Appeal are referred to as Justices of Appeal.

A Court of Appeal is usually presided over by three judges. At the court's discretion, it can have five judges on 'matters of significant importance'. It can also sit with as few as two judges.

The Court of Appeal hears appeals from the County Court and from a single judge of the Supreme Court.

The Court of Appeal hears appeals from the County Court and the Supreme Court.

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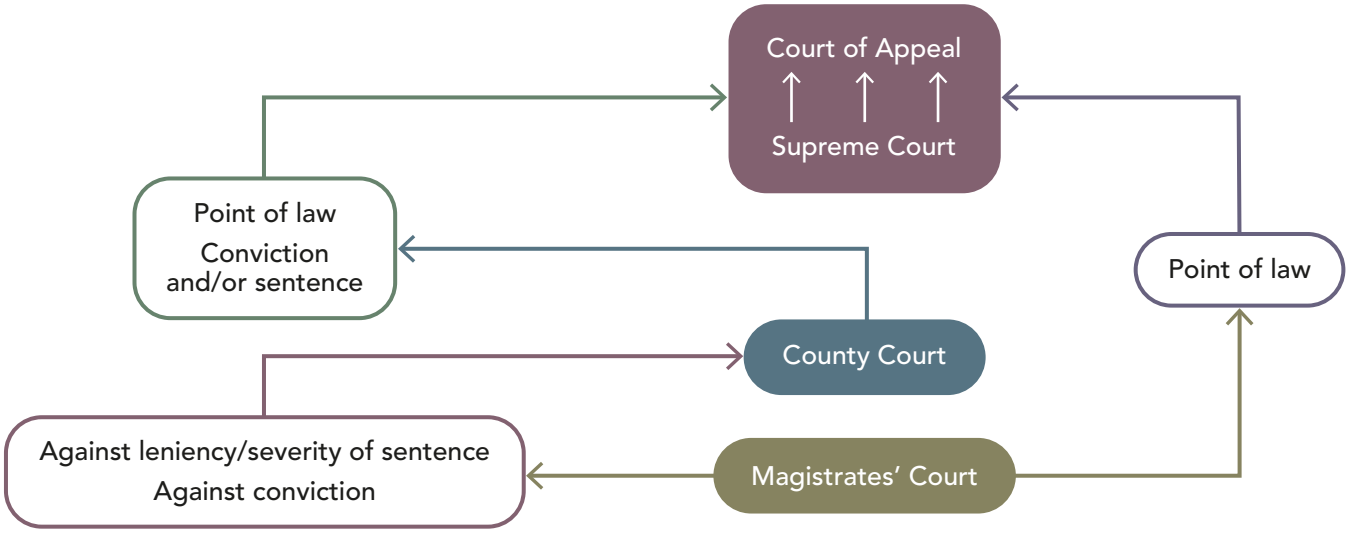


Figure 3.7 Criminal appeals in Victoria's courts

The High Court of Australia

The High Court of Australia is the highest court for criminal appeals.

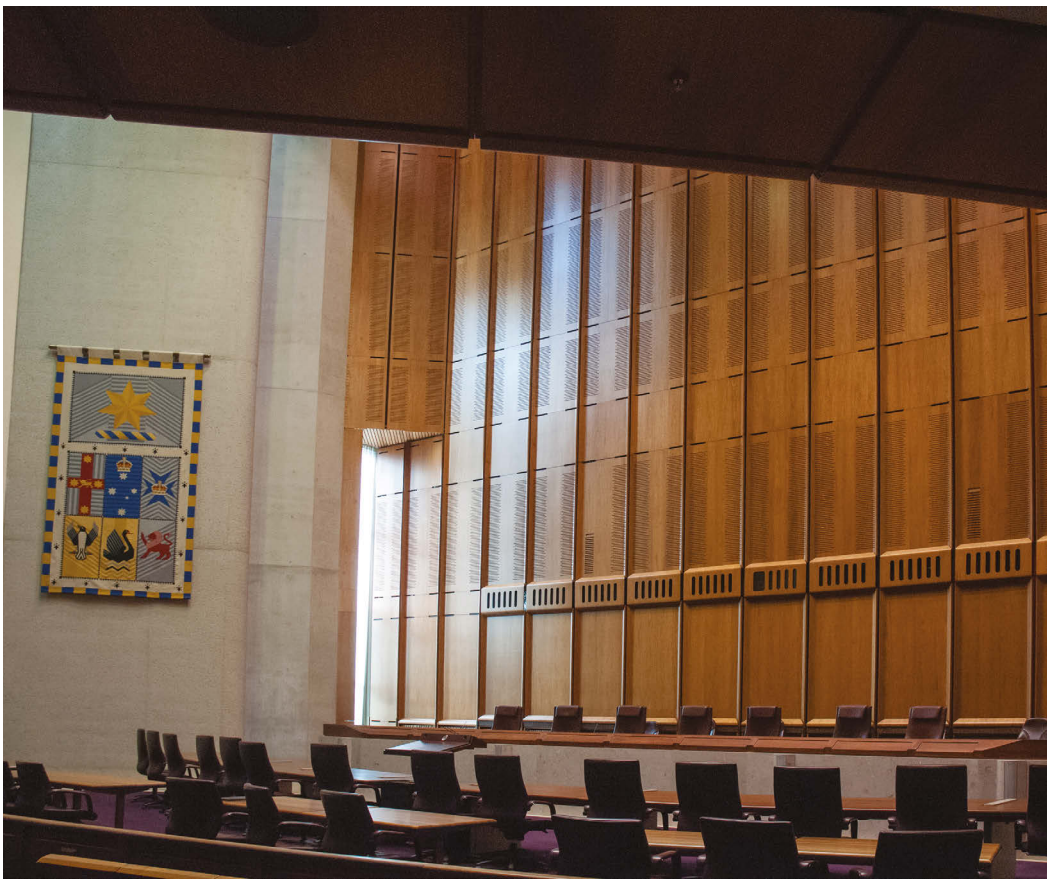
The High Court, located in Canberra, is the highest court in the Australian hierarchy. It exercises both original and appellate jurisdiction. Under section 71 of the Commonwealth Constitution it will hear all matters 'arising under the Constitution', matters relating to the interpretation of the Constitution, disputes involving the Commonwealth, disputes between States, and trials for Commonwealth offences.

For more information on the High Court, go to www.hcourt.gov.au.

The High Court will hear criminal appeals from the State and Territory Supreme Courts. These are dealt with by a Full Court of not fewer than two Justices.

There is no automatic right to have an appeal heard by the High Court. Parties who wish to appeal must persuade the Court, in a preliminary hearing, that there are special reasons for the appeal to be heard.

Decisions of the High Court are final; there are no further appeals once the matter has been decided. Its decisions are binding on all other courts throughout Australia.



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3.4 Institutions to assist an accused

Legal representation is considered necessary in our legal system.

Our criminal justice system is based on the presumption of innocence: an accused person is to be presumed innocent until their accuser proves them guilty 'beyond reasonable doubt'. It is regarded as essential that an accused has legal representation to help them prepare their defence. Legal representation can be expensive. This is one factor that limits the capacity of the criminal system to achieve justice. To address this concern, institutions such as Victoria Legal Aid and Community Legal Centres have been established.

The following case highlights the importance of the need for legal representation.

DIETRICH V THE QUEEN [1992] HCA 57

In 1988 the accused, Dietrich, was found guilty in the County Court of Victoria of importing a trafficable quantity of heroin into Australia.

Before the trial, Dietrich had made unsuccessful applications to be represented by Victoria Legal Aid (VLA). However, VLA would not represent him unless he pleaded guilty. Dietrich also applied through Commonwealth legislation, to the Federal Minister for Justice and the Attorney-General, to have counsel appointed to his trial to represent him. These applications were also rejected. As a result, Dietrich was unrepresented at his trial. Also before the trial, Dietrich had argued that it should be adjourned or stayed (not proceed) until he had an opportunity to get legal representation. The County Court refused those requests.

After his trial, Dietrich applied for leave to appeal to the Court of Appeal on the basis that his trial was a miscarriage of justice as he did not have legal representation. The basis of the argument was that the lack of representation had denied him his right to a fair trial. The application to the Court of Appeal was dismissed.

Dietrich appealed to the High Court on the same basis.

The High Court allowed the appeal, holding that by not having legal representation the accused was denied a fair trial. The decision of the majority of the High Court was expressed by Mason CJ and McHugh J:

> … we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent (i.e. 'needy') accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

Dietrich was successful in his appeal to the High Court. The comments of the Justices were significant because of their implications for the provision of legal aid. That is:

1. Access to legal representation is fundamental to the achievement of justice in criminal law, and
2. Governments have the responsibility to provide sufficient funds for legal services, and their failure to do so may result in an indefinite stay of proceedings in trials for serious criminal offences (that is, until representation is secured).

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What is legal aid?

An accused must have the opportunity to access legal advice.

Our legal system has complex processes and procedures. A person accused of a crime must have the opportunity to access legal advice and information that will place them on a 'level playing field' with the prosecution if justice is to be achieved.

'Legal aid' services help people who are dealing with the criminal justice system. These services, which are provided free or at lower cost, provide:

- legal information and advice
- legal representation.

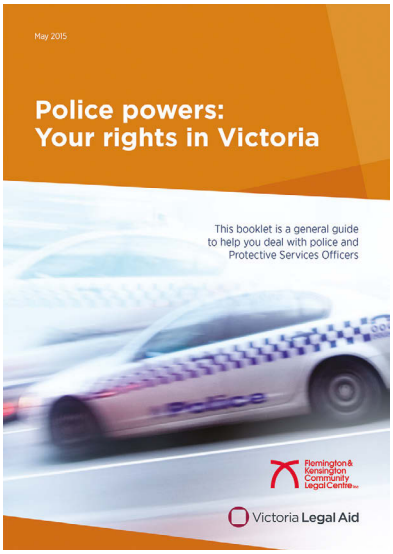
There are various agencies in Victoria that provide legal aid services:

- Victoria Legal Aid (VLA)
- Community Legal Centres, such as Fitzroy Legal Service
- Victorian Aboriginal Legal Service (VALS)
- Duty lawyer services
- Justice Connect
- Legal Assistance Scheme.

Victoria Legal Aid

In Victoria, legal aid is mainly provided by Victoria Legal Aid (VLA). This is a government-funded agency established to ensure that Victorians who cannot afford to pay for a private lawyer can receive assistance with their legal problems. It has 14 offices in metropolitan and regional Victoria and provides assistance to people on a range of legal issues, including criminal matters for adults and children.

VLA has lawyers and administrative personnel on staff. It can also employ private lawyers to represent clients. About 75% of applications for assistance are assigned to private lawyers. These lawyers charge VLA at a discount rate.



VLA can provide advice, assistance and representation.

VLA can:

- provide legal advice in person, by videoconferencing, or over the phone
- provide assistance to a person in court who is unrepresented by a lawyer
- organise a case, which may include representing the person in court.

VLA educates the public about the law.

VLA also publishes a number of booklets and pamphlets to help inform Victorians, including students, about the legal system and their rights.

Who can VLA help?

VLA can help people who:

- cannot afford a private lawyer
- have an intellectual disability, an acquired brain injury or mental illness
- are in a psychiatric in-patient unit
- are experiencing or at risk of homelessness
- are a child or young person (18 years and younger) going to the Children's Court
- cannot speak, read or write well in English
- are Indigenous Australians
- are in custody or facing a serious penalty.

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Cambridge University Press

Priority is given to those charged with serious criminal offences, whose liberty is threatened by the charges, or whose fundamental democratic freedom would be denied if legal assistance is not provided. Priority is also given to those who experience severe disadvantage and children who are defendants in criminal matters.

www.legalaid.vic.gov.au

Who can get legal aid?

Anyone can apply for legal assistance by completing and submitting an application online. Eligibility is determined by a means test, a merits test and the State reasonableness test.

Legal assistance is provided if you satisfy a means test and a merits test. A lifestyle test can also apply.

The means test is based on the person's:

- assessable income (including money received from work, welfare benefits and other sources)
- other assets (a house, car, savings)
- weekly living expenses (housing, utilities, childcare).

A lifestyle test may also be applied. This considers any conflict between the information provided by the person in their application and their actual lifestyle. For example, there could be a conflict if an applicant claims to have no assets and very little income, but drives an expensive car.

The State reasonableness test applies to anyone who has a matter to be determined in the Magistrates' Court, or summarily in the Children's Court, or is appealing from the Magistrates' Court to the County Court.

An individual's lawyer or VLA must consider:

- the nature and extent of any benefit which a grant of legal assistance might give to the individual, the public or a sector of the public
- the nature and extent of any detriment which a refusal of a grant might cause to the individual, the public or a sector of the public.

If the application for assistance relates to a proceeding other than a criminal appeal, the VLA will consider whether the matter is likely to end up in favour of the individual and, if it is a criminal appeal, whether there are reasonable grounds for the appeal.

VLA will also determine whether the person applying for a legal assistance grant can afford to pay the full costs of the legal services themselves. If a grant of assistance is made, VLA considers whether or not the person will be required to pay a contribution towards their legal costs.

The means test does not apply to children who are to appear in the Children's Court or to a person involved in criminal proceedings under Part 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Accessibility and VLA

VLA provides accessible information in a number of formats. The website has a 'Find Legal Answers'. VLA operates a free telephone Legal Help line and referral service during normal work hours. Interpreters are available for over 20 languages, and if a further language is required, a free Translating Interpreting Service is available. If a person is deaf or has a speech impairment, the National Relay Service can be used to phone VLA over the internet.

Advice on legal matters is free of charge as long as the interviews and any follow-up resulting from the interview (writing letters, etc) are limited to one hour's work. The 'VLA Handbook for Lawyers' provides all the relevant guidelines.

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Legal brief 3.2

Recent developments in the provision of legal aid

Expansion in means test criteria

In February 2016, the VLA announced a change in the criteria for the means test which would allow an estimated additional 700 Victorians to receive legal aid. The changes were estimated to cost the VLA an additional $5 million over the next 5 years. 'This will help people who currently fall through the cracks,' the Executive of VLA said. 'Often people who do not qualify for legal aid, but cannot not afford a private lawyer, are forced to pay for representation on their credit cards or go without legal assistance.'

Access to Justice Review

In October 2016 the *Access to Justice Review* was released. The aim of the review was to identify ways to improve access to justice of Victorians with 'everyday' problems. In addition, it aimed to ensure that the disadvantaged and vulnerable, and those with Aboriginal and Torres Strait Islander backgrounds, were able to receive the support they needed when engaging with the justice system.

Sixty recommendations were made, including that VLA should become the primary entry point for information about legal issues and services in Victoria. Specifically, VLA should take the role of leading, assisting and coordinating with other services providing legal information. In addition, VLA should continue to set the guidelines for eligibility for legal assistance and make decisions on individual applications.

It also recommended that VLA should become the primary entry point for online information about legal issues and services. This would include funding to expand the VLA website, particularly to:

- introduce a live web-chat service
- provide information in a wide range of languages and in an accessible format that can be integrated with VLA's Legal Help Line.

VLA, the report said, should explore other ways in which technology can support its role as the main source of legal assistance.

The Commonwealth and State governments, the report noted, need to grant funds on the basis of a longer time period – 4 years – to improve the ability of the legal assistance sector to plan for the future.

And finally, the Victorian government and the courts should work together to ensure the adequate availability of interpreter services. All staff of all courts should be educated to identify when interpreter services are required.

Community Legal Centres (CLCs)

For more information on community law centres, visit www.communitylaw.org.au.

Currently there are over 50 CLCs in Victoria, staffed by paid and volunteer lawyers and others. These centres receive funding mainly from the Commonwealth and Victorian governments, but they are also be part-funded by local councils, universities and other organisations. CLCs offer free advice and help for Victorians experiencing social and economic disadvantage. They can also determine eligibility for legal assistance and help the accused to complete the necessary applications for that assistance. They can also arrange (or provide) representation in court proceedings.

MONASH-OAKLEIGH LEGAL SERVICE (MOLS) AND THE SPRINGVALE MONASH LEGAL SERVICE (SMLS)

Monash University provides training for law students through the Monash-Oakleigh Legal Service (MOLS) and the Springvale Monash Legal Service (SMLS) CLCs, operating in partnership with Victoria Legal Aid. Disadvantaged members of the community can obtain free and confidential legal advice for minor criminal matters and other issues referred to the CLCs by the VLA. The CLCs are largely run by students, under the supervision of solicitors employed by Monash Law School, and volunteers from the legal industry, who also offer free advice.

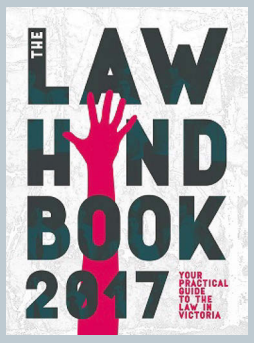
ISBN 978-1-316-64754-7

Access to CLCs

Advice is generally given to anyone, without having a formal means test, but where work is undertaken, a client is usually required to demonstrate an element of financial difficulty. If a client is able to pay for a private lawyer, an appropriate referral can be made. If court representation is required, the centre is able to arrange a barrister to appear on behalf of the client in court. Most barristers will appear for free or for a reduced fee, depending on the client's financial circumstances, the urgency of the case, the resources of the CLC's lawyer and the outcome of the application for legal assistance.

FITZROY LEGAL SERVICE

This community legal service, situated in the Fitzroy Town Hall, provides legal advice and representation, including a drop-in legal advice service for those who are charged with a criminal offence. The Fitzroy Legal Service also works with the Neighbourhood Justice Centre, Collingwood, and produces the annual Legal Handbook, which is a practical guide to Victorian law.



The Neighbourhood Justice Centre (NJC), Collingwood provides support services and community programs for those in the Yarra district. Lawyers provided by VLA and the Fitzroy Legal Service will also provide legal advice and representation for matters to be heard in the Magistrates' or Children's Courts to be held at the NJC.

NEWSREPORT 3.2

Legal action launched to get children out of adult prison

IN DECEMBER 2016 THE SUPREME COURT HEARD A case brought against the Victorian government by the Fitzroy Legal Service, to ensure that children are not held in the Barwon maximum security adult prison.

About 15 children were sent to Barwon Prison after riots occurred at the Parkville Youth Justice Centre, resulting in considerable damage to facilities.

A spokesperson for the Fitzroy Legal Service said that all children have the right to be safe. Barwon is undeniably unfit for children. Putting them in an adult jail is dangerous and sets a terrible precedent.

The Fitzroy Legal Service argued that the government:

- acted unlawfully when sending the children to Barwon
- failed to act in the best interests of the children in its care, and
- breached the Victorian Charter of Human Rights and Responsibilities in sending the children to an adult prison.

They were being locked in their cells for more than 20 hours per day. The spokesperson for the service said, 'evidence shows that exposing children to these conditions causes irreparable psychological damage'.

Earlier, when a challenge on the same issue was brought by the Victorian Aboriginal Legal Service and the Human Rights Law Centre, the government had agreed not to hold Indigenous children in an adult prison.

The Supreme Court held that holding children in an adult prison was unlawful and that their human rights were at risk. Justice Garde ordered that the children be moved to a suitable youth facility by 4pm the following day. However, he later granted a stay on that order, at least till 28 December, and acknowledged that they had been sent to Barwon for emergency reasons and that there was nowhere else for them to go.

Following an unsuccessful appeal to the Victorian Court of Appeal, the Victorian government reclassified a section of Barwon Prison as a youth justice facility. In May 2017, the Supreme Court again declared the detention of young offenders in an adult prison unlawful.

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The Victorian Aboriginal Legal Service (VALS)

The VALS provides services to Aboriginal and Torres Strait Islander people who require legal assistance, including for criminal matters. Victoria Police are required to notify VALS when a person of Aboriginal or Torres Strait Islander descent is taken into custody.

Services provided include:

- legal advice and, if needed, referral services
- the assistance of a duty lawyer
- legal casework services, including representation and assistance in criminal law, in both summary and indictable offences, if necessary.

Priority will be given to:

- a person in custody
- where there is a real risk to a person's physical safety
- where personal or cultural wellbeing is at risk
- a family who has a member who died in custody and who is seeking representation at the inquiry into their death
- where a client would be significantly disadvantaged if assistance is not given.

The client must prove their Aboriginality (Confirmation of Aboriginality form) and must meet the requirements of a means and merit test. Applicants for legal casework need to satisfy one or more of the following requirements:

- be under 18 years of age
- have their main source of income coming from a Community Development Employment Project or Centrelink (or equivalent) benefits
- have a gross household income under $46,000.

The VALS uses its discretion to determine whether or not a particular case has merit.

NewsReport 3.3

Law societies call on PM for legal assistance funding

ONE MONTH AFTER THE RELEASE OF THE VICTORIAN GOVERNMENT'S *Access to Justice Review*, law societies from every State and Territory sent an open letter to Malcolm Turnbull. It called on the Prime Minister to reverse the proposed $35 million cuts to community legal centres and to boost funding to legal aid and Aboriginal legal services.

In 2014 the Productivity Commission (Commonwealth) recommended an immediate $200 million annual boost to legal assistance services.

Community services across the country were reported as being badly underfunded even without the cuts, turning away 160,000 people a year. 'This is a vital call on the prime minister to take urgent action', a spokesperson for the Federation of Community Legal Centres said.

'These centres provide free legal help for women escaping family violence, and vulnerable people experiencing workplace mistreatment, and other issues. The impact of these cuts will be felt by vulnerable people who cannot afford to pay a lawyer and who belong to the growing numbers who are not eligible for Legal Aid. They are cuts that hit people with nowhere else to go,' the spokesperson said.

Following this strong opposition, the proposed cuts in funding to CLCs were abandoned in the 2017 Federal budget.

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Table 3.2 Other sources of legal advice and assistance

Institution	Nature of assistance provided
Duty lawyer services	Provides lawyers at many of the courts across the State to help people who are at court for a hearing, but do not have their own lawyer. The service is provided free of charge, but priority is given to those who: • cannot afford a private lawyer • have an intellectual disability, an acquired brain injury or mental illness • are experiencing or are at risk of homelessness • cannot speak, read or write well in English • are Indigenous • are in custody or facing a serious penalty In general, depending on an individual's circumstances, duty lawyers are able to give information (for some matters there is printed information available), provide legal advice about the law and what happens in court, represent the client in court on the day or arrange for a Legal Aid lawyer to conduct the case. In criminal matters, assistance is automatically given to anyone going before the Children's Court. In the Magistrates' Court, priorities will include adults who have been remanded in custody and who are being brought before a court for the first time. The duty lawyer will provide advice and, where appropriate, make an application for bail. If the accused has a private lawyer, the duty lawyer will contact the lawyer to ensure that they are aware that their client is in custody. The income test does not apply to anyone in custody.
Justice Connect (previously Public Interest Law Clearing House or PILCH)	A not-for-profit association committed to improving access to justice and protecting human rights for people in Victoria and NSW. It facilitates the provision of **pro bono** legal services and undertakes law reform, policy work and legal education. Services are provided by members that include law firms, Federal and State funding bodies, university law faculties, CLCs, corporate legal departments, the Victorian Bar and the Law Institute of Victoria. In criminal law, Justice Connect helps people who are ineligible for legal aid and cannot afford a lawyer to access free legal assistance. In Victoria, legal advice cannot be given for general criminal matters, but the pro bono services include legal advice and/or representation to clients experiencing homelessness or who are at risk of homelessness with the types of offences this situation attracts. This is mainly in areas of fines and infringements. Legal assistance is provided where 50% or more of the person's infringements are directly related to their homelessness. For example: • public transport fines • being drunk in public • begging • littering.
Magistrates' Court	If a person has a matter to be dealt with in the Magistrates' Court, registrars of the court are able to give procedural advice. However, they cannot give legal advice outside the scope of their duties and knowledge; nor can they act as representative for any person. They are strictly impartial. Matters that they can advise on include: • adjournments • types of cases • application for a payment plan or a stay relating to fines • applications to convert fines to community work • diversion hearings.
The Legal Assistance Scheme	The Legal Assistance Scheme is offered through the Law Institute of Victoria. The Victoria Bar offers a similar service. This is a referral service that facilitates pro bono legal assistance from private legal professionals to individuals who have a legal problem requiring a barrister, whose case has merit, but who cannot afford legal assistance on a full fee-paying basis and do not qualify for legal aid.

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Robot lawyers
www.robot-lawyers.com.au.

NEWSREPORT 3.4

Robot lawyers – an innovation in criminal law and legal aid

VICTORIA LEGAL AID AND RMIT UNIVERSITY JOINED TO DEMONSTRATE THE USE of robot technology to eliminate lengthy and expensive legal disputes. 'Technology offers the opportunity to help Australians who fall into the justice gap,' the Director of RMIT's Centre for Innovative Justice and previous Victorian Attorney-General, Rob Hulls, said. 'It is time to think differently.'

Robot technology is already being used by some law firms, but they are quick to point out that robot lawyers do not take the place of a lawyer representing a client in court.

How do robot lawyers help?

Robot lawyers will help an accused person seeking assistance to present their story in court. When a person is pleading guilty, it (sometimes referred to as 'she') will ask questions about the personal circumstances – these should be answered in detail.

The robot will then email a document based on those questions and answers that can be given to a court if necessary. The robot can also email a Character Reference Guidelines document.

The robot lawyer cannot help if the accused is pleading not guilty or is contesting the facts in the case.

This Dutch technology has already been adopted for some areas of law in the UK and Canada.

Dan Lear received a parking ticket when taking his three children to school in London. He found a website, DoNotPay, a free online robot lawyer service. It had helped drivers in London and New York appeal parking tickets. He logged in and the DoNotPay site asked him a series of questions, such as where the ticket was issued and a description of what happened. Within minutes, he had a 500-word letter to send to the city council. And yes, they ultimately let him off.

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3.5 Committal proceedings

Before an indictable offence can proceed to a higher court, a **committal hearing** is conducted in the Magistrates' Court. This hearing is designed to establish whether the prosecution has a case against the defendant. The prosecution must establish that there is a *prima facie* (at first appearance) case or sufficient evidence against the defendant to support a conviction by a jury in a higher court. If that is proven, the case can proceed to trial. If there is not sufficient evidence to support a conviction, the defendant is discharged.

The committal hearing also allows the defendant to see the prosecution's evidence against them. There are two types of procedure that can be followed: the traditional committal hearing (including the committal mention system) or the 'hand-up brief'.

The *Criminal Procedures Act 2009* (Vic) limits the cross-examination of some witnesses at a committal. These include:

- victims of a sexual offence
- children
- persons with cognitive impairment (such as mental illness, intellectual disability, dementia or brain injury)
- a witness who has made a statement which has been included in a hand-up brief or has given testimony in examination-in-chief. These people cannot be cross-examined at a committal.

The purposes of committal hearings are:

- determining whether there is evidence of sufficient weight to support a conviction for the offence charged
- determining whether a charge for an offence is appropriate to be heard and determined summarily
- determining how an accused proposes to plead
- ensuring that the prosecution's case is adequately disclosed
- ensuring that the accused can hear the evidence against him/her and cross-examine witnesses
- enabling an accused to put forward a case at an early stage
- enabling the issues in contention to be adequately defined.

Committal mention system

A committal mention identifies those cases in which the defendant intends to plead guilty.

The Magistrates' Court uses the mention system for dealing with committals. It is designed to identify cases in which a defendant intends to plead guilty. This provides for the more efficient operation of the court system and avoids unnecessary delays. A defendant is not required to enter a plea at the committal mention. However, if a defendant pleads guilty at the committal mention hearing, a date will be set for the case to be heard in a higher court and for the offender to be sentenced. Approximately 30% of all defendants indicate at the committal mention stage that they intend to plead guilty. If the committal is contested – that is, if the defendant pleads not guilty – the magistrate will require information about:

- the number of witnesses to be called
- the likely length of the hearing.

The magistrate may then:

- adjourn the hearing of the committal proceeding to enable the defendant to obtain legal representation
- set a date for a contested committal mention (in some cases)
- set a date for a committal hearing in the Magistrates' Court
- conduct a committal proceeding immediately (if the magistrate believes that there is sufficient evidence).

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'Hand-up brief'

Most committals are conducted as hand-up briefs, where written documents are used instead of hearing witnesses.

The main purpose of the hand-up brief is to inform defendants of the case against them. This saves court time, as the defendant is then in a position to make an informed decision about whether they will plead guilty or not guilty (this is called contesting the committal). The entire committal procedure can be conducted by a hand-up brief. This means taking written sworn statements instead of oral evidence at the hearing. At least 42 days before the committal mention hearing, the Crown will notify the defendant that it intends to use a hand-up brief. Copies of the charge sheet, sworn statements, photographs and other material that is to be used as evidence by the prosecution are served on (sent to) the defendant.

At least 14 days before the date of the committal mention hearing, the defendant must notify the prosecution if he or she intends to question prosecution witnesses. The court must consent to the cross-examination of witnesses if there is to be a contested committal hearing (if the defendant is going to plead not guilty). If the defendant does not want to question any of the prosecution witnesses during the committal process, the deposition alone is presented to the court. Based on the deposition, the magistrate decides whether the case should be committed for trial. Today, most committal examinations are conducted by hand-up brief.

Committal hearing

A committal hearing involves the hearing of the prosecution case in court. The defendant may elect to not present a defence.

A committal hearing begins with the defendant's name being called and the charge being read out. The defendant does not have to enter a plea at this stage. The prosecution calls witnesses who are examined (this is the examination-in-chief), cross-examined (by the defence) and re-examined (by the prosecution). Witnesses are examined under oath. The evidence from each witness is recorded in writing. All the evidence presented by the prosecution is collected in a single document, known as a deposition.

After the evidence for the prosecution is heard, the defendant will be given an opportunity to call witnesses and make submissions. A defendant who wishes to plead not guilty must decide whether to present a defence at the committal hearing or to reserve it for the trial. Usually, the defence case is not heard at the committal hearing. If the defendant does present a defence, the process used is identical to that involving the prosecution witnesses. This also forms part of the deposition. After all the evidence has been heard, the court decides whether there is sufficient evidence to support a conviction in a higher court. If it decides that there is not, the case is dismissed and the defendant is discharged. If there is a case to answer, the defendant will be directed to stand trial in a higher court.

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NEWSREPORT 3.5

Justice delayed, justice denied: court overhaul overdue

Committal hearings are rightly under review

JUSTICE DELAYED IS JUSTICE DENIED, SOMEONE said once. It may have been William Gladstone or William Penn, but whatever its origins, the phrase has become both a legal maxim and a cliché, because it is so true. Victims of crime and those accused of crime all deserve access to a speedy trial and, hopefully, resolution. Lately, the maxim has become a rallying call for those who believe an overburdened, complex, ponderous and ever more expensive judicial system denies that justice and needs significant, perhaps root-and-branch, reform.

In Victoria the element of the court system most open to such reform is committal hearings, the first in a two-step process of taking a criminal matter to a verdict. Here, all criminal prosecutions destined for the County or Supreme Courts first come before a magistrate who holds a committal hearing to assess whether there is sufficient evidence to send the case to trial. Committals are meant to be a filter, ensuring that, on the evidence, cases with little chance of success are not sent before a jury. Directors of public prosecutions (DPPs) can of course still choose to take matters directly to court.

Former DPP Jeremy Rapke QC was calling for the abolition of committals 5 years ago, arguing that they were a waste of time and money and clogged up the court system. They were no longer properly serving the filtering process for which they were originally created and were costly, inefficient and time-wasting. Abolishing committals would eliminate much of the delay between when an accused was charged and when the trial was finally heard. Now, it seems, the state government may be leaning towards a similar view.

As *The Sunday Age* revealed today, the government is considering scrapping committal hearings in what would be one of the most significant overhauls of our judicial system. Attorney-General Robert Clark has been meeting with the courts, the DPP and Legal Aid to discuss possible reforms to the committal system. Already critics are suggesting that if it goes as far as abolition, the results would be 'disastrous'. But even they agree that the committal hearing process needs a remake. That is also *The Sunday Age*'s view. Mr Clark says: 'some form of … preliminary hearing or scrutiny of serious criminal charges needs to be available', but committals have become too loosely controlled, duplicate much of what must happen at the trial stage, run for too long and, in many cases, turn into something of a lawyers' picnic.

'Coulda, woulda, shoulda' is also a cliché, if a far less elegant one. But the difference between the first two words is at the heart of what could be the most effective reform to committals. At present magistrates must be satisfied that there is reasonable prospect that a properly instructed jury could convict a charged person. If, as Chief Magistrate Ian Gray suggests, that word were replaced with *would*, fewer cases with little chance of success would be sent to trial. We would also support tightening and controlling cross-examination in the Magistrates' Courts. Too often these days witnesses – and too often there are too many of those – are cross-examined on matters where there is little dispute about their evidence, or that are covered in their statements.

In Magistrates' Courts new duties now take up increasing time, such as family violence intervention orders, which have grown 48% in the last five years. Committal hearings remain an important part of the justice safety net. They screen out cases where the evidence is not strong enough and allow accused people to know what they are facing at trial and decide whether to plead guilty or not guilty. But the process needs to be streamlined and unclogged. And our message to Mr Clark is: Without delay.

Sydney Morning Herald, *22 July 2012*

3.6 Pre-trial negotiations

The settlement of criminal disputes is an important part of obtaining justice for the victim, their family, the accused and the community in general. The use of **plea negotiations** and sentence indications has attracted more attention than almost any other part of the criminal justice system. Many legal practitioners argue that they are an important, though controversial, part of reducing delays and costs for both parties and stress for the victim. A lack of transparency for the community and victim until after the process is completed, however, along with the fact that the sentencing judge may not be given information about all the aggravating factors (an aggravating factor is something that makes the crime worse), means that there are now many dissenters.

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WHAT FACTORS WILL INFLUENCE AN OFFENDER TO PLEAD GUILTY?

In most criminal cases in Victoria the accused person enters a guilty plea. According to the Sentencing Advisory Council, in the period 2009–14, almost 72% of criminal cases in the Supreme Court, and nearing 85% in the County Court, resulted in a plea of guilty without going to trial, or a plea of guilty being entered during the trial. For instance, if a suspect makes a full admission about their involvement in the offence during an interview with police, it is likely that they will plead guilty at the trial. In such a case there is no need for adjudication, and the role of the court is to determine the sanction that should apply.

Plea negotiations

Plea negotiations are informal processes between the defendant and his/her legal representative and the prosecution.

After the investigation of an offence, a number of decisions will be made. These decisions include whether to charge the suspect, and if so, what the charge or charges should be. In a number of cases, the charges initially filed are not those that are eventually proceeded with. For example, if a person charged with a number of offences decides to plead guilty to some of them, the prosecution has the discretion to not proceed with the other charges.

Commonly, the accused and his/her legal representative will negotiate with the prosecution, offering to plead guilty to an offence with a lower penalty if the more serious offence is withdrawn. Alternatively, the accused may choose to plead guilty to the more serious charge if an agreement can be reached about the facts on which the plea is based. In some cases, after the accused has been committed to trial, the Crown may decide not to proceed with the case.

In many cases, the charge is clearly appropriate to the facts of the case, and the guilty plea can be seen as justified. In other cases, however, the police may 'overcharge'. This means that the police lay more charges than necessary, because they expect that some of the charges will be withdrawn during pre-trial negotiations in exchange for a plea of guilty to the remaining charges.

Controversy can arise when the accused has negotiated a charge to a lesser crime than the one set out in the original charge.

Appropriateness of plea negotiations

To many, the process of plea negotiations looks like a 'win-win' situation. The prosecution secures a conviction, avoids the costs to the taxpayer of an expensive trial, and saves the victims of crime the trauma of appearing in court. Plea negotiation does indeed do this: it streamlines the flow of cases by producing guilty pleas, thus saving court time.

The essence of any plea negotiation is to hasten the normal process, but at what cost? The potential for injustice to the defendant, the victim and the community can be great. An unprepared or inexperienced lawyer could advise a client to accept a plea negotiation when there may be the chance of an **acquittal**. The prosecution may go ahead with a lesser charge rather than prosecute for a more serious offence. A prosecution for a more serious offence may require lengthy argument, and the calling of many witnesses – this means considerable expense. Plea negotiation can be seen as a path to easy solutions to cases. However, how effective is our legal system if plea negotiation discourages an accused from exercising their right to a fair hearing?

Critics of plea negotiations refer to the benefits it gives to the defendant. They argue that plea negotiations 'soften' the deterrent effect of punishment because it gives criminal defendants the power to bargain for a lesser punishment. Some argue that more experienced criminals are more likely to receive favourable plea negotiations because they are familiar with the criminal law system. This operates against the idea that a criminal should receive a punishment that fits the crime.

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Table 3.3 Appropriateness of plea negotiations

Appropriateness of plea negotiations	Weaknesses of plea negotiations
The prosecution is able to get a conviction for the crime/s and the offender receives a sanction.	Controversy arises when serious charges are downgraded. This can mean the public loses faith in the criminal law system achieving justice and protecting the community.
The process streamlines pre-trial and trial procedures and reduces delays in the legal system.	The process lacks transparency – negotiations are not subject to review or appeal and are not reported. There are currently no legislative guidelines to plea negotiation procedures.
Plea negotiations save costs to the taxpayer.	The victim does not get to testify against the accused so justice is not seen to be done.
The victim is saved the prolonged proceedings of a trial. If it was a violent crime, for example, it means they do not have to go through the circumstances again, including cross-examination by the defence counsel.	Criminals who have committed serious crimes are back in the community earlier, having received a reduced sentence.

NewsReport 3.6

Plea bargaining, a matter of negotiation

PLEA BARGAINING IS WHEN A DEFENDANT PLEADS guilty to a lesser charge in order to be given a more lenient sentence. It is an important part of the criminal justice system, but not without controversy.

There was community shock when a plea negotiation was used by gangland bosses Carl Williams and Tony Mokbel. Williams pleaded guilty to one count of conspiracy and three counts of murder on a plea deal with the Victorian Office of Public Prosecutions [OPP]; Mokbel was sentenced on drug trafficking offences after pleading guilty following a deal with the OPP, which allegedly included the withdrawal of eight additional drug-related charges and other charges related to his involvement in up to three murders.

However, Victoria's OPP firmly believes in plea bargaining, saying that by using this negotiation process, the backlog of criminal offences is reduced. It claims that the justice system is not undermined – arrangements reached in each case are based on justice, not expediency. They will reflect the evidence in the particular case and the charges the prosecutor thinks are appropriate.

Settlement of criminal cases can have positive effects for victims and their relatives, for the accused, and for the community's continued level of confidence in the criminal justice system.

There are a number of advantages in negotiating an appropriate settlement in criminal cases:

- Because the defendant has pleaded guilty, there is certainty of the outcome for the prosecution and the community.
- It saves victims and witnesses the trauma of the adversarial process;
- Valuable community resources are used efficiently. According to the OPP, each plea saves the justice system (and victims and witnesses) a trial. On average, a trial uses 7–10 days of court time, compared to about one day for a plea.
- As a proportion of matters completed by the OPP, plea negotiations are growing significantly, with a corresponding fall in the proportion of cases going to trial.
- A 5% shift in completions from trials to pleas can reduce the number of trials by about 25 a year, saving some 175 trial court days. It is estimated that a day in court costs about $20,000 – this amounts to roughly $3.5 million.
- Decisions regarding plea negotiations are made according to the Direction of Public Prosecution's (the DPP's) policy guidelines, with checks and balances, and in consultation with those involved.

The disadvantages are:

- It undermines the principles of public and open justice, where justice is seen to be done and the public has access to criminal proceedings.
- The lack of transparency can create perceptions of unfairness, of hidden justice. The motives for plea negotiations can be unclear to the public, and to victims. Victims may not be kept informed of the status of the case and may believe that the gravity of the case is being lessened. For instance, during a bail hearing in the NSW Supreme Court, the judge criticised the DPP after learning that an offer had been made to reduce kidnapping charges against a man in 'secret negotiations' so that the case could be dealt with in the Local Court. The judge was later advised that the DPP would not continue with the plea negotiation. The man had been charged with kidnapping his former girlfriend and threatening to bury her alive to kill her.
- Plea negotiation is not formalised in Victoria's law. Its use falls within the discretionary powers of the prosecution.

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Activity 3.3 Folio exercise

Pleas, a matter of negotiation

1 Explain the meaning of plea negotiation (plea bargaining).
2 Explain how the availability of plea negotiation encourages guilty pleas.
3 Critics of plea negotiation argue that it 'softens the deterrent effect of punishment because it gives criminal defendants the power to bargain for lesser punishments'.
   a Explain the meaning of the 'deterrent effect' of punishment.
   b Do you agree with the statement that plea negotiation softens the deterrent effect?
4 'Plea negotiation is widely used in the criminal justice system, yet seldom praised.' Evaluate the weaknesses of the use of plea negotiation in the criminal justice system.
5 Do plea negotiations provide for justice in the criminal law system? Discuss.

CRIMINAL JUSTICE DIVERSION PROGRAM

The Diversion Program is a way of taking a matter out of court, and avoids a plea of guilty. It is also a chance to avoid a criminal record. The emphasis is on keeping the accused out of the criminal justice system and focusing instead on their rehabilitation.

The informant (usually a police officer) needs to give the accused a diversion recommendation and the magistrate will then decide if the accused is eligible. If the magistrate agrees, the accused is placed on a diversion plan, which has conditions. These conditions are normally in place for 12 months, and may include:

- writing a letter of apology to any victim
- making a donation
- attending counselling (such as for anger management), doing a drug or alcohol awareness course, or a driving course
- doing community work.

If the conditions of the plan are followed, the police will drop the charges and there will be no finding of guilt and therefore no criminal record.

You may be eligible for diversion if your offence:

- is to be heard in the Magistrates' Court
- does not have a minimum or fixed sentence or penalty, and
- you agree that you were responsible for the crime (this is not a plea of guilty).

The Diversion Program is usually for a first offence that is not too serious: for example, criminal damage, careless driving or minor theft. It will not be available for excessive speeding, driving while under the influence of drugs or alcohol or refusing to take a drug or alcohol test. If the offence is a traffic offence, the accused will still get the demerit points.

If an accused wishes to take part in a Diversion Program

The accused needs to ask for a diversion before they attend the Magistrates' Court. They need to write a letter asking to take part in the program. The letter should include details about the accused including, for example, whether or not they have apologised to any victim, and whether it is their first offence. Institutions such as the VLA and CLCs can help the accused with what should be included.

The accused will be interviewed by a diversion coordinator. This officer will write to any victim involved in the offence to find out if they want the accused on the program. If the victim does not want the accused to take part in the program, the accused will not receive a diversion plan.

In court the accused should ask the magistrate for a diversion plan, and should have documents with them that support their suitability. These should include character references, receipts for payment of any damages incurred in the crime, and reports from doctors or counsellors they have seen.

If a diversion plan is made and the accused fails to comply with the conditions, they will return to court, where the magistrate may reinstate the plan. If the magistrate does not do this, the accused will need to have the offence heard in the court.

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Sentence indication

A sentence indication allows a judge or magistrate to indicate to the accused whether they are likely to receive a custodial or a non-custodial sentence.

A sentence indication scheme is another way of encouraging people to plead guilty early. Early guilty pleas save court time and costs, as well as sparing victims stress.

Sentencing indication allows an accused person, or their legal representative, to request an indication from the judge as to whether they are likely to receive a custodial or a non-custodial sentence if the accused pleads guilty. Under this scheme a judge or magistrate would indicate to an accused person, before a trial was to start, what kind of sentence discount they would receive in return for a guilty plea. The *Criminal Procedure Act 2009* (Vic) provides that:

- If a non-custodial indication is given, and the accused pleads guilty at the next available opportunity (either immediately after the indication or at the next pre-trial hearing), this is then binding on the judge in sentencing, so a custodial sentence cannot be given.
- If a person pleads guilty after a custodial indication is given, this can be changed to a non-custodial penalty after the revelation of all material at a later plea hearing examination.
- If an indication is given, but the accused does not plead guilty, the case must be relisted with a different judge, unless all parties agree otherwise.

Victorian courts must take into account a guilty plea, and its timing, when determining an appropriate sentence.

There have been criticisms of the sentencing indication scheme, including:

- The negative impact on victims of being unable to 'have their day in court' and feeling that the accused has been given a light sentence.
- Much of the accused's mitigating circumstances (things that might result in a lower sentence) and aggravating factors (things that might result in a higher sentence) – such as their personal circumstances at the time of the offence, any psychiatric and/or intellectual problems, drug addiction, remorse, acts of reparation (making amends for a wrong that has been done) – may be unknown to the judge at the time of making the indication.
- Society's increasing pressure for harsh sentences may not be reflected in sentence indications.
- Court inefficiency may be being prioritised above the interests of justice.

The scheme has also been criticised for its apparent incompatibility with other legislation, in particular the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that people charged with a criminal offence must 'not be compelled … to confess guilt'. This point was made in the Victorian Parliament (Parliamentary Debates: Legislative Assembly, 6 December 2007, 4348):

> What this legislation will do is introduce a system where people who are disadvantaged and not able to make the judgements which are so fundamental to their future will be under enormous pressure to plead guilty, simply because they think that course of action is better than going to trial.

The judge is also required to make a statement when giving an indication that a more severe sentence is likely if the case proceeds. This could be interpreted by the accused as a suggestion that they should plead guilty immediately, or face a more severe sentence. If a defendant does not have legal representation, this pressure may mean an innocent person pleads guilty.

Activity 3.4 Folio exercise

Pre-trial negotiations

1 Define the term 'justice'.
2 Explain how pre-trial plea negotiations and sentence indications affect the elements of fairness, equality and access and the achievement of justice in the criminal law system.
3 Evaluate the process of plea negotiation and sentence indication.

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3.7 Roles in the criminal trial

The key personnel in a criminal trial are the judge, the jury, the prosecution, the accused and legal practitioners. They all have important responsibilities during the trial.

Responsibilities of the judge

The judge presides over the court.

The judge is responsible for ensuring that both parties obey the rules of court procedure. One important function of the judge is to ensure that the party who bears the burden of proving the case – the prosecution – has legally satisfied this responsibility.

Where there is a judge and a jury, the judge does not reach a decision as to guilt. At the end of the hearing the judge presents a summary of the evidence, the issues presented by the parties and the relevant law to the jury. When doing this, the judge must act impartially and treat each party equally and fairly. The judge is responsible for the following.

- **Deciding the admissibility of evidence:** The judge may exclude inadmissible evidence, such as hearsay (a statement made out of court that is used in court to prove the truth of something: if X says, in court, that Y told her Z, and Y is not in court to be asked about Z, X's evidence about Z is hearsay, and will be excluded) or similar fact evidence (evidence about the accused's past bad acts: an accused's past convictions cannot generally be used as evidence in a court case). This evidence may prejudice the jury's final decision.
- **The selection and empanelling of a jury:** The judge is responsible for the process through which a jury is selected and empanelled.
- **Safeguarding the rules of procedure:** The judge must ensure that each party acts according to the rules of procedure.
- **Deciding all questions of law:** Although each party may present evidence to suggest the relevant law that applies to their case, the ultimate decision as to the relevant law is the judge's. In a criminal case, the judge is also responsible for deciding the consequences of breaking the law; that is, deciding the appropriate sanction.
- **Deciding questions of fact when there is no jury:** In the Magistrates' Court, for example, the magistrate performs the role of both judge and jury. The magistrate decides if the facts have been proven and how the law applies to those facts. Once these two issues have been decided, the magistrate reaches a decision (verdict). In the County Court or the Supreme Court, where a jury is present, the jury is the trier of facts. The jury must decide the facts of the case and how the law, as prescribed by the judge, applies to the facts.
- **Deciding the sanction:** In a criminal case where the defendant has been found guilty, the judge decides the sanction.

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The judge is not allowed to intervene unnecessarily in the conduct of the case. The judge must remain neutral and cannot assist the parties in the presentation of the case, either to prompt a party to ask a particular question of a witness or to introduce a legal issue. The judge must listen carefully to all the evidence presented by both parties.

The role of the judge is to be independent and impartial.

The judge can only ask questions of witnesses when it is necessary to clear up any point that has been overlooked or obscured. The impartiality of the judge in a trial is seen as the key to ensuring that justice is being done. Justice includes the concept that every individual will be treated fairly and equally. This can only be achieved if the judge is an impartial observer of the contest.

Responsibilities of the jury

The use of juries is based on the idea that you have the right to be judged by your peers. The word 'peer' comes from a Latin word meaning equal. To be judged by your peers means to be judged by persons with the same legal standing – ordinary members of the community. Juries are made up of ordinary men and women of the community. The jury system also reflects the idea that everyone in a community is responsible for the administration of justice.

A jury of 12 is used in criminal trials (that is, for indictable offences) in the County Court and Supreme Court in which the accused pleads not guilty.

When a trial is expected to continue for an extended period, the judge may empanel 15 jurors; but only 12 take part in reaching the verdict. The accused (or counsel for the accused) has a right to peremptory challenges or challenges for cause. With peremptory challenges, the accused does not have to give any reason for challenging the juror. Jurors whose names and occupations or numbers are called must walk across the courtroom, past the accused (who is in the dock) and be seated in the jury box. During this time, either party has the right to challenge the prospective juror. Challenges must be made before the juror is seated in the jury box.

The accused has the right to challenge peremptorily:

- six jurors if only one person is arraigned (on trial)
- five jurors if two people are arraigned
- four jurors if more than two people are arraigned.

In 2017 the Justice Legislation Amendment (Court Security, Juries and other matters) Act reduced peremptory challenges from six to three and prosecution stand asides from six to three. These changes are to come into effect 1 May 2018.

The Crown has the right to stand aside jurors in criminal trials. The Crown can stand aside:

- six jurors if only one person is arraigned
- 10 jurors if two people are arraigned
- four jurors for each person arraigned if more than two people are arraigned.

The accused and the Crown also have a right to an unlimited number of challenges for cause. A challenge for cause is one where there is a good reason for the juror not being selected. Challenges for cause are rare. The judge hears all challenges. Where there has been a challenge for cause, the judge must decide whether the reasons given for the challenge are valid. Potential jurors who have been challenged return to the jury pool.

In summary, the jury performs the following functions:

- attends the trial for as long as required
- listens to all evidence and submissions presented by counsel for both sides
- remembers, collates and analyses arguments presented for both sides
- decides questions of fact
- follows instructions given by the judge on questions of evidence, procedure and points of law
- follows the judge's direction, if issued, to acquit the accused
- takes note of the judge's final summary of the case
- reaches and delivers a verdict.

In criminal cases, the verdict must be 'beyond reasonable doubt' if the accused is to be found guilty.

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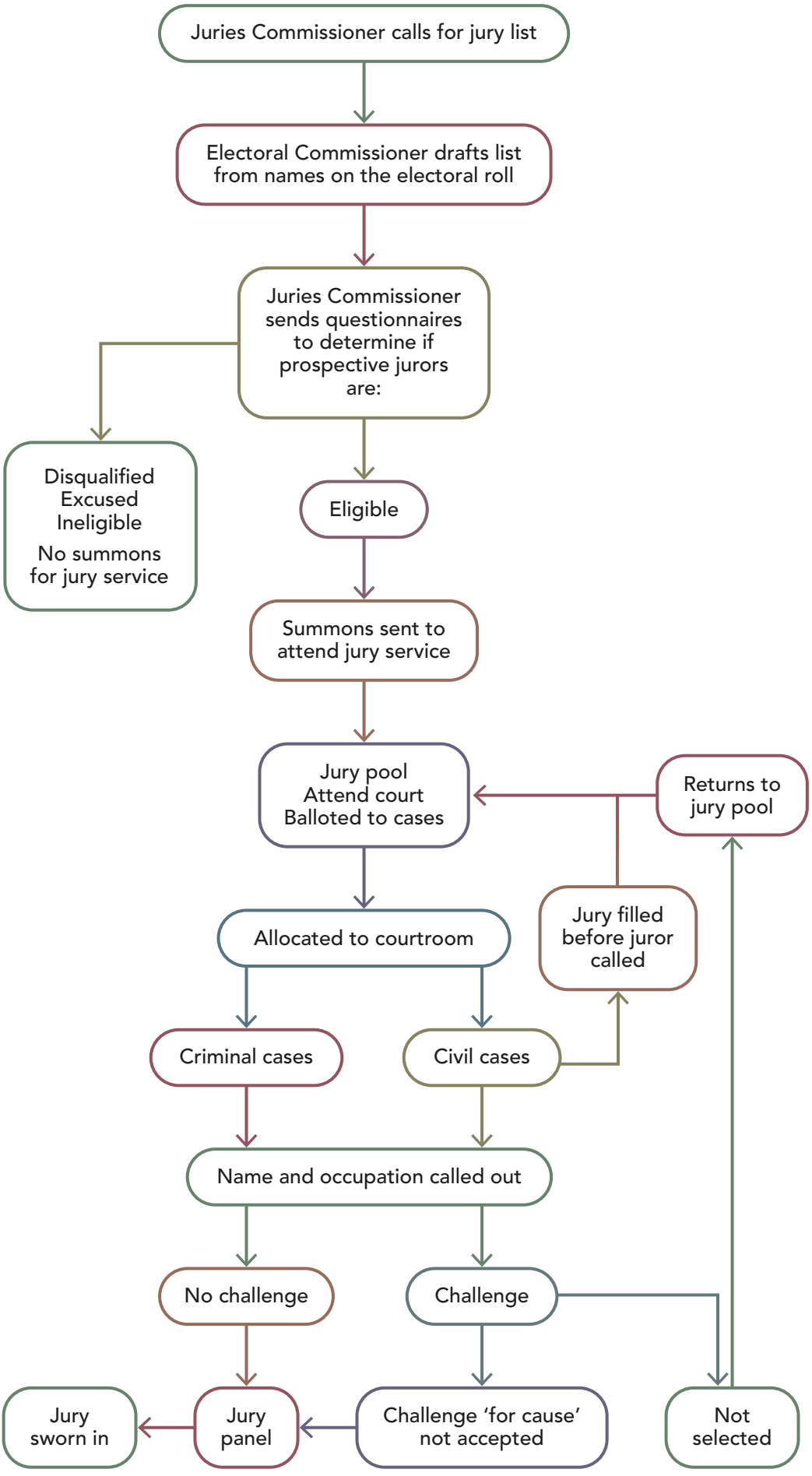

Figure 3.8 How juries are selected

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THE ROLE OF THE JURY

Once the jury has been empanelled and sworn in, the judge will ask the jury to elect a foreperson. The foreperson's role includes:

- asking the court questions on behalf of individual jury members or the whole jury
- taking responsibility for deliberations
- delivering the verdict.

The foreperson is not, however, meant to influence the jury's verdict. Their vote does not carry any extra weight.

When lawyers have presented their evidence and arguments, the trial judge will explain their role to the jury. Essentially, the jury is a fact-finding body that must:

- listen to all the evidence presented by both parties
- consider the evidence
- reach a decision based on the evidence.

The role of the judge in a jury trial

When a case is being heard by a judge and a jury, the judge presides over the court and instructs the jury on its role and responsibilities. The judge:

- explains which party has the burden of proof
- explains the standard of proof required
- applies the rules of evidence and procedure
- directs the jury as to the law that applies to the facts
- gives rulings on points of law when appropriate
- summarises the law that is applicable to the case
- answers questions from the jury.

In a criminal case, a judge may direct the jury to acquit the accused if the judge believes, at the conclusion of the prosecution evidence, that the charge has not been proved by the evidence.

After hearing the case, the jury retires to the jury room to consider the evidence and reach a verdict. When the jury reaches a verdict, the foreperson reads the verdict out to the court.

If a verdict cannot be reached, the judge may declare the jury to be a hung jury. In this case, the jury is discharged and a new one is empanelled. The trial will then recommence, from the beginning. Judges are reluctant to discharge a jury, because of the cost and the time involved in rehearing a case.

The jury listens to the evidence, considers the evidence and reaches a verdict.

The judge will pass sentence.

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NewsReport 3.7
In the line of duty

GRAPHIC EVIDENCE OF ROTTING BODIES IN barrels and the death of a toddler would rock most people. Imagine sitting in the jury box and being confronted with graphic and horrific evidence. Imagine trying to put aside your emotions in an effort to be fair in reaching a verdict. Imagine how things heard during the trial could haunt you. Being a juror in any case is not easy. For some jurors, particularly those hearing murder cases, the experience can be traumatic. This can be the result of carrying out a civic duty, for a juror.

Snowtown murder case

Such was the trauma caused by the Snowtown murder trial that some of the jurors were counselled during the proceedings. Justice Brian Martin, of the South Australian Supreme Court, warned jurors not to think about the case. After leaving the court, they were addressed by a psychiatrist. Ongoing counselling was arranged for jurors, court officials and staff who saw and heard the evidence.

The jurors saw photographs of the autopsies of eight murder victims whose bodies had been kept in barrels. They heard what was found in barrels – large pieces of skin, matted knots of hair, a kneecap, bones, dismembered torsos, bodies slashed, tortured and cut. They heard evidence of the screams of victims as they were tortured. They heard of toes being crushed with pliers. One victim was decapitated and had her arms cut off.

This trial concerned the murder of 11 of the 13 victims. The killings were uncovered when police found eight rotting and dismembered bodies in six barrels inside a former bank in Snowtown, a country town north of Adelaide. Two other bodies were discovered in an Adelaide backyard two days later. Another man, whose body was found hanging from a tree, also became part of the murder count, as did the remains of a young man whose bones were discovered in 1994 but were identified only five years later.

Four jurors were excused during the 11-month trial, which cost $15 million. South Australia's first fully electronic courtroom was established to deal with the evidence, which included more than 1000 exhibits and resulted in 16,000 pages of court transcript. A total of 228 witnesses, many related to the alleged killers and the victims, were called. (At the end, the jury was hung.)

Jaidyn Leskie case

Across the border in Victoria, jurors in the trial of Greg Domaszewicz heard about the death of toddler Jaidyn Leskie. The Domaszewicz jury consisted of eight men and four women. They came from a panel of 60. Twenty-five asked to be excused. They were aged between early 20s and late 60s, and English-speaking. When asked by Justice Frank Vincent if any others had second thoughts, three more asked to be excused. The defence counsel challenged five members, and all were indeed rejected. The Crown made no challenges. One of the 12 jurors was excused late in the trial following the death of a relative.

Both of these shocking cases captured the attention of the nation.

Civic duty

It is a civic duty to be a juror. Jurors come from and represent the community in which they live. They are there to reflect the values and moral codes of their community. It is not a glamorous job. The pay is lousy. Thanks are few – the judge may speak of a 'valuable contribution' at the end of the trial. Jurors will leave the court from a side door and may bid each other goodbye. That's it!

Stress factors

Studies report that jurors can experience stress. There can be rage, depression, flashbacks, nightmares, irritability and sleeplessness. A study by the University of NSW and the Justice Research Centre found that jurors experienced frustration due to time delays and not receiving all the relevant information about the case. They also had concerns about time, accommodation and food.

Stress factors for jurors can be multiple. They may include dealing with gruesome or graphic evidence, media attention, fear of revenge by the defendant, the length of the trial, community response, lack of anonymity in country locations, the personalities and group dynamics of the jury, and the sense of community responsibility. It is important to note that in Victoria, counselling and debriefing is now offered to jurors. Only about 1% of jurors actually participate in the programs offered.

Police sift through soil at the house where two bodies linked to the Snowtown case were discovered in a backyard grave

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Activity 3.5 Structured questions

The jury in the criminal justice system

1 Explain the role of the jury in a criminal trial.
2 Discuss the purpose of having a jury determine a verdict in criminal cases in the County Court and the Supreme Court.
3 Contrast the role of a magistrate and that of a judge in a jury trial.
4 Outline the factors which could make jury service difficult.
5 Evaluate the role of the jury in the criminal justice system.

NEWSREPORT 3.8

Five members of one family murdered

AFTER THREE YEARS OF COURT HEARINGS, INCLUDING FOUR SEPARATE TRIALS, a NSW Supreme Court jury found Lian Bin 'Robert' Xie guilty of the murder of five members of his extended family. The majority decision was accepted by Supreme Court Justice Fullerton on 12 January 2017.

The trial involved the murder of Xie's brother-in-law, newsagent Min Lin, Min Lin's wife Lily Lin, her sister, Irene Lin, and Min and Lily's two sons, Henry (12) and Terry (9).

Xie was first charged with the murders in May 2011. In the first trial the jury was discharged for legal reasons. The jury was again discharged in the second trial, due to the ill-health of the trial judge. The third trial, which lasted 10 months, failed to reach a verdict. The fourth trial, which led to the conviction, began in June 2016.

During this last trial the jury was sequestered (isolated) in a hotel from 12 November, to help them focus on the task. On 6 January, the jury stated that they could not reach a unanimous decision. The following Monday, when they restated their position, the court granted permission for them to hand in a majority verdict of 11 to 1.

Lian Bin 'Robert' Xie

In Victoria, a majority verdict is not permitted in murder trials.

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Activity 3.6 Case study

The role of the jury

1 Outline the role of the jury in a criminal trial.
2 Explain how the jury helps achieve fairness in the criminal legal system.
3 Read 'Five members of one family murdered'. What do you think the impact of a retrial would be on the accused and the prosecutors?
4 In murder trials, a jury must come to a unanimous decision, meaning all 12 jurors must agree that the accused is guilty or all 12 jurors agree s/he is not guilty. Why do you think the NSW Supreme Court judge allowed a majority 11:1 verdict in Xie's case?
5 What impact could a majority verdict being accepted in a murder trial have on the achievement of justice?
6 Read the article 'The right to trial by jury'. Why is it considered so important in our legal system that the decision of guilt or innocence is left to the jury?

NEWSREPORT 3.9

The right to trial by jury

JURY TRIALS IN VICTORIA ACCOUNT FOR ABOUT HALF OF 1% OF criminal proceedings. The system is regarded as a very important institution.

The High Court's Justice Deane has probably given the best defence of the jury system. In the decision in *Kingswell v The Queen* (1985) 159 CLR 264, he said that the 'rationale and the essential function' of trial by jury is 'the protection of the citizen against those who customarily exercise the authority of government: legislators … administrators … judges'.

He continued:

> Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a 'fair go' tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases.

Courtesy of the High Court of Australia

The prosecution and the accused

The Office of Public Prosecutions prepares and conducts prosecutions for the DPP.

The prosecution can discontinue a prosecution.

In a criminal case, the accused and the prosecutor are responsible for presenting the relevant facts to support their case. In criminal cases, which involve an offence against the state, the state is represented by the Director of Public Prosecutions (DPP).

The prosecution will initiate a case against the defendant. The decision to initiate a case is based on evidence presented to them by a law enforcement officer. The law enforcement officer may be a police officer or other authority, such as a transit officer.

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The accused has the choice of pleading guilty or not guilty. Defendants who plead not guilty will have the opportunity to present a case in their defence. If they plead guilty, issues relating to the sentencing of the accused may be raised in court.

In presenting their case, each party decides which arguments they intend to rely on and selects the evidence that supports these arguments. In a criminal trial of an indictable offence, the prosecution must present the bulk of this evidence at the time of committal. The defendant is under no obligation to disclose evidence at the committal hearing.

THE ROLE OF THE DDP

The Office of Public Prosecutions (OPP) prepares and conducts prosecutions for the Director of Public Prosecutions (DPP). The DPP has responsibility for the prosecution of indictable offences and, if considered necessary, the conduct of any committal or summary prosecutions in the Magistrates' Court. In exceptional circumstances, the DPP can put aside a decision by a Magistrates' Court not to commit a case for trial and present the accused for trial.

Preparing the indictment

All evidence presented during the committal process is recorded and collected: this is called a deposition. The deposition is forwarded to the DPP and the Criminal Trial Listing Directorate. At this time, a request is made by the court to the DPP for the indictment, any prior convictions of the defendant, any other prosecution witnesses intended to be called and any other documentation intended to be used.

A Crown prosecutor assesses the deposition and refers the case to the Solicitor-General. An indictment is drawn up. It is a formal document outlining the specific charges, together with details about the charges. It usually contains the same charge that appeared in the deposition, but the Crown prosecutor can add new or further charges if it is considered appropriate.

Discontinuing a prosecution

If the Crown prosecutor considers that the prosecution's evidence is not strong enough, the Attorney-General will be advised to discontinue the prosecution. This was previously known as *a nolle prosequi*. It 'discontinues' proceedings without actually acquitting the defendant. The matter can be recommenced if further evidence becomes available.

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The legal practitioners

The parties are responsible for presenting their case.

Legal representatives prepare and present the case for the parties.

In most instances, the accused will engage a legal representative to prepare and present their case. The accused is responsible for arranging and paying for this. A solicitor will provide advice and will prepare the case (a 'brief') for a barrister. The barrister is a member of the Bar and will present the case in court.

If a person does not hire a lawyer to present their case, they may be disadvantaged. Lawyers and barristers have expertise in presenting cases in court and may be able to present a more persuasive argument than an individual who does not have any experience with court processes. The trial may not be a contest between two equal parties if one of the parties does not have legal representation.

As a result of a recommendation by the Victorian Law Reform Commission to establish a Public Defender Scheme, VLA has implemented the Public Defenders Unit (PDU), which is a team of 11 advocates. According to VLA: 'The PDU appears in some of the most difficult and complex matters VLA deals with, including murder, conspiracy, sex offences, arson and important test cases on issues such as human rights.'

The VLRC stated that the aim of establishing such a unit is to encourage the development of high-level skills among a select group of defence barristers and provide a resource for educating later generations of criminal trial lawyers.

Activity 3.7 Folio exercise

Criminal cases' pre-trial procedure

1 Identify the parties in a criminal case.
2 Explain the role of the accused in a criminal trial.
3 Explain the role of the DPP.
4 Using an annotated flow chart, describe the pre-trial processes leading up to a trial in Victoria.
5 Analyse the responsibilities of key personnel in a criminal trial.

3.8 The criminal trial

A criminal trial is heard in the County Court or the Supreme Court by a judge and jury. A hearing in the Magistrates' Court follows a similar procedure but does not include a jury.

A criminal trial begins with the arraignment of the accused: this is when the judge's associate reads out the charge/s and asks the defendant to plead guilty or not guilty.

Pleading guilty

If the accused pleads guilty, a summary of the case is presented and the accused is sentenced.

If the accused pleads guilty, a summary of evidence is presented. Any earlier convictions are read out. Information in relation to the character of the accused may be presented. Counsel acting for the accused may submit arguments in favour of leniency or an appropriate penalty. The judge then passes sentence; in some instances, the judge may wait until further information is available, particularly in relation to medical reports or earlier convictions. If the sentence is delayed, the accused may be remanded in custody or released on bail.

Pleading not guilty

If the accused pleads not guilty, a jury of 12 people will decide whether the accused is guilty beyond reasonable doubt in the County Court or Supreme Court.

A not guilty plea lengthens the trial process, because the case is heard by a judge and 12 jurors. Following a plea of not guilty a jury will be empanelled. The role of the jury is to decide whether the prosecution has proven that the accused is guilty 'beyond reasonable doubt'. Any questions of law that have not been resolved at the directions hearing will be resolved prior to empanelling the jury.

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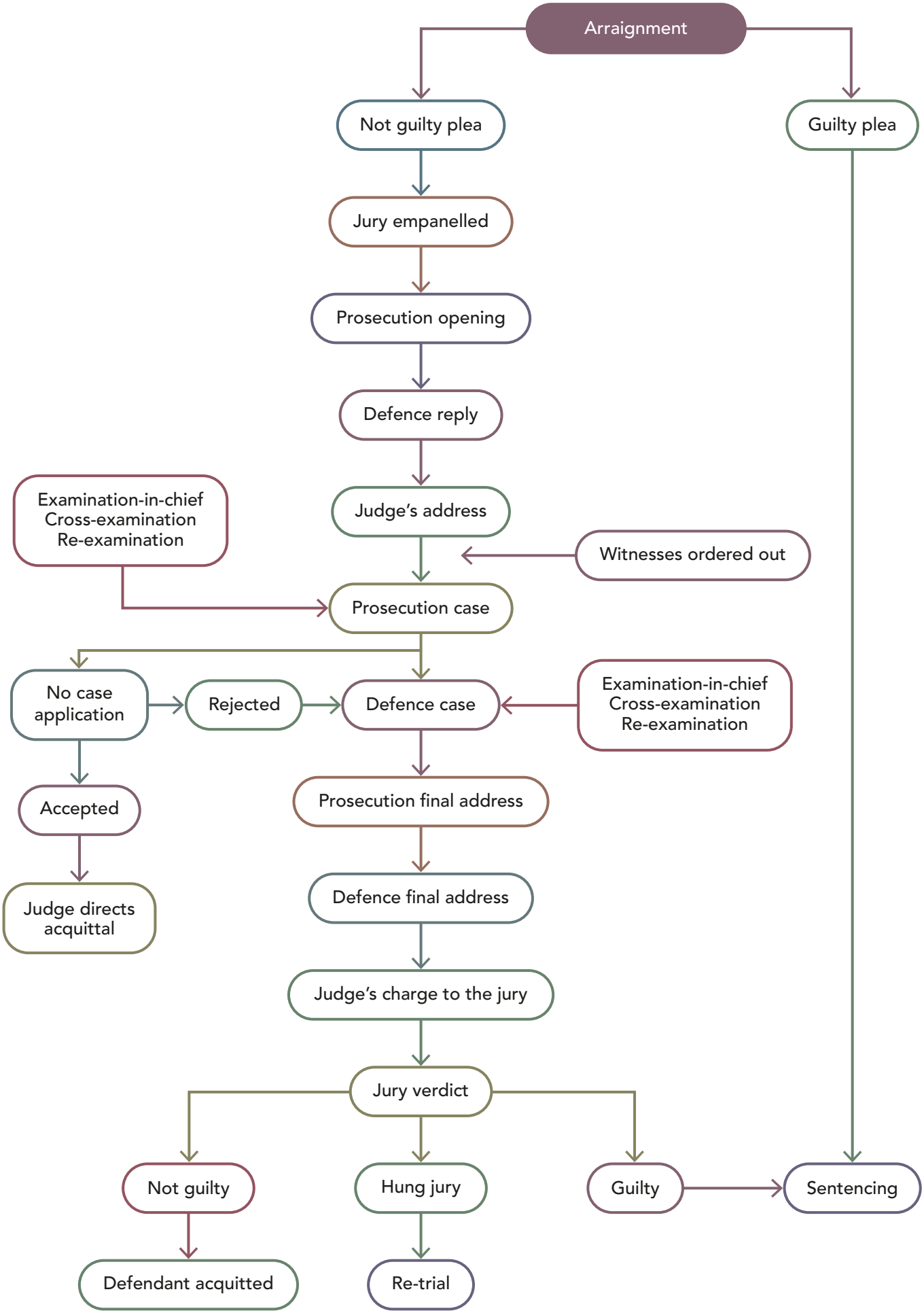

Figure 3.9 The criminal trial

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The process of a criminal trial

Prosecution opening

The prosecution presents a summary of the case.

The prosecution starts with a summary of the case. This summary explains:

- the nature of the alleged offences
- the elements that must be proved by the Crown
- the evidence that the prosecution will be presenting to the court in order to prove the charges against the defendant.

Defence response

The defence presents a response to the prosecution.

The defence presents a response to the prosecution opening. This response must outline the issues in the trial and identify those facts that are not contested (that is, the facts the two sides agree on). This should be consistent with what was disclosed or identified in the pre-trial stages. The trial judge may limit the length of the prosecution opening or the defence response.

Address to the jury

The judge addresses the jury on issues relating to the trial.

Immediately after the defence response to the prosecution opening, or at any other time the trial judge thinks appropriate, the trial judge may address the jury on:

- the issues in the trial
- the relevance to the conduct of the trial of any admissions made, directions given or matters determined before the start of the trial.

Prosecution case

The prosecution calls witnesses.

Before any witnesses are called, the court may 'order out' witnesses (ask them to leave the courtroom). Prosecution witnesses are then called, one at a time. Witnesses are examined-in-chief (by the prosecution), cross-examined (by the defence) and re-examined (by the prosecution). The rules of evidence are complex. The judge will decide whether questions or evidence are admissible. Court rules also govern how barristers question witnesses. Some evidence is not allowed in criminal trials because it is considered prejudicial to the accused. For instance, as a general rule, evidence about previous convictions can only be introduced after the jury reaches a verdict. Evidence about previous convictions is used to help the judge determine the appropriate sentence. In some cases, the court can allow information about previous criminal convictions of defendants. This type of evidence is known as 'propensity' evidence. For instance, the prosecution may want to present evidence about previous convictions for violent offences to demonstrate that the accused has a propensity for (tendency towards, or habit of) violent behaviour.

'No case' application

At the end of the prosecution's evidence, the defence may argue that there is no case to answer. If the judge agrees, the jury will be directed to acquit the accused.

Defence case

The defence calls witnesses. The accused has the right to remain silent.

If the case is still proceeding, the defence can then present witnesses. Defence witnesses are examined in the same way as prosecution witnesses. The accused can remain silent. The judge (and jury) and the prosecution cannot draw any inference from this: the fact that the defendant has decided not to give evidence cannot be taken as a sign that the defendant has something to hide.

Final addresses

The defence and the prosecution sum up their case.

After the defence completes its case, both the prosecution and the defence address the jury. This stage can be quite crucial, particularly in longer trials in which the jury may have forgotten or overlooked evidence presented earlier. Counsel summarise the evidence presented, drawing attention to the strengths of their arguments and highlighting the weaknesses in the other side's argument.

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Judge's charge to the jury

The judge instructs the jury on the relevant points of law. This is referred to as the judge's charge to the jury. The judge will advise the jury that the onus is on the Crown to prove 'beyond reasonable doubt' that the accused is guilty of the offences.

The judge instructs the jury on the relevant law.

Verdict

The jury then retires to the jury room to consider its verdict. When a jury cannot reach a unanimous verdict after 6 hours, a majority verdict may be accepted in some cases. A majority verdict is defined as the verdict of 11 out of 12 jurors.

In theory, the jury is given 6 hours to reach a decision, but this may be extended if the jury feels it can reach a verdict given more time. However, the judge may ultimately, on the advice of the jury foreperson, declare the jury a hung jury – a jury unable to reach a verdict. In this case the jury is discharged and a new trial is ordered.

The jury reaches a verdict. A majority verdict can be accepted after 6 hours except in murder, serious drug offences and Commonwealth offences, where a unanimous verdict is required.

Obviously, this represents a great deal of time and considerable expense to the parties and the community. Consequently, it is preferable to extend the jury's time limit, particularly if an agreement is likely. Even if it appears that the jury is at loggerheads, the judge may return the jury to the jury room to reconsider the matter. When the jury reaches a verdict, the jury foreperson informs the court of the verdict. Being found not guilty means being acquitted. When there is a guilty verdict, the judge will pass sentence.

After the verdict is reached the judge sentences the offender. The judge can take into account a range of factors, including the impact of the crime on the victim.

3.9 Justice in the criminal justice system

The purpose of law is to achieve justice. Chapter 1 discussed the concept of justice and addressed the difficulties in defining it. Whether justice has been achieved is dependent on the values of the community at the time, the particular circumstances relating to a case and the individual who has been affected and how they have been affected. One thing that is clear is that the concept of justice involves being genuinely respectful towards all people.

A legal system can only operate if it has the support of the majority and the community will only support the legal system if justice is provided.

It is difficult for the legal system to meet all the expectations of the parties involved in a criminal case – the accused and the victim.

The common elements of justice are fairness, equality and access to the legal system.

Fairness

Everyone has the right to a lawful hearing and procedural fairness or impartiality. This means decision-making that is objective and reasonable by the person exercising administrative power: the magistrate or judge. They must also be independent, having no constraints or bias in their decision-making.

Criminal trials provide for a fair hearing, with an independent and impartial magistrate or judge and jury.

The criminal pre-trial processes aim to provide individuals with a fair hearing. Individuals have the right to remain silent. This recognises that all individuals have the right to be considered innocent until proven guilty. This also protects individuals against self-incrimination.

Criminal processes and procedures reflect our basic values. These include the principle that we are entitled to a fair treatment in a criminal matter. These values are reflected in:

- the right to be considered innocent until proven guilty: the burden of proof is on the accuser to prove the guilty of the accused 'beyond reasonable doubt'
- the right to silence: there are many reasons for reticence – fear of the police, lack of understanding of the legal system, of what is being asked, lack of confidence in expressing oneself. Guilt cannot be assumed if a person chooses not to speak in court.
- the right to trial by jury: a cross-section of the community means a range of values, making sure the law remains relevant and meaningful.

The presumption of innocence, the right to silence and the right to trial by jury are principles that aim to provide for a fair trial and to ensure that we are all treated equally.

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A person accused of a criminal offence has their case heard before an independent and impartial body. The rules of evidence and procedure used in a trial ensure that the prosecution and the defence have an equal opportunity to present their case. The use of the jury means that the final decision is made by unbiased and impartial representatives of the community.

Do all people receive a fair hearing? A number of factors may affect the fair and equal treatment of minority groups. These problems are discussed in more detail in Legal brief 3.5 Access to justice and cultural differences.

Equality

Equality is reflected through non-discriminatory processes and procedures that treat everyone in the criminal justice system the same way.

The criminal justice system strives to achieve non-discriminatory outcomes and to protect all who come before it. Everyone should be treated the same, enjoying equal rights and opportunities throughout the legal system. The aim is that no person is disadvantaged.

Wealth and power can cause differences in equality in Australia but the criminal justice system tries to balance that out with services available to the accused, pre-trial procedures to determine if enough evidence is actually available to commit the person to a higher court, and trial procedures that require the same processes and procedures for both parties. Equal treatment is reflected in:

- the use of interpreters for people with language difficulties
- specialist courts, such as the Koori Court, that recognise cultural differences and their importance
- evidence being given orally in court so that it can be tested through cross-examination.

However, are all people treated equally?

Access to legal resources

A criminal justice system must be accessible to all members of society for it to be considered fair and just. Everyone has the right to defend themselves and receive justice, whether they are the accused or the victim. However, a person without effective legal representation could be considered unlikely to receive a fair trial.

Cultural diversity and justice

Cultural diversity can cause injustice in our legal system.

The laws in our criminal justice system reflect the values and culture of a mainly white Anglo-Saxon society, whereas Australia is made up of many different cultures. These fundamental differences, if not recognised in our community and addressed where necessary, can create injustices in our criminal law system. Two particular groups are at risk: Indigenous people and migrants.

Indigenous Australians

Our legal system is based on oral evidence in the courtroom. Where an accused or witness is unable to speak or understand English, an interpreter is provided. However, currently in Australia there are approximately 200 different Indigenous languages – a number are becoming extinct (there were estimated to be 250 at the time of colonisation). For people needing an interpreter, and it's usually older Indigenous people, the interpreter may have to be a family member or friend of the accused. This may not be easy in itself, bearing in mind Indigenous people's complex kinship rules.

There are differences in pronunciation and grammar in 'Aboriginal English', a recognised form of English. Sometimes this form of language is seen as a pidgin English and the speaker is seen as less educated. This can be a difficulty when an accused Indigenous person is being tried by a jury. Courts have started to recognise Aboriginal English, but many injustices have occurred through a lack of awareness.

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Further cultural differences that have caused injustices in the legal system include:

- the way direct questioning is done with Indigenous witnesses or accused persons
- the fact that it is seen as disrespectful to have or maintain direct eye contact with a 'respected' Indigenous person
- the fact that it is not acceptable in Indigenous cultures to disagree with a 'respected' Indigenous person
- the fact that it is not acceptable for a woman to discuss matters of a sexual nature, particularly with a man (many police and legal personnel are men).

Immigrants and refugees

One in four Australians were born overseas. There are 300 languages spoken in Australia, including Indigenous languages, and there are 120 religions.

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Legal brief 3.3

Immigrants, refugees and justice

Immigrants and refugees can have particular issues with the police and the criminal justice system. The most important are related to pre-migration life experiences and the difficulties associated with settling in a new country. Refugees, in particular, have left their country at short notice, often without their families, are unable to return to their country of origin and are uncertain about the possibility of maintaining links with their family. In addition, they face a severe lack of social, economic and political opportunities and life choices, making integration difficult.

Research indicates that it is young immigrants who are more likely to come into contact with the police and the justice system.

There are few ongoing programs to improve migrants' knowledge and understanding of the criminal justice system and the role of the police.

Some of the more specific problems that are experienced include:

- discrimination and prejudice
- social isolation and disenfranchisement
- difficulties assimilating with the broader Australian culture and/or maintaining a sense of their own identity with their original culture.

Refugees can be suffering undiagnosed and/or untreated trauma.

Refugees can also be suffering trauma from their past. All these factors affect their involvement in society generally, and the criminal justice system. Some of the key issues with the criminal justice system are:

- difficulties with police, including perceptions of racism, bias and over-policing
- racially motivated attacks – or 'hate' crimes – predominantly by strangers
- a disproportionately high fear of crime
- a lack of awareness of the law and of how the criminal justice system operates
- under-reporting crime as victims: this may be due to a lack of understanding of, or confidence in, the criminal justice system and a fear of police

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- concern about the stigma and shame associated with contacting the criminal justice system: this can also be a barrier to the use of both formal and informal support services
- difficulties accessing culturally appropriate programs such as legal assistance.

A report published by the Judicial Council on Cultural Diversity in 2016 revealed that migrant and refugee communities do not have the same access to justice as mainstream Australians. The Judicial Council has stated that for justice to be accessible, equitable and fair, courts must be able to understand and respond to the needs of our culturally diverse society, and citizens must be able to understand and respond to our legal system. The Council highlighted four key areas where inequalities cause major concern:

- a lack of coordination across the judiciary in addressing areas of concern arising from cultural and linguistic diversity
- an absence of national competencies in relation to cultural diversity
- a lack of consistency in the requirements for engaging interpreters, as well as their underutilisation, and concerns about the interpreter quality, and
- insufficient resources and/or formal structures dedicated to help judicial officers (judges and magistrates) and administrative staff design or implement cultural diversity policies.

A further problem for immigrants and refugees is the use of sensational language when the media reports crime. The following have been headlines recently:

A young person responding to media stories about African young people commented:

> Imagine opening your newspaper only to find the headline which suggests that all young people like me, who have my skin colour, are criminals. There are so many good Australians who are working against the racial discriminatory and divisive stereotyping that makes it so hard for me to feel like I belong in this society. And we're not disengaged, although every time I see another instance of racial discrimination or racial stereotyping, it makes us feel just a little bit more disconnected from the society that we call home.

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Activity 3.8 Folio exercise

Migrants, refugees and justice

1 Explain how fairness, equality and access to the legal system relate to justice.
2 Outline some difficulties experienced by migrants and refugees in dealing with the criminal justice system.
3 To what extent do you think these difficulties limit the achievement of justice?
4 Describe what changes to the criminal justice system could help overcome these problems.

Time delays

It is important that criminal procedures are conducted in a timely manner. The accused, victims and witnesses can experience significant stress waiting for a case to be finalised. For a person who has been denied bail, the consequence of delay is that they are denied their liberty. This can affect their employment, personal wellbeing and relationships.

A number of pre-trial procedures have been introduced to reduce delays. The committal process filters out cases where there is not sufficient evidence to obtain a conviction in a higher court. Committal mention hearings have been introduced to identify cases in which the defendant intends to plead guilty. This is designed to make the committal procedure more efficient and so to reduce delays. However, it has been suggested that more can be done to encourage the early identification of guilty pleas.

NewsReport 3.10

Delays end on permanent stay

CONSIDER THE CASE OF KARA LESLEY MILLS. In October 2006 Mills was charged in the ACT with four offences, including trafficking in a controlled drug, or alternatively, possessing that drug, and receiving stolen property. On 6 September 2007, following a committal hearing, Mills was committed to stand trial.

On 28 July 2008 the trial started, but it was stopped after the informant revealed in evidence that fingerprints on the bags containing the drugs had been tested – the defence had been told that it had not. Evidence was given that although fingerprint analysis had been undertaken it revealed no useful information. That was highly relevant to Mills's defence, which was that the bags were left by someone else. DNA analysis had been requested but it had not been conducted.

A pre-arraignment conference was scheduled for 30 June 2009, but it was twice adjourned (because of counsel and witness unavailability), and when the matter returned on 11 August 2009, counsel for Mills indicated that representations were being made to the DPP regarding a permanent stay of proceedings because of delays. Consideration of that issue led to further adjournments.

On 29 October 2009, the next case conference was held and the matter was set down for trial on 7 March 2011. The stay application was foreshadowed and a timetable was set. On 14 April 2010 the prosecution informed Mills's solicitors that no DNA analysis of the seized drug packaging would be conducted. No reason was given. On 15 April 2010, the pre-trial application was part-heard but then not relisted until 18 February 2011, apparently because of a death in the family of counsel for the prosecution. On 7 March 2011, some four years after Mills was charged, the rest of the application was heard.

The matter was taken to the ACT Supreme Court. Chief Justice Terrence Higgins found that for a matter to take 4 years to come to trial after the decision to prosecute was unreasonable. He said: 'The delay of two and a half years from the first trial, in a relatively simple case is … egregiously unreasonable, for whatever reason it might happen.' Judge Higgins granted a permanent stay, believing it was the only appropriate response – the alternatives, an award of costs, relaxed bail conditions or credit for time served, were not.

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Legal brief 3.4

Delays and justice

The criminal justice system includes processes for the investigation, adjudication and sanctioning of criminal offences. These processes aim to provide fair and equal treatment of those accused or convicted of an offence. The accused is protected by the principles of a fair trial and guilt must be proven beyond reasonable doubt. Delays limit the capacity of the criminal justice system to achieve these aims.

Delays can cause significant hardship and undermine public confidence in the legal system.

There is no one measure of what is a reasonable time for the resolution of a criminal matter. Time must be allowed for an allegation to be fully investigated and for a court to hear all the relevant evidence; however, it is also important that criminal cases should not be unduly delayed.

Why are delays a problem?

There are a number of consequences of delays in the criminal justice system. Delays may result in unnecessary hardship for victims and their families. Witnesses may have difficulty remembering details. A person accused of a crime may be denied their liberty and held on remand. Delays undermine public confidence in the ability of the criminal justice system and send the wrong message to offenders in the community. Delays also undermine the morale of those in the community who are responsible for enforcing the criminal law.

Delays also contribute to the costs of the criminal justice system. Delays increase the cost of court administration. Delays also have cost implications for witnesses and victims. Contested cases are generally very time-consuming, especially in the higher courts, where a jury must be empanelled. For participants engaged in the hearing of a contested case, this can result in additional pressure.

What causes delays?

The processes and procedures for hearing criminal cases are complex. Delays can occur in the investigation of an offence, in the pre-trial stages or during a trial. Some of the reasons for delays follow.

Delays in determining a plea	In most cases the defendant pleads guilty and the case is not contested. However, even uncontested cases can result in delays. These delays can be due to a late plea negotiation between the defence and the prosecution.
Delays in the preparation of cases	Delays can occur in the delivery of a brief, and the preparation, disclosure and filing processes. These are compounded by defence difficulties and the unavailability of legal aid.
Court workloads	Delays are a by-product of the increased workload due to: • the increased number of cases heard by the courts • the average length of criminal cases • the number of court appearances needed to resolve a matter.
Delays in collecting evidence	The prosecution of complex cases relies on quality evidence resulting from police investigation. Such investigations typically require costly and time-consuming research and expertise.
Adjournments	A case may be adjourned because the courts have over-listed the number of cases that can be heard, or due to limited court facilities – such as access to videoconferencing facilities – or because a witness is not available on the day of the trial.
Rules of evidence	The rules of evidence and the reliance on oral evidence contribute to delays in the criminal justice system.

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DELAYS IN THE DARC!

Delays occur because of the DARC:

- **D**etermining a plea
- **A**djournments
- **R**ules of evidence
- **C**ourt workloads/Case preparation/Collecting evidence.

WHY TRIALS ARE DELAYED

A report, *Criminal Trial Delays in Australia: Trial Listing Outcomes*, prepared by the Australian Institute of Criminology, examined the reasons for delays in the hearing of criminal trials.

The study found that for every 10 criminal trials listed to begin on a certain date:

- three would proceed as scheduled
- four would be settled without a trial, either through a guilty plea or withdrawal of the case by the prosecution
- three would be adjourned and rescheduled.

The reasons for trial adjournment or delay were identified as:

- legal counsel did not prepare for the trial because they believed it was unlikely to proceed
- the prosecution was uncertain about the strength of its case and how to proceed
- the prosecution decided to amend the charges shortly before the trial date, leading to late plea negotiations.

Trial delays were also due to a lack of experienced lawyers, limited or late disclosure of evidence, limited or late communication between the prosecution and defence, limited incentives for early guilty pleas and confusion about probable sentencing outcomes.

Other reasons for trial delay are limited consequences for intentional delay of the trial, and failure to manage victims and witnesses so that they are able to appear on the scheduled trial date.

Criminal Trial Delays in Australia: Trial Listing Outcomes is available at http://aic.gov.au/publications/current%20series/rpp/61-80/rpp74.html.

How can we reduce delays?

A number of processes in the criminal justice system aim to reduce delays. These include the following.

Plea negotiations	By the defence counsel and prosecution negotiating which charges are likely to succeed and not proceeding with those that are weak, the pre-trial and trial procedures are more efficient, with time not wasted on those charges not likely to be proven. Plea negotiations allow criminal procedures to move straight from pre-trial to the sentencing hearing, avoiding the need for a trial, thus saving time, money and stress for witnesses.
Sentence discounts	The practice of giving sentencing discounts for guilty pleas reduces the number of contested cases. This practice allows the accused, as advised by legal counsel, to plead guilty on the presumption that they will receive a more favourable sentence. There is, however, a serious problem with this idea: the basic principle of our criminal justice system is that the defendant has the right to decide whether they should plead guilty or not guilty. We are all presumed to be innocent until proven guilty. If a defendant has exercised their right to plead not guilty, should they be treated more harshly than if they had pleaded guilty?
Sentence indication	The defendant can ask the court to provide an indication of the sentence likely to be imposed if they plead guilty. A sentence indication procedure will help the defendant weigh up their options and should lead to earlier resolution of matters, which would reduce delays in hearing cases.

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A number of changes have been recommended to address delays. These include the following.

Abolish committal hearings	It has been suggested that committal hearings should be abolished. Most committal hearings proceed as a hand-up brief. Some people have argued that the committal process avoids delays, as it clarifies issues and helps the defendant in deciding whether or not to plead guilty. Critics argue that the process rarely discharges a defendant at the committal stage, but has encouraged guilty pleas through the identification of the key evidence against the accused. A possible flaw in the committal system is that the DPP has the statutory right to commit a person to trial regardless of a magistrate's decision.
Change court work practices	• Magistrates' Court cases to be listed by the hour • Custody centres to be built next to courts • Time limits to be set for the determination of applications for legal aid • Use of split sittings to extend court hours – a court could be used by one judge in the morning (from 9am to 1.15pm) and by another judge in an afternoon sitting (from 1.30pm to 5.45pm) • Introduction of night court sittings and the extension of weekend courts beyond bail and remand.
It should be noted that it would require more magistrates and court staff to make this system work. This would require more financial resources and an overall increase to the courts' operating budget.	

Ways to improve accessibility and reduce delays

Studies have identified seven areas that contributed to trial efficiency:

- having legal representation available after arrest and before the defendant is charged
- providing improved incentives for defendants to plead guilty early
- verifying that prosecutors are involved at or before the charging process, so that they can provide advice about the most appropriate charges so that charges are not withdrawn prior to the trial
- ensuring that charges are examined by experienced lawyers, preferably those who will be involved in the case
- guaranteeing that lawyers start plea negotiations before any court hearing
- ensuring that lawyers concentrate only on the issues in dispute: in other words, find as much common ground as possible
- ensuring that communication between the parties' lawyers involves sufficient expertise and authority to make decisions.

Delays may be avoided by using directions hearings, giving on-the-spot fines and offering sentence discounts.

Activity 3.9 Case study

The impact of delays

1 Outline how the processes and procedures used in the criminal justice system provide for:
   - a fair hearing
   - access to justice.

2 Outline the ways in which delays may occur in the criminal justice system.

3 Describe the impact of the problem of delays in the criminal justice system on the effective operation of the criminal justice system.

4 Describe one recent change, or proposed change, to reduce delays in the criminal justice system. How would the change enhance the effective operation of the criminal justice system?

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Legal brief 3.5

Access to justice and cultural differences

An individual who feels that they have not been treated fairly can appeal to a higher court.

The law does not recognise any difference between a recent migrant or refugee and a native-born Australian. However, differences do exist. These may result from differences in cultural background, language skills and expectations of the criminal justice system. These factors may limit the capacity of the criminal justice system to provide for fair and equal treatment.

Perceptions of police	Immigrants and refugees come to Australia with a range of attitudes and expectations. Some may feel frightened and intimidated by police. They may come from a country in which police had the power to detain and torture a person without trial. Or they may expect that, as happens in some southern European countries, the police can be called to adjudicate in marital disputes or neighbourhood arguments. They may not understand why the police in Australia will not act in this capacity.
Use of interpreters	Many Australians are confused about their rights when questioned by the police. The problem is compounded for a person who does not speak, read or understand English very well. In Victoria, any person whose knowledge of the English language is insufficient to understand the questioning has the right to an interpreter. The police must arrange for one to be made available, and no questions can be asked until the interpreter is present. However, in practice, the need for an interpreter is determined by the police. The need for interpreters when police question a suspect with limited English has been recognised, in part, by the courts. Australian cases suggest that police statements taken without an interpreter may be inadmissible. The admission of such evidence is at the discretion of the judge. The judge can refuse to admit confessions if the warning and/or the questions were not interpreted for the suspect. The judge will not allow this evidence if its admission would be unfair.
Understanding of bail	Not all countries have a system of bail. Bail may be granted on the condition that a sum of money is posted (that is, lodged) as a guarantee that an accused will appear at the time of trial. The system of bail is used mainly in common law countries, so people from other countries may not be familiar with the concept. Even if they do have an understanding of what is meant by bail, not all people will have the resources to fulfil the bail requirements. Migrant and refugee communities have a large proportion of single people and working-class family groups. In many cases, they have neither the ready money to cover bail nor the ability to find a suitable guarantor. Moreover, in many countries the police have the power to impose on-the-spot fines. A person who is not familiar with the concept of bail might confuse the lodging of bail with the payment of a fine. They might think the payment at the police station is the payment of a fine and that nothing more will be done, not realising that they are expected to appear in court.
Understanding of court processes	The Magistrates' Court is the busiest court in the court hierarchy. If you are going to appear in court, you are most likely to appear in a Magistrates' Court. You might appear as either a defendant or a witness. Either way, if you are a new arrival, or otherwise unfamiliar with legal procedures in Australia, there is a lot going on in a Magistrates' Court that will confuse you.

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NewsReport 3.11

Police work with Sudanese community

POLICE OFFICERS ARE MAKING EFFORTS TO learn more about Sudanese refugees in Melbourne. Some officers have visited South Sudan to learn more about the background and culture of young Sudanese refugees in suburbs such as Dandenong and Collingwood. The long arm of the law has also stretched out to Sudanese youths – those who have expressed an interest in becoming police officers have been given tours of the Police Academy.

More than 2500 Sudanese have settled in Greater Dandenong since 2001.

The visits to Sudan are part of Victoria Police's drive to move away from a reactive approach to policing and to better understand the members of this community.

While featuring low in crime statistics, the tall Sudanese youths have attracted considerable media attention with their habit of gathering in large numbers. This has raised fears about the emergence of Sudanese gangs. For the law enforcers, the refugees' deep-rooted fears about men in uniform have hampered communication efforts and liaison programs.

Police say that regardless of cultural understanding, there are laws that have to be followed and the police have a job to do. However, the way that police enforce the law is important.

Police training includes simple things such as police officers checking their assumptions and working with the community, rather than, for example, moving on a group of young people because they are out together in a large group that might look intimidating to outsiders.

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For more information about these initiatives look at: Department of Immigration and Border Protection (http://www.border.gov.au/about and https://www.dss.gov.au/sites/default/files/documents/11_2013/community-profile-sudan.pdf), Victoria Legal Aid (www.legalaid.vic.gov. au/3641.htm) and the Magistrates' Court (www.magistratescourt.vic.gov.au/publication/annual-report-2011-2012).

NewsReport 3.12

Does criminal justice cater for diversity?

VICTORIANS ORIGINATE FROM MORE than 230 countries and there are more than 200 languages spoken in the community. This diversity includes Indigenous people. People from different cultural and language backgrounds can experience significant disadvantages in their dealings with the justice system.

Different understandings

People from different cultural or language backgrounds may not be familiar with how our legal system works. Our trial system may be unfamiliar. They may have a distrust of police and the court system.

The reasons for this are likely to be many and varied. Possible causes could be past experiences with corrupt police in their home country. Some may come from countries where police are used to quell criticism of the government and arbitrarily detain citizens.

The key to overcoming these issues is to build relationships with people in these communities. Crucial to this is building an understanding of rights, obligations and responsibilities.

Building trust

The Department of Immigration has implemented a program entitled 'Taking the Initiative'. In this program police show new arrivals the principles of police work, and how it is planned and implemented. New arrivals can see that police in Australia are highly accountable and aim to serve the community.

Police also have access to information about different cultures. This information helps the police develop education programs for their workforce.

Victoria Police has implemented a range of programs to establish and build relationships with people from different groups in the community.

It offers recruitment packages in a range of languages, because it aims to recruit a workforce that is broadly representative of the community. A study conducted by Victoria University in the Brimbank area concluded that young people from Sudanese and Pacific Islander backgrounds wanted to see their own communities reflected in the police force.

Victoria Police also offers the 'Community Encounters' program as part of their training. This program works with community members from Muslim, African and Indigenous communities, people with mental illness and people from a variety of faith backgrounds. There are also representatives from the gay, lesbian, bisexual, transsexual and intersex community. Through meetings and discussions with these community groups Victoria Police aims to build respect and mutual understanding.

The Victoria Police Multicultural Liaison Unit has been established to build relationships within the community. Victoria Police has also established other groups, such as the Community Engagement Support Team, Aboriginal Policy and Research groups and Strategic and Emerging Issues groups to be proactive in engaging with and responding to a range of people within the community.

Understanding rights

Victoria Legal Aid also has programs to help people from different backgrounds. These programs aim to improve understanding

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of and trust in the criminal justice system. A range of material is available on the VLA website.

Publications such as 'What's the law? Australian law for new arrivals', 'Police powers: Your rights in Victoria', 'Your day in Court' and 'Magistrates Court fact sheets' are available in a range of languages. An interpreter service can also be accessed by telephone.

The 'Settled and Safe' program allows community education officers to educate those new to Australia about rejecting family violence and ways to help prevent it.

Courts making connections

The courts, particularly the Magistrates' Court, have embraced the concept of building relationships and trust with those from diverse backgrounds. Recent studies indicate that the Koori Court system has been successful in reducing recidivism. As a result, Indigenous communities have developed a greater degree of trust in the court system at this level.

Magistrates' Courts have developed specific initiatives according to local needs. The Neighbourhood Justice Centre (NJC) has created Aboriginal Hearing Days. This special list was established to provide better support for Indigenous people and to increase the rate of court attendance. Koori justice workers provide support for those attending court.

Working with the NJC, the Dandenong Magistrates' Court provides funding for a refugee community worker so that greater confidence and trust can be built with refugee communities. The Sunshine Magistrates' Court, also with the assistance of the NJC, funds a refugee community worker to nurture relationships between African Australians and magistrates.

Finally, the courts themselves are engaging their local communities to build better relationships and trust. For example, magistrates address Aboriginal forums, and magistrates, police and community members organise dinners in the Sunshine area and provide tours of the courts.

Through these sorts of programs the criminal justice system is trying to build relationships with all sectors of the community, to ensure that all people can access information and assistance and understand how the criminal justice system operates.

Activity 3.10 Folio exercise

Migrants and the law

1 Identify and explain how the three elements, fairness, equality and access to resources, contribute to a just legal system.
2 Explain how these elements apply to the operation of the criminal justice system. In your responce, you may refer to aspects of the criminal investigation, pre-trial processes and procedures, and sanctions.
3 Outline the difficulties faced by migrants in their dealings with the criminal justice system.
4 To what extent do you believe these difficulties limit the achievement of justice in the legal system? Justify your answer.
5 Propose changes to the operation of the legal system that would help to overcome these problems.

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Key point summary

Do your notes cover all of the following points?

- ❑ Reasons for a court hierarchy (the Magistrates' Court, County Court and Supreme Court) include:
  - specialisation
  - appeals
  - other reasons
    - administrative convenience
    - doctrine of precedent
    - time and money
    - expertise and experience
    - minor matters determined locally.
- ❑ Institutions to assist the accused.
- ❑ The need for legal representation.
- ❑ What is legal aid?
- ❑ The role of institutions available to assist the accused in Victoria. These institutions include:
  - Victoria Legal Aid
  - Community Legal Centres
  - Victoria Aboriginal Legal Service
  - Other forms of assistance
    - Duty lawyer services
    - Justice Connect
    - Magistrates' Court
    - Legal Assistance Scheme.
- ❑ The purposes of committal proceedings.
  - A committal proceeding is a hearing before a Magistrates' Court in which the prosecution is required to present witnesses to prove that there is sufficient evidence to obtain a conviction in a higher court. The defendant does not have to enter a plea. Committal proceedings include the following:
    - Committal Mention Court: this court identifies those committals that are to be contested.
    - Hand-up brief: an alternative committal proceeding. Evidence is presented in the form of sworn statements.
    - Committal hearing: this is the prosecution's case in court. The defendant does not have to enter a plea.
- ❑ Pre-trial negotiations – the purposes and appropriateness of pre-trial negotiations, including:
  - plea negotiations
  - sentence indications.
- ❑ The responsibilities of parties in the criminal justice system
  - Judge
  - Jury
  - The parties
    - Prosecution/Office of Public Prosecutions
    - Accused

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- ❏ Legal practitioners
- ❏ Justice in the criminal justice system include:
  - fairness
  - equality
  - access to legal resources.
- ❏ Factors affecting the achievement of the principles of justice
  - Cultural differences – Indigenous Australians may be disadvantaged due to linguistic and cultural differences. Further cultural differences that have caused injustices in the legal system include:
    - direct questioning of an Indigenous witness or accused
    - the fact that it is seen as disrespectful to have or maintain direct eye contact with a respected person
    - the fact that it is not appropriate to disagree with a respected person
    - the fact that is not appropriate for a woman to discuss matters of a sexual nature, particularly with a man (police and legal personnel are often men).
  - Cultural differences – Immigrants and refugees may experience problems due to cultural differences, language skills and differing expectations of the operation of the legal system. These problems may arise in relation to:
    - understanding the difference between bail and sanctions, and their capacity to fulfil bail conditions
    - understanding their rights and responsibilities during a police interrogation
    - understanding how our trial system operates
    - the need for an appropriate interpreter in court in order to give evidence and understand proceedings.
  - Time delays
    - Delays prolong individual suffering, lower community respect for the operation of the law, can result in violation of the rights of individuals; however, cases cannot proceed so quickly that matters are not fully considered.
    - Delays increase costs.
- ❏ Reasons for delays include:
  - determining a plea
  - preparation of cases
  - collecting evidence
  - workloads of the courts
  - adjournments
  - rules of evidence.

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End-of-chapter questions

Revision questions

1 Outline the meaning of the presumption of innocence. Describe two ways this is reflected in the criminal justice system.

2 Explain the role of plea negotiations in the criminal justice system.

3 Describe how specialisation in the court hierarchy contributes to a fair criminal justice system.

4 Explain a hand-up brief. Why was this procedure introduced?

5 Discuss the role of Victoria Legal Aid in the community.

6 Explain the role of the Office of Public Prosecutions in Victoria.

7 Outline the responsibilities of juries in Victoria's criminal justice system.

8 In your opinion, what is the major purpose of a sentence indication? Explain.

9 Explain why legal representation is considered necessary in the criminal justice system.

10 Outline the processes and procedures that ensure that an individual charged with a criminal offence will receive a fair hearing.

11 Evaluate the appropriateness of criminal pre-trial plea negotiations.

12 **a** Outline the problems that may be experienced by either migrant groups or Indigenous Australians in their dealings with the criminal justice system.

b Suggest ways in which these problems could be overcome.

13 How do delays limit access to the criminal justice system? Discuss two proposed changes to address these problems.

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Practice exam questions

1 Define 'plea negotiation'. [2 marks]

2 Describe the role of Community Legal Centres in Victoria. [3 marks]

3 Describe two responsibilities of a judge. [3 marks]

4 Identify and outline the factors that are taken into consideration when determining if a person is eligible for legal aid. [4 marks]

5 Explain how committal hearings contribute to a just legal system. [4 marks]

6 Describe the role of the Office of Public Prosecutions in Victoria. [4 marks]

7 'Committal hearings cause delays and have no useful purpose.' Discuss the extent to which you agree or disagree with this statement. [5 marks]

8 Explain how the court hierarchy reflects the principles of justice. [4 marks]

9 Discuss the role of the jury in achieving justice in the criminal justice system. [6 marks]

10 Mandy has requested a sentence indication. What is a sentence indication? Discuss its role and appropriateness in achieving justice in criminal justice system. [5 marks]

11 Describe how the availability of legal aid contributes to a fair and equal hearing in the criminal justice system. [6 marks]

12 Identify one problem that restricts access to the legal system. Evaluate a recent change, or a recommendation for change, that could provide a solution for the problem. [6 marks]

13 'A defendant's culture determines how an individual will be treated in the criminal justice system.' To what extent do you agree with this statement? In your response justify your answer by making reference to specific difficulties that may be experienced by newly arrived migrants and Indigenous Australians. [8 marks]

14 Evaluate the extent to which two criminal procedures contribute to the ability of the criminal justice system to achieve the principles of justice. Identify one recent change, or proposed change, that aims to improve the effectiveness of the criminal justice system. [10 marks]

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CHAPTER 4
SANCTIONS AND OUTCOMES

This chapter focuses on understanding how the criminal justice system seeks to achieve the principles of justice during the sentencing stage of a trial. We look at the types of sanctions the courts may apply and discuss their ability to achieve the purposes of sentencing. We study the factors considered by courts when sentencing. Also considered are the factors which impact on the delivery of justice in sentencing: access to fair and equal treatment in the sentencing process. Lastly, we study recent reforms and consider recommendations to enhance the ability of the criminal justice system to promote the principles of justice during the sentencing process.

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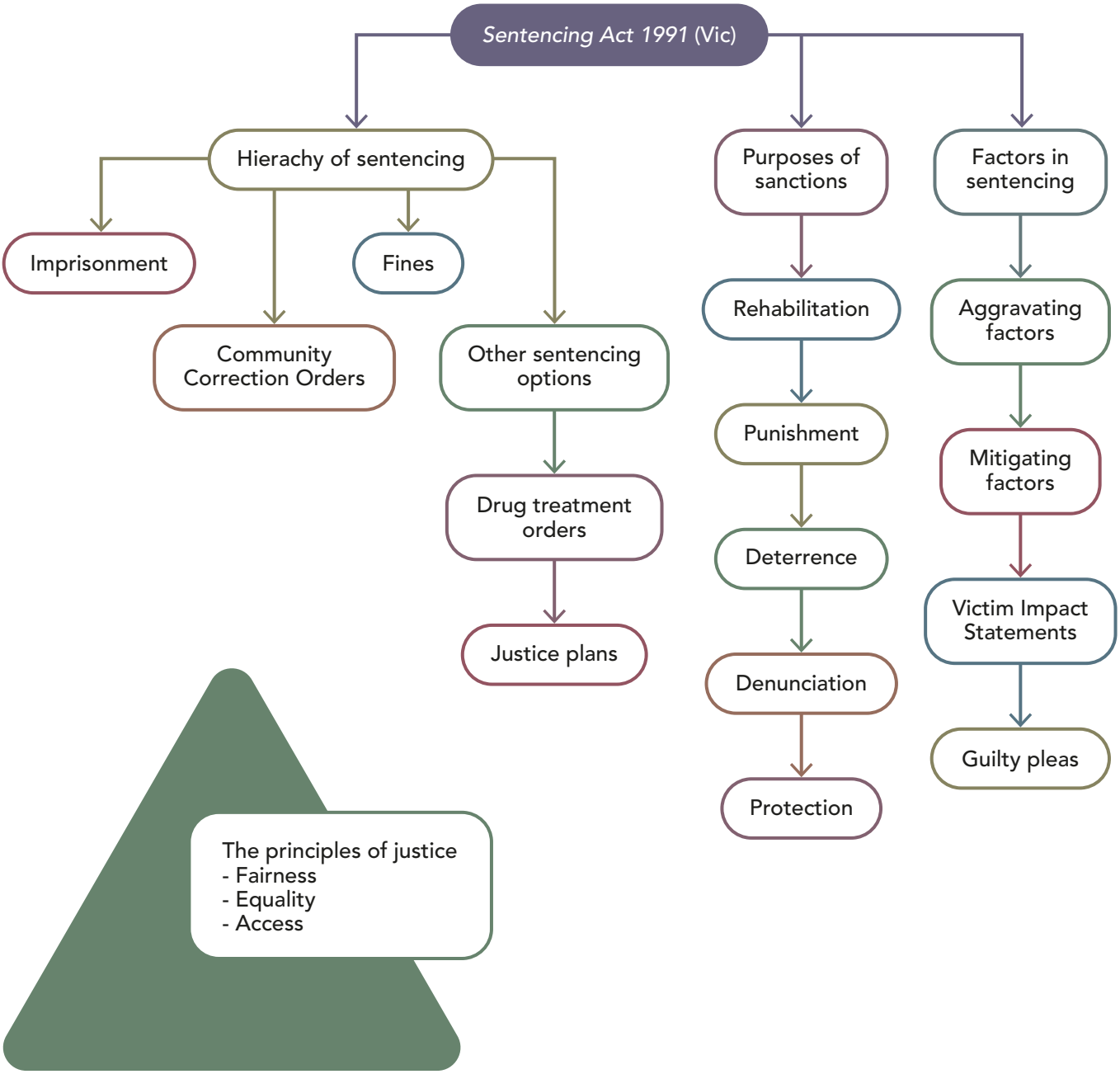

Key terms

aggravating factors evidence presented which increases the seriousness of the offence and so contributes to a harsher sentence: for example, use of a weapon

Community Correction Order (CCO) a sentencing order requiring an offender to comply with conditions while in the community: can include doing unpaid community work, and/or drug/alcohol treatment or curfews

mitigating factors evidence presented which reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

parole the conditional release of a prisoner before the end of the original sentence

principles of sentencing long-established values, prescribed in legislation, to be considered by courts when sentencing (for example, it should be fair and proportional)

recidivism a person relapsing into criminal behaviour

sanction a penalty handed down by a court for someone found guilty of breaching a law: for example, a fine or imprisonment (sometimes interchanged with 'sentence')

sentence a penalty handed down by a court for someone found guilty of breaching a law in a criminal trial: to declare a sentence on a guilty person (sometimes interchanged with 'sanction')

sentence hearing a post-trial procedure at which the offender is given a sentence by the magistrate or judge

specified sentence discount scheme a procedure whereby a court imposes a less severe sentence because the offender pleaded guilty

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4.1 The *Sentencing Act 1991* (Vic)

The *Sentencing Act* sets out a range of factors to be considered in determining a sanction.

The *Sentencing Act 1991* (Vic) is the key legislation guiding sentencing in Victoria. It sets out:

- the purpose of sentencing
- the hierarchy of sentencing options (organised from least severe to most severe)
- the factors a court considers when sentencing.

It offers a range of **sanctions**, including fines, **Community Correction Orders** (CCOs) and imprisonment.

For information about sentencing, visit the Sentencing Advisory Council at www.sentencingcouncil.vic.edu.au.

CRIMES ACT 1958 (VIC)

In addition to the *Sentencing Act 1991* (Vic), other important legislation guiding sentencing includes the *Crimes Act 1958* (Vic), which identifies the most serious offences (indictable offences) and states the maximum terms of imprisonment. The *Summary Offences Act 1966* (Vic) sets out summary offences (less serious offences). Drug-related offences and their maximum penalties are identified in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and driving offences are set out in the *Road Safety Act 1986* (Vic).

***Crimes Act 1958* (Vic)**
Section 3 Punishment for murder

(1) Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to—

(a) level 1 imprisonment (life); or

(b) imprisonment for such other term as is fixed by the court—

as the court determines.

4.2 Purposes of criminal sanctions

The purpose of a sanction is to provide for just punishment, deterrence, rehabilitation, denunciation and community protection. For young offenders, rehabilitation is the principal consideration, as identified in the *Children, Youth and Families Act 2005* (Vic).

The *Sentencing Act* sets out the purposes or reasons for sanctions being imposed. These include:

- **Just punishment:** to inflict some kind of loss or burden on the offender in a manner that is just, given the circumstances of the crime committed. The hierarchy of sentencing options allow various degrees of loss to be imposed, ranging from a financial loss (fine) to deprivation of liberty (imprisonment). The principle of proportionality operates to guard against the imposition of an unduly lenient or harsh **sentence**. For example, a long prison sentence would be considered a 'just punishment' for a serious crime such as murder. (The median sentence for murder – the sentence in the middle of all the sentences in length – is 20 years.)
- **Deterrence:** there are two types of deterrence: general (public) and specific. General deterrence is aimed at preventing crime in the general population for fear of the perceived consequences. The punishment serves as an example to members of the public who might be tempted to commit crime. In contrast, specific deterrence is designed to deter the particular offender from reoffending. A person who loses their licence for drink driving will hopefully be deterred from driving under the influence again.
- **Rehabilitation:** to establish conditions that would alter or modify the behaviour of offenders so that they will abandon their wrongdoing and reintegrate into society as law-abiding citizens. Rehabilitation includes general education programs and drug dependency programs designed to address the underlying issues contributing to the criminal behaviour.

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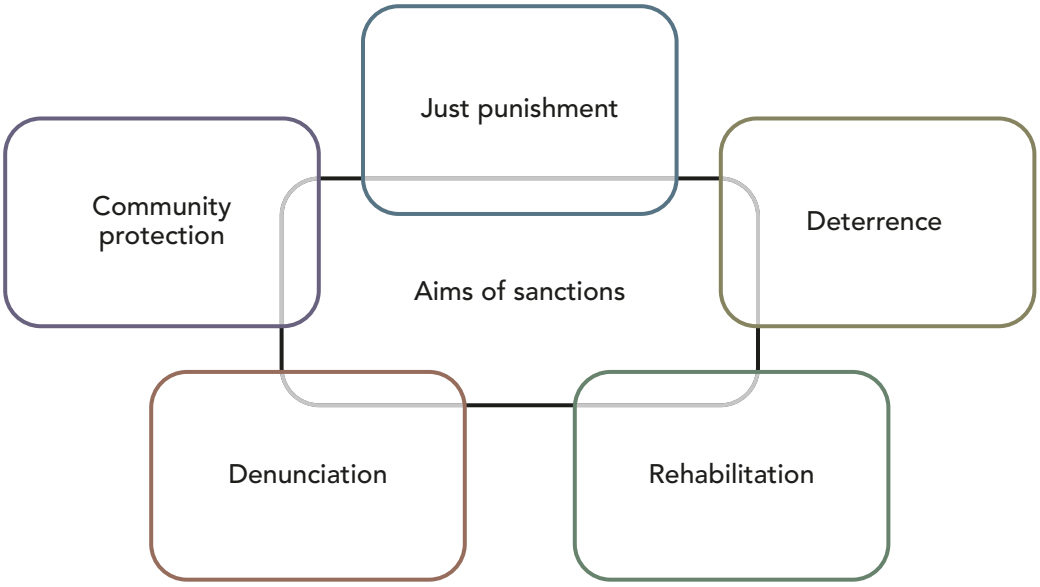
- **Denunciation:** to condemn and criticise publicly the conduct of the offender as wrong and inexcusable. This is a fundamental purpose of criminal law and of sentencing, as it requires that a sentence should also communicate society's condemnation of the particular defendant's behaviour. The concept of denunciation is explained in *R v MacDonald* (unrep, 12/12/95, NSWCCA), where Gleeson CJ, Hunt CJ at CL and Kirby P said:

  > In a case such as the present, it is important to bear in mind the denunciatory role of sentencing. Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances calling for a variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime. The protection of human life and personal safety is a primary objective of the system of criminal justice. The value of which the community places upon human life is reflected in its expectations of that system … Society was entitled to have the conduct of the respondent denounced at least in that fashion.

- **Community protection:** sanctions should operate to protect the community against the potentially harmful actions of individuals: removing an offender from the community, for example, extinguishes the threat of harm to others. However, the principle of proportionality ensures that a sentence should not extend beyond what is appropriate to the crime merely to protect society. Imprisonment (removing an individual from the community) is seen as a last resort.



4.3 Factors considered in sentencing

If an offender pleads guilty or is found guilty, the judge will hold a **sentencing hearing**. The sentencing hearing is part of the post-trial process and is where the offender is given a sentence by the judge. The sanction may include a fine, or a Community Correction Order (CCO), or imprisonment. Maximum penalties are legislated by parliament and are used by the courts as a reference point when sentencing. The courts consider a number of factors, including the impact of the crime on the victim.

The court has already heard evidence during the trial stage, including:

- **The nature and circumstances of the offence:** the way crimes are committed varies enormously. Some crimes are planned, while others are spur of the moment. Some cause a great harm, others very little.
- **The degree of criminality:** the extent of misconduct relates to the number of offences and their seriousness.
- **Injury, loss or damage:** the extent and degree of injury or loss will affect the sentence.

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The **sentence hearing** process allows for additional information to be presented to determine the most appropriate sentence. This includes the following.

Mitigating factors

Mitigating factors are evidence about the offender or the circumstances of the crime which may reduce the sentence, such as:

- The offender was an accessory to the crime (helped the main offender) but not the main actor.
- The offender showed remorse for the crime.
- No one was hurt or likely to be hurt during the crime.
- The offender had minor or no criminal history.
- The offender pleaded guilty and co-operated with police.

Aggravating factors

Aggravating factors are evidence about the offender or the circumstances of the crime which may increase the sentence, such as:

- The offender has a criminal record.
- The nature of the crime was particularly cruel.
- The offender used a weapon.

Guilty pleas

Guilty pleas or intentions to plead guilty must be taken into account when sentencing. They are treated as mitigating factors and can result in a reduced sentence. A plea of guilty may be taken into account through either a specified sentence discount or a sentence indication. A guilty plea may be taken as a sign of remorse. In addition, a guilty plea can also save the community the considerable cost of conducting a full trial and reduce delays in our court system. An early guilty plea will also spare victims and witnesses the potential trauma of giving evidence.

Specified sentence discount

The **specified sentence discount scheme** allows a judge or magistrate to impose a less severe sentence when the offender pleads guilty. In 2008, an amendment to the *Sentencing Act* required courts to provide a 'specified sentence discount'. The court will state what penalty would have been imposed (the overall sentence and the non-parole period) for the offence had the offender not pleaded guilty, and the final discounted sentence that recognises that the offender did plead guilty.

A specified sentencing discount is used in adult courts and applies to:	A specified sentencing discount in the Children's Court applies to:
• all custodial orders • fines of 10 penalty units or more (or aggregated fines of 20 penalty units or more).	• youth attendance orders • youth residential centre orders • youth justice centre orders.

The specified sentencing discount provides an incentive for pleading guilty at an early stage of proceedings. This places defendants in a better position to make this decision early in the criminal proceedings.

SPECIFIED SENTENCE DISCOUNT

The most common guilty plea discount (in 44.9% of cases) for imprisonment sentences was between 20% and 30% less than the sentence that would otherwise have been imposed.

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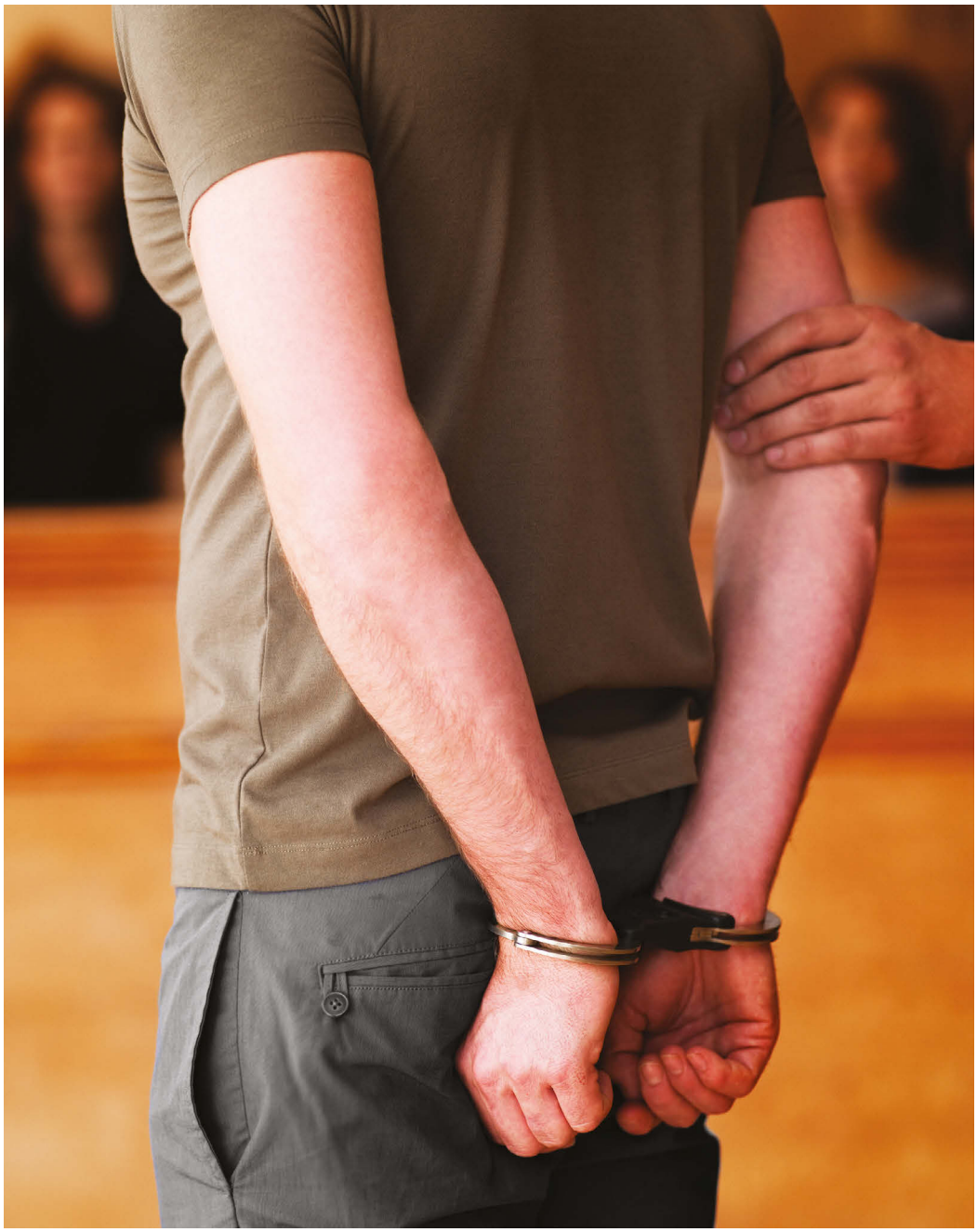


Sentence indication

Sentence indication is a process that permits a magistrate or judge to give a defendant a general indication of the sentence that would be likely to be imposed if the defendant pleaded guilty before a hearing or trial.

Sentence indications are used in the Victorian Supreme, County and Magistrates' Courts. In the Supreme and County Court the accused can apply for a sentence indication at any stage in the proceedings after the written charges are filed. The prosecutor must consent to the application and the judge must agree to it as well. The judge will then be given a summary of the facts agreed to by both the prosecution and the defence, and other relevant information. Based on this information the judge will indicate whether or not he or she is likely to impose a custodial sentence if the accused enters a guilty plea at that stage in the proceedings.

In the Magistrates' Court, a magistrate can indicate if he or she is likely to impose a custodial sentence, or can indicate the type of sentence likely to be imposed. For instance, the magistrate may indicate that he or she would be likely to impose a Community Correction Order.

ISBN 978-1-316-64754-7

Victim Impact Statements

The *Sentencing Act* states that the impact of the crimes on the victim must be considered during the sentencing process. This helps courts understand the effect of the crime on the victim.

The court must consider:

- the impact of the offence on the victim
- the personal circumstance of the victim
- any injury, loss or damage resulting directly from the offence.

The Victim Impact Statement is a statutory declaration that may be read or presented to the court. It may include photos, drawings, poems and other material related to the impact on the victim.

VICTIMS CHARTER

The *Victims' Charter Act 2006* (Vic) identifies key principles for the treatment of victims of crime when dealing with criminal justice agencies, including the right to prepare a Victim Impact Statement.

The victim of a violent crime committed by an adult offender may ask to be placed on the Victims' Register: this allows them to be informed of the offender's parole or release.

NEWSREPORT 4.1

A powerful voice

US VICE PRESIDENT JOE BIDEN HIGHLIGHTED TO THE world the power of Victim Impact Statements when he read a 7000-word one to a court: it was a letter written by a Stanford University rape survivor.

Victoria introduced Victim Impact Statement legislation in 1994, providing victims with the chance to tell courts how a crime affected them. Later the *Sentencing Act* was amended, requiring the court, when sentencing, to take into account not only the personal circumstances of the victim and any injury, loss or damage resulting from of the offence, but also the impact of crime on victims.

The Victims Support Agency (VSA) prepared *A Victim's Voice – Victim Impact Statements in Victoria*, looking at VIS legislation in the State. It found that:

- Not all victims realise they have a choice about whether or not to make a statement.
- Victims usually have a very limited understanding of the criminal justice system and court processes.
- The way information is delivered is important.
- Providing information to victims sometimes includes 'expectation management'.

The VSA believed that the government should direct the VSA and the Department of Justice to assess the effectiveness of Victim Impact Statements, determining whether they:

- are the appropriate tool to inform the court about the impact of the crimes
- assist the court in determining sentence
- increase victims' levels of satisfaction and participation in the criminal justice system.

The VSA consulted with police, prosecutors, defence counsel, judges and magistrates, victims' service agencies, witness assistance services and victims. This research found that:

- two-thirds of judges and magistrates felt that Victim Impact Statements were often or occasionally of help in determining a sentence. The same percentage felt that the statements could contain additional information relevant to sentencing.
- Victim Impact Statements could be therapeutic and have a restorative element. For instance, in the trial of serial killer Paul Dupas, he could not be sentenced to further time in jail, but Justice Cummins viewed the use of the Victim Impact Statement in the trial as a vindication of the rights of all victims of crime.

Despite the power of the US university student's letter, some lawyers believe that Victim Impact Statements have several problems:

- the victim has to relive the event
- courts need to be careful not to allow the views of victims to disproportionately influence sentences.

ISBN 978-1-316-64754-7

Activity 4.1 Folio exercise

Victim Impact Statements

Read the article 'A powerful voice' and complete the following tasks:

1 Explain the purpose of Victim Impact Statements.
2 To what extent, and in what ways, do Victim Impact Statements promote the principles of justice?

Activity 4.2 Structured questions

Factors in sentencing

Read the information above on the factors taken into account in determining a sentence and complete the following tasks:

1 What is the difference between aggravating circumstances and mitigating circumstances?
2 An early guilty plea can be seen as a mitigating factor. Explain.
3 It has been suggested that the sentencing discount for guilty pleas and sentence indications may be beneficial to victims of crimes. Explain.
4 It has been suggested that a by-product of schemes that encourage an early guilty plea is that an innocent person may feel under pressure to enter a guilty plea. Such schemes presume that the defendant is well advised and understands the process and the consequences. To what extent do you think that sentence discounts and sentence indications reflect the principles of justice?
5 How are Victim Impact Statements used in the sentencing process?
6 Discuss how three factors considered in sentencing affect the ability of the criminal justice system to achieve the principles of justice for the offender and the victim.

Other factors the courts may consider

- Offender's personal circumstances: the offender's character, previous behaviour, cultural background, age, physical and mental condition are all likely to be considered.
- Victim's circumstances: the victim's age and vulnerability (due to physical or mental impairment) may affect the sentence.
- Offender's family and dependants: only in exceptional circumstances will the court consider the impact of the sentence on the offender's family or dependants.
- The maximum penalty for the offence: this is set out in the relevant legislation.

The role of the judge or magistrate – to integrate and balance all relevant considerations – is challenging. The outcome sometimes does not please the victim, the offender or the public.

SENTENCING GUIDES

The *Sentencing Act* gives the Court of Appeal power to make guideline judgments for sentencing. These are used by other courts in sentencing offenders.

In 2003, the *Sentencing Act* established the Sentencing Advisory Council. The Sentencing Advisory Council provides advice to the Court of Appeal on guideline judgments, conducts research into community attitudes on sentencing and reports on sentencing statistics.

ISBN 978-1-316-64754-7

NewsReport 4.2

Victoria's prison population up, fuelled by increasing use of remand

VICTORIA'S PRISON POPULATION HAS GROWN BY 67% over the past decade (from 3908 prisoners to 6520), largely due to an increase in the number of people refused bail (particularly for violent offences), a new report from the Sentencing Advisory Council reveals.

Released today, the report, *Victoria's Prison Population 2005 to 2016*, analyses both published and previously unpublished data to map trends in imprisonment in Victoria.

The report reveals that the 67% increase in the adult prison population was unevenly spread across different groups of prisoners. For example, over the survey period, there was:

- a 154% increase in the number of unsentenced prisoners (those being held on remand awaiting trial or sentencing) compared with a 46% increase for sentenced prisoners;
- a 147% increase in the number of Aboriginal and Torres Strait Islander prisoners (compared with a 62% increase for non-Indigenous prisoners); and
- a 75% increase in the number of female prisoners (compared with a 66% increase for males).

The percentage of all sentenced offenders sent to prison has remained fairly steady over the survey period, but the average length of prison sentences has been decreasing for some offence types since 2010–11. This is largely due to an increase in the use of sentences combining prison with a community correction order (CCO). For example, 38% of the sentences of imprisonment imposed in the Magistrates' Court for drug offences in 2014–15 also required the offender to comply with a CCO upon release.

The use of shorter prison terms, especially sentences combining prison with a CCO, has led to a decline in the number of sentenced prisoners since 2014 (from 4973 in 2014 to 4637 in 2016). However, this small decrease has been more than made up for by the increase in unsentenced prisoners.

Since 2014, the sentenced prisoner population has decreased by 7%, while the unsentenced prisoner population has increased by 65%. The increase in unsentenced prisoners was a result of more people being held on remand, rather than an increase in the average length of time spent on remand. The unsentenced prisoner population grew from 19% of the total prison population on 30 June 2006 to 29% on 30 June 2016, meaning that close to one in three prisoners has not been sentenced for the charges for which they are in prison.

Both the number of detected offences and the rate of detected offending as a proportion of the total population have increased since 2010–11, after having been relatively stable since 2004–05. These increases have been the result of an increase in 'unique alleged offenders' apprehended for offences against the person, such as cause injury offences.

Other key findings of the report

Combined orders (prison plus a CCO) have increased as a proportion of all prison sentences imposed by all courts, particularly for violent offenders. This means that an increasing proportion of prisoners continue to be supervised in the community after they are released from prison.

There have been changes to the balance of offence types for people in prison. For example, in 2004–05, property offences were the most common offence type attracting a prison sentence. In 2014–15, more offenders were sent to prison for offences against the person than for any other offence type.

Sentencing Advisory Council Chair, Emeritus Professor Arie Freiberg said:

> This report shows that changes to detected crime, as well as changes to bail and sentencing practices, are having an effect on both the size and the composition of Victoria's prison population.
>
> There has been an increase in the prison population caused by an increase in detected crime, especially crimes against the person, including family violence. The overall percentage of all people sentenced who receive a prison sentence has stayed more or less the same over the past 10 years. However, more people are now being sentenced, and so more people are going to prison.
>
> What's new is that an increase in the number of relatively short prison terms, including terms combined with a CCO, has led to a decrease in the sentenced prisoner population. But this decrease has been more than made up for by the increase in prisoners held on remand.

Sentencing Council Media release, 3 November 2016

ISBN 978-1-316-64754-7

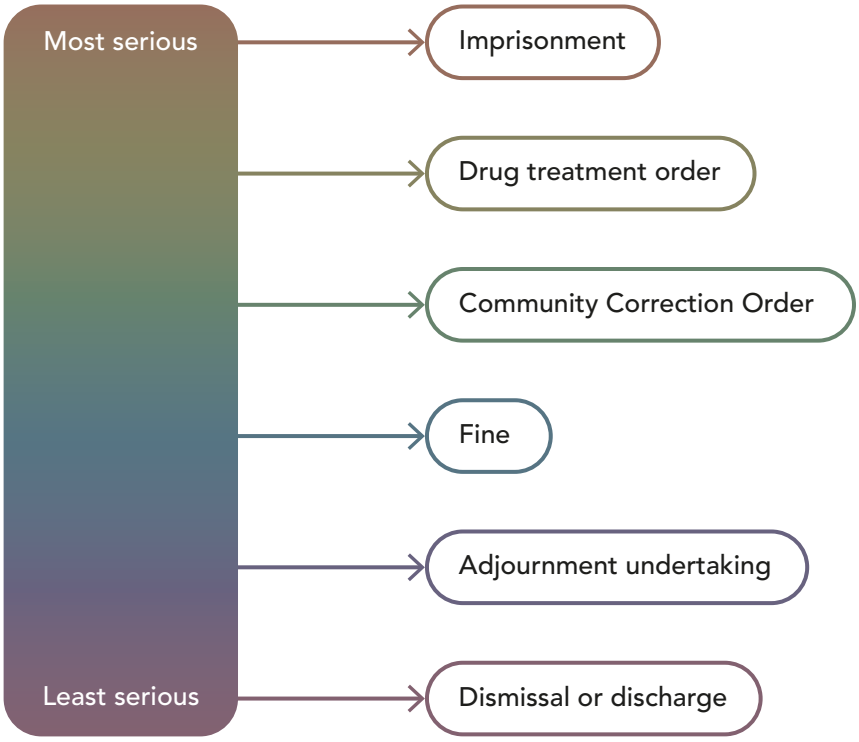
4.4 Types of sanctions

The *Sentencing Act* sets out a hierarchy of sanctions. The courts are required to consider less severe sanctions, such as adjournments or fines, before imposing harsher sanctions, such as imprisonment. The provisions of the Act apply to all courts except the Children's Court.

There is a hierarchy of sanctions – imprisonment is considered the last resort.

SENTENCING CHILDREN

Sentencing children requires a different approach due to their vulnerability and need. Section 362(1) of the *Children's Youth and Families Act 2015* (Vic) identifies rehabilitation and diversion from the criminal justice system as the primary purpose in sentencing children.



Dismissal, discharge and adjournment

Where possible, the aim is to not record a conviction against the defendant – even if he or she is found guilty of the offence. A criminal conviction of any kind can have a number of negative effects on an offender. Its immediate effects can include a licence cancellation, and/or financial loss due to a fine. It may also have indirect and long-lasting consequences. For example, applications for insurance, loans and jobs may be less likely to succeed, and may even be denied, on the grounds that the person has a criminal record.

Dismissal, discharge and adjournments give courts the discretion to not record a conviction and/or not impose a sanction. These options are most likely to be used in relation to relatively minor offences or first offences.

A court will therefore consider the following factors in relation to whether or not to impose a recorded conviction:

- the nature of the offence committed
- the character and record of the offender
- the impact of the conviction on the offender's employment, social and economic wellbeing.

Dismissal

A dismissal is an order by which the court finds an offender guilty of an offence but does not record a conviction or impose a sanction.

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Discharge

A discharge is when the court finds an offender guilty of an offence and records a conviction but does not impose a sanction.

Adjournment

An adjournment which allows a person to be released into the community can be made with or without recording a conviction.

Adjournment without conviction

An adjournment without conviction is an order by which a court finds a defendant guilty of an offence, adjourns the hearing for up to 60 months and releases the defendant. An adjournment without conviction usually requires the defendant to agree to 'be of good behaviour'. Providing that the offender is of good behaviour for the period of the adjournment, no conviction is recorded. The adjournment may also specify that the defendant comply with special conditions imposed by the court. This is now a common order imposed by the Magistrates' Court for minor offences.

Adjournment with conviction

A court can convict an offender for an offence and adjourn the case for up to 60 months. The offender is released after giving the court an undertaking to 'be of good behaviour' for the period of the adjournment. The court may also impose special conditions during this period.

THE CRIMINAL JUSTICE DIVERSION PROGRAM (CJDP)

The CJDP is governed by section 59 of the *Criminal Procedures Act 2009* (Vic). It operates in all Magistrates' Courts, and provides a diversion program for those convicted for the first time and those convicted of minor offences. The program allows offenders to avoid a criminal record by accepting conditions. The conditions aim to benefit the offender, the victim and the community as a whole. For instance, offenders facing charges for minor driving offences could be ordered to attend a driver safety course rather than receive a bond or fine. Also, an offender may be required to make full reparation to their victim (pay back whatever the costs of the offence to the victim were) and to send a letter of apology. The program draws upon community resources for appropriate counselling or treatment, and helps local community projects by providing voluntary work and donations (from the offenders). The diversion program can be used where:

- the offence is triable summarily
- the defendant admits the facts
- there is sufficient evidence to gain a conviction
- a diversion is appropriate in the circumstances.

Offences punishable by a minimum or fixed sentence or penalty are not appropriate for diversion. Using a diversion program requires the consent of the prosecution. Where a charge involves a victim, the court will ask for the victim's view as well. This may include information about the amount of compensation sought for property damage and whether an apology from the person charged would be valued.

Fines

A fine is a monetary penalty for an offence.

Fines are the most common sanctions imposed in Victoria and are used for summary and indictable offences. A court can impose a fine with or without recording a conviction. In determining the amount of the fine, the court must take into consideration, among other things, the financial circumstances of the offender. However, while the financial circumstances are important, they are not the only consideration in determining the amount of the fine.

Usually an Act sets a maximum fine for a particular offence, measured in penalty units, which have a monetary equivalent. For example, under section 46(2) of the *Road Safety Act 1986* (Vic), 'a person who fails to stop the vehicle when so requested or signalled is guilty of an offence. Penalty: 8 penalty units'.

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Penalty units are organised into 11 levels. Each level is equivalent to a set penalty unit value, as set out in the table below.

Fines are an appropriate sentence option for low-level crime. They are a cost-effective and speedy sanction and generally serve as effective deterrents for minor offences. In 2014, the *Fines Reforms Act* was passed by the Victorian parliament. It established a new fines recovery model 'aimed at making Victoria's fine system fairer and more equitable for vulnerable and disadvantaged members of the community'. The legislative change was in response to recommendations made by the Sentencing Advisory Council and the Department of Justice.

Under the *Infringements Act 2006* (Vic), there are special circumstances, such as drug addiction or homelessness, where an infringement notice can be withdrawn or an enforcement order cancelled. Melbourne City Council has waived parking fines for homeless people sleeping in vehicles.

NewsReport 4.3

Homeless people more likely to be fined

UNDER THE *SUMMARY OFFENCES ACT 1966*, THE MAXIMUM SENTENCE FOR BEGGING IS 12 MONTHS' jail. Fines are usually more than $100.

The non-profit organisation Justice Connect Homeless Law, which provides justice through pro bono work, has looked at public transport fines relating to homeless people. They noted:

> People experiencing homelessness are: (1) more likely to get fines and infringements because they are forced to carry out their private lives in public places; and (2) less likely to be able to address the fines and infringements through payment or navigating the complex legal system.

A personal story of homelessness and fines

'Hamish', who incurred about $13,000 in public transport fines, said:

> There is no way I could've dealt with the fines by myself, the only way I did was with the help of workers and a lawyer. The letters kept coming and to deal with them there was lots of writing, it was all a bit much. On clearing the fines the judge took into account the fact that I haven't had any fines for almost two years. The way I stopped getting fines is that I stopped catching the tram. I have to ride or walk everywhere. I only buy tickets for appointments.

What's the cost? Infringements system review

Homeless Law knows through its casework that once vulnerable people enter the infringements system, it is extremely difficult to exit. To help understand the resource implications of the current infringements system, Homeless Law engaged an independent consultant to undertake a high-level analysis of Victoria's infringements system.

The consultant reviewed 13 infringements files run by Homeless Law and mapped the complex way in which fines and infringements progress through multiple stages and involve a number of agencies and decision-makers. Some of the key findings from the consultant's analysis are:

- **Overwhelming debts** – On average, individuals accumulated 18 infringements each, valued at $6363 per person. One person had 61 infringements, with a total value of $17,237.
- **Difficult to resolve** – Duration of cases can vary, with cases analysed taking between 6 months and 2.5 years to resolve. The average time taken to resolve an infringement matter was 14 months.
- **Expensive** – The average cost to law firms of running an infringements matter was $19,825 per case. One case required an investment equivalent to $54,000 in fees to resolve.

From www.justiceconnect.org.au

ISBN 978-1-316-64754-7

In 2014 the Victorian parliament passed the *Fines Reform Act*. The Act established a new body, Fines Victoria, to manage unpaid fines. Fines Victoria will replace the Infringement Court. The Act also sets out special processes for those who cannot afford to pay their fines.

The Act introduced a Work and Development Permit (WDP). The WDP scheme aims to give vulnerable and disadvantaged people non-financial ways to pay off fines. They can work off the debt as well as address offending behaviour through approved activities and treatment. Vulnerable people who would be eligible to participate in the WDP scheme include people:

- with an intellectual or mental disability
- with addiction issues
- who are experiencing homelessness or acute financial hardship (this may include victims of family violence).

However, the implementation of the new fines recovery model was deferred to allow for the development of a new IT system. It is anticipated that the new system will be in place by the end of 2017.

The *Fines Reform and Infringement Amendment Act 2016* (Vic) altered the commencement date for the *Fines Reform Act* from 30 June 2016 to 31 December 2017, but also allowed for the early commencement of some provisions of the *Fines Reform Act*, including the WDP scheme.

Activity 4.3 Folio exercise

Fines – a new approach needed

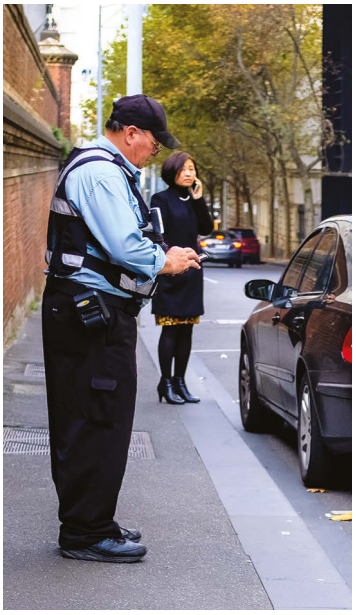
Read the 'Fines' section then complete the following tasks:

1 Identify and explain how fines achieve two purposes of sentencing in Victoria.
2 A review of fines was prompted because fines were seen as discriminatory towards the vulnerable and disadvantaged in society. What problems do you think vulnerable people would encounter in dealing with fines?
3 Identify two reforms introduced to overcome problems with the use of a fine as a sanction.
4 Discuss the ability of fines to achieve the purposes of sentencing (include at least two strengths and two weaknesses in your discussion).
5 Suggest one reform to the system for the administration of fines which would further increase the ability of the criminal justice system to achieve fair and equitable outcomes in sentencing.

Table 4.1 Penalty units and the corresponding monetary value for Victoria 2016–17
Note: In 2016–17, each penalty unit had a value of $155.46.

Level	Monetary value	Penalty units
1		No fine is issued for a level 1 offence
2	$466,380,00	3000 penalty units
3	$373,104.00	2400 penalty units
4	$279,828.00	1800 penalty units
5	$186,552.00	1200 penalty units
6	$93,276.00	600 penalty units
7	$37,310.40	240 penalty units
8	$18,655.20	120 penalty units
9	$9327.60	60 penalty units
10	$1554.60	10 penalty units
11	$777.30	5 penalty units
12	$155.46	1 penalty unit

Source: Sentencing Advisory Council



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An offender who is required to pay a fine can apply to the court for:

- an instalment order – the offender pays a certain amount, say $10, each week, or
- time to pay – the offender is given a certain amount of time, say 3 months, to pay the fine.

For more information on fines visit the Sentencing Council website: https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-options-for-adults/fine.

NewsReport 4.4

Are fines fair?

FINES ARE THE MOST USED CRIMINAL SANCTION. THEY ARE ISSUED FOR A range of minor offences and are an alternative to going to court. But are they fair? People experiencing social or economic disadvantage are less likely to be able to pay any fines they are given and may also have difficulty getting legal assistance. There is also the issue of the number and range of finable offences and the lack of proportionality between some offences and their penalty amounts.

Realising this, some European countries are now pegging fines to people's wealth. Germany, France, Austria and the Nordic countries are issuing sliding-scale fines based on a person's wealth.

Take the case of a Finnish businessman who was caught going 125km/h in an 80km/h zone. The police officer who pulled him over used a federal taxpayer database to learn that his income was more than $9 million per year, and wrote the man a ticket for more than $77,000.

The independent thinktank, The Australia Institute, advocates for a proportional traffic fine system. For speeding 20km/h over the limit, the average Australian fine is $236, regardless of whether you are on a low income or a millionaire, the Institute says. Under the Finnish model, the lowest income earners would be fined $100, and the highest earners would be fined more than $1000.

Activity 4.4 Folio exercise

Sanctioning crime

1 The penalty for illegal use of a mobile phone (using a mobile phone while driving) is 4 demerit points and a fine of $466. Describe how the monetary fine punishes drivers and describe the impact this may have on their future behaviour.
2 Other than deterrence and punishment, identify and explain another aim of sentencing that is achieved by imposing a financial penalty for using a mobile phone while driving.
3 Describe two problems identified with using fines as a sanction.
4 Describe one other sanction studied and discuss how effectively it achieves at least two of the aims of sanctions.

Community Correction Orders

CCOs were introduced in 2012 under Part 3A of the *Sentencing Act*. They are highly flexible, and can be used alone or in addition to prison or a fine. CCOs aim to provide non-custodial sentence options which can be applied to a wide range of offending behaviours. They are regarded as a radical new sentencing approach because they can be tailored to meet the particular circumstances of the offender and the crime. The court may attach a range of conditions which aim to achieve multiple sentencing purposes (punish, rehabilitate) simultaneously. CCOs are recognised as an appropriate alternative to imprisonment because of the flexibility they offer.

The Community Correction Order (CCO) is a flexible sentencing order served in the community. Courts may apply conditions to match the circumstances of the offender and the nature of the crime.

ISBN 978-1-316-64754-7

In 2014, the Director of Public Prosecutions, John Champion SC, applied to the full bench of the Court of Appeal to issue a guideline judgment on CCOs. The purpose of the appeal was to clarify when and in what circumstances a CCO may be applied by courts. Mr Champion stated that the guideline judgment would provide certainty and consistency in the sentencing process and so increase public confidence in the criminal justice system.

The Sentencing Advisory Council published the following report on the guideline judgment in the news section of their website.

NEWSREPORT 4.5

Watershed event in Victorian sentencing

ON 22 DECEMBER 2014, THE VICTORIAN COURT OF APPEAL HANDED down its first guideline judgment in sentencing offenders. This judgment gives general guidance to Victorian courts on the imposition of a community correction order (CCO) – Victoria's newest intermediate sentencing order.

The purpose of a CCO is to provide a non-custodial sentence that may be used for a wide range of offending behaviours while having regard to, and addressing the circumstances of, the offender. CCOs come with a range of new conditions, and a CCO can be imposed for a period up to the maximum penalty for an offence in the County and Supreme Courts.

The Director of Public Prosecutions applied to the Court of Appeal in 2013 for a guideline judgment in relation to two cases in which the offender had applied for leave to appeal against the sentence: *R v Clements* (S APCR 2013 0141) and *R v Boulton* (S APCR 2013 0135). The Court of Appeal joined a third case: *R v Fitzgerald* (S APCR 2013 0177). All three appellants had received a lengthy CCO: 10 years, 8 years, and 5 years respectively.

Consistent with its statutory functions, the Sentencing Advisory Council indicated its support for the giving of a guideline judgment, and provided research materials to assist the Court of Appeal in making its decision.

The guideline judgment will assist all courts by structuring the approach to be taken in determining whether to impose a CCO and in setting the length and conditions of a CCO. This will enhance consistency and transparency in sentencing, and help promote greater public confidence in the criminal justice system.

A copy of the guideline judgment is available at the Australasian Legal Information Institute (AustLII) website.

Sentencing Advisory Council, 5 January 2015

In the Magistrates' Court, a CCO can be imposed for a maximum of 2 years. In the higher courts, a CCO can be imposed for up to the statutory maximum term of imprisonment for that offence. For example, for the offence of theft the maximum length of a CCO could be up to 10 years – the same as the maximum term of imprisonment available for that offence.

Conditions on CCOs

All those sentenced to a CCO must abide by basic conditions, such as not reoffending, not leaving Victoria without permission and abiding by any order of the Secretary of the Department of Justice.

Each CCO will also include at least one other 'optional' condition, chosen according to the purposes of sentencing for that offender and that offence. Optional conditions that may be attached to a CCO for all or part of its duration can require the offender to:

- undertake medical treatment or other rehabilitation
- remain free of alcohol and/or drugs
- not enter, remain within or consume alcohol in a licensed premise (hotel, club, restaurant)

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- complete unpaid community work up to a total of 600 hours
- be supervised, monitored and managed by a Corrections worker
- abstain from contact or association with particular people (for example, their co-offenders)
- live (or not live) at a specified address
- stay away from nominated places or areas
- abide by a curfew, remaining at a specified place for 2 to 12 hours each day
- be monitored and reviewed by the court to ensure compliance with the order
- pay a bond – a sum of money that may be forfeited wholly or partly if the offender fails to comply with any condition imposed.

An offender who breaches the conditions of their CCO may be resentenced for the original offence and face an additional 3 months' imprisonment or a fine of 30 penalty units.

Intensive compliance period

If a court imposes a CCO of 6 months or longer, the court can set an intensive compliance period for part of the order. For example, if a CCO is imposed for 1 year, an intensive compliance period might be set for a lesser period, such as 6 months. The court will order that one or more of the conditions attached to the CCO must be completed during this intensive compliance period.

NewsReport 4.6

CCOs – A get out of jail card?

A CCO IS A FLEXIBLE SENTENCING ORDER SERVED in the community, under a range of restrictions, including curfews and alcohol bans. The order can be imposed by itself or in addition to imprisonment or a fine.

Between 2013 and 2016, the number of criminals on CCOs doubled, to 11,730. Auditor-General Andrew Greaves said 27% of those with a CCO were classified as having a 'high risk of reoffending'. In the 2014–15 financial year, nearly 25% of those on CCOs ended up returning to the corrections system.

The advantages of CCOs are that they:

- can be both punitive and rehabilitative
- offer courts the 'best opportunity' to promote the best interests of both the community and the offender
- cost less than jail – offenders live at home, remain in the community, and can continue to financially support themselves and their family
- ease jail crowding
- offer a chance for offenders to complete drug/alcohol programs, psychological/psychiatric counselling or other Corrections programs outside jail
- avoid exposing offenders to jail and prison conditions that may be unsafe.

The disadvantages are that:

- with the jump in the imposition of CCOs, Corrections Victoria staff, who are responsible for monitoring offenders on the orders, are overworked – their load is more than 60 offenders per officer in some locations, according to Mr Greaves
- offenders face long waits to access support programs, including for alcohol and drug problems
- public safety may be compromised – offenders are more easily able to continue criminal behaviour than if they were in prison
- breaches could overrun the County Court.

The problem for governments is that the community may view CCOs as 'get out of jail' cards – offenders living in the community when they should be imprisoned. In 2016, following a number of controversial cases involving CCOs, a new law made those who were convicted of crimes such as murder, rape, sexual abuse of a child under 16, and commercial drug trafficking no longer eligible for CCOs. The State government currently has to deal with prison overcrowding, building a new youth justice centre, and the ballooning cost of the prison and corrections services.

Judges and magistrates have to be mindful when imposing CCOs. The Court of Appeal issued a guideline judgment that clarified what magistrates and judges should consider in making the orders, and how legal practitioners should make submissions on them.

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Activity 4.5 Folio exercise

Is it time to review CCOs?

Carefully read the whole section on CCOs then complete the following tasks:

1 What is a CCO?
2 Outline four conditions that may be imposed through a CCO order and suggest why a magistrate or judge would impose each condition you have identified.
3 What is an intensive compliance period for a CCO?
4 One of the advantages of CCOs is that they can be both punitive and rehabilitative. Explain.
5 Evaluate the use of CCOs as a sanction. To what extent do you think CCOs contribute to the achievement of the principles of justice?

Other court orders

Court orders for youth and vulnerable offenders

These include:

- **Justice plans:** The court may attach a 'justice plan' for intellectually disabled offenders as a condition of sentence. Justice plans are prepared by the Department of Human Services, and specify treatment services recommended to reduce the chances of reoffending.
- **Youth attendance orders:** These impose a conviction and order that the young person attend a youth facility.
- **Youth Justice Centre Order:** A court can record a conviction and order a Youth Justice Centre Order to detain a young person aged under 21 but over 15. The maximum terms are 2 years (in the Children's and Magistrates' Courts) and 3 years (in the County and Supreme Courts).
- **Youth Residential Centre Order:** A court can record a conviction and order a Youth Residential Centre Order to detain a child aged between 10 and 15. The maximum terms are 1 year (in the Children's Court), 2 years (in the Magistrates' Court) and 3 years (in the County or Supreme Court).

Drug treatment order (DTO)

A drug treatment order (DTO) allows a custodial sentence to be suspended to allow the offender to undertake a rehabilitation program.

The Drug Court, operating in the Magistrates' Court at Dandenong since 2002 and now also in Melbourne, can place offenders on a DTO. The court imposes a custodial sentence which is suspended while the offender undertakes a rehabilitation program that has been specifically designed for the offender.

The offender is closely monitored. There are regular meetings with the magistrate and counsellors. The offender also needs to consent to urine tests. Breaches of parts of the treatment order can result in short periods of imprisonment. If the offender continues to offend, the original custodial sentence can be imposed.

Imprisonment

Imprisonment means that a person is detained by the State and denied their liberty.

Imprisonment removes an offender from the community and denies them their liberty. This is considered the most severe sanction. The *Sentencing Act* recognises it as a sentence of last resort, which means that judges must consider all other sentencing options before imposing a prison term. Prison is seen as a way to protect the community, as well as punish the offender and denounce the behaviour. Some would argue that imprisonment also acts as a deterrent. Programs offered within prison aim to provide for the rehabilitation of offenders.

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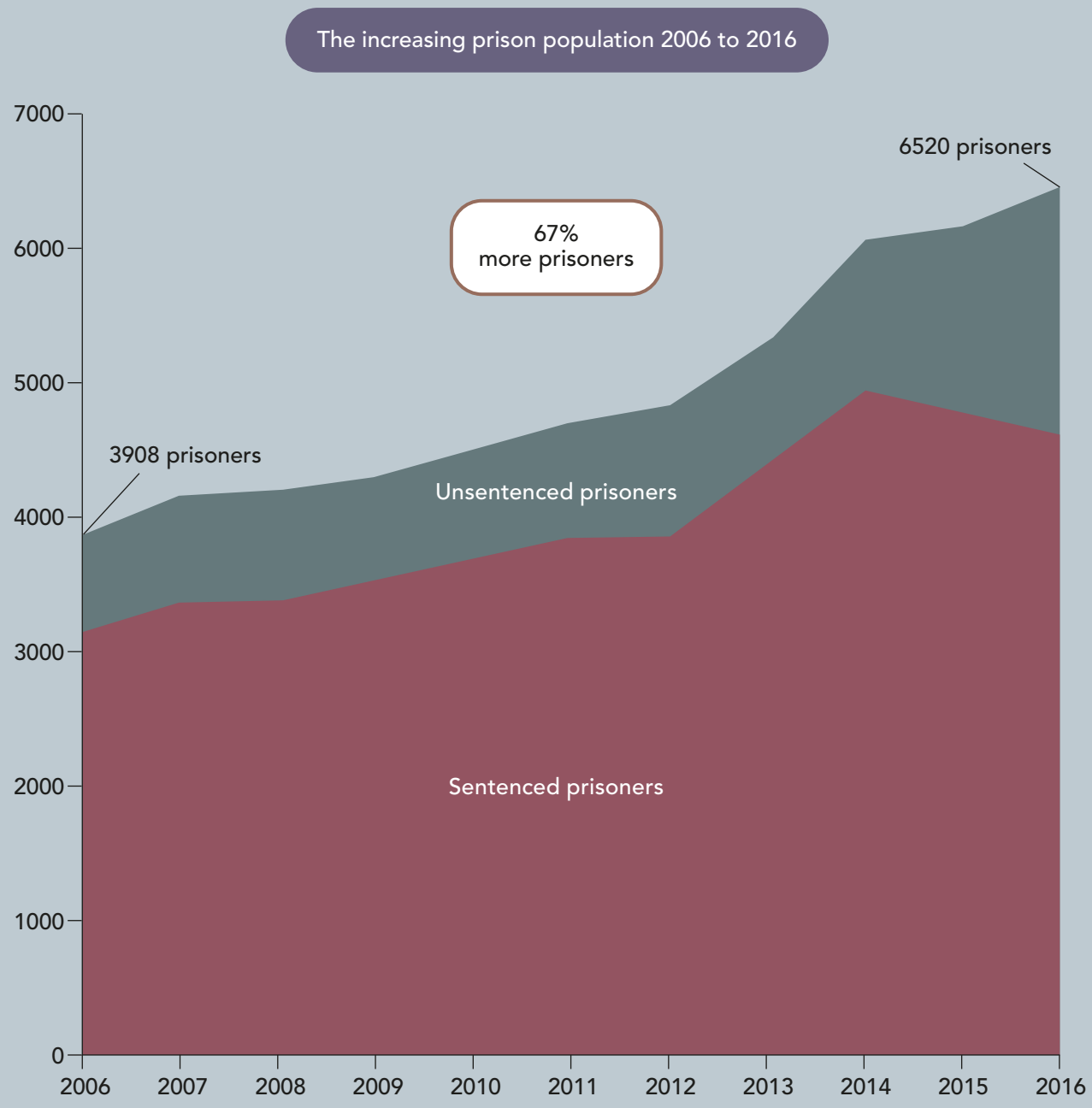
VICTORIA'S CRIME RATE

Victoria's imprisonment rates are consistently among the lowest in Australia.

However, in the past 5 years, custodial sentences have increased by 40% in the Magistrates' Court, and are up 9% in the higher courts. This increase can be attributed to an increase in the number of shorter jail terms being imposed.



Number of adult prisoners on 30 June 2006 to 30 June 2016 (from Sentencing Advisory Council)

The *Sentencing Act* establishes levels of imprisonment. While Acts of Parliament specify the maximum sentence for all offences punishable by imprisonment, they rarely specify a minimum term. This allows the courts some discretion to determine lengths of imprisonment. A minimum term of imprisonment is the time that a prisoner must serve before they can apply for **parole**. In all cases courts are guided by the principle of parsimony, meaning that they must not impose a greater sentence than is necessary to achieve the purposes of sentencing. For example, the *Crimes Act* creates the offence of murder and sets a baseline sentence of 25 years, but it does not specify a minimum.

For more information on Victoria's prison population trends refer to the Sentencing Council: https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/victoria-prison-population

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The Magistrates' Court has limited jurisdiction to impose a maximum term of 2 years imprisonment or a maximum of 5 years for multiple offences.

Table 4.2 Levels of imprisonment

Level	Maximum term of imprisonment	Type of offence
1	Life	Murder, trafficking drugs
2	25 years	Rape, armed robbery, arson
3	20 years	Manslaughter, serious injury
4	15 years	Recklessly causing serious injury
5	10 years	Threats to kill, indecent assault
6	5 years	Recklessly causing injury
7	2 years	Going equipped to steal
8	1 year	Cultivation of narcotic plant
9	6 months	Obstructing a police officer

SENTENCING AMENDMENT (COWARD'S PUNCH MANSLAUGHTER AND OTHER MATTERS) ACT 2014 (VIC)

This Act sets a mandatory non-parole period of 10 years for adults convicted of manslaughter committed by a single punch or in circumstances of gross violence.

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Prison sentence options include the following.

Table 4.3 Prison sentence options

Concurrent sentences	A concurrent sentence means that where the offender has committed more than one offence, the sentence for each offence can be served at the same time.
Cumulative sentences	Cumulative sentences are usually applied only for serious offences and if the offender has a long history of offending. A cumulative sentence means that all terms of imprisonment are added together to form a total period of imprisonment.
Serious offenders	A serious offender includes an offender who has repeatedly committed an arson, serious drug or sexual offence. When sentencing a serious offender, the court will consider the protection of the community from the offender as the principal purpose for which the sentence is imposed. To achieve that purpose, the court may impose a longer sentence.
Serious sex offenders	Serious sex offenders must serve multiple jail terms (consecutively), except in exceptional circumstances. A serious sex offender is defined as anyone sentenced to jail for two or more sex offences.
Indefinite detentions	Indefinite jail sentences can be imposed for offences such as murder, manslaughter and sex offences. The offender serves their nominal sentence, after which their sentence is reviewed by a judge. If the judge decides at that stage that the offender is still a danger to the community, the offender will be returned to jail for another 3 years. After this time has elapsed, the case is reviewed once more.

DOES LIFE IMPRISONMENT MEAN LIFE?

In Victoria, only the Supreme Court can impose a life sentence. A term of 'life' means for the term of an offender's natural life. However, the court must fix a non-parole period for any sentence of 2 years or more, unless it considers that the nature of the offence or the past history of the offender makes it inappropriate to fix a non-parole period. If a non-parole period is not set for a life sentence, the offender will remain in prison for their whole life.

For example, an offender may be sentenced to life imprisonment with a non-parole period of 25 years. This means that the offender must serve a minimum term of 25 years before becoming eligible for parole. In this example, the Adult Parole Board may release the offender after 25 years or may decide against parole, in which case the offender returns to prison until the Adult Parole Board rules them eligible for parole or until the end of their sentence.

What are indefinite sentences?

An indefinite sentence can be imposed if a court believes that the offender is a serious danger to society. This may be the case for serious violent or sexual offenders.

It is the court, not the Adult Parole Board, that decides whether release is appropriate. Release is only granted if the court finds that the offender is no longer a danger to the community.

Activity 4.6 Folio exercise

You be the judge

Visit the Sentencing Advisory Council website, choose one offender and do the 'You be the Judge' exercise. Then complete the following tasks:

1 Explain the elements of the sentencing process which promote the principles of justice in a sentencing outcome.
2 What sentence did you decide on and why?
3 Identify two mitigating factors the judge referred to when deciding the sentence.
4 Do you consider that the sentence imposed reflected the purposes of sentencing and the relevant legislation? Why or why not?

Sentencing Advisory Council website, 'You be the Judge': https://www.sentencingcouncil.vic.gov.au/you-be-the-judge.

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Other court orders for criminal offences

In addition to sentencing, the courts can also make other orders. These include the following.

Compensation orders

Courts have the power to make a compensation order if the defendant has been convicted of an offence and placed on a bond or CCO and another person has suffered loss or property damage as a result of the offence. If the victim applies for compensation, the court can order the defendant to compensate the victim for the loss, damage or destruction of property.

Restitution orders

Courts may order a defendant who has been found guilty of stealing goods or being in possession of stolen goods to return the goods to the owner. If the goods have been sold, the defendant may be ordered to pay compensation to the value of the goods stolen.

Hospital orders

Courts can make a diagnosis, assessment and treatment order for a period of up to 3 months. These orders can be made once a defendant has been found guilty. However, if, in the court's opinion, the defendant is suffering from a mental illness that requires treatment and admission to a psychiatric in-patient service, the defendant can be admitted as an involuntary patient.

Cancellation or suspension of licences or permits

Under the *Road Safety Act*, the courts and VicRoads have the power to suspend, cancel or vary licences and permits issued under the Act.

Drug offender cautioning scheme

Under this scheme, first-time offenders for possession of drugs are formally cautioned by the police rather than being charged with an offence.

4.5 Justice and sentencing

Sanctions aim to represent the values of the community. Sanctioning aims to provide just punishment, deterrence, denunciation and community protection. Although sanctions are supposed to represent the values of the community, the media sometimes report outrage at the sentences handed down by our courts.

Sanctioning options aim to treat offenders fairly, with the sanctions reflecting the seriousness of the offence.

Justice in sentencing is a complex matter. Basic principles of justice imply that all offenders facing the criminal justice system will have access to fair and equitable treatment. While this means that like cases will be treated alike, the sentencing process allows different sentences to be imposed on offenders, to reflect their different circumstances and degrees of culpability. For example, an offender found guilty of premeditated murder may receive a harsher sentence than an offender who has committed a spur of the moment killing. Both sentences could be considered fair given the different circumstances. The *Sentencing Act* requirement that courts consider mitigating and aggravating factors promotes fair sentencing outcomes for all offenders.

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Sentencing guidelines promote fair and equitable sentencing for all offenders.

Sentencing guidelines set out in legislation guide courts when sentencing. They are fundamental to the effective operation of the criminal justice system, and ensure that sanctions are:

- not unnecessarily severe to achieve the purpose for which the sanction is imposed. For example, if a court can achieve the aim of the punishment with a fine, the court must not impose a CCO to achieve that purpose. Similarly, if a CCO will achieve the purpose, the court must not impose a prison term.
- proportional and measured in relation to the offending behaviour. For example, imposing 1 year's imprisonment for failure to pay a traffic fine would be deemed excessive considering the lack of seriousness of the offence.
- equitable and similar sanctions imposed on like offenders and in like circumstances. Consistency, fairness and predictability in sentencing are essential if the community is to have confidence in the criminal justice system.
- just and appropriate in circumstances where an offender is sentenced for multiple offences. The guidelines that indicate which sentences are to be served cumulatively and which are served concurrently ensure that sentences are not unnecessarily harsh.

THE PRINCIPLES THAT GUIDE SENTENCING

- Parsimony: a court must not impose a sentence that is more severe than necessary to achieve the purpose/s for which the sentence is imposed.
- Proportionality: this ensures that the overall punishment must be proportional to the gravity of the offending behaviour.
- Parity: this promotes fairness for offenders by imposing similar sentences for comparable offences committed by offenders in similar circumstances.
- Totality: this applies when a number of sentences are imposed and means adjusting the overall sentence to promote a just and appropriate outcome in light of the overall offending behaviour.

Equal and fair sentencing

Our sentencing system is not perfect, and many social and cultural factors, as well as time and financial costs, affect the system's ability to deliver fair and equal treatment to all.

For a start, a range of factors affect the offender's ability to understand the sentencing process. These factors include education, housing, mental health and drug/alcohol dependence.

The 2015 Victorian Ombudsman's report, 'Investigation into the rehabilitation and reintegration of prisoners in Victoria', stated that:

- only 14% of prisoners completed secondary school
- 75% of male and 83% of female prisoners have a history of substance abuse and the average prisoner was unemployed at the time of offending
- 40% of prisoners suffer from mental illness and cognitive disabilities and were homeless.

Traditional sentencing options, particularly imprisonment, often fail to address the underlying cause of the criminal behaviour. Given that 99% of prisoners in Victoria will be released at some point, there is a pressing need to address the offending behaviours and an equal need to prepare prisoners to re-enter society as law-abiding citizens. All this requires treatment and education while offenders are in prison and transition support when they are back in the community.

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Cultural diversity and sentencing

Inequality in sentencing outcomes may occur because of an offender's cultural background. Victoria has one of the most culturally diverse populations in Australia and yet the law does not make concessions for recently arrived migrants, Indigenous Australians or refugees.

Minority groups may have difficulty understanding and effectively contributing to the sentencing process because of their cultural background, language barriers and different expectations of the legal system. This can result in unfair and unjust sentencing outcomes.

INDIGENOUS OFFENDERS

There has been a significant reduction in the rate of Aboriginal adults serving a Community Based Service (CBS) order since 2010–11, from 16 per 1000 to 11.8 per 1000 in 2015. However, Aboriginal Victorians continue to be overrepresented in justice supervision, at almost 12 times the rate of non-Aboriginal Victorians. In 2015, 261 Aboriginal young people (10–17 years) received a police caution, arrest or summons or other type of police processing. In Victoria, Aboriginal adults are 11 times more likely to be incarcerated than Victoria's non-Aboriginal population (nationally 13 times more likely). Aboriginal adults make up 0.7% of Victoria's population but represent 8.0% of the State's prisoners.

Victorian Government Aboriginal Affairs Report 2016

NEWSREPORT 4.7

Patrick Dodson makes impassioned plea for 'a smarter form of justice'

AUSTRALIA'S LEGAL SYSTEM HAS BECOME A 'feared and despised processing plant' for most Aboriginal people, propelling the most vulnerable and disadvantaged towards a 'broken, bleak future', according to Patrick Dodson.

Lamenting that the situation has deteriorated since the landmark Royal Commission into Aboriginal Deaths in Custody in 1991, Professor Dodson has called for a formal engagement between Indigenous Australia and the parliament on a new approach.

'Accepting the status quo permits the criminal justice system to continue to suck us up like a vacuum cleaner and deposit us like waste in custodial institutions,' Professor Dodson declared in an impassioned speech to mark the 25th anniversary of the report.

'We need a smarter form of justice that takes us beyond a narrow-eyed focus on punishment and penalties, to look more broadly at a vision of justice as a coherent, integrated whole.'

Professor Dodson was one of the commissioners who investigated 99 Aboriginal deaths in custody between 1980 and 1989 and made 339 recommendations.

Since the report was tabled in parliament in May 1991, the rate at which Indigenous people are imprisoned has more than doubled, raising questions about how effectively the recommendations have been implemented.

'Certainly, one has to wonder what happened to the principle of imprisonment as last resort and the 29 recommendations relating to this issue,' said Professor Dodson, who is set to become a Labor senator next month.

Professor Dodson said mandatory sentencing, imprisonment for fine defaults, 'paperless' arrest laws, tough bail and parole conditions and punitive sentencing regimes had all contributed to high incarceration rates, along with funding cuts to frontline legal services and inadequate resourcing for much-needed diversionary programs.

'This suggests that legislators in some jurisdictions have not learnt from the past, and are still intent on arresting their way out of Indigenous disadvantage,' he told the National Press Club on Wednesday.

Professor Dodson cited the 'devastating' case of 22-year-old Ms Dhu, who died in the Port Hedland lock-up in 2014, but said her story 'could have been plucked at random from almost any moment in the modern story of Aboriginal injustice'.

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Activity 4.7 Essay

Sentencing options in Victoria

Review the text information on sentencing options in Victoria and write an essay on the following topic: 'The hierarchy of sentences, the purposes of sanctions and the factors taken into consideration in sentencing allow judges and magistrates significant discretion in determining appropriate sentencing outcomes.' To what extent do you support this statement? Include a discussion of at least three sentencing options in your response.

Activity 4.8 Structured questions

Smarter justice for Indigenous people

Read the article 'Patrick Dodson makes impassionate plea for a "smarter form of justice"' and complete the following tasks:

1 List the sentencing practices Dodson identified as contributing to the increasing incarceration rates of Indigenous offenders.
2 Suggest one reason for Indigenous people being 'more likely to come to the attention of the police, more likely to be arrested and charged and more likely to go to jail'.
3 Evaluate whether the statistics quoted on Indigenous prisoners support his argument.
4 Draw on the material in the article to suggest two reforms to improve the treatment of Indigenous people in the criminal justice system.

'For our communities, the storyline is all too familiar: the minor offence; the innocuous behaviour; the unnecessary detention; the failure to uphold the duty of care; the lack of respect for human dignity; the lonely death; the grief, loss and pain of the family.'

A quarter of a century after the report, Indigenous people were more likely to come to the attention of police, more likely to be arrested and charged and more likely to go to jail, he said.

'The statistics speak for themselves and the cold hard facts remain an indictment on all of us,' he said.

In the past decade, the incarceration rate for Indigenous men had more than doubled; Indigenous youths now comprised more than 50% of juveniles in detention; and, for Indigenous women, the rate of imprisonment was accelerating even faster – a 74% increase in the past 15 years.

'If we are to disrupt current trends, we must invest in rebuilding the capacity of families and communities to deal with the social problems that contribute to these appalling indicators.'

Professor Dodson stressed the need to develop preventative programs that engage the community in winding back 'the ravages of drug and alcohol abuse, the scourge of family violence and welfare dependency'.

'We will not be liberated from the tyranny of the criminal justice system unless we acknowledge the problems in our own communities and take responsibility for the hurt we inflict and cause to each other.'

Professor Dodson appealed to governments to embrace the royal commission's call for a response based on a philosophy of empowerment.

'The Australian Parliament needs to be more open to the idea of engaging in a formal way with Indigenous people on matters that affect our social, cultural and economic interests as well as our political status within the nation state,' he said.

Professor Dodson said he hoped to play a constructive role in advancing solutions in his new role as a senator.

Michael Gordon, The Age, *13 April 2016*

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Legal brief 4.1

Just sentencing for Indigenous people

Australia's Indigenous people are jailed at a disproportionate rate compared with non-Indigenous people.

The disadvantage experienced by Indigenous people in their dealings with the criminal justice system has been recognised for the past two decades. A disproportionate number of Aborigines in custody has been seen as evidence of prejudice and discriminatory attitudes. Various reports have called for changes in the way the criminal justice system deals with Indigenous people.

THE FACTS – A STATISTICAL VIEW

Statistical evidence bears testament to the disadvantage experienced by Indigenous Australians in their dealings with the criminal justice system:

- Indigenous Australians make up approximately 2.5% of the general population.
- Indigenous Victorians are 6 times more likely than non-Aboriginal people to be charged with a criminal offence.
- Indigenous Victorians are 10 times more likely than non-Aboriginal Victorians to be sent to jail.
- Indigenous adults are 14 times more likely than non-Indigenous adults to be incarcerated.
- Indigenous children are 24 times more likely than non-Indigenous children to be detained.
- Laws allow for children aged 10 and 11 years old to be detained in every jurisdiction, in violation of the UN Convention on the Rights of the Child.
- Most of the deaths of Indigenous Australians in custody are of men aged between 15 and 40 who are serving sentences of less than 6 months.

Various reports have concluded that Indigenous people are subject to discriminatory and prejudicial attitudes in their dealings with the criminal justice system.

Royal commission

In 1987, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established to investigate the reasons for the high number of Indigenous people dying in police custody or in prison. The final report was presented in 1991. It included 339 recommendations for change. The report concluded that Aboriginal people were 29 times more likely to be detained in custody than any other group in the community.

The report identified several reasons for Aboriginal people being more likely to be imprisoned or detained in custody. These included:

- they are more likely than non-Indigenous people to be charged and detained in custody for 'street' crimes such as offensive language and alcohol-related offences
- the prevalence of racist or stereotypical attitudes among law enforcement officers
- poverty and limited access to education, health facilities and housing services
- cultural disadvantage.

Some of the problems relate to dealings with the police.

How did Victoria respond?

In 2005 a Victorian report noted that Indigenous people still experienced disadvantage in their dealings with the criminal justice system. The report identified difficulties relating to policing and the prison system. Problems relating to the police included:

- harassment, discrimination and racist attitudes, particularly in relation to Indigenous young people and recently released Indigenous prisoners
- the perception of over-policing of Indigenous people, especially in regional Victoria
- a lower use of cautioning, which results in Indigenous people accumulating a number of minor convictions
- the unwarranted use of violence, sometimes allegedly severe, towards Indigenous people
- an unnecessarily high incidence of arrest in relation to public drunkenness and street offences
- an inadequate level of cultural awareness among police, insufficient training in this area, particularly for recruits, and the need for training that is more community based.

Problems identified relating to the prison system included:

- the need for extensive improvement to pre-release and post-release programs
- the need for more and better educational programs in prison, particularly with reference to Aboriginal culture

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- difficulties in maintaining family visits to prisoners because of distance, expense and, in some cases, because of the criminal records of those family members
- a lack of cultural awareness among correctional staff at all levels
- blatant racism by some individuals within the correctional system.

A number of changes have been introduced to help Indigenous people in their dealings with the criminal justice system. The introduction of the Koori Court was seen as a very positive improvement. The use of Elders and Respected Persons was seen as valuable – it increased respect for the process and those involved, and a sense of community.

However, although the use of Koori Courts has been seen as a positive reform, there is concern about:

- the increased amount of time involved in hearing cases
- having to plead guilty in order to appear before the Koori Court.

Royal Commission into Family Violence

The Royal Commission into Family Violence tabled its report in the Victorian parliament in March 2016. Its role included investigating ways to:

- prevent violence
- improve early intervention
- support victims
- make perpetrators pay
- develop and refine responses to family violence in the legal system – police, corrections, child protection, legal and family violence support services
- better coordinate community and government responses.

While the Royal Commission was focused on family violence in the mainstream community, it acknowledged the involvement of Aboriginal Elders and community members, who provided insights and suggestions for:

- early intervention
- community-based family violence strategies.

Children's Koori Court Family Division

A Children's Koori Court Family Division was opened at Broadmeadows in October 2015. This court aims to reduce the trauma that Koori children suffer when they are forced to take part in court proceedings. It also aims to keep Indigenous families in their communities, including by placing children with a family member or other Indigenous family if their own family breaks down or their parents are no longer able to care for them.

Aboriginal Justice Agreement

The Victorian government and the Koori community signed Phase 3 of the Agreement in 2015. It builds on the developments implemented previously to improve Koori justice outcomes in Victoria. It also included the launch of the Aboriginal Social and Emotional Well-Being (SEWB) website, which will focus on improving the mental health and wellbeing of Indigenous people while they are incarcerated and upon release.

See http://www.justice.vic.gov.au/home/your+rights/aboriginal+justice+agreement/ for more information on the Aboriginal Justice Agreement.

Expansion of the Koori Court

The ongoing expansion of Koori Courts in Victoria greatly assists in ensuring that sentencing orders are appropriate to the cultural needs of the Koori offender.

Two new courts were opened in 2016: in Geelong and Mildura. By addressing the underlying causes of the offending behaviour, the courts are already reducing **recidivism** rates. While the laws applied are identical, the critical difference is the informal and interactive format of proceedings. This is another example of helping Indigenous communities gain ownership of – and accountability for – their participation in the criminal justice system.

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Activity 4.9 Written report

Access to justice for Indigenous Australians

Present a written report analysing the effectiveness of the legal system and the difficulties faced by Indigenous people in their dealings with the criminal justice system.

Part 1

Justice in the criminal justice system

1 Identify two principles of justice reflected in the operation of the criminal justice system.
2 How do the principles you chose apply to sentencing? In your report you may refer to aspects of the sentencing process or to specific sanctions.

Part 2

Problems in the criminal justice system

1 Identify and explain at least two problems faced by Indigenous people in their dealings with the criminal justice system.
2 What effects do these problems have on the capacity of the criminal justice system to achieve the principles of justice for Indigenous offenders?

Part 3

Describe and evaluate two recent reforms, or recommendations for reform, that aim to improve the operation of the legal system in relation to Aboriginal people.

Legal brief 4.2

Other recommendations for just sentencing outcomes

A number of other sentencing options to promote fair and just sentencing have been recommended by various bodies. These include:

- Address and overcome the causes underlying the criminal behaviour – this would be the most effective way to prevent reoffending and rehabilitate the offender. The average prisoner has not completed high school, is most likely unemployed at the time of committing the crime and has a history of substance abuse.
- Focus on rehabilitation of vulnerable groups within the prison population, including Aboriginal and Torres Strait Islander prisoners, those with cognitive disability, and women and young offenders, and on reintegrating them into the community upon release (2015 Victorian Ombudsman investigation into rehabilitation and reintegration).
- Engage family and community support agencies in pre- and post-release transition programs.
- Ensure that CCOs are focused on reintegrating young people into the community by targeting programs linked to addressing the offending behaviour (the Church Network for Youth Justice submitted that the effectiveness of sentencing options as deterrence to reoffending depends on this).
- Develop and provide community experiences that are meaningful to the young person, where they are treated with dignity, and can enter a trusting relationship with an adult. Conversely, 'meaningless work, [or] a dehumanising or violent experience will promote bitterness and militate against deterrence' (Australian Law Reform Commission, '**Principles of Sentencing**').
- Increase the number of Neighbourhood Justice Centres (NJCs) – currently, the City of Yarra has the only one in Australia. The primary focus of the centre is to address the underlying issues causing criminal behaviour. As such it brings together a multi-jurisdictional court, a broad team of support services and community support services. The NJC has successfully reduced crime and increased community safety, thus reducing costs in the criminal justice system. The Sentencing Advisory Commission endorsed this one stop shop approach, which brings together 20 independent agencies who work collaboratively to address the underlying causes of harmful behaviour.
- Continue the expansion of the Koori Court – increase the number of locations for children's Koori Courts and broaden their use so that they can hear 'not guilty' pleas: this could further improve deterrence and promote alternative sentencing options before imprisonment for young Indigenous offenders.
- Use circle sentencing to avoid Indigenous offenders going to jail – it operates successfully in Canada: a circle of people, mainly Elders, but also police and the magistrate, decide on a sentence which does not include a jail term. It is only used with offenders who have pleaded guilty.

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Costs

Prison is a costly option for the community and the current rates of recidivism indicate that imprisonment as a sanction may not be effective.

It has been suggested that more funding is needed for prisons to implement programs that address the causes of offending. This would include funding for training and education. It would also include access to stable employment and housing for offenders, especially after release from prison. Extra funds would support a 'whole of offender' case management approach. Using this approach, individual needs are identified and specific programs targeting the particular offender's behaviour would be implemented and monitored.

NEWSREPORT 4.8

Swedes give a new twist to rehabilitating prisoners

SWEDISH PRISONS ARE RENOWNED for being liberal and progressive, with a focus on rehabilitation. The way Sweden treats prisoners may be partly responsible for keeping jail and recidivism rates low. Prison numbers have fallen and jails have closed.

Inmates are regarded as people with needs, to be assisted and helped. They learn how to be physical labourers, craftsmen … and even academics.

In high-security prisons, common areas include table tennis tables, pool tables, and steel darts. Correctional officers fill both rehabilitative and security roles.

The country also has 'open' prisons – prisoners stay in housing that resembles university dormitories and can commute to a job and visit families while electronically monitored. In these facilities, prisoners and staff eat together. They are not expected to wear uniforms.

Activity 4.10 Folio exercise

Swedish approach reduces recidivism

Read the article 'Swedes give a new twist to rehabilitating prisons' and complete the following tasks:

1 Explain the approach adopted by Swedish corrective services to imprisonment and to reducing recidivism rates.
2 What evidence is there to suggest that Victoria is moving towards placing greater emphasis on the rehabilitation and reintegration of offenders into society?
3 To what extent do these recent reforms enhance the ability of the sentencing system to achieve the principles of justice?
4 Evaluate how effective Victorian prisons have been in achieving the aims of sanctions.

4.6 Sentencing reforms

The changing nature of crime and sentencing, and community values, means that sentencing policy is continuously undergoing refinement and change: options are implemented, then evaluated by the enforcement agencies – the police, the judiciary, corrective services – and the public.

It is vital that courts hand down decisions in accordance with legislative guidelines (which include considerable discretion, so that courts can impose sanctions that respond to the particular circumstances of each case) and that they remain independent of government and not subject to political interference.

Sentencing options must remain flexible if they are to be effective.

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WHAT IS THE SENTENCING ADVISORY COUNCIL?

The Sentencing Advisory Council was established in 1991 by the government to bridge the gap between the community, the government and the courts.

Its jurisdiction is derived from Part 9A of the *Sentencing Act*. It is an independent statutory body and its key function is to monitor, evaluate and provide feedback to policy-makers, legislators and the community on sentencing statistics and trends in Victoria.

This information helps the government (executive) and parliament (legislative) develop effective sentencing law and implement it in the courts.

The Sentencing Advisory Council provides community education, advises the Attorney-General, publishes reports, receives submissions from the public and liaises with courts on sentencing and criminal justice issues. The Sentencing Advisory Council thus plays a valuable role in promoting public confidence in sentencing.

Its policy recommendations are generally accepted by government and adopted in legislation.

While the public is not directly involved in the sentencing process, individuals can indirectly influence sentencing policy by contacting their local MP or the Attorney-General and making their views known. There are also parliamentary law reform committees that review aspects of sentencing – they have public hearings and accept submissions from the public.

Evaluating sentencing

The approach taken to determining an appropriate sanction has strengths, but aspects of the sentencing process are the subject of ongoing community concern. The table below outlines the key strengths of the sentencing process and some of the issues faced by the system.

Strengths	Problems
• Sentencing legislation, made by parliament, reflects community values. The legislation guides the courts when making sentencing orders. • Judges and magistrates retain discretion (in the majority of cases) when determining sentencing orders, meaning they can weigh up a number of individual factors to determine a fair outcome based on the nature of the offender and the severity of the offence. • Key sentencing principles (parsimony, proportionality, totality, parity) guide sentencing outcomes to ensure fairness for offenders by imposing similar sentences for comparable offences committed by offenders in similar circumstances. • The Victim Impact Statement enables magistrates and judges to consider the impact the crime has on the victim and their family, thus promoting a fair outcome for the victim, offender and the community. Similarly, the Victims' Charter promotes confidence in the sentencing process by informing victims of the right to have a voice in the sentencing process. • The *Sentencing Act* allows for the Court of Appeal to provide guideline judgments to help courts with their sentencing practices, to promote fair and just outcomes for offenders, victims and the community. • The Sentencing Advisory Committee monitors and evaluates sentencing practices to promote fair and consistent sentencing. The committee provides expert advice and makes recommendations to the Attorney-General. • The appeal system exists to enable the Office of Public Prosecutions to appeal any sentence they regard as inappropriate. Similarly, offenders may appeal any sentence they consider too lengthy. The appeal system provides a safeguard against inappropriate sentencing. • The vast majority of sentences are not subject to appeal. They are regarded as just, fair and appropriate and promote public confidence in the criminal justice and sentencing systems.	The sentencing process is not a perfect system: • Understanding criminal behaviour and how best to respond to it in a manner that is fair, just and equal to the offender, the victim and the community is an ongoing challenge for the criminal justice system. • There are concerns within the community regarding some aspects of sentencing: in particular, for sexual assaults such as rape, and for sexual offences against children. • Sentencing ranges are broad, and this sometimes creates inconsistency in sentencing and may cause the public to question the sentencing. • Vulnerable, disabled and mentally impaired victims of crime may have difficulty communicating the impact of a crime/s in court and/or in an impact statement. This reduces the fairness of the sentencing process for marginal groups in society. • Constant changes in criminal behaviour may result in outdated and ineffective sentencing laws, and thus inappropriate and unjust outcomes. • Politically motivated agendas may result in the introduction of 'tough on crime' sentencing laws 'to protect and promote the safety of the community'. • Sentencing practices have traditionally focused on punishment and deterrence for adult offenders, but this approach has not effectively reduced crime rates or rehabilitated offenders. This may be considered unfair, as sentencing practices have failed to address the underlying issues of the offender's behaviour and failed to create a safer community. • High-profile cases involving well-known personalities, or particularly horrifying cases, attract social media attention and can lead to close public scrutiny of the sentence options. The community may form opinions without a full understanding of the facts or of the sentencing considerations judicial officers must consider.

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Key point summary

Do your notes cover all the following points?

Sentencing and justice

- ❑ Key legislation regulating sentencing in Victoria: the *Sentencing Act 1991* (Vic) for all courts except the Children's Court. Sanctions for young offenders are set out in the *Children, Youth and Families Act 2005* (Vic).
- ❑ Purposes of sanctions: punishment, denunciation, deterrence, rehabilitation and protection of society.
- ❑ Hierarchy of sanctions for adults in Victoria include:
  - dismissal, discharge and adjournment
  - fines
  - community correction orders (CCOs)
  - drug treatment orders
  - imprisonment
  - Youth Attendance Orders, Youth Justice Centre Orders and Youth Residential Centre Orders for children and young offenders.

Factors considered by the court in sentencing

- ❑ Aggravating factors – evidence about the offender or the circumstances of the crime which may increase the sentence. These include:
  - the offender has criminal record
  - the nature of the crime (particularly cruel)
  - the offender used a weapon.
- ❑ Mitigating factors – evidence about the offender or the circumstances of the crime which may reduce the sentence. These include:
  - the offender was an accessory to the crime
  - the offender showed remorse for crime
  - no one was hurt or likely to be hurt during the crime
  - the offender had minor or no criminal history
  - the offender pleaded guilty and cooperated with police.
- ❑ Guilty pleas (sentence discount and sentence indication schemes)
  - Guilty pleas or intentions to plead guilty must be taken into account when sentencing. They are treated as a mitigating factor and result in a reduced sentence. A plea of guilty may be taken into account through either a specified sentence discount or a sentence indication.
- ❑ Victim Impact Statements
  - The Victim Impact Statement is a statutory declaration that may be read or presented to the court. It may include photos, drawings, poems and other material related to the impact on the victim.
- ❑ Other factors include:
  - the offender's personal circumstances
  - the victim's circumstances
  - the offender's family and dependant/s
  - the maximum penalty for the offence
  - the sentencing guidelines for the offence.

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Types of sanctions

- ❑ fines
- ❑ community correction orders (CCOs)
- ❑ drug treatment orders
- ❑ imprisonment.

Factors that impact on sentencing

- ❑ cultural differences
- ❑ costs.

Recent reforms to sentencing to enhance the achievement of justice

- ❑ the Sentencing Advisory Council
- ❑ Fines reforms Acts.

Recommendations to enhance the ability of the criminal justice system to achieve justice

- ❑ Swedish approach to prisons
- ❑ Recommendations for achieving justice for Indigenous people.

End-of-chapter questions

Revision questions

1 Explain two aspects of the sentencing process which promote the principles of justice.

2 Judges have often commented that sentencing is one of the most trying facets of their job. Describe two factors that a judge may take into account in determining an appropriate sanction and comment on why the courts find this role challenging.

3 Describe one feature of the sentencing process which promotes justice for each of the following: the offender, the victim and the community.

4 To what extent do you consider that the sentencing process provides for access to fair and equal treatment?

5 Briefly describe three sanctions and discuss the ability of these sanctions to achieve their purposes.

6 'It would be unjust to send all offenders to prison.' To what extent do you agree with this statement? Justify your answer.

7 Describe two advantages of having multiple sentencing options to choose from.

8 'Community Correction Orders have enormous potential to address the underlying causes of criminal behaviour.' Present one argument in support of and one argument against this statement.

9 Discuss the extent to which the sanction of imprisonment enhances the ability of the criminal justice system to achieve the principles of justice.

10 'Cultural factors may reduce the ability of the sentencing process to enhance the achievement of the principles of justice in some cases.' Synthesise the relevant information in the text and comment on the accuracy of this statement. Discuss one other factor which may reduce the capacity of the sentencing process to deliver justice for offenders.

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Practice exam questions

1 Explain the term 'rehabilitation'. [2 marks]

2 Describe the main components of a Community Correction Order. [2 marks]

3 Describe two purposes of imprisonment. [4 marks]

4 What is an aggravating factor? [2 marks]

5 Explain how a guilty plea may be taken into account in the sanctioning process. [4 marks]

6 What is a Victim Impact Statement and what effect does it have on the sentencing process? [5 marks]

7 Outline the four purposes of sanctions. [4 marks]

8 Discuss two sanctions other than imprisonment. For each sanction, outline how it fulfils the purposes of sanctions. [6 marks]

9 Explain three factors that a judge would take into consideration in determining an appropriate sanction. [6 marks]

10 To what extent do those three factors reflect the purposes of sentencing? [3 marks]

11 Identify one problem in relation to sanctioning that involves costs or time. Evaluate a recent reform or recommendation for reform that could provide a solution to the problem. [6 marks]

12 'A defendant's culture determines how an individual will be treated in the criminal justice system.' To what extent do you agree with this statement in relation to sentencing outcomes? In your response make reference to the experience of Indigenous Australians. [8 marks]

13 'Sanctioning options provide that individuals are treated fairly, as the sanction reflects the seriousness of the offence.' Using examples, analyse this statement. [8 marks]

14 Evaluate the extent to which two sanctions contribute to the effective operation of the legal system. Discuss one recent reform and one proposed reform that aim to enhance the effectiveness of sanctions. [10 marks]

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CHAPTER 5
CIVIL LAW AND JUSTICE

This chapter explores the operation of the civil justice system. We look at the factors to consider in the initiation of a civil claim, examine the institutions and processes used to resolve civil disputes and the purposes of their remedies. We evaluate the ability of the civil justice system to achieve the principles of the justice system. Factors affecting the effectiveness of the civil justice system and recent reforms and recommendations for reform are also examined.

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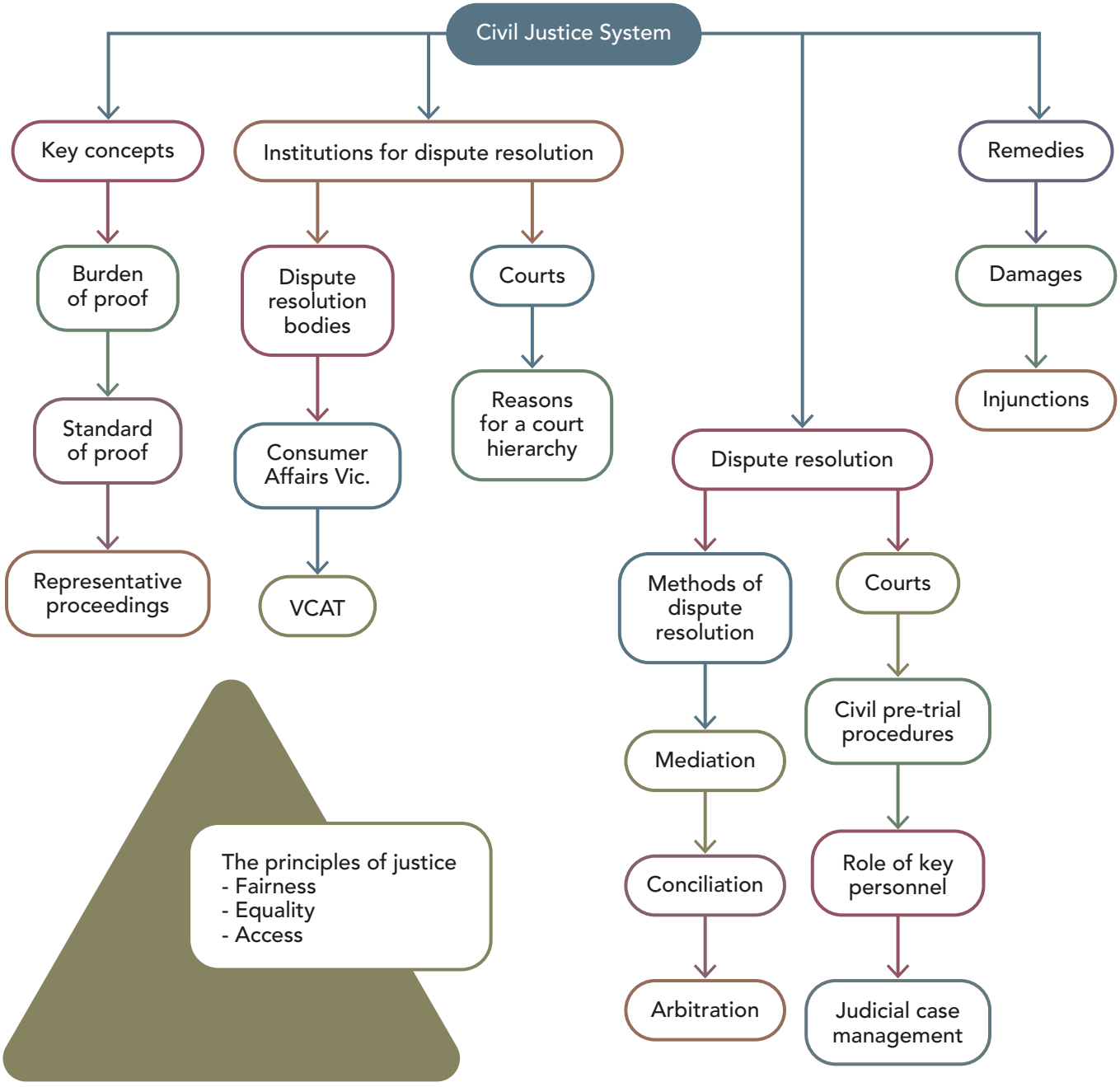

Key terms

balance of probabilities the standard of proof required in a civil case: to be successful, litigants must prove that their case, their version of the facts, is more probable than the other party's version

counter-claim a cross-action that, although capable of supporting an independent action, is pleaded in an existing claim

damages a monetary award: this is the most common outcome of a civil case

directions hearing a hearing conducted by a judge that allows the court to establish timelines for the completion of the pre-trial stages in a civil matter

discovery the pre-hearing stage in civil proceedings where the parties exchange further details and information: it may include documents, written interrogatories (questions) and/or an oral examination

injunction an order for a party to do, or refrain from doing, a particular thing; a court order for an action to be taken or for the deferment of an action

interrogatories written pre-trial questions sent by one party to another to find out the basis of a civil dispute

litigation engaging in court action over a civil matter

plaintiff the party who initiates a civil action

remedy broadly, any means by which a wrong is redressed

statement of claim a document in which the plaintiff sets out the facts they are relying on in the claim against the defendant, together with the relief they are seeking

writ the originating document used to begin a civil claim

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5.1 Civil actions

All members of the community have rights and obligations. Some of these rights and obligations fall within the criminal law and some fall within the civil law. A civil action arises when an individual suffers damage as a result of their rights being infringed by the actions or omissions of another party. The individual affected by the breach is responsible for taking the case to court.

A **remedy** is sought from the party responsible for the breach. In many cases, the civil wrong can be easily remedied by the parties negotiating and reaching a suitable agreement. However, if an agreement is not reached, the wronged party may seek legal advice and start legal proceedings. The person initiating a civil action is referred to as the complainant (in cases heard in the Magistrates' Court) or the **plaintiff** (in cases heard in the County Court or Supreme Court). The party responding is referred to as the defendant.

Areas of civil law

Civil law includes torts, contracts and other disputes, such as family law and inheritance.

Two areas of civil law are torts and contract. The word 'tort' comes from the French word meaning 'wrong'. Civil actions may also be disputes relating to matters such as family law and inheritance.

Torts

The law of torts includes actions for negligence, defamation, trespass or nuisance. A monetary award of **damages** or compensation is the most common remedy in such actions.

Contract

Contract law involves a legally binding agreement between two or more parties. Most civil disputes concerning the law of contract involve a breach of contract. A breach of contract occurs when one of the parties has broken the terms of the agreement. The plaintiff usually wants financial compensation or an order requiring the defendant to perform or refrain from performing some specific action.

In Australia, the legal system provides institutions and processes to resolve civil disputes. These institutions include Consumer Affairs Victoria (CAV), the Victorian Civil and Administrative Tribunal (VCAT), and the courts. These bodies use a range of processes to resolve disputes. For more information on CAV and VCAT see page 162.

5.2 The principles of justice and civil law

The aim of the *Civil Procedure Act 2010* (Vic) is to facilitate the 'just, efficient, timely and cost effective resolution of the real issues in dispute' through the court, whose duty is to uphold the law and administer justice. Courts are able to make any order they consider appropriate in the interests of justice when settling civil disputes.

The processes, procedures and institutions of the civil justice system contribute to the achievement of justice.

Fairness

The principle of a fair and unbiased hearing is central to the idea of 'fair play' in a civil case. The pre-trial, trial and post-trial processes and procedures aim to achieve fair outcomes for parties. The community expects that the key features of the civil justice system will apply fairly to all and that an impartial adjudicator (judge or magistrate) will produce an outcome.

In our civil justice system individuals are free to initiate legal actions to resolve disputes about their rights. The standard of proof in civil cases is the balance of probabilities. This means that each party has an equal opportunity to persuade the court that their version of the facts is the most likely one.

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Equality

The principle of equality is also fundamental to achieving justice in the civil justice system. The civil pre-trial, trial and post-trial processes and procedures aim to provide similar and uniform treatment for all people. The rules of evidence and procedure ensure consistency and predictability and allow all parties to be treated in a uniform manner.

Access

The principle of access to the law is another value underpinning the concept of justice. The civil justice system provides a range of options for parties to resolve disputes.

Civil disputes differ in nature and complexity. For instance, a dispute may involve a relatively minor consumer complaint or a complex commercial agreement.

In a minor civil claim, such as those involving a consumer and a trader, the dispute may be resolved with the assistance of CAV or heard and determined by VCAT. This allows a dispute over a small amount of money to be resolved in a relatively inexpensive and quick manner. However, in a civil action involving a complex commercial agreement, the case may be heard and determined by a court.

An individual involved in a minor consumer dispute would be unlikely to enforce their rights if they were faced with a lengthy and costly trial. By providing alternative means to resolve these disputes, the civil justice system tries to ensure that all individuals have access to the legal system.

5.3 Features of a civil case

The key features of a civil case are that:

- it is concerned with a dispute between two individuals and was initiated by one of the parties
- the court has provided a remedy to the dispute.

'THIS IS AN EX-PARROT'

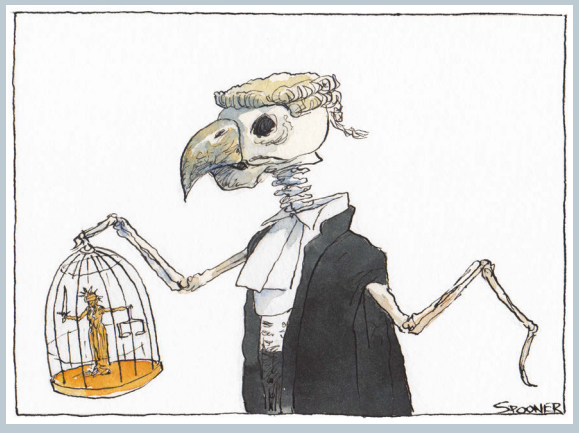
> Mr Praline, from the famous Monty Python 'Dead Parrot' sketch, explains the situation: 'This parrot is no more! He has ceased to be! 'E's expired and gone to meet 'is maker! 'E's a stiff! Bereft of life, 'e rests in peace! If you hadn't nailed 'im to the perch 'e'd be pushing up the daisies! 'Is metabolic processes are now 'istory! 'E's off the twig! 'E's kicked the bucket, 'e's shuffled off 'is mortal coil, run down the curtain and joined the bleedin' choir invisible!! THIS IS AN EX- PARROT!!'

Consider the case of the bird collector who purchased a rare Red-Lored Amazon parrot. In the middle of the night he hears a thud, and he finds the parrot dead, just a month after he bought it. 'I was lying in bed, and I heard a clunk,' Mr Farkas said. 'I knew that poor Pepe had fallen off his perch. I raced next door and, sure enough, there he was: dead, with his claws in the air.'

Mr Farkas had noticed that there was something wrong with the bird when it was delivered to his home. He contacted the dealer, who reassured him that the bird was only unsettled by the journey. The dealer said that there was nothing wrong with the bird and that the bird had been flying around her room before being delivered to him.

Not satisfied with the condition of the parrot, Mr Farkas consulted a vet. The vet's diagnosis: parrot fever. When Mr Farkas confronted the dealer with this news, the dealer claimed that Mr Farkas had mistaken the new parrot for another.

Following the death of the parrot, a furious Mr Farkas started legal action to recover the money he had paid for the rare bird. Mr Farkas was successful in his claim, but it was a hollow victory. The judge allowed the defendant to pay the awarded damages in instalments. Mr Farkas, by then aged 72, would be 139 when he received the final payment.



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Dispute between individuals

Civil disputes are between individuals.

Mr Farkas, the owner of the deceased parrot, initiated the action and is thereby known as the plaintiff.

Purpose

The purpose of civil law is to restore the injured party to their original position.

A civil case aims to restore the injured party to their original position through a remedy. The court may make any one of various orders to resolve a dispute. However, as is evident in the case, the financial position of the parties may limit the effectiveness of remedies in restoring the parties to their original position. The costs of a civil action are borne by the parties in dispute. The party who loses the case may be ordered to pay the costs of both parties.

5.4 Key concepts of civil justice

Upholding justice and protecting individual rights is essential for a civil justice system to operate effectively. The law recognises that individuals have the right to have their disputes determined by a 'competent, independent and impartial' tribunal.

Civil law concepts recognise the importance of protecting the individual's rights to fairness, equality and access to the law. The key concepts protecting these values are:

Burden of proof

In a civil case the person bringing the claim, the plaintiff, has the burden of proof.

The burden of proof refers to the responsibility the plaintiff has to present the necessary facts (evidence) to establish the case against the defendant. It is fair that the party making the allegation has the task of establishing liability.

Standard of proof

The standard of proof refers to the amount of evidence the plaintiff must present to the court to win. In civil law the plaintiff must present sufficient evidence to prove on the **balance of probabilities** that the facts they claim are substantially the truth. The level of evidence required is what would be regarded as adequate by a reasonable person.

> In civil matters, such as the case of Mr Farkas, the plaintiff must prove, on the balance of probabilities, that their account of the facts is right. In other words, the plaintiff must prove that their version of the facts is the more likely. In this particular case, the plaintiff had to prove to the court that, on the balance of probabilities, the dealer knew that the parrot was ill when it was sold to Mr Farkas.

Representative proceedings

The term 'representative proceedings' refers to a claim brought by a group of people and that arises out of a similar or related legal interest. Sometimes several people may each have suffered the same type of damage as a result of an infringement of their rights. Instead of each person initiating separate legal proceedings, it may be possible for a single legal action to be started on behalf of all the people affected. One or more of the group may represent the whole group. These types of proceedings are also referred to as 'class actions'.

Representative proceedings are a growing feature of Australian **litigation**. They help promote access to justice and are also an effective way for the courts to deal with large numbers of claims in a timely and efficient manner.

Representative proceedings, or class actions, allow groups with a common grievance to bring a joint action.

Allowing proceedings to be brought on behalf of a group or a class of persons can ensure that people who have cause of action are not prevented or discouraged from taking action due to cost barriers or ignorance of their legal rights.

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In Victorian courts, representative proceedings can be brought by one or more members representing a group with a common grievance. They must demonstrate on behalf of the group that:

- the claims arise from the same transaction or series of transactions
- there is a common question of fact or law
- it is convenient for the claims to be heard together: in Victoria, representative proceedings are permitted in claims for damages. All group members must consent in writing to be named in the case.

Representative proceedings improve access to the law because:

- individuals with a claim do not have to file or fund a separate lawsuit
- individuals with claims too small to warrant an individual lawsuit may still have access to the law for their case
- individuals have the opportunity to hold powerful firms and organisations accountable for their actions.

MULTI-MILLION DOLLAR SETTLEMENT: BLACK SATURDAY BUSHFIRES KILMORE EAST – KINGLAKE 7 FEBRUARY 2009

Bushfire class action settled via mediation 2014, pay-outs distributed in 2016–17

- 119 dead
- 1242 homes destroyed
- 1084 homes damaged
- 125,000 hectares of land burnt.

2013: Class action (negligence) initiated in Supreme Court

Maurice Blackburn Lawyers represented Kinglake plaintiffs who suffered 'injury, loss or damage'. The action was against AusNet (electricity provider) and four other defendants.

- lead plaintiff (Carol Matthews) represents 10,000 group members as part of class action
- largest class action in Australian history
- trial lasts for 16 months (208 days).

July 2014: Supreme Court approves settlement

Plaintiffs and defendants reach agreement to settle dispute.

- $494 million awarded in record payout
- lawyer fees are $60 million.

November 2016: Hundreds of victims still awaiting pay-out due to complexity of case

- Plaintiffs criticise the delay (12–18 months), stating that 'justice delayed is justice denied'.

Note: The trial was held in a purpose-built court to accommodate the large legal teams, numerous expert witnesses and interested community members. The trial ran for 16 months.

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SECOND CLASS ACTION

7 February 2009: Murrindindi–Marysville Fire

- 40 people dead
- 500 homes destroyed.

May 2015: Settlement agreed in Supreme Court

- Dr Katherine Rowe, who lost her husband in the fire, was the lead plaintiff
- $300 million agreement between plaintiffs and defendants.

2017: Hundreds await payment due to delay in administering the payment funds.

Lead plaintiff Dr Katherine Rowe

NEWSREPORT 5.1

Power to the people

A REPRESENTATIVE PROCEEDING OR REPRESENTATIVE action is more commonly known as a class action. This procedure allows a legal claim to be made by many people at the same time, as long as they have sustained a similar type of harm as a result of a similar type of circumstance. It allows proceedings to be brought on behalf of a group or a class of people, making justice more easily achieved by those who are most in need.

The precedent for class actions of such magnitude as the Black Saturday bushfires trial was set in 1998 following a gas explosion at Esso's Longford plant. Two workers were killed and Victoria's gas supply was shut down for almost two weeks. In 2002 four legal firms conducted the class actions in the Supreme Court on behalf of thousands of businesses, consumers and workers who were adversely affected by the interruption of gas supply following the explosion. The matter was settled in December 2004.

Never before in the English-speaking world had there been a case like this where a customer of a public utility sued for an interruption of supply.

NEWSREPORT 5.2

ANZ beats big class action

ANZ BANK WON A HIGH COURT CASE IN 2016 against a class action over late payment fees for credit cards. The fees are charged on top of interest when the minimum payment is not met by the due date.

Attracting 43,500 disgruntled customers, the action was financed by litigation funder IMF Bentham.

The class action, run by legal firm Maurice Blackburn, started in 2010, when customers claimed the bank unfairly overcharged thousands of customers for paying their credit card bills late. The key issue in the challenge was whether the charges were proportionate to the cost to the bank. Customers claimed that the $33 fee was unfair, as the actual cost to the bank was a tiny fraction of this sum – often only 50 cents.

In 2014, the Federal Court's Justice Michelle Gordon (now a High Court judge) found that the fees were illegal. But the following year ANZ appealed and the decision was reversed, leading to the High Court challenge.

The High Court dismissed the claim that the fees were unenforceable and the bank was engaged in unconscionable conduct.

The decision stopped a broader class action against other banks, including Commonwealth Bank, National Australia Bank and Westpac. With about 180,000 customers signed up, it was billed as the biggest class action in Australia.

ISBN 978-1-316-64754-7

Activity 5.1 Folio exercise

Representative actions

Read 'Multi-million dollar settlement', 'Power to the people', and 'ANZ beats big class action' and complete the following tasks:

1 Outline the key features of a civil action.
2 Read pages 151 to 154. What factors would a person need to consider when thinking about taking legal action to enforce their rights?
3 What is a representative proceeding?
4 What do you consider to be the main advantages of representative proceedings? Justify your view.

Deciding to take civil claim

In any civil matter, the plaintiff will seek legal advice to establish if there is a remedy available and, if so, the likelihood of success. Court action is an expensive and time-consuming process. Before any action is started, the plaintiff must consider the following.

Court action is costly and time-consuming. A number of factors must be taken into consideration before taking court action.

Negotiation options

There are several ways to resolve civil disputes without the need to go to trial. The majority of civil claims do not proceed to court, with 95% of all civil claims resolved through negotiated settlement. Settlement may occur after parties use one or more of the following options: informal discussion with legal representatives, mediation, conciliation and/or arbitration. Negotiation options may focus on identifying the needs and wants of each party, and generally emphasise a win–win solution. This is particularly advantageous where the parties wish to maintain a relationship after the negotiation.

Negotiating options are informal agreements between parties which result in a settlement before trial. Most civil claims are settled via informal settlement options.

Before agreeing to a negotiated settlement, it is important for the plaintiff to seek legal advice and consider a number of factors, including:

- decisions and settlements in similar cases
- the monetary value of the case
- the chances of winning
- the possible delay in going to trial
- personal information that may be revealed at trial
- the merits and weaknesses of the case
- perhaps having to agree to give up the right to pursue any other legal action in exchange for a sum of money from the defendant.

Negotiating options are always a possibility and are the least costly and most time-efficient dispute resolution process.

Costs considerations

In civil matters the parties bear the costs of the action. The parties need to carefully consider the costs and the possible financial consequences if they are unsuccessful.

- **What will it cost?** It is not until legal action is initiated that the costs of legal proceedings become evident. There are legal fees and report costs, payment for expert witnesses, and court costs.
- **Will I recover the costs?** The cost of legal proceedings could easily be greater than the amount of compensation or damages awarded. The costs awarded by the court may also not cover all the costs of the action. Costs are usually allocated to cover 'in-court' action, but may not take into consideration all the actions taken before the court hearing.
- **Will the defendant be able to pay the costs?** It is no use spending time and money to seek an award of damages if the defendant is a 'straw person' – a term used to describe someone who has no money. They will not be able to pay the compensation or the costs of the court action.

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Limitation of actions

Time limits on initiating civil actions are specified under a variety of statutes. The *Limitation of Actions Act 1958* (Vic) specifies the time limits within which actions must be initiated in Victoria. Other legislation, including the *Trade Practices Act 1974* (Cth) and the *Wrongs Act 1958* (Vic), also state time limitations for civil actions.

The purpose of time limits is to:

- ensure that cases are initiated while recollections of events are fresh
- provide for personal and business certainty
- ensure that plaintiffs act within a timely manner to resolve issues.

Limitation periods vary depending on the type of action claimed:

For breaches of contract	For simple contracts, including oral contracts, within 6 years (section 51(1)(a) of the *Limitation of Actions Act*). Parties may agree, in the contract itself, to extend this period.
For tort	Within 6 years (section 5(10) (a) of the *Limitation of Actions Act*). The time commences on the date the damage occurs.
For personal injury tort	Within 3 years of date of 'discoverability' or 12 years of the date of the act/omission which caused the injury or death (section 27D(1) of the *Limitations of Actions Act*). Special provision is made for minors where the act or omission is made by a parent or guardian. In 2015 the *Limitations of Actions Amendment (Child Abuse) Act* was passed. It removes 'the limitation periods that apply to actions that relate to death or personal injury resulting from child abuse'.

Courts also have discretion to extend time limits to enable proceedings to be initiated beyond the limitation period. Courts will grant an extension where it is believed that it is 'just and reasonable' to do so. The court must consider a number of factors, including: the length of the delay, the reasons for the delay, and the impact on the defendant of being deprived of the protection of the limitation period.

NewsReport 5.3

Australia out of touch but not of time

IN THE CASE OF *MACKENZIE V POSITIVE CONCEPTS Pty Ltd & Anon* [2016] VCS 259, the Victorian Supreme Court, in the interests of justice, extended the 6-year time limit to 13 years.

In 2002, Mackenzie sustained serious injuries following an assault while working at a hotel as a security officer. In 2003 he engaged lawyers to represent him in his WorkCover claim. The insurance company paid for his weekly benefits and determined that his injuries were not sufficient to get impairment compensation. Mackenzie's lawyers did not advise him that he could take further legal action against his employer and the hotel in common law proceedings.

In 2013, Mr Mackenzie engaged another law firm to pursue his entitlements.

In May 2015, Mackenzie started action against his employer and the operator of the hotel. Both defendants pleaded that Mackenzie was out of time, as he only had 6 years from the date of assault to commence action. Mackenzie sought an extension of time to bring his claim.

The finding

The court found in favour of Mackenzie because:

- he suffered physical and serious psychological injuries from the accident, requiring him to have continuing treatment and medication, and resulting in disability;
- his former lawyers did not advise him of his right to bring a claim in court;
- he believed that he had exhausted all his legal rights;
- after Mackenzie was encouraged to see a lawyer, he attended and instructed his current lawyers.

The court accepted that Mackenzie was a credible and honest witness; and that the delay caused no prejudice to the defendants.

Scope of liability

Scope of liability for negligence is stated in S51 of the *Wrongs Act 1958* (Vic).

The plaintiff must establish a causal link between the defendant's actions and the harm caused. In negligence it must also be shown that it is appropriate for the scope of the defendant's liability to extend to the harm caused.

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WHO CAN BE SUED?

- Any human being or legal person may be a party in a civil action. A 'legal person' includes corporate bodies such as companies or incorporated clubs and associations.
- A party may be vicariously liable for the actions of another person. Vicarious liability is when one person (such as an employer) is held liable or sued for the acts or omissions of another (an employee).

Enforcement issues

The fact that the plaintiff has been successful in a court action and has received a judgment against the defendant does not always ensure that they get paid the amount that has been awarded. If the court makes an award of damages (or an order) that the defendant does not comply with, the court can enforce it by ordering one of the following:

- **A warrant for distress:** If the defendant fails to pay the amount awarded by the court, the court can order that property owned by the defendant be seized and sold to recover sufficient funds to the pay the amount owing.
- **A garnishee order:** The plaintiff can apply to the court for a garnishee order. This compels a third party who owes money to the defendant to pay the plaintiff.
- **An attachment of earnings:** Sometimes the plaintiff applies to the court for an attachment of earnings order. This instructs the defendant's employer to deduct the amount owing from the defendant's wages or salary.
- **Sequestration:** This document enables the court to appoint not fewer than 4 people to seize or control land or property owned by the defendant until the defendant complies with a judgment or until a further court order is made.
- **Bankruptcy and liquidation:** The plaintiff can apply to have the defendant's assets placed under the control of an independent person or trustee. This process means that the defendant is declared bankrupt. If the defendant is a company, the plaintiff can arrange for the defendant's assets to be liquidated by placing the defendant's property under the control of a liquidator. A liquidator is a person appointed to dissolve a company. In either case, the defendant's assets are sold and the proceeds are distributed. The amount received by the plaintiff will depend on the total assets and liabilities of the defendant. Liquidation or bankruptcy does not guarantee the plaintiff recovery of the full judgment amount.
- **Imprisonment:** If the defendant fails to comply with a court order, the plaintiff can take action to have the defendant imprisoned for contempt of court. This does not mean the defendant does not have to comply with the original order. In addition to the prison sentence, the court will take the necessary steps to ensure that the original court order is complied with.

Problems relating to the enforcement of orders include financial costs, the uncertainty surrounding the value of the defendant's assets and the time delay in settling the issue.

Other factors

Other factors to take into consideration include:

- **What about the publicity?** In some cases, litigation may result in unwanted publicity. For instance, a public personality may have been wrongfully and unlawfully detained for shoplifting. Their rights have been infringed. However, taking court action may result in more publicity about the alleged shoplifting. This publicity may be seen as more damaging than the unlawful detention.
- **Am I likely to succeed?** In cases involving complex or novel circumstances, the common law may be uncertain. There is a risk in taking these cases to court. If you lose, you will be required to pay not only compensation, but also the costs.

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- **Is it worth the time and inconvenience?** Civil action presents the average person with a mass of complicated legal procedures and formalities leading up to and during the trial. Pre-trial stages require an exchange of several documents. The litigant may need to:
  - visit a solicitor and discuss matters relevant to the case
  - obtain evidence and reports
  - attend medical consultations. In some cases, it may take several years before the matter is heard by a court. The plaintiff may not consider the matter serious enough to justify the time and expense.
- **Which court will hear the case?** Claims for less than $100,000 may be heard in the Magistrates' Court. The County Court and the Supreme Court can hear claims for unlimited amounts.

BALMAIN FERRY CASE

The case of *Balmain New Ferry Co. Ltd v Robertson* (1906) 4 CLR 379 demonstrates the risks involved in losing a case. In this case, Mr Robertson deposited one penny in the wharf turnstile so that he could travel by ferry. He missed his ferry and refused to pay another penny to exit the wharf. The wharf attendant would not allow him through the turnstile until he paid the penny. A notice above the turnstile stated: 'A fare of one penny must be paid on entering or leaving the wharf. No exception will be made to this rule whether the passenger has travelled by ferry or not.' Mr Robertson was so outraged that he took the matter to court. He claimed damages for false imprisonment and assault. The case was eventually decided on appeal – Mr Robertson lost. In today's terms, his one penny ended up costing him thousands of dollars in legal costs.

NEWSREPORT 5.4

Relatives of missing airline passengers launch legal action

A MELBOURNE WIDOW OF A PASSENGER ON Malaysia Airlines flight MH370 lodged documents in the Victorian Supreme Court.

Jennifer Chong, of Kew, lost her husband, Chong Ling Tan, when the flight disappeared in the Indian Ocean on 8 March 2014.

The documents, lodged by Shine Lawyers, claim the airline was negligent in failing to ensure that the flight was safe for her husband and other passengers and crew.

The claim seeks undisclosed damages for nervous shock suffered by Ms Chong and her two sons, as well as compensation owed under international air accidents law.

Just before the 2-year deadline for lodging such claims under the Montreal Convention, there was a flurry of writs being lodged. They included one by Chicago-based Ribbeck Law Chartered for an Indonesian lawyer, the father of one of the 239 people who lost their lives.

The plane, on a flight from Kuala Lumpur to Beijing, disappeared somewhere in the Indian Ocean. The main wreckage of the Boeing 777 and the remains of those on board have not yet been found.

The airline paid 'full compensation' to a number of next of kin.

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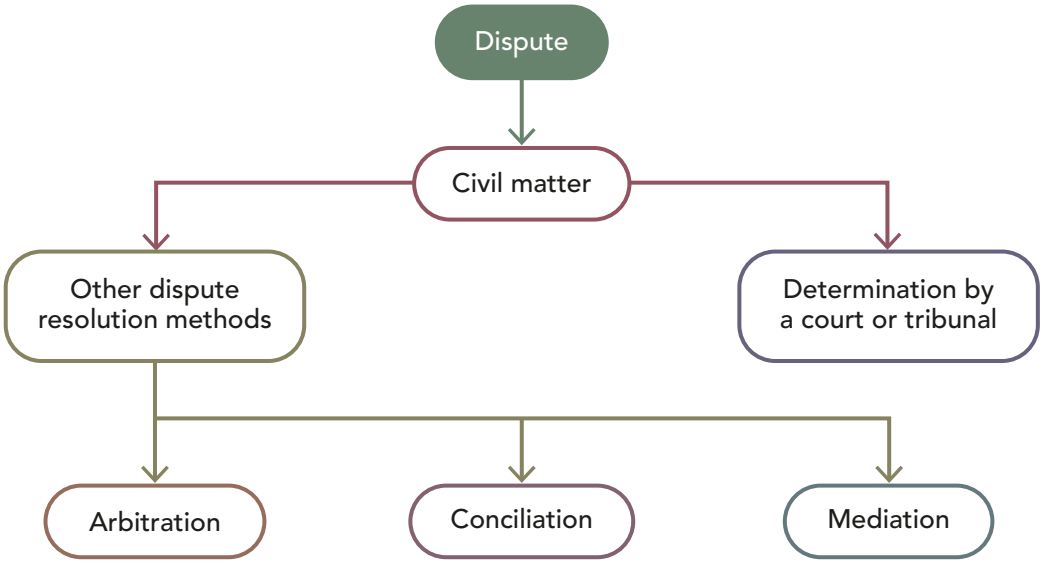
5.5 Methods of dispute resolution

The decision of a judge or magistrate in a court is a formal means of resolving a dispute. In civil cases, court action is considered a last resort.

Dispute resolution methods include mediation, conciliation and arbitration.

Institutions such as complaints bodies, tribunals and courts offer other avenues for dispute resolution. For instance, CAV provides advice to businesses, consumers, landlords and tenants about their rights and responsibilities. VCAT and the courts use a range of dispute resolution methods. The main alternative dispute resolution methods used to resolve a civil claim are mediation, conciliation and arbitration.



Mediation

Many people use mediation to settle a dispute. In a mediation session, disputing parties face each other across a table and, with the help of a neutral third person (the mediator), resolve the dispute in a way that is fair and acceptable to all concerned. During mediation, the parties identify the disputed issues, develop options and consider alternatives. The parties to the dispute determine the final agreement.

Mediation is the process in which an impartial third person (or persons) helps the parties identify the issues in dispute and facilitates discussion of possible solutions. The parties make the final decision.

Mediation is used as a dispute resolution method by a range of bodies in the community. In some instances, the agreements reached in mediation may not be binding.

Both the courts and VCAT use mediation. Mediation works in tandem with, rather than in opposition to, the court system. The Magistrates' Court, County Court and Supreme Court refer cases to mediation. If the parties reach a settlement they can make a written agreement to this effect. The parties can apply to the court to have orders made to finalise their case and give effect to their agreement.

MEDIATION AND THE MAGISTRATES' COURT

In the Magistrates' Court, all civil cases that are being defended are referred to either a pre-hearing conference or mediation before they are listed for hearing. Mediations are generally held for more complex matters, where the amount in dispute is $30,000 or more. The parties will be informed of the court's intention to refer the matter to mediation. The parties are given 21 days to raise with the registrar any matters that would be relevant to a decision about mediation or when the mediation should occur. If no issues are raised by the parties, a mediation order will be made.

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MEDIATION AND THE COUNTY COURT

All cases in the Common-Law Division, General and Applications Lists are referred to mediation. Mediation is encouraged in the majority of civil cases before the County Court.

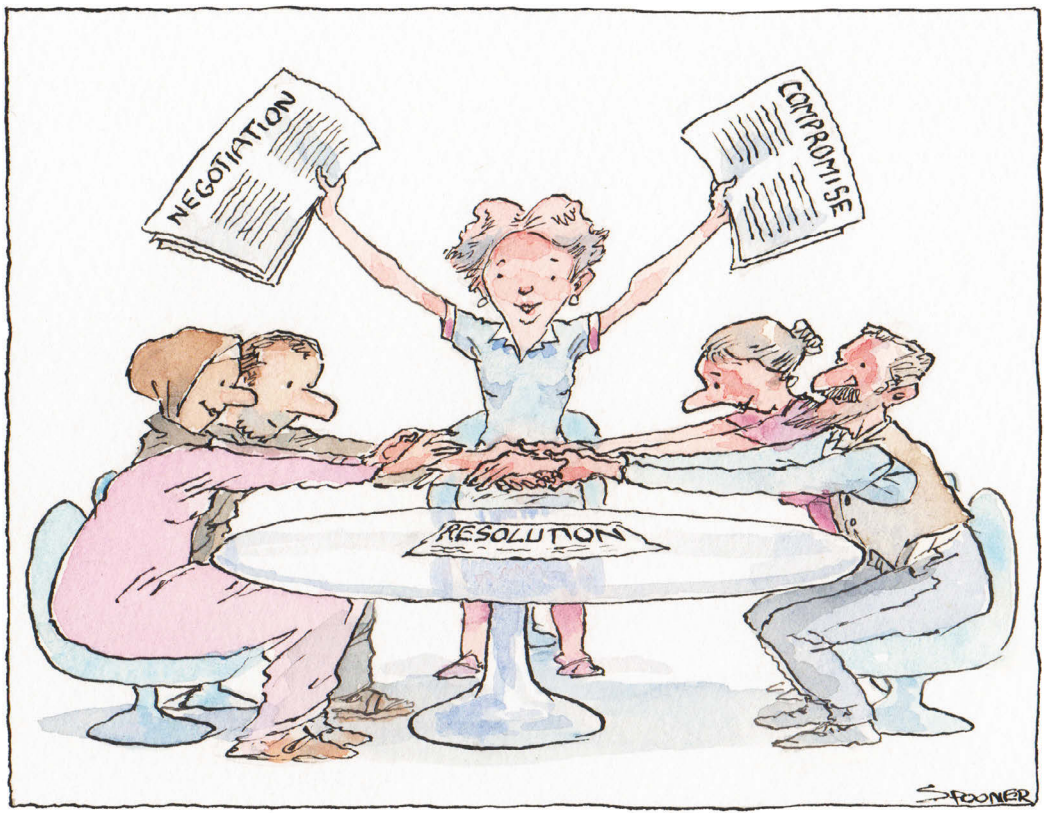
VCAT also refers matters to mediation and has a purpose-built mediation centre. When VCAT refers parties to mediation, an agreement reached in mediation can become part of an order of the tribunal.

SHORT MEDIATIONS AT VCAT

Short Mediation and Hearings (SMAHs) are a shortened form of mediation. If the parties are unable to resolve their dispute during the SMAH, the matter proceeds to hearing on the same day. SMAHs are conducted by accredited VCAT staff mediators. SMAHs are currently available in the Civil Claims List.

Role of the mediator

The role of the mediator is to facilitate the discussion and help the parties identify the issues. There are a number of models of mediation. There may be one or more mediators involved. The mediators do not give advice or make suggestions as to what should be done. The mediators do not make a decision for the parties. Mediation does not try to discover truth or establish fault.



Process of mediation

How mediation works

Mediation focuses on the relationship between the parties and is appropriate where there is an ongoing relationship.

Individuals may choose to go to mediation voluntarily or mediation may be ordered by a court or VCAT. The aim of the mediation process is to help people come to a 'win–win' solution. To achieve this, the process aims to first establish effective communication between the parties.

Mediation focuses on the ongoing relationship between the parties and emphasises cooperation. It allows the parties to make decisions about what best suits them. It is based

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on the principle that people are most likely to be satisfied by agreements that they have developed themselves. Parties who have reached a mutually acceptable agreement are likely to comply with the decision. The basic characteristics of a mediation process are:

- the parties make the decision – all parties to the dispute must agree to any resolution and the final decision is made by the parties
- confidentiality – all discussions during the mediation process are treated as confidential, and evidence of anything said in mediation is not admissible in court or legal proceedings
- impartiality – the mediators are neutral, independent and impartial
- cooperation – the parties are willing to discuss the issues.

WHEN IS MEDIATION APPROPRIATE?

Mediation is not suitable in all disputes. Mediation is appropriate in disputes where communication and discussion about the issues will lead to a resolution of the dispute. Mediation is an effective form of dispute resolution when the people involved in the dispute are prepared to discuss issues and take responsibility for how their dispute is resolved.

Mediation offers a number of significant advantages over litigation, including:

- it costs less than court action
- it is less emotionally draining than a legal battle
- you make your own decisions
- if you have a continuing relationship, you can still work together
- it focuses on future actions rather than past faults
- it improves communication.

Mediation may not be appropriate if:

- the dispute requires an interpretation of the law or a legal ruling
- the parties are not willing to attend the mediation and meet with the people they are in dispute with
- the parties are not willing to negotiate in good faith
- the parties are not willing to settle the dispute and reach an agreement
- there is a history of broken agreements between the parties
- there is an imbalance of power between the parties: for example, an ongoing history of violence between the parties.

Why is mediation appropriate?	Why would mediation be inappropriate?
• **Mediation is often less expensive.** Mediation avoids the costs of a trial, and is significantly less expensive than litigation. Parties may not require legal representation, and the fees involved for the services of mediators are lower than court fees. However, court-ordered mediation may involve a referral to use a senior barrister as a mediator, which can be quite expensive.	• **Is it a binding decision?** Although mediation as part of a pre-hearing process with a court or tribunal may be binding, other forms of mediation are not binding. VCAT/courts can recognise the terms agreed to in mediation in court or tribunal orders.
• **Mediation is generally faster.** Mediation is often quicker than going to trial, and a dispute may be resolved in a matter of days or weeks instead of months or years.	• **There is limited public scrutiny of mediation.** Mediation may provide settlements that are confidential. There is therefore little public scrutiny of matters resolved in this fashion. As a result, there may be limited checks that individuals are being treated fairly.
• **Win–win solution.** Mediation can produce a win–win solution where both parties feel that they have got something out of the process. This is particularly appropriate where the parties to the dispute have to continue to have contact with one another, such as in the case of neighbours, families or business partners.	• **Mediation may not produce a solution.** The mediation process may not produce a solution. One party may refuse to participate in good faith or may refuse to reach a compromise. If the dispute is not resolved through mediation, the parties may then have to face the usual and traditional costs. The use of mediation in these cases may add to delays in settling a dispute.
• **Informal atmosphere.** The informal atmosphere of mediation encourages compromise. Mediation encourages a problem-solving approach: the parties in conflict sit down and discuss the issues involved, consider options and reach an agreement through negotiation. It is a less intimidating method of dispute resolution than courts.	• **Informal atmosphere.** There can be too much informality with mediation and a more powerful or confident party can take advantage of this. This may produce a result that reflects the imbalance of bargaining power.
• **Parties are encouraged to resolve their own dispute.** Mediation is a cooperative method of resolving disputes. It encourages parties in dispute to try to resolve their own conflict with the assistance of third parties who are experienced in mediation procedures, rather than leaving the resolution to the legal system.	• **There may be an imbalance of power.** The process is inappropriate where the two parties have unequal power in the relationship; the more dominant party may force the other party to accept a solution which is unjust.

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Legal brief 5.1

Mediation – increasing access to dispute resolution

One popular form of dispute resolution method has been mediation. Over time, this approach has been integrated into the court process. The practical reality is that only a small minority of cases go to trial. In recent years, courts have drawn upon dispute resolution methods, such as mediation, in an effort to speed things up, to relieve the burden on the courts, to reduce the cost of dispute resolution, and simply to provide litigants with additional options.

For many years the only way to resolve disputes was to go to court, which was expensive. People who could not afford a solicitor or court action could not resolve their disputes. This often meant that disputes were left until the situation had become serious before action was taken. Sometimes when a judge resolves a dispute neither party is satisfied with the outcome. This can lead to increased tension between the parties. In some cases, this can result in ongoing disputes.

Dispute Settlement Centre of Victoria

In Victoria, mediation centres offering free services have been set up specifically to encourage mediation for the resolution of minor disputes.

The Dispute Settlement Centre of Victoria coordinates the work of mediators throughout Victoria and offers mediation and conciliation services. It deals with a variety of problems between neighbours, including disputes about fence boundaries, trees or plants, abuse between neighbours, animals, family relationships, drainage, and several other kinds of problems. The centre also deals with youth homelessness and offers a parent–adolescent mediation service. The centre offers a number of services aimed at helping people resolve disputes, including:

- advice and coaching on methods of dispute resolution
- court-based mediation of civil claims under $40,000 at some Magistrates' Courts
- mediation of Intervention Order applications referred by the police or the courts.

Courts and mediation

For more information go to www.justice.vic.gov.au/disputes/.

Victorian courts encourage the use of mediation in the great majority of civil cases. In some cases mediation may be ordered, without the consent of the parties, at the pre-hearing conference or **directions hearing**.

The Supreme Court may at any stage of a civil case (with or without the consent of the parties) order a case to mediation. At any time, parties can ask the court to refer them to a mediator. The mediator can be appointed by the court, or agreed upon by the parties. The parties share the costs of the mediator.

The Family Court provides a number of mediation services to help people come to an agreement about matters relating to a separation or divorce. Generally mediation can cover issues relating to children, or financial issues, or both. A court mediator, who is a trained social worker or psychologist, conducts mediations for issues relating to children. A deputy registrar (a court lawyer) may mediate financial matters.

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DISPUTE SETTLEMENT CENTRE VICTORIA – MEDIATION

If the Dispute Settlement Centre of Victoria is organising a mediation hearing, a step-by-step process will be followed with the roles of the parties clearly defined. But first everyone must agree about who will attend mediation.

In preparation for mediation, the centre will ask the participants if they have information about their rights and responsibilities in the matter as well as:

- What are the issues or problems to discuss?
- How do these matters affect your day-to-day life?
- What would you like to see happen?
- What would you be prepared to do to help this happen?

The parties are encouraged to participate in the process by expressing their view of the dispute, listening to the other party's view, and participating in the negotiations. The parties' most crucial role is to contribute to the solutions and agreements developed.

Legal representatives may be present in mediation sessions, but they rarely attend non-court-related mediations. In court-related cases they provide expert professional advice to their clients on legal options and issues. Clients and solicitors may confer during the session or adjourn to private discussion rooms. An unrepresented party may seek legal advice after the mediation if a cooling-off period has been included in the agreement.

Support people can be available. They are usually a friend, family member or neighbour accompanying a person who would otherwise be on their own. They do not participate in the discussions and negotiations during the session, but usually help the person they are with by talking over the matters that are discussed and helping them reach a suitable and satisfactory outcome.

Witnesses and expert witnesses are not generally needed. Mediation is not a process of determination, and so does not rely on the weight of evidence and testimony of witnesses to reach a resolution.

NewsReport 5.5

Mediation streamlines justice

MEDIATION IS STREAMLINING THE WHEELS OF JUSTICE AT ALL LEVELS. Whether in the Supreme Court or for minor matters, dispute resolution is cutting time and legal costs, often removing stress, and providing parties with certainty.

The court benefits from the mediation process because every case that settles before reaching judgment frees up judicial time and resources for other proceedings. Multimillion-dollar claims, such as the Black Saturday bushfires and the Murrindindi Black Saturday bushfire class action, have been settled through mediation.

Chief Justice of the Supreme Court of Victoria Marilyn Warren says mediation:

> is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.

Activity 5.2 Folio exercise

The role of mediation

Read Legal brief 5.1 'Mediation – increasing access to dispute resolution', then complete the following tasks:

1 Outline the role of mediation.
2 Briefly explain the reasons for the Supreme Court referring cases to mediation.
3 Describe the role played by legal representatives, if they are present, in mediation sessions.
4 Describe the role of a support person in mediation.
5 Discuss when mediation is most appropriate in civil disputes. Suggest and justify circumstances when mediation may not be appropriate to resolve a civil dispute.

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Conciliation

Conciliation involves an impartial third party who listens to both sides and suggests ways in which the parties could resolve the dispute. The parties make the final decision.

Conciliation is a method of dispute settlement in which an impartial third party tries to get the disputing parties to reach an agreement. The third party is known as a conciliator. The conciliator listens carefully to all the evidence and the arguments of each party. The conciliator may suggest a resolution to the dispute but does not force the parties to reach an agreement. The decision reached by the parties is not binding unless it is incorporated into a formal settlement or incorporated into an order made by a court or a tribunal. However, as with mediation, because they have reached a mutually acceptable agreement, the parties are more likely to keep to its terms.

Conciliation is used by CAV and the courts. The Magistrates' Court uses a form of conciliation in pre-hearing conferences. The pre-hearing conference is a compulsory meeting of parties and/or their legal representatives at the court. The conference is normally conducted by a registrar, who will help the parties attempt to resolve the dispute. The process is informal, and discussions are confidential. When a pre-hearing conference does not resolve the dispute, the matter will be listed for hearing or arbitration.

A number of lists at VCAT require the parties to attend a compulsory conference which is like a conciliation. (A list is a section of VCAT that hears specific types of cases. For instance, the Civil List would hear civil disputes, including consumer matters and retail tenancies.) The parties must attend the conference, and in some, legal representation is permitted. The VCAT member may suggest ways to settle the dispute, but the parties make the final decision. If no decision is reached the case will proceed to a hearing. If a decision is made, the VCAT member can make orders recording the settlement.

Why is conciliation appropriate?	Why would conciliation be inappropriate?
• **Parties have their say.** Conciliation allows parties to have their say without strict rules of procedure. The conciliator assists but does not make the decision. The conciliator listens to the facts, makes suggestions and helps the parties come to their own decision.	• **Conciliation may prolong the case.** If the case is not resolved, the use of conciliation may add to the delays in getting a case in court, and therefore to the cost of taking action. Conciliation is not appropriate if the dispute requires an interpretation of law.
• **Expertise of conciliator.** The conciliator usually has some expertise in the area of law. For instance, conciliation conferences held by the Family Court are usually compulsory; they are between people who have not been able to reach an agreement about the division of their assets. A registrar of the court, who is an experienced family lawyer, conducts these conferences.	• **Conciliation relies on goodwill.** A conciliator attempts to resolve a dispute by talking through the issues with the parties in the hope that agreement can be reached. In trying to help the parties reach agreement, conciliators may meet with the parties and indicate to them the strengths and weaknesses of their case. A conciliator can suggest options for settlement. However, one party may refuse to attend or may withdraw at any time.
• **Conciliation is an inexpensive and informal process.** Conciliation is less costly than taking a case to court, and its informality encourages cooperation. The conciliator will help everyone discuss the complaint and work towards resolving it. They will ask questions, explain the law, point out the strengths and weaknesses of the complaint and the response and provide information about the process, make suggestions or give options for resolving the complaint.	• **Lack of finality.** Although the conciliator may suggest a solution, the conciliator cannot impose one. Conciliation agreements depend on both parties being willing to compromise. If no agreement is reached the process could further delay a court hearing to resolve the dispute.
• **Conciliation process is more cooperative and less competitive than court action.** For this reason, the conciliation process tends to generate less ill-will between parties. Participating in a conciliation process can improve the relationship between the disputing parties. This is a key advantage in situations where the parties have an ongoing relationship, such as in parenting a child or workplace cases.	• **Decision may not be binding.** However, a decision made in conciliation or pre-hearing court procedures may be binding. The terms agreed to in conciliation can be recognised in court/tribunal orders.

Arbitration

Arbitration is a method in which the parties refer the dispute to a third person to make a decision. The third person is known as the arbitrator. The arbitrator resolves the dispute by listening to the views of both parties and making a decision in favour of one of the parties. The arbitrator has the power to make an order that is binding on the parties. Often there are limited rights of appeal against an arbitrator's decision.

The Magistrates' Court can use arbitration to resolve civil disputes where the claim is less than $10,000.

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Why is arbitration appropriate?	Why would arbitration be inappropriate?
• **The decision is binding.** The arbitrator has the power to make an order that is binding on the parties. Decisions reached are final and enforceable in the courts.	• **Win–lose scenario.** An arbitrated decision is a decision in favour of one party: one party wins and the other party loses. One party will feel less satisfied with the outcome of the arbitration.
• **It is more informal than court and usually faster.** Arbitration also offers greater privacy to the disputants than the traditional court process. The arbitrator resolves the dispute by making an award or a decision in favour of one of the parties that is binding on both parties. While arbitration is more formal than other dispute resolution methods, it is still less formal than court proceedings.	• **Arbitration is not always a quick dispute resolution method.** Arbitration can require a client to pass through many stages before a decision is reached. As a result, it can be confusing and does not necessarily work out to be quicker or cheaper than court proceedings.
• **The arbitrator has considerable expertise in the area.** Arbitration usually involves taking the dispute to a qualified independent third party who has expertise in the area of the dispute.	• **Appeals are limited.** Arbitration decisions are legally binding and enforceable but the right of appeal from such decisions is very limited – successful appeals are uncommon.
• **Costs are lower than for court.** Arbitration allows individuals to recover debts or exercise their rights without facing significant costs. Therefore, parties are more likely to exercise their rights.	• **Arbitration can be expensive.** Arbitration is not always cheap – it can be as expensive as court action. Arbitration often bears similarities to court proceedings and parties may choose to have legal representation, but it is not required. In addition to paying for legal representation, the parties have to bear some of the costs of engaging the arbitrator.

Activity 5.3 Folio exercise

The role of dispute resolution methods

1 Describe the difference between conciliation and arbitration as dispute resolution methods. Choose one type of civil dispute and explain why you think conciliation or arbitration is an appropriate method of dispute resolution.

2 Describe the process used in mediation, and explain why it is an appropriate option to resolve civil disputes.

3 Using the following table as a guide, discuss how conciliation, mediation and arbitration compare as dispute resolution methods.

Table 5.1 Comparison of dispute resolution methods

Method	Appropriateness in disputes resolution	Weaknesses
Mediation	• Mediation is often less expensive • Mediation is generally faster than court • Win–win solution • Informal atmosphere • Parties are encouraged to resolve their own dispute	• Mediation may not produce a solution • Informal atmosphere may allow a more confident party to take advantage • There is limited public scrutiny of the outcomes of mediation
Conciliation	• Allows parties to have their say • Expertise of conciliator can help parties reach a decision • Conciliation is an informal process and relatively inexpensive • Conciliation process is more cooperative and less competitive than court action	• Lack of finality if the parties cannot agree • Conciliation relies on goodwill • Conciliation may prolong the case if the case is not resolved
Arbitration	• Binding decision • Usually faster than taking a case to court • The arbitrator may have considerable expertise in the area of law relating to the dispute • Arbitration can offer remedies that courts cannot • More formal procedure is appropriate for more serious disputes • Limited costs	• Arbitration can be expensive • Appeals are limited • Arbitration is not always a quick dispute resolution method • Win/lose scenario

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5.6 Institutions for resolving civil disputes

Consumer Affairs Victoria

Consumer Affairs Victoria (CAV) provides information and advice to businesses, consumers, landlords and tenants about their rights and responsibilities.

Consumer Affairs Victoria (CAV) is a government body that provides information and advice to consumers, traders, tenants and landlords. CAV has broad jurisdiction in relation to consumer, trader and tenancy disputes. The jurisdiction of CAV includes disputes relating to:

- *Australian Consumer Law and Fair Trading Act 2012* (Vic)
- *Domestic Building Contracts Act 1995* (Vic)
- *Residential Tenancies Act 1997* (Vic)
- *Retirement Villages Act 1986* (Vic)
- *Estate Agents Act 1980* (Vic)
- *Conveyances Act 2006* (Vic)
- *Owners Corporations Act 2006* (Vic).

The purpose of CAV

CAV:

- reviews consumer legislation and industry codes and recommends changes to the Victorian government
- provides advice and education on rights and responsibilities to consumers, tenants, landlords and businesses
- registers and issues licences to businesses and occupations (such as estate agents, motor vehicle traders, second-hand dealers and pawnbrokers)
- conciliates disputes such as between consumers and traders, and landlords and tenants
- enforces compliance with consumer laws.

CAV also provides advice and information through its website, telephone helpline and via social media. This includes:

- information and advice about consumer rights and obligations
- answers to commonly asked questions or common disputes
- self-help tools such as sample letters and checklists.

Conciliating disputes

CAV uses conciliation to resolve disputes. See page 160 for a discussion of when it is appropriate to use conciliation.

CAV uses conciliation to resolve some disputes. Conciliation is conducted by a CAV officer and is generally conducted over the phone. The conciliator will outline the rights and responsibilities of the parties and suggest what may constitute a reasonable outcome. However, participation in conciliation is a voluntary process and CAV cannot compel parties to participate. Nor can CAV make a binding determination in a dispute. However, CAV will inform the parties if access to civil remedies via the courts or VCAT are options.

CAV will not conciliate all complaints, but will provide a conciliation service where:

- the dispute is within their jurisdiction
- there has been an attempt to resolve the dispute
- the dispute has not been determined by, or is not pending in, VCAT or a court
- there is a 'reasonable likelihood' of settlement.

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CONSUMER AFFAIRS VICTORIA

CAV plays an important role in balancing the interests and rights of businesses and consumers by providing processes that are fair, equal and accessible to all.

Fair: The conciliation processes ensure procedural fairness, with outcomes based on what is fair and reasonable in the circumstances and under the law.

Equal: CAV is an independent body and offers impartial advice when resolving disputes.

Access: Free conciliation is available for those who satisfy their dispute resolution criteria.

CAV ensures that businesses abide by consumer laws and provides consumers with avenues to exercise their rights.

Civil disputes not resolved via negotiated options or a complaints body such as CAV may access tribunals. Tribunals are usually more specialised and the proceedings are less formal than those in courts. In many instances, the rules of evidence and procedure are relaxed. Legal representation may not be required. In some tribunals, legal representation is not allowed.

This informality means that people feel less intimidated and find it easier to express themselves as well as understand the proceedings. Tribunals are less expensive than courts and most matters can be dealt with in a shorter time than that taken by courts. The decisions made by a tribunal are final.

However, there are some disadvantages associated with the use of tribunals. There may be a restricted right of appeal against a decision made in a tribunal. The formality of the courts gives each individual an equal opportunity to represent their case, whereas the less formal atmosphere of a tribunal may allow a more confident party to dominate.

5.7 Victorian Civil and Administrative Tribunal (VCAT)

VCAT is an umbrella tribunal established in 1998 by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

VCAT SNAPSHOT

- **3.8 million** pages viewed online
- **28%** of website use by mobile phone
- **143,599** incoming emails handled
- **26,795** counter enquiries answered at our main hearing venue
- **87,448** cases finalised
- **102%** clearance rate
- **58** hearing venues used across Victoria
- **1685** translator and interpreter sessions
- **210,997** calls answered
- **120,000** people visited our main venue (approximate)
- **61%** resolution rate for cases that went to compulsory conference or mediation

Source: VCAT Annual Report 2015–16

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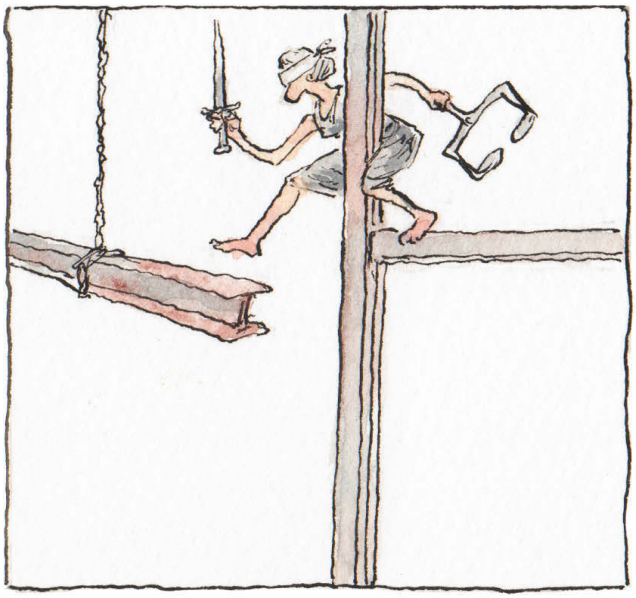
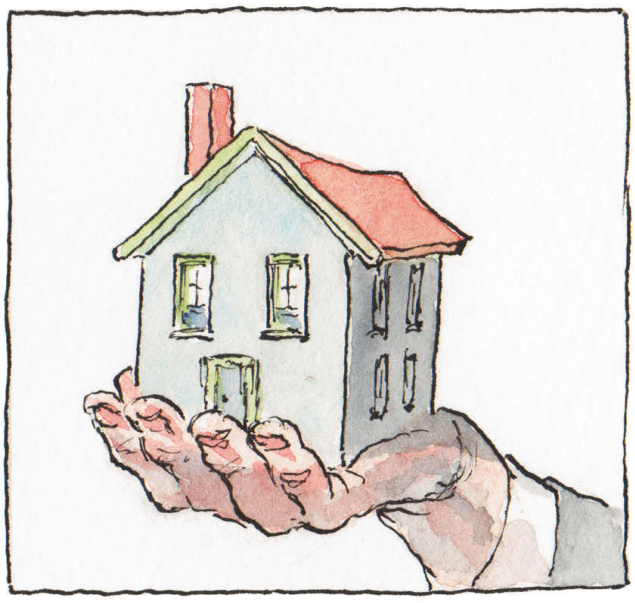
VCAT is divided into four Divisions: each Division handles different types of cases, referred to as lists. Each list specialises in a particular area of law.

Each list hears particular types of cases, as shown in the table below:

Table 5.2 VCAT's divisions and lists

Civil Division	Human Rights Division	Administrative, Executive and Registry Division	Residential Tenancies Division
• Building and Property List • Civil Claims List • Owners Corporations List	• Guardianship List • Human Rights List	• Legal Practice List • Planning and Environmental List • Review and Regulations List	• Residential Tenancies List





The purpose of VCAT

VCAT's role is to provide a low-cost, accessible, efficient and independent tribunal delivering high-quality dispute resolution. VCAT achieves this by using a range of dispute resolution processes. In this way, VCAT is often seen as being more accessible than courts, which have tended to be more formal, stressful and expensive. (However, in recent years the courts have adopted and encouraged alternative dispute resolution options to settle civil disputes.)

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VCAT aims to provide dispute resolution that is:

- cost-effective
- informal
- fair
- consistent
- accessible
- timely
- impartial.

VCAT filing fees are lower than the fees charged by courts, and in some lists, legal representation is not needed. VCAT is more accessible because the proceedings are relatively informal. They are not bound by the rules of evidence and the parties often feel more able to tell their story. The emphasis is on bringing the parties to a mutually acceptable agreement. VCAT encourages the use of mediation. Proceedings heard by VCAT can be heard in a relatively timely manner – minor disputes can be heard in a matter of weeks.

VCAT personnel

VCAT is headed by a president, who is also a Supreme Court judge. Vice-presidents, who are County Court judges, assist the president. Members, responsible for settling individual disputes, are allocated to each list. These members may be full-time, part-time or sessional.

For more information on VCAT, go to www.vcat.vic.gov.au.

Dispute resolution methods

VCAT's dispute resolution process may vary from list to list. Different types of disputes require different approaches. A full hearing may take from 15 minutes to an hour in small civil disputes, owners corporations and residential tenancies matters. In other lists, hearings can take up to a day or longer. In more complicated cases, a hearing may be held over a period of several days. Generally, VCAT dispute resolution methods include mediation and compulsory conferences.

VCAT uses a range of dispute resolution methods, including mediation and compulsory conferences.

Compulsory conferences

VCAT may direct the parties to attend a compulsory conference – an informal pre-hearing conference using alternate dispute resolution methods. It may be held to:

- identify and clarify the issues in dispute
- promote a settlement
- identify the questions of fact and law to be decided
- allow directions to be given concerning the conduct of the hearing (such as about the filing and serving of witness statements).

Compulsory conferences can be used to clarify issues and promote a settlement.

Parties who fail to attend a compulsory conference may have their case struck out or a decision made against them. Statements made during a conference can only be used during a hearing if both parties agree.

Mediation

To help settle disputes, VCAT can arrange for a case to be mediated. This usually occurs before a hearing commences. VCAT does not charge a fee for the mediation. If the mediation is successful, the mediator notifies VCAT that the parties have agreed to settle.

VCAT can refer a case for mediation.

VCAT will make out the necessary orders to give effect to the settlement. If mediation is not successful, the matter will be referred back to a hearing. Statements made during mediation cannot be used as evidence.

Parties who fail to attend a mediation may have their case struck out or a decision made against them.

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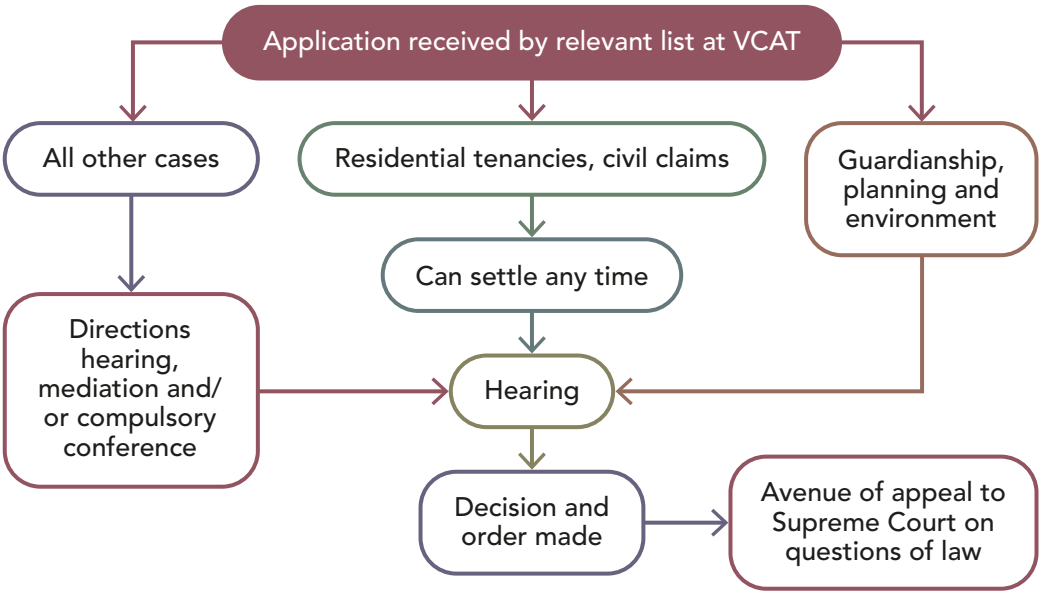

Figure 5.1 A simplified approach to resolving disputes (Note: a case can settle at any time, and there are a range of options before a guardianship matter goes to hearing)

Hearings

VCAT hearings are relatively informal and not bound by the rules of evidence. However, VCAT is bound by the rules of natural justice.

When a hearing is held, it takes place before a member of VCAT. Although hearings are conducted in a relatively informal atmosphere, the degree of formality will vary according to the nature of the dispute. Parties must act respectfully and be prepared to give evidence on oath or affirmation. They will have the opportunity to call or give evidence, ask questions of witnesses and make submissions. VCAT is bound by the rules of natural justice. A person is not excused from giving evidence on the grounds that it may be self-incriminating. However, such evidence would not be admissible in a court for criminal proceedings.

Generally, the hearing is conducted in public. However, VCAT can order that the hearing or part of the hearing be in private. VCAT also has the power to restrict or prohibit the publication of certain evidence.

VCAT can sit at any place in Victoria. It may also conduct a hearing by means of a conference using telephone, video or other telecommunication links. In addition, if the parties agree, the hearing can be conducted entirely 'on the papers': that is, without either party appearing in person at the hearing. Parties can put their case directly to VCAT themselves, or in some circumstances VCAT can allow the use of a lawyer or professional advocate to help settle the matter. In limited circumstances, parties are automatically allowed to have a legal representative or professional advocate.

Orders

Decisions made by VCAT are binding. VCAT has the power to make a range of orders and the types of order made may vary from list to list. Generally, VCAT can make orders such as to require a party to pay a sum of money, restore goods or undertake particular work, vacate a rented property, and vary or cancel a contract. VCAT can also dismiss a claim.

Orders made by VCAT can be enforced through the courts. For example, orders requiring payment of less than $100,000 can be taken to the Magistrates' Court. The Magistrates' Court can make certain orders to enforce payment. This includes requiring that the payment be made by instalments or issuing a warrant to seize property.

Appeals

A party who is dissatisfied with VCAT's decision can lodge an appeal, on a question of law, against an order of VCAT to:

- the Court of Appeal, if the president or vice-president was sitting on the VCAT panel that made the order
- the Trial Division of the Supreme Court in all other cases.

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In order to have an appeal heard by the Supreme Court or the Court of Appeal, the court must grant permission to appeal ('leave to appeal'). When the Supreme Court or the Court of Appeal hears an appeal from VCAT it may:

- affirm, vary or set aside the order
- make an order that VCAT could have made in the proceedings
- send the case back to VCAT to be heard again.

Disputes heard by VCAT	
Anti-discrimination	Unlawful discrimination, sexual harassment, victimisation, vilification, exemptions, etc.
Business regulation	Reviews various licensing and other decisions. Disciplinary proceedings in relation to a number of occupational groups.
Civil disputes	Disputes about goods bought or sold, or relating to someone you hired (or someone who hired you) to supply a service in trade or commerce.
Domestic building	Domestic building disputes between home-owners, builders, subcontractors, architects, engineers and other building practitioners. Reviews decisions of domestic builders' warranty insurers.
FOI, TAC and other claims	Reviews Victorian government decisions (State, statutory authorities and local councils), including decisions made by TAC (the Transport Accident Commission) or the Victims of Crime Assistance Tribunal, and FOI (Freedom of Information) decisions.
Guardians – administrators	Hears applications and makes orders for guardianship and/or administration. Appoints a substitute decision-maker when it is in the best interests of an adult with a disability.
Health and privacy	Hears matters referred by the Health Complaints Commissioner and the Office of the Commissioner for Privacy and Data Protection; reviews public health orders made by the Chief Medical Officer, etc.
Joint property and water	Hears and determines disputes related to real estate, and subdivision disputes affecting an owner's corporation.
Land valuation	Objections to land value assessments; decisions on differential rating; claims for compensation under the *Planning and Environment Act 1987* (Vic).
Legal practice	This list deals with disputes about lawyers' services and costs and complaints about lawyers' conduct.
Mental health	Reviews decisions made by the Mental Health Review Board.
Owners corporations	Hears disputes between neighbours in a property affected by an owner's corporation (formerly known as a 'body corporate'), disputes about fees, etc.
Planning and environment	Hears and decides applications by individuals and bodies involving disputes about the use and development of land.
Powers of Attorney	Can cancel, change or suspend a power of attorney.
Residential tenancies	Hears disputes between landlord and tenant, rooming house owner and rooming house resident, Director of Housing and tenant.
Retail tenancies	Disputes between a landlord and tenant arising under or in relation to a retail premises lease.
State taxation	Disputes over assessments made by State government departments in the imposition of State levies and taxes such as stamp duties, payroll tax, business franchises (petroleum and tobacco).

NewsReport 5.6

Police cannot keep beards – court

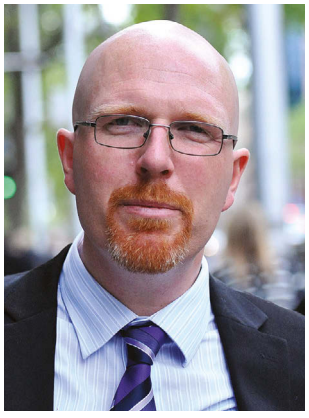
A GROUP OF VICTORIAN POLICE OFFICERS LOST THEIR BID TO KEEP facial hair and ponytails after a Supreme Court judge upheld a tribunal decision that found the force's policy was not discriminatory.

They had challenged the ban on beards and ponytails at VCAT, arguing that they were discriminated against on the basis of their physical appearance.

Judge Gregory Garde found there was no error in VCAT's 2013 finding in favour of Police Commissioner Ken Lay, and dismissed the matter.

'The Tribunal was not satisfied that having a goatee imparts any information or ideas or conveys any meaning at all,' the judge said. Judge Garde concluded that there was no reason why the Chief Commissioner could not set other grooming standards, as he has done.

Goatee-wearing Leading Senior Constable Michael Kuyken (pictured) and 15 other officers made the challenge.



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NEWSREPORT 5.7

Student's VCAT action against school fails

A PRIVATE SCHOOL GIRL TOOK A CASE AGAINST her school to VCAT, claiming that the school was responsible for the fact that she did not gain entry to her preferred university course.

The student had attended the school in Year 9 and part of Year 10. She suffered glandular fever and subsequently completed her studies in Sydney. However, her ATAR score was not high enough to get her into law at the University of Sydney.

She sought $95,000 from the school for the additional fees she would incur studying law at a postgraduate level and her inability to earn income in the meantime. Her mother had sought $450,000 in lost earnings as well as the cost of moving from country NSW to Sydney, where the student finished her schooling. They claimed that the student had failed to reach her academic potential because she did not have access to appropriate academic support.

School staff told the hearing that the student was disorganised and needed to be reminded to attend classes on time and with the relevant books.

VCAT dismissed the claim. VCAT's Deputy President, Ian Lulham, found that the student had failed to see that attending class, having access to school tutoring facilities and additional input from a teacher were all forms of academic support.

In his judgment, he said: 'Support does not mean that the school does the work for the student.'

5.8 Appropriateness of VCAT in resolving disputes

Strengths of VCAT dispute resolution

Dispute resolution methods used by VCAT have a number of strengths.

Dispute resolution methods used by VCAT include mediation and compulsory conferences. In many instances the parties reach a mutual agreement. This is sometimes described as a 'win–win' situation. The parties are able to discuss issues, explore possible solutions and reach a decision. Of course, in the case of a hearing, the final decision is made by a third party. The use of VCAT is seen as having a number of strengths that contribute to its appropriateness in resolving disputes:

- **VCAT is less costly:** VCAT provides an efficient, low-cost, informal and less intimidating access to high-quality dispute resolution and decision-making for civil cases. The cost of applying for a dispute to be heard before VCAT is far lower than the cost of taking a case to court, where you would have to pay for legal advice, legal representation and perhaps even a jury (for civil court cases). For instance, the 2016–17 fee for a small claim (involving an amount of less than $15,000) was $204.90. In small claims cases the parties must represent themselves, so there is no financial outlay for legal representation. As no costs are awarded, the parties are assured that there will be no financial burden other than what the tribunal considers to be an appropriate resolution of the dispute. There are grounds for waiving application fees in cases of financial hardship. However, costs in other matters can be greater. The fees for planning disputes in the Planning and Environment – Major Case List can be in excess of $3000.
- **VCAT is less intimidating:** VCAT provides an alternative to the formal justice system. For many parties, this is a less intimidating form of dispute resolution than courts, because of the absence of strict rules of evidence and procedure. The hearing of evidence and examination of witnesses is less formal. VCAT removes one of the most significant barriers to a person pursuing their legal rights through legal action – the risk of a costs order against you if the dispute is not resolved in your favour. At VCAT, parties are generally expected to bear their own costs, unless the tribunal orders otherwise. This gives individuals greater access to dispute resolution methods.

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- **VCAT is faster:** VCAT allows a more timely resolution of disputes. As the hearings are generally less formal there are fewer pre-hearing requirements around preparing a dispute to go before VCAT. VCAT aims for a shorter time period from application to settlement than the courts. If the parties cannot reach a decision, VCAT will make a decision. In recent times VCAT has been subject to delays because it has become the preferred dispute resolution body for many disputes.
- **VCAT hearings are conducted in a less formal manner:** VCAT does not use the strict rules of evidence and procedure used by courts. The parties are given the opportunity to put their case in their own words. This process is less intimidating than the formal procedure of questions and answers used in courts.
- **The parties are encouraged to reach an agreement themselves:** This may happen either before a hearing or in the early stages of a hearing. VCAT can use mediation or conciliation to encourage the parties to reach an agreement. If the parties cannot, the matter will go to a hearing and a binding decision will be handed down.

Dispute resolution methods used by VCAT are less expensive, less time-consuming and less formal (or intimidating) than traditional courts.

Weaknesses of VCAT dispute resolution

VCAT works efficiently and provides a low-cost method of dispute resolution. However, there are a few weaknesses, which include:

- **VCAT is only suitable for civil disputes:** VCAT is not used in criminal matters. Also, complex civil disputes involving larger amounts may be more appropriately resolved by the court system. VCAT's focus is usually on minor civil matters, reviews of administrative decisions or social issues.
- **Escalating cost of VCAT hearings:** The cost of VCAT hearings has escalated in recent years. This is due to an increase in the number of people using legal representation. Although in some lists (such as the Civil Claims List) legal representation is generally not permitted, VCAT will allow parties to be legally represented if they both agree or in certain circumstances. For instance, the Residential Tenancies List allows legal representation in all cases involving an eviction. As a result, some costs of taking a claim to VCAT have increased. The VCAT hearing process used to resolve discrimination matters may be just as expensive and formal as courts. In these cases, VCAT may not be cheaper than taking a dispute to court.
- **When parties are unable to reach a decision:** In this situation VCAT will make a decision which is binding on the parties. This will result in one of the parties feeling less satisfied with the final outcome. Also, an individual may compromise too much to resolve the dispute if they are intimidated or manipulated by a stronger party.
- **Limited right of appeal:** There is a limited right to appeal against a decision made by VCAT. An appeal can only be made on a point of law. The positive is that this restricts further costs.

The parties are encouraged to reach an agreement themselves, but they can walk away from mediation or a compulsory conference.

VCAT is not suitable for all disputes.

The cost of VCAT hearings has escalated in recent years, as more parties are now using legal representation.

There is a limited right to appeal against a decision made by VCAT.

VCAT provides a winner/loser resolution similar to the courts.

VCAT REFORMS

There have been a number of recent reforms in the operation of VCAT. They have aimed at improving access to dispute resolution and reducing the costs.

The 2015–16 VCAT Annual Report identified the following reforms:

- video conferencing to improve access for people in remote areas
- improving support for self-representation
- improved customer service with extended opening hours and a pilot concierge service at the main hearing venue
- a new online system to help landlords and tenants access and manage their cases at any time
- improved application access via new online forms.

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Activity 5.4 Folio exercise

The role of VCAT

1 Give two reasons for tribunals being introduced.
2 Explain the role and structure of VCAT.
3 What methods of dispute resolution would be used by VCAT to resolve the disputes discussed in the articles 'Police cannot keep beards – court' and 'Student's VCAT action against school fails'?
4 Discuss two aspects of VCAT's operation or structure which make it an appropriate body to resolve civil disputes.
5 Explain why VCAT may not always be an appropriate body to settle a civil dispute.

Activity 5.5 Multimedia report

Victorian Civil and Administrative Tribunal (VCAT)

Using the VCAT website, find out more about VCAT. Prepare a multimedia presentation and a written report. A multimedia presentation may include:

- presentation software such as Prezi and a set of written notes
- a PowerPoint presentation and an oral presentation.

Your multimedia presentation should deal with:

- the role of VCAT
- the dispute resolution methods used by VCAT
- the relationship between VCAT and the court hierarchy.

Prepare a written report discussing the appropriateness of methods used by VCAT to settle civil disputes. You should prepare an oral presentation of your work in addition to the multimedia summaries.

5.9 Courts – civil jurisdiction

Courts are arranged in a hierarchy or a ranking.

All courts in the Victorian hierarchy have civil jurisdiction, which means they have the power to hear and determine civil claims up to a specified level.

In Australia, various courts have been established to settle legal disputes. These courts are organised into a hierarchy – a ranking in order. In the Victorian court hierarchy the Magistrates' Court, the County Court and the Supreme Court (Trial Division and Court of Appeal) have the jurisdiction to hear civil matters. The Victorian hierarchy also includes the High Court of Australia, which has jurisdiction over matters that relate to the whole of Australia.

Each court has its own civil jurisdiction. The term 'civil jurisdiction' means power to hear and determine a civil dispute. In other words, each court has the power to hear and determine certain types of civil cases. The Magistrates' Court deals with minor cases, and the Supreme Court deals exclusively with the most serious matters.

Table 5.3 Court civil jurisdictions

	Original jurisdiction	Appellate jurisdiction
High Court	• Constitutional matters (five–seven justices) • Federal matters (one justice)	• Appeals from a single justice of the High Court • Appeals from the Full Court of State Supreme Courts – in Victoria, appeals from the Court of Appeal (at least two justices)
Supreme Court of Victoria – Court of Appeal		• Appeals from a single judge of the Supreme or County Court
Supreme Court of Victoria (Trial Division)	• Damages claims for unlimited amounts (one justice with an optional jury of six)	• An appeal on a point of law from a Magistrates' Court (one justice)
County Court of Victoria	• Damages claims for unlimited amounts (one justice with an optional jury of six)	
Magistrates' Court	• Claims up to $100,000	

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Magistrates' Court

The Magistrates' Court has original jurisdiction over civil matters up to $100,000. The Magistrates' Court is responsible for processing 90% of all civil cases, including claims relating to debts, damages and other monetary disputes. The Magistrates' Court cannot hear appeals.

The Magistrates' Court is the lowest court and hears civil claims up to $100,000.

MAGISTRATES' COURT

Where is the court?
The Magistrates' Court is a local court. The locations of the courts are listed on the court's website.

What types of cases does it hear?
The Magistrates' Court hears civil claims to the value of $100,000.

Can the court hear appeals?
No.

Who presides in the court?
Magistrate.

There are several dispute settlement methods that can be used by the Magistrates' Court to settle civil disputes. These methods include mediation, conciliation and arbitration.

Mediation

The Magistrates' Court can refer a civil dispute to mediation when the amount in dispute is $30,000 or more. In some suburban and regional Magistrates' Courts claims for less than $40,000 are referred to mediation provided by the Dispute Settlement Centre of Victoria. A registrar reviews the case and decides if the case is suitable to be referred to mediation. Alternatively, the matter may be referred directly to a pre-hearing conference.

Some Magistrates' Courts refer some civil disputes to mediation where the amount is less than $40,000.

Conciliation

Pre-hearing conferences in the Magistrates' Court use the process of conciliation. Parties to a dispute may apply to have a pre-hearing conference. Magistrates or registrars may also refer cases to a pre-hearing conferences. A pre-hearing conference will be used when the court believes that it will encourage an out-of-court settlement or if there are complex issues and some of them can be resolved before a court hearing.

For more information on the Magistrates' Court, go to www.magistratescourt.vic.gov.au.

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If both parties agree on a settlement at conciliation or mediation, a consent order will be entered by the magistrate or registrar. If a settlement cannot be reached, the case will be referred to the court.

Arbitration

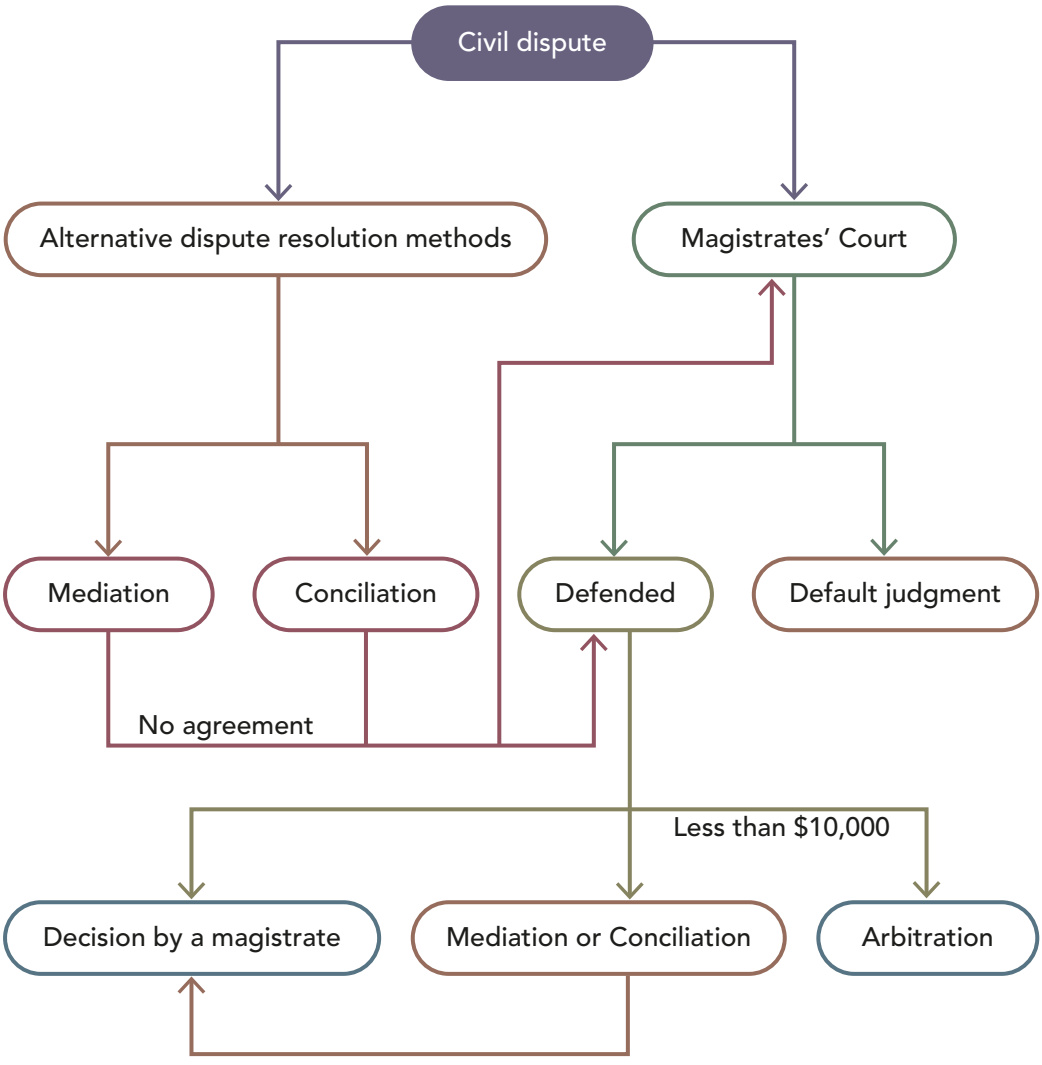
The Magistrates' Court uses arbitration for civil claims for up to $10,000.

Civil cases in which the compensation claimed is less than $10,000 must be heard by arbitration. Arbitration is a less formal hearing than a court hearing, and is conducted by a registrar. The decision of the arbitrator is final and binding.

An appeal against a final order in a civil matter must be made within 30 days of the date of the decision.

Under special circumstances, an application can be made to have a case involving less than $10,000 heard by the court. These special circumstances include:

- the case involves a complex question of law
- the facts of the case are not in dispute
- the parties involved are in agreement.



Appeals from the Magistrates' Court

Appeals on a point of law in civil cases decided in the Magistrates' Court are heard in the Supreme Court.

The only right of appeal for a civil case heard in the Magistrates' Court is an appeal on a point of law, and such an appeal goes to the Supreme Court. The Supreme Court can:

- affirm the decision
- reverse the decision
- send the case back to the Magistrates' Court and direct that the magistrate apply the law as decided in the Supreme Court.

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County Court

The County Court has original jurisdiction to hear and determine civil matters. The civil jurisdiction is divided into two divisions: the Commercial Division and the Common Law Division. Civil juries of six members can be used, but only if requested by the plaintiff or defendant.

The County Court hears civil claims for unlimited amounts.

Appeals

The County Court cannot hear appeals on civil matters from the Magistrates' Court. In civil matters, an appeal from a decision of the County Court can be heard by the Supreme Court – Court of Appeal on the following grounds:

- a point of law
- a decision as to the facts
- the amount of damages awarded.

Appeals from the County Court are heard in the Supreme Court – Court of Appeal.

For more information on the County Court, go to www.countycourt.vic.gov.au.

COUNTY COURT

Where is the court?

The County Court is in Melbourne and circuit sittings are held in major country towns.

What types of civil cases does it hear?

The County Court has unlimited jurisdiction for civil claims for personal injuries and other personal actions.

Can the court hear appeals?

The County Court does not hear civil appeals from a Magistrates' Court.

Who presides in the court?

Judge.

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Supreme Court

The Supreme Court hears civil claims for unlimited amounts.

The Supreme Court consists of a Trial Division and a Court of Appeal. The Trial Division has extensive original jurisdiction in civil matters. The Supreme Court can hear civil claims for unlimited amounts. There is an option to use a jury of six in civil matters.

SUPREME COURT

Where is the court?

The Supreme Court is in Melbourne. There are circuit sittings in major country centres.

What types of cases does it hear?

The Supreme Court consists of a Trial Division and a Court of Appeal. The Trial Division has an unlimited civil jurisdiction.

Can the court hear appeals?

A single judge of the Supreme Court hears appeals from the Magistrates' Court on a point of law. Appeals from the County Court and from a single judge of the Supreme Court are heard by the Court of Appeal.

Who presides in the court?

Judge.

For more information on the Supreme Court, go to www.supremecourt.vic.gov.au.

Appeals

A single justice of the Supreme Court hears appeals from the Magistrates' Court.

A single justice of the Supreme Court will hear appeals:

- on a point of law (civil case) from the Magistrates' Court
- some Victorian Civil and Administrative Tribunal (VCAT) cases on a point of law.

Court of Appeal

The Supreme Court – Court of Appeal hears appeals from the County Court and Supreme Court.

The Court of Appeal hears civil appeals from the County Court and from decisions made by a single justice of the Supreme Court. It also hears appeals from proceedings that have come before VCAT, where an order has been made by the President or a Vice-President of the tribunal.

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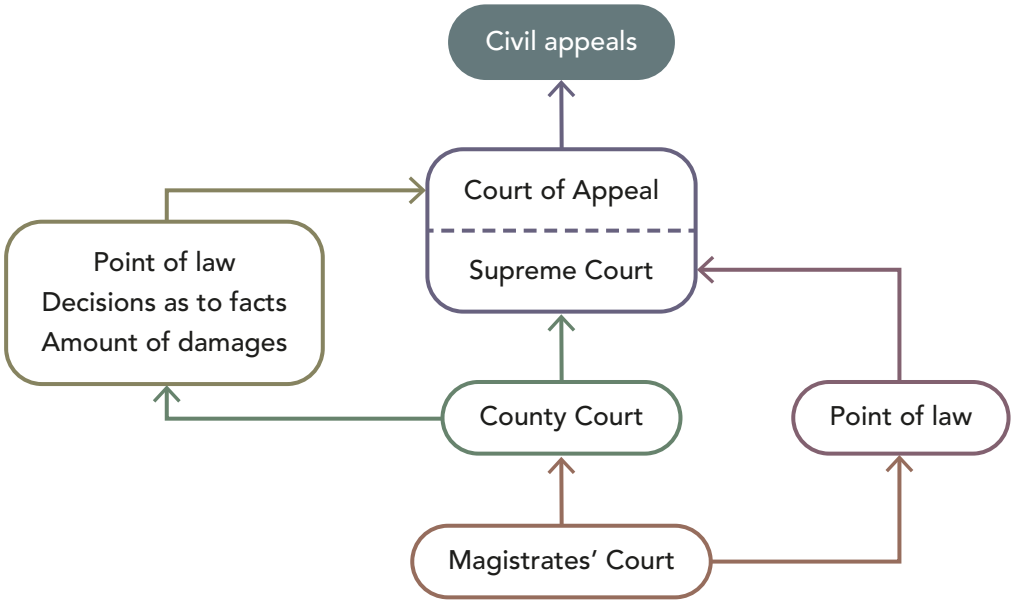

NewsReport 5.8

Modernising case-flow at the County Court

THE COUNTY COURT OF VICTORIA WAS THE FIRST END-TO-END ELECTRONIC court for criminal and appeal cases in Australia. It is now in the process of adding the civil jurisdiction: the Common Law and Commercial divisions.

Focusing on improving the ecosystem of the court, the first area to become electronic was filing, and then management of documents once they are received. This involves approval or rejection of the lodged documents and storing them in the document management system, mimicking the paper file, along with all its colour-coding and classifications. Case management is also electronic, and involves managing events and references to the lodged documents – some of these go back 30 years.

The system offers judges different ways to get information. It is also able to incorporate changes in legislation and regulations.

HIGH COURT OF AUSTRALIA

The High Court is the highest court in the Australian hierarchy. The High Court is the final court of appeal. For more information about the role of the High Court see Chapter 9.

For more information on the High Court, go to www.hcourt.gov.au.

ISBN 978-1-316-64754-7

5.10 Reasons for a court hierarchy

There are a number of significant reasons for structuring our courts as a hierarchy. A number of these reasons were discussed in relation to the hearing of criminal cases in Chapter 3.

Reasons for a court hierarchy include the need to reduce delays and the right to appeal. The right of appeal is an important feature of our legal system, as it gives an individual the opportunity to have their case determined in another court, thereby ensuring certainty, consistency and fairness. How could an individual exercise their right to an appeal in a legal system that offered only one level of court?

The main reasons for a court hierarchy are therefore to enable the following.

Administrative convenience

A court hierarchy provides for the most efficient use of court resources and avoids delays.

A court hierarchy makes efficient use of the limited financial and physical resources available. A hierarchy of courts allows for the allocation of cases according to their complexity and thereby reduces the likelihood of delays. This efficiency provides cost savings and promotes timely access for litigants. Minor civil cases can be allocated to the lower courts where they can be heard relatively quickly. More complex civil matters generally take longer to hear. These cases are heard in higher courts by judges with the expertise to deal with such matters. The jurisdiction of each court is clearly established so people do not waste time, money and energy initiating an action in an inappropriate court.

Appeals

A court hierarchy allows for a system of review.

Fundamental to the concept of justice is the right to appeal. An appeal allows for the review of decisions made by courts. A system of review would not be possible without a court hierarchy. People who believe that they have grounds for an appeal would not have the opportunity to have their case heard again in a superior court by a judge with special knowledge and expertise.

The system of precedent is largely reliant on appeals from the lower courts. Many precedents would never be established if there were no opportunity for an individual to appeal against the decision made by an adjudicator in a lower court.

Other reasons

Precedent

A court hierarchy is necessary for the doctrine of precedent to operate.

The doctrine of judicial precedent is largely dependent on a hierarchy of courts. Precedents are established in the superior courts and binding on all courts lower in the hierarchy, thereby providing consistency in decisions. The doctrine of precedent cannot operate unless there is a hierarchy of courts.

Specialisation

A court hierarchy allows each court to develop the skills, expertise and processes to deal with specific types of disputes.

A court hierarchy enables the workload of the courts to be spread, and for courts to develop expertise in hearing particular types of disputes. A judge in the Family Court, for instance, can become fully conversant with matters relating to family law.

Time and money

A court hierarchy allows minor cases to be heard relatively quickly and in a less costly manner.

A court hierarchy enables minor matters to be dealt with relatively quickly and in a cost-effective manner in the Magistrates' Court rather than in the County Court or Supreme Court, where it may cost thousands of dollars and take years before the case is finally determined.

ISBN 978-1-316-64754-7

NewsReport 5.9

The chook, the shrink, the lawyer and his Ferrari

THE BATTLE LINES HAVE BEEN DRAWN IN LEAFY HENRY STREET, KEW. ON ONE side of the fence sits Goldie, a family rooster, whose exuberant crowing and predilection for the next-door neighbour's Ferrari has led him all the way to the County Court.

On the other side of Goldie's fence lives Mr Con Kay, a solicitor who has issued a nuisance and negligence writ against the bantam, seeking damages for personal and psychological stress. Goldie's decision to roost one night on the garage roof that covers Mr Kay's Ferrari did not help the situation.

Mr Kay claims that Goldie's unreasonable and excessive crowing noises have caused him occupational, mental, emotional and intellectual stress, disrupting his sleep and diminishing his earning capacity.

In the Goldie camp are cameraman Rob McKay, his radiographer wife Rene and their four children, who last month pre-empted a County Court injunction by returning Goldie to the local farm whence he came.

It was a red-eyed Rob McKay who instructed Goldie's former owners to have the bantam destroyed. Not good enough, fumed Con Kay, who is still seeking damages.

And the bird? 'Spy' is happy to report that Goldie lives to fight his own legal battles. 'The farm owners didn't have the heart to put Goldie down,' explained barrister Jim Bassell, who is representing the rooster. 'He is staying with a couple of psychologists, friends of the McKays.'

Mr McKay said that when he heard of his neighbour's concern he did his best to silence his foghorned leghorn. 'I even phoned the council, who told me I should perhaps treat the rooster like a power tool and not allow it to make any noise after 7pm on week nights and 9pm on weekends,' he said.

Consequently, each night for about a year, Mr McKay rounded up the bird, put it in a cage and shut it inside his car. Apart from one unfortunate escape, when Goldie spent the night next door in imminent danger of putting a deposit on Mr Kay's luxury car, the problem was thought to be resolved.

Not so, according to the lawyer's deposition. After issuing an injunction against the rooster, which effectively forbade it to enter its own garden, Mr Kay sent the McKays a summons that listed 37 alleged stressful and noisy incidents.

If successful in the County Court, the writ could result in thousands of dollars in damages.

Mr McKay said that the male offspring from successful unions between Goldie and the family chooks had been given to friends. He wondered how many more neighbourhood disputes had been triggered by his generosity. 'I suppose it's the circles you move in, but all our friends have roosters,' he said. 'Other groups of people may get together and talk about what was on television, but we get together and talk about chickens.'

Lawrence Money, The Age

Activity 5.6 Folio exercise

Neighbours in dispute

Read the 'The chook, the shrink, the lawyer and his Ferrari' and prepare a report that deals with all the following:

1 List the facts of the case.
2 Describe the role and function of the County Court.
3 Explain the dispute resolution method used.
4 Outline the other dispute resolution methods that could have been used in this case.
5 Decide which method of dispute resolution you believe would have been most appropriate in this case and explain your choice.
6 Identify the problem/s in accessing the law highlighted by this article. Discuss.

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5.11 Appropriateness of courts in resolving disputes

The civil justice system presents individuals with a range of ways in which they can resolve disputes. Taking a case to court is a costly process, but there are some cases that must be heard by a court.

Strengths of courts

Taking a civil dispute to court provides a binding decision but is very costly and time-consuming.

Where complex fact or legal issues are involved, determination by a judge or a magistrate may be the most appropriate dispute resolution option. The court system uses an adversarial process to hear cases. This includes strict rules of evidence and procedure. Some people find this formality intimidating. Furthermore, it also means that legal representation is required. Therefore, going to court to resolve a civil dispute is costly and time-consuming. However, the courts do have the power to make a final and binding decision.

The advantages of using a range of other methods to resolve civil disputes have been recognised by the courts: they do refer parties to mediation, conciliation and arbitration.

The reasons for courts being considered appropriate bodies for the resolution of disputes include:

- **Courts provide a binding resolution:** Courts use a range of dispute resolution methods to resolve disputes. If parties are unable to resolve a dispute using these methods, a judicial determination by a court provides a resolution which is final and binding.
- **Courts can adjudicate on a range of civil disputes:** The court hierarchy enables courts to specialise in hearing specific types of cases such as family law and tort law, and so develop appropriate procedures to effectively settle these disputes.
- **Courts allow for legal representation to prepare and present the case:** Every party in a dispute has the right to seek legal representation to argue their case. The use of legal representation ensures that both parties are treated equally and that each party has the opportunity to present their side of the facts in an objective, reasoned way.
- **Courts follow strict rules of evidence and procedure:** Courts follow strict rules of evidence and procedure, and aim to ensure that each party has an equal opportunity to present their case and challenge the evidence presented by the opposing side.

Courts are bound by the principles of natural justice.

- **Courts are bound by the principles of natural justice:** An important feature of Australia's legal system is that the person presiding over the case (judge or magistrate) must ensure that the rules of natural justice are observed. Natural justice is based on the concept of 'fair play' and was originally developed through the common law. According to the principles of natural justice, every person is entitled to a fair and unbiased hearing. Courts must remain impartial at all times. Both parties are considered equal before the law and have the right to present their version of the facts to the court, which will not favour either party.

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Weaknesses of courts

The use of courts to resolve disputes may be seen as inappropriate in a number of circumstances. These include:

- **Courts are very expensive:** Courts are very expensive due to court costs and the need for legal representation. The unsuccessful party in a civil matter has to consider the possibility of paying large amounts in damages, party–party costs (what a court orders one party to pay the other as part of the terms of settlement) and court costs. Even the successful party will be out of pocket, because whatever amount is awarded will not cover all their solicitor costs. This may prevent or discourage some parties from pursuing a valid civil claim through the courts. This is particularly a concern for those parties whose dispute cannot be settled through other dispute resolution methods or is outside the jurisdiction of VCAT.

Courts are very expensive due to high court costs and the need for legal representation.

- **Court cases are time-consuming:** Preparation and exchange of civil pre-trial documents, scheduling of pre-trial conferences and the trial itself can take up a lot of time. In addition, court workloads and the availability of one's barrister can cause delays. Plaintiffs who have suffered serious injury may be placed under huge financial strain because of delays and may be pressured to settle for a lesser sum rather than wait to go to trial.

Court cases are time-consuming.

- **There is a need for legal representation:** Lack of legal representation may hinder access to justice or equal treatment. Individuals who are unable to afford their own legal representative and are ineligible for legal aid are at a huge disadvantage in the court system. In civil cases, Legal Aid is often unable to represent parties. Individuals who cannot afford legal representation may find it difficult to prepare a case and understand proceedings. Their chances of presenting a successful case in a courtroom, pitted against an experienced lawyer, are not good.

Individuals who are unable to afford their own legal representative and are ineligible for legal aid are at a huge disadvantage in the court system.

- **Court decision may not be an appropriate method in all disputes:** A final determination by a court creates a situation where there is a winner and a loser. This may not be appropriate where there is an ongoing relationship between disputing parties. For instance, if the dispute is between neighbours, the winner and loser outcome may in fact escalate the dispute in the future rather than settle it.

Judicial processes are adversarial, and there is always a winner and a loser.

5.12 Should I go to a court or VCAT?

There are several questions that an individual should answer when deciding which dispute resolution body to use. First, consider the nature of the dispute. Does the dispute involve complex legal issues? Other questions to be considered include the following:

- How formal is the process?
- How much will it cost?
- Who makes the decision?
- What impact will it have on my relationship with the other party?
- Will the other party attend?
- How long will it take?
- Do I need a lawyer?
- Is the decision binding?
- Is there a right of appeal?

In deciding which method is most appropriate, consider the strengths and weaknesses of courts and VCAT. These strengths and weaknesses are summarised in Table 5.4.

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Table 5.4 Comparison of courts and VCAT

Questions to consider	Courts	VCAT
How formal is the process?	Determination by a judge or magistrate in the courts uses a formal adversarial process to resolve disputes. This includes the use of strict rules of procedure and evidence that aim to ensure that all parties are treated equally. However, an individual may find that the formal procedures used in the courts are intimidating.	VCAT is generally less formal than the courts and does not follow the same strict rules of procedure and evidence. An individual is less likely to feel intimidated. However, this may be a disadvantage when the parties are not equally able to present their views.
How long will it take?	The pre-trial and trial processes used by the courts allow time for the preparation of cases and for the issues to be examined in detail. However, the time required to prepare a case for court may result in delays in settling a dispute. Delays may also occur due to the workload of the courts.	VCAT can hear cases relatively quickly. If the parties cannot reach a decision, VCAT will make a binding decision.
How much will it cost?	The costs of taking court action can be significant because each party is responsible for preparing and presenting their case. This requires legal advice. The costs of court action may mean that some people do not have the opportunity to fully exercise their rights.	VCAT is less costly than going to court. A relatively small fee is charged and in some lists the use of legal representation is generally not allowed.
Do I need a lawyer?	In most instances, a party will require legal representation. This ensures that all parties are treated equally. However, legal representation adds to the costs of taking action.	In some lists legal representation is not allowed. Although this reduces the costs of taking action, an individual may be disadvantaged if they are not confident in presenting their own case.
Who makes the decision?	A magistrate, judge or the option of a judge and jury in a higher court. This means that an impartial body makes the decision. However, the use of a jury will add to the costs of a case.	The parties are encouraged to reach an agreement. This means that the parties are more likely to feel satisfied with the outcome, as they are part of the decision-making process. However, if no agreement is reached a decision is made for the parties. One party may compromise too much.
Is the decision binding?	The court determines a winner and a loser. The decision of the court is binding.	Orders made by VCAT are binding and enforceable. When the parties reach a decision it is a win–win situation. However, where VCAT makes a decision for the parties there is a winner and a loser.
What impact will it have on my relationship with the other party?	Courts use an adversarial approach, which may result in animosity between the parties.	VCAT uses mediation and compulsory conferences. These processes allow the parties to reach a mutually acceptable resolution. This may preserve the ongoing relationship between the parties. However, in a tribunal determination a decision is made for the parties. One party may be antagonised by the decision.
Will the other party have to attend?	If a defendant does not appear, the court may make a decision in their absence.	If a party does not appear, VCAT may make a decision in their absence.
Can the decision be reviewed?	The courts have a right of appeal – this is consistent with the principles of justice.	VCAT has a limited right of appeal.

Activity 5.7 Folio exercise

Are alternative dispute resolutions more appropriate?

A recent report states:

> The practice of using alternative dispute resolution methods has become an accepted part of the Australian court system. Courts, such as the Magistrates' Court, direct parties to mediation, conciliation and arbitration aimed at clarifying issues and promoting settlement. VCAT has been established utilising these methods. However, while dispute resolution methods are credited with high settlement rates, some commentators remain cautious about their benefits.

1 Outline the dispute resolution methods discussed in the quotation.
2 Using examples, explain how VCAT uses alternative dispute resolution methods.
3 Discuss and justify the dispute resolution methods used by the Magistrates' Court.
4 Explain why courts remain an essential dispute resolution option in civil cases.

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5.13 Purpose of pre-trial proceedings

The *Civil Procedure Act 2010* (Vic) guides civil pre-trial, trial and post-trial procedure in Victoria. Section 7 of the Act provides for an 'overarching purpose' in relation to the conduct of civil proceedings. That purpose is for the court to facilitate 'the just, efficient, timely and cost-effective resolution of the real issues in dispute'.

Section 9(1) sets out a list of matters that inform the overarching purpose when the court makes orders or gives directions, including 'justice, early settlement of disputes, efficient conduct of the court's business, minimising delay and dealing with a proceeding in a manner proportionate to the complexity or importance of the issues in dispute and the amount in dispute'. This means that the courts must treat all people equally, conduct court business in an efficient manner, and act in the public and parties' interests to settle disputes early. These underlying values underpin the rules regulating civil processes and aim to promote the core principles of justice.

Civil proceedings are usually started after the plaintiff has consulted a solicitor. The solicitor may send a letter of demand to the defendant in the hope that the dispute will be resolved without the need for litigation.

A letter of demand is sent by the plaintiff to the defendant. It outlines the nature of the claim and the remedy sought.

Purpose

- informs the defendant that the solicitor is acting on behalf of the plaintiff
- establishes the nature of the plaintiff's claim and the remedy sought
- indicates a time limit (usually about 2 weeks) within which the defendant must respond
- informs the defendant that a writ will be issued and served for failure to respond
- explains that if the defendant does not reply to the letter, or responds by denying the claim and/or informs the solicitor of an intention to defend the claim, legal proceedings will commence.

Mr Michael Stubbs
82 View Street
Carlton Victoria 3053
1 April 2030
Dear Mr Stubbs

I represent Anthony John Highbrow, the pedestrian struck by your scooter on the footpath at the intersection of Morgan and Willet Streets, Carlton, on 10 November 2029.

The circumstances indicate that travelling at an excessive speed and your failure to keep a proper lookout were the sole causes of the accident. Accordingly, I look to you to compensate my client for his personal injuries. As a result of the collision my client suffered a broken arm. He has been unable to work for 10 weeks and required medical treatment.

The estimated costs are: (i) loss of earnings $240,000 (ii) medical expenses $510.

I therefore seek total of $240,510 compensation on behalf of my client. If full settlement is not received within 14 days, legal action will be taken against you.

I would be obliged if you would advise me within seven days of your intentions.

Please note that if recourse is had to legal proceedings this letter will be tendered in court as evidence of your failure to attempt settlement.

Yours sincerely

RU Kiddin
Solicitor

Figure 5.2 Sample letter of demand

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Supreme Court – pre-trial proceedings

The procedures outlined in the following discussion are the procedures used for Supreme Court cases. Pre-trial proceedings in a civil case begin with the exchange of a series of legal documents.

Writ

In Supreme Court proceedings a writ informs the defendant of the nature of the claim, the remedy sought, the date and time of the court hearing, and the mode of trial.

A writ may also include the formal statement of claim.

In most cases to be heard in the Supreme Court, a **writ** is served to notify the defendant of the case. The writ is prepared by the plaintiff's solicitor. A copy of the writ is filed in the Supreme Court. The writ is registered (and receives a number). It is issued and witnessed by the court and then it is served on (sent or delivered to) the defendant.

Purpose

- informs the defendant of the case against them, the particular court in which the matter will be heard and the mode of trial (either party may choose to have a jury)
- outlines the title of the action, the full names and addresses of the parties, and an endorsement of the claim: the endorsement of the claim is either the formal **statement of claim** or a statement that gives sufficient details of the nature of the plaintiff's claim
- provides a timeline for execution of the writ (within 12 months) (however, this time can be extended by the court for up to an additional 12 months – if a writ is not served within the prescribed time limit, it is deemed to have 'gone stale' and becomes invalid)
- explains the protocol for issuing a writ either served on the defendant or on the defendant's solicitor personally: the Supreme Court rules also allow for service by fax or telephone.

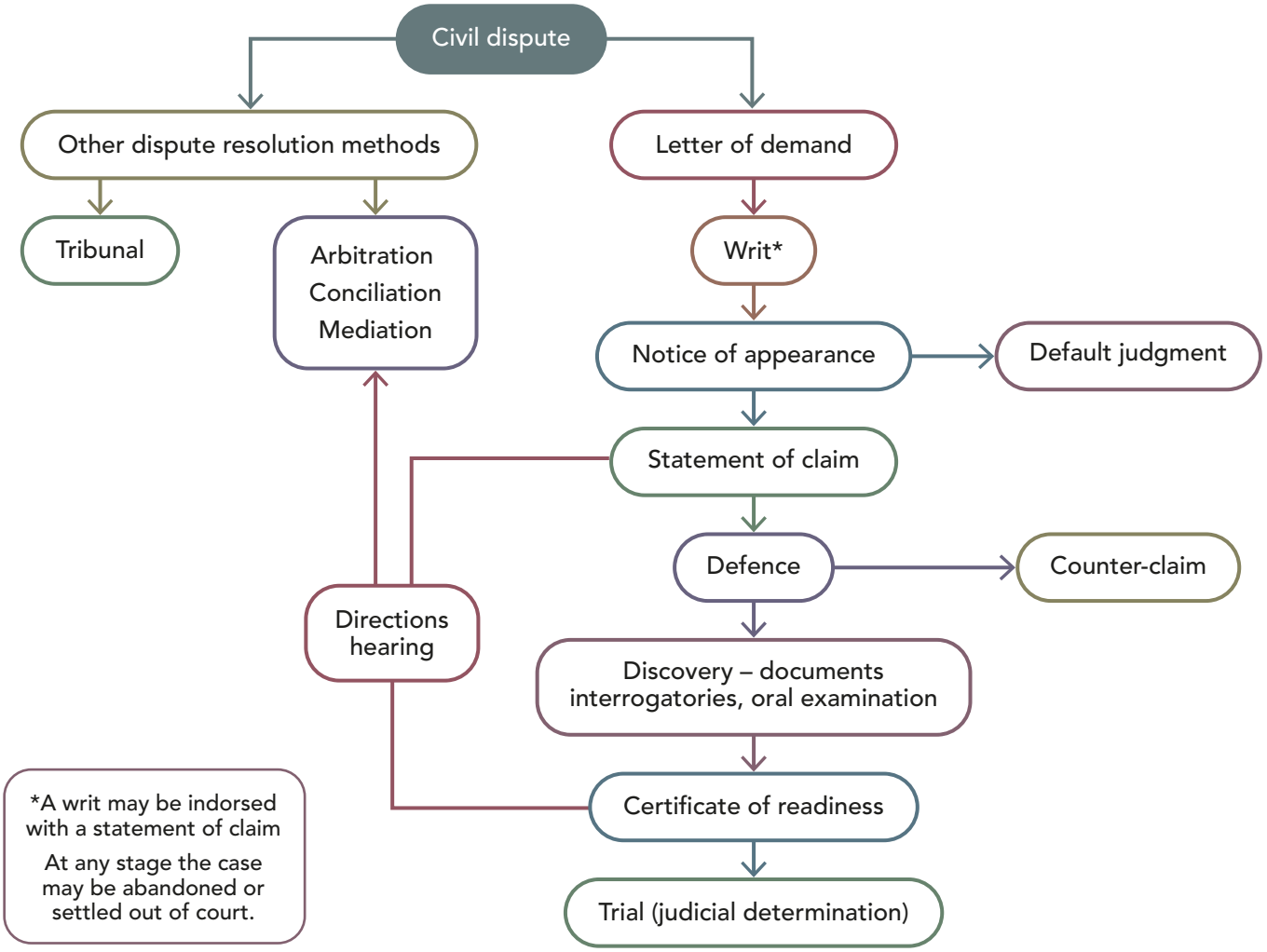

Figure 5.3 Pre-trial proceedings – civil

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WRIT

IN THE SUPREME COURT **2030 No. #**
OF VICTORIA
AT
BETWEEN

ANTHONY JOHN HIGHBROW **Plaintiff**

And

MICHAEL RONALD STUBBS **Defendant**

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –

1. (a) filing a 'Notice of Appearance' in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
2. (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows –

(a) where you are served with the writ in Victoria, within 10 days after service;

(b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

(c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;

(d) where you are served with the writ in any other place, within 42 days after service.

IF the plaintiff claims a debt only and you pay that debt, namely, XXX and XXX for legal costs to the plaintiff or his solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court. FILED 15 April 2030

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

[Plaintiff's indorsement of a statement of claim or of a statement sufficient to give with reasonable particularity notice of the nature of the claim and the cause thereof and of the relief or remedy sought in the proceeding.]

ANTHONY JOHN HIGHBROW was struck by a scooter ridden on the footpath by MICHAEL RONALD STUBBS at the intersection of Morgan and Willet Streets, Carlton, on 10 November 2028. The circumstances indicate that travelling at an excessive speed and failure to keep a proper lookout were the sole causes of the accident.

1. Place of trial – (If no place of trial is specified, trial will be in Melbourne.)
2. Mode of trial – (If trial before a Judge and jury is not specified, trial will be before a Judge sitting alone.)
3. † This writ was filed –
   (a) by the plaintiff in person;
   (b) for the plaintiff by [RU Kiddin], solicitor, of [1 Stubbs Rd, Carlton];
   (c) for the plaintiff by [name of firm of solicitor], solicitor, of [business address of solicitor] as agent for [name or firm of principal solicitor], solicitor, of [business address of principal].
4. The address of the plaintiff is – 1 Morgan Street, Carlton
5. The address for service of the plaintiff is – 1 Stubbs Rd, Carlton
6. The address of the defendant is – 82 View Street, Carlton

* [Strike out this paragraph where order made fixing time for appearance and substitute 'THE PROPER TIME TO FILE AN APPEARANCE' is within ... days after service on you of this writ.'] † [Complete or strike out as appropriate.]

Adapted from Supreme Court (General Civil Procedure) Rules, 2005, © Department of Justice, Victoria

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AN ORIGINATING MOTION

An originating motion is an alternative to a writ. The Supreme Court provides for the use of an originating motion where there is no defendant to the proceedings, or where an application is authorised by the court, or where required by Supreme Court rules. The Supreme Court rules provide that a proceeding may be commenced by an originating motion where there is no substantial dispute of fact. In such cases there is no need for pleadings or discovery.

Notice of Appearance

A Notice of Appearance tells the plaintiff and the court that the defendant intends to defend the claim.

This document must be lodged by the defendant within 10 days of receiving the writ from the plaintiff.

Purpose

- allows the defendant to choose whether they will represent themselves by filing a Notice of Appearance or ignore the writ (this may result in a default judgment being made against the defendant)
- informs the plaintiff that the action will be defended.

Pleadings

Pleadings provide for an exchange of information between the plaintiff and the defendant. Pleadings consist of a number of stages.

Pleadings refer to the large number of documents parties file with the court before the trial, outlining their case.

Purpose

- outlines the precise nature of the claim: defines the issues in dispute and the remedy sought by the plaintiff
- provides the defendant with a fair opportunity to deny, defend, admit or counter the plaintiff's claim
- provides both parties with insights into the opposing case and enables the parties to know what evidence it will be necessary to have available – this provides procedural fairness
- prevents injustices that may occur if a party is taken by surprise
- avoids wasting court time with unnecessary questions that are not in dispute – this reduces the cost of the claim
- allows the parties to weigh the strength of their case and helps the parties reach an out-of-court settlement.

Statement of claim

A statement of claim is sent by the plaintiff to the defendant. It explains the claim in more detail.

The statement of claim is the first document exchanged as part of the pleading process. This document clearly sets out the precise details of the plaintiff's claim.

Purpose

- informs the defendant of the full details of the cause of action
- states the facts alleged by the plaintiff
- informs the defendant of the remedy being sought or the amount of compensation being claimed
- enables the court to assess if there is reason to strike out the case – this may occur if there are insufficient facts to prove the claim.

It is not necessary for the plaintiff to supply documentary or other evidence at this stage.

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Statement of Claim (Extract)

IN THE SUPREME COURT OF VICTORIA AT **2030 No. #**

BETWEEN **ANTHONY JOHN HIGHBROW Plaintiff**

And

MICHAEL RONALD STUBBS Defendant

The Plaintiff says:

1. On the 10th day of November 2028 the Plaintiff was standing at or near the intersection of Morgan Street and Willet Street, Carlton, in the said State when a scooter travelling on a footpath and under the control of the Defendant struck the Plaintiff.
2. The said collision was caused by the negligence of the Defendant.
3. Particulars of Negligence:
   (a) Failing to keep a proper lookout
   (b) Travelling at an excessive speed in the circumstances
4. By reason of the said collision the Plaintiff suffered personal injuries.

Figure 5.4 Statement of claim

Defence

The defence is a document lodged by the defendant (or their solicitor) in response to the statement of claim.

The defence is sent by the defendant to the plaintiff. It sets out details of the defence.

Purpose

- allows the defendant to present their version of the facts and defend any of the claims being made against them: the defendant may admit to some allegations and deny others
- sets out the extent to which the defendant considers they are liable: where a defendant files an appearance, a defence should generally be served within 30 days of receiving either the indorsed writ or a statement of claim.

Reply

The plaintiff may choose to respond to the statement of defence. A reply is not necessary if the reply is a denial of all allegations in the defence.

In some cases the plaintiff may send the defendant a reply to the defence claimed.

Purpose

- allows the plaintiff to clarify any allegation made in the defence: for instance, the statement of defence may claim that there is no right to action because the time in which this action can be taken under the *Limitation of Actions Act 1958* has expired. In this case, the plaintiff would need to show why the claim is not barred by the *Limitation of Actions Act*. Usually pleadings do not continue after the reply.

Counter-claim

In some situations, the defendant may respond to a statement of claim with a **counter-claim**.

A counter-claim is the defendant's response to a claim, in the form of a claim against the plaintiff.

Purpose

- provides the defendant with the opportunity to bring an action against the plaintiff, claiming that the plaintiff was either partly or completely responsible for the damage or injury.

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Under the Supreme Court rules, a defendant who has a claim against the plaintiff may counter-claim in the proceeding. The defence and the counter-claim are included in one document. The counter-claim will be tried at the trial of the plaintiff's claim unless the court orders otherwise.

The court may decide not to hear the counter-claim as part of the proceedings where a counter-claim may delay the trial of the plaintiff's claim or cause prejudice to one of the parties. The court may:

- order separate trials of the counter-claim and the claim of the plaintiff
- order that any claim included in the counter-claim be excluded
- strike out the counter-claim without prejudice to the right of the defendant to assert the claim in a separate proceeding
- order that any person joined as defendant to the counter-claim cease to be a party to the counter-claim.

Either party can apply to the court to order that further and better particulars be provided about any fact or matter stated in the pleadings. Further information is also obtained during the **discovery** process.

Discovery by inspection of documents

The discovery process includes more information relevant to the case.

The discovery process allows parties to ask to see documents relevant to the case. Information required by the parties may include:

- copies of medical reports
- reports by expert witnesses
- letters and memos
- contracts
- photographs, tape recordings, transcripts, microfilm, videotapes, film, computer disks and other documentary materials.

A Notice of Discovery is sent requesting documents relevant to the case.

Purpose

Discovery can include the inspection of relevant documents.

- allows the parties to request more information and inspection of documents relevant to the facts of the case
- ensures that parties disclose all relevant documents in their possession to the other party. An affidavit of documents must be filed and a copy must be served on the party requesting discovery. The affidavit of documents identifies the documents that are or have been in the possession of the party making the affidavit. Parties can inspect the documents listed and demand that copies of documents relevant to the case be produced. This is done by serving a Notice to Produce. Generally, a party cannot refuse to produce documentary evidence if requested to do so by the other party. Failure to provide the documents means that the documents cannot be produced as evidence in court. The court has the power to prevent unnecessary discovery. The court may order that discovery is not required or should be limited to specified documents or questions.
- promotes an out-of-court settlement, since the parties gain a greater understanding of their chances of success in court.

Interrogatories

Discovery can include asking specific questions, known as interrogatories.

Both parties have a right to request more information from the other or to ask further questions to gain a better understanding of the facts. These written questions, or **interrogatories**, are limited to matters of fact. Interrogatories must be answered in writing, by affidavit.

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Purpose

- provides the parties with more detailed and specific information
- encourages an out-of-court settlement as parties gain greater understanding of inconsistencies of the evidence in the case
- crosschecks evidence given in court with that presented in the interrogatories: inconsistencies between information in the interrogatory and evidence given in court may weaken an individual's case.

Discovery by oral examination

The Supreme Court rules provide that a party may orally examine the other party. Discovery by oral examination cannot be conducted without the consent of the relevant party (the consent must be written). A party who has consented to be orally examined by another is not required to answer written interrogatories, but they can agree to do so.

Discovery can also include oral examination.

Responses to questions asked during the examination are recorded in a deposition (a written record). Where there is an objection to any question, the objection is also recorded in the deposition. These answers may be used as evidence at the trial.

OTHER INFORMATION EXCHANGED

In addition to the discovery of documents and interrogatories, the Supreme Court rules provide for the exchange of other information that may be relevant to a case. These rules are designed to ensure that all parties are fully informed and that the case, should it go to court, will proceed smoothly.

- At any time, the parties to a dispute may make voluntary admissions. An admission is an acknowledgment that a statement is true.
- A party may also serve a notice seeking the admission of a factual statement or recognition of the authenticity of a document.
- The parties are required to declare the use of expert evidence. The use of an expert witness should be declared at least 10 days before the trial. A statement should be sent that:
  - identifies the witness
  - describes their qualifications to give evidence as an expert
  - details the substance of the evidence they will give.

The Supreme Court rules also provide that where a plaintiff claims damages for a bodily injury, the plaintiff is required to disclose any medical reports. The defendant may also request that the plaintiff submit to appropriate examinations by a medical expert.

5.14 Judicial powers of case management

Case management is a system of rules introduced to reduce costs and delays in the court system. The systems and processes introduced reflect the principles of justice and guide the judiciary, litigants and legal representatives to resolve disputes in a fair and equal way, while improving access to the courts.

The development of case management processes has changed the role of the judiciary in a fundamental way. Increased judicial powers to guide and speed civil pre-trial, trial and post-trial processes means the parties and legal representatives must comply with specific timelines. Failure to do so may result in fines from the court. The judiciary adopts a 'case manager approach' and maintains control of the case from its initiation to its settlement. New technologies have helped them achieve these goals.

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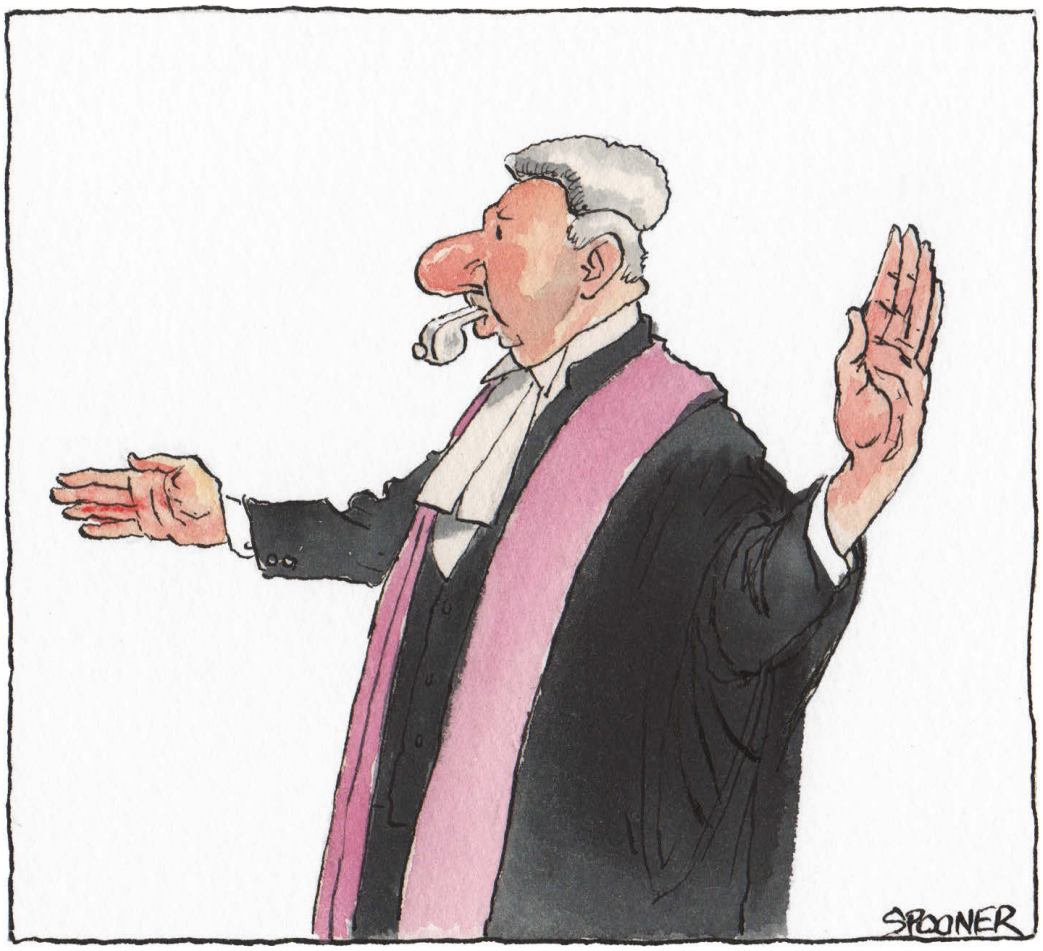
CASE MANAGEMENT

Case management allows:

- each case to be assessed on the basis of its needs and complexity
- early planning, scheduling and control over proceedings by a judicial officer
- ongoing communication between the court and the parties.

Case management enhances the ability of the civil justice system to achieve justice.

The *Victorian Civil Procedures Act 2010* (Vic) guides the development of case management rules and practices. Individual courts have adopted the rules best suited to their jurisdiction. The Supreme Court (General Civil Procedure) Rules 2005 (Vic) contain procedures to help the Commercial court manage cases, including rules regarding direction hearings, further directions, and case management conferences. The use of mediation or other dispute settlement methods is a key feature of the case management process. Similarly, the Magistrates' Court General Civil Procedure Rules 2010 (Vic) specify certain limitations on litigants. The courts' rules mean that litigants must check the issues in dispute and the relevance of documents they plan to provide to the court to avoid unnecessary delay and cost.



Directions hearings

A directions hearing allows the court to give directions about the conduct of the case. It is also an opportunity to encourage the parties to resolve the dispute or refer the case to mediation.

The Supreme Court has introduced directions hearings. These allow the court to take an active role in the conduct of the proceedings. Matters dealt with at a directions hearing include:

- the state of the pleadings
- any disputes concerning the state of the pleadings, requests for details or complaints

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- timeframes for discovery (documents, interrogatories, oral examination), mediation, filing of court books (a compilation of documents relevant to the case)
- referral to mediation
- ordering the parties to provide each other with a list of witnesses and a summary of the evidence of each witness
- fixing the date for trial or a further directions hearing.

In some civil matters, the Supreme Court provides that there may be two directions hearings. At the first directions hearing, matters relating to the conduct of the proceedings are discussed and a date for the second directions hearing is set. At the second directions hearing a trial date will be fixed. This means that the parties will know when they must be ready for trial. Wherever possible, directions, other than directions for the trial, will be given 'on the papers', without the need for any attendance by parties. Further directions hearings may be held where necessary.

Mediation

The Supreme Court now refers all civil matters to mediation to promote out-of-court settlements and reduce the backlog of civil cases waiting for trial. During the directions hearing – and in fact at any stage in the proceedings – the court may, with or without the parties' consent, order the parties to mediation. (At any stage during the proceedings the court may also, with the consent of the parties, refer the parties to arbitration.)

NewsReport 5.10

Why do courts encourage mediation?

MEDIATION HAS GAINED INCREASING acceptance as a dispute resolution process. This dispute resolution process is now widely recognised by the Supreme Court as a means of reducing the backlog of civil cases. Mediation has also been used by the County Court. The Magistrates' Court has the power to refer cases to mediation provided by the Dispute Settlement Centre of Victoria.

When should mediation be used?

Mediation is appropriate for most of the disputes that come before our courts. Whether a case can be resolved by mediation will depend on a number of factors.

First, the parties must be willing, and they must be capable of discussion and negotiation. The primary intention of the parties in attending the mediation sessions must be to settle the dispute.

Second, the parties need to be on an equal standing. In other words, one party should not be more powerful than the other. Third, the parties need to be in equal bargaining positions for mediation to be effective. Each party needs to be aware of the range of options and be in a position to make real choices.

Mediation is most effective if it is used early in a dispute. As a dispute develops, individuals tend to develop polarised views. Perceptions of injustice rise, and the dispute builds over time. These emotions will hinder the dispute resolution process.

However, mediation cannot take place until issues have been defined. Each party will need an understanding of the other's claim. To achieve this there needs to be adequate exchange of information between the parties. In some cases – which would otherwise be heard before a higher court – this may not be possible until pleadings have been conducted.

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NewsReport 5.11

Bushfire class action settled through mediation

ON THE EVE OF THE SIXTH ANNIVERSARY OF the Black Saturday bushfires, the Murrindindi Black Saturday bushfire class action settled, after being referred to Court-led judicial mediation. The successful mediation resulted in significant cost and time savings for the community, the legal system and all parties involved. Importantly, it also saved witnesses and victims the psychological and emotional stress of enduring a lengthy trial.

In July 2014, Justice Dixon, who was hearing the preliminary arguments in the class action, referred the matter to the Court's Appropriate Dispute Resolution (ADR) [commonly also known as Alternative Dispute Resolution] team for judicial mediation by Associate Justice Efthim, in the hope that a settlement could be reached without the matter having to go to trial.

Associate Justice Efthim convened preliminary meetings involving representatives from both parties and expert witnesses. His Honour engaged an expert mathematician and valuer to determine a sample by which [the] quantum of the claim could be estimated. A valuer was then engaged to obtain a relevant sample by which the question of loss could be estimated.

Case management conferences were next held with the valuer and the parties to estimate loss. When the parties were in agreement as to the estimate of the loss, the mediation commenced.

The matter was settled, through mediation, without the need for a trial. The mediation resulted in a $300 million settlement, without admissions of liability, and brought an end to the multiple legal actions arising from the deadly 2009 Murrindindi bushfire.

Judicial mediation in this matter allowed for a streamlined process, and made full use of the Court's facilities and expertise in complicated class actions. The efficiency of the judicial mediation system is clear.

It must be duly noted and acknowledged that Associate Justice Efthim played a pivotal role assisting the parties to resolve the case.

Upon settlement, Justice Dixon thanked the parties, assisted by their lawyers and the mediator (Associate Justice Efthim) for the sensible and necessary compromises that had brought the Murrindindi proceeding to a close.

'Active management of these proceedings by judges facilitated timely disclosure of documents, evidence, expert opinions and arguments and helped all those involved in these disputes, whether as plaintiffs, defendants, witnesses, experts or lawyers, to find an appropriate compromise. Resolution of so many claims within that time frame is an achievement worthy of note.'

The settlement was subject to Court approval (as are all class actions), largely to safeguard the interests of group members. The settlement was approved by Justice Emerton in May 2015.

The settlement of the Murrindindi class action followed the settlement of the separate class action in relation to the Kilmore East–Kinglake fire. In contrast, this matter went through an external mediation process.

On 15 July 2014, after a 200-day trial before Justice Jack Forrest, the parties agreed to a settlement without admission of liability worth $494 million, the largest in Australian legal history. The Court heard the application on 24 and 25 November 2014 and received approval from Justice Osborn on 23 December 2014.

The Supreme Court of Victoria is supervising the ongoing process of distribution of settlement funds as it has done with earlier Court-approved settlements arising out of the Beechworth, Coleraine, Horsham and Pomborneit fires.

Key issues in this matter included the pre-trial management of 40 expert witnesses, the use of expert conclaves, the effectiveness of concurrent evidence and the use of expert assessors to assist judicial officers.

The length and scope of the Kilmore East–Kinglake trial also demanded that the Court adopt flexible and innovative case management practices, including the use of a paperless 'e-trial'.

Since settlement, the Court has commissioned research into the way in which these issues were addressed in the context of the Kilmore East–Kinglake trial which will highlight lessons to be learned for the future conduct of a large-scale litigation. It is expected that the research will be published in early 2016.

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Activity 5.8 Written report

Civil pre-trial processes – is mediation the answer?

Read 'Bushfire class action settled through mediation' and prepare a report. Your report may be presented as a multimedia presentation or a written report.

A multimedia presentation may include:

- presentation software such as Prezi and a set of written notes
- a PowerPoint presentation and an oral presentation
- using a multimedia package to prepare a computer presentation and an oral presentation.

Your report should address the following:

- Describe the judges' role in the pre-trial process: identify other pre-trial processes which may have assisted in the early resolution of the civil dispute.
- At what the stages in the pre-trial process is mediation most likely to occur? Justify your view.
- List the advantages of mediation highlighted in the article. Explain other advantages of mediation.

NEWSREPORT 5.12

Police make big pay-out to two teenage migrants

A CIVIL ACTION IN THE COUNTY COURT HAS RESULTED IN VICTORIA POLICE paying thousands of dollars to two teenage migrants. During the 16-day hearing, the court heard allegations from two young African migrants against eight police officers and the State.

In evidence, the teenagers described being beaten by police officers, handcuffed, and then falsely imprisoned. They said they had done nothing wrong.

Police said the use of force and the pepper spray was necessary because the young men resisted arrest.

The day before Judge Susan Cohen was due to retire to consider a verdict, the police sought to settle the allegations out of court. The following morning a confidential agreement between the parties was signed

By settling out of court, Victoria Police avoided the possibility of an adverse finding. It is believed that the payment was about $200,000. This included compensation to the two young men, legal costs associated with three weeks in court, and two months of trial preparation.

It is estimated that Victoria Police's own legal representation, court costs and the wages of the eight police officers who attended court proceedings amount to between $200,000 and $250,000. Altogether, close to $500,000 of public funds was spent on the case.

The courts encourage the use of mediation and arbitration to resolve civil disputes.

Activity 5.9 Folio exercise

Settling out of court

Read the article 'Police make big pay-out to two teenage migrants' and complete the following tasks:

1 Briefly outline the allegations made by the plaintiffs in this case.
2 Which court heard this case? What was the outcome of the case?
3 One purpose of pre-trial procedures is to promote out-of-court settlements. Describe other purposes of pre-trial procedures leading up to the hearing of a civil case. Evaluate the extent to which these pre-trial procedures achieve the purposes you have identified.
4 Discuss what factors you think contributed to the parties settling out of court in this case.

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5.15 The civil trial

The purpose of a civil trial is to facilitate the just resolution of disputes, 'as quickly, inexpensively and efficiently as possible'. A number of personnel play a role and hold key responsibilities in the delivery of a just outcome: the judge, the jury, the parties and the legal practitioners. Each has specific responsibilities and tasks to perform to ensure that the outcome balances the interests of the plaintiff and those of the defendant.

Responsibilities of the judge

The judge is an impartial umpire, responsible for empanelling a jury, deciding the admissibility of evidence, applying the rules of procedure, deciding questions of law, deciding the verdict (if there is no jury) and deciding the remedy.

A civil trial may be heard by a judge or by a judge and a jury. The judge has a responsibility to act as an impartial and independent adjudicator. The judge must not intervene unnecessarily in the conduct of the case, and must remain neutral, act impartially and treat each party equally. The judge cannot help the parties in the presentation of their case, either by prompting a party to ask an appropriate question of a witness or by introducing a legal issue. The judge can only ask questions of witnesses when it is necessary to clear up a point that has been overlooked or obscured. The judge's duties include:

- **Enforcing the rules of evidence and procedure:** The judge must ensure that each party acts according to the rules of procedure so that each has an equal opportunity to present their case.
- **Ensuring that the plaintiff has legally established the 'burden of proof'**.
- **Overseeing the jury selection and empanelling process:** The judge is responsible for the process through which a jury is selected and empanelled.
- **Summarising the facts and explaining the relevant law to the jury.**
- **Deciding the admissibility of evidence:** The judge may prevent a jury hearing inadmissible evidence because that evidence may prejudice the jury's final decision.
- **Deciding all questions of law and ruling on their relevance:** Although each party may present evidence to suggest the relevant law that applies to their case, the ultimate decision as to the relevant law is the responsibility of the judge.
- **Deciding questions of fact when there is no jury:** In the Magistrates' Court, for example, the magistrate performs the role of both judge and jury. The magistrate decides which version of the facts presented is most likely to be true and how the law applies to those facts. Once these two issues have been decided, the magistrate reaches a decision (verdict). In the County Court or the Supreme Court, where a jury is present, the jury is the trier of facts. The jury must decide their verdict on the facts of the case and how the law, as prescribed by the judge, applies to the facts.
- **Determining the remedy:** In a civil case, the plaintiff can choose to have either the judge or the jury determine the appropriate award. In defamation cases a jury cannot determine damages.

In 2017 the *Justice Legislation Amendment* (Court Security, Juries and other matters) *Act* reduced peremptory challenges in civil trials from three to two. These changes are to come into effect 1 May 2018.

The impartiality of the judge in a civil trial promotes fair and equal treatment and is seen as the key to ensuring that the principles of justice are upheld. When a decision is made by an independent body, it is more likely to be accepted by the parties and the community as a fair decision.

If either party has opted for a trial by judge and jury, the trial will start with the empanelling of the jury. The jury panel will consist of six jurors. Each party is permitted to challenge three of the potential jurors from a list of 12, without having to give a reason for the challenge: each party is asked to cross three names off the list of 12 potential jurors.

An additional two jurors may be selected in long cases. However, only six jurors make the final decision.

Where there is a judge and a jury, the judge presents a summary of the evidence and the issues presented by the parties to the jury. When doing this, the judge again must act impartially and treat each party equally.

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Responsibilities of the jury

The jury is not an essential feature of the civil trial process and is used in only approximately 2% of cases in the County and Supreme Courts. Their responsibilities include:

- listening to and evaluating evidence
- determining questions of fact and applying the law as explained by the judge
- deciding fault and awarding damages
- remaining unbiased and making a decision on the evidence presented.

The jury safeguards the rights of the parties by reflecting community standards and thus promoting justice that is in line with community values. Impartiality is central to the concept of a fair trial. The random selection process and the checks to excuse potential jurors ensure a fair trial.

The use of a jury of six people is optional in civil trials. The role of the jury is to reach a decision, but it can also determine the level of damages.

WHAT ARE THE RESPONSIBILITIES OF THE JURY IN A CIVIL TRIAL?

Either party to a civil case can request a jury, providing they are prepared to meet the cost. The jury's main task is to listen to the evidence presented by both parties, and to consider the facts of the case according to the relevant law. The standard of proof required is on the 'balance of probabilities'. The 'balance of probabilities' means that one account of the facts is, on balance, more probable than the other. If the jury is unable to reach a unanimous decision after 3 hours, a majority verdict (five out of six jurors) is acceptable. The task of the civil jury does not stop at delivering the verdict. If the jury decides in favour of the plaintiff, then it may also be asked to decide the extent of damages to be awarded to the plaintiff. The jury may also need to consider whether the plaintiff can be blamed in part for any of the loss, damage or suffering. If so, the plaintiff's award of damages is reduced in proportion to the extent of blame.

SHOULD JURIES ASSESS DAMAGES?

Using juries in civil cases to determine the level of damages has been criticised. It is claimed that there are inconsistencies between the amounts awarded by different juries in similar cases. A jury does not give reasons for its decision. It does not account for how it arrived at the final amount of damages awarded. This means that it is difficult to know if the jury has taken into account all aspects of damages, such as pain and suffering. In some cases, juries are said to be 'excessively generous'. This criticism is frequently made of juries in cases of negligence involving an individual and an insurance company. On the other hand, some jury estimations of damages can be very conservative. The difficulty in predicting how juries will calculate damages discourages some people from using a jury in a civil case. In defamation cases, damages can only be assessed by the judge.

Under the *Defamation Act 2005* (Vic) juries cannot determine damages in defamation cases.

Activity 5.10 Folio exercise

Juries in civil trials

Describe how juries operate in the civil justice system and outline their key responsibilities in a case. Your response should consider:

- the number of jurors who form the jury in each class of case
- the circumstances in which a jury trial is required and those in which it is not
- the standard of proof required.

It is often suggested that the right to trial by jury in a civil matter should be abolished. Do you agree? Justify your opinion.

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Responsibilities of parties (plaintiff and defendant)

In civil cases the plaintiff needs to prove their allegations on the balance of probabilities.

In our trial system, the individual has responsibility for, and control over, the conduct of their case. This means that the individual (plaintiff and defendant) is responsible both for preparing and for presenting their case in court. This includes conducting the pre-trial stages and presenting the case in court.

The role played by parties in civil proceedings is referred to as 'party control'. They decide all matters relating to:

- initiating the action and nominating the relevant court or dispute resolution body
- if a jury will be used
- pre-trial processes
- identifying key issues to be presented in court
- researching and controlling the evidence, the law and its presentation
- the type and number of witnesses to be called.

Parties to a civil action may decide to use a legal practitioner to present the case on their behalf.

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Responsibilities of legal representation

The complexity and number of rules regulating court procedures and the admissibility of evidence mean that parties may choose to use legal representation. Legal representatives have a number of responsibilities:

- representing the parties in court
- protecting the rights of individuals by ensuring fair and equal treatment in court
- researching the facts and the relevant law
- deciding the order and presentation of relevant material and witnesses.

Providing both parties have equal representation, it is assumed that the truth will emerge and a just and fair outcome will result. Financial disadvantage or one party appearing without representation, may contribute to an unfair decision.

WHAT CONTROL DO PARTIES HAVE?

Initiate the case

The parties are responsible for initiating the case. In a civil case, it is up to the individual parties involved to determine whether the case should go to court. The plaintiff will initiate the case by the issue of a writ or summons (depending on which court is to hear the case). The individual parties are also responsible for completing the **pleadings** and **discovery** stages. These steps ensure that the parties are properly prepared before the court hearing.

The parties initiate the case.

Decide the facts and issues

In a civil case, the parties decide on the relevant points of law to be considered by the court and the relevant facts at issue. In presenting their cases, each party decides which arguments they intend to rely on and selects the evidence that supports these arguments. In a civil case, the parties may disclose their arguments and the evidence they intend to rely on during the pre-trial stages. Parties must decide if they intend to disclose any evidence and when such disclosures should take place.

The parties decide on the facts and issues.

Role in determining the time, place and mode of trial

The parties also have a role in determining the time and place of the trial. In a civil case, the plaintiff may nominate the court. If the case is to be heard in the County Court or the Supreme Court they can choose to have the case heard by a judge, ora judge and jury.

The parties determine in what court the trial will take place.

Presenting their case in court

The parties are responsible for presenting their case in court. In most instances, the individual will engage a legal representative to prepare and present their case. A court case often appears, therefore, as a contest between two lawyers. The individual parties have responsibility for arranging and paying for legal representation.

The parties are responsible for presenting their cases.

Is legal representation necessary?

In civil cases, an individual has a right to appear in court and tribunals unrepresented. Litigants may be unable to afford a lawyer, or may not be able to find a lawyer to represent them or may choose to represent themselves in court. However, evidence suggests that if a person does not hire a lawyer to represent their case, they may be disadvantaged. The majority of unrepresented litigants appear in the civil jurisdiction. Courts in the Victorian court hierarchy have rules to help litigants navigate the civil administrative procedures. The courts help self-represented litigants prepare for court, file documents and understand court procedure. In 2014–15, a total of 1665 applications were made in the Probate Court of the Supreme Court by self-represented litigants. The court self-help information pack aims to reduce the time spent by judges on answering common questions.

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NEWSREPORT 5.13

Self-represented litigants seek their day in court

VICTORIANS HAVE THE RIGHT TO REPRESENT THEMSELVES IN COURT. With the high cost of legal representation and tight legal aid budgets, the number of unrepresented litigants is increasing. But it is not easy.

They have to pit themselves against the complexities of our adversarial legal system, procedural barriers such as legal terms and court rules, and possibly against solicitors and barristers, obey the instructions of magistrates and judges, and seek the help of court officers. Judges may be required to spend more time conducting a hearing because of the lack of legal knowledge of the litigant. The judge or magistrate has a duty to tell the self-representing litigant their rights but will not give tactical advice.

To help self-represented litigants, the Victorian County Court has a self-represented litigants' coordinator and an instructive video, explaining matters such as who the plaintiff and defendant are, how to prepare the case, what the expectation is, and court rules. A booklet is also available.

When taking on a civil case, the losing party is usually ordered to pay the costs of the winning party, which may be more than the amount in dispute.

The High Court has provided general advice to courts dealing with unrepresented litigants: 'There is no limited category of matters regarding which a judge must advise an unrepresented accused – the judge must give an unrepresented accused such information as is necessary to enable him to have a fair trial.'

The High Court recognised the problem of self-representation in the joint statement of Mason CJ, Brennan, Deane, Dawson and McHugh JJ in *Jones v Dunkel* [1959] HCA 8 at [25]–[26]: 'A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.'

5.16 Civil remedies

Some civil actions involve a matter of principle. For example, in the *Balmain Ferry* case referred to in 'Concepts of civil justice', Mr Robertson proceeded not because he wanted to recover his penny, but on a matter of principle. Similarly, actions such as defamation, trespass or nuisance may not actually result in substantial injury, damage or loss (financial or otherwise) to the plaintiff.

However, in most cases, the plaintiff may have suffered considerable hardship due to the civil wrong. The aim of civil remedies is to restore the parties to their position before the wrong. A common remedy is an award of damages. In some cases, the court may make an order requiring the defendant to do or refrain from doing something. The plaintiff will specify the type of remedy and the amount sought in the statement of claim. It is also possible to obtain an equitable remedy, such as an **injunction** or an order of specific performance.

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Damages

The most common remedy for any civil action is an award of damages. The court generally orders the defendant to pay a sum of money to restore the plaintiff to their original position by providing compensation for the injury or damage suffered. The amount awarded will largely depend on the sum claimed by the plaintiff and the jurisdiction of the court. Damages fall into the following categories.

The aim of civil remedies is to restore the parties to their original position.

An award of damages is the payment of money, generally to restore the plaintiff to their original position by providing compensation for an injury or damage suffered.

- **Compensatory damages:** The most common form of damages is an award that attempts to compensate the plaintiff for the injury or damage suffered. Compensatory damages are of two main types:
  - **Specific or special damages:** This type of award is made to compensate the plaintiff for items that can be easily measured in terms of money, such as medical and hospital expenses and loss of income.
  - **General damages:** It is difficult to accurately determine the cost of pain, suffering and loss of enjoyment of life. General damages are calculated according to the degree that the injury or damage has affected the plaintiff's lifestyle. For example, a permanent leg injury that requires continued physiotherapy and restricts activity may be said to have a greater effect on a young professional footballer than it would on a retired golfer. The footballer's entire sporting career may be at risk, while the impact on the golfer may be to lifestyle rather than career. Consequently, the amount of damages awarded to the two would differ, even though the nature of the injuries may be similar.
- **Exemplary damages:** Sometimes the court may intend to make the defendant an example to the rest of the community. In such cases, the defendant may be ordered to pay a large amount of money, either to punish them or to deter others from acting in the same way.
- **Nominal damages:** In some instances the plaintiff may not have suffered any significant injury, loss or damage. The principle of the matter is more important than the amount of compensation required. In such cases, the court may order the defendant to pay nominal damages to the plaintiff. Nominal damages are awarded to reinforce the legal interest of the plaintiff.
- **Contemptuous damages:** In some cases the plaintiff may have a valid claim and may even be successful in exercising such rights. However, the court may not be particularly sympathetic. Consequently, the plaintiff may be awarded an amount that may seem to make a mockery of the court action.

NewsReport 5.14

Footballer compensated for knee injury

JUNIOR FOOTBALLER BEAU HART WAS 17 WHEN HE INJURED HIS KNEE when taking a mark. In seeking compensation, he argued that the injury was caused when he fell on a steel fence which was too close to the boundary line.

The defendants – the Beaumaris Football Club, the Southern Metro Junior Football League and Bayside Council – claimed that the boundary line was in line with the standards set by the Victorian Amateur Football Association: – at least 3 metres from the fence.

Taking into account maps and evidence from witnesses, the County Court's Judge Robert Dyer said the boundary and the fence were about 2.68 metres apart.

Hart required knee surgery, and was in hospital for more than 3 weeks. The accident happened in 2009. Hart is now a qualified carpenter but cannot maintain his work rate and will need a knee replacement. In 2016, he was awarded $589,525.

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ARE THERE ANY LIMITS ON DAMAGES?

The *Wrongs Act 1958* (Vic) deals with claims for personal injury or wrongful death in Victoria. The Act deals with injuries other than transport accidents, workplace injuries or injuries as a result of intentional sexual assault or misconduct.

The following provisions of the *Wrongs Act* apply to injuries that occurred on or after 21 May 2003, or where proceedings were commenced on or after 1 October 2003. According to the Act, personal injuries can take the form of:

- loss of earnings and future earning capacity – however, a court will disregard any amount of the plaintiff's gross weekly earnings that exceeds three times the average weekly earnings
- the maximum amount of damages for non-economic loss was increased in 2015 to $577,050
- damages for pain and suffering, although they are only recoverable where a plaintiff has suffered a 'significant injury'. The minimum level for recovery of damages is:
  - an impairment of 5% for non-psychiatric injury, as set out in the American Medical Association Guide to the Evaluation of Permanent Impairment
  - an impairment of 10% for a psychiatric injury, as set out in the Clinical Guidelines to the Rating of Psychiatric Impairment, arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth; or the injury is the loss of a breast.

Injunctions

An injunction is a court order that requires the defendant to do something or to refrain from doing something.

In certain circumstances, an award of damages is inappropriate, as the plaintiff is trying to prevent the defendant doing something or force the defendant to do something. An injunction is an order awarded against the losing party in a civil action that commands or prohibits certain behaviour.

When an injunction orders the defendant to perform some action – such as fulfilling the terms of a contract – this is known as a mandatory or compulsive injunction. Injunctions can be temporary or ongoing. An injunction that is temporary is known as an interlocutory, provisional or interim injunction. These injunctions are issued before a case has been finally decided, to prevent a party from continuing an action before or during the court hearing. Injunctions that have an ongoing effect are referred to as perpetual injunctions.

Do civil remedies achieve their purpose?

Damages	Injunctions
• Damages are effective in cases involving economic loss, particularly cases where the specific value of the damage can be clearly identified, such as a debt owing or loss of wages. • It may be possible to measure economic loss for a loss such as wages, but determining the level of damages for loss of future earnings is much more difficult to calculate. • The ability of damages to restore the plaintiff to their original position depends on the nature of the damage suffered. For instance, in the case of the loss of a limb, the loss of a loved one or stress and anxiety it may be difficult to calculate a monetary value – nothing will restore the plaintiff to their original position. • In some instances Acts of Parliament, such as the *Wrongs Act*, place restrictions on the amounts that can be awarded. This may mean that the plaintiff is not fully compensated for the damage suffered. • Taking a case to court can be a very time-consuming, stressful and costly process. Damages cannot compensate for these factors.	• An injunction can restore a plaintiff to their original position by ordering the defendant to fulfil an obligation, such as perform their part of a contract. • Where the actions of the defendant have already caused damage, an injunction will not restore the plaintiff but it can stop any further damage. • The effectiveness of an injunction may depend on the willingness of a defendant to comply with the injunction.

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Other remedies

Orders of specific performance

In cases involving breach of contract, the plaintiff may want the defendant to fulfil the contract rather than pay damages. In such a case the court can grant an order for specific performance.

A specific performance order requires that the defendant fulfil a contract.

Restitution

If the defendant has property belonging to the plaintiff, the court may make an order of restitution. This compels the defendant to return the property.

Restitution requires the defendant to return property to the plaintiff.

Rescission

In a dispute involving a contract, a breach of a condition of the contract may result in the court making an order to rescind or cancel the contract. Generally, such a rescission order is not made unless the parties can be restored to their original position before the contract. However, legislation does allow for rescission orders to be made in some circumstances, even if neither party can be fully restored to their original position.

Rescission cancels a contract in circumstances where the plaintiff can be returned to their original position.

NewsReport 5.15

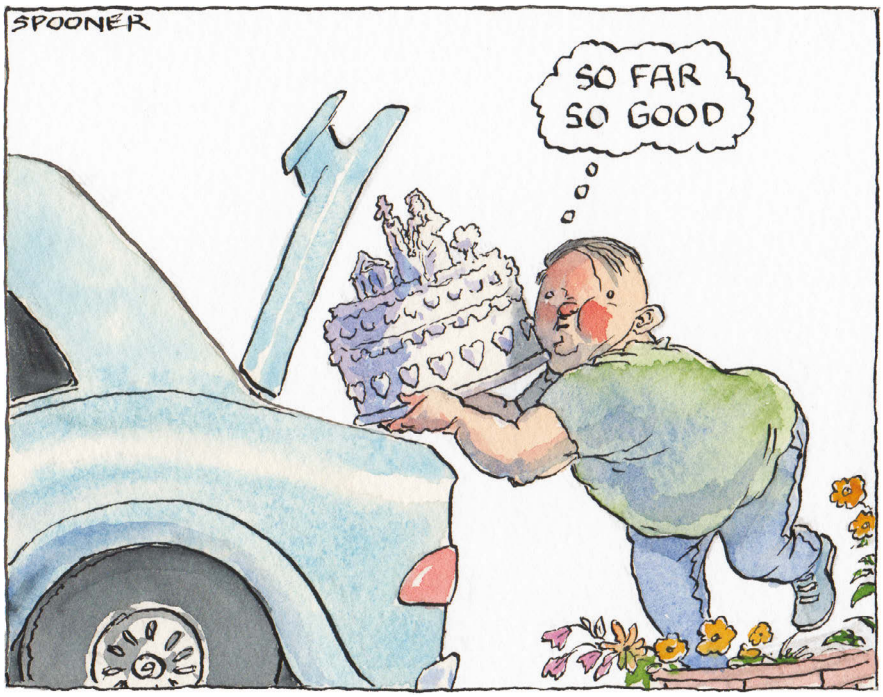
Wedding cake fall leads to damages

THE FATHER OF THE BRIDE WAS PLACING A WEDDING CAKE IN THE BOOT of his car when he fell and landed in a sunken garden bed. He injured his arm and shoulder, requiring surgery.

Glenn Turner, a diesel mechanic, sued the Harrington Grove Country Club, in Sydney's southwest, and architectural firm Hassell.

Judge John Hatzistergos, in the NSW District Court, ordered the club and Hassell to pay Turner $216,000 plus his legal costs. He said the depth of the garden bed was not obvious and the risk of serious injury was high.

An award of more than $250,000 would have been made, the judge said, except that Turner's stepping onto the kerb behind his car was considered contributory negligence.



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5.17 Legal costs

A judgment will usually provide for the payment of legal costs. In most cases, the unsuccessful party will have to pay the legal costs for both parties: if the plaintiff is successful, the defendant will pay both parties' legal costs, and if the plaintiff does not win, the court will order the plaintiff to pay costs for both parties. However, this does not mean that the losing party will meet all legal costs. The costs awarded by the court are based on a set scale. In many instances, costs that are awarded by the court are less than the costs actually incurred by the party involved. The successful party may still have to pay some costs.

NEWSREPORT 5.16

Pay-TV court case labelled 'wasteful'

THE CLOSING OF PAY-TV STATION C7 RESULTED IN ONE OF THE LONGEST AND most costly cases in Australian history, with trial judge Justice Ronald Sackville saying that the $200 million litigation was 'not only extraordinarily wasteful, but borders on the scandalous'.

Owned by Channel Seven, C7 had rights to the AFL, Olympics, tennis, domestic cricket and golf. When C7 lost access to the AFL rights, Austar and Optus stopped using the service and C7 was closed down.

Channel Seven took legal action, claiming $1.1 billion from several major media companies for allegedly colluding to prevent C7 buying the AFL and rugby league rights. The Federal Court sat for 120 days and court transcripts amounted to 9530 pages. Justice Sackville dismissed Seven's $1.1 billion claim in a 1120-page judgment.

During the formal costs hearing, the Federal Court heard argument from PBL, Telstra and Optus that they should receive costs backdated due to Seven's rejection of a formal settlement offer. Documents revealed that PBL had spent $21.5 million, Telstra had spent $20.7 million and Optus had spent $9.2 million.

Several months later three judges of the Full Court of the Federal Court dismissed the Seven Network's appeal. Two judges disagreed with some of the reasoning of Justice Sackville, but this did not change the outcome of the appeal.

In the 235-page judgment, the court said the Seven Network had failed to establish that there was any 'anti-competitive purpose' in the business dealings of the respondents in the retail TV market.

5.18 Evaluating the civil justice system

To evaluate the effectiveness of the civil justice system we need to consider the extent to which these procedures contribute to justice. The critical tests for our justice system are whether it provides for fairness, equality and access.

Numerous aspects of the civil justice system uphold the key element of justice when settling a dispute. People involved in civil disputes have the right to have that dispute determined by an independent and impartial third person. Civil disputes in our courts are determined by either an independent and impartial judge, or a judge and jury. If the dispute in the Magistrates' Court is worth less than $10,000 it may be determined by arbitration. Both litigation and arbitration provide for a decision made by an independent and impartial third person.

Many aspects of our civil justice system contribute to promoting the key principles of justice.

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Costs

A number of options are available to help individuals with the cost of legal assistance. These include government-funded services, community organisations and the private sector.

- Victoria Legal Aid offers free advice on how to resolve legal problems.
- Community legal services help by recommending free services for those facing economic or social disadvantage.
- The Office of Public Advocate advises on topics affecting individuals with a disability.
- The Victorian Aboriginal Legal Service offers free advice to the Indigenous community.
- The Law Institute of Victoria assists with referrals to member solicitors in relevant areas of law.
- Consumers Affairs Victoria provides advice and information to business and consumers.

Victoria Legal Aid helps people with legal problems, protects the rights of individuals and represents them in court.

Timely resolution of disputes

It is essential that the legal system provides timely resolution of disputes. If disputes are not settled reasonably quickly, people may lose respect for the law and take the law into their own hands. Also, unnecessary delays in resolving disputes can result in hardship for individuals and the community.

Civil pre-trial procedures help speed up the resolution of disputes by allowing the parties to clarify issues. This helps the preparation of the case and reduces the time taken for the case to be heard in court. Alternatively, pre-trial procedures may result in the parties reaching an out-of-court settlement and avoiding going to court altogether. Directions hearings allow the courts to monitor the progress of the pre-trial procedures.

Nevertheless, delays in civil cases hinder the timely resolution of disputes. Delays can be due to the actions of the parties, the range of pre-trial procedures that need to be completed, or the workload of the courts. The problems relating to delays and possible solutions are discussed in more detail in the Legal briefs in this chapter.

Accessibility

The legal system provides for effective access to mechanisms to resolve civil disputes in a number of ways. These include the following.

- **The legal system provides a number of dispute resolution processes:** Depending on the nature of the dispute, parties may choose to use one of a range of dispute resolution methods or take an action through the courts. Alternative dispute resolution methods are relatively cheap and quick.
- **The legal system provides a range of institutions to resolve disputes:** The courts are structured so that more complex cases are heard in the higher courts and minor disputes are heard in lower courts. However, taking a civil dispute to court is costly.
- **The legal system provides for a system of review:** In some circumstances individuals who feel that they have not been dealt with fairly may appeal their case to a higher court. However, the right of appeal is limited if the dispute is heard by a tribunal. Appeals from the Magistrates' Court are also extremely limited.

The legal system provides for effective access to mechanisms for the resolution of civil disputes through its processes, institutions and systems of review.

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Factors limiting justice

Civil pre-trial procedures allow for the timely resolution of disputes by ensuring that the parties are fully informed and by encouraging out-of-court settlements.

Civil trial procedures provide for a fair and unbiased hearing before an independent and impartial third person. The appeals process allows an independent review of a decision.

Delays result in further suffering for the plaintiff.

Delays have an impact on the reliability of evidence.

Delays lessen the community's respect for the law.

To be perfectly effective the civil justice system would need to provide access to the law to all individuals, regardless of their social, geographic and financial circumstances. For many individuals, our legal system fails on all fronts. Costs, delays and limited access affect the ability of the civil justice system to achieve justice.

Costs

The costs of initiating civil actions can be prohibitive. These costs include legal advice and representation. Legal advice is often necessary if individuals are to be fully informed of their rights. Legal representation may not be necessary in a minor dispute, but it is necessary if the parties are taking a civil dispute to court. This barrier means that many citizens are denied access to justice, so our justice system is struggling to uphold one of its key elements.

Delays

The time it takes to resolve civil disputes has been an ongoing concern for those seeking to improve our civil system of justice. For litigants, the concern may relate to the wait for personal injury compensation. A case may be weakened where witnesses die or forget.

Delays result in uncertainty and anxiety for all parties. For the courts generally, delays may harm their public reputation as effective institutions and deter individuals from exercising their rights. However, it is important to remember that courts (and other dispute resolution bodies) aim to give a definite answer to important issues between disputing parties. Gathering relevant information, and the consideration of that evidence, may take considerable time.

The justice system does have a responsibility to reduce 'unacceptable' and 'avoidable' delays. A number of factors contribute to these sorts of delays, including lengthy pre-trial and trial practices and procedures, insufficient resources (judiciary, court staff, facilities) and lack of court control.

Access

The principles of justice are underpinned by the assumption that all citizens have equal treatment before the law and equal opportunity to protect their rights by accessing the law. However, the growing demand for legal aid services means that not everyone is able to get the assistance they need. People are missing out on assistance because of where they live, or because they can't afford a lawyer or because they don't understand the legal system. This reduces the ability of the civil justice system to dispense justice equally to all. It is not considered fair if some in society are left to represent themselves, or abandon legal action altogether or enter a dispute with an organisation where the power imbalance may result in an unfair outcome.

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Legal brief 5.2

Do delays limit the civil justice system?

Speedy justice is highly valued in our legal system. It is often said that 'justice delayed is justice denied'. Delays detract from the effective operation of the civil justice system.

Why are delays a problem?

Delays can result in injustice to individuals. For example, a plaintiff who has suffered a personal injury can experience hardship if there is a wait for compensation. A litigant's case may be weakened by delay because witnesses die or forget.

Delays also increase the period of uncertainty for litigants and lead to unnecessary anxieties. Witnesses, including medical practitioners and other experts, incur costs if they have to wait around a court for a long time before being called to give evidence. Delays may also result in general harm to the community through the court not being available to resolve other disputes.

Delays reduce the general community's respect for legal processes and procedures. This deters individuals from using the courts to settle disputes. If people are not able to use the courts to settle disputes, the legal system cannot operate effectively.

But do quick hearings lead to justice? The legal process needs time in order for things to be done properly. A quick resolution could result in a greater injustice. A certain amount of delay is inherent in the system. Court action aims to provide a definite answer to problems. Therefore, it requires careful preparation and consideration.

The question is when do delays become excessive and intolerable? At what point does the delay limit the effective operation of the legal system? The answer to these questions seems to be that undue delay occurs when, in the circumstances, the lapse of time is both considerable and not essential to a just resolution of the claim.

What causes delays?

Delays result from a combination of factors. Some of the reasons for such delays are outlined below. None of these factors alone leads directly to a delay, but all of them contribute to them.

Delays may be caused by individuals, lawyers, the use of juries or the workload of courts.

How do individuals contribute to delays?

The role of the individual in contributing to delays cannot be overlooked. The defendant who seeks legal advice at the last possible moment contributes to delays. They may seek an adjournment so that their case can be properly prepared. The plaintiff who fails to attend a doctor's appointment for an assessment of their condition may prolong pleadings. Human failings, combined with the problems that exist in the structures of our legal system, contribute to significant delays.

How do lawyers contribute to delays?

As in all professions, there are some lawyers who are more efficient and knowledgeable in specialist areas than others. Some lawyers are more in demand than others. The workloads of individual lawyers can have an impact on delays in the courts.

There are many steps in the preparation of a court action. Lawyers who have a large workload may need to put off some tasks because of the pressure to have another case ready for court. Solicitors also rely on barristers to draft documents and to give advice in relation to the law affecting their case. Here again there is potential for delay. The barrister is not involved in all the stages of litigation and may take some time to become familiar with the facts. A solicitor may not brief a barrister until just before the hearing. These practices can result in court delays. A deep-pocketed defendant or their insurer may have little commercial motive to resolve claims quickly.

Delays during the actual hearing of a case may result from either a party's lack of preparation or late amendments to pleadings. The use of directions hearings in the pre-trial stages aims to ensure that the parties are adequately prepared for the court hearing.

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How do juries contribute to delays?

The use of juries in civil cases is often cited as a factor contributing to delays and increased costs. Juries are one reason for the use of strict rules of evidence. Lawyers conduct lengthy and detailed examinations of expert witnesses to make sure that the jury understands the evidence.

However, juries are an important component of our justice system. They enable community participation in the administration of our justice system. Jury decisions reflect prevailing social values. Juries provide a fair and unbiased hearing, as well as the recognition of basic human rights.

The use of a jury can contribute to the time taken to hear a case. When a jury is used to hear a civil action, the evidence of expert witnesses needs to be carefully and fully explored through examination and cross-examination. As the jury consists of people without legal training, the opening and closing statements are likely to take longer than in a non-jury trial. Generally lawyers will tend to call more witnesses and take longer in examining each witness. Certainly, the use of juries in civil cases contributes significantly to the costs and time taken in reaching settlement of a claim. The continued use of juries in civil cases has been the subject of considerable debate.

How can we reduce delays?

Delays could be reduced by appointing more judges, reducing court workload, delegating some functions to court officials, extending the sitting times of courts and/or imposing time limits on some procedures.

One way of reducing delays and costs is to allow the courts greater control. The involvement of courts through the directions hearing process has meant that timelines for the conduct of the pre-trial stages can be established. This has reduced delays in the pre-trial processes.

Over the past 10 years the Supreme Court of Victoria has introduced a number of initiatives to reduce delays in hearing civil cases. These include:

- Increased use of technology: During the Kilmore East bushfire trial, the Supreme Court made sure that the judge, Justice Jack Forrest, had the use of leading-edge technology in a special courtroom with the support of a team facing the lawyers. It was found that almost one-third of the predicted court time was saved by using technology in the courtroom.

PAPER-FREE COURT

RedCrest is a case management system available to Commercial Court users 24 hours a day, 7 days a week. It plays a crucial role in facilitating the court's objectives of becoming paper-free and more service-oriented by providing an easy-to-use platform for electronically filing documents of varying sizes, formats and complexity. It also frees up staff from data entry, file management and counter duties to better manage proceedings, ensuring that cases are properly prioritised and moved through the court as quickly as possible. The Commercial Court Registry now delivers a paper-free service to its users. The system includes a number of case-management efficiencies such as:

- ensuring a central, secure and verifiable repository of all documents filed in a proceeding
- allowing different levels of access to the file of the judiciary, judicial support, registry staff and legal practitioners
- providing access for judicial officers and associates to materials on the court file at all times, without having to move the file between the registry and the barristers' chambers
- automated notifications to chambers and parties when a new document is filed.

RedCrest's operation in the Commercial Court is unique because, unlike similar court systems, it allows both practitioners and the court to directly interact with the electronic court file. Some of the defining features of this innovation are:

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- In 2017, Practice Notes SC Gen 5: Technology in Civil Litigation, aimed to 'promote the effective use of technology in the conduct of civil litigation to reduce time and costs', was introduced. It outlines the expectations of judges, legal practitioners, staff and litigants in facilitating the just, efficient, timely and cost-effective resolution of disputes. The expectation that all communication will be electronic is in line with the court's overarching obligation to save time and money. Handling pre-trial processes and trials online is now regarded as fundamental to the efficient conduct of a civil trial.
- Organising the administration of cases in lists: 'Lists' are managed in the pre-trial stages using the directions hearing process; all specialist lists are managed by particular judges, with the aim of reducing delays and costs. The Court of Appeal eliminated the automatic right of appeal – appeals now require leave, and in many cases leave is decided on the papers. Specialist appeal benches have been established: for instance, an insolvency case will have insolvency expert judges.
- Increased referral of parties to mediation: Court-annexed mediation, especially using associate judges, is proving effective and beneficial to parties, saving time and money. For instance, in the Commercial Court it is not unusual, after the plaintiff's case is opened and the defendant responds, that the judge then refers the matter to court-annexed mediation.

Appoint more judges

It is sometimes suggested that the appointment of more judges would help to reduce delays in our court system. The number of judges certainly has an effect on delays. However, the number of judges appointed to the court is not the only factor that determines the amount of 'judge time' in court.

Increasing the number of judges in the court would result in considerable expense. When calculating the costs of employing new judges, we must also consider the cost of their associates, tipstaff, court reporters, registrars and other court officials, as well as the provision of facilities.

Extend court sitting times

The average number of days that a judge sits in court depends on the number of days the courts are open. Apart from public holidays, the courts observe a six-week vacation from just before Christmas and another break for the first fortnight in July. A 'vacation judge' is available to hear urgent matters during these times. One way to reduce delays would be to require the courts to operate during these vacation times.

However, judges argue that they will often work during these times, on tasks such as writing reserved judgments. The main cause of delay is the difficulty in accurately estimating the amount of judge time needed. If officials knew that a given number of judges would be required at a given time, there would be fewer delays.

- allowing a user to register a system account and having access rights assigned based on their role in the proceedings
- enabling parties to initiate a case and make payments without having to leave their desk
- facilitating the filing of documents to the court file in real time with email notifications of filings being automatically sent to each party
- permitting electronic service of documents by the parties.

The system currently accepts filings in all judge-managed matters in the General Commercial, Corporations, Intellectual Property, and Technology, Engineering and Construction lists. About 750 proceedings are now managed in RedCrest. These include the Timbercorp and Great Southern debt recovery proceedings, which accounted for approximately 500 of the cases filed to 30 June 2015. RedCrest has over 1200 registered users, of whom approximately 1100 are external to the court. More than 6500 documents have been accepted for filing. The court is committed to the continued improvement of all its systems and processes and has actively encouraged and welcomed feedback from users about RedCrest's functionality. External users were recently invited to participate in an online survey about their experiences using the system; this feedback is vitally important to the realisation of the court's paper-free vision.

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Legal Brief 5.3

Do costs limit the civil justice system?

Why are costs a problem?

The costs of taking a civil action are high and increasing. This can deter individuals from exercising their rights and therefore limit their access to dispute resolution. If individuals are not able to exercise their rights, the civil justice system cannot operate effectively.

Who can afford a civil case?

Costs can deter people from accessing dispute resolution.

A recent study found that most actions involving claims for damages for personal injuries are brought by ordinary people in the community. These people are neither very rich nor very poor. This may be partly due to the growth in the practice of solicitors acting on alternative fee arrangements. Solicitors acting on such arrangements are willing to take the work on the basis that if the case is lost they will not expect to recover their fees. The success rate of such cases is high. However, the situation in relation to commercial claims is different. Most plaintiffs in these actions fall into the 'very rich' category. In practice, many of these plaintiffs are corporations.

What effect do pre-trial procedures have on costs?

Costs include the cost of legal assistance, the cost of running pre-trial procedures and costs associated with self-represented people.

Recent attempts to increase access to justice have seen an increase in judicial management of cases. This includes the use of directions hearings. However, directions hearings can add to the costs of justice. When a lawyer attends a direction hearing the 'meter is on'. Furthermore, the practice of charging on the basis of time spent rewards delay and inefficiency. Changing the system of charging for legal services may result in a more efficient system of litigation.

What impact does self-representation have on costs?

The impact of costs could be reduced by the use of other dispute resolution methods, providing legal insurance, the use of contingency fees and increasing access to legal assistance.

A self-represented litigant is a person who does not have legal representation. A self-represented litigant imposes additional work on the courts. The civil justice system operates on the presumption that lawyers will represent parties in court. Individuals representing themselves are less likely to be adequately informed or prepared. They may lack knowledge of court procedures, they may not understand the law and legal terminology and they often will not have the skills to present their case, but if court officials or judges help them, the system is vulnerable to claims of bias.

When one party has no legal representation it may increase the costs for all parties involved. A self-represented litigant may require more pre-trial procedures. The issues in the cases may be poorly defined and require further clarification. There may be more time and expense spent in responding to unclear or irrelevant evidence.

What is the cost to the community?

There are too many civil cases that take longer than is really needed to reach a resolution. These cases consume more public and private resources than is desirable. Longer cases result in delays in the court system and the need for increased court services.

If the cost of litigation is too great, the integrity of our civil justice system as a whole will suffer. The public will see the system as ineffective and seek other means to resolve their disputes.

How can we reduce costs?

Our methods of trying civil cases need to change. Changes should aim at reducing the costs to the parties in a civil action. Saving costs to litigants would also save costs for the community.

Dispute resolution methods

In recent years, the use of alternative dispute resolution methods (also referred to as appropriate dispute resolution methods) has been encouraged. People in a civil dispute are free to choose the kind of dispute resolution they want to use. Courts should keep encouraging the use of other methods by providing for them within the court system. In addition, there is a range of civil matters that can be dealt with by tribunals. These tribunals use other dispute resolution methods and parties frequently do not require legal representation.

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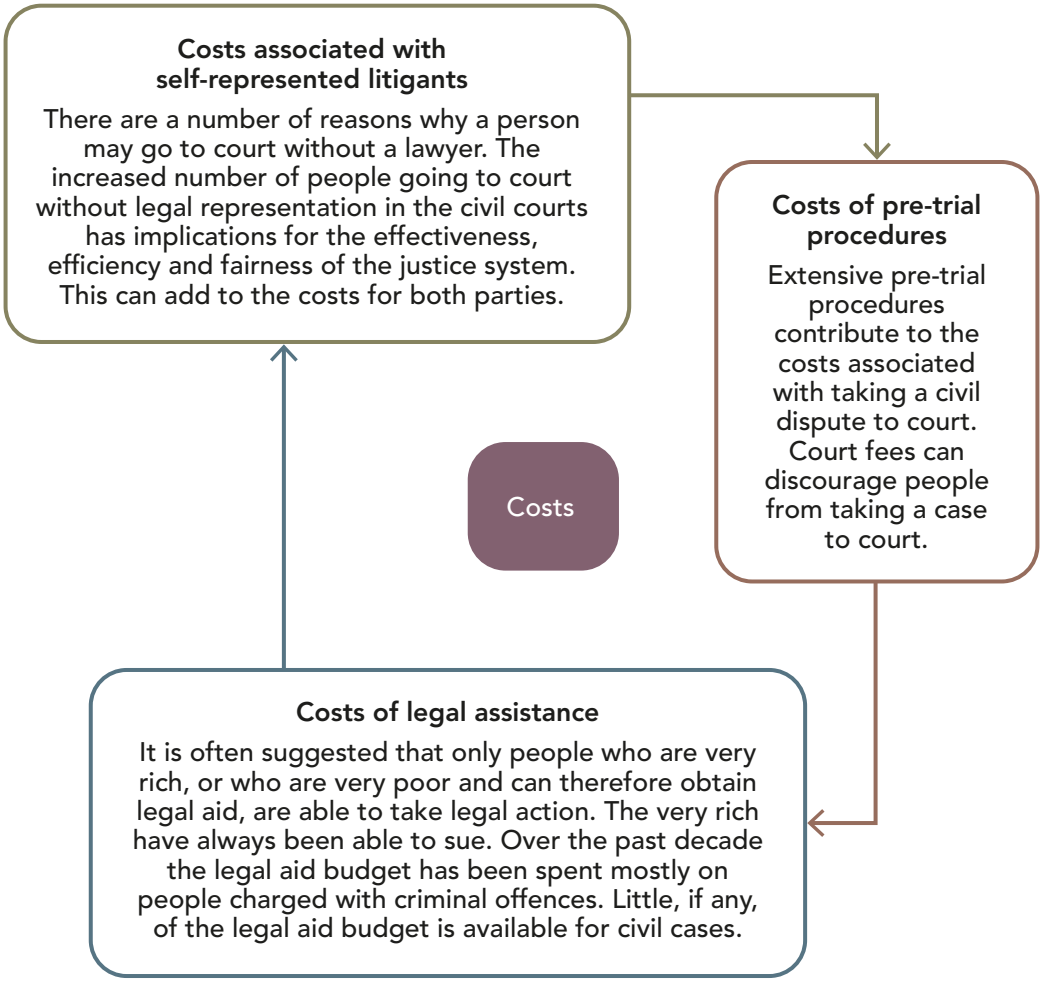

Legal insurance

It has been suggested that one way to improve access to justice would be to introduce a system, similar to that in Germany, of publicly funded legal insurance. This would guarantee that all people could afford to take legal action. But what would be the consequences for the court system? The number of judges per head of population in Germany is greater than the number in Australia. Would it be possible to increase access to justice and allow more people to go to court without increasing the number of courts and judges? Would it be worth increasing the numbers if the result was more efficient and effective use of our legal processes?

The use of funding arrangements

Both lawyers and litigation funding companies can provide support for a client to bring their case. However, support provided by a lawyer is different from funding provided by a litigation funder company. Litigation funder companies charge a fee which is a share of the amount awarded by the court to the plaintiff. Lawyers are prohibited from using this type of charging arrangement.

The introduction of litigation funder agreements may increase the capacity of individuals to exercise their rights through the courts. Litigation funders provide security for costs and agree to pay any adverse costs ordered by the court. The funder is paid a share of the amount recovered and is not paid if the case is unsuccessful. It has been suggested that the use of litigation funder arrangements could increase access to justice.

In 2017 the Victorian Law Reform Commission began an inquiry into litigation funding and group proceedings. The Commission was asked to report on:

- the supervision of litigation funders, including clear disclosure requirements, limits on the success fees that can be charged by a litigation funder to plaintiffs when a decision or settlement results in a payment to the plaintiffs by a defendant, and obligations to disclose funding arrangements
- whether the existing prohibition on law firms charging contingency fees would help mitigate the issues presented by the practice of litigation funding.

For more information on the VLRC inquiry see <www.lawreform.vic.gov.au>.

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Conditional billing arrangements

Some firms offer a 'no win, no fee' approach, also known as conditional billing. The law firm Slater & Gordon pioneered this approach in Victoria in 1994, and has taken out a trademark on their No Win – No Fee™ scheme. The scheme was introduced in response to growing community concern about access to justice. The No Win – No Fee arrangement provides that if a claim is not successful, the plaintiff is not required to pay any legal fees to the firm. However, the plaintiff may still be required to pay 'disbursements' (costs such as court costs or witness expenses that a legal representative has to pay and so should reasonably expect to be reimbursed for) and bears the risk of paying the other party's costs if they are unsuccessful in their claim. If the claim is successful the plaintiff is charged legal fees. These fees may include an 'uplift' (or success) fee. In Victoria, an uplift fee of up to 25% is allowed. Conditional billing is most commonly used in personal injury, workers' compensation, wills disputes and defamation cases.

Introduction of electronic case management

In Australia, large law firms have been involved in eDiscovery, or electronic case management, for some time. eDiscovery – 'electronic discovery' – refers to the process of collecting and processing material for use in civil litigation electronically. The Supreme Court Practice Notes require the use of electronic documents to reduce costs.

Principle	Assumptions
Dealings in hard copy are to be the exception rather than the rule in all aspects of civil litigation in the court. Converting Electronic Documents into hard copy requires justification.	Communications and dealings in modern society are predominantly conducted electronically. A large number of discoverable documents are stored by parties electronically.
The inability or reluctance of a lawyer to use common technologies should not mean additional costs for other parties. Sourcing technology services through a third-party provider is accepted practice.	The use of common technologies is a core skill for lawyers and a basic component of all legal practice, whether provided in house or through a third-party provider.
Wherever possible, parties are to exchange documents in a useable, searchable format or in the format in which the documents are ordinarily maintained. The exchange format should allow the party receiving the documents the same ability to access, search, review and display the documents as the party producing the documents.	Documents in electronic form offer greater functionality and efficiency in dealing with information.
An unreasonable failure to cooperate in the use of technology which occasions additional costs will constitute a breach of the overarching obligations of the parties.	Cooperation between the parties in the use of technology reduces costs.
Parties should be prepared to address the court on the use of technology at an early stage of a proceeding.	The early and consistent use of technology in a proceeding may produce efficiencies for both the parties and the court.
The increased capacity to store, search and access a large volume of documents through the use of technology does not relieve parties of the obligation to limit the presentation of documentary evidence to that which is necessary and proportionate to the conduct of the case.	Parties will refine the documents to be presented to the court to those which are necessary for the conduct of the proceeding.

Increase access to legal assistance

For more information on VLA's Access to Justice Review, go to https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-review.

Limitations in legal aid funding and the need to help people access the legal system when they don't have legal representation has resulted in a number of changes. Legal Aid recommendations to improve access to justice include:

- **Extra investment from State and Federal governments:** Additional funds would allow more services, which would meet the needs of broader groups of people. Victorian Legal Aid called for a further investment of almost $72 million per year from Federal and State governments.
- **Expand key services:** The self-help website and Legal Help phone line offer advice and referral information in 20 languages. Improvement in this service would greatly enhance access for individuals seeking assistance to deal with civil issues.
- **Lower the eligibility criteria to ensure that more people qualify for assistance:** The means-test criterion means that services are only available to the most disadvantaged and vulnerable groups. The eligibility criteria need to realistically reflect the level of disadvantage and the cost of legal assistance.

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REFORMING THE CIVIL JUSTICE SYSTEM

Numerous organisations and institutions review and monitor the ability of the civil justice system to achieve the principles of justice and uphold the elements of fairness, equality and access.

In 2016 the Department of Justice and Regulation released 'The Access to Justice Review' to the State government. The report compiled findings based on 'extensive consultation with key stakeholders and the community' on ways to improve access to justice for Victorians.

The purpose of the report was to ensure that individuals with everyday problems, as well as disadvantaged and vulnerable groups, receive assistance when they engage with the law and the justice system.

The report made 60 recommendations. It proposed four key strategies:

1 **Better information:** Improve systems that provide legal information to the public. This would assist people who are not eligible for assistance but are unable to afford help. Access to relevant information for the 'missing middle' would empower them to solve the issue. It was recommended that Victoria Legal Aid be the central entry point for Victorians seeking legal advice.

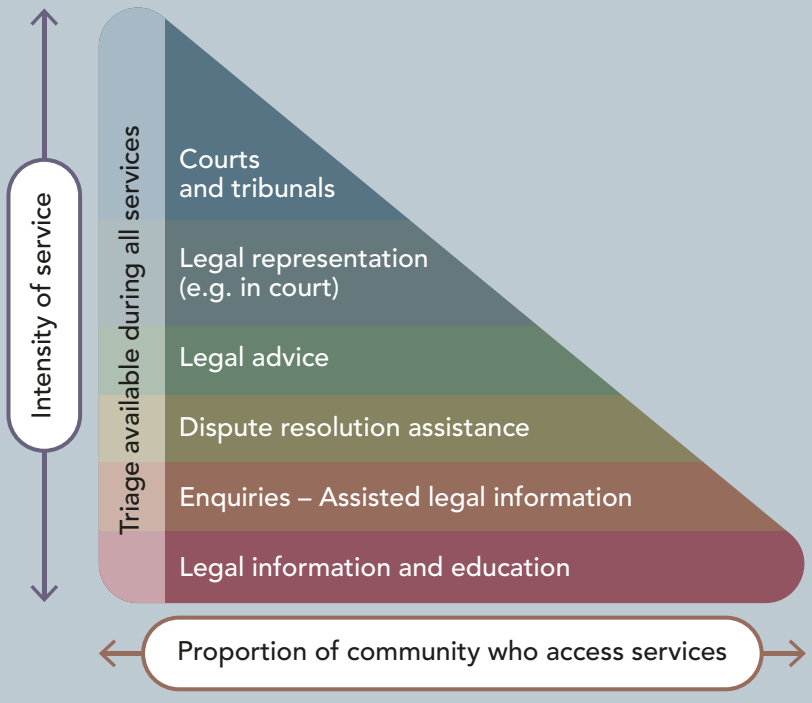
2 **More flexible and integrated services:** The report recommended a system that catered for a variety of people and problems, at the right time and at the right place. Providing accessible information and dispute resolution processes that are appropriate would help the 'middle group' resolve their claims. The recommendation supports a 'no wrong door' approach, so that people get the advice they need when they need it.

3 **Better use of technology:** The report acknowledged the changing expectations the public has around accessing information on mobile devices outside regular business hours. It was recommended that complaint bodies, tribunals and courts make better use of different technological platforms to access and be accessed by the community. For example, an online tool that connects pro bono legal practitioners to Community Legal Centres would improve the public's access to information and dispute settlement.

4 **Stronger leadership, governance and linkages:** Despite ongoing improvements in this area, it was recommended that better communication and more sharing of experience and expertise (in areas such as ADR and self-representation) would improve the efficient delivery of justice.

Other key recommendations included:

- widening the use of alternative dispute resolution
- improving VLA services for disadvantaged and vulnerable groups
- improving access to the VCAT small claims list (online dispute resolution)
- assisting self-represented Victorians
- improving pro bono services.



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NewsReport 5.17

Family Court Chief Justice calls for more funds

FAMILY COURT CHIEF JUSTICE DIANA BRYANT called for more resources to protect parents and children from family violence.

She said judges often had less than two hours to put in place interim parenting arrangements for children, orders that remain in place for up to three years, until a final hearing takes place.

Chief Justice Bryant said that at these initial hearings judges faced allegations and counter-allegations of family violence, substance abuse and mental health problems. As a result, it was impossible to get to the bottom of the issues in such a short time.

Chief Justice Bryant said the family law system needed an extra $20 million for more family consultants and registrars to help judges manage these cases. She said that without additional funds, judges would continue to be faced with deciding what contact orders to put in place between parents and children, or whether contact should be cut altogether, in situations where they do not have the time or the information to be sure their decisions are the best possible ones.

Activity 5.11 Structured questions

Time and money – civil justice

Carefully read the Legal briefs 'Do delays limit the civil justice system?' and 'Do costs limit the civil justice system?' and complete the following tasks:

1 Describe how the procedures and processes for the resolution of civil cases provide for:
   - fairness
   - equality
   - access.
2 Outline the process used to bring a civil case to court.
3 What impacts do delays in the hearing of claims have on the ability of the civil justice system to achieve the principles of justice?
4 Describe how the costs of litigation affect the ability of the civil justice system to achieve the principles of justice.
5 Synthesise your reading on recent reforms or recommendations to overcome the factors affecting the ability of the justice system to achieve the principles of justice. To what extent do these reforms/recommendations enhance the ability of the civil justice system to achieve the principles of justice?

Activity 5.12 Essay

An effective civil justice system?

Critics of our civil justice system claim that it does not provide an effective means for resolving civil disputes. It needs to be understood that there is no simple, magic solution that will allow everybody who thinks they have a grievance to have that grievance resolved by a court cheaply and speedily. If civil cases are going to be fought to the bitter end, as they often are, they will be expensive. In your essay, include the following:

- an outline of the principles of justice
- a description of the purposes of the civil pre-trial procedures for litigation in the Supreme Court
- a description of two factors that limit the effectiveness of these processes to achieve the principles of justice
- a discussion of two recent changes, or proposed changes, aimed to enhance the effective operation of our civil justice system.

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Key point summary

Do your notes cover all of the following points?

- ❏ Civil law is concerned with the rights and responsibilities that individuals have towards each other.
  - Two main areas are torts and contract. Other areas include family law and inheritance.
  - Civil actions are initiated by one individual against another individual.
  - Civil cases are decided on the balance of probabilities.
- ❏ Civil justice system – key concepts
  - Burden of proof – the plaintiff must prove the allegations
  - The standard of proof – on the balance of probabilities
  - Representative proceedings – group or class actions.

Resolving a civil dispute

- ❏ Factors to consider when initiating a civil claim include:
  - negotiation options
  - costs
  - limitation of actions
  - the scope of liability
  - enforcement issues
    - a warrant of distress
    - an attachment of earnings
    - a garnishee order
    - sequestration
    - bankruptcy/liquidation
    - imprisonment.
- ❏ Dispute resolution methods
  - Mediation – impartial mediator/s help the parties clarify issues. The parties make the decision. Mediation is encouraged in the Magistrates' Court, the County Court and the Supreme Court if there is a possibility that the parties may settle. VCAT also encourages the use of mediation.
  - Conciliation – a third party helps the two parties reach an agreement by suggesting ways in which they may resolve the dispute. This method may be used by courts. VCAT compulsory conferences may use a process like conciliation. Consumer Affairs Victoria offers a conciliation service.
  - Arbitration – the parties refer the dispute to a third person who makes the decision. The third person is known as an arbitrator. This method is used in some Magistrates' Court cases.

Consumer Affairs Victoria (CAV)

- ❏ The purpose of CAV
- ❏ In what circumstances will CAV provide a conciliation service
- ❏ Appropriateness of CAV.

Courts and VCAT

- ❏ Australia's court system is arranged as a hierarchy. Each court is ranked in order according to its jurisdiction – its power to hear and determine a case.
- ❏ Reasons for the existence of tribunals
  - They allow for specialisation in the nature of the dispute heard and the procedures used to deal with disputes.
  - Some tribunals adopt informal procedures and do not require legal representation.
  - They settle cases quickly.
  - They may be able to deal with social problems (before they become legal problems) as well as legal problems.

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VCAT

- Appropriateness of VCAT
  - less costly
  - less intimidating
  - offers a more timely resolution of disputes
  - the parties are encouraged to reach an agreement themselves – VCAT hearings are conducted in a less formal manner.
- Weaknesses of VCAT
  - tribunals are usually suitable for minor civil disputes
  - escalating cost of VCAT hearings
  - parties may not reach an agreement
  - limited right of appeal.

Courts

- Magistrates' Court
- County Court
- Supreme Court
- Reasons for a court hierarchy
  - it is administratively more convenient, as it allows for more effective case management of the workload of the courts
  - it provides for a system of appeals and review
  - other reasons
    - the system of precedent can operate effectively only if there is a hierarchy
    - it allows for specialisation in the courts
    - it saves time and money, as minor matters can be dealt with quickly and more complex matters can be dealt with in a different court.
- Strengths of courts
  - Courts provide a binding resolution of disputes.
  - Courts can adjudicate on a range of civil and criminal disputes.
  - Courts allow for legal representation to prepare and present the case.
  - Courts are bound by the principles of natural justice.
  - Courts follow strict rules of evidence and procedure.
- Weaknesses of courts
  - Courts are very expensive.
  - Court cases are time-consuming.
  - Individuals may not be able to afford legal representation.
  - Courts are not always the most appropriate method.
- The purposes of the pre-trial stages (see diagram on page 182)
  - letter of demand
  - writ
  - pleadings
    - notice of appearance
    - statement of claim
    - defence
    - reply
    - counter-claims
  - discovery process
    - written interrogatories
    - discovery of documents
    - oral examination
  - judicial case management
  - directions hearings
  - mediation

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- The aim of civil remedies is to restore the parties to their original position before the wrong happened
  - If the court finds a party liable a range of remedies is available
    - damages (compensatory damages, exemplary damages, nominal damages, contemptuous damages)
    - injunctions
    - orders of specific performance
    - restitution
    - rescission.
- Evaluation of civil procedures
  - Both litigation and arbitration provide for a fair and unbiased hearing because the decision is made by an independent and impartial third person.
  - Pre-trial procedures help the timely resolution of disputes by allowing the parties to clarify issues. However, delays in civil cases hinder the timely resolution of disputes.
  - The legal system provides access to arrange of dispute settlement processes and bodies as well as a system for review.

Problems

- Delays
  - Reasons for delays
    - the nature of the claim
    - increase in litigation
    - new technologies that make it easier to ask more pre-trial questions
    - inefficient procedures
    - inadequate court resources to cope with the amount of work.
  - More than half of all civil actions are settled before the commencement of a court hearing.
  - There are delays between the initiation of a case and the listing for hearing to allow for a negotiation process: these may occur as a result of seeking legal advice, or because of collecting relevant information or reports.
  - Mediation and the control of pre-trial stages have been used to reduce delays in the hearing of civil cases.
- Costs
  - The costs of legal representation may deter individuals from taking legal action. Even if you win a case, not all of the costs of going to court may be covered.
  - Costs
    - legal assistance
    - pre-trial procedures
  - Costs can be reduced by:
    - increasing the use of a range of dispute resolution methods
    - legal insurance
    - the use of contingency fees and litigation funders
    - eDiscovery/electronic case management
    - increasing access to legal assistance.
- Recent reforms and recommendations for reforms

End-of-chapter questions

Revision questions

1. Outline the key concepts of the civil justice system.
2. Using examples of courts that you have studied, explain the reasons for a court hierarchy.
3. List what factors an individual should consider before commencing a civil action. Explain.
4. Discuss what methods can be used to resolve civil disputes.
5. Explain why alternative dispute resolution methods such as conciliation and mediation are suitable in resolving civil cases.
6. Explain the role of the Victorian Civil and Administrative Tribunal (VCAT).

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7 To what extent do courts use a range of dispute settlement methods?

8 Outline the responsibilities of the following key personnel in the resolution of a civil dispute:

- **a** the judge
- **b** the jury
- **c** the parties
- **d** legal practitioners.

9 Discuss the appropriateness of the courts, VCAT and CAV as dispute resolution bodies.

10 Explain how the judicial powers of case management promote fairness, equality and access to the civil justice system.

11 Describe the purpose and function of a directions hearing.

12 Outline the purpose of civil remedies.

13 Discuss how delays in the hearing of a civil case can result in injustice.

14 Describe how civil procedures contribute to the achievement of the principles of justice.

15 Outline what impact delays in the hearing of civil cases have on the ability of the civil justice system to achieve justice.

16 Discuss two recent reforms or recommended reforms that aim to increase access for people who cannot afford to take a civil case to court.

Practice exam questions

1 Outline the role of Consumer Affairs Victoria in the resolution of a civil dispute. [2 marks]

2 Explain the role and responsibilities of the judge in the civil justice system. [4 marks]

3 Discuss three factors that an individual would need to take into account before starting a civil action. [6 marks]

4 Explain the burden and standard of proof in a civil case. [2 marks]

5 Carefully read the following case study and answer the following questions.

A man successfully sued a ski-lift operator and was awarded $278,000 compensation after being injured during a ski lesson. The lesson was meant to be conducted on conventional runs. However, some of the skiers in the group became bored and the group was taken to a 'terrain park' used by experienced snowboarders. The man broke his back after falling from a ski jump in the terrain park. He was rushed to hospital and underwent a spinal fusion involving the insertion of screws and titanium plates to prevent the vertebrae from collapsing onto his spinal cord. Following the court decision, the man suggested that this was a case of an instructor not properly looking after students. The jury recognised that ski instructors, like other teachers, had a duty of care to their students.

- **a** Describe the purpose of the processes leading up to the hearing of such a civil claim in a higher court. [8 marks]
- **b** Explain how a directions hearing would have assisted in the preparation of this case for trial. [2 marks]
- **c** In this case a remedy of compensatory damages has been awarded. Explain what compensatory damages are. Describe the purpose of two other remedies that may be awarded by a court. [6 marks]

6 Discuss why delays are a problem in a civil dispute. Evaluate two reasons for delays occurring in the hearing of a civil dispute. [8 marks]

7 Evaluate two recent reforms or two recommended reforms that aim to overcome the problem of delays in the hearing of civil disputes. [8 marks]

8 Explain the reasons for a court hierarchy. [8 marks]

9 Explain the purpose and appropriateness of VCAT. [6 marks]

10 To what extent do the processes and procedures for hearing a civil claim contribute to the effective operation of the civil justice system to achieve the principles of justice? [10 marks]

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UNIT 4
THE PEOPLE AND THE LAW

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CHAPTER 6
THE AUSTRALIAN PARLIAMENTARY SYSTEM

Parliament is our supreme law-making body. This chapter explores the role of parliament in law-making. It also examines the roles played by the Crown and the houses of parliament. In order to understand these roles, it is necessary to learn about the historical development of the Australian parliamentary system.

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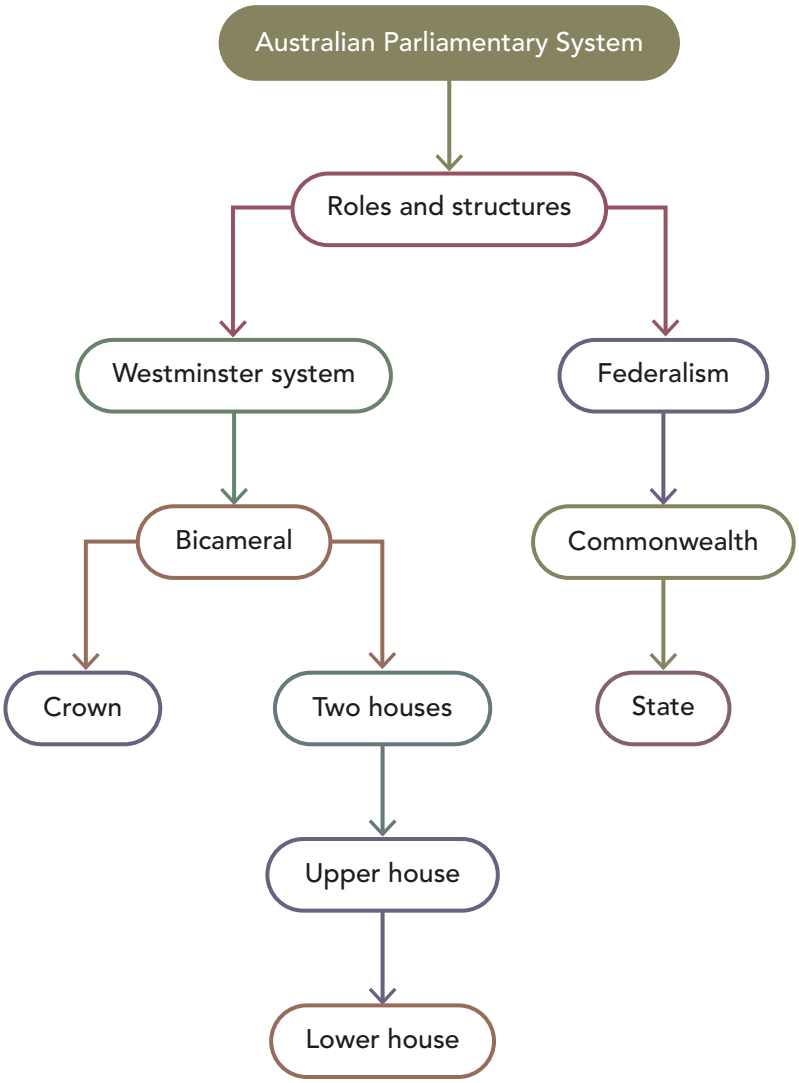

Key terms

bicameral a parliament with an upper and a lower house

Crown the authority of the monarch, represented in Australia by Governors and the Governor-General

Federation the joining together of separate States to form one nation

government the party (or parties in coalition) holding a majority of seats in the lower house

High Court the highest court in Australia, established by the Constitution, and the only court with the authority to interpret the Constitution

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

parliament the supreme law-making body, consisting of elected representatives and the Crown

Senate the upper house of the Commonwealth parliament

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6.1 A Westminster system

Australia adopted the Westminster system from Great Britain.

Australia's legal system is based on the British legal system. Like most countries colonised by Great Britain, Australia adopted the basic structure of the British parliamentary system. This is known as the Westminster system, named after Westminster Palace in London, where the British parliament sits.

Figure 6.1 Bicameral parliament

In the Westminster system, parliament consists of two houses and the Crown.

The Westminster system of parliament consists of two houses and the sovereign. A parliament that consists of two houses is known as a **bicameral** parliament. The monarch is referred to as the **Crown**.

Parliament is the ultimate law-making authority. It is a democratic body that represents and is responsible to the people. The Crown retains the right to accept or refuse proposals passed by both houses of parliament. However, the usual practice is that the Crown accepts laws passed by parliament.

6.2 Parliament in Australia

Both the Commonwealth and Victorian parliaments are based on the Westminster system. The structure of Australia's Commonwealth parliament is formally set out in the Commonwealth Constitution.

Before Federation

WAS AUSTRALIA AN EMPTY LAND?

When the British colonised Australia they brought with them the English legal system. They did not recognise the existence of an Indigenous legal system or the land rights of the Indigenous people. At that time, Australia was considered to be a *terra nullius* – in other words, Australia was considered an empty land. It was not until 3 June 1992, in the famous Mabo case (*Mabo and Others v Queensland (No. 2)* (1902) 175 CLR 1; [1992] HCA 23), that our courts recognised native title, or ownership of land.

Australia was first colonised as a convict colony. These convicts were released after serving their time as prisoners and settled in various parts of the country. Free settlers also arrived and began industries and trade. These settlers wanted representative and responsible **government** in the form of a Westminster-style parliament.

Before Federation, each colony had its own parliament.

This was granted by the British parliament passing a Constitution for each of the colonies (today's States). These constitutions meant that each colony had a parliament with limited law-making powers. Each colony could make its own laws and had its own courts. These courts could hear and determine disputes concerning British laws and laws made by the colony.

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Federation

Between 1881 and 1900, the colonies met to discuss forming a **Federation** of six colonies. The colonies wanted to create a central authority to legislate on national issues. Each colony also wanted to retain the power to govern in its own territory. A federal political system that would balance these interests had to be designed. Some powers had to be set aside for a central authority. Other powers had to be reserved for the colonies.

WHAT IS A FEDERAL SYSTEM?

Australia has a federal system of government. Under this federal system, the country is divided into States. Each State has its own parliament, which can exercise powers relating to certain issues, such as transport, power, water and education. In a federation, the people of the States agree that specified matters are more effectively handled by a national authority than a State body. Therefore the central authority – the parliament of Australia – has the power to make laws about matters that would affect the whole country, such as defence, currency, trade and postal services.

Voting for Federation

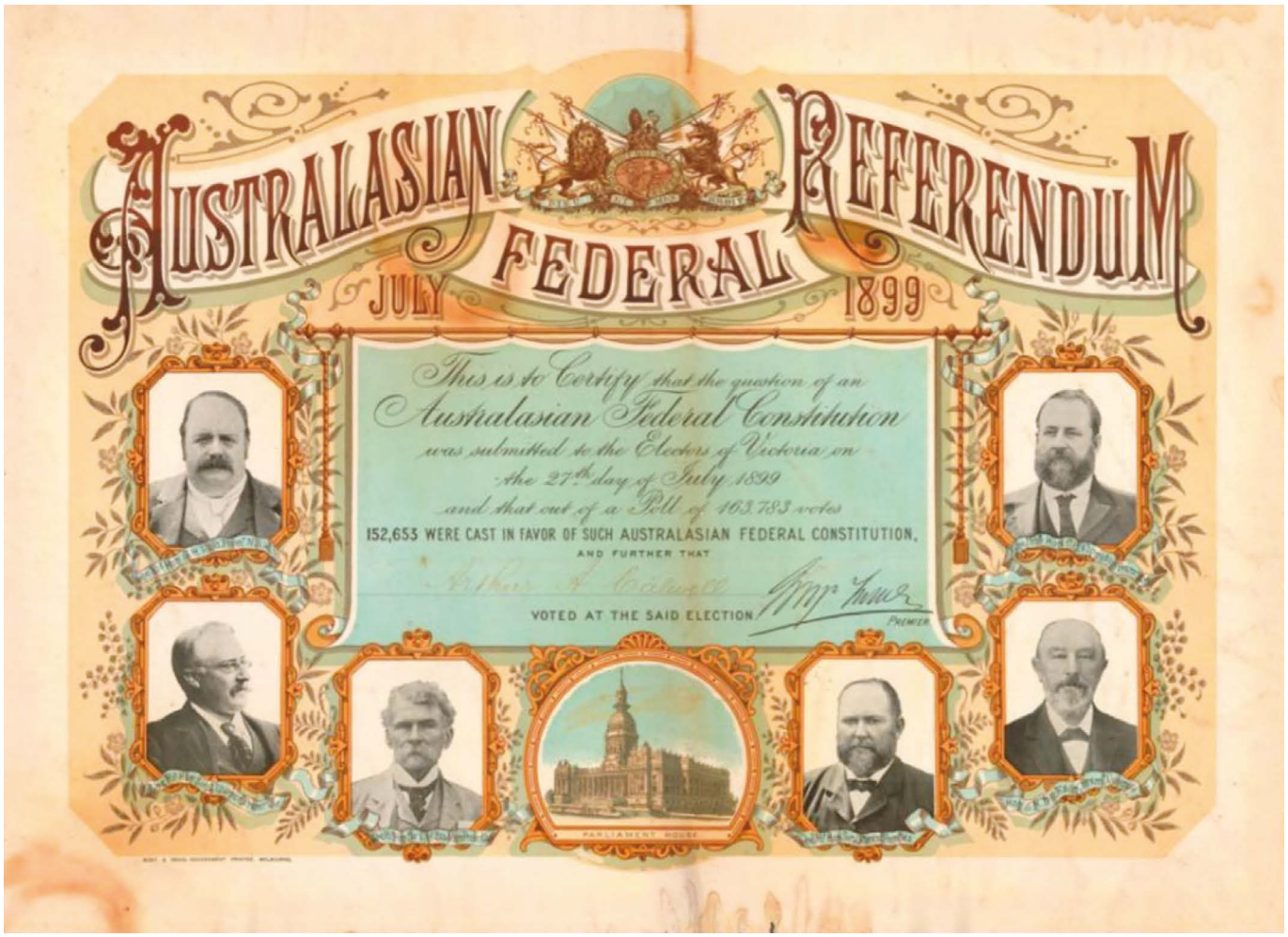

Figure 6.2 Federation Referendum Certificate

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The Constitution

Australia became a federation of States in 1901, when the Australian Constitution came into force.

The Australian Constitution was passed by the British parliament. It came into force on 1 January 1901. The Australian Constitution sets out the structure of the Commonwealth parliament and its powers to make laws. It defines the relationship between the Commonwealth parliament and the State parliaments. It establishes that the Commonwealth parliament has a **House of Representatives** (lower house) and a **Senate** (upper house).

The Constitution also established the **High Court** as the highest Australian court of appeal. When the Constitution came into force, the colonies became known as States. The States had their own parliaments with some of the law-making powers that they exercised as colonies.

Between 1901 and 1986, the historical influence of the British legal system on the Australian parliaments and the courts slowly ended. In 1986 the *Australia Acts* cut the last links between Great Britain and the States. These nearly identical Acts were enacted by the British and Australian parliaments, and they came into force on the same date. The *Australia Acts* established the Australian High Court as the final court of appeal.

The Commonwealth Constitution sets out the structure of the Commonwealth parliament.

The Australian Constitution sets out the three main functions of government:

- the legislative function, including the structure of the Commonwealth parliament and its law-making powers
- the executive (administration) function of government, which includes establishing the Executive Council (the ministers and parliamentary secretaries)
- the judicial function, including establishing the High Court.

The Constitution can be found at www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.aspx.

OUTLINE OF THE COMMONWEALTH CONSTITUTION

Legislative function	**Chapter I** sets out the structure and powers of the Commonwealth parliament. This chapter includes the powers of the Governor-General, the structure of the Senate and the House of Representatives, how elections will be conducted, and the law-making powers of the Commonwealth parliament.
Executive function	**Chapter II** discusses the powers of the executive government and the role of ministers.
Judicial function	**Chapter III** sets out the role of the High Court, the power to establish federal courts and how judges are appointed. This chapter also includes a right to trial by jury (section 80).

	Chapter IV discusses the new Commonwealth government's responsibilities in relation to trade and finance. **Chapter V** recognises the powers of the States and the right of residents of all States to be treated equally, and places some limitations on the powers of the State parliaments. **Chapter VI** sets out how new States may be formed. **Chapter VII** describes how the Australian Capital Territory would be formed. **Chapter VIII** describes the process that is used to change the Constitution.

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6.3 Commonwealth parliament

The Commonwealth parliament is a bicameral parliament. It consists of the House of Representatives (lower house), the Senate (upper house) and the Crown.

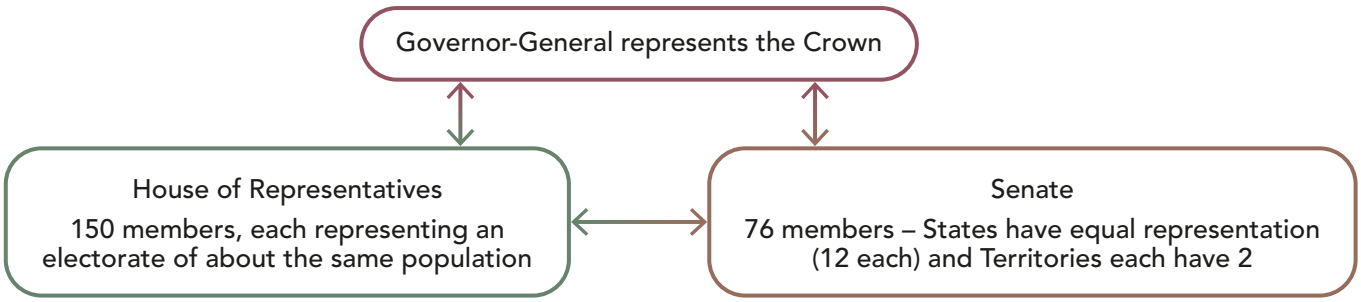

Figure 6.3 Commonwealth parliament

The House of Representatives

The lower house of the Commonwealth parliament is known as the House of Representatives. It consists of 150 members. For the forty-sixth federal election it is proposed that the number of members in the House of Representatives be increased to 151. This change will reflect the growth in population.

For more information on the parliament of Australia, go to www.aph.gov.au.

Members of the House of Representatives are elected to represent areas called electorates. Each electorate is an area with approximately the same number of voters. Voters directly elect one member for their electorate in elections held every 3 years. Members are responsible to the electorate and represent the interests of the people in their electorate.

The House of Representatives is designed to represent the interests of the majority of people in Australia. For this reason it is sometimes referred to as the 'people's house'. The House of Representatives also plays an important role in the formation of government. The political party that wins a majority of seats in the House of Representatives forms government. For this reason it is sometimes referred to as the 'house of government'.

The House of Representatives is the lower house, and represents the interests of the majority of people.

HOW MANY REPRESENTATIVES?

The number of representatives from any State varies according to the population of the State. The Constitution allows parliament to increase or decrease the total number of members in the House of Representatives. This is to meet the requirement that the number of members shall be as near as practicable to twice the number in the Senate. The Constitution also states that no State shall have fewer than five representatives.

The role of the House of Representatives

The main function of the House of Representatives is to make laws. It shares this function with the Senate. A Bill (a proposed new law) must be passed by both the House of Representatives and the Senate before it can become law (it is then called an Act). Any member of the House of Representatives can introduce a proposal for a new law. However, most Bills come from members of the government. To become a law, the Bill must receive the approval of both houses of parliament and royal assent. It can be amended by both houses of parliament.

The role of the House of Representatives includes making laws, representing the majority and forming government.

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Other key roles of the House of Representatives include:

- **Determining government:** The party, or parties in coalition, with a majority in the lower house forms government. To remain in government, the party must maintain the support of the majority of members in the lower house.
- **Providing for representative government:** Members of the House of Representatives are elected to represent areas of approximately the same number of electors. The electoral system ensures that the House of Representatives represents the interests of the majority of voters.
- **Providing for responsible government:** Individual members of the House of Representatives have the opportunity to present the views of their electorate by presenting petitions or raising issues with ministers during Question Time.
- **Scrutinising government:** The House of Representatives plays an important role in providing for responsible government. In the House of Representatives, legislation is debated, ministers make policy statements, matters of public importance are discussed, and ministers are questioned during Question Time.
- **Controlling government spending:** The government can only collect taxes or allocate the spending of public money if a law is passed by parliament.

Figure 6.4 House of Representatives

The Senate

The Senate is the upper house. Each State elects 12 senators and each Territory elects two.

The Senate consists of 76 members. Each State elects 12 representatives and each Territory elects two. This system guarantees equal representation for each State irrespective of its population. The Commonwealth Constitution maintains a balance of numbers between the lower house and the upper house by ensuring that the lower house has roughly double the number of members of the upper house.

The Senate is directly elected by all Australians who qualify to vote. Voting is conducted according to the proportional representation system: groups and independent candidates are elected to the parliament in proportion to the number of votes they receive. With the exception of financial Bills, the Senate has powers equal to those of the House of Representatives.

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Senators are elected for a term of 6 years. Half the Senate retires every 3 years. Whenever possible, these elections are held at the same time as the election for the House of Representatives. All members of the House of Representatives must be elected every 3 years. The Senate therefore provides stability as well as ongoing membership.

The role of the Senate

The role of the Senate includes making laws, reviewing laws and representing the interests of the States.

The Senate shares a role in law-making with the House of Representatives. A Bill must be passed by both the Senate and the House of Representatives to become a law. Most Bills are proposed by the government and start in the House of Representatives, but new laws can also start in the Senate.

Other key functions of the Senate include:

- **Reviewing laws:** The Senate provides for the review of legislation passed by the House of Representatives. Historically, the upper house has the responsibility to check legislation passed by the lower house. For this reason the Senate is sometimes referred to as the 'house of review'. The Senate can originate, amend or reject any proposed law.
- **Providing for representative government:** A function of the Senate is to safeguard the interests of the States. As each State elects an equal number of senators, the Senate provides for equal representation among the States. For this reason the Senate is sometimes called the 'States' house'.
- **Providing for responsible government:** The party, or parties in coalition, with a majority in the House of Representatives does not need a majority in the Senate to form government. When the Senate is not composed of a majority of senators from the party or parties forming government it can exert considerable influence on the government and make it account for its actions and proposals. Individual senators also have the opportunity to present petitions and to raise issues during Question Time.
- **Scrutinising government:** Like the House of Representatives, the Senate has responsibility for supervising administrative laws, protecting the rights of citizens, presenting conflicting views in open debate, and gathering and disseminating information. When the government does not hold a majority of seats in the Senate, the Senate can question government actions very effectively.

Figure 6.5 The Senate

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NEWSREPORT 6.1

Pressures to legislate

THE PRESSURES ON MODERN PARLIAMENTS ARE enormous, due to the volume of legislation. In 1901, the first year of the Commonwealth of Australia, parliament passed 17 laws. That year, parliament passed an Act every 16 or 17 days. In its first 10 years, it averaged about 23 laws a year. In 1952, the parliament passed more than 100 Acts. Now the House of Representatives spends, on average, only 2 or 3 hours on each Bill it considers.

With this pressure on parliaments, the existence of the Senate is sometimes questioned. This usually happens when legislation is being blocked in the upper house, frustrating the government. When this situation occurs, there are often public debates about the effectiveness of the Senate and the cost of having a second chamber.

Other crucial roles of the Senate

The writers of the Constitution believed that the primary role of the Senate was to protect the interests of the less populous States by giving representation to all States. It has virtually equal power with the House of Representatives to make laws. Although the government is formed by the party, or coalition of parties, with a majority in the House of Representatives, they do not have to hold a majority of seats in the Senate. The upper house can therefore force the government to account for its actions. The Senate can withhold finance by rejecting the money Bills, which impose tax or appropriate revenue in other ways.

The Senate keeps a check on government by scrutinising Bills, delegated legislation (laws made by subordinate authorities) and government administration. This is done through procedures (such as Question Time) in the Senate chamber, and through the operation of the Senate committee system.

Strengths of the Senate

The Senate has a number of strengths. Besides the power to veto legislation, the Senate:

- forms an integral part of the doctrine of the separation of powers. The Senate provides for checks and balances on the power of the executive. It can make the government accountable and expose misconduct.
- reviews legislation to improve Bills with amendments or to defeat what it considers unwise legislation
- has been mostly outside the control of the government of the day, be it Liberal/National or Labor: the government of the day often does not have a majority in the Senate
- provides a broader sense of representation: residents of small States and supporters of opposition parties receive better representation (in the sense of having a higher number of representatives) in the Senate than in the House of Representatives
- allows for input from small parties by providing opportunities for them to discuss their ideas for new policies: small party representation helps foster respect for the diversity of the Australian community
- has a committee process that allows time for detailed study of issues
- allows citizens to express their views to parliament through the presentation of petitions: this function can be more effective in the Senate than in the House of Representatives, because it is more likely that minor parties are represented there and the committee system is better developed
- sits for longer and devotes more time to individual pieces of legislation than the House of Representatives: it is likely to consider more amendments from senators representing minor parties.

Weaknesses of the Senate

The Senate is not a perfect institution. Its weaknesses include:

- senators vote according to party policies – this may override the original function of the Senate to represent the interests of the States
- empowering small parties – such as the Greens – who may effectively have the power to veto laws supported by the majority party in the lower house
- the disproportionate representation of small States and Territories: Tasmania, with a relatively small population, has 12 senators, but the ACT and Northern Territory each have only 2 senators – in 2010, the 12 senators from NSW represented about 4,591,748 voters, while the 12 Tasmanian senators represented 357,873 voters. There are also questions around the cost of providing such representation.
- 6-year terms can insulate senators from the full impact of changes in the views of the electorate, and may thus diminish the degree to which senators are responsive to the electorate.

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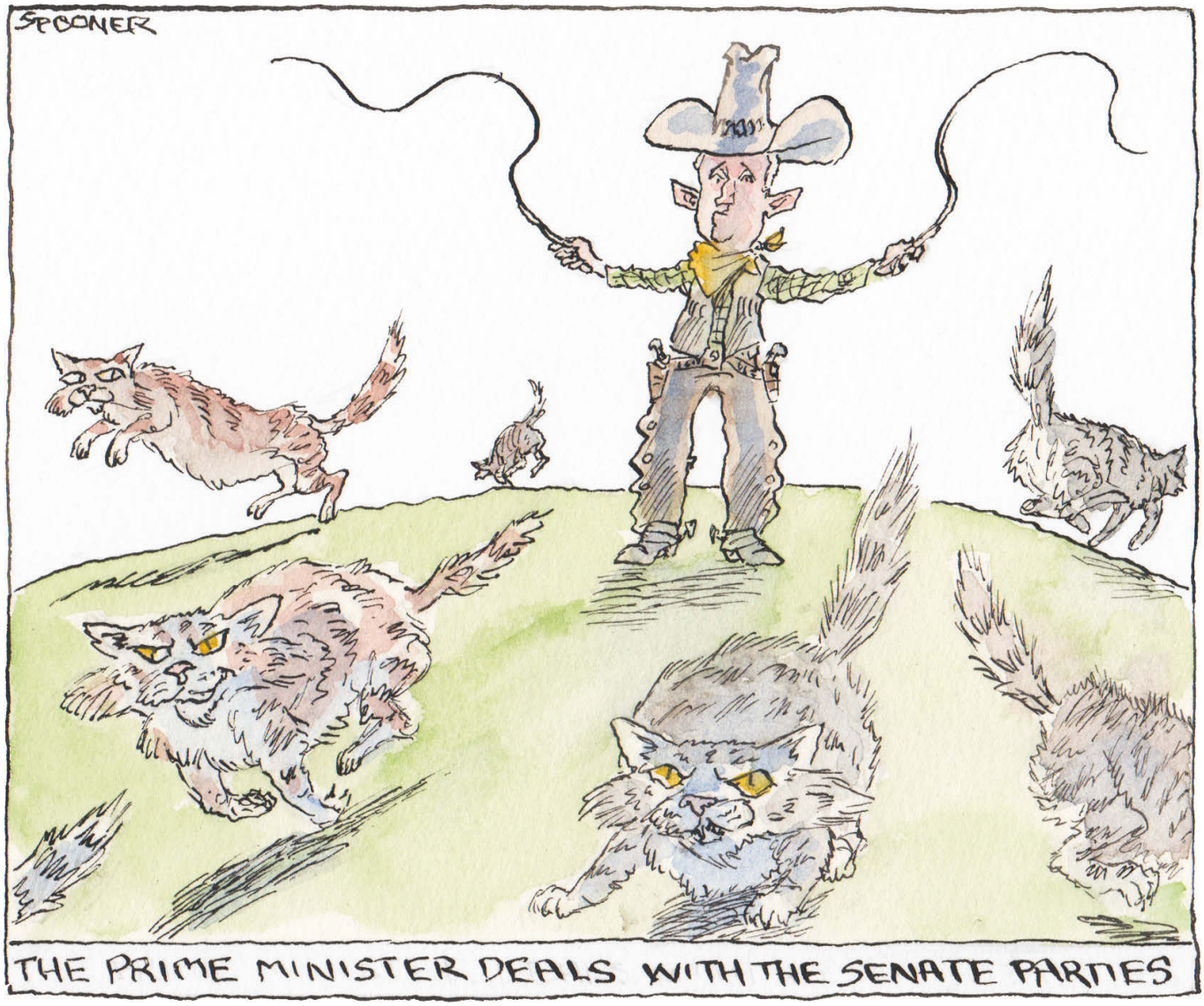

Activity 6.1 Folio exercise

The role of the Senate

Read 'Pressures to Legislate' and complete the following tasks:

1 Outline the differences between the role of the House of Representatives and the role of the Senate.
2 What do you consider to be the two most important roles of the Senate? Justify your view.
3 What do you consider to be the two most significant weaknesses of the Senate? Explain.
4 How do you think the bicameral structure of parliament provides for effective law-making?

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The Crown

The Governor-General represents the Crown.

The Queen, on the recommendation of the Prime Minister, appoints the Governor-General. The Governor-General represents the Crown, and exercises the powers and functions given to the position by the Constitution. The Governor-General acts on the advice of the Executive Council.

For more information about the Governor-General of Australia, go to www.gg.gov.au.

Role of the Governor-General

The role of the Governor-General includes granting royal assent, issuing writs for elections and proroguing parliament.

The powers of the Crown include:

- to grant royal assent to legislation
- to appoint the times for the holding of parliament
- to bring to an end a session of parliament without dissolving it (to prorogue the parliament)
- to dissolve the House of Representatives and bring about an election
- to cause writs to be issued for the general election of members of the House of Representatives
- to choose and summon executive councillors (ministers and parliamentary secretaries) and to appoint ministers of state for Australia.

The Governor-General has wide powers as a representative of the Crown. He or she can dissolve both houses of parliament. This action effectively dismisses the elected government and results in an election. This happened in 1975 when Governor-General Sir John Kerr dismissed the Whitlam Government.

CROWN OR REPUBLIC?

The Crown is formally the Head of State in Australia. There has been a continuing debate in Australia about the appropriateness of the Queen still holding this position. In 1998, a Constitutional Convention was held to consider alternatives. In 1999, following the Convention, a referendum was held. Australians were asked to vote on whether Australia should become a republic. The referendum proposal was not successful.

Ten years later the republic debate was raised again. In 2009 a Senate committee investigated a proposal for a plebiscite referendum on the issue. A plebiscite or advisory referendum would require a simple 'Yes' or 'No' to a question. In the event of a 'Yes' vote, the details of a model for a republic would be determined later. The Committee recommended a further education campaign on the issue.

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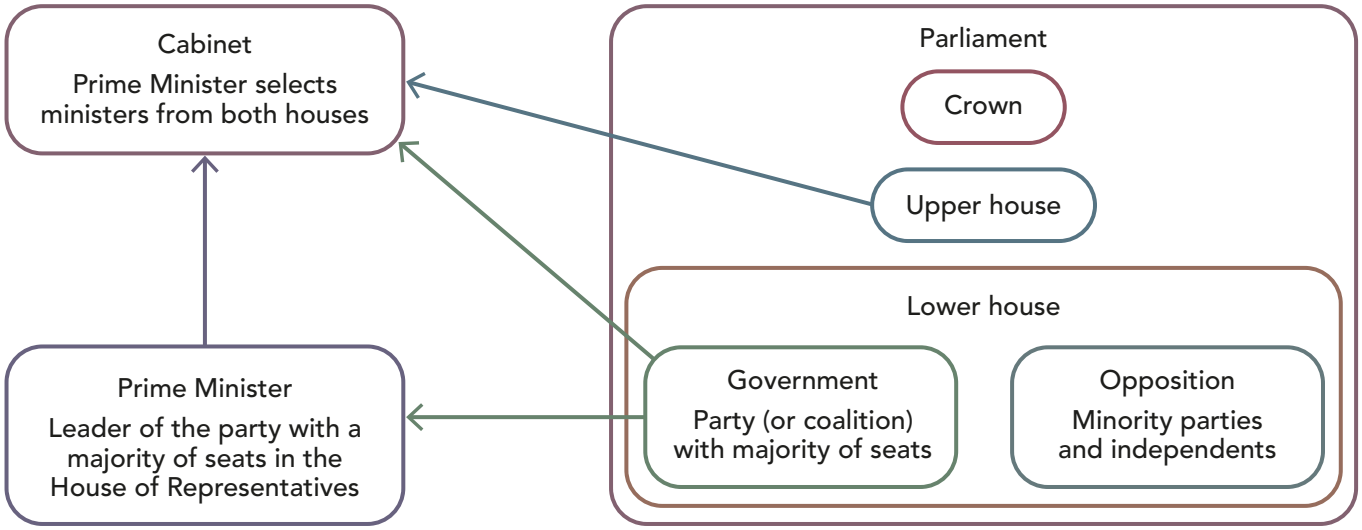
Legal brief 6.1

How is government formed?

The political party, or parties in a coalition, with a majority of members elected to the lower house (House of Representatives) forms the government. The minority party or parties form the opposition. The State government is formed in the same way.



How is a Prime Minister selected?

The leader of the party that holds a majority in the House of Representatives becomes the Prime Minister. At a State level, the Premier is selected in a similar manner.

What is a minister?

The Prime Minister recommends other members of the majority party (or parties in coalition) to the Governor-General to be appointed as ministers of state.

A minister is responsible and answerable to parliament for the actions of a government department. (For example, the Minister for Resources, Energy and Tourism is responsible for the Department or Departments of Resources, Energy and Tourism.) A minister must be a member of parliament; they may be a member of either the House of Representatives or the Senate. Each minister has a portfolio. A portfolio is a special area of responsibility.

The minister is responsible to the Governor-General, the Prime Minister and to the members of both houses. Ministers can be asked to answer questions on all aspects of the departments for which they are accountable. This is a key feature of responsible government. At a State level, ministers are responsible to the Governor, the Premier and the State parliament.

What is Cabinet?

Cabinet is a meeting of ministers. Members of Cabinet form the Executive Council. Most members of Cabinet are ministers 'with portfolio'. This means that they are in charge of government departments. The members of Cabinet determine the general policy of the government. Most Bills are approved by Cabinet before they are presented to the parliament.

The way Cabinet works is not set out in the Constitution. Cabinet operates according to practices inherited from the Westminster system, which are designed to reflect the principles of responsible government. They include:

- The Governor-General will act on the advice given by ministers in Cabinet (the Executive Council).
- Ministers who are members of Cabinet come from the party that has a majority in the House of Representatives.
- Ministers are expected to resign if their house of parliament passes a motion of no confidence in them.
- Ministers are responsible to parliament for the activities and decisions of their government departments. They are expected to answer questions during Question Time in parliament.

All ministers are responsible for the decisions made by the Cabinet. This is known as collective responsibility: members of Cabinet are expected to publicly support all decisions made in Cabinet.

What is the Executive Council?

The Commonwealth Constitution provides for a Commonwealth Executive Council. The Governor-General acts on the advice given by this Executive Council. The Executive Council is made up of the ministers and parliamentary secretaries.

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6.4 Victorian parliament

The Victorian parliament is also a bicameral parliament. It consists of the **Legislative Assembly** (lower house), the **Legislative Council** (upper house) and the Crown.

The Legislative Assembly

The Legislative Assembly is the lower house representing the interests of the majority of people.

The Legislative Assembly is the lower house of the Victorian parliament. It consists of 88 representatives. Members are elected from electorates. Each electorate represents an area within Victoria of approximately the same population. Members of the Legislative Assembly are elected every 4 years.

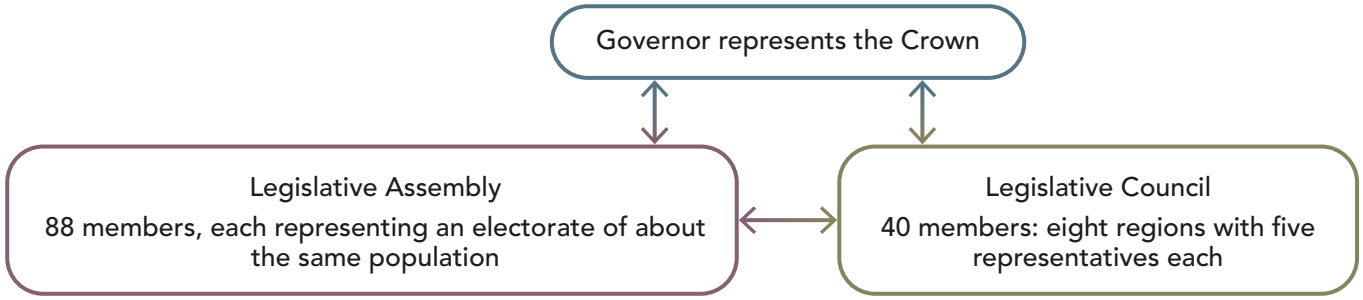

Figure 6.6
Victorian parliament

The role of the Legislative Assembly

The role of the Legislative Assembly includes making laws, representing the majority and forming government.

The Legislative Assembly performs a role similar to that of the House of Representatives. The main function of the Legislative Assembly is to make laws; it shares this role with the Legislative Council. To become a law, the proposal must receive the approval of both houses of parliament and royal assent from the Governor.

Other key functions include:

- **Determining government:** The party, or parties in coalition, with a majority in the lower house forms government.
- **Providing for representative government:** Members of the Legislative Assembly are elected to represent areas of approximately the same number of electors. The electoral system ensures that the Legislative Assembly represents the interests of the majority of voters.

For more information on the Victorian parliament, go to www.parliament.vic.gov.au.

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- **Providing for responsible government:** Individual members of the Legislative Assembly have the opportunity to put forward the views of their electorate by presenting petitions or raising issues with ministers during Question Time.
- **Scrutinising government:** The Legislative Assembly plays an important role in providing for responsible government. Legislation is debated, ministers make policy statements, matters of public importance are discussed and ministers are questioned during Question Time.
- **Controlling government spending:** The government can only collect taxes or allocate the spending of public money if a law is passed by parliament.

Figure 6.7 Legislative Assembly

The Legislative Council

The Legislative Council is the upper house of the Victorian parliament. It consists of 40 members representing eight regions. Each region is made up of 11 electoral districts, each of about 470,000 electors. Each region elects five representatives. Members of the Legislative Council are elected for 4 years.

The Legislative Council is the upper house, and represents the interests of the people in different areas.

The role of the Legislative Council

The Legislative Council plays an important role in law-making. A Bill must be passed by both the Legislative Assembly and the Legislative Council before it can become law. Most laws are proposed by the government and therefore start in the Legislative Assembly, but they can also start in the Legislative Council.

The role of the Legislative Council includes making laws, reviewing laws and representing the interests of different regions.

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Other key functions include:

- **Reviewing laws:** The Legislative Council provides for the review of legislation passed by the Legislative Assembly. The Legislative Council can originate, amend or reject proposed laws (except an appropriation Bill: in this context 'appropriation' means the spending of money, so appropriation Bills are where the government tries to get the permission of parliament to spend money on the programs it wants to implement).
- **Providing for representative government:** A function of the Legislative Council is to safeguard the interests of people in all areas of Victoria. As each region elects an equal number of representatives, the Legislative Council provides equal representation of all areas in the state.
- **Providing for responsible government:** The party, or parties in coalition, with a majority in the Legislative Assembly does not need a majority in the Legislative Council to form government. When the Legislative Council is not composed of a majority of members from the party forming government it may be more forceful in requiring the government to account for its actions. In addition, individual members have the opportunity to present petitions and to raise issues during Question Time.
- **Scrutinising government:** Like the Legislative Assembly, the Legislative Council can supervise administrative laws, protect the rights of citizens, present conflicting views in open debate, and gather and disseminate information. When the Legislative Council is not composed of a majority of members from the party forming government it may more effectively question government actions.

Figure 6.8 Legislative Council

CAN THE LEGISLATIVE COUNCIL BLOCK SUPPLY?

The Legislative Council cannot block supply. A supply Bill is an appropriation Bill concerned with taxation or government spending. The Council can debate and consider appropriation Bills. The Legislative Council has one month to consider such Bills. If in that time the Legislative Council does not pass the Bill, it will automatically be presented to the Governor for royal assent.

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The Crown

At a State level, the Crown is represented by the Governor. The role of the Governor is similar to the role of the Governor-General.

The role of the Governor

The powers of the Governor include:

- to grant royal assent to legislation
- to appoint the times for the holding of parliament
- to bring to an end a session of parliament without dissolution (to prorogue the parliament)
- to dissolve the parliament and bring about an election
- to cause writs to be issued for the general election
- to appoint ministers of state for Victoria.

The role of the Governor includes granting royal assent to Bills, issuing writs for elections and proroguing parliament.

For more information on the Victorian Governor, go to www.governor.vic.gov.au.

Activity 6.2 Folio exercise

Parliament online

Using the Australian parliament's homepage (www.aph.gov.au), complete the following research on the role of the Commonwealth parliament:

1 Go to 'House of Representatives'. Go to 'About the House of Representatives'. Complete the following tasks:
   - The House of Representatives is sometimes called the 'people's house' or the 'house of government'. Explain.
   - How often are elections held for the House of Representatives?
   - Go to 'Seating Plan for the House of Representatives'. Design a diagram to explain the composition of the House of Representatives.

2 Go to 'About the House of Representatives'. Go to 'Infosheet 19'. Go to 'The House, Government and Opposition'. Complete the following tasks:
   - Explain the role of the government and the opposition in the House of Representatives.
   - How is government formed?
   - Describe the role of the following: Prime Minister, Leader of the Opposition, ministers, whips, backbenchers and shadow ministers.

3 Go to 'Senate'. Go to 'About the Senate'. Complete the following tasks:
   - What is the role of the Senate?
   - How often are elections held for the Senate?

4 Prepare a written response to the following by drawing on the material covered in your internet research and notes taken from the text:
   - Describe the structure of the Commonwealth parliament.
   - Describe the role and function of each house of the Commonwealth parliament.

5 Draw up a chart like the one below. Suggest the differences and similarities between the Commonwealth parliament and the Victorian parliament for each feature listed.

	Similarities	Differences
Upper house		
Lower house		
Crown		

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Key point summary

Do your notes cover all of the following points?

- ❑ Structure of parliament and the roles played by the two houses and the Crown
  - Australia is a federation of States.
  - The structure of parliament in Australia is based on the British Westminster model.
  - The Commonwealth parliament and the Victorian parliament are bicameral.
- ❑ Commonwealth parliament
  - It consists of the House of Representatives (lower house), Senate (upper house) and the Governor-General (Crown).
  - The House of Representatives consists of 150 members and is designed to represent the interests of the majority of people. Each member represents an electorate of approximately the same number of electors. Government is formed by the party with a majority in the House of Representatives.
  - The Senate consists of 76 senators: 12 from each State and 2 from each Territory. The Senate provides:
    - equal representation of all States
    - review of legislation passed by the lower house.
- ❑ The role of the Governor-General
  - The Crown is represented by the Governor-General at a federal level. Powers include:
    - royal assent to legislation
    - appointing parliament's sitting times
    - dissolving or proroguing parliament
    - issuing writs for general elections
    - appointing ministers and other officials.
- ❑ Victorian parliament
  - It consists of the Legislative Assembly (lower house), Legislative Council (upper house) and the Governor (Crown).
  - The Legislative Assembly consists of 88 members and is designed to represent the interests of the majority of people. Each member represents an electorate of approximately the same number of electors. Government is formed by the party with a majority in the Legislative Assembly.
  - The Legislative Council consists of eight regions, each with five members, and provides:
    - equal representation of all regions
    - review of legislation passed by the lower house.
- ❑ The role of the Governor
  - The Crown is represented by the Governor at a State level. Powers include:
    - royal assent to legislation
    - appointing parliament's sitting times
    - dissolving or proroguing parliament
    - issuing writs for general elections.

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End-of-chapter questions

Revision questions

1 Outline the structure of the Victorian parliament and of the Commonwealth parliament.

2 Describe the role of the lower house in both the Commonwealth and the Victorian parliament.

3 Describe the role of the upper house in both the Commonwealth and the Victorian parliament.

4 Distinguish between the roles of the houses of parliament and the Crown in the Australian parliamentary system.

Practice exam questions

1 Outline the structure of the State and Commonwealth parliaments. [6 marks]

2 Identify two roles played by the Crown in the Australian parliamentary system. [2 marks]

3 Explain the role played by each of the houses of parliament and the relationship between the two houses. [6 marks]

4 'The lower house provides for the interests of the majority of people to be represented. We do not need a Senate.' Do you agree? Justify your decision. [6 marks]

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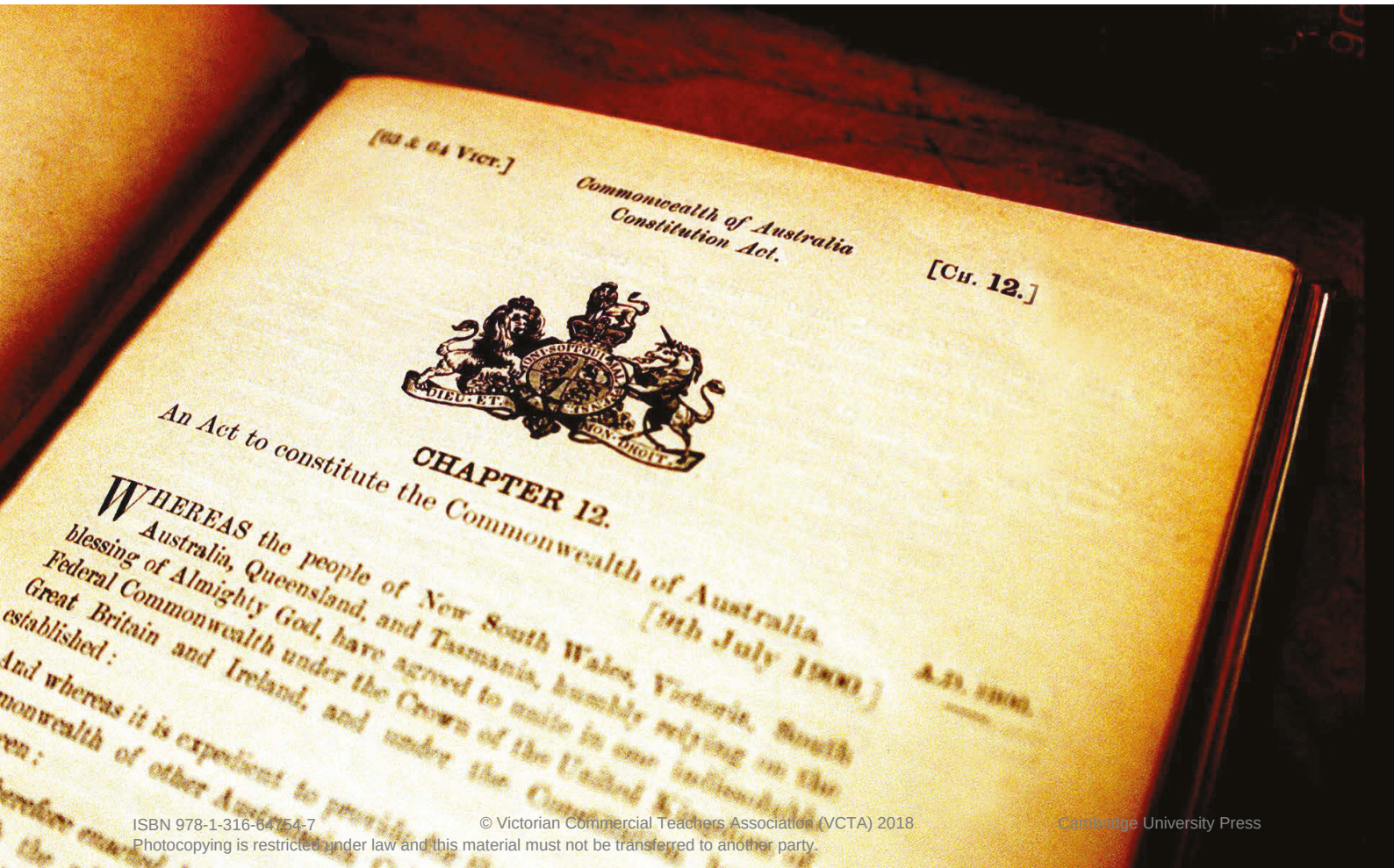
CHAPTER 7
THE PEOPLE AND THE AUSTRALIAN CONSTITUTION

This chapter focuses on exploring the relationship between the people and the Australian Constitution. We begin by exploring the constitutional division of law-making powers of the State and Commonwealth parliaments and the significance of section 109 of the Australian Constitution in relation to these powers. The Australian Constitution also acts as a check on parliament in law-making and we explore the mechanisms that ensure that parliament does not make laws beyond its powers.

We also explore the role of the people in protecting and changing the Constitution by looking at the referendum process, the role of the High Court as a guardian of the Australian Constitution and the impact of international declarations and treaties on the interpretation of the Commonwealth's external affairs power.



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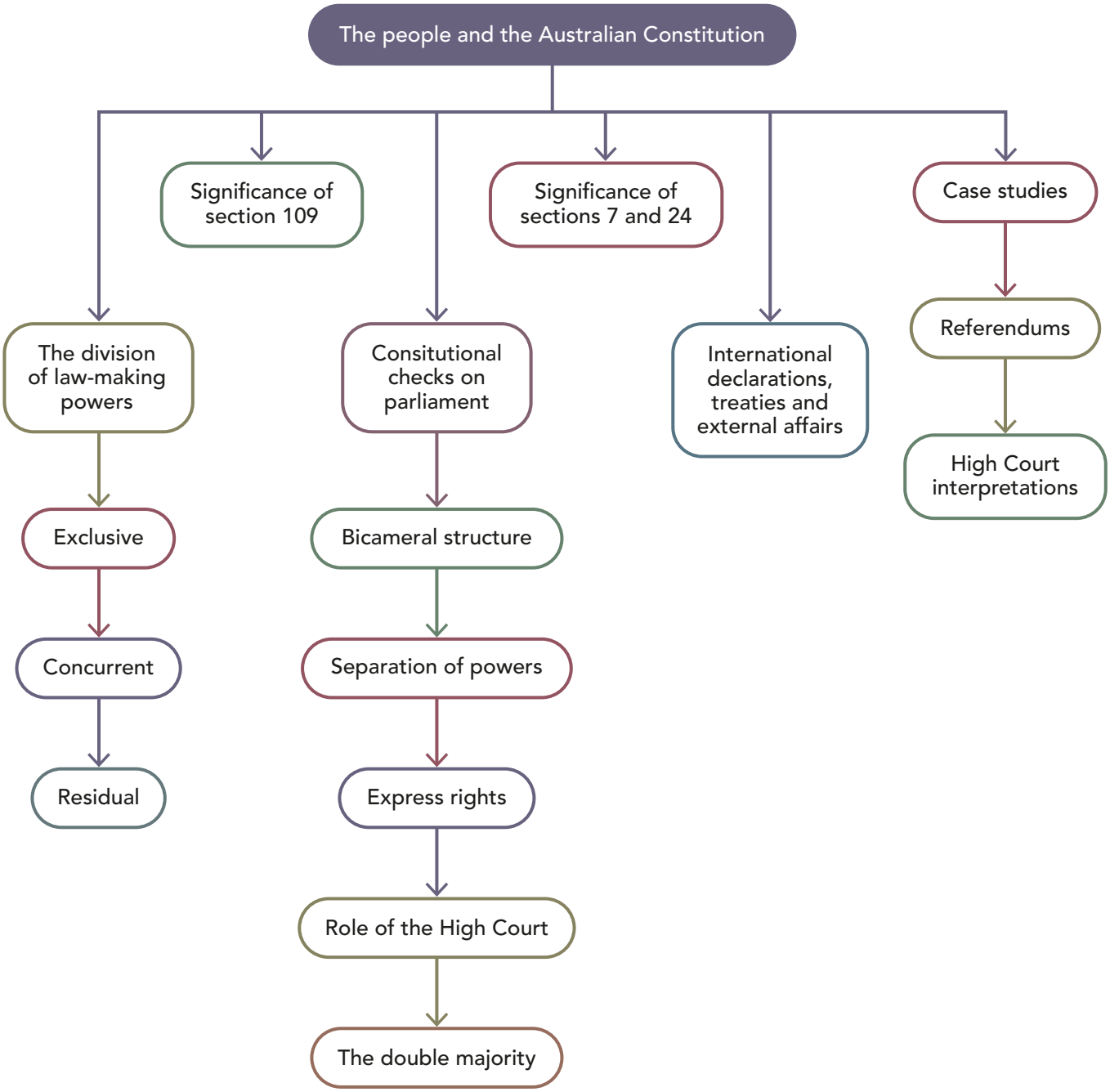

Key terms

bicameral a parliament with an upper and a lower house

concurrent powers specific law-making powers in the Constitution that may be exercised by both the Commonwealth and State parliaments

constitution a set of rules or principles according to which a state or other organisation is governed

division of powers the system in which law-making powers are divided between the Commonwealth and the States

double majority for a referendum to be passed it must have a 'yes' vote from the majority of electors overall, plus a 'yes' vote from the majority of electors in the majority of States

exclusive powers law-making powers set out in the Constitution that may only be exercised by the Commonwealth parliament

express rights a right that is entrenched within the Australian Constitution

High Court the highest court in Australia, established by the Constitution, and the only court with the authority to interpret the Constitution

referendum the process set out in section 128 of the Constitution to allow the Constitution to be formally altered

residual powers law-making powers that remained with the State parliaments after Federation

separation of powers the division of powers of government among legislative, administrative and judicial bodies to provide a system of checks and balances

specific powers the legislative powers of the Commonwealth parliament stated (specified) in the Commonwealth Constitution

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7.1 The Australian Constitution

Before 1901, Australia was six separate colonies that were all self-governing. During the 1890s a series of conventions were held to draw up a draft Constitution for the coming nation. Each colony was represented. The Constitution had to be passed by the British parliament, because they still had ultimate control over the colonies. The British Act was passed in 1900 and took effect on 1 January 1901. This Act is *The Commonwealth of Australia Constitution Act 1900* (UK). The Commonwealth was born.

The Australian Constitution established the guidelines for a Federation: it distributed powers between the Commonwealth and the six States, set out the structure of the Australian parliament and its power to make laws, and defined the relationship between the Australian parliament and the States and their parliaments.

Since 1901 there have been some alterations to the Australian Constitution, which demonstrates that it is indeed a living document.

ALTERATIONS TO THE AUSTRALIAN CONSTITUTION

- Constitution Alteration (Senate Elections) 1906 (No. 1 of 1907)
- Constitution Alteration (State Debts) 1909 (No. 3 of 1910)
- Constitution Alteration (State Debts) 1928 (No. 1 of 1929)
- Constitution Alteration (Social Services) 1946 (No. 81 of 1946)
- Constitution Alteration (Aboriginals) 1967 (No. 55 of 1967)
- Constitution Alteration (Senate Casual Vacancies) 1977 (No. 82 of 1977)
- Constitution Alteration (Retirement of Judges) 1977 (No. 83 of 1977)
- Constitution Alteration (Referendums) 1977 (No. 84 of 1977)

THE AUSTRALIAN PEOPLE AND THE CONSTITUTION

In reality, … the Constitution is a document which was conceived by Australians, drafted by Australians and approved by Australians.

Since that time, Australia has become an independent nation, and the character of the Constitution as the fundamental law of Australia is now seen as resting predominantly, not on its status as an Act of the British Parliament, which no longer has any power over Australia, but on the Australian people's decision to approve and be bound by the terms of the Constitution.

What has been judicially described as 'the sovereignty of the Australian people' is also recognised by section 128, which provides that any change to the Constitution must be approved by the people of Australia.

From Australia's Constitution. Background information: with overview and notes by the Australian Government Solicitor

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7.2 Division of law-making powers

Figure 7.1 shows the division of law-making powers under the Australian Constitution and the way inconsistencies between State and Commonwealth legislation are resolved.

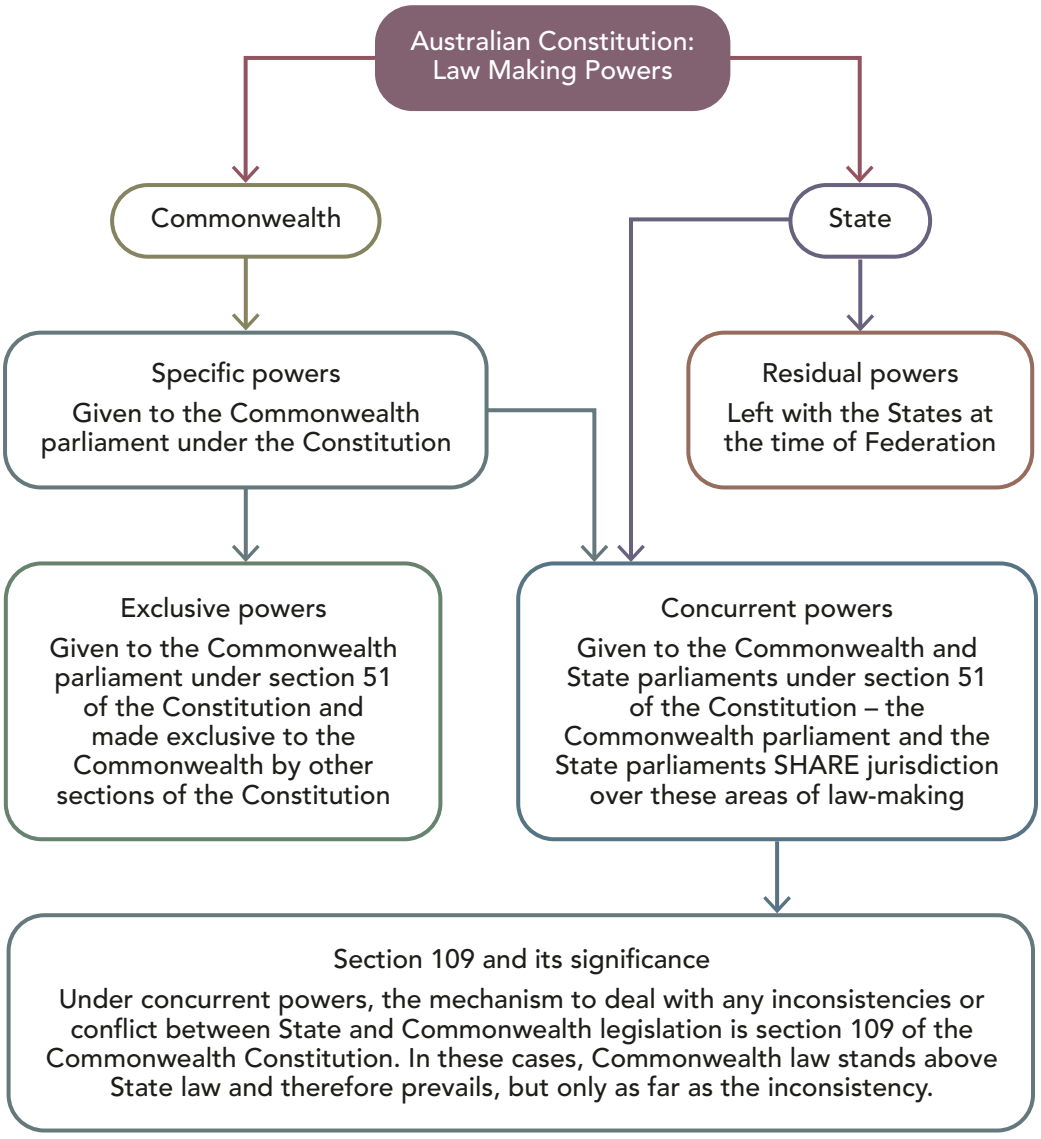

Figure 7.1 The division of law-making powers in the Australian Constitution

How does the Constitution divide law-making power?

The **Constitution** divides the law-making powers between the Commonwealth parliament and State parliaments. All powers of the Commonwealth parliament are listed in the Constitution. These powers are known as **specific powers**, and are mentioned separately or named one by one.

The Constitution states the law-making powers of the Commonwealth.

Most of the specific powers of the Commonwealth parliament are listed in sections 51 and 52 of the Constitution.

Under section 51 of the Constitution, the Commonwealth parliament may make laws 'for the peace, order and good government of the Commonwealth' in respect of any of the categories listed. These include taxation, external affairs and immigration.

Sections 51 and 52 list the powers of the Commonwealth parliament, or specific powers.

Section 52 states areas in which the Commonwealth parliament has exclusive power. Some law-making powers listed in section 51 may be used only by the Commonwealth parliament; others may be used by the Commonwealth and State parliaments concurrently.

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THE CONSTITUTION – SECTIONS 51 AND 52

Part V – Powers of the parliament

51 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:

(i) trade and commerce with other countries, and among the States;

(ii) taxation; but so as not to discriminate between States or parts of States;

(iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;

(iv) borrowing money on the public credit of the Commonwealth;

(v) postal, telegraphic, telephonic, and other like services;

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

(vii) lighthouses, lightships, beacons and buoys;

(viii) astronomical and meteorological observations;

(ix) quarantine;

(x) fisheries in Australian waters beyond territorial limits;

(xi) census and statistics;

(xii) currency, coinage, and legal tender;

(xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;

(xv) weights and measures;

(xvi) bills of exchange and promissory notes;

(xvii) bankruptcy and insolvency;

(xviii) copyrights, patents of inventions and designs, and trade marks;

(xix) naturalisation and aliens;

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) marriage;

(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) invalid and old-age pension;

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances;

Exclusive powers

Exclusive powers are law-making powers that can only be used by the Commonwealth.

An **exclusive power** is a law-making power that is not shared with any other law-making authority. An exclusive Commonwealth power is a law-making power that can be exercised only by the Commonwealth parliament.

Section 52

All the powers in section 52 are exclusive powers.

All the powers in section 52 are exclusive. Section 52 states that the Commonwealth parliament has the exclusive power to make laws about:

- the Australian Capital Territory
- matters relating to the control of the public service
- other matters declared by the Constitution to be within the exclusive power of the Commonwealth parliament.

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(xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the State;

(xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) the people of any race for whom it is deemed necessary to make special laws;

(xxvii) immigration and emigration;

(xxviii) the influx of criminals;

(xxix) external affairs;

(xxx) the relations of the Commonwealth with the islands of the Pacific;

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) railway construction and extension in any State with the consent of that State;

(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or office of the Commonwealth.

52 Exclusive powers of the parliament

The Parliament shall, subject to this Constitution, have exclusive power to make laws for 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.

Section 51

Many of the exclusive powers of the Commonwealth parliament are stated in section 51 of the Constitution. However, not all of the powers set out in section 51 are exclusive. To understand which powers in section 51 are the exclusive powers of the Commonwealth parliament you may need to look at other sections of the Constitution.

Some powers in section 51 are exclusive.

Exclusive by nature

Some powers are exclusive to the Commonwealth because of what they are about. In other words, they are exclusive because they refer to things that only a Commonwealth parliament can do. An example of this is section 51(iv): 'Borrowing money on the public credit of the Commonwealth'. Other examples are sections 51(xxiv), (xxv), (xxx), (xxxi), (xxxiii), (xxxvi) and (xxxviii).

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Exclusive because States are prohibited

Making laws about currency is an exclusive power.

Some powers listed in section 51 can be used only by the Commonwealth parliament. For example, section 51(xii) gives the Commonwealth parliament the power to make laws about currency, coinage and legal tender. Section 115 declares: 'A state shall not coin money, nor make anything but gold and silver coin legal tender in payment of debts.' Thus, section 51 gives the power to make laws about currency to the Commonwealth parliament, and section 115 specifically prohibits States from coining money. Therefore, only the Commonwealth parliament has the power to coin money. The power to make laws about currency is therefore an exclusive power of the Commonwealth parliament.

Making laws about naval or military forces is an exclusive power.

Similarly, section 51(vi) of the Constitution specifies that the Commonwealth parliament can make laws about raising an army, and section 114 says, 'a state shall not raise or maintain any naval or military force'. Therefore, the power to make laws about military forces is an exclusive power of Commonwealth parliament. Section 51(iii) grants the Commonwealth parliament the power to make laws concerning the imposition of bounties on the production of goods, and section 90 of the Constitution states that this is an exclusive power.

To understand the **division of powers** between the two levels of government it is necessary to read the entire Constitution.

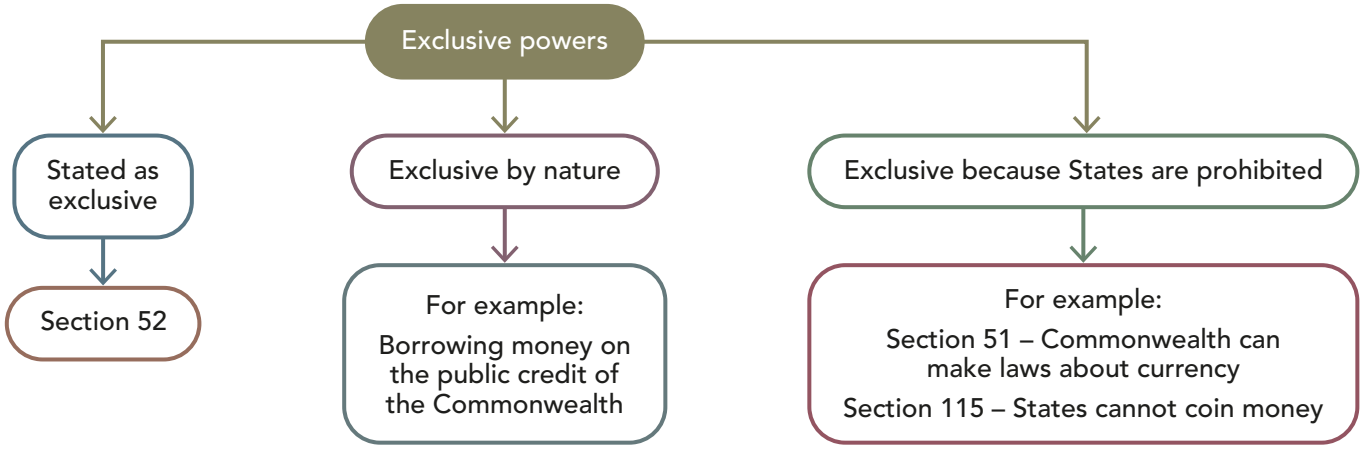
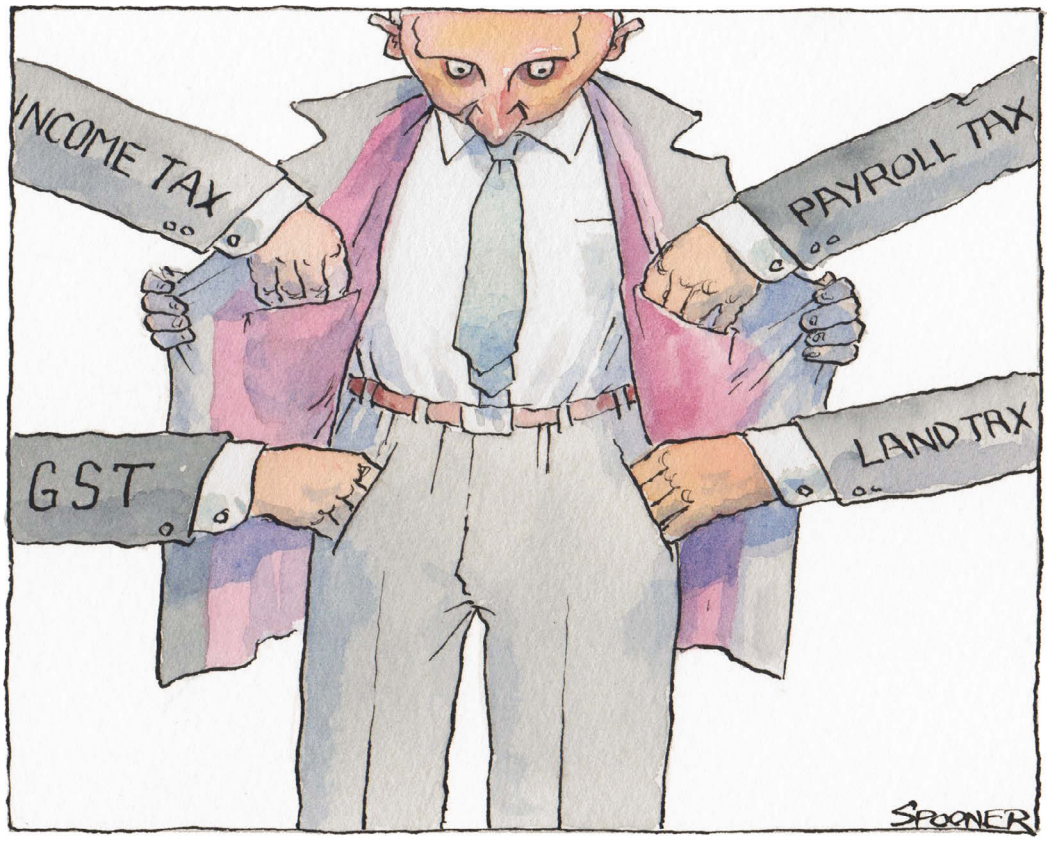


Figure 7.2 Exclusive powers



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Concurrent powers

Although some powers listed in section 51 can be used only by the Commonwealth parliament, the States are not excluded from legislating on all the areas listed in that section. State parliaments can make laws about some areas set out in section 51 provided they are not excluded from using that power by another section of the Constitution. These powers are known as **concurrent powers**.

Some powers stated in section 51 are shared with the States – these are called concurrent powers.

'Section' can be abbreviated to 's', and 'sections' to 'ss'.

Concurrent powers are those for which both the Commonwealth parliament and State parliaments have law-making power. The States share law-making powers with the Commonwealth parliament in many areas listed in section 51. These areas include marriage, divorce, taxation and bankruptcy.

Exclusive powers	Specific powers, s 51 and s 52	Concurrent powers
	s 51 The Parliament shall, subject to this Constitution, have power to make laws for peace, order and good government of the Commonwealth with respect to	
s 90 States cannot levy custom or excise	iii) bounties on the production of goods	
s 114 States cannot raise armies or navies	vi) navy and military defences	
s 115 States cannot coin money or legal tender	(xii) currency, coinage and legal tender	
	(xxi) marriage laws (xxii) divorce and matrimonial causes.	States can make laws about child welfare, some forms of maintenance and some property disputes
Law-making power of the Commonwealth parliament	Law-making power shared by State and Commonwealth parliaments	

Figure 7.3 Powers of parliament

Residual powers

Commonwealth parliament makes laws on matters set out in the Constitution. Subjects such as criminal law, police, education, health and the environment are not mentioned in the Constitution. Therefore, the States have the power to make laws about these matters. These law-making powers are referred to as the **residual powers** of the States. In this case 'residual' means that which is left over: powers that remained with the States after Federation became the residual powers of the States. The Constitution does not list these residual powers. However, the Constitution recognises the power of State parliaments in section 107, and section 106 recognises the validity of the separate State constitutions.

Residual powers are the law-making powers of the States.

Residual powers are not listed in the Constitution.

S 106 SAVING OF CONSTITUTION

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.

S 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.

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Section 96 allows the Commonwealth parliament to make grants of money to the States. When the Commonwealth grants money to a State it can impose conditions on the way in which the State spends that money. These conditions may influence the policies of State governments.

S 96 FINANCIAL ASSISTANCE TO STATES

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Activity 7.1 Folio exercise

Understanding the division of powers

Complete the following chart by providing a clear explanation as well as an example of each:

Law-making powers	Explanation	Example
Specific powers		
Exclusive powers		
Concurrent powers		
Residual powers		

7.3 Significance of section 109 of the Australian Constitution

S 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.

Section 109 states that when State and Commonwealth laws conflict, Commonwealth law prevails.

If the Commonwealth parliament and a State parliament make a law on the same area of law (under concurrent powers), and the State law is inconsistent with the Commonwealth law, then there is conflict between the State and Commonwealth legislation.

Section 109 of the Constitution provides a mechanism to resolve this. It says that Commonwealth law stands above State law, so if there is a conflict the Commonwealth law prevails and the inconsistent part of the State law is invalid.

The impact of section 109

Marriage is an area of concurrent power. The *Marriage Act 1958* (Vic) provided laws for a valid marriage. Before this Act there was no Commonealth law about marriage. When the Commonwealth parliament passed the *Marriage Act 1961* (Cth) it made the pre-existing Victorian legislation largely redundant because both laws covered the same areas, so the Commonwealth law prevailed. In this case there was no conflict between the State law and the Commonwealth law; the Victorian law was redundant because there was now a Commonwealth law that covered the same area. Since this time the inconsistent areas of the Victorian Act have been repealed (removed from the Act).

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Table 7.1 Strengths and weakness of s 109

Strengths	Weaknesses
• If a State law is challenged successfully (by the Commonwealth or by an individual or group), the Commonwealth law will prevail. • State law will be deemed invalid ONLY to the extent of the inconsistency.	• Does not restrict the State from making its own law if such a law is challenged by the Commonwealth (or by an individual or group) and the challenge fails. • Does not restrict States from legislating in respect of residual powers. • Does not restrict States if there is no overlap.

Legal brief 7.1

s 109 in action

John McBain v The State of Victoria and others (2000) FCE 1009

In this case Dr John McBain, who was registered and practising in the State of Victoria, was providing a patient, Leesa Meldrum, with IVF treatment. However, as the law stood, this treatment was deemed illegal as Ms Meldrum was single, and section 8 of the *Infertility Treatment Act 1995* (Vic) banned single women from treatment. Dr McBain challenged this by citing the *Sex Discrimination Act 1984* (Cth), which is not gender specific. He believed that the State law was inconsistent with the Commonwealth law.

Justice Sundberg, in the Federal Court, found in favour of Dr McBain and stated that fertility treatments such as IVF are 'services provided by medical practitioners', within the meaning of section 22 of the *Sex Discrimination Act*.

Therefore, on this basis, the section of the Victorian legislation that discriminated against single women was struck out. This is illustrated in Figure 7.5.

Leesa Meldrum outside the High Court

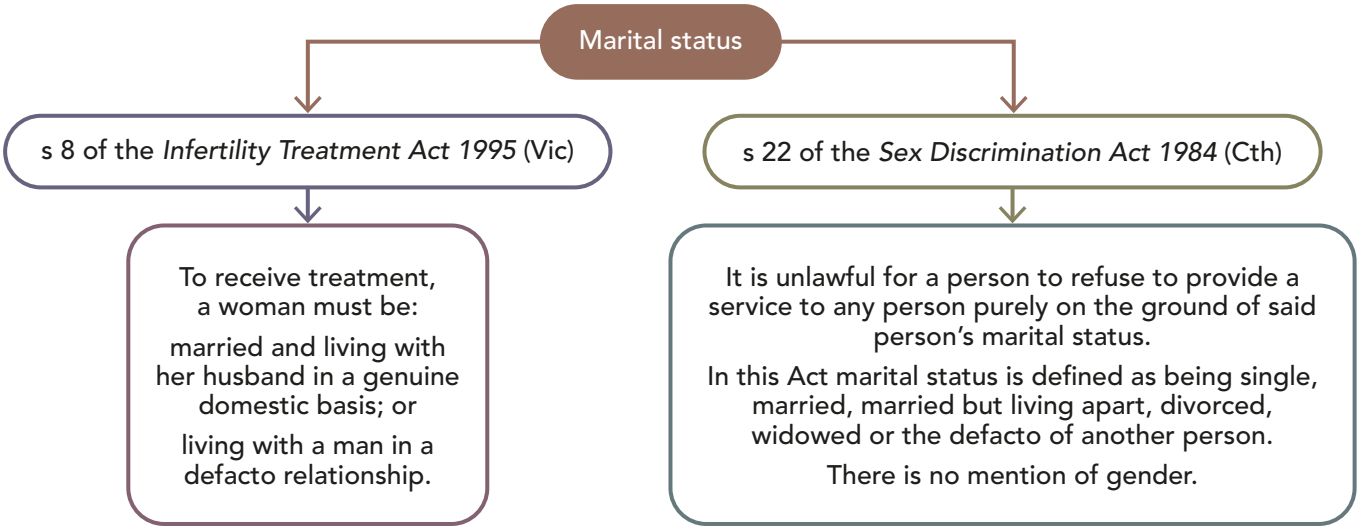

Figure 7.4 The impact of s 109

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Activity 7.2 Folio exercise

Understanding the significance of s 109

1 Using the example above (*McBain v State of Victoria*), explain the significance of section 109 of the Australian Constitution.

2 Explain the impact that section 109 can have on the Commonwealth and on the States.

7.4 Constitutional checks on parliament

The writers of the Constitution did not have the same understanding of people's rights as we do today. In the late 1890s, they were preoccupied with ensuring a good system of government in Australia, and preventing the new Australian government from interfering with the rights of the States. Little thought was given to protecting the rights of individuals.

The writers of the Constitution shared a belief that the best way to protect individuals' rights was to ensure the peace, order and good government of Australia. They therefore created a system of structures designed to ensure good government. These checks and balances were designed to prevent governmental power being concentrated in the hands of a small number of people, who might then abuse it. Since its establishment other mechanisms have been incorporated into the Australian Constitution to ensure that these checks and balances work. They include:

- the **bicameral** structure of Commonwealth parliament, with a Senate that acts as a house of review for the House of Representatives (see Chapter 6)
- the **separation of powers**, which ensures that no one person holds the power to make (legislature), administer (executive) and enforce (judiciary) the law
- **express rights**, the five rights which are entrenched (explicitly named) in the Australian Constitution
- the establishment of the **High Court** as the guardian of the Constitution of Australia, ensuring that State and Australian governments abide by its terms
- the stipulation that changing the Australian Constitution requires a **referendum** and that there has to be a **double majority** for a referendum to be successful (section 128).

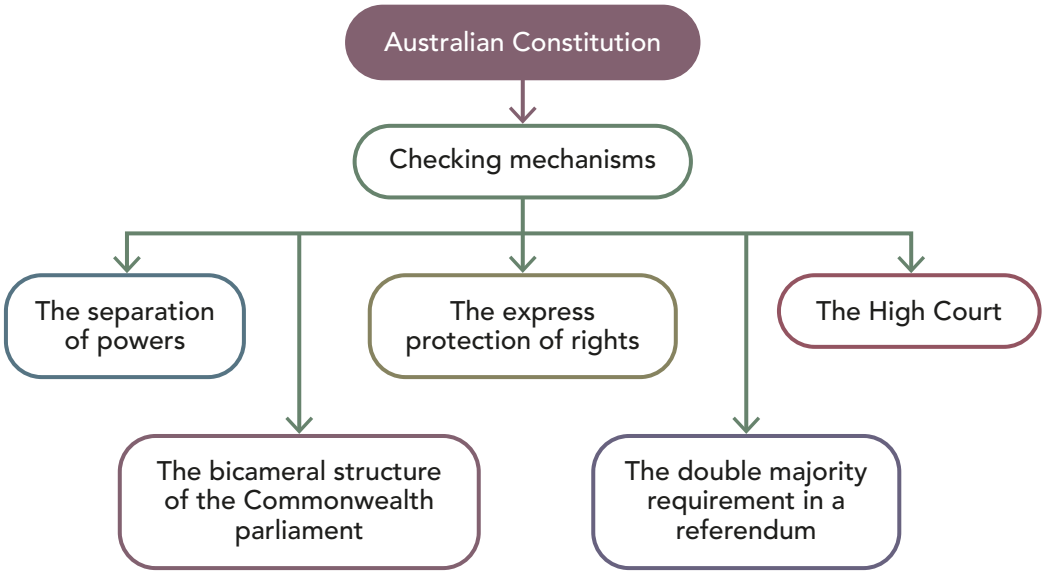

Figure 7.5 Checking mechanisms of the Australian Constitution

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Bicameral structure of Commonwealth parliament

The Commonwealth parliament consists of two houses and the Crown. It is made up of:

- an upper house, known as the Senate
- a lower house, known as the House of Representatives
- the Crown, represented by the Governor-General.

See Chapter 6 for more detail about the bicameral structure of parliament.

Separation of powers

This system was established to prevent the concentration of government power, in the belief that the concentration of power tends to cause corruption and the abuse of power. It is designed to protect the rights of the people by providing checks and balances that ensure that the government cannot become oppressive.

'Separation of powers' means that different bodies perform the three functions of a legal system: legislative, executive and judicial.

The courts (the judicial arm of the system) have an important role to play. The separation of powers relies on courts being independent of the legislature and the executive. An aggrieved person is able take action in the courts, and the courts can act as a check on the other two arms of government if need be.

Each arm of government is outlined in a separate chapter of the Australian Constitution:

- Chapter I deals with the legislature. In s 1 it specifies that the Australian Constitution gives the legislative power to the Australian parliament.
- Chapter II deals with the executive. It specifies in s 61 that the Australian Constitution gives the executive power (the power to administer government's laws and business) to the Crown (i.e. executive government).
- Chapter III deals with the judiciary. It specifies in s 71 that the Australian Constitution gives the judicial power to the High Court.

NewsReport 7.1

Judiciary free from political interference

THE ISSUE OF SEPARATION OF POWERS CAME TO the fore in 2017 when three Federal Cabinet Ministers made comments that could be interpreted as critical of Victorian judges' leniency to sentencing terror offenders.

The Ministers – Greg Hunt, Alan Trudge and Michael Sukkar - later made an abject apology after being required to appear before the Victorian Court of Appeals. They had faced possible contempt of court charges.

Following comments, Melbourne barrister Rob Stary told ABC Radio Melbourne: "We must have in a separation of powers doctrine an independent judiciary who should be free from political interference." He added: "Judges are independent and they should be free from any political interference."

The separation of powers ensures that courts act as independent umpires. They limit the action of the political and executive arms of government.

Two former High Court judges have made this very clear. Giving the Southey Memorial Lecture in 1981, Sir Ninian Stephen said: "It is self-evident that the exercise of jurisdiction such as this will from time to time frustrate ambition, curtail power, invalidate legislation and fetter administrative action … This is part of our system of checks and balances. People who exercise political power and claim to represent the will of the people do not like being checked or balanced".

In a 1998 Melbourne speech, Murray Gleeson said: "Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern. The greater that intrusion, the more occasions there will be for the citizen to complain of it. For redress of such complaints, whether because of a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law, it will be primarily to an independent judiciary that the citizen must look".

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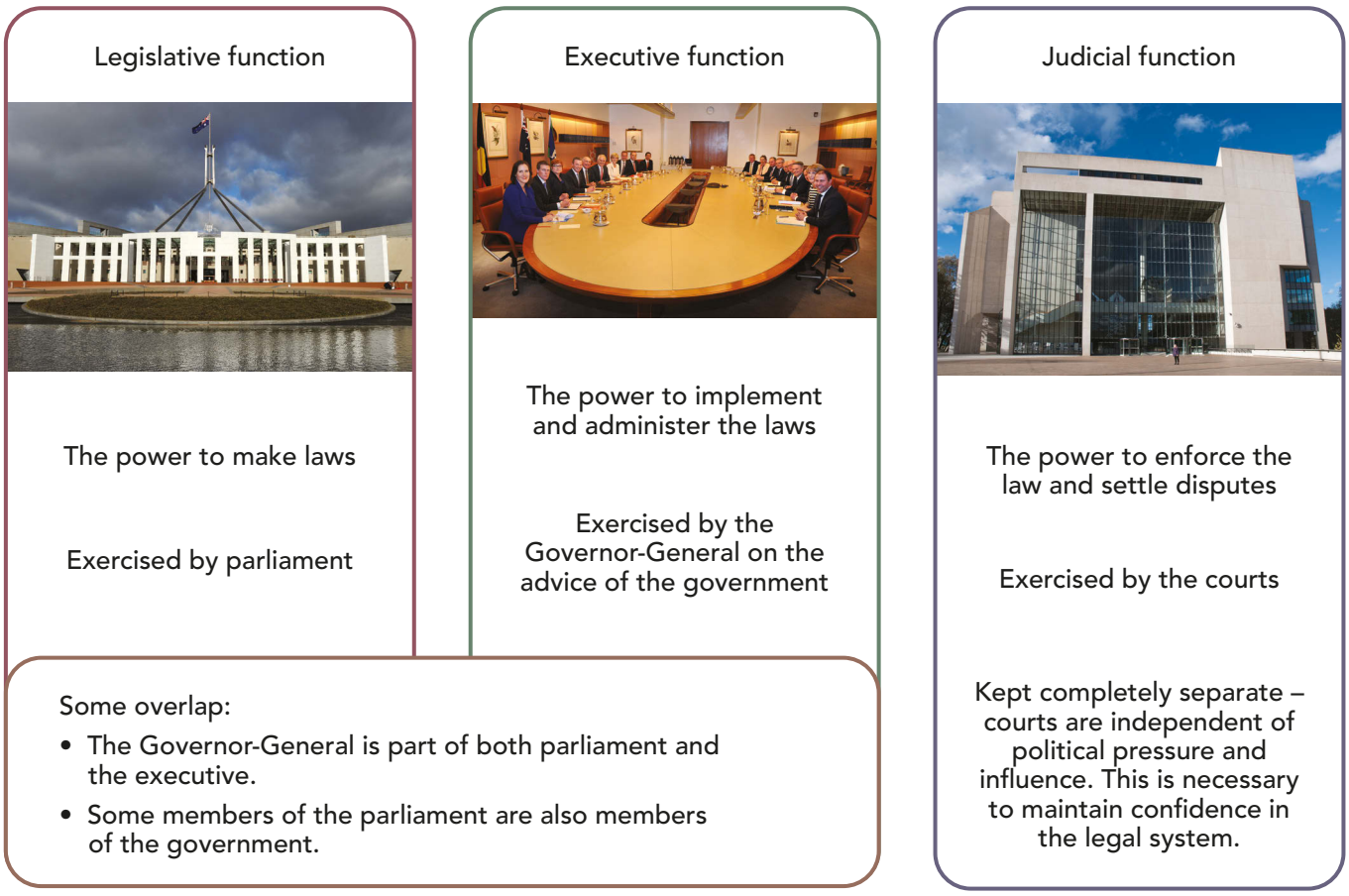

Figure 7.6
Separation of powers

Legislative function

In the Australian legal system, the legislative function, or law-making power, is given to the parliament. At a federal level, the law-making power is given to the Australian parliament. At a State level, the power to make laws is given to each of the State parliaments.

Executive function

The executive function includes the administration of laws and the carrying out of the business of government. This includes the day-to-day management of government affairs. In theory, the Queen's representative, the Governor-General, exercises the executive function. However, the Governor-General acts on the advice given by the government of the day. In practice, through its ministers and government departments, the government is largely responsible for the administration of the law and for carrying out the other business of government.

Judicial function

The judicial function is the task of applying the law. This function is given to the courts. The courts have the power to interpret the laws and to decide how these laws apply to individual cases. The courts are independent of the legislative and executive functions of the government. Therefore, the courts are not subject to political interference. The courts can act as a check on the use of law-making powers and on government actions.

Although in theory there is a separation of powers between the executive and legislative functions, in practice this distinction is blurred. Because the party that holds a majority in the lower house of parliament forms the government, there is some overlap. This is because some members of parliament (who perform a legislative function) are also ministers of the government (and perform an executive function). Furthermore, parliament sometimes gives the power to make regulations to government departments.

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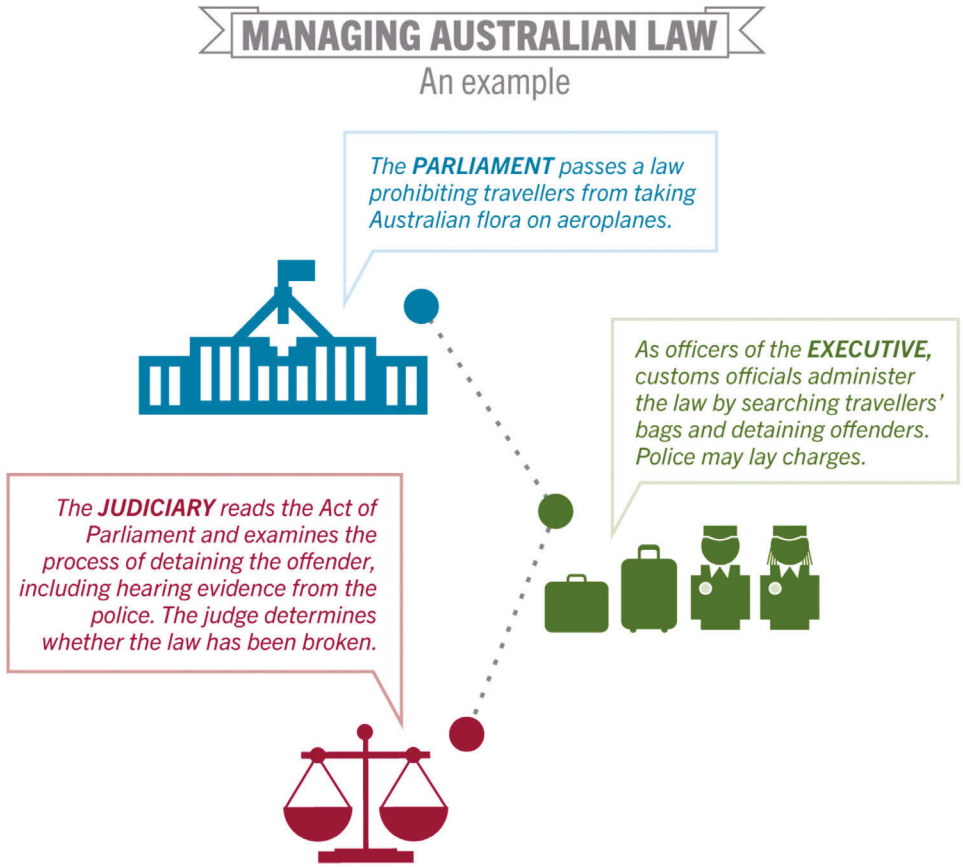

Figure 7.7 Separation of powers in action

We can see that the separation of powers provides independence between the bodies that make the law and those who have to enforce the law.

It provides a check on the power of parliament to ensure that it does not go beyond its area of power. For example, if an individual or group feels that a law contravenes the Constitution they can take the matter to court.

NewsReport 7.2

Why is the separation of powers important?

IN 1981 SIR NINIAN STEPHEN, A FORMER HIGH COURT justice, said:

> Governments of the present day necessarily pose a greater threat to individual liberties than did those of last century. Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern. The greater the intrusion the more occasions there will be for the citizen to complain of it. [To protect their rights,] it will be primarily to an independent judiciary that the citizen must look.

So if a citizen thinks that the Australian parliament has exceeded its law-making powers, it is vital that there be an independent umpire. This is the job of the High Court. It resolves these disputes. The independence of the High Court is important in that it stands between the citizen and the law, and between the Australian parliament and the law in determining questions of rights.

The separation of powers can create tension between the political arms of government (the legislature and the executive) and the courts. That is a sign that the separation is working effectively, that the courts are helping to ensure good government. In 1999 the Chief Justice of the High Court, Murray Gleeson, put it this way:

> It is self-evident that the exercise of [judicial review] will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action … This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.

Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 ***Public Law Review*** *108 at 111*

What would happen if the separation of powers was not in place? The executive and legislature would be free to do what they wanted.

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NewsReport 7.3

High Court throws out immigration policy

IN JULY 2011 THE LABOR GOVERNMENT ANNOUNCED A NEW IMMIGRATION policy, the 'Malaysia Solution'. It centred on Malaysia accepting 800 boat people from Australia, and Australia taking 4000 'genuine refugees' from Malaysia and resettling them into the community.

The Immigration Minister, Mr Chris Bowen, made the deal using his ministerial powers rather than by trying to amend the *Migration Act 1958* (Cth).

The policy was successfully challenged in the High Court. In a 6:1 decision, the court said Malaysia did not have laws in place to ensure the safety of asylum seekers. (Malaysia is not a party to the UN Refugees Convention or its protocol, and Australia is.)

The ruling meant that unaccompanied children could not be sent away from Australia without the written consent of the Immigration Minister.

Activity 7.3 Folio exercise

Understanding separation of powers

Read 'Why is the separation of powers important?' and 'High Court throws out immigration policy' and complete the following tasks:

1 Define the term 'separation of powers'.
2 Explain how the structure of the separation of powers protects the rights of the people.
3 Discuss why courts are so important to the separation of powers.

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Express rights

The rights clearly stated in the Constitution are referred to as express rights. These express rights are entrenched in our Constitution. Rights entrenched in the Australian Constitution can only be changed by referendum. The entrenched, express rights of individuals include the following:

The Australian Constitution includes five entrenched or express rights.

Table 7.2 Express rights

Section of Constitution	Express right
s 51(xxxi)	The acquisition of property on just terms.
s 80	The right to a jury trial for indictable Commonwealth offences.
s 92	Interstate trade and commerce.
s 116	Freedom of religion.
s 117	No discrimination among residents based on the State they reside in.

The acquisition of property on just terms

Section 51(xxxi) of the Australian Constitution provides that the Commonwealth parliament may make laws to acquire property from individuals 'on just terms'. Although this section of the Constitution may appear to recognise the right of individuals to own property, it also recognises that there may be reasons why parliament needs to acquire property from an individual. High Court interpretations state that:

The Australian Constitution contains limited property rights.

- the Commonwealth parliament may acquire property for a purpose for which it has the power to make laws
- the Commonwealth must be able to show 'just terms' – the Commonwealth must provide individuals with a fair and reasonable level of compensation.

NewsReport 7.4

The High Court and the Marlboro Man: the plain packaging decision

THE HIGH COURT OF AUSTRALIA'S RULING ON THE PLAIN PACKAGING of tobacco products is one of the great constitutional cases of our age. The ruling will resonate throughout the world - as other countries will undoubtedly seek to emulate Australia's plain packaging regime.

Having announced its ruling some weeks ago now, the court recently published the reasons for its decision on tobacco companies' challenge to Australia's regime for the plain packaging of tobacco products.

By a majority of six to one, the High Court of Australia rejected the arguments of the tobacco companies that there had been an acquisition of property under the Australian Constitution. The majority judges variously described the case of the tobacco companies as "delusive", "synthetic", "unreal", and suffering "fatal" defects in logic and reasoning. The dissenting judgement was by Justice Heydon …

The majority of the High Court of Australia held that the plain packaging regime did not amount to an acquisition of property. This ruling is consistent with precedents on intellectual property and constitutional law, such as the Grain Pool case, the Nintendo case, and the Phonographic ruling.

In a judgement notable for its clarity and precision, Justices Hayne and Bell ruled, "The Plain Packaging Act is not a law by which the Commonwealth acquires any interest in property, however slight or insubstantial it may be."

"The Plain Packaging Act is not a law with respect to the acquisition of property," they concluded.

(Source: adapted from an article by Matthew Rimmer that originally appeared in The Conversation *18 October 2012)*

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NewsReport 7.5

Just terms challenged

IN OCTOBER 2007, AN ABORIGINAL COMMUNITY lodged a High Court challenge against the Federal government's takeover of Aboriginal land in the Northern Territory. The action was taken by traditional owner Reggie Wurridjal and Bawinanga (a community organisation in the Arnhem Land community of Maningrida). They claimed that the takeover had not been done on 'just terms'.

The High Court challenge aimed to prevent the government's compulsory acquisition of Aboriginal land and other assets under 5-year leases, and the abolition of the permit system controlling entry onto Aboriginal land. These controversial measures were imposed following a report into child sex abuse in Aboriginal communities.

The plaintiffs were seeking compensation in the High Court because:

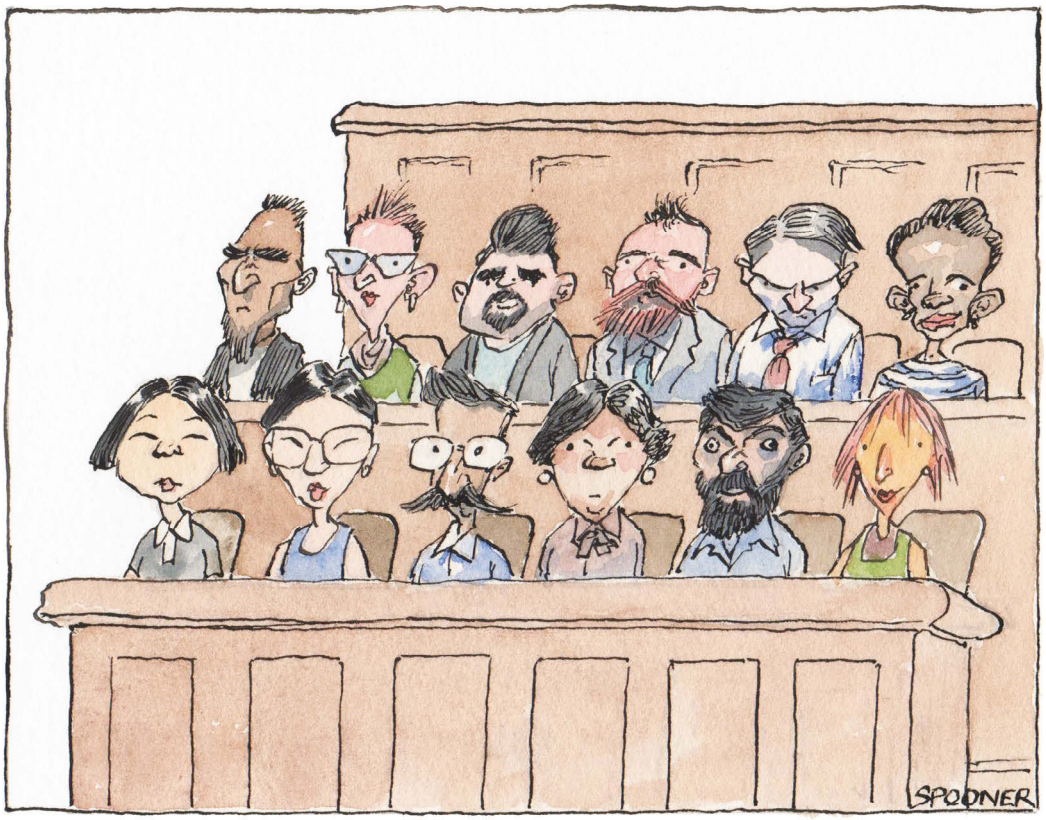
- abolishing the permit system would allow unlimited access to sacred sites;
- native title rights would be suspended; and
- the Commonwealth would have exclusive possession over Aboriginal land.

The plaintiffs sought to have the takeover declared constitutionally invalid.

The Commonwealth, in response, argued that the plaintiffs had no case for compensation under s 51(xxxi) of the Constitution because the Commonwealth laws were made under the Territories power contained in s 122 of the Constitution, and that power does not require acquisitions of property to be on just terms. The Commonwealth relied on the 1969 case *Teori Tau v The Commonwealth* [1969] HCA 62, in which the High Court had held that laws made under s 122 were not subject to the 'just terms' requirement.

In February 2009 the High Court found for the Commonwealth, and held that the takeover was valid. But the court also overruled *Teori Tau v The Commonwealth*, holding that the requirement for just terms compensation did apply to laws made under the Territories power. The Commonwealth would thus be required to pay compensation.

The right to a trial by jury for indictable Commonwealth offences



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Section 80 of the Constitution guarantees the right to a trial by jury. This right applies to offences under Commonwealth law that are indictable. The constitutional right to a trial by jury does not extend, in theory, to offences against State law. High Court interpretations have further defined the right to a trial by jury:

- an accused person cannot elect to have a trial by a judge alone for a Commonwealth offence
- majority verdicts cannot be used for Commonwealth offences – in all indictable Commonwealth offence trials, the jury verdict must be unanimous (this is not the case in relation to all offences that are indictable under State law).

An important limitation on the right to trial by jury is the fact that parliament can define which offences are 'indictable' offences.

The Australian Constitution guarantees a trial by jury for offences under Commonwealth law that are indictable.

TRIAL BY JURY

Brown v R [1986] HCA 11; (1986) 160 CLR 171

In *Brown v R*, the accused, Michael Rodney Jonathon Brown, was presented for trial in the Supreme Court of South Australia. He was charged with offences under s 233B(1)(ca) of the *Customs Act 1901* (Cth). He pleaded not guilty. Before a jury was empanelled he elected to be tried by a judge alone under s 7(1) of the *Juries Act 1927* (SA). The trial judge ruled that under s 80 of the Constitution it is not possible for a person indicted for an offence against a law of the Commonwealth – Brown's case did fall into this category – to make an election to be tried by a judge alone.

Brown appealed the case to the High Court. The High Court decided that s 7 of the *Juries Act* (SA) contravened s 80 of the Australian Constitution, which states that there should be trial by jury for indictable Commonwealth offences. A person charged with an indictable Commonwealth offence who pleads not guilty must be tried by jury. This is an example of the rule that Commonwealth law prevails over State law when they are in conflict, to the extent of the conflict.

Freedom of movement

Section 92 of the Constitution provides that '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'. High Court interpretations have found the following:

The Commonwealth Constitution provides for limited freedom of movement.

- that this freedom primarily relates to trade, commerce and communications
- that 'the protection of s 92 is given to the movement of people, the transport of goods, the transmission of communications, the passage of signals of any kind and any other means by which "interchange, converse and dealings between States in the affairs of life" are carried across State boundaries … The means of movement will vary with what is moved; it is not essential that the means of movement be physically perceptible' (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29 per Brennan J)
- that section 92 does not provide an absolute guarantee of freedom of movement. In *Cole v Whitfield* (1988) 165 CLR 360 the High Court stated that personal movement across a border cannot, generally speaking, be impeded. More recent cases illustrate that section 92 does not provide an absolute guarantee of freedom of movement. If a law is not directly regulating interstate communication, but affects interstate commerce as part of regulating some other activity, it does not contravene the freedom expressed in section 92 provided that the law is not disproportionate or inappropriate to the legitimate constitutional purpose for which it has been made. For instance, in *AMS v AIF* (1999) 199 CLR 160, an injunction to restrain a mother from moving her child from Western Australia to the Northern Territory was found not to infringe section 92.

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Freedom of religion

The Commonwealth Constitution provides for freedom of religion.

Section 116 of the Constitution provides for freedom 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.

- In *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559, the High Court determined that the Commonwealth cannot establish a particular religion, but could assist the practice of religions by providing financial assistance to religious schools.
- The Commonwealth cannot make a law imposing religious observance.

NewsReport 7.6

The High Court school chaplains case and what it means for Commonwealth funding

… WILLIAMS V COMMONWEALTH INVOLVED A challenge to the National School Chaplaincy Program (NSCP) brought by Ronald Williams, a parent of children who attended the Darling Heights State Primary School in Queensland. Williams challenged a funding agreement entered into between the Commonwealth and Scripture Union of Queensland, the group who provided chaplaincy services at the School.

So how can a case about school chaplains now affect how the government in Canberra funds programs?

A complicated case

There were several bases for the constitutional challenge. One of the most publicised was the argument that it breached section 116 of the Constitution by requiring a religious test for an office under the Commonwealth. At Darling Heights State Primary School the chaplain was employed by Scripture Union of Queensland, which was funded by the Commonwealth.

The High Court unanimously dismissed this argument, and held that the connection between the chaplain and the Commonwealth was not sufficient to render the chaplain an "office under the Commonwealth".

The point the case turned on then involved the breadth of the Commonwealth government's power to spend money and enter into contracts. This power is governed by the breadth of the Commonwealth's executive power but this power is ill-defined.

Section 51 lists the legislative "heads of power" – specific areas of power. But executive power is not spelled out in the same way under section 61.

Money and power

Prior to this case there had been a long-held assumption that the Commonwealth executive power extended to entering into contracts and funding agreements in, at least, areas that fell within the Commonwealth's legislative heads of power – even where the Parliament had not passed legislation authorising those contracts and agreements.

If that was correct, the question would have been whether the funding agreement between the Commonwealth and the Scripture Union fell within the legislative heads of power, argued in this case under section 51(xx) and section 51(xxiiiA) of the Constitution with respect to trading corporations and the provision of benefits to students.

In this case, four of the judges (Chief Justice French and Justices Gummow, Bell and Crennan) expressly rejected this position. Two judges (Justices Hayne and Kiefel) did not determine this issue because they found the funding agreement did not fall within ss 51(xx) or (xxiiiA). Justice Heydon dissented.

The majority decision

The main reasons advanced by the majority centred on the federal nature of our constitutional system, and the importance of responsible and representative government (and therefore the role of Parliament) in it.

So, for example, Chief Justice French notes that if the Commonwealth had a wide executive power to spend money, there are "consequences for the Federation" which would flow from that. After all, funding is an essential tool of public administration and for government policy.

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- The Commonwealth cannot make a law that requires a person to have a particular religious belief in order to be employed by the Commonwealth or to be appointed to a Commonwealth office.
- In *Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, Justice Rich noted: 'Any regulations, therefore, which empower the Government to prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of the war do not infringe s 116. The peace, good government and order of the Commonwealth may be protected at the same time as the freedom of religion is safeguarded.'
- Section 116 applies only to the Commonwealth. Few State constitutions specifically recognise religious freedom.
- The right may be limited in the interest of national security or to ensure that people follow the 'ordinary laws' of the community.

If the Commonwealth had power to enter into such agreements without legislative backing, policies could be implemented in the absence of scrutiny from the Parliament, including the Senate.

So, generally speaking, it appears that the Commonwealth will need statutory authority to enter into contracts and spend public money. This exposes funding agreements to the scrutiny of the Houses of Parliament.

However, the majority indicated there will be some exceptions to this position, for example, contracts required to administer the departments of the Commonwealth pursuant to section 64 of the Constitution.

The funding agreement for the chaplaincy program was held by the majority not to fall within these exceptions and was, therefore, invalid.

Flow on effects

There are many other funding agreements made by the Commonwealth, for example, many of the grants paid directly to local governments, which will fall outside these exceptions.

The Commonwealth must act quickly if it wants to save these types of agreements, including the agreements under the school chaplaincy program. Commonwealth funding agreements must be divided into two types: those that are with respect to the Commonwealth's legislative specific areas of power but have no legislative backing at the moment; and those that are not with respect to the Commonwealth's legislative specific areas of power.

The first type can probably be saved relatively easily by legislation that retrospectively validates and provides authority to enter into these contracts.

This could be done on a piecemeal basis, or as Sir Owen Dixon once suggested, through a "General Contracts Act". This could say that the the Commonwealth Executive is and has been authorised to enter into any particular contract or agreement the entry into which could be or could have been authorised by any law made pursuant to any of the heads of legislative power in ss 51, 52 and 122 of the Constitution.

For the agreements under the NSCP this would then raise the question of whether they are "with respect to" any of the heads of legislative power. Justices Hayne and Kiefel have already expressly found that they are not. Justice Heydon found that they are. The other judges did not decide the question.

Those agreements that are not referable to a head of legislative power cannot be saved in this way. That's not to say these funding arrangements cannot be saved at all. The Commonwealth Parliament has an (almost) unlimited power to make grants to States, on the terms and conditions it sees fit.

(Source: adapted from an article by Gabrielle Appleby that originally appeared in The Conversation *20 June 2012)*

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Protection against discrimination on basis of State of residence

The Commonwealth Constitution prohibits discrimination against a person because of the State they live in.

Section 117 of the Constitution provides that residents of 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'. This section makes it unlawful to discriminate against a person based on the fact that they live in another State. It does not provide a general protection against discrimination.

For instance, in *Re Loubie* [1986] 1 Qd R 272, a resident of New South Wales was charged with a criminal offence in Queensland. Under the *Queensland Bail Act*, he would have been entitled to bail except for the fact that he was ordinarily a resident outside the State of Queensland. In the case, this provision of the *Bail Act* was seen as contravening section 117 of the Constitution, and thus invalid.

Clearly, these express rights are a check on parliament in relation to law-making in these areas.

Do express rights protect us?

Table 7.3 Strengths and weaknesses of express rights

Strengths	Weaknesses
The five express rights are entrenched in the Constitution. They can only be removed or amended by a referendum (s 128).	There are only five express rights, which provides for only *limited* protection.
Express rights are fully enforceable by the High Court. If an Act of Parliament *infringes* an express right, the High Court can declare the *legislation invalid and unconstitutional.*	It could be argued that a more entrenched 'Bill of Rights' would provide greater protection.
	The protection of express rights by the High Court is a *complaint-based approach* to the protection of rights. The people/groups who believe their rights have been infringed must bring a case before the High Court before it can declare legislation unconstitutional. This can be expensive and time-consuming.

Table 7.4 Limitations of express rights

Section of Constitution	Limitation
s 51(xxxi) The acquisition of property on just terms	This section of the Constitution **does not apply** to the acquisition of property by **State governments**.
s 80 The right to a jury trial for indictable Commonwealth offences	s 80 only applies to **Commonwealth offences**. Therefore, this is a limited protection as **most indictable offences are State offences because 'law enforcement' is a residual power**. The High Court has ruled that 'indictable' means 'crimes tried on indictment'. Hence the Commonwealth parliament can avoid s 80, and thus avoid a jury trial for a particular offence, by legislating for the offence to be a summary offence.
s 92 Interstate trade and commerce	The right to interstate trade and commerce is more of an economic right than a fundamental democratic or human right. s 92 does not provide an absolute guarantee of freedom of movement.
s 116 Freedom of religion	s 116 only prohibits the Commonwealth parliament from passing legislation that restricts religious freedom in four ways: it **does not apply to State laws**.
s 117 Discrimination of residents based on the State they reside in	This section does not provide a general protection against discrimination. For example, it does not provide protection against other forms of discrimination – such as race or sex discrimination. But these are protected by other legislation.

ISBN 978-1-316-64754-7

Activity 7.4 Folio exercise

Understanding express rights

1 Complete the table below in relation to the rights that are expressly stated in the Constitution

Express Right	Section	Explanation	Example (Case)
The acquisition of property on just terms			
The right to a jury trial for indictable Commonwealth offences			
Interstate trade and commerce			
Freedom of religion			
Discrimination of residents based on the State they reside in			

2 Express rights are entrenched in the Australian Constitution and therefore fully protect the people of Australia. Discuss.

Role of the High Court in interpreting the Australian Constitution

High Court interpretation may change our understanding of the Constitution.

The Constitution allows the High Court to hear disputes concerned with constitutional powers. To decide these disputes, the High Court interprets the application of sections of the Constitution.

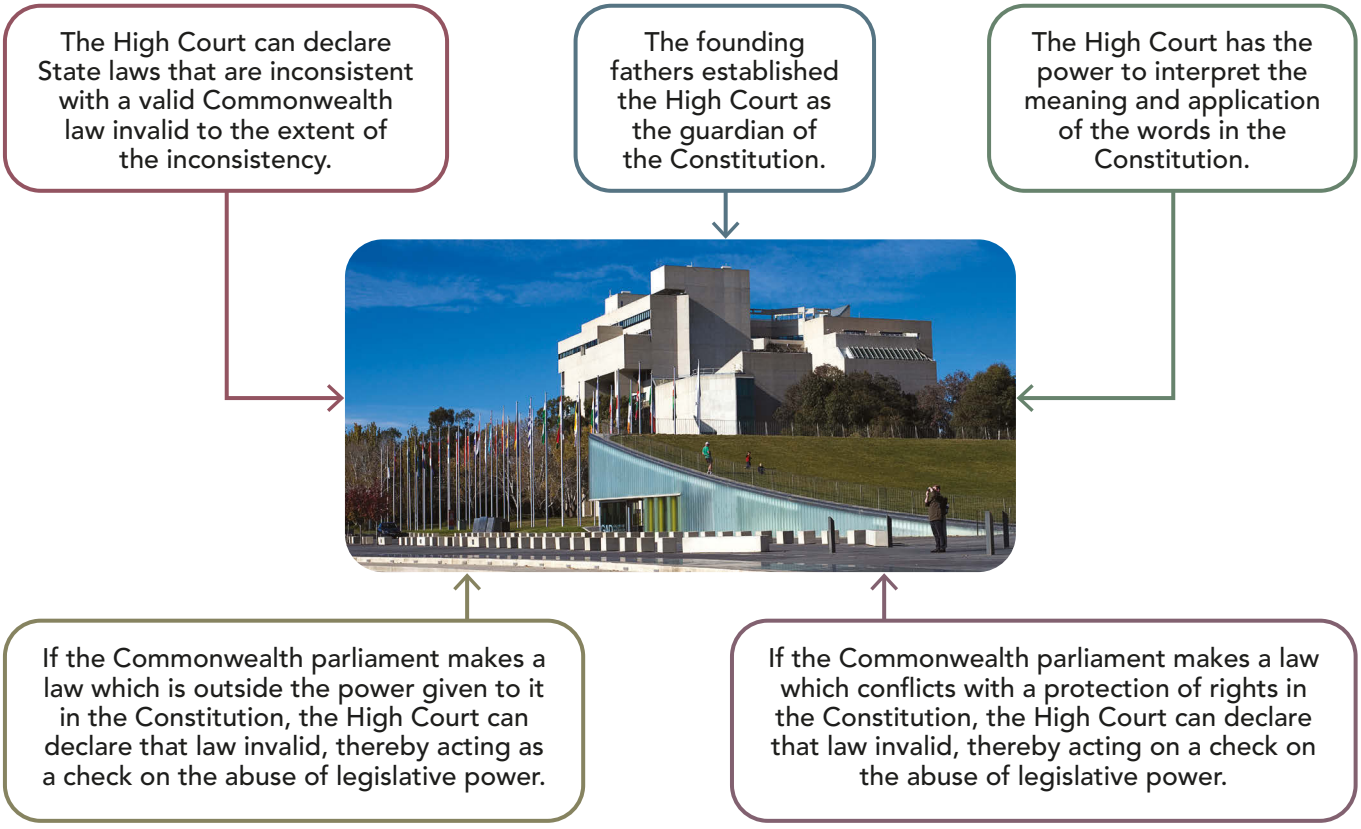

Figure 7.8 The role of the High Court in interpreting the Constitution

The constitutional powers of the Commonwealth parliament can be challenged by an individual or a group of individuals. Individuals (or groups) can challenge the constitutional power of the Commonwealth if the law affects them.

ISBN 978-1-316-64754-7

CAN GRANTS TO SCHOOLS BE A FORM OF DISCRIMINATION?

In the case of *Attorney-General (Vic); ex rel Black v The Commonwealth* [1981] HCA 2, a group of individuals challenged provisions of the State grants legislation. The legislation permitted money grants to denominational schools. This case claimed that these grants amounted to discrimination in favour of particular religious groups. It was argued that discrimination in favour of a religious group contravened section 116 of the Constitution. The High Court disagreed. The grants were not made to any one religious group. Therefore, the grants did not contravene section 116 of the Constitution.

The role of the High Court is discussed in more detail later in this Chapter.

Requirement for a double majority in a referendum

For more information about the role of the High Court, go to www.hcourt.gov.au.

As we have seen, the Australian Constitution acts as a check on parliament in the area of law-making. One important check is the process for changing the Constitution set out in s 128, known as a referendum.

The writers of the Commonwealth Constitution considered the Constitution to be so important that they made changing it a difficult process. A proposed change can be introduced to either the House of Representatives or the Senate as a Bill. It must then be approved by parliament before the proposal can be put to the public. The proposal must be passed by both houses. Special provisions apply when one house rejects a referendum proposal twice.

A proposed change to the Constitution must be passed by both houses of parliament.

A referendum can only be passed with a double majority: a 'yes' vote from a majority of electors in Australia nationally, and a 'yes' vote from a majority of voters in a majority of the States (at least four out of six).

After it has been passed in both houses, the amendment is put to a vote of all enrolled electors nationally, to vote 'yes' or 'no'. The referendum must receive a 'yes' vote from a majority of electors in Australia nationally, and a 'yes' vote from a majority of voters in a majority of the States (at least four out of six). This is sometimes referred to as a 'double majority'. The double majority stipulation in the Constitution acts as a check on the law-making power of parliament. It ensures that the interests of the States and the interests of the national population are considered equally before any change to the Constitution can be made.

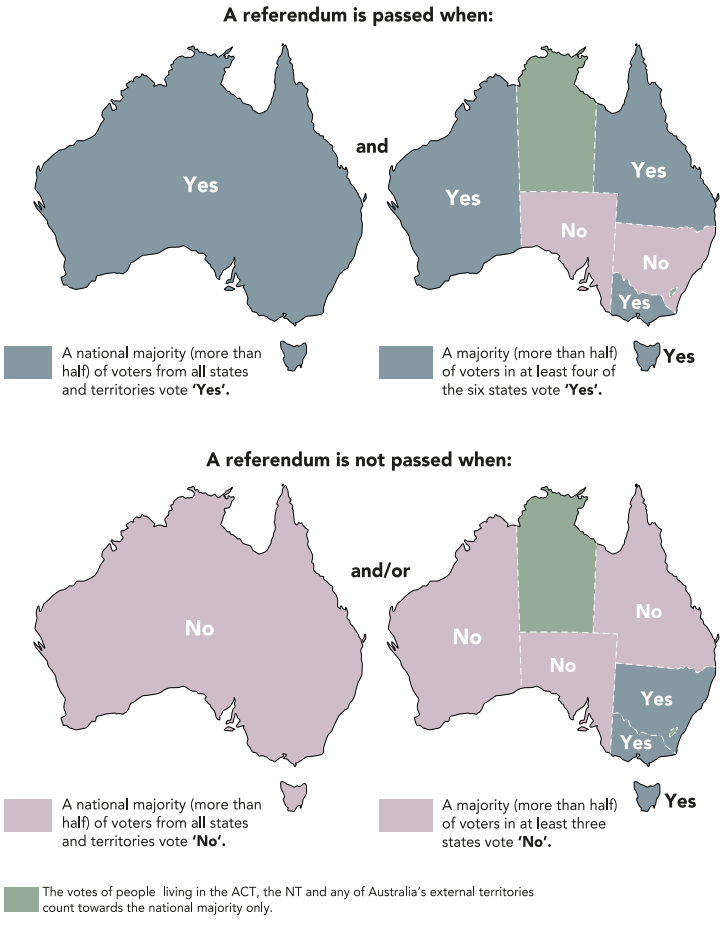

Figure 7.9 Double majority in a referendum

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S 128 OF THE AUSTRALIAN CONSTITUTION

Section 128 sets out the process of a referendum.

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, *Territory* means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives

Figure 7.10 Aboriginal activist Faith Bandler (right) at the Sydney Town Hall, where people were voting in a referendum on whether to give Aboriginal people the right to vote, on 27 May 1967

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7.5 The referendum process

Section 128 sets out the process for changing or amending the Constitution. This process results in a change to the written words of the Constitution. Under section 128, the initiation of a referendum proposal can only come from the Commonwealth parliament.

Stages of a referendum

There are three stages in a referendum, and they involve:

- the parliament
- the Governor-General
- the people.

The parliament

Any proposed change must first be put in a Constitutional Alteration Bill that must pass both houses of parliament or one house twice if the Governor-General allows it. If one house passes the proposed change and the other house rejects it, after a period of 3 months it can be passed through the first house again. If it is rejected a second time by the second house, the Governor-General may still submit the proposed change to the people if he/she feels that it is a sufficiently important issue.

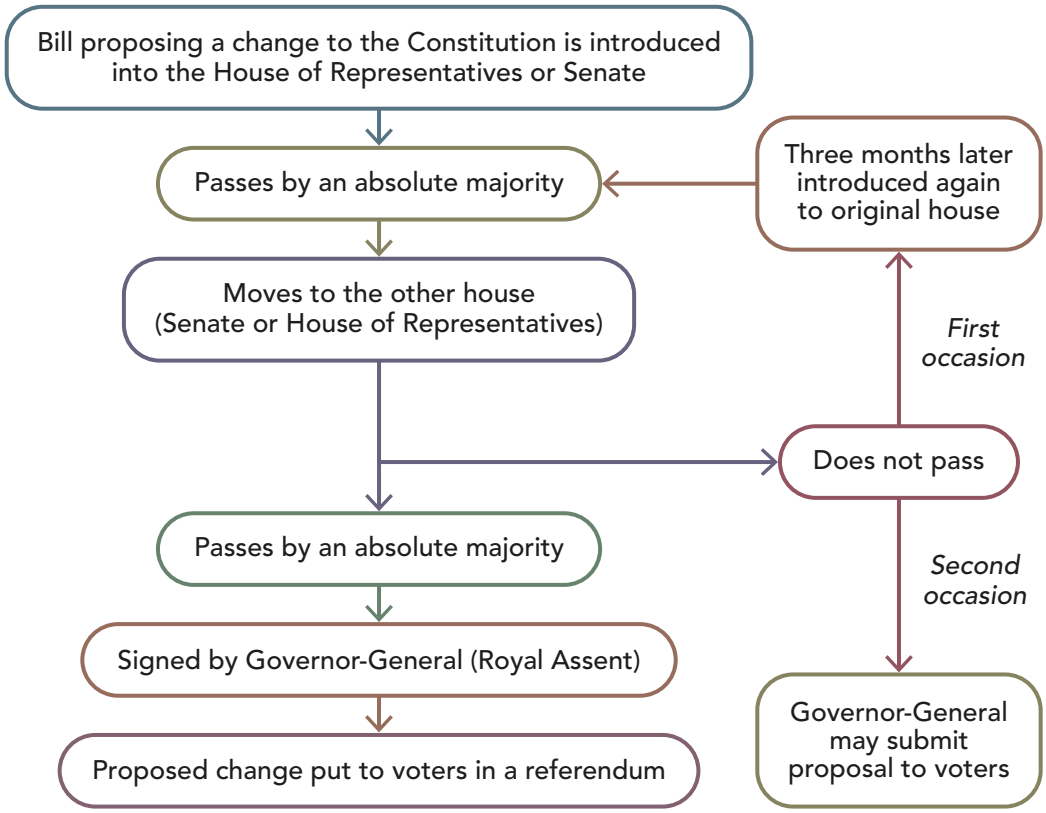

Figure 7.11 The process through parliament

The people

The proposed change is put to the people no sooner than 2 months and no later than 6 months after the Bill has passed parliament.

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.

The referendum is put to all eligible voters. Voters are required to answer 'Yes' or 'No' to the question asked. For example, 'Should Australia become a Republic?'

For a referendum to pass it must achieve a double majority. This process is illustrated in Figure 7.12.

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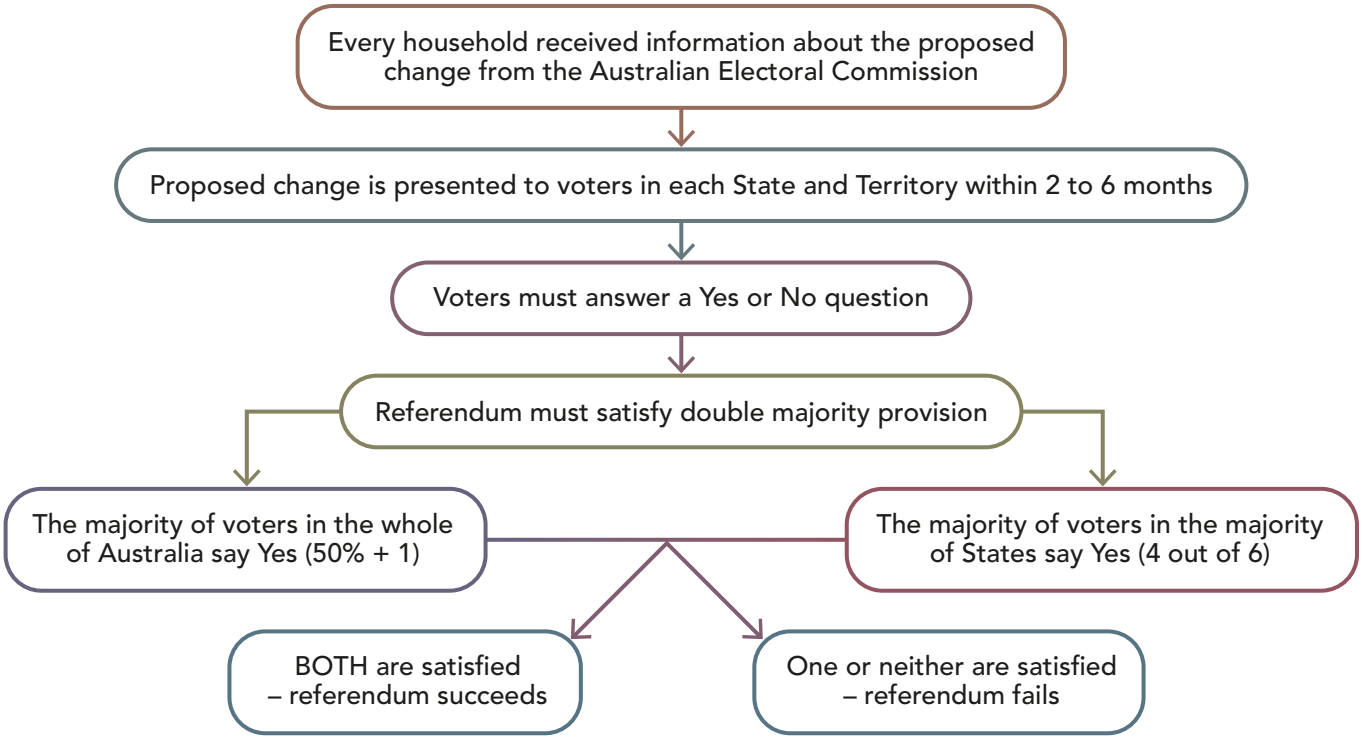

Figure 7.12 The process for the people

The Governor-General

If the referendum achieves a double majority, it is then passed to the Governor-General for royal assent.

Once royal assent has been given, the change to the Constitution is made.

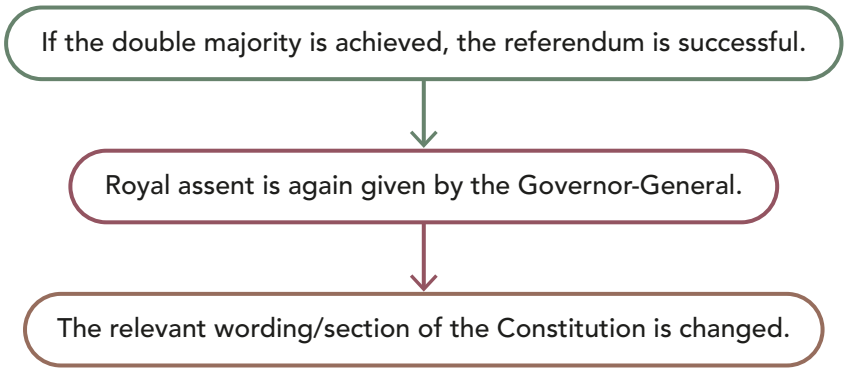

Figure 7.13 The process for the Governor-General

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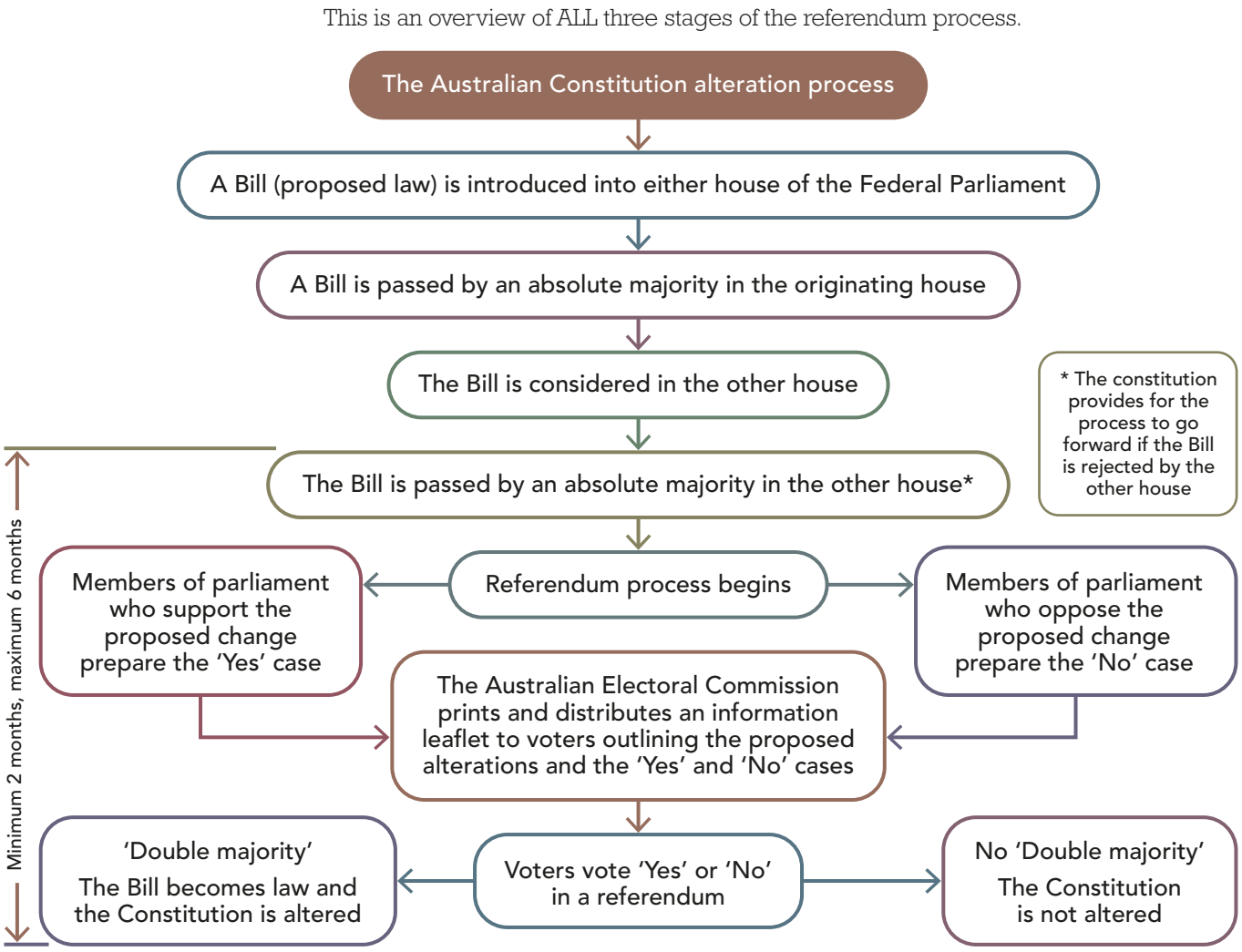

Figure 7.14 Changing the Constitution – an overview

How does a referendum change the Constitution?

A referendum changes the words of the Constitution.

A referendum is the only way in which the actual wording of the Constitution can be changed. A successful referendum can result in words being inserted into the Constitution or words being deleted from the Constitution.

Inserting new words

The Constitution has always clearly stated the power of the Commonwealth to make laws about invalid and old-age pensions.

In 1946 a successful referendum clarified the power of the Commonwealth parliament to make laws about other social security benefits. This referendum resulted in a new subsection being added: section 51(xxiiiA).

S 51 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:

(xxiii) invalid and old-age pensions;

These words were inserted into the Constitution:

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances ...

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Deleting words

The Constitution originally gave the Commonwealth parliament power to make laws with respect to the people of any race other than the 'aboriginal race'. In 1967, a referendum was held to remove this phrase discriminating against Indigenous people.

The proposal was that section 51(xxvi) be amended to strike out the term 'other than the aboriginal race in any State', and that section 127 be struck out in its entirety.

Since 1967 the Constitution appears with a line through the terms to be struck out below.

S 51 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:

(xxvi) the people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws;

S 127

~~**127 Aborigines not to be counted in reckoning population**~~

~~In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted;~~

In recent reprints of the Constitution the words are deleted and a note about the amendment is inserted.

7.6 Significance of the 1967 referendum

The then Prime Minister of Australia, Harold Holt, introduced legislation into the Commonwealth parliament for a referendum to be held on 27 May 1967.

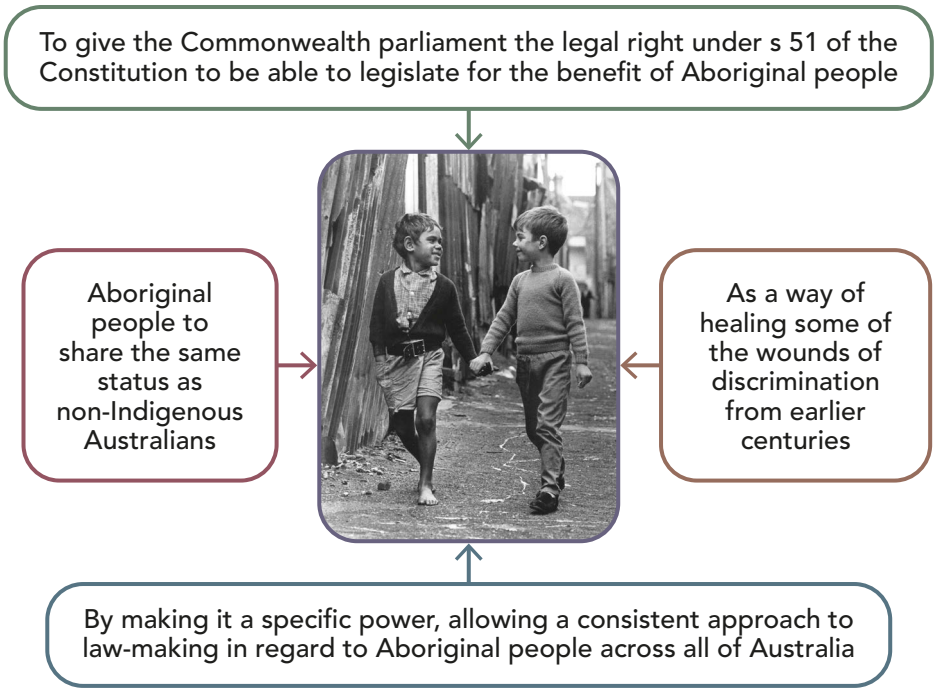

Figure 7.15 Reasons for holding the 1967 referendum

The 1967 referendum was about allowing the Commonwealth the legal right to create special laws for the benefit of Aboriginal people, including being counted in future census figures.

The 1967 referendum was not about giving Aboriginal people the right to vote. This had already been given in 1962 with the passing of the *Commonwealth Electoral Act 1962* (Cth), which amended the *Commonwealth Electoral Act 1918* (Cth).

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This referendum was successful, with nearly 91% of electors voting in favour of the change. It demonstrates the importance that the people of Australia placed on making this change to their Constitution.

NewsReport 7.7

1967 – a time for change

BEFORE 1967, SECTION 51(XXVI) OF THE CONSTITUTION WAS WORDED IN such a way that it prevented the Commonwealth parliament from legislating in relation to Australia's Indigenous peoples. Since this power was not given to the Commonwealth, it remained with the State parliaments as a residual power.

In 1967, a referendum was held to alter the words of the Commonwealth Constitution. The referendum succeeded, and this resulted in the deletion of words from the Constitution.

This referendum affected the division of legislative powers: the words in the Constitution had until then stopped the Commonwealth from legislating for Indigenous peoples, so this power had rested with the States, as a residual power. However, the successful referendum gave the Commonwealth specific (concurrent) power to make laws for Aboriginal Australians and Torres Strait Island people.

Figure 7.16 Bill Onus, President of the Victorian Aborigines' Advancement League

Eight successful referendums

This formula for popular approval was based on the procedure used in the Swiss Federation. During the first 70 years of its operation in Switzerland, this procedure resulted in 47 changes. In Australia, only 8 changes have resulted from 44 referendum proposals. The writers of the Constitution wanted a simple formula for amending the Constitution. However, they did not want one that would make the process too easy.

Referendum proposals are difficult to pass. The requirement to obtain a double majority poses many problems. If a major political party does not support the proposal, the supporters of that political party will often vote against the proposal. Many voters do not understand the nature of the Constitution and the extent of the powers given to the Commonwealth parliament. These voters may not understand the effect of the proposed changes. As a result, they may vote against them.

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Table 7.5 History of referendums

Year	Subject	Government submitting	States where voters in favour of proposal	Percentage of voters in favour of proposal
1906	Senate elections †	*Protectionist	6 (All)	82.65
1910	Finance	*Fusion	3 (Qld, WA, Tas.)	49.04
	State debts †	*Fusion	5 (All exc. NSW)	54.95
1911	Legislative powers	Labor	1 (WA)	39.42
	Monopolies	Labor	1 (WA)	39.89
1913	Trade and commerce	*Labor	3 (Qld, SA, WA)	49.38
	Corporations	*Labor	3 (Qld, SA, WA)	49.33
	Industrial matters	*Labor	3 (Qld, SA, WA)	49.33
	Railway disputes	*Labor	3 (Qld, SA, WA)	49.13
	Trusts	*Labor	3 (Qld, SA, WA)	49.78
	Monopolies	*Labor	3 (Qld, SA, WA)	49.33
1919	Legislative powers	*Nationalist	3 (Vic., Qld, WA)	49.65
	Monopolies	*Nationalist	3 (Vic., Qld, WA)	48.64
1926	Industry and commerce	Nat-CP	2 (NSW, Qld)	43.50
	Essential services	Nat-CP	2 (NSW, Qld)	42.79
1928	State debts †	*Nat-CP	6 (All)	74.30
1937	Aviation	UAP	2 (Vic., Qld)	53.56
	Marketing	UAP	0	36.26
1944	Post-war powers	Labor	2 (SA, WA)	45.99
1946	Social services †	* Labor	6 (All)	54.39
	Marketing	* Labor	3 (NSW, Vic., WA)	50.57
	Industrial employment	* Labor	3 (NSW, Vic., WA)	50.30
1948	Rents, prices	Labor	0	40.66
1951	Communists	Liberal/CP	3 (Qld, WA, Tas.)	49.44
1967	Nexus (Parliament)	Liberal/CP	1 (NSW)	40.25
	Aboriginal people †	Liberal/CP	6 (All)	90.77
1973	Prices	Labor	0	43.81
	Incomes	Labor	0	34.42
1974	Simultaneous elections	*Labor	1 (NSW)	48.32
	Amendment	* Labor	1 (NSW)	48.02
	Democratic elections	* Labor	1 (NSW)	47.23
	Local government	* Labor	1 (NSW)	46.87
1977	Simultaneous elections	Liberal/NCP	3 (NSW, Vic., SA)	62.20
	Casual vacancies †	Liberal/NCP	6 (All)	73.30
	Territorial votes †	Liberal/NCP	6 (All)	77.70
	Retirement of judges †	Liberal/NCP	6 (All)	80.10
1984	Terms of senators	* Labor	2 (NSW, Vic.)	50.60
	Interchange of powers	* Labor	0	47.10
1988	Parliamentary terms	Labor	0	32.80
	Fair elections	Labor	0 States (ACT in favour)	37.41
	Local government	Labor	0	33.48
	Rights and freedoms	Labor	0	30.62
1999	Republic	Liberal/NCP	0 States (ACT in favour)	45.13
	Preamble	Liberal/NCP	0	39.34

Note: subjects marked † achieved sufficient majorities for change to the Constitution.
** Referendum held at the same time as a federal election.*
Source: Australian Electoral Commission

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Voters who do not understand the Constitution may see a referendum as an attempt to increase the power of federal politicians. This distrust of politicians may sway an elector to vote 'No'. Voters in smaller States in particular tend to vote against anything they see as an increase in Commonwealth power.

The proposed 2013 referendum to give local government financial powers was deferred because it had been legislated to be held only on 14 September. The election was conducted a week earlier.

Since 1967, however, there has been an increase in the success rate of referendums. This reflects changing attitudes to the structure of federalism in Australia. It also reflects the changing economic needs of our country. Today, we expect the Commonwealth government to provide social services and improvements in our quality of life. The States cannot fund such costly programs, because the Commonwealth has the power to raise revenue by taxing incomes, so it has been necessary to alter the Constitution to allow the Commonwealth parliament to legislate in these areas.

Referendum proposals for substantial change have generally not been successful. Those concerned with minor changes to the Constitution, such as the retirement age of judges and rules for the filling of casual vacancies in parliament, have been far more easily accepted.

You can track the progress of these proposals by visiting www.aph.gov.au.

In March 2013, both houses of the Commonwealth parliament passed an Act to give further recognition to Indigenous people in Australia. The *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) aimed to raise awareness of better protect the rights of Indigenous people. The Act provided for a 2-year program of community awareness on the issue in preparation for a referendum on the topic. Also in March 2013, a Joint Standing Committee of both houses of the Commonwealth parliament recommended a separate referendum to give the Commonwealth the power to directly finance local government activities. The referendum was initially planned for the same day as the 2013 federal election. Some States, such as Victoria, opposed the 'Yes' vote (go to www.aph.gov.au for further details).

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NEWSREPORT 7.8

Why referendums fail – lessons from the referendum for a republic

IN AUSTRALIA, MOST REFERENDUMS DO NOT succeed. This is because the formal process of seeking a change to the Constitution is so demanding. When writing the Commonwealth Constitution, the nation's founding fathers believed that the referendum process would protect Australians from proposals with unsound or unclear implications. For a referendum to succeed, a 'special majority' of Australians is required: the double majority – an overall majority plus majorities in a majority of States.

A costly process

It was estimated that the 1999 republic referendum cost $91 million. This included the cost of a nationwide education program, advertising, the preparation of ballot papers and a poll by the Electoral Commission. The costs of the Electoral Commission alone were estimated to be in excess of $55 million.

A difficult process

Difficulties in initiating constitutional change start with the amendment procedure. Section 128 of the Constitution sets out the conditions for changing the Constitution, which starts in Commonwealth parliament. This means that the government may have the whip hand from the start if the issue is one that the opposition does not support.

A referendum Bill must first be passed by both houses, but in practice, the Governor-General acts in the way he or she always acts: he or she will sign the writ for a referendum only on the recommendation of the Prime Minister. The current polarisation of federal politics has resulted in a referendum being a 'political football', with both major parties being concerned with concentrating political power rather than dispersing or sharing it.

The double majority

The 'special majority' required for the success of a referendum proposal can be viewed as a veto. Australians have not been afraid to use this veto, saying no to 36 of 44 proposals. Of the defeats, 31 proposals received less than 50% of the total vote and 11 failed to receive majorities in any of the six States. Only five proposals have failed because, despite receiving a majority of votes, they did not obtain the support of a majority of States. Proposals of low significance have tended to succeed.

Apathy or understanding

The failure of referendums is sometimes attributed to voter apathy and failure to understand the nature of the proposal.

Some people could view the history of referendum proposals as showing that Australians were non-thinkers and negative. However, research has shown that informal voting is low and that voters have been able to distinguish between proposals when two or more are put to the vote.

Keys to success

One essential element is needed for a referendum proposal to be successful: there must be federal consensus before and during the referendum campaign. The Prime Minister, as leader of the government, is usually pivotal in the referendum debate. The republic question showed for the first time a Prime Minister actively campaigning against the proposal. However, two leading frontbenchers, Treasurer Peter Costello and industrial relations minister Peter Reith, had views different from their leader. The double majority requirement for success means that the support of key players for the referendum must be evident not only at a national level but also at a State level.

Another essential element is communicating the reasons for change clearly to voters. One lesson learnt from the republic referendum is the importance of those advocating change being able to communicate the advantages of the change.

Figure 7.17 The Yes/No referendum booklet, advising voters of both sides of the argument

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Activity 7.5 Folio exercise

Referendums – a critical appraisal

Read 'Why referendums fail—lessons from the referendum for a republic' and '1967 – a time for change' and complete the following tasks:

1 Describe the process used to bring about a change in the wording of the Constitution.
2 Explain what is meant by the term 'double majority'.
3 Analyse the effectiveness of the referendum process in bringing about a change in the Constitution.
4 List the factors that limit the likely success of a referendum proposal.
5 Does section 128 protect the Australian Constitution? Discuss.
6 Before 1967, the Constitution did not give the Commonwealth the specific power to make laws about Indigenous people. Who held this legislative power? What term would be used to describe this type of power? Explain.

Activity 7.6 Multimedia report

Change and protection

Section 128 is there to allow changes to be made to the Australian Constitution, and also to protect it.

Present a multimedia report to the class that addresses both aspects – change and protection of the Australian Constitution. Your multimedia presentation should involve the use of at least one of the following:

- presentation software such as Prezi and a set of guide notes
- a PowerPoint presentation and a set of speaker notes
- a multimedia package to prepare a computer presentation and a set of student notes.

Provide an oral presentation of your work in addition to the multimedia presentation. Your presentation should do the following:

1 Outline the process that would be used to change any aspect of the Australian Constitution (by adding new words or deleting content).
2 Discuss the part or parts of the change process that are there to protect the Australian Constitution.
3 What factors would influence the likely success or failure of this process?

7.7 Impact of a High Court case on law-making powers

The High Court interprets the day-to-day application of the Constitution.

It is the role of the High Court to interpret the Constitution and to determine its day-to-day operation and application; it does not alter the written words. Its role is to determine the intentions of the founders when they wrote the Constitution and how those intentions apply to the present circumstances.

Case related to division of law-making powers: *R v Brislan; Ex parte Williams* [1935] HCA 78: (1935) 54 CLR 262.

The following case illustrates the impact a High Court interpretation of the Constitution can have on the division of law-making powers between the Commonwealth and the States.

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Cambridge University Press

DOES 'LIKE SERVICES' INCLUDE NEW TECHNOLOGIES?

R v Brislan; Ex parte Williams [1935] HCA 78; (1935) 54 CLR 262

Section 51(v) of the Constitution gives the Commonwealth parliament the power to make laws about 'postal, telegraphic and other like services'. When the Constitution was written, the post and telegraph were the main forms of communication. In 1905, the Commonwealth parliament passed the *Wireless Telegraphy Act*. Under this Act, all owners of wireless sets (radios) were required to have a licence. The defendant was charged with having a wireless without a licence. She challenged the validity of the law, claiming that the Constitution did not give the Commonwealth parliament power to make laws about wireless sets.

To resolve this dispute, the High Court had to interpret the meaning of the words 'like services' in section 51(v). The High Court decided that a wireless was a 'like service'.

Therefore, the *Wireless Telegraphy Act* was valid.

Jones v Commonwealth (No. 2) [1965] HCA 6; (1965) 112 CLR 206

A similar case occurred in 1965. In this case, the validity of the *Broadcasting and Television Act 1942–1962* (Cth) was questioned. Television had not been invented when the Constitution was written. There is no direct reference to making laws about television in the Constitution. In this case, the High Court decided that television was also a 'like service' under section 51(v). Therefore the *Broadcasting and Television Act* was valid.

These interpretations of the Constitution indicate that the term 'like services' gives the Commonwealth parliament the power to make laws on a range of communication technologies.

This case had a significant impact, as it meant a shift in the division of law-making powers from the States to the Commonwealth: the power to make laws in relation to broadcasting and wireless sets now lay with the Commonwealth parliament. Of course the States could still make laws in this area but if there was ever any conflict between their laws and the Constitution, section 109 would apply.

Activity 7.7 Folio exercise

The role of the High Court

1 Complete the table below, providing a detailed explanation of the roles of the High Court in relation to the Constitution.

Role	Explanation
Acts as a guardian of the Constitution	
Keeps the Constitution relevant and up to date	
Forms one of the checking mechanisms related to any injustice or abusive power that may arise	
Gives meaning to the words in the Constitution	
Applies the Constitution to everyday situations when a case is brought before it	

2 Can the High Court make actual changes to the words of the Constitution? Explain.

3 Read the article related to the Brislan and Jones cases and complete the following tasks:

- a Which section of the Constitution was interpreted in each of these cases?
- b Explain why Brislan felt that the charges should not have been brought in the first place.
- c Outline the High Court's decision in each case.
- d Do you agree with their decision? Explain your reasoning.

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7.8 Significance of the High Court's interpretation of sections 7 and 24

A key principle of the Australian parliamentary system is to ensure that we have a representative government: this means preventing governments abusing their power by making them answerable to the people at regular elections. This also aims to ensure that members of parliament represent the views and needs of those who voted them in.

Representative government is set up by two sections of the Australian Constitution:

- section 7, which requires that the Senate be 'directly chosen by the people'; and
- section 24, which states that the House of Representatives must be 'directly chosen by the people'.

Roach v Electoral Commissioner [2007] HCA 43

The High Court can declare laws invalid.

In *Roach v Electoral Commissioner* [2007] HCA 43; (2007) CLR 162, the High Court held that the requirement that there be representative government indirectly protected the right of adults to vote. If the parliament passed legislation that, for example, took away the right of women to vote, that would be contrary to representative government, and therefore not a valid law.

Legal brief 7.2

Do we have the right to vote?

Case related to interpretation of sections 7 and 24: *Roach v AEC* [2007] HCA 43; (2007) CLR 162.

The Australian Constitution sets up the structure of representative government in the following way: members of parliament must be voted in by, and must represent, their electorates. Sections 7 (Senate) and 24 (House of Representatives) require that members of parliament be 'directly chosen by the people'.

Facts of the case

In 2007 Ms Vickie Lee Roach took a case to the High Court seeking to clarify whether the Constitution protected the right to vote. Ms Roach was a 49-year-old Aboriginal woman who was serving a 5-year sentence for negligently causing serious injury in a car accident. At the time, Ms Roach was validly enrolled to vote in the Federal seat of Kooyong in Victoria. She would still be imprisoned during the November 2007 election. Ms Roach sought to challenge legislation that would stop her from voting at that election.

In 2006 the Australian parliament had amended the *Commonwealth Electoral Act 1918* (Cth); the amendment imposed a complete ban on any prisoner voting. Before this change, only prisoners serving terms of 3 years or more were disqualified.

Ms Roach sued the Electoral Commission in the High Court of Australia. She argued that the complete ban was invalid since:

- it interfered with the system of representative government the Constitution set up, thus breaching section 7 and section 24; or
- it violated the implied right to political freedom of communication.

The decision

By a majority (Gleeson CJ, who delivered an individual judgment, and a joint judgment from Gummow, Kirby and Crennan JJ), the High Court held that the Constitution's requirement for representative government was a restriction on the Australian parliament's power to decide who may vote. The High Court held that there is now constitutional

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Implications of representative government

In addition to the express rights, the High Court has considered that some rights may be implied by the Constitution. This involves drawing implications from the words of the Constitution. An implication is something that is meant or intended but not actually said. An implied right is a right that was intended by the drafters of the Constitution but not expressly stated in the document.

Implied rights can be read into the Commonwealth Constitution by the High Court.

The idea that the Constitution can be interpreted to include rights that are implied, but not stated, is much debated. Some commentators feel that these interpretations go beyond the role of the court, which is to interpret the meaning of the Constitution. However, as the Constitution provides for an elected and representative government, one could argue that it implies the need for a free debate so that the vote is informed and the representative government is effective.

Right to freedom of political communication

The right to freedom of speech is not stated in the Constitution. However, the High Court has determined that the Constitution contains an implied right to freedom of communication on political matters.

Freedom of communication on public affairs and political matters is implied in the Constitution.

This implied right was first recognised in the case of *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* [1992] HCA 45; (1992) 66 ALJR 695. This case is also known as the political advertising case.

protection of the right of Australian adults to vote. However, the Court held that the right to vote was not protected by the implied right of political communication.

Instead, the majority held that the structure of representative government in the Australian Constitution limits the Australian parliament's power to decide who may vote. (Gleeson CJ's judgment focused on particular parts of the structure of representative government, sections 7 and 24, to reach his conclusion. Gummow, Kirby and Crennan JJ focused on the whole structure to reach a similar conclusion.) So the parliament cannot pass laws that, by unreasonably taking away the right to vote of a class of persons, would interfere with representative government.

In this case the complete ban on prisoners voting was unreasonable, since many were serving short terms for minor offences. But the old ban – on prisoners who are serving terms of 3 years or more – was valid, since the length of sentence indicated that the prisoner had engaged in conduct that was viewed as taking them outside community expectations. So Ms Roach won the legal point but did not regain her vote.

This decision was a significant one, as the High Court's interpretation of section 7 and section 24 of the Australian Constitution has seen a range of views being expressed by eminent academic lawyers seeking to further clarify the relationship between the structures and text of the Constitution and rights which are protected. It will be interesting to see how future cases develop and clarify the reasoning of the Court in this area.

Vickie Lee Roach

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NewsReport 7.9

Political advertising case

A TELEVISION BROADCASTER CHALLENGED THE VALIDITY OF CHANGES MADE to the Broadcasting Act 1942 (Cth) by the Political Broadcasts and Disclosure Act 1991 (Cth). These amendments imposed bans on radio and television advertising for Federal, State and local government elections. The High Court held that the law was invalid because there was an implied right of freedom of communication on political matters.

The High Court stated that:

- the Constitution establishes a system (or structure) of representative government
- in a representative government, members of parliament are directly elected by the vote of electors
- a free discussion or debate about public affairs and political matters is essential to an informed vote, which is essential to the system of representative government
- since the Constitution provides for an elected and representative government, it implies the need for a free debate so that the vote is informed and the representative government effective.

Impact on defamation laws

This interpretation of freedom of communication on political matters was extended in 1994 in the case of *Theophanous v Herald and Weekly Times Ltd* [1994] HCA 46: (1994) 182 CLR 104. In this case the High Court decided that the Constitution protected, in most circumstances, those who commented on individuals engaged in political debates from being sued for defamation. It stated that the Constitution protects a 'free flow' of information and ideas between politicians, voters and anyone else involved in political processes (such as trade unions, community groups, and political and economic commentators).

The Constitution therefore protects discussion of the political views and public conduct of people who are engaged in activities that have become the subject of political debate. The result of the Theophanous case means that the implied right of freedom of communication on political matters could be used as a defence in a defamation action.

NewsReport 7.10

The gun control case

In 1995, the Victorian County Court heard one of the first cases claiming freedom of speech on government and political matters. The defence was based on the Theophanous case. The case involved the Sporting Shooters' Association of Australia, Victoria (SSAAV) and Gun Control Australia. The SSAAV sued Gun Control Australia for defamation. The SSAAV claimed that two defamatory articles were published in the Gun Control Australia magazine in January and May 1990. In determining whether the articles could be described as 'government and political matters', the judge considered the context in which the articles were published. The SSAAV and Gun Control Australia were the main parties involved in a public gun control debate. The judge considered that the articles were part of the ongoing debate about gun control and therefore part of a political discussion. The judge found that the defendants were not liable for defamation because the articles were part of a political debate and there is a constitutional right to freedom of communication on government and political matters.

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Limitations on freedom of political communication

In 1997, the High Court considered a defamation suit brought against the Australian Broadcasting Corporation (ABC) by former New Zealand Prime Minister David Lange. In this case, *Lange v Australian Broadcasting Corporation* [1997] HCA 25: (1997) 189 CLR 520, the High Court held that there was no absolute right to freedom of communication.

The High Court stated that parliament can pass a law restricting freedom of communication for some legitimate reason. These restrictions would be valid if:

- the object of the law is compatible with the maintenance of the system of representative and responsible government provided for by the Constitution; and
- the law is reasonably appropriate and adapted to achieving that legitimate object or end.

This freedom limits the ability of parliaments to restrict free political communication, rather than guaranteeing the rights of individuals. In addition, freedom of communication does not apply to the discussion of political matters in other countries.

Freedom of political communication operates as a limit on parliament's powers. There is no absolute right to freedom of communication.

CHANGES IN HIGH COURT INTERPRETATIONS OVER TIME

In the first 20 years after Federation the High Court interpreted the powers of the Commonwealth parliament in a very limited way. The High Court was more attuned to protecting States' rights, and took the view that any Commonwealth law that would restrict these 'reserved powers' was invalid.

This changed in 1920 when the High Court decided that the Constitution should be given a much broader interpretation – it should be interpreted according to the natural meaning of the words. Since the 1980s the High Court has appeared to be giving the Constitution a very liberal interpretation, expanding the range of law-making powers that can be used by the Commonwealth parliament.

In recent years, some commentators have suggested that the High Court has adopted an 'activist' role in interpreting the Constitution. The term 'activist' implies that the High Court is working towards bringing about change.

There are a number of reasons for the High Court adopting an activist approach to the Constitution. These reasons include economic changes, changes in the nature of war and therefore defence, and changes in communication and transportation. Between 1901 and the start of the 21st century there have been significant changes in world politics and in the nature of diplomacy. The High Court must somehow take all of this into account.

The impact of High Court interpretations of the Constitution can be seen in several areas:

- the powers of the Commonwealth parliament in relation to external affairs
- the financial relationship between the Commonwealth and State governments
- the implied right of political communication.

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NEWSREPORT 7.11

Has the High Court gone too far?

FOR MANY AUSTRALIANS, THE HIGH COURT MAY conjure up images of bewigged elderly men toiling over books. Long seen as the bastion of tradition and conservative attitudes, the High Court provided a narrow and legalistic application of our Constitution in the past. However, since the mid-1980s things have been rapidly changing. The rate of change in recent years has resulted in the court being criticised for being too revolutionary – an unaccountable, unelected maker of new laws.

1980s – a change in approach

From 1987 onwards, there has been a clear change in approach: the High Court now considers the intentions of the authors of the Constitution in deciding how the Constitution should be interpreted.

Under Chief Justice Mason (1987–95), the High Court had been the most activist court that Australia had ever seen. In the landmark case of *Cole v Whitfield* [1988] HCA 18; (1988) 164 CLR 360, the Court increased the power of governments to regulate interstate trade by reversing the established interpretation of section 92 of the Constitution.

Susan Kiefel, the first female Chief Justice of the High Court

1990s – protecting rights

In the 1990s, the Court signalled a new era of constitutional interpretation. It protected the rights of the accused to a fair trial. It recognised the right to freedom of speech as an implied intention of the founding fathers. This was a period of new commitment to the protection of rights.

George Williams, a well-known scholar in constitutional law, describes the High Court at this time as 'avowedly activist in that it was prepared to confront its role in common law and the interpretation of the Constitution where justice or the needs of contemporary Australia dictated'.

The pace of change

The 1990s were also a period of significant controversy about the role of the High Court. No longer was the High Court seen as irrelevant to or remote from daily affairs. It became the subject of media and public debate. Under Mason, the High Court handed down a great number of landmark decisions over a relatively short period of time. The pace of change was partly due to the types of cases that the Court was now hearing. The High Court only hears the most difficult cases. There are no easy answers to these cases and they often have political implications.

The pace of change can also be attributed to the membership of the Court. During the Mason period, the court was made up of judges who were prepared to recognise their role as law-makers.

High Court or parliament?

Some commentators see Australia's High Court as travelling too far from the traditions of British legal principles. It has been claimed that the Court has moved too close to the US model, where the Supreme Court is seen as the last line of defence against bad laws and government interference in civil liberties.

Critics also argue that there has been a shift in political responsibility from the parliament to the High Court and that politically contentious issues are best handled by parliament.

Others contest this view. They argue that the High Court was established as part of a system of checks and balances on the power of parliament and the executive. The High Court performs an important role in protecting our rights. It protects us against potential abuse of power. It interprets the powers of the parliament and the limits on the use of those powers. Given a global context of rapid social, economic and political change, this is not an easy task.

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HIGH COURT LANDMARKS

1901 The High Court was created by the Constitution.

1901–20 The High Court had a strict interpretation of the meaning of the Constitution. Three of the judges who were sitting on the High Court were involved in drafting the Constitution. These judges saw the Constitution as an agreement between the States that gave the Commonwealth parliament restricted and limited powers. The Constitution was interpreted in a way that would preserve the reserved powers of the States.

1920 The High Court heard the Engineers' Case (*Amalgamated Society of Engineers v Adelaide Steamship Co.* [1920] HCA 54; (1920) 28 CLR 129). In this case the High Court established the principle that it would give the Constitution the broadest possible meaning. Over the following years there was a general widening of the interpretation of section 51.

1940s In the First Uniform Tax Case (*South Australia v Commonwealth* [1942] HCA 14; (1942) 65 CLR 373), the High Court decided that the Commonwealth parliament had the power to tax incomes. The Commonwealth had, using its taxation power, passed legislation that created a national income tax. Before then, each State had its own income tax laws. The new Commonwealth income tax was payable at such a high rate that a taxpayer could not effectively pay both income taxes. The States challenged the tax in the High Court. They argued that:

- taxation was a concurrent power,
- the Commonwealth tax was so high that people would not be able to pay State income tax, and therefore
- the States would no longer be able to impose income taxes.

The High Court disagreed, and held that since section 109 ensured that Commonwealth law overrode inconsistent State laws on concurrent powers, the Commonwealth could impose such a tax. This decision gave the Commonwealth government a significant financial advantage over State governments, and broadened the Commonwealth parliament's powers in relation to taxation. In the State Banking Case of 1947, the High Court held that the Commonwealth parliament cannot pass laws whose sole purpose is to restrict and control State governments (*Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31). However, the judgment of the First Uniform Tax case stood, giving the Commonwealth the ability to dominate this area of concurrent power.

1980s The High Court broadened its interpretation of external affairs power to include making laws to implement international treaties in *Koowarta v Bjelke-Petersen and Others* [1982] HCA 27; (1982) 153 CLR 168, and *Commonwealth v Tasmania* (Tasmanian Dam Case) [1983] HCA 21; (1983) 158 CLR 1.

1990s The High Court recognised that there is an implied right to freedom of communication about political affairs.

2000s The High Court emphasised the importance of a representative government in its interpretation of sections 7 and 24 in the case of *Roach v AEC* [2007] HCA 43; (2007) CLR 162.

Activity 7.8 Folio exercise

Understanding the significance of ss 7 and 24 of Australia's Constitution

Read 'Do we have the right to vote?' and the article 'Political advertising case' and complete the following tasks:

1 Define the term 'representative government'.
2 Identify the two sections in the Constitution that relate to having a representative government.
3 Referring to the Roach case to support your answer, explain how the structure of representative government protects the right to vote.
4 Referring to the article 'Political advertising case', explain how the structure of representative government impliedly protects freedom of communication on political matters.

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Table 7.6 Does the Australian Constitution protect our rights?

Feature	Strengths	Weaknesses
Approach to the recognition of rights	• Express rights are entrenched in the Constitution and cannot be removed except by referendum. • Implied rights have been interpreted by the High Court and reflect the capacity of the Constitution to meet the changing needs and values of our society.	• The number of rights entrenched is very limited. Referendums to alter these rights, or to entrench other rights, are rarely successful. • Implied rights develop through case law and do not provide a comprehensive recognition of rights. They develop in an ad hoc manner.
Nature of the rights protected	• Express rights are mainly civil and political rights. • There is an implied right to freedom of communication on public affairs and political matters.	• Civil and political rights are limited; democratic rights are not mentioned in the Constitution. • Most rights are concerned with limitations on the action that the Commonwealth may take in relation to individuals.
Enforcement	• Express and implied rights are fully enforceable by the High Court, which can invalidate legislation that infringes those rights. • Rights stated in the Constitution operate as limitations on government power. Some rights are expressed as specific prohibitions. The Commonwealth parliament cannot make laws that conflict with an express or implied right.	• Enforcement through the High Court is time-consuming and costly. • Express rights mainly relate to the action of the Commonwealth government. • The Constitution does not necessarily safeguard individuals from the actions of State parliaments.
Constitutional interpretation	• The High Court interprets the meaning and application of those rights expressed in the Constitution. • High Court interpretation has implied rights consistent with fundamental democratic principles.	• Historically, the interpretation of express rights has been narrow. • The development of implied rights has been limited.

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7.9 International declarations and treaties and their impact on the external affairs power

What are treaties and declarations?

Treaties are formal agreements between nations. Treaties can be bilateral: between two nations. An example of this is the aviation agreement between Australia and the United Arab Emirates (UAE). Multilateral treaties are between three or more nations, and an example is the United Nations (UN) Charter. Multilateral treaties are generally developed through international (inter-governmental) organisations such as the UN or the International Labor Organization (ILO), but regional multilateral treaties such as the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP) are of growing importance for Australia.

Frequently, 'declarations', such as the Declaration on the Rights of the Child, are adopted by the UN General Assembly. However, those declarations are not treaties, which means they are not intended to be binding. Such declarations may, however, be part of a long process that leads ultimately to the negotiation of a UN Convention such as the UN Convention on the Rights of the Child, which *is* intended to be binding on the member states that adopt it. They may also, in certain circumstances, help in the interpretation of a treaty, as is the case with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970).

The external affairs power means that the Commonwealth can make laws to implement international declarations and treaties.

Treaties are formal agreements between two or more nations. They are binding at international law and they cover areas of importance to all signatories.

International declarations are different from treaties in that they are not intended to be binding. However, they may in certain circumstances help in the interpretation of a treaty.

NewsReport 7.12

What does the Constitution say about treaties and declarations?

THE CONSTITUTION SETS OUT TWO POWERS IN RELATION TO INTERNATIONAL declarations and treaties:

- First, there is the power to enter into international declarations and treaties, which is an executive power.
- Second, there is the power to implement international declarations and treaties, which is a legislative power.

Section 51(xxix) of the Constitution gives the Commonwealth parliament the power to legislate with respect to 'external affairs'. This has been interpreted by the High Court to mean that the Commonwealth parliament may legislate to implement in Australian law an international declaration or treaty that has been entered into by the executive under section 61 of the Constitution:

> 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.

For more information about treaties and international declarations, go to http://dfat.gov.au/international-relations/treaties/Pages/treaties.aspx.

Why do we need treaties?

Improvements in technology, and the increasing globalisation of the world, have meant that countries are interacting more frequently. This can be challenging, and concerns should be discussed between all relevant parties. Thus, if a country has a vested interest in a particular industry or issue they may sign a treaty either with one other nation (bilateral) or with several other nations or international organisations (multilateral) to ensure that their voice is heard about that particular area.

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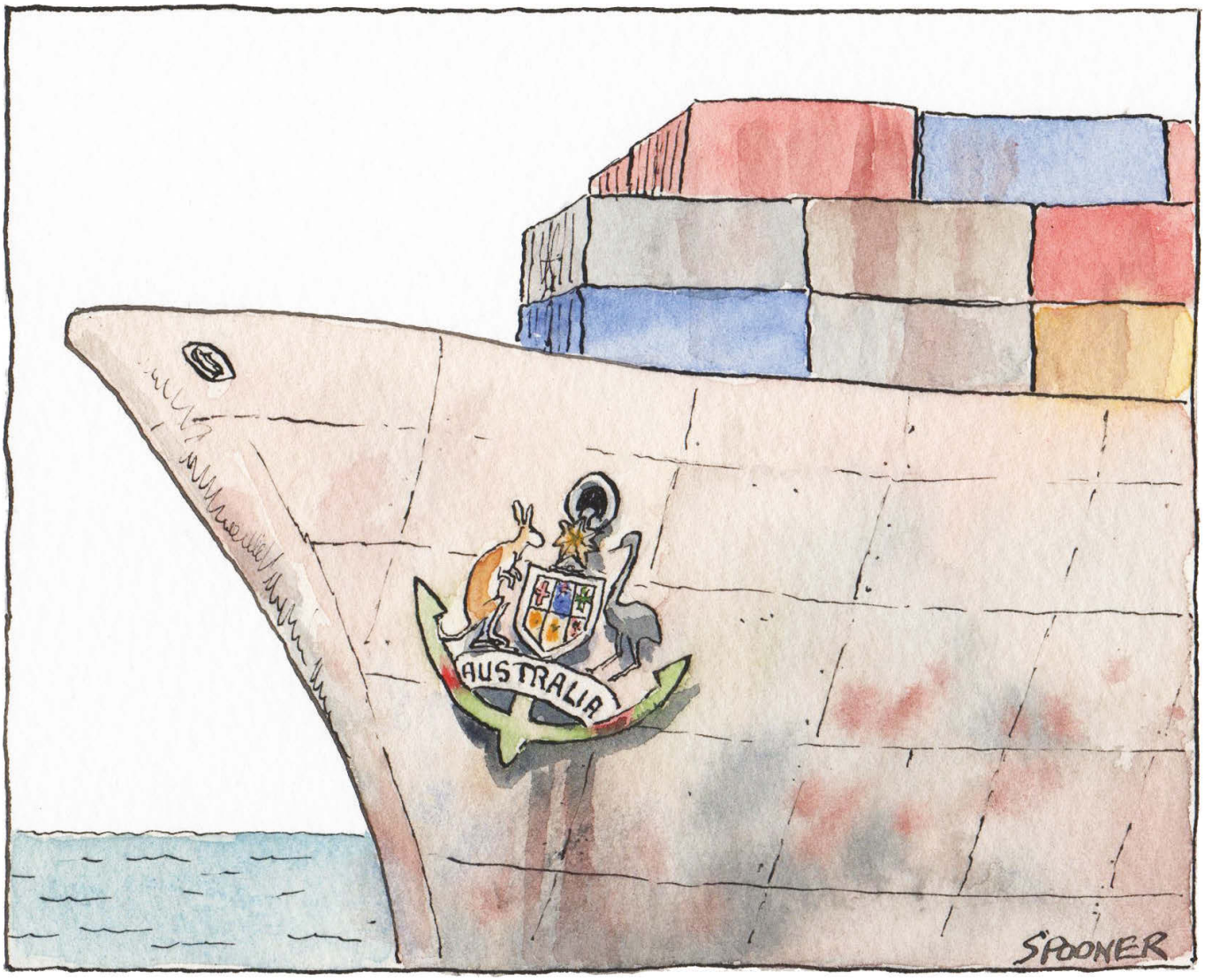

WHAT AREAS DOES AUSTRALIA HAVE A VESTED INTEREST IN?

Australia has a vested interest in many areas that either are covered by treaties or continue to be developed into treaties. Examples include:

Shipping – Given that Australia is an island, many of our treaties relate to our borders. In the area of shipping, Australia has assisted in revising the Law of the Seas Convention. This allowed Australia to gain sovereign rights over large areas of sea and the Continental Shelf.

Weapons of mass destruction – Australia also has a vested interest in ensuring that weapons of mass destruction are removed from the world, and has worked on putting together a comprehensive Chemical Weapons Convention draft – which in fact is fast approaching universal acceptance.

Nuclear non-proliferation – With the continued threat of nuclear weapons, Australia provided the stimulus to the development of a comprehensive Test Ban Treaty, which aims to ban the testing of nuclear weapons.

International cooperation on law enforcement – Borders do not stop criminal activity. Australia has played a significant role in relation to treaties on international cooperation on law enforcement, such as in relation to drug trafficking and terrorists.

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Legal brief 7.3

Impact of treaties on the Constitution

As we saw earlier, section 61 provides the power to the executive, rather than parliament, to enter into treaties. This means that important decisions related to treaty negotiations – which include determining the objectives of the treaty, determining the limits of Australia's power and finally deciding whether or not Australia should actually sign and ratify the treaty being discussed – are taken at ministerial level, usually by Cabinet.

However, just signing a treaty does not make it law in Australia. The Commonwealth parliament must pass legislation to implement the terms of the treaty. The Commonwealth parliament is given this power in section 51(xxix) of the Constitution.

What are external affairs?

At the time when the Commonwealth Constitution was being drafted, the subject of international declarations and treaties was not considered particularly important. The Commonwealth parliament was given power to implement these for Australia by way of legislation. However, the types of declarations and treaties that existed at that time were unlikely to have a significant impact on traditional areas of government responsibility.

As noted by Sir Robert Menzies in 'The High Court and the external affairs power' (HP Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Law Book Co., 1992):

> When the draftsmen of the Constitution wrote down the magic words 'external affairs', there did not leap into their minds any vision of the complex and novel things that were to come many years later. Least of all could they have imagined a comprehensive world organisation of which Australia would be a member, that there would be an International Labor Organization, or that the political stuff of 19th century treaties would largely have substituted for it the bargaining of merchants, of exporters and importers, agreements in the fields of health and science, the literally hundreds of matters engaging our attention and turning our eyes out to other lands and other peoples.

External affairs today

Today, the external affairs power is seen as giving the Commonwealth parliament the power to make laws about matters physically external to Australia and laws affecting Australia's relations with other nations. This power enables the Commonwealth parliament to legislate to implement Australia's obligations under international agreements. The interpretation of the external affairs power by the High Court has also allowed the Commonwealth parliament to make laws about matters that have traditionally been considered the residual powers of the States.

However, there are some limitations to the scope of the power. They include:

- constitutional restrictions and prohibitions on the Commonwealth parliament – express constitutional guarantees (such as freedom of interstate trade) and implied constitutional guarantees (such as the prohibition on legislation discriminating against the States or preventing a State from continuing to exist and function as such)
- the treaty must be genuine (*bona fide*)
- the law implementing the treaty must be a reasonable and appropriate means of giving effect to the purpose of the treaty.

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International declarations, treaties and Australian law

The Constitution gave the Commonwealth the power to enter into treaties and international declarations.

The Commonwealth's powers in relation to treaties were not widely used until the past 30 years. Although the Commonwealth government had unlimited powers to sign treaties, it was not clear that the Commonwealth parliament would be able to pass laws to implement treaty obligations. The position was clarified in the following cases, which indicate that the Commonwealth parliament has a broad power to legislate to implement the terms of an international agreement.

THE KOOWARTA CASE

Koowarta v Bjelke-Petersen and Others [1982] HCA 27; (1982) 153 CLR 168

In this case John Koowarta, an Aboriginal Australian man, attempted to purchase the Archer River cattle station, which covered much of the Wik nation's traditional land. The Queensland government, headed by Joh Bjelke-Petersen, blocked the sale on the grounds that Aboriginal people should not be allowed to buy large areas of land.

Koowarta argued that the Queensland government could not do this under the *Racial Discrimination Act 1975* (Cth), a Commonwealth Act which ratified an international treaty.

The Queensland government argued that the *Racial Discrimination Act* was not valid because the Commonwealth parliament did not have the power to make laws about racial discrimination. The Queensland government argued that the external affairs power should be given a limited interpretation. It should not be used to allow the Commonwealth parliament to take over the residual powers of the States.

The majority of the judges in this case decided that the *Racial Discrimination Act* was valid: it was a legitimate use of the Commonwealth's power to make laws to implement international agreements. The Commonwealth parliament can use the external affairs power to pass a law, provided it:

- gives effect to an obligation;
- is imposed on Australia by an international convention or treaty to which Australia is a party;
- concerns a matter of that convention or treaty which is an international concern; and
- concerns the relationship between Australia and other countries.

The Archer River flows through the land contested in *Koowarta v Bjelke-Petersen*

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THE FRANKLIN DAM CASE

Commonwealth v Tasmania [1983] HCA 21; (1983) 158 CLR 1

In this case the Tasmanian government challenged the validity of the *World Heritage Properties Conservation Act 1983* (Cth). This Act was passed by the Commonwealth parliament. The Act prohibited the clearing, excavation and building of a dam in protected areas, including an area on the Gordon River (below its junction with the Franklin River). The Gordon and Franklin rivers run through large areas of untouched wilderness. These wilderness areas contain many unique features. The flooding of the two rivers would have seriously damaged this significant area.

The area was nominated by the Commonwealth government to be included in the World Heritage List. The World Heritage List was established by an international treaty, which Australia had signed, and aimed to protect the world's cultural and natural heritage. The High Court was asked to determine whether the Commonwealth parliament had the power to ban the building of a dam in Tasmania.

The Commonwealth parliament claimed that, under sections 51(xxix), 51(xx) and 51(xxvi), the Constitution implied that it could make laws on matters of national concern. The High Court decided that the external affairs power gave the Commonwealth parliament the power to make laws that fulfil Australia's obligations under international treaties. Australia had signed a treaty to protect World Heritage areas, therefore the Commonwealth parliament was able to make laws to protect Australia's heritage.

Decisions in cases such as the Koowarta case and the Franklin Dam case were seen as greatly expanding the powers of Commonwealth parliament. In the past 30 years, the Commonwealth parliament has passed laws relating to the environment, racial discrimination and human rights, and has increased the size of the Australian fishing zone – all based on its external affairs power. It has been speculated that, unless the High Court acts to limit the interpretation of this power, the external affairs powers of the Commonwealth parliament are almost unlimited.

The High Court's interpretation of external affairs has expanded the Commonwealth's law-making powers.

There have been a number of High Court cases looking at treaties and the interpretation of what constitutes an 'external affair'.

The Koowarta case demonstrates the impact of the International Convention on the Elimination of All Forms of Racial Discrimination, which Australia signed on 13 October 1966.

Table 7.7 *Koowarta v Bjelke-Petersen and Others* [1982] HCA 27; (1982) 153 CLR 168

Relevant treaty	Facts	The issue	The decision
International Convention on the Elimination of All Forms of Racial Discrimination	The Aboriginal Land Fund Commission entered into a contract to buy a pastoral lease in Queensland. The Queensland Minister for Lands refused to give his consent to the transfer of the lease because the Queensland government's policy was opposed to the acquisition of large parts of the State by Indigenous Australians. Mr Koowarta brought an action against the Premier of Queensland, Mr Bjelke-Petersen.	Mr Koowarta claimed that the Premier had breached sections 9 and 12 of the *Racial Discrimination Act* 1975 (Cth). The Queensland government responded by challenging the Commonwealth parliament's power to make a law about racial discrimination.	The High Court decided that the Commonwealth racial discrimination law related to external affairs because it: • gave effect to an obligation imposed on Australia by an international convention or treaty to which Australia is a party; • related to a matter under convention or treaty that is an international concern; and • concerned the relationship between Australia and other countries.

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The World Heritage Convention was adopted by the UN Educational, Scientific and Cultural Organisation (UNESCO) General Conference at its 17th session in Paris on 16 November 1972. The Convention came into force in 1975. In August 1974, Australia became one of the first countries to ratify (sign and thus adopt) the Convention.

Table 7.8 Cases relating to the World Heritage Convention

Name of case	Facts	The issue	The decision
Fanklin Dam case *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1	Australia ratified the Convention for the Protection of the World Cultural and Natural Heritage in August 1974. The Tasmanian government asked that an area of Tasmania be listed for protection. A subsequent Tasmanian government authorised the construction of a dam on the Franklin River within this area. In 1982 the area was accepted by the World Heritage Committee for entry into the World Heritage List. In 1983, the Commonwealth passed the *World Heritage Properties Conservation Act* and prohibited the construction of a dam in the heritage area.	The Tasmanian government questioned the ability of the Commonwealth parliament to make a law to stop construction activity in a World Heritage area in Tasmania.	The High Court decided the Act was valid on a variety of constitutional grounds, one of which was the external affairs power. Once a *bona fide* treaty has been entered into, the Commonwealth has the power to legislate to implement the treaty obligations, subject to implied and express constitutional prohibitions.

Name of case	Facts	The issue	The decision
Lemonthyme Forest case *Richardson v The Forestry Commission* [1988] HCA 10: (1988) 164 CLR 261	The *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth) established a Commission of Inquiry to determine whether the Lemonthyme and Southern Forests areas in Tasmania formed part of a World Heritage area, and should be listed under the Convention for the Protection of the World Cultural and Natural Heritage. The Act provided interim protection for the area, to prevent damage or destruction prior to the commission making its decision.	The Commonwealth Minister for the Environment commenced an action against the Forestry Commission of Tasmania and a timber business, claiming that they breached the interim protection measures in the Act. The defendants challenged the validity of the legislation.	The High Court held that the Commonwealth had the power to pass this legislation because the external affairs power extends to: • a law required to discharge a treaty obligation that is known to exist; and • a law that is required to ensure the discharge of a treaty obligation which is reasonably apprehended to exist.

Name of case	Facts	The issue	The decision
Queensland Rainforest case *Queensland v The Commonwealth* [1989] HCA 36; (1989) 167 CLR 232	A proclamation was made by the Governor-General under the *World Heritage Properties Conservation Act 1983* (Cth), to protect an area of rainforest in Queensland. The area had already been listed on the World Heritage List.	The Queensland government claimed that the proclamation was invalid, on the basis that: • the area was not one in relation to which a proclamation could be made under the Act; and • the World Heritage listing was not conclusive of the area being part of Australia's natural heritage.	The High Court decided that the law was valid because: • the listing of the property is conclusive of its status in the international community; • there was an 'international duty' to protect or conserve the property; and • the protection of the property was an external affair and the proclamation was a means of discharging the responsibility.

Activity 7.9 Folio exercise

International declarations, treaties and external affairs

1 Name two international treaties that Australia has signed and identify the legislation that was passed to implement these treaties.

2 Explain how the High Court's decision in the Koowarta case and the Franklin Dam case changed our understanding of the Commonwealth's power to make laws relating to external affairs.

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Key point summary

Do your notes cover all the following points?

The purpose of the Australian Constitution

- ❑ Came into force on 1 January 1901
- ❑ Set out the structure, function and law-making powers of the Commonwealth parliament
- ❑ Established the High Court
- ❑ Provided the framework for Federation
- ❑ Set out the law-making powers of Commonwealth parliament

The division of law-making powers

- ❑ Exclusive powers (mainly in sections 51 and 52) are exclusive to the Commonwealth parliament and cannot be used by the States
- ❑ Concurrent powers are those that are shared between State and Commonwealth parliaments
- ❑ Residual powers are those that fall under the law-making powers of the States

Significance of section 109

- ❑ If there is an inconsistency between a State law and a Commonwealth law relating to an area of concurrent law-making power, Commonwealth law will prevail to the extent of the inconsistency

Constitutional checks on parliament

- ❑ Bicameral structure (Chapter 6)
- ❑ Separation of powers: The powers of government are divided to provide a system of checks and balances:
  - Legislative: make the laws
  - Executive: administer the laws
  - Judicial: enforce the laws
- ❑ Express rights in the Constitution
  - Acquisition of property on just terms
  - Trial by jury for a Commonwealth offence that is indictable
  - Freedom of movement
  - Freedom of religion
  - Protection against discrimination
- ❑ Double majority: this relates to section 128 of the Australian Constitution and the referendum process
  - a referendum allows for a change to the written words of the Constitution
  - a referendum can only be passed by a double majority
    - Step 1: the proposal is approved by an absolute majority in both houses of parliament
    - Step 2: the proposal is approved to go to a national vote by the Governor-General
    - Step 3: the proposal is put to a vote
    - to succeed, the proposal must be passed by the majority of people nationally and a majority of people in a majority of States
    - Step 4: if the vote succeeded, the change to the Constitution is given royal assent by the Governor-General
  - the 1967 referendum, which succeeded, was about allowing the Commonwealth the right to create special laws for the benefit of Aboriginal people, and about including Aboriginal people in future census figures
  - the 1967 referendum was not about giving Aboriginal people the right to vote: this had occurred in 1962

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- Role of the High Court is:
  - to interpret the Constitution and to determine its day-to-day operation and application
  - to apply meaning to the text of the Constitution; it cannot alter the written words
  - to determine the intentions of the founders when they wrote the Constitution and how those intentions apply to the present circumstances.
- High Court interpretation
  - Cases involving the interpretation of the Constitution arise in:
    - a conflict between a State and the Commonwealth parliament
    - a dispute between individuals or groups and the State or the Commonwealth government.
- The impact of the High Court's interpretations on parliament includes:
  - in the early 1900s, the High Court took a more legalistic approach to the Constitution, but over the past 30 years the High Court has played a more liberal and activist role
  - *R v Brislan; Ex parte Williams* [1935] HCA 78: (1935) 54 CLR 262 had a significant impact as it meant a shift in the division of law-making powers from the States to the Commonwealth.
- Significance of the High Court's interpretation of sections 7 and 24, relating to representative government
  - a key principle of the Australian parliamentary system is to ensure that we have a representative government.
  - this prevents governments from abusing power by making them answerable to the people at elections, and ensuring that members of parliament represent the views and needs of those who voted them in
  - section 7 requires that the Senate be 'directly chosen by the people'
  - section 24 states that the House of Representatives must be 'directly chosen by the people'
  - cases related to interpretation of sections 7 and 24
    - *Roach v AEC* [2007] HCA 43; (2007) CLR 162: the High Court held that the requirement of s 7 to have a representative government protects the right to vote by prohibiting the parliament from making a law that unreasonably takes away that right to vote.
    - *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* [1992] HCA 45; (1992) 66 ALJR 695: the High Court held that the Constitution provides for an elected and representative government, and for this to be effective there is an implied right to freedom of communication on political matters.

The impact of international declarations and treaties on the interpretation of the external affairs power

- Definitions of:
  - international declarations
  - treaties
  - external affairs as used in section 51(xxix) of the Australian Constitution.
- Powers as set out in the Australian Constitution related to this area
- Impact of treaties on the Constitution in the area of legislation
  - signing treaties
  - implementing treaties
- What external affairs means today
  - legislative: through parliament
  - interpretation: by the High Court
- Limitations of these powers
- Cases where international declarations and treaties have impacted on the interpretation of the external affairs power
  - racial discrimination – Koowarta case
  - World Heritage Convention – Franklin Dam case

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End-of-chapter questions

Revision questions

1 Explain the meaning of the following terms and give examples:
- residual powers
- concurrent powers
- exclusive powers.

2 Using an example, explain the significance of section 109 of the Australian Constitution.

3 Outline the referendum process.

4 Explain the significance of the double majority.

5 To what extent does the referendum process provide an effective mechanism for bringing about a change in the Constitution?

6 What is the role of the High Court in relation to the Constitution?

7 Using examples, describe the significance of a High Court case that has interpreted the Constitution and its effect on the law-making powers of the State and Commonwealth parliaments.

8 Express rights are there to act as a check and balance on parliament. List and explain the express rights contained in the Australian Constitution.

9 Outline the significance of sections 7 and 24 of the Australian Constitution

10 Using a case, explain how sections 7 and 24 protect our right to vote.

11 Using a case, explain how sections 7 and 24 protect our right to freedom of political communication.

12 Explain the meaning of the following terms:
- international declarations
- treaties
- external affairs

13 The World Heritage Convention was adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) General Conference at its 17th session in Paris on 16 November 1972. The Convention came into force in 1975. In August 1974, Australia became one of the first countries to ratify the Convention. Using an example, explain how the signing of this treaty impacted, through the Constitution and the High Court, on the external affairs power of the Commonwealth and State parliaments.

14 On 13 October 1966 Australia signed the International Convention on the Elimination of All Forms of Racial Discrimination. Using an example, explain how the signing of this treaty impacted, through the Constitution and the High Court, on the external affairs power of the Commonwealth and State parliaments.

Practice exam questions

1 Outline the purpose of the Australian Constitution. [2 marks]

2 Using examples, describe the way in which the Constitution sets out the law-making powers of the Commonwealth parliament. [6 marks]

3 Explain the principle of separation of powers. [3 marks]

4 Describe the 'double majority' in relation to the referendum process. [4 marks]

5 Using one High Court case, analyse the significance of High Court interpretations of SS7 and 24 of the Constitution. [5 marks]

6 Discuss one case in which the High Court has interpreted the Australian Constitution. What effect did the case have on the law-making powers of the Commonwealth and the States? [5 marks]

7 Using a case, discuss the impact international declarations may have on the interpretation of the external affairs power. [8 marks]

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CHAPTER 8
PARLIAMENT AND LAW-MAKING

Parliament is the supreme law-making body. This chapter examines the law-making process of parliament and investigates the factors that affect the ability of parliament to make law. These factors include:

- the roles of the houses
- the representative nature of parliament
- political pressures
- restrictions on the legislative powers of parliament.

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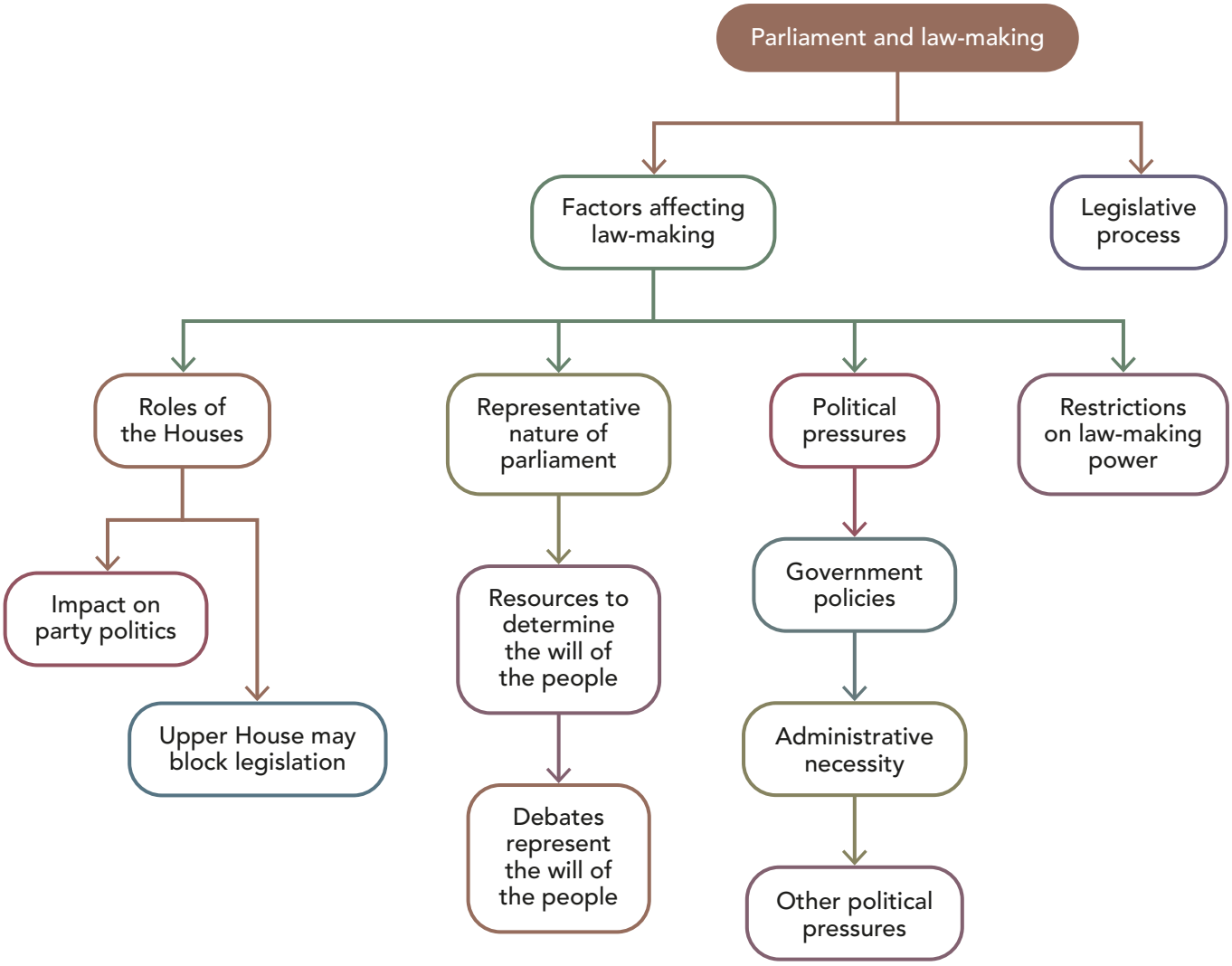

Key terms

Act a law passed by parliament

Bill a proposed law to be considered by parliament

delegated legislation law-making powers given by parliament to subordinate bodies such as local councils, government departments and statutory authorities

financial Bill a proposed law concerned with government spending

legislation an Act of Parliament or piece of delegated legislation

legislative process the process used by parliament to make laws

private member's Bill a proposed law introduced by a member of parliament without Cabinet approval

royal assent the final stage in the approval of a Bill: after a Bill has been passed by both houses it must be approved by the Crown

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8.1 The ability of parliament to make laws

The main role of parliament is to make laws.

The main role of parliament is to make laws. Parliament is responsible to the public, which has elected its members to represent their interests. Public opinion is the barometer of changing social needs, to which parliament may respond.

Legislative change may result from changing needs, changing values or technological advances, or through omissions or inconsistencies in existing **legislation**. The reasons for change in the law are discussed in more detail in Chapter 10.

There are a number of factors that affect the ability of parliament to make laws. These are the roles of the houses, the representative nature of parliament, political pressures and restrictions on the legislative powers of parliament.

The majority of legislation is put forward by the government as a result of Cabinet decisions. Other influences on legislative policy include approaches to members of parliament, reports of committees or the public service, or pressure from the opposition, a political party, pressure groups, interest groups, the media, trade unions or other organisations.

The number of Acts passed by parliament in any sitting (sitting periods are generally around 2 weeks at a time: in 2016 the House of Representatives sat for 51 days in total and the Senate sat for 42 days in total) depends on several factors. These include the amount of business before the parliament at that sitting, the nature and urgency of the legislation, political expediency, public support and the degree of opposition.

8.2 The legislative process

The process used by parliament to make laws is known as the legislative process.

A law passed by parliament is known as 'an **Act**', 'legislation' or 'a statute'. The procedure used by parliaments to make a law is known as the **legislative process**. The legislative process in parliament starts with the introduction of a Bill.

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Bills

A **Bill** is a proposed law. A Bill will become a law after it has been passed by both the upper and lower houses of parliament and assented to by the Crown. The main types of Bills are the following.

A Bill is a proposed law. Bills may be government Bills, private members' Bills or private Bills.

Government Bills

A government Bill is a Bill that has been approved by the Cabinet. These Bills are introduced either as a result of government policy or after recommendations put forward by government departments or other bodies, such as parliamentary committees, law reform commissions or interest groups in the community. (A Bill concerned with government policy is sometimes referred to as a public Bill.)

Most Bills are government Bills, which therefore already have the support of Cabinet.

The majority of legislation introduced into parliament reflects the needs of the government departments. As the government represents the majority in the lower house, a Bill with Cabinet support will usually be passed by parliament. Government Bills include **financial Bills**, such as the budget, which provide for government spending.

WHAT IS CABINET?

At a Federal level, Cabinet consists of the Prime Minister and ministers. At a State level, Cabinet consists of the Premier and ministers. Cabinet plays an important role in the legislative process. The law-making policies of the government are decided at Cabinet meetings. Cabinet will also decide the order in which proposed changes in the law will be presented to parliament. It officially approves legislation to be introduced by the government.

Cabinet is not formally recognised by the Constitution. The role of Cabinet in the making of laws comes from parliamentary convention. Parliamentary conventions are unwritten rules about how parliament operates that have developed over time.

Cabinet has extensive resources to determine the need for change in the law. It receives advice from various committees. When Cabinet approves a Bill, it will appoint a minister to be responsible for the passage of the Bill through parliament. When the government holds the majority in both houses of parliament, the Cabinet has a powerful influence. In this situation, a Bill approved by Cabinet will receive the support of the majority of members in both houses.

Private members' Bills

Any member of parliament can introduce a Bill without Cabinet support. A Bill may be introduced by a member of the opposition or by a government backbencher. These Bills are known as **private members' Bills**.

A private member's Bill may be introduced by any member of parliament; it has not been endorsed by Cabinet.

Private members' Bills are usually unsuccessful. Generally, members of parliament are members of a political party and will vote according to their party's policies. Private members' Bills that have been introduced by the opposition are usually defeated, as members of the party in government will often vote against the proposition. A private member's Bill introduced by a government backbencher may encounter similar problems.

Private Bills

Sometimes it is necessary to pass a Bill that affects only a small proportion of the community.

These are known as private Bills and they are usually passed without opposition. For example, the *Uniting Church in Australia Act 1977* (Cth) affects only one section of the Australian community.

Drafting legislation

Drafting is a process of framing legislation in the form of a Bill. The Parliamentary Counsel (the official parliamentary draftsperson) is a public servant and lawyer who is responsible for drafting legislation.

Bills are drafted by the Parliamentary Counsel's Office.

The minister responsible for the introduction of a Bill, or the relevant government department, will brief the Parliamentary Counsel on the requirements of the Bill. The counsel will draft a Bill based on this advice.

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NewsReport 8.1

Where do new laws come from?

TECHNICALLY, MOST OF OUR LEGISLATION COMES from the government. Government Bills have the approval of the Cabinet.

Reasons for change

There are many factors that may influence a change in the law. One important influence is the policies of the political party in government. These policies form a 'to do list' of the promises made at election time. Furthermore, a minister may have a personal commitment to a particular issue. In this case the minister may press for changes to be made.

Alternatively, a minister may respond to a perceived problem referred to them by their department. This may involve consultation with a law reform body, public servants or outside bodies headed by academics, judges or experts in a particular field. Public servants who are responsible for the administration of laws may find that when administering a particular law there are administrative difficulties, or public dissatisfaction, or unexpected consequences. They may put a proposal to the minister for a change in the law.

Decisions made by judges when hearing cases requiring the interpretation of the law may also influence a change. Ministers, their staff or public servants may have been lobbied by groups and individuals in the community for changes in the law to address particular concerns. Some changes in the law will result from a combination of these influences.

Drafting legislation

Once a decision to change the law or to introduce a new law has been made, a Bill must be written. This is called drafting legislation. The Parliamentary Counsel, who is a lawyer trained in this particular area, usually does this. The Parliamentary Counsel heads a team – the legislative drafting office, which is attached to a parliament.

The Parliamentary Counsel aims to write legislation that is clear, precise, unambiguous and easy to read. The legislation will impose new rules that tell people what they can and cannot do, and what the penalties are for breaching those rules. The legislation will also stipulate people's rights, duties and obligations in relation to those new rules.

Impact of errors

The Parliamentary Counsel strives to prepare legislation that is error-free. Errors made in drafting a legislative document may have immediate and direct results. An error in a law providing social security benefits may deny people a benefit the law meant them to be entitled to. An ambiguity in a conveyancing law, for instance, may cause disputes and delay the transfer of residential property. An unclear, imprecise law will confuse people governed by it and lead to costly and time-consuming court cases to interpret it.

The drafting process

The drafting process usually starts with instructions being given to the Parliamentary Counsel. This process may start with a phone conversation or oral instructions. In most situations, instructions will be given in written form, setting out the details of what the proposed Bill aims to achieve. The Parliamentary Counsel will need to work through the instructions and analyse them from a number of different points of view, including the following:

- What is the law trying to achieve?
- Does parliament have the power to make the law?
- What are the possible legislative options?
- Are there any gaps?
- Are there any other matters that need to be considered, such as the relationship between the proposal and existing legislation?

However, time restrictions can often limit the ability of the Parliamentary Counsel to consider all aspects. Often the drafting process is hurried. This is partly because of the workload of individual drafters and partly because legislation often needs to be written quickly after policy decisions have been made.

Activity 8.1 Folio exercise

Drafting legislation

Read 'Where do new laws come from?' and complete the following tasks:

1 Why are most changes in the law in the form of government Bills?
2 Briefly outline the factors that may influence a change in the law.
3 Parliamentary Counsels, who are experts in drafting laws, write proposed laws. Why are experts needed to draft laws?
4 Discuss why it is important that legislation be clear, precise and unambiguous.

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Stages in the legislative process

The legislative process consists of a number of readings that aim to provide for full debate and consideration of a Bill.

The greater part of the time in which parliament is sitting is taken up with the consideration of proposals for new laws or changes to existing laws. Before a Bill becomes a law it must pass the stages discussed below. These stages are called 'readings'. The term 'reading' dates back to a time when most members of parliament could not read, and the Bill would be read to them.

A Bill, with the exception of a financial Bill, may start in either house, but most legislation is initiated in the lower house. Financial Bills must start in the lower house. Bills agreed to by the lower house are then sent to the upper house.

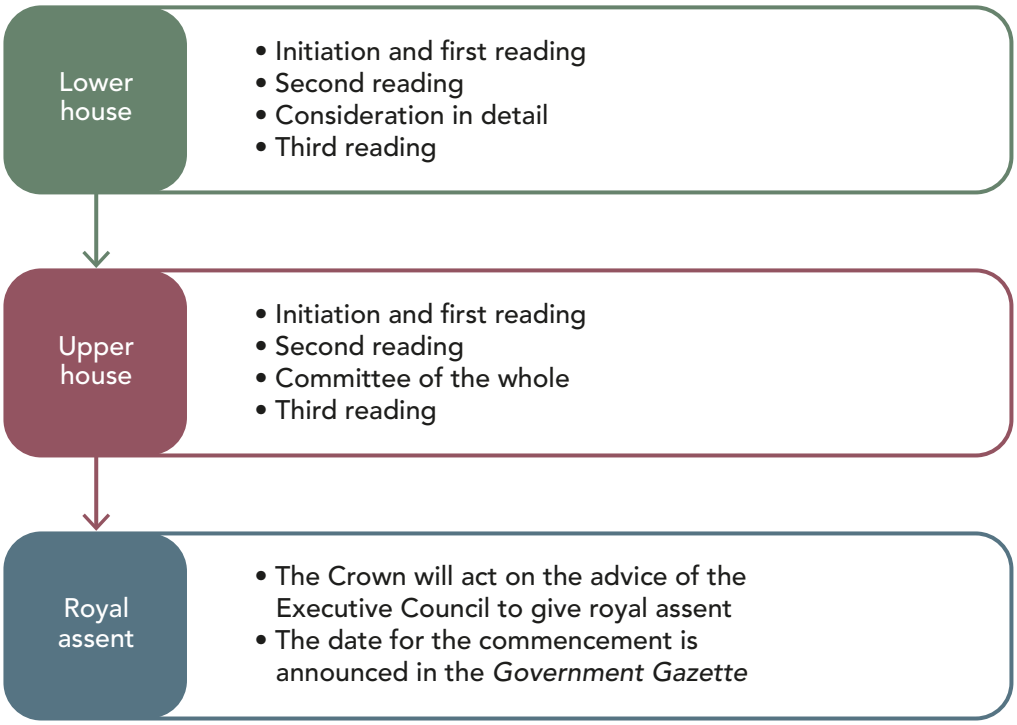

Figure 8.1 The legislative process

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Table 8.1 The legislative process

Lower House	
Introduction and first reading	The first reading is the Bill's formal introduction. The member must present the Bill to the house. The title is read out. There is no discussion or debate. Copies are circulated to all members of the house. The contents of the Bill are made known. At this time the Bill may move immediately to the second reading or a future date for the second reading is set.
Second reading	At the second reading, the minister will deliver a speech explaining the main purpose of the Bill. The minister then presents an explanatory memorandum to the house. The explanatory memorandum includes the reasons for the Bill and outlines its main provisions. Further debate on the Bill may be deferred and a time set for the continuation of the second reading. This allows time to study the Bill, as well as the opportunity for public discussion or reaction. When the debate resumes, the opposition, usually represented by a shadow minister, will outline their response to the Bill. The government and opposition will then take turns to speak either for or against the Bill. It is important to note that the opposition does not oppose all Bills. At the end of the debate the house will vote either for or against the continuation of the Bill. The second reading debate is usually the most substantial debate, as it is when the general principles and the reasons for and against the Bill are discussed.
Consideration in Detail	Having accepted the main purpose of the Bill, the house may consider it in detail. The deputy speaker takes the speaker's place. The house is now said to be in Consideration in Detail. The deputy speaker proposes each clause of the Bill to the house for agreement. Discussion and amendment may occur. When the considerations are completed, the speaker again takes the chair. The house resumes sitting and the deputy speaker reports that the Bill has been adopted with or without amendment. In some instances, the house may agree that the Bill does not need to be considered in detail – this stage is not compulsory. When a Bill is not controversial, the house may agree to bypass this stage and go directly to the third reading. The Senate and the Legislative Council refer to this stage as Committee of the Whole.
Third reading	The house will formally accept or reject the Bill as reported (presented). This report will include any amendments agreed to during the Consideration in Detail. There may be some further debate. However, the third reading is usually a formality in the lower house, as the government always has a majority in the lower house, and the government introduces most Bills. The house will vote for or against the Bill at the completion of the third reading.
Upper House	
When the Bill has been passed in the lower house, it is sent to the upper house. The Bill will go through the three reading stages in the upper house. When the Bill has passed the upper house, it is returned to the lower house, either with or without amendment. Both houses must approve amendments in identical form. The upper house can reject a Bill passed by the lower house. When there are disagreements, messages may pass between the two houses so that an agreement can be reached about the provisions in the Bill. If no agreement can be reached, the Bill may be 'laid aside', meaning that no further action is taken.	
Crown	
Royal assent	The final stage in the legislative process is known as **royal assent**. When both houses have passed a Bill, it is presented to the Crown by the initiating minister. The Crown will act on the advice of the Executive Council to give royal assent. Once a Bill receives royal assent it becomes an Act. An Act will come into force on a date set in the Act or on a date proclaimed by the Crown.

When will the Act come into force?

Once a Bill receives royal assent it will come into force either on a date set in the Act or on a date proclaimed by the Crown.

Sometimes the whole Act commences at the same time, but at other times different parts commence at different times. If no commencement date is specified, the Act will commence 28 days after it receives the royal assent.

Proclamation

Proclamation means that the date for the commencement of the Act may be announced (proclaimed) by the Crown in the *Government Gazette*. Proclamations can be made for a number of reasons. A proclamation can be used to set the date for the commencement of an Act or parts of an Act.

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ARE HUMAN RIGHTS PROTECTED IN LAW-MAKING?

In Victoria, the impact of laws on human rights must be considered as part of the legislative process. The Victorian Charter of Human Rights and Responsibilities requires that a 'statement of compatibility' must be presented to parliament before the second reading speech.

The statement of compatibility must state either that:

- the Bill is compatible with the human rights in the Charter, and explain how; or
- parts of the Bill are not compatible with human rights, and explain the nature and extent of the incompatibility.

The statement of compatibility ensures that ministers take responsibility for the human rights impact of proposed laws.

The Commonwealth parliament also considers the impact of laws on human rights. A statement of compatibility is prepared for any Bill introduced into a house of the Commonwealth parliament. The statement assesses whether the Bill is compatible with human rights contained in a range of international human rights agreements that Australia is a signatory to.

The statement of compatibility is presented to parliament at the same time as the Explanatory Memorandum for the Bill.

8.3 Factors affecting law-making by parliament

The primary role of parliament is to make laws. Parliament can make laws to remedy existing problems or in anticipation of future problems.

It is clearly stated in section 1 of the Australian Constitution that the legislative power of the Commonwealth shall be vested in the Commonwealth parliament. Within the restrictions of the Constitution, the Commonwealth parliament has the ultimate power to make law.

Similarly, section 15 of the Victorian Constitution states that 'the legislative power of the State of Victoria shall be vested in a Parliament … to be known as the Parliament of Victoria'. The Victorian Constitution gives general powers to the Victorian parliament to make laws for Victoria. The Australian Constitution specifically takes away some of these powers by giving them exclusively to the Commonwealth parliament.

Provided that the Victorian parliament is making laws within these constitutional limits, it also has the ultimate power to make laws for the state of Victoria.

The roles of the houses

The bicameral structure of the parliament contributes to the representative nature of parliament as a law-maker. The lower house represents the will of the majority of people. The upper house provides equal representation for each State or Territory (or region, in Victoria). In theory, this means that a range of interests is represented in the law-making process.

The bicameral structure of parliament provides for a representative law-making process.

SUPREMACY OF PARLIAMENT

The term 'supremacy of parliament' (also called the 'sovereignty of parliament') refers to the idea that parliament is the supreme or ultimate authority in the nation and that Acts of Parliament will override other forms of rule. Providing it is acting within its constitutional powers, parliament can make, amend or repeal law. Laws made by parliament:

- cannot be overruled by a court (but can be interpreted)
- override **delegated legislation**.

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Impact of party politics

Members of parliament may represent the views of their political parties rather than their electorates.

Parliament may not provide a forum for debate that reflects the public's best interests because it is dominated by party politics. Members of parliament may represent the views of their political parties rather than their electorates.

Role of the upper house

The upper house may act as 'a rubber stamp' or may block legislation.

Most Bills are government Bills. These usually originate in the lower house. As government is formed by the political party with a majority of seats in the lower house, government Bills will be passed by the lower house. However, the government may not have a majority of seats in the upper house. The upper house can act as a check on the actions of the lower house. One of its essential roles is to review legislative proposals.

If the majority party in the lower house controls the upper house, the upper house may not act to review the legislative process. In this situation, the upper house may in effect become a 'rubber stamp' – a body that approves government Bills automatically.

Alternatively, if the government does not have sufficient support in the upper house, legislation may not be passed. The upper house may act to frustrate the legislative program of the government and block the passage of legislation.

Representative nature of parliament

Parliament is democratically elected to represent the will of the majority.

Parliament is an elected and representative body. The system is based on the idea that elected members represent the will of the majority of people, and therefore that the laws made by parliament reflect the will and the values of the majority of people. For instance, there has been growing concern in the community about family violence. Laws to implement the recommendations of the Royal Commission on Family Violence passed with bipartisan support. This means that both the opposition and the government supported these laws.

NewsReport 8.2

Bipartisan support for action on family violence

THE VICTORIAN ROYAL COMMISSION INTO FAMILY VIOLENCE WAS ESTABLISHED ON 22 FEBRUARY 2015. The Commission was established in response to concerns about a series of family violence-related deaths in Victoria, and included a growing awareness of the scale of family violence and that existing policies had been ineffective in reducing the prevalence and severity of the violence.

The Royal Commission delivered its final report to the Governor on 29 March 2016. The report, consisting of seven volumes, contained 227 recommendations. The *Family Violence Reform Implementation Monitor Act 2016* (Vic) was passed by the Victorian parliament on 13 December 2016. This Act establishes an entity to monitor and report on the implementation of the Royal Commission's recommendations and action plan.

Rosie Batty, whose son Luke was killed by his father on 12 February 2014

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Resources to determine the will of the majority

Parliament has the resources and expertise necessary to ascertain the views of the community and the need for a change in the law. The parliament can form committees, working parties and special bodies to prepare recommendations for legislative action to fulfil the needs of the community. Legislation is often the result of lengthy inquiries, reports from law reform bodies, or investigations. These processes help parliament make laws that reflect the values of the community. However, these investigations can be time-consuming and costly.

Parliament has the resources and expertise to determine the will of the majority.

Debates represent the will of the people

The legislative process has many stages. This means that members can be informed about community views towards proposed changes. This also means that the laws passed by parliament have fully considered the views of the community.

However, the legislative process can be time-consuming and parliament must be sitting in order for it to make laws.

The legislative process ensures that the views of the community about proposed changes in the law are heard.

Delays in law-making

Members of parliament may sometimes delay passing a Bill to allow time for public response and debate. Pressure groups provide feedback via representations to ministers, other community members and groups write letters to parliamentarians and newspapers and express their views on social media, opinion polls may be conducted, and sometimes there is direct action, such as protest rallies.

As parliament is an elected and representative body, members of parliament are sensitive to public opinion and are, in general, careful not to alienate voters by passing legislation that is not popular. If members of parliament pass laws that do not represent the views of the community, they may lose their seats at the next election.

Parliament can only change the law when it is sitting.

WHAT IS REPRESENTATIVE AND RESPONSIBLE GOVERNMENT?

The idea of representative government is central to democracy. Representative government refers to a government that represents the views of the majority of people.

Government is formed from an elected and representative body. Members of the government come from the party with a majority of members elected to the lower house of parliament. This system aims to ensure that the government represents the views of the majority of people. If members of the government fail to represent the interests of the community, they will not be re-elected to parliament.

The idea of responsible government is also crucial to a democracy. Responsible government means that government is answerable to the parliament, and therefore to the people. There are a number of ways in which government is responsible. Ministerial responsibility provides that ministers must answer to the parliament for the actions of their departments.

Political pressures

A number of kinds of political pressure may affect the ability of parliament to make laws. As noted above, changes in the law may be the result of the policies of the political party in government or the needs of government departments.

Government policies

The majority of proposed laws are government Bills. During elections, political parties present to the community a range of political policies. If a party is elected to government, these policies form the basis of their legislative program – the changes that they will implement. These proposed changes will be introduced with the support of Cabinet. This means that these Bills will be supported by the government members.

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Administrative necessity

A government department may determine that a law needs to be introduced to deal with a particular issue. The proposal would be passed on to the minister in charge of the government department. The minister will then raise the issue with Cabinet and seek support to propose a change in the law.

NEWSREPORT 8.3

Why introduce a private member's Bill?

SINCE FEDERATION, ONLY 28 NON-GOVERNMENT Bills have been passed by the Commonwealth parliament. The opportunity to introduce private members' Bills is limited. The government controls the parliamentary agenda and the timing of when legislation can be introduced.

Unsuccessful Bills can still serve a valuable purpose. A private member's Bill may deal with a topic which the government opposes. The introduction of the private member's Bill will potentially force the government to debate the issue, thus raising public awareness around the issue. Sometimes the aim may be to attract media attention to the issue. Sometimes private members' Bills deal with highly controversial issues, such as same-sex marriage or euthanasia. For instance, on 12 September 2016, Adam Bandt, Cathy McGowan and Andrew Wilkie introduced the Marriage Legislation Amendment Bill 2016 [No. 2] into the House of Representatives. This Bill proposed to amend the *Marriage Act 1961* (Cth) to 'allow couples to marry, and to have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status'. The Bill was withdrawn from the Notice Paper in 2017. Later that year the Marriage Law Postal Survey asked Australians for their views on same-sex marriage.

Where the issue is highly controversial the government may be wary of possible electoral backlash if they endorse the Bill.

Sometimes the vote on a private member's Bill will be a conscience vote. In other words, individual members of parliament will be free to vote as individuals, not according to their party policies. Therefore, private members' Bills allow members of parliament to vote according to the values of their electorates.

Other political pressures

Other political pressures that affect the law-making role of parliament include lobbying by individuals and groups in the community. In theory, parliament reflects the will of the majority of people. However, where there are strongly opposing views in the community, parliament may not be able to determine the will of the majority and therefore be unable to act. The impact of individuals and groups (including the media) on parliament's ability to make laws will be discussed in more detail in Chapter 10.

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The legislative process is dominated by government through the Cabinet. While it may be argued that Cabinet, like the government, needs to act in the interests of the majority of the people, it may sometimes fail to act in this way due to particular electoral pressures. This is particularly evident with highly controversial issues, such as euthanasia, abortion or marriage equality. On the other hand, members of parliament who ignore the demand to change unpopular laws may suffer the consequences at election time.

ABORTION LAWS SLOW TO CHANGE

In the 1960s, section 65 of the *Crimes Act 1958* (Vic) clearly prohibited 'unlawful' abortion. In 1969, Justice Menhennitt interpreted 'unlawful' to mean any abortion that is not performed in good faith to preserve the mental or physical wellbeing of the mother (*R v Davidson* [1969] VR 667). Despite an outcry from both pro- and anti-abortion groups, parliament was slow to revise or amend this legislation. It wasn't until 2008 that the *Abortion Law Reform Act* (Vic) removed most provisions about abortion from the *Crimes Act 1958* (Vic).

Parliament may be reluctant to act on controversial issues due to electoral pressures.

Restrictions on law-making powers

Parliament is the supreme law-making body. The Commonwealth parliament has the power to make laws in relation to the exclusive powers stated in the Constitution. Section 109 recognises the supremacy of the Commonwealth parliament in relation to concurrent areas of law. The State parliaments can exercise both residual and concurrent law-making powers. If a State parliament makes a law which conflicts with a valid Commonwealth law, the State law will be declared invalid to the extent of the inconsistency.

For more information about the division of law-making powers between the State and Commonwealth parliaments, see Chapter 7.

In a federal system both State and Commonwealth parliaments are restricted in their law-making powers. The Commonwealth parliament is restricted to the law-making powers set out in the Constitution. Should the Commonwealth parliament make a law that is outside its constitutional powers, the law may be declared *ultra vires* (beyond their legal power and authority) and thus void. Provided that parliament is acting within its law-making powers, it is capable of undertaking comprehensive law reform.

The ability of a parliament to make laws is restricted by its law-making powers under the Constitution.

The ability of parliament to make laws may also be affected by confusion about law-making responsibilities at the Federal and the State levels.

Activity 8.2 Multimedia report

The ability of parliament to make laws

Complete a multimedia report on factors that affect the ability of parliament to make laws. Your multimedia presentation should involve the use of at least one of the following:

- a PowerPoint presentation and a set of speaker notes
- a multimedia package to prepare a computer presentation and a set of student notes.

To complete this task, you will need to, where possible, use examples to illustrate key points.

Your presentation should address the following questions:

- How do the roles of the houses of parliament affect the ability of parliament to make law?
- How does the representative nature of parliament affect the ability of parliament to make law?
- How do political pressures affect the ability of parliament to make law?
- How do the restrictions on the law-making powers of the State and Commonwealth parliaments affect their ability to make laws?

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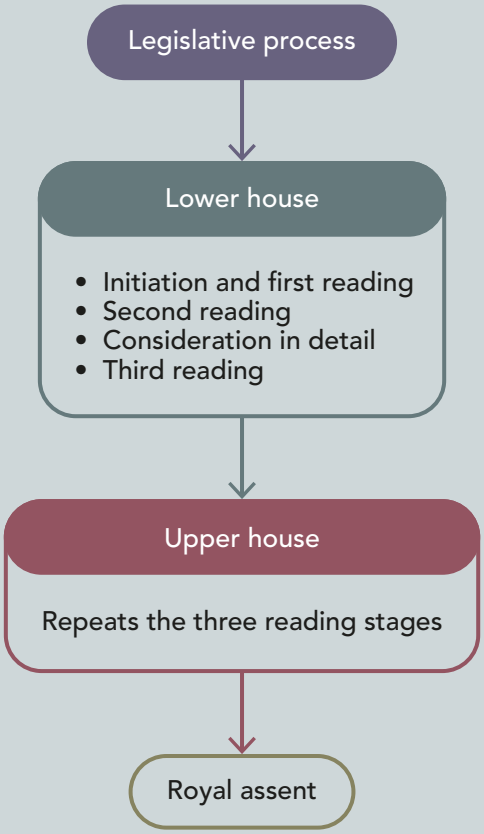
Key point summary

Do your notes cover all the following points?

- ❑ Initiation of legislation
  - The majority of legislation is proposed by the government as a result of Cabinet decisions.
  - When Cabinet approves legislation, a minister will be appointed to oversee the introduction of the Bill.
- ❑ Legislation is drafted by Parliamentary Counsel, who will write the proposal (known as a Bill) on the advice of the relevant minister or member of parliament.
- ❑ Legislative proposals must be passed by both houses of parliament. In each house a Bill must pass through the following stages:



  - Lower house
    - *Initiation and first reading* – These stages usually occur at the same time. The Bill is formally introduced and the title read. Copies are distributed.
    - *Second reading* – The minister will outline the purpose of the Bill and the broad principles will be debated.
    - *Consideration in Detail* – The Bill will be considered in detail, section by section, clause by clause. Discussion and amendment may occur.
    - *Third reading* – Amendments from the Consideration in Detail are adopted and the Bill is voted on.
  - Upper house
    - The Bill will go through the three reading stages in the upper house. In the upper house the *Consideration in Detail* is known as *Committee of the Whole*.
  - The Crown
    - The Crown will grant royal assent on the advice of the Executive Council. The Bill will come into force either on the date set in the Act, or 28 days after royal assent, or on a date proclaimed by the Crown in the *Government Gazette*.
- ❑ Supremacy of parliament: The term 'supremacy of parliament' (also called the 'sovereignty of parliament') refers to the idea that parliament is the supreme or ultimate authority in the nation and that Acts of Parliament will override other forms of rule.

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❑ Factors that affect the ability of parliament to make laws

Roles of the houses of parliament	• The lower house represents the will of the majority of people. The upper house provides equal representation for each State (region, in Victoria). In theory, this means that a range of interests is represented in the law-making process. • Parliament is dominated by party politics. Members of parliament vote according to the views of their political parties rather than according to the majority views of their electorates. • A significant role of the upper house is to act as a house of review. As legislation must be passed by both the lower house and the upper house, the upper house can act as a check on the Bills presented by the lower house. • The upper house may either 'rubber stamp' or block legislation.
The representative nature of parliament	• Parliament is an elected and representative body. Elected members represent the will of the majority of people. Therefore, in theory, the laws made by parliament reflect the will and the values of the majority of people. • Parliament has the resources and expertise necessary to assess the views of the community and the need for a change in the law. • In theory, members of the public can follow the debates of parliament and express their concerns to their local member. • Members of parliament may sometimes delay passing a Bill to allow time for public response and debate. • Members of parliament are sensitive to public opinion and are, in general, careful not to alienate voters by passing legislation that is not popular.
Political pressures	• The majority of proposed laws are government Bills which reflect the political policies of the government and are introduced with the support of Cabinet. Legislation introduced without the support of Cabinet is unlikely to be successful. • The legislative process is dominated by the government, through the Cabinet. • Other political pressures that affect the law-making role of parliament include lobbying by individuals and groups in the community. Where there are strongly opposing views in the community, parliament may not be able to determine the will of the majority and therefore will not act. • Parliament may not legislate on politically sensitive issues, fearing electoral backlash.
Restrictions on the law-making powers	• Parliament is the supreme law-making body, provided that it is making laws within its constitutional powers. • Parliament can make laws to comprehensively reform an area of law. • In a federal system, there may be some confusion about the law-making responsibilities of the Commonwealth and State parliaments.

End-of-chapter questions

Revision questions

1 What is the difference between a government Bill and a private member's Bill?

2 What is the role of the Parliamentary Counsel?

3 Explain the role of Cabinet in the legislative process.

4 How does the process used by parliament to make laws reflect the representative nature of parliament?

5 Explain four factors that affect the ability of parliament to make laws.

Practice exam questions

1 Suggest one reason for most Bills being first introduced in the lower house. [2 marks]

2 Outline two ways in which the role of the upper house may affect the ability of parliament to make laws. [4 marks]

3 How do restrictions on the law-making powers of parliament affect the ability of parliament to make law? [4 marks]

4 'The representative nature of parliament, combined with political pressures, significantly impact on the ability of parliament to make laws.' Discuss. [10 marks]

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CHAPTER 9
THE ROLE OF THE COURTS IN LAW-MAKING

This chapter considers the role of courts in making laws: the courts and parliament have complementary roles. It traces the development of judge-made law, the operation of the doctrine of precedent and the interpretation of statutes by judges. The roles of the Victorian courts and the High Court in law-making are examined, as are the reasons for, and the effects of, statutory interpretation. Factors that affect the ability of courts to make law are discussed. The chapter concludes by examining the relationship between courts and parliament in relation to law-making.

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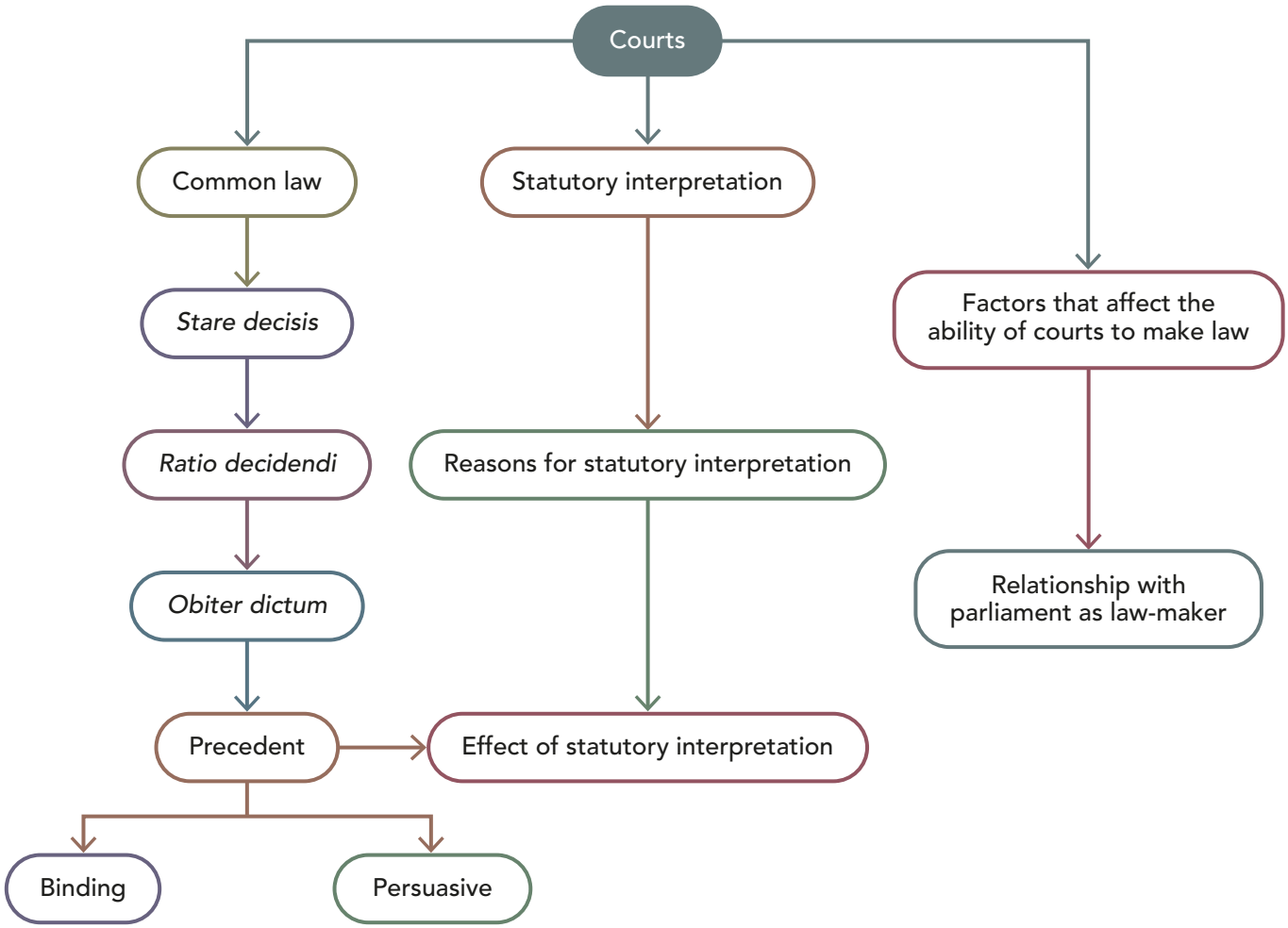

Key terms

binding precedent a precedent that must be followed – for instance, a decision of the Supreme or High Court

common law case law developed in the courts – this term is sometimes used to describe all case law or judge-made law

doctrine of precedent the system used by courts to make law: judgments of superior courts are written and reported in law reports, and applied to future cases with similar facts. Note: the expression 'doctrine of precedent' refers to the overall system used to create law in courts, not to specific judgments.

ejusdem generis a legal maxim used in the interpretation of statutes – it means 'of the same kind': when a general term will be interpreted to include the category indicated by the specific terms that precede it. The rule is that the general words are limited in meaning to the same kinds of things as appear in the specific words in the list. For example, if a statute applied to tigers, lions, leopards and other animals it could be assumed that a panther would be included as another animal, but not a cow. The list must contain at least two specific words before the general word or phrase for this rule to operate.

inter partes a decision between the parties, in which one wins and one loses

legal maxim a traditional rule, convention or practice

obiter dictum a judge's statement of opinion or observation made during a judgment but not part of the reason for a decision

persuasive precedent a precedent that a court does not have to follow but which is nevertheless very influential – applies to decisions of a lower court or a court at the same level

precedent law made by courts: it may refer to a single judgment ('a precedent') or several judgments ('precedent')

ratio decidendi the legal reasoning, or rule, upon which a decision is based

stare decisis the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

statutory interpretation the process of judges giving meaning to words within an Act where there is a dispute as to the application of the Act

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9.1 What is the doctrine of precedent?

One of the most important ways that the legal system achieves fairness is by making sure that like cases are treated alike. The idea here is simple, and we see examples of it in everyday life. For example, imagine a teacher states that there will be no talking during class time, and enforces that rule with all students – except one. Allowing one student to talk while everyone else in the class may not is inconsistent, and unfair, and should not happen. Once a rule is set up, it should be applied to all students.

In the same way, it would be grossly unjust if the law about murder was applied to most people, but not all. Those people who avoided a murder conviction might feel happy, but those who did not would be outraged – and society would be confused about whether murder was illegal or not. Instead of social cohesion, there would be disintegration.

The **doctrine of precedent** is simply a system used by courts to make sure that similar cases are dealt with in similar ways, in the interests of consistency and fairness.

When a legal dispute arises, the courts are the place where it must be resolved. In order to make sure that each case is dealt with fairly (and consistently), courts will look to see if any previous case (that is, a **precedent**) has dealt with the same fact situation, and will apply that precedent to ensure consistency. (To enable courts to find precedents, judgments of courts are recorded in written reports called law reports.)

The doctrine (that is, system) of precedent grew out of the courts' role of adjudicating disputes, and their desire to be fair in doing so.

Law created by courts using the doctrine of precedent is referred to as '**common law**', precedent or judge-made law.

9.2 How did common law develop?

Common law evolves from decisions made by courts.

The evolution of the common law can be traced back to the days of Anglo-Saxon England. Before 1066, when the Normans under William the Conqueror invaded England, the Saxons had established a system of local courts throughout the country. These courts applied laws that consisted of a combination of local customs and laws made by the kings.

A system of courts

After the Norman Conquest, the Norman kings introduced a more centralised structure for government and the administration of justice. This evolved over many centuries. At first the Norman kings relied on the existing courts to administer justice, but they sent out their own officials to preside over cases.

The role of these justices was mainly to collect taxes. They also had the responsibility for settling minor disputes. They travelled around England collecting taxes and hearing disputes. These travelling justices became known as 'circuit' judges. Today, judges travelling to regional centres to hear cases are still referred to as being 'on circuit'.

By the 12th century a network of king's courts had developed and the local courts became less important. A major advantage of taking a case to the king's court was that the decisions were more effectively enforced. The decisions of the king's court had the backing of the king's power.

Referring to past decisions

The rulings and principles established by judges developed into a uniform system of law. The circuit judges would meet and compare the cases that they had heard throughout the country. They would discuss the advantages and disadvantages of the various local customs that they had experienced. Gradually, the judges began to replace the local customs they considered to be unfair with the customs applied in similar cases from

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other areas. As a result, a body of 'common customs' evolved. This provided for greater consistency and certainty throughout England.

The law that was common throughout England became the law declared by judges. The judges would look at previous cases to decide what the law should be. This process is known as precedent. The operation of the doctrine of precedent is a feature of the common law system.

Common law evolved from judges looking at previous cases to determine what the law should be. Each time a judge decides that an established rule applies to a new situation, the judge is using precedent. Other judges would apply the same legal principles in similar cases. This is different from the law made by parliament, which is found in Acts or statutes.

Common law evolves through the application of the doctrine of precedent.

Common law and statute law

Today, many of the common law principles have been rewritten in statutes. Where there is a conflict between common law and statute law, statute law prevails. In other words, if common law says one thing and the statute law states something different, you must obey the statute law.

If common law and statute law conflict, statute law prevails.

9.3 Precedents

A precedent is a reported judgment of a court that establishes a point of law. A judgment is a court decision. The judgment will include the reasons for the decision. The reasons for the decision are known as the ***ratio decidendi***. The judgments of courts are published in law reports.

The *ratio decidendi* forms the legal principle. These legal principles are used to determine later cases. The doctrine of precedent refers to rules used by the court to decide when they should use the legal principle established in a past case.

A precedent is a reported judgment of a court that establishes a point of law.

Not all court judgments are reported. Only the decisions of the higher courts (known as 'courts of superior record') that involve new or significant issues of law are published in law reports. To determine what the law should be, lawyers and judges refer to the reports of past similar (or like) cases. In Australia, all courts in the court hierarchy from the Supreme Court and above are courts of superior record.

Only reported decisions can form a precedent.

Reported judgments

To understand how lawyers and judges use precedent, it is important to understand how to read a reported case. When a case is reported, a full statement of the case is printed. This statement will include:

- the names of the parties involved in the dispute
- the name of the court and the year the case was heard
- a summary of the facts
- the arguments presented by both sides
- the judgments of the judge/s – the reasons given by a judge, explaining and justifying the decision made
- a decision ***inter partes*** – a decision in favour of one of the parties, specifying which party won the case.

Go to the Library section of the High Court of Australia's website (http://www.hcourt.gov.au/library/about-the-library) for examples of recent judgments.

Ratio decidendi

Not everything said by a judge (or judges) in the course of reaching a decision is a precedent. Only the *ratio decidendi* forms the legal principle to be used in future cases.

The term *ratio decidendi* means literally 'the reason for deciding'. The *ratio decidendi* is the rule of law stated by the judge as the reason for deciding. According to the doctrine of precedent, in cases that have similar circumstances, the *ratio decidendi* of higher courts will be binding on all lower courts (in the same court hierarchy), when there are similar fact circumstances.

The *ratio decidendi*, or reason for deciding, forms the legal principle.

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Obiter dictum

Obiter dicta, the plural of *obiter dictum*, are statements made that do not form a *ratio decidendi* but may be persuasive.

A comment made by a judge that is on a question of law, but not directly relevant to deciding the case, is an ***obiter dictum:*** a statement made 'by the way'. A judge's statement or opinion in a judgment that is not part of the *ratio decidendi* (precedent) may be used as a persuasive argument in later cases.

Stare decisis

Stare decisis means to stand by what has been decided.

Stare decisis means 'to stand by what has been decided'. Lower courts stand by, or follow, the decisions of the higher courts in 'like cases'.

The rules relating to *stare decisis* can be summarised as follows:

- Precedents can be set only by a higher court (usually when exercising an appellate – appeal – jurisdiction).
- All lower courts are bound by the decisions of higher courts in the same hierarchy.

  For instance, the Victorian County Court is bound by the decisions of the Victorian Supreme Court. Both courts are part of the Victorian court hierarchy. The Victorian County Court does not, however, have to follow a decision of the South Australian Supreme Court – the South Australian Supreme Court is not part of the Victorian court hierarchy. (A decision of a court from outside the hierarchy is 'persuasive' – it can be used as a convincing argument about what the law should be – but it is not binding.)
- Decisions of courts at the same level, or equal standing, are not binding. For example, a judge of the Supreme Court may disagree with previous decisions of other judges in the Supreme Court. The previous decisions are seen as highly persuasive. By convention, a judge will follow a decision by an earlier judge in the same court. This convention is seen as providing for certainty and consistency. One exception to this convention is the High Court (the highest court in Australia): it is not bound by its own past decisions.

Binding precedent

A precedent made by a higher court that must be followed is a binding precedent.

A **binding precedent** is a legal principle that must be followed. The doctrine of precedent depends on lower courts following the decisions of higher courts. The general rule is that a decision of a higher court in the same hierarchy is binding or must be followed by lower courts in the same hierarchy when deciding similar or 'like' cases. For instance, in Victoria a judge of the County Court must follow the decisions of judges in the Supreme Court. A decision of the High Court is binding on all other Australian courts.

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STRONG v WOOLWORTHS LTD (t/as BIG W) (ABN 000 014 675)

and Another

[2012] HCA 5; [2012] 285 ALR 420

HIGH COURT OF AUSTRALIA

FRENCH CJ, GUMMOW, HEYDON, CRENNAN and BELL JJ

5 August 2011, 7 March 2012 – Canberra [2012] HCA 5

Negligence – Causation – Slip and fall – Shopping centre – Whether absence of adequate cleaning system was cause of injury – Necessary condition of harm – Where evidence did not establish when hot chip fell on floor – Whether plaintiff's case on causation more probable than not – Where injury occurred around lunchtime – Where second cleaner employed during middle of day – Increased risk of injury – Factual causation – Material contribution – (NSW) *Civil Liability Act 2002* ss 5, 5D, 5E.

The respondent, Woolworths Ltd (Woolworths), operated a Big W store in a shopping centre at Taree. On a day in late September 2004 at approximately 12.30pm, the appellant, Kathryn Strong, slipped and fell on a hot chip outside the Big W store, in an area for which Woolworths was responsible and close to a food court. Strong suffered a serious spinal injury as a result of her fall. At the time of the injury, Strong was already disabled, having had her right leg amputated above the knee, and walked with the aid of crutches. Strong's injury occurred when one of her crutches made contact with the hot chip.

Strong brought proceedings for negligence against Woolworths in the District Court of NSW. At first instance, Robison DCJ awarded Strong over $580,000 damages. On appeal, the NSW Court of Appeal (Campbell JA, Handley AJA and Harrison J) found that Strong had failed to prove that Woolworths' negligence was a cause of her injury: see *Woolworths Ltd v Strong [2010]* NSWCA 282.

Strong appealed to the High Court of Australia.

Held, per French CJ, Gummow, Crennan and Bell JJ (Heydon J dissenting), allowing the appeal:

Per French CJ, Gummow, Crennan and Bell JJ:

(i) It was not necessary for Strong to point to evidence permitting an inference as to when the hot chip had been deposited on the floor. It was sufficient for Strong to prove that it was more probable than not that Woolworths' negligence was a necessary condition of her fall. This required a consideration of the probabilities in light of the evidence which did not establish when the hot chip was deposited: at [34].

Kocis v SE Dickens Pty Ltd [1998] 3 VR 408, applied.

(ii) The engagement of a second cleaner between 11am and 2pm did not support the conclusion that the probabilities were against the chip being deposited before 12.15pm. The cleaning company did not increase the frequency of inspections during this time and the full-time cleaner took a lunchbreak during this time. Both of these facts tend against a finding of an increased risk of injury during this period: at [36].

(iii) There was no evidentiary basis for the finding that the hot chip was dropped shortly before Strong's accident. There was no evidentiary basis for the finding that hot chips are more likely to be consumed at lunch rather than for breakfast or for a mid-morning snack. The conclusion that the hot chip was deposited on the floor at a particular time was only speculation: at [37], [38].

Appellant v respondent

Case citation

Name of court

Five justices who heard the appeal

Date of decision

Catchwords (key issues)

Facts

Summary of decision

In judgments, 'Brown CJ' refers to Chief Justice Brown. Other judges are referred to as Smith J, and if there is a list of judges, JJ is used to mean the plural: Smith, Jones and Black JJ.

Figure 9.1 An example of a reported judgment

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Persuasive precedent

A persuasive precedent does not have to be followed. It may be contained in *obiter dicta*, or in a decision of a lower court or a court in another hierarchy.

A **persuasive precedent** is a precedent that contains a 'convincing' argument, but one that does not have to be followed because it is not binding: it is not a decision made by a higher court in the same court hierarchy in a case with similar facts.

Decisions that are considered to be persuasive authority include:

- *obiter dicta* statements of a court at the same level in the same court hierarchy; for example, a Supreme Court judge is not bound by the *obiter dicta* statements made by other Supreme Court judges in past cases
- *ratio decidendi* of courts of the same level or lower in the same hierarchy; for example, a County Court judge would not be bound by a decision of another County Court judge or a decision of a magistrate in a previous case
- the decision of a court in another hierarchy.

Although not binding, such cases may be seen as points of reference. They give an indication of what other judges think the law should be.

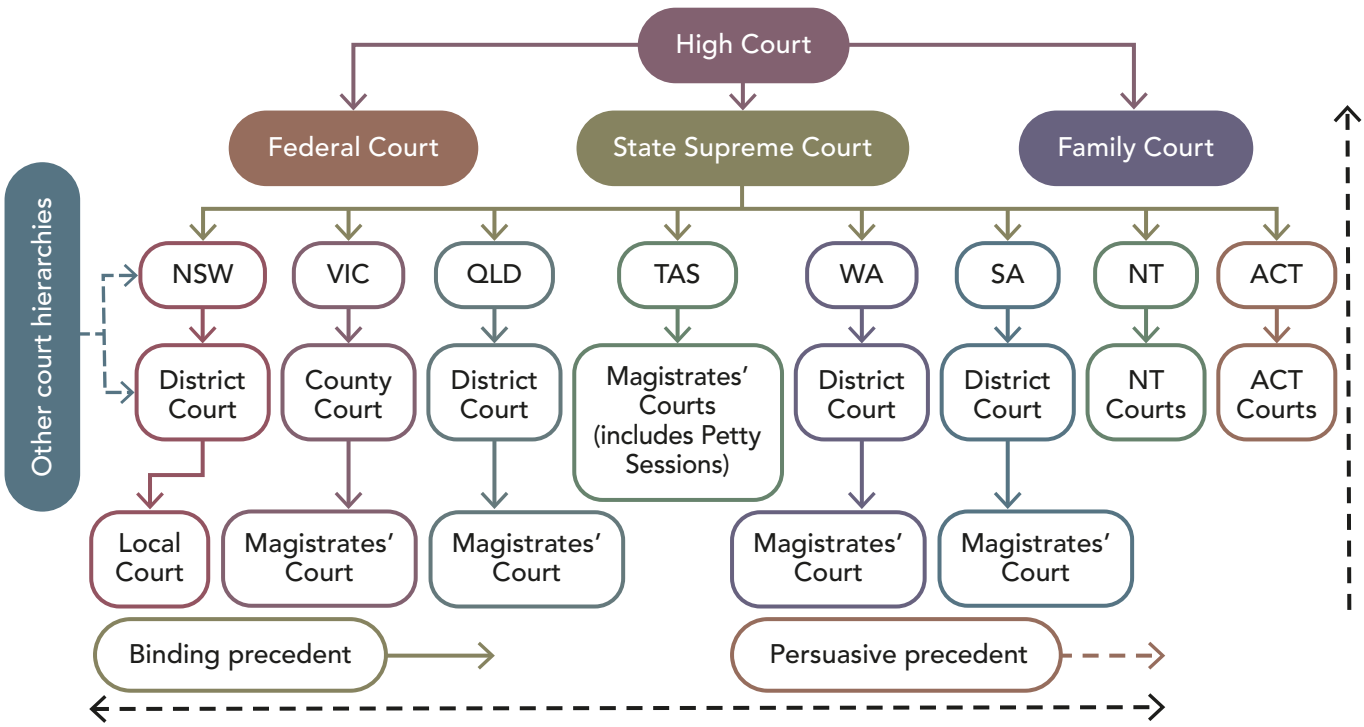

Figure 9.2 Courts forming a binding precedent

Precedent in action

The operation of the doctrine of precedent is easier to understand by looking at examples. The case of *Donoghue v Stevenson* [1932] AC 562 is a significant case. In this case the fundamental legal principle of negligence was established.

Donoghue v Stevenson

A friend of Mrs Donoghue bought her a bottle of ginger beer. The beer was served in a dark, opaque bottle. Mrs Donoghue had drunk about half the bottle of ginger beer before emptying what remained onto her ice-cream. As she did this, a partly decomposed snail floated out of the bottle. Mrs Donoghue became ill. She suffered gastroenteritis and shock. She claimed that her illness was a direct result of consuming the ginger beer and seeing the decomposed snail.

Mrs Donoghue sued the manufacturer of the ginger beer. She claimed that they had been negligent. Mrs Donoghue could not bring an action under the law of contract because she was not a party to the contract. The contract for the sale of the ginger beer had been formed between the manufacturer and Mrs Donoghue's friend. The defence counsel argued on behalf of the manufacturer that there was no duty of care because there was no contract between the manufacturer and Mrs Donoghue. A duty of care only applied to 'dangerous things'. The ginger beer could not be considered a 'dangerous thing'.

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However, the House of Lords decided that Mrs Donoghue was entitled to be compensated by the manufacturer. This case was the first case in which the House of Lords decided that the manufacturer owed a duty of care to the ultimate consumer.

The basic legal principle of negligence is based on Lord Atkin's *ratio decidendi*:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.

NewsReport 9.1

M'Alister (or Donoghue) [Pauper] v Stevenson

House of Lords [1932] AC 562

THE APPEAL WAS HEARD BY FIVE JUDGES OF THE House of Lords. Lord Atkin summed up the majority view:

> The liability for negligence, whether you style it such or treat it as in other systems as a species of '*culpa*' [blame], is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay … The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.
>
> … [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care … It is a proposition that I dare to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

The result was that by a majority of 3:2, the Lords held that there was a valid cause of action.

Grant v Australian Knitting Mills

A later Australian case heard in the Privy Council, *Grant v Australian Knitting Mills* [1936] AC 85, involved similar circumstances. In this case the plaintiff, Dr Grant, bought some woollen underwear from a store. The underwear had been manufactured by the Australian Knitting Mills Ltd. Dr Grant suffered dermatitis as a result of wearing the woollen underwear. It was later discovered that the condition was caused by the excessive use of chemicals in the process used to make the underwear. Although not identical, this case can be seen as having similar circumstances to the earlier case of *Donoghue v Stevenson*.

According to the doctrine of precedent, the court would have applied the rule of law stated in *Donoghue v Stevenson* to the case of *Grant v Australian Knitting Mills*. Like Mrs Donoghue, Dr Grant was deemed to be a 'neighbour'. He was a person who was closely and directly affected by the act of the manufacturer and the manufacturer ought to have had him in mind as being affected when preparing the underwear. The manufacturer had a duty to take reasonable care to avoid acts that they could reasonably foresee would be likely to injure consumers such as Dr Grant. Dr Grant was successful in his claim for damages. This was the first Australian case to adopt the legal principle of negligence.

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Table 9.1 Are the fact situations the same?

Donoghue v Stevenson	*Grant v Australian Knitting Mills*
• A consumer purchased goods. • Mrs Donoghue did not have a contract with the manufacturer. • There was a snail in the bottle. • The bottle of ginger beer had been carelessly prepared. • The ginger beer manufacturer could have reasonably foreseen that damage would result from the carelessness. • Mrs Donoghue was closely and directly affected by the actions of the manufacturer. • Mrs Donoghue suffered gastroenteritis and shock.	• A consumer purchased goods. • Dr Grant did not have a contract with the manufacturer. • Underwear contained chemical residues. • The underwear had been carelessly prepared. • The underwear manufacturer could have reasonably foreseen that damage would result from the carelessness. • Dr Grant was closely and directly affected by the actions of the manufacturer. • Dr Grant suffered dermatitis.

Hedley Byrne v Heller

The principles of *Donoghue v Stevenson* have been applied and extended to many other cases. For example, in the case of *Hedley Byrne v Heller* [1964] AC 465, the principles were extended to include liability for providing information and advice.

In this case a banker was asked by a creditor to provide information about the creditworthiness of another person. The banker provided the information, stating that the individual in question had a good credit rating. On the basis of this information, credit was given. However, the loan was not repaid and the information supplied by the bank was found to be incorrect. The creditor sued the banker but was unsuccessful. Although the court agreed that a duty of care was owed, the banker had clearly stated that the advice was given 'without responsibility on the part of the bank or its officials'.

The court found in favour of the banker. The court also stated that if the banker had not made the disclaimer, the banker would have been found liable. (A disclaimer is a statement that you will not be responsible. In this case, the disclaimer stated that the bank would not be responsible for the information.) The court based this decision on the fact that a 'special relationship' existed between the person giving the statement and the person relying on the statement. The banker owed a duty of care to the creditor. This case provided the basis for many cases about the giving of special expert advice in a particular area. It applies to advice given by doctors, lawyers, financial advisers and other professionals.

FULLER-LYONS V NEW SOUTH WALES

There have been many cases which have applied the principles of *Donoghue v Stevenson* – and the application has not just been to a manufacturer or a person. An example is the case of *Fuller-Lyons v New South Wales* [2015] HCA 31.

In this case the State of New South Wales, as the legal entity responsible for the operation of the rail network in NSW, was sued for negligence. In 2011, 8-year-old Corey Travis Fuller-Lyons fell from a train about 2 minutes after it had left the station. Although there was no evidence about how he fell from the train, he must have fallen through the front doors of the train carriage. These doors were fitted with locks that were centrally operated by the guard on the train. When these doors were locked, they could not be forced open. The primary judge found that the most likely explanation for the boy's having fallen out of the carriage was that he had been caught in the doors as they closed. This would have left at least part of his body out of the train as it left the station. The facts indicate that the boy fell from the train as it negotiated a bend at about 100 kilometres per hour.

The appellant successfully argued that the failure of a railway employee to keep a proper lookout before signalling the guard that it was safe for a train to depart from a station was negligence. This left young Corey vulnerable to falling out of the moving train because the carriage door was not properly closed.

The State appealed to the Court of Appeal of the Supreme Court of New South Wales against the finding of liability. This case was successful but the subsequent appeal by Fuller-Lyons to the High Court of Australia reversed that decision.

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9.4 Flexibility and precedents

As we have already discussed, the doctrine of precedent means that lower courts rely on the decisions of higher courts to decide what the law should be. This may give the impression that the law, once stated by a court, can never be changed or modified. This is not true. There are a number of approaches that judges can take to ensure that the law avoids injustices and keeps pace with the changing needs and values of society.

The processes of reversing, overruling, distinguishing and disapproving allow for flexibility in precedent.

Following

When a subsequent court uses a precedent, it is said to be 'following' the previous decision. Lawyers also refer to this as seeing a precedent being 'applied' to a later case.

Reversing

Where a higher court hears a case on appeal and decides that the lower court which had heard the case had decided the case wrongly, it will reverse the decision. The *ratio decidendi* of the lower court is no longer valid. It is replaced by the *ratio decidendi* of the higher court. Examples of reversing are *Strong v Woolworths* and *Fuller-Lyons v New South Wales*.

CAR THEFT – A JOINT ENTERPRISE?

Another example of a decision being reversed on appeal occurred in a case involving the theft of a motor vehicle and subsequent accident. In this case, it was claimed that the driver owed a duty of care to the passenger who had jointly stolen the car that had been driven.

In *Miller v Miller* [2011] HCA 9, 16-year-old Danelle Miller had been drinking, and unsuccessfully tried to enter a nightclub. Having been refused entry, she decided to steal a car to get home. She did steal a car, and then she asked her older sister, Narelle (who was unlicensed and had also been drinking), to drive her younger cousin and herself home. Maurin (aged 27), Narelle's uncle, was at a taxi rank and saw Narelle begin to drive off. He stopped her and said he would drive. Some of Maurin's friends also got into the car. In total, there were nine passengers crammed in the car, with Maurin driving. When Maurin began to speed and drive erratically, Danelle asked him to stop and let her out. He did not. Later, when the car slowed down, Danelle again asked Maurin to stop and let her out. Maurin ignored her requests to get out of the car.

Shortly afterwards Maurin lost control of the car and it struck a pole. One passenger was killed. Danelle was very seriously injured. She sued Maurin in the West Australian District Court for negligence, and won that case. However, on appeal to the Court of Appeal of Western Australia, the court concluded that Maurin did not owe Danelle a duty of care because Maurin and Danelle had engaged in a joint illegal enterprise, being the illegal use of a motor car. On appeal to the Full Court of the High Court, the Court reversed this decision. It held that Danelle had withdrawn from that joint enterprise when she asked to be allowed to get out of the car:

> Because Danelle had withdrawn from, and was no longer participating in, the crime of illegally using the car when the accident happened, it could no longer be said that Maurin owed her no duty of care. That he owed her no duty earlier in the journey is not the point. When he ran off the road, he owed a passenger, who was not then complicit in the crime which he was then committing, a duty to take reasonable care.

The High Court concluded, therefore, that the orders of the Court of Appeal of the Supreme Court of Western Australia be set aside, and the appeal to the Court of Appeal of the Supreme Court be dismissed.

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Overruling

A case may come before a higher court that relies on a legal principle that has been set in an earlier (and different) case decided in a lower court. The judge presiding in the higher court may believe that that other earlier case has been wrongly decided and the higher court would not follow the decision made by the lower court. When a higher court decides not to follow the decision of a lower court in a previous case, the higher court is overruling the earlier decision.

Reversing and overruling are different processes in that overruling a case requires two separate cases. (A decision being reversed involves one case that is subject to an appeal to a higher court.)

Disapproving

Lower courts can also disapprove a binding precedent. However, they are bound to apply the precedent.

Courts at the same level are not bound by each other's decisions. Where a judge in a court refuses to follow an earlier decision of another judge at the same level, that judge are said to have disapproved the other decision. In other words, they have demonstrated that their opinion of the law differs from that of the judge in the earlier case. This may result in an appeal to a higher court to determine what the law should be.

Distinguishing

Courts are bound only by the decisions of higher courts in similar cases. Where the facts of a case are sufficiently different from those in a previous case, the decision in the previous case will not be considered binding. Of course, no two cases are exactly the same. Provided a judge is satisfied that the facts of the new case are sufficiently different from the earlier one so that it would be unjust to apply the earlier precedent, then the precedent will be 'distinguished'. This is an appropriate way to avoid using the earlier precedent. The judge may decide the new case by formulating a new precedent. This process allows for the continued development of the common law to meet new situations.

Activity 9.1 Folio exercise

Explaining the doctrine of precedent

1 Define precedent. Explain the difference between a precedent and the doctrine of precedent.
2 Explain why the principle of *stare decisis* is essential to the effective operation of the doctrine of precedent.
3 Distinguish between *ratio decidendi* and *obiter dictum*.
4 Describe the difference between a binding and a persuasive precedent.
5 Identify the circumstances under which a precedent will be considered binding.
6 Will judges always follow past decisions? Explain the processes of reversing, overruling, disapproving and distinguishing a decision. What impact does each of these processes have on the operation of the doctrine of precedent?

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Legal brief 9.1

The chip, the slip and the trip to court

At about 12.30 pm on 24 September 2004, the plaintiff, Ms Strong, was browsing at a shopping centre with her daughter and a friend. The plaintiff walked with the aid of crutches after having had her right leg amputated above the knee a number of years earlier. Unfortunately for her, as she browsed an area out the front of the local Big W store (owned by Woolworths, the defendant), her right crutch lost its grip when it came into contact with a greasy chip on the ground. The plaintiff slipped and fell heavily, injuring her spine severely.

The plaintiff sued the defendant for negligence in the District Court of NSW, arguing that she fell because the defendant failed to have a system to regularly clean the area, causing the chip to become a hazard. The District Court found for the plaintiff and awarded over $580,000 in damages.

The defendant appealed to the NSW Court of Appeal. The defendant did not deny that reasonable care required that they inspect and clean the area at regular intervals – say every 20 minutes. But the defendant then argued that the plaintiff had not proved that the defendant's failure to have such a system had caused her injury. The reason? The plaintiff had not proved the chip had been on the ground longer than 20 minutes.

The Court of Appeal agreed with the defendant, holding that there was no evidence the chip had been on the ground long enough for the defendant to have removed it if the defendant had been inspecting the area every 20 minutes. The evidence that would have helped the plaintiff here included things like the chip being dirty, or no longer hot.

The plaintiff appealed this decision to the Full Court of the High Court.

The facts in detail

The defendant's store was very close to a food court in a shopping centre, similar to many other shopping centres. The defendant was running a pot plant sale in the area just outside the entrance of its store, with two racks of plants on display. The plaintiff, her daughter and her friend were browsing in this area, and as the plaintiff approached the pot plants on her right, the tip of her crutch slipped out from underneath her after coming into contact with the chip.

As noted above, the defendant had no specific system in place to ensure inspection and cleaning of the pot plant sale area. However, the defendant did not deny that it was responsible for ensuring the safety of those in the area.

The defendant's argument: the plaintiff hasn't proved our failure to clean caused the injury

Elsewhere in the centre, the owner of the centre was responsible for inspecting and cleaning. It had hired a cleaning company to ensure that common area floors were kept clean of rubbish, and inspected and cleaned at intervals of no more than 15 minutes. The defendant admitted that the system used by the owner of the centre could be used as evidence of what was reasonable care.

But the defendant argued that the plaintiff had not proved that the failure to clean regularly had caused the plaintiff's injury. Lawyers call this 'proving causation'. The defendant said that in order to prove causation, the plaintiff needed to provide some proof that the chip had been on the ground for longer than 15 minutes, which was the maximum wait between cleanings that the defendant should have provided. Since the accident happened at about 12.30pm, the defendant effectively argued that the chip had most likely been dropped less than 15 minutes earlier. Even if the defendant had been cleaning the area every 15 minutes, this newly dropped chip would still have been there. Thus, the defendant's breach was not the cause of the injury to the plaintiff.

The decision

A majority of the High Court (French CJ, Gummow, Crennan and Bell JJ) rejected the defendant's argument, and decided in favour of the plaintiff.

The majority spent some time considering the correct interpretation of NSW legislation on the question of causation, but concluded that the real question in the case was about whether the plaintiff had provided enough proof to show the defendant's breach had caused the plaintiff's injury.

On that point, the majority rejected the defendant's argument that the plaintiff had to prove the chip had been put on the ground earlier than 20 minutes before her fall. Instead, the matter depended on considering the probabilities. If there was no evidence that the chip had been dropped at a particular point in time, the probability was that it was dropped in the first half of the day, rather than the 20 minutes before the plaintiff fell.

There was no evidence that the chip had been dropped less than 20 minutes before the accident, or at any other particular time of day. Although the incident had occurred at lunchtime, the Court felt the evidence pointed to the chip having been dropped much earlier:

> Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court … The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall …

On that basis, the Court reversed the decision of the Court of Appeal and restored the damages awarded to the plaintiff in the District Court.

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Activity 9.2 Folio exercise

The chip, the slip and the trip to court: a case study of precedent in action

Read 'The chip, the slip and the trip to court' and complete the following tasks:

1 Refer back to the case of *Donoghue v Stevenson* (1932) AC 562.
   a What is the law of negligence?
   b To what extent is the fact situation in the case described above similar to the fact situation in *Donoghue v Stevenson*?
   c Outline any differences that you have noted between the fact situations in the two cases. To what extent do you consider these differences significant?
   d What is a binding precedent?
   e Do you think that the principles of negligence should be applied in the chip, slip and trip case? Explain your position.

2 This case was heard on appeal by the High Court. It reversed the decision of the NSW Court of Appeal. Explain what the term 'reversed' means. What impact would the decision made in this case have on future cases concerned with slipping over? Would the case be binding on Victorian courts?

3 Consider each of the following situations. Using the judgment in the case above, do you think that the principles of negligence could apply? Explain.
   a Assume that the defendant could prove the chip fell 5 minutes before the plaintiff slipped. Would the defendant still be liable?
   b Now assume the plaintiff could show the chip fell 25 minutes before her slip. Would the defendant be liable?
   c Now assume the same situation occurred as in the real case – except that the defendant's staff had put a witch's hat near the chip while they waited for cleaners to arrive. The area was unattended in the meantime. Would the defendant still be liable?

4 Read the following excerpt of the dissenting judgment of Justice Heydon in the case of *Strong v Woolworths Limited* [2012] HCA 5 at [70]:

> ... An employee of the [defendant], who was a witness whose evidence the trial judge accepted, and who worked as 'people greeter' near the place where the [plaintiff] fell, said it was her duty and practice to call the cleaners as soon as she saw a spillage, and that they would respond in a minute or two. She also said that the employees of the [defendant] were trained to be constantly vigilant for spillages … [This] evidence indicates that the risk was reduced by the unsystematic means … described.

   a What is a dissenting judgment?
   b Can a dissenting judgment influence the future development of the law? Explain.
   c How does the operation of the doctrine of precedent help the community know what the law requires in a situation?

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9.5 Interpreting past decisions

Following the development of legal principles through the decisions of judges in earlier cases can be difficult. Determining which precedent, if any, applies in a particular case is part of the expertise and analytical skill required of the legal profession. It is the role of lawyers to present to the court the principles which they believe support their arguments and case. It is the role of the judge to determine how these arguments apply to the facts of the case.

There are several reasons for it being difficult to determine how a precedent – or which precedent – will apply to a case. As we have already seen, precedent is based on the concept that judges will follow the past decisions of judges in higher courts in reported cases. However, finding the relevant cases from the large number of reported cases can be difficult.

Problems in interpreting past decisions include the following.

Problems in using precedent include locating the relevant cases, identifying the *ratio decidendi*, determining what is a like case and checking for conflicting decisions.

- **Locating relevant cases:** Over time, there may have been numerous cases relating to a particular area of law. A lawyer may have failed to find all the relevant cases or a particularly significant case where the facts in question are crucial.
- **Identifying relevant *ratio decidendi*:** Even when the relevant cases have all been located, identifying the *ratio decidendi* can also be problematic. Reported cases often involve complex arguments. The judgment may contain many comments about the facts of the case, references to other cases, and statements about general propositions of law as well as the reasons for deciding. It may be difficult to determine what is *obiter dictum* and what is the *ratio decidendi*.
- **Cases with more than one *ratio decidendi*:** Precedents are often established by courts hearing appeals. In these cases, the court will be presided over by three, five or even seven judges. While the judges may agree on the final outcome of the case, each judge may have a different reason for deciding. In such cases each judge prepares a statement of their own reasons for deciding and there may be multiple *rationes decidendi*. This makes it very difficult to decide which fundamental principle of law in the reported case will apply to future cases.

MANY REASONS – SAME CONCLUSION

The case of *Smith v Jenkins* [1970] HCA 2 was referred to in the High Court case of *Miller v Miller* [2011] HCA 9. Both cases concerned a driver and passenger in a car accident and the illegal use of a vehicle, and negligence was an issue. In *Smith v Jenkins* the High Court concluded, unanimously, that the plaintiff could not recover damages from the driver of the motor vehicle where both plaintiff and driver were illegally using a motor vehicle at the time of the accident. Each member of the Court gave separate reasons.

In this case three of the five Justices commented:

- Chief Justice Barwick rested his conclusion on there being no duty of care owed by one illegal user to another.
- In the opinion of Justice Kitto, the important consideration was that the actual act done negligently was itself the criminal act in which both plaintiff and defendant were engaged.
- Justice Owen stated that the relationship between two criminals engaged in carrying out a criminal venture gave rise to no duty of care owed by one to the other 'in the execution of the crime'.

- **Dissenting judgments:** In some instances, one or more judges may dissent or disagree with the final decision. The dissenting judges prepare a statement of their reasons for dissenting. Where there is more than one judgment it is even more difficult to determine what the relevant law is.
- **Determining what is a like case:** Of course no two cases are exactly alike. There may be a number of factual and legal similarities between a case currently being considered and past cases, but each case also has things that distinguish it from earlier cases. It may be difficult to determine the extent to which the specific facts of a case can be generalised to fit a category that would give rise to a

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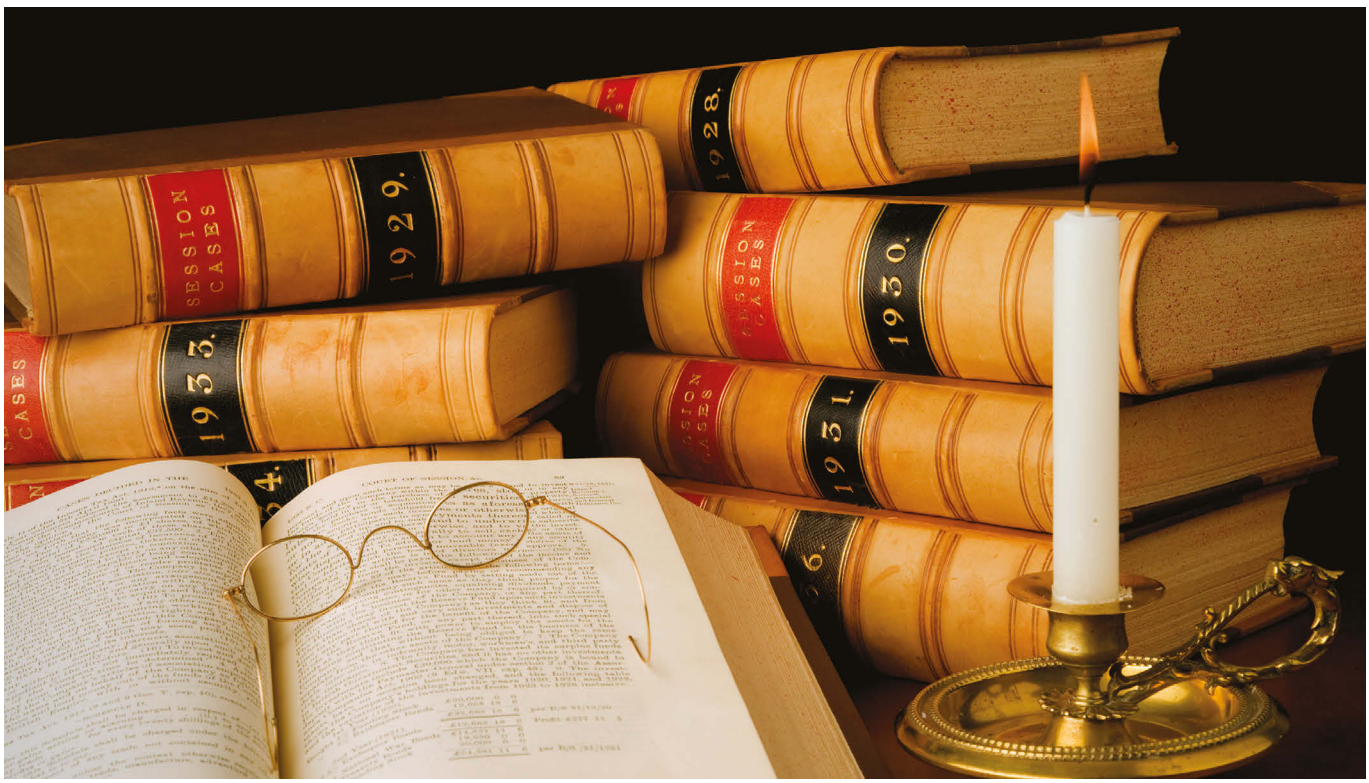
particular legal right. For instance, to what extent do the facts of *Grant v Australian Knitting Mills* match the facts of *Donoghue v Stevenson*? Certainly, there are many similarities. However, *Donoghue v Stevenson* was concerned with goods sold for consumption and *Grant v Australian Knitting Mills* was concerned with clothing. Do the cases fit into the same general category, which gives rise to a legal right? Is the difference in the purpose for which the goods were sold significant enough to distinguish the case? In *Grant v Australian Knitting Mills* the judges decided that the facts, although slightly different, did fit into the same general category.

- **Conflicting authorities:** In some cases, more than one precedent may be presented to the court. Where a judge is faced with conflicting authorities, a decision will have to be made about which precedent to follow. Factors that may influence this decision will include the level of the court hearing the previous case, the number of judges and whether or not they all agreed, as well as the degree to which the decision has been followed by other courts.



Activity 9.3 Folio exercise

Judge-made law

1 Describe the role of the Supreme Court in the law-making process. Would the decisions of the following courts be binding on the Victorian Supreme Court? Explain.
   - Supreme Court of NSW
   - High Court
   - Supreme Court of Canada.

2 Explain the difference between the following terms:
   - overruling and reversing
   - disapproving and distinguishing.

3 What would you expect to be the outcome if a judge did not follow a precedent that is clearly binding on the court?

4 How does the doctrine of precedent operate to reduce conflict in the community?

5 Outline the major problems that may be experienced in interpreting past decisions.

6 'The doctrine of precedent provides for the consistent application of legal principles as well as providing a means to develop the common law to meet the needs of the community.' Do you agree? Justify your opinion.

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9.6 Statutory interpretation

The role of a court is to apply the law to resolve disputes. As well as applying common law to resolve a case, courts may also need to apply statutes, or Acts of Parliament. Judges must interpret the words of an Act when a case comes before the court in which the intention or the meaning of words used is disputed. This is called **statutory interpretation**. By doing this, judges are often involved in clarifying what is the law.

Statutory interpretation is when judges decide on the meaning and application of the words or terms in an Act to resolve a dispute before the court.

The English language is very complex. This is particularly true of its legal terminology. Acts of Parliament can be difficult to understand. Attempts are being made to simplify the language used so that the average person can more easily understand it. However, judges may still need to interpret Acts of Parliament. Even lawyers and judges find that the language used in Acts is confusing. In many instances there is argument about what the words and phrases mean. The easiest way to understand how judges interpret statutes is to look at an example. Consider the following case.

Legal brief 9.2

Searching for meaning

In March 2014 police investigating the alleged fraud and sale of works by Australian artist Brett Whiteley applied for two search warrants. The search warrants were issued under the *Crimes Act 1956* (Vic) s 465(1). The warrants allowed the police to break, enter and search for:

> Any paint, frames, solvents, sketches, notebooks or any other item used in the manufacturing of the fraudulent WHITELEY paintings. Evidence of financial transactions, photographs and/or digital images relating to fraudulent WHITELEY paintings.

The place named in the first warrant was the private home of suspect Mohamed Siddique. The second was his business premises.

A total of 36 items were seized in Siddique's home and 23 items were seized from his business premises. Some of the items seized were named or described in the warrant. Others were not, including paintings attributed to Australian artists Charles Blackman and Howard Arkley.

The police documents listing the items seized did not distinguish between items named or described in the warrant and other items. The police also requested that some items be analysed or examined and retained as evidence. The police lodged the relevant documentation with the Magistrates' Court.

On 16 May 2014 Siddique filed an application with the Magistrates' Court, in accordance with s 78(6) of the *Magistrates' Court Act 1989* (Vic) for the return of all items seized.

Section 78(6) says:

> The Court may direct that any article, thing or material seized under a search warrant be returned to its owner, subject to any condition that the court thinks fit …

Some goods were returned; others were not.

On 27 August 2014 Siddique's application under s 78(6) for the outstanding goods came before the Magistrates' Court. The court decided that it did not have jurisdiction to order the return of the items not specified on the warrants. The magistrate accepted the submission that the property had been seized under common law and not under s 78(6) of the *Magistrates' Court Act*. The magistrate concluded that Siddique needed to commence a separate civil proceeding against the police.

On 20 June 2014 Siddique filed a writ in the Victorian Supreme Court Trial Division, claiming damages for trespass on grounds including that some of the goods seized were seized unlawfully because they were not goods described in the warrants. He also lodged an application to appeal to the Trial Division of the Supreme Court challenging the magistrate's interpretation.

The issue for deliberation by Justice Bell of the Supreme Court was whether the paintings were 'seized under a search warrant' within the meaning of s 78(6). The question of whether the paintings were 'unlawfully seized' was to be decided by the trial judge in a separate civil case.

Justice Bell decided that an:

> interpretation of the word 'under' in s 78(6) that requires the relevantly seized item to be joined up with the authority to seize in the subject warrant is supported by the context of s 78 as a whole …
>
> s 78(6) is a provision that, properly interpreted, confers discretion upon the court to order the return of seized property as specified in the warrant concerned. It is not a provision that confers discretion to order the return of other items seized, whether lawfully or unlawfully, during the execution of the warrant. That may be a pity because it forces individuals to seek separate recovery of property seized during the execution of, but not under, a warrant when, in most cases, the discretionary procedure in s 78(6) might conveniently cover both situations. That is a matter for the legislature, not this court.

Justice Bell decided that the magistrate was correct in his interpretation of s 78(6) and dismissed the appeal.

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Siddique sought leave to appeal to the Court of Appeal. The question was whether s 78(6) covers items seized 'under a search warrant' but not named or described in the search warrant. Justice Bell also noted that:

> The matter depends principally on the proper construct of s 78(6). That in turn requires that attention be focused on the statutory text, context and purpose.

Interpreting the search warrant case

When interpreting the words or terms used in an Act the court will consider the purpose of the provisions. In deciding this question the court considered the purpose of s 78(6) to be to facilitate the recovery of a person's property when it has been taken by the state against their will or without their consent.

Courts can refer to a range of intrinsic and extrinsic sources to assist in the interpretation of legislation. They may also refer to precedent.

Referring to extrinsic material

The word 'under' requires context. The court considered the definition of 'under' according to various dictionaries, where it was defined as 'in accordance with', 'pursuant to', and 'by virtue of', and concluded that the use of 'under' in a statutory provision:

> sets up a convenient, summary method for citizens to obtain the return of their own property after it has been taken from them against their will

and so protects individuals from intrusion by the state.

Referring to precedent

The court referred to a number of past cases. These cases considered the rights of individuals in relation to the execution of search warrants. They considered both common law and statutory protections. The court referred to a number of past decisions. Referring to the case of *Southam v Smout* [1964] 1 QB 308, at 320:

> Lord Denning MR said, adopting a quotation from the Earl of Chatham:
>
> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement. So be it – unless he has justification by law …

In *Trans Nominees Pty Ltd v Scheffler* (1986) 42 SASR 361, at 369, it was noted that:

> the court will construe such statutes strictly, resolving any ambiguity in favour of the subject, and insist upon strict compliance with the statute and the conditions by which the warrant is authorised.

The court indicated that there was not:

> any reason why parliament would have intended to distinguish between seized items that have been named and described in the relevant warrant and other items seized in the course of executing the self-same warrant.

'Under a warrant'

The court found that the items were seized 'under the warrant'. The court referred to the case of *Ghani v Jones* [1970] 1 QB 693, at 706, in which Lord Denning stated, in relation to the execution of a search warrant by police officers:

> If in the course of their search they come upon other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary.

The court concluded that:

> none of the items was seized under purely common law powers and all of them were seized 'under' a search warrant within the meaning and for the purpose of s 78(6).

and, later, that:

> without a warrant the police officers would be trespassing on private property and invading the occupier of the house. In those circumstances the officers would need to reply upon purely common law powers, if available, to justify seizure of property.

The court stated that a strict interpretation of the provision:

> may be mandated with respect to the authorisation of State interference with private property, [and] a broad construction is to be preferred with respect to a statutory provision that alleviates that interference. Nor does there seem to be any reason why parliament would have intended to distinguish between seized items that had been named and described in the relevant warrant and other items seized in the course of the execution of the self-same warrant.

Decision

The Court of Appeal decided that goods not named or described in the warrant but lawfully seized in the execution of the warrant should be treated as goods 'seized under the search warrant' for the purposes of s 78(6). Therefore, the Magistrates' Court could order the return of the items seized by the police. In reaching this decision the court stressed the importance of the purpose of s 78(6) as a means for individuals to obtain the return of their property and a protection to lessen the effect of interference with private property by the state.

The Court of Appeal quashed the decision of the magistrate to dismiss the application for the return of the property. The Court of Appeal did not decide if Siddique's property should be returned to him. The case was returned to the Magistrates' Court to be reheard and redetermined.

In May 2016 a Supreme Court of Victoria jury found Siddique guilty on two counts of obtaining financial advantage by deception and one count of attempting to do so. In May 2017 the Court of Appeal set aside the convictions and ordered a verdict of aquittal

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Activity 9.4 Folio exercise

Applying an interpretation

1 Describe the role of the courts in interpreting an Act.
2 Outline the approaches used by judges in determining the meaning of a particular statute. How were some of these approaches used in the case of *Siddique v Martin*?
3 To what extent do you think that the Court of Appeal in the *Siddique v Martin* case created law? Explain.

9.7 Reasons for interpreting statutes

There are several reasons why it is necessary for the courts to interpret a statute. One of the problems in drafting legislation is that legislation attempts to cover every situation that has happened (or that might arise). But Acts of Parliament often set out the law dealing with a specific area only in broad terms. The courts will need to interpret whether the broad terms set out in the Act include the specific circumstances in the case before them.

An Act may need to be interpreted because it was written in broad terms or there were problems interpreting the Act.

Table 9.2 Why legislation may need to be interpreted

The intention of the Act is not clear	• Parliament's intention may not be clear enough. Accurate instructions and direction may not have been given to the Parliamentary Counsel.
The Act is about a complex and technical topic	• Parliamentary Counsel may not be familiar with specialist areas, such as areas of technology.
Difficulty in foreseeing possible future applications of the Act	• It is difficult to consider all future applications of an Act. In our rapidly evolving society it is almost impossible to predict changes in technology and science, or social and environmental conditions.
Inconsistencies within an Act or between Acts	• Lengthy Acts, or Acts that have been amended a number of times, may cause problems in that there may be inconsistencies. Various provisions within an Act may vary slightly, as the same word may be used in more than one context within the Act, resulting in confusion.
Time pressures in drafting legislation	• There may have been pressure to draft the Act in a hurry, resulting in clumsy, vague or ambiguous wording within the Act. • Due to time pressures in drafting legislation, there may not have been sufficient communication between the instructing minister and the Parliamentary Counsel. • There may have been little opportunity to check the legislation after drafting. This may result in loopholes.
Problems relating to defining words	• The words used in an Act may attempt to cover a broad range of situations, but the courts have to interpret whether a specific situation comes under this broad definition. • Words may not be defined within the Act. • Often Acts need to be interpreted to limit conflict between Acts within a State or between a State and the Commonwealth. • Language is by its nature imprecise – words may change meaning over time.
Words used may not cover recent changes	• Legislation may have become outdated and need to be revised. The wording of an Act may not cover recent changes. For instance, a statute may refer to records and tape recordings but not specifically refer to other forms of recording technology, such as DVDs or the downloading of music from the internet.

An Act may need to be interpreted because there are problems relating to defining terms, or the meaning of terms has changed over time. When interpreting an Act judges must interpret the intention of parliament.

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9.8 How judges interpret legislation

When interpreting the words or phrases in Acts of Parliament, courts consider what parliament had in mind when making the legislation in question – that is, what parliament's intent or purpose was.

There are a number of sources or aids used by judges to help them arrive at the intention of the legislation. These sources may be either intrinsic or extrinsic. Intrinsic sources are those that are contained within the Act. Extrinsic sources are sources that are not contained in the Act.

Intrinsic sources

Judges can refer to intrinsic sources. These include looking at sections within an Act to determine its meaning: margin notes, footnotes, the definition sections and the object or purpose clause.

Judges will refer to other sections of the Act to interpret the meaning of terms or words in an Act. For instance, judges will refer to the words in the Act, the margin notes, the footnotes, the long title and the object or purpose clauses. Most Acts contain a section where words used commonly throughout the Act are defined. For example, the *Transport Accident Act 1986* (Vic) defines a 'transport accident' as 'an incident directly caused by, or arising out of, the driving of a motor car, railway train or tram'. Some Acts also have schedules that may help. Schedules appear after the main sections in the text of the Act. They are often used to spell out in more detail how the provisions of the Act are to work in practice. The *Road Safety Act 1986* (Vic), for instance, contains a schedule that links a driver's blood alcohol content to the maximum period of licence cancellation.

Extrinsic sources

Judges may also refer to sources outside the Act to guide them in the task of interpretation. These include dictionaries, legislative guidelines, second reading speeches and previous decisions.

Dictionaries

Judges can refer to extrinsic sources. These include dictionaries, second reading speeches, legislative guidelines and previous decisions.

Courts may refer to authoritative legal dictionaries, such as *Jowitt's Dictionary of English Law*, or to standard English dictionaries, such as the *Oxford English Dictionary*.

Legislative guidelines

There is legislation passed by both the Commonwealth and State parliaments specifically to guide courts. It sets out what other sources judges can use when interpreting legislation.

Table 9.3 Legislation provides guides for interpretation

Acts Interpretation Act 1901 (Cth)	*Interpretation of Legislation Act 1984* (Vic)
• Commonwealth Acts must be read or interpreted in accordance with the purpose or spirit of the legislation. • Since 1981, all Acts of the Commonwealth parliament contain object clauses. These clauses are sections within the body of the Act setting out the general aims of the legislation. • Courts are permitted to refer to any reports prepared before the provisions were enacted. This includes reports by a Law Reform Commission, and treaties and international agreements referred to in the parliamentary process. • Courts are required to consider explanatory materials when interpreting legislation.	• Courts are required to interpret legislation according to the purpose and intention of the statute. • Courts may refer to the following materials in interpreting legislation: parliamentary debates; reports of parliamentary committees, royal commissions, law reform commissioners and commissions, boards of inquiry and other similar material. • The Act allows courts to refer to headings, schedules, marginal notes, footnotes, and other parts, divisions or subdivisions within the Act. • Commonly used terms that regularly appear in most Acts of Parliament or are explained or defined within the *Interpretation of Legislation Act*.

Second reading speeches

The second reading speech is where the relevant minister explains the reasons for putting the proposed law to parliament. This helps make clear what the intent of the proposed legislation is. All parliamentary proceedings are recorded in *Hansard*.

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Previous decisions

It is possible that words requiring interpretation have already been interpreted by a court in an earlier case. The court may look at that earlier decision to interpret the legislation. Where the interpretation was made in a higher court, and the case involves the same Act, then the previous decision is a binding precedent.

Common law principles of interpretation

Before the passing of the Commonwealth and State legislation described above, judges used traditional common law principles as a guide when interpreting statutes. These traditional approaches were referred to as rules or **legal maxims**. Although these rules have been largely replaced by the guidelines set out by parliament, it is still important to understand some of the maxims referred to by judges.

The maxim of ***ejusdem generis*** is particularly important. This term literally means 'of the same kind'. This rule of interpretation applies when judges are faced with interpreting the meaning of a section of an Act in which a number of specific terms are followed by a general term. This may sound a little confusing. Consider the following hypothetical example.

Parliament passes a law that requires a flagpole to be installed on every 'house, flat, bungalow or other dwelling'. Mr W owns a caravan that is his permanent home. He refuses to install a flagpole. In deciding whether Mr W has committed an offence the court would need to consider whether a caravan is a 'dwelling', as referred to in the Act.

According to the *ejusdem generis* maxim, where specific words have been used to form a class, the general words immediately following that class should be given a meaning confined to that class. In this instance, the specific words are 'house, bungalow, flat'. The meaning of the term 'other dwelling' should be confined to dwellings used for the same purpose. A house, bungalow and flat are residential dwellings. Therefore, the term 'other dwelling' could be seen as applying to buildings used for residential purposes. Mr W's caravan is used for residential purposes. It could therefore be argued that his caravan is an 'other dwelling' for the purposes of this Act.

Table 9.4 Other maxims

expressio unius est exclusio alterius	The express mention of one term is to the exclusion of others.
ut res magis valeat quam pereat	It is preferable to preserve a piece of legislation than to destroy it.
noscitur a sociis	A word is known by 'the company it keeps' – or, as some legal texts say, 'words of a feather flock together'! The meaning of a word is limited by the words immediately preceding it.
lex non cogit ad impossibilia	The law does not expect a person to do that which is impossible (not merely difficult or inconvenient).

9.9 What effect does statutory interpretation have?

Statutory interpretation does not amend or change the printed words of an Act. The immediate effect of statutory interpretation is that the meaning of the words in the Act is determined in order to settle a dispute.

Statutory interpretation gives meaning to terms but does not alter the written words in an Act.

However, statutory interpretation can also have a number of other effects. Among other things, statutory interpretation can do the following.

- **Form a precedent:** If the decision has been made by a higher court, the reason for that decision will form a binding precedent to be followed by lower courts in the same court hierarchy in similar cases.
- **Limit the scope of the legislation:** If the court gives a narrow or limited interpretation to words or terms, the interpretation may limit the range of circumstances that the Act may apply to.
- **Increase the scope of the legislation:** If the court gives a broad interpretation to words or terms, the interpretation may extend the range of circumstances that the Act may apply to.

Statutory interpretation can form a precedent for future cases.

Statutory interpretation can either broaden or limit the scope of an Act.

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Legal brief 9.3

Is a studded belt a weapon?

A young man, aged 20, was apprehended by the police while purchasing food from McDonald's. He was wearing a black leather belt to hold up his pants. The belt, which he had purchased earlier from a market stall, had raised silver studs on it. He was charged with an offence under s 6 of the *Control of Weapons Act 1990* (Vic), which reads:

1 A person must not possess, carry or use any regulated weapon without lawful excuse. Penalty: 60 penalty units or imprisonment for 6 months. [now 120 units or 1 year]

2 A person must not carry a regulated weapon unless it is carried in a safe and secure manner consistent with the lawful excuse for which it is possessed or is carried or is to be used. Penalty: 10 penalty units. [now 20 penalty units]

3 In this section 'lawful excuse' includes:

   a the pursuit of any lawful employment, duty or activity; and

   b participation in any lawful sport, recreation or entertainment; and

   c the legitimate collection, display or exhibition of weapons, but does not include for the purpose of self-defence.

On 20 December 1990, the Governor-in-Council made the Control of Weapons Regulations 1990. Under these regulations a regulated weapon included any article fitted with raised pointed studs and which is designed to be worn as an article of clothing.

The young man was found guilty in the Magistrates' Court of possessing a regulated weapon. The young man subsequently appealed to the Supreme Court. The questions to be decided by the Supreme Court were:

- Is a studded belt a regulated weapon?
- Is wearing a studded belt to hold up trousers a lawful excuse for possessing the studded belt?

Looking at the purpose of the Act

The purpose of the Act was 'to regulate weapons other than firearms'. What constituted a 'weapon' was not defined in the Act, although objects that may be considered to be weapons were listed in the Regulations.

Using dictionaries

As the word 'weapon' was not defined in the Act, the judge had to use other references to determine the meaning: the *Oxford English Dictionary* and the legal encyclopaedia *Halsbury's Laws of England*. In *Deing v Tarola* [1993] 2 VR 163, Justice Beach stated:

> The *Oxford English Dictionary* defines 'weapon' as 'An instrument of any kind used in warfare or in combat to attack and overcome an enemy'.
>
> That would seem to me to be a particularly wide definition; not one which gives great assistance when construing the provisions of the Act and regulations made under it. Given a literal interpretation it could encompass such things as pieces of timber, lengths of piping, brickbats and the like. Indeed, in one view of the matter, it could include almost any physical object.
>
> It would seem to me that a more appropriate interpretation of the word 'weapon' is that appearing in *Halsbury's Laws of England* (3rd edition, Volume 10 at page 653). Then, when dealing with the phrase 'offensive weapon', the learned author says: 'Large clubs or sticks are offensive weapons. The expression includes anything that is not in common use for any other purpose but that of a weapon. But a common whip is not such a weapon; nor probably is a hatchet which is caught up accidentally during the heat of an affray.'

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Using precedent

The judge also referred to previous cases that had dealt with interpreting the meaning of 'weapon'. He referred to the case of *Wilson v Kuhl; Ryan v Kuhl* [1979] VR 315, in which the meaning of the term 'offensive weapon' was considered. In that case the judge said that:

> Any physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury. A knuckleduster is an article of this kind. In my opinion, an article such as a sawn-off shotgun is, of itself, an offensive weapon … An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is, an aggressive purpose. A carving knife is an article of this kind.

The decision

Justice Beach concluded:

> The proposition that, without more, the possession, the carrying or the use of such a belt amounts to the possession [of a weapon], is a proposition I feel a reasonable man would regard with derision.
>
> The conclusion I have come to in the matter is that a studded belt is not a weapon; although like many other articles in common use throughout the community, [it] may be used as such. In that situation, I consider it is not within the regulating power of the Governor-in-Council to prescribe it as a regulated weapon …
>
> I consider it is a lawful excuse for possessing a studded belt that the belt is used to hold up the trousers of the person wearing it, or that it is being worn for decorative purposes. A belt, whether studded or not, is an article of wearing apparel. If a person's intent is to wear it as a piece of clothing or wearing apparel, such an intent is perfectly innocent. If a person has a completely innocent intent, as is the situation in the present case, then in my opinion that innocent intent constitutes a lawful excuse for that person's actions.

The judge ordered that the magistrate's order for the studded belt to be forfeited and destroyed be quashed (set aside).

Parliament changes the law

Since this case was heard, the *Control of Weapons Act* has been amended. Neither the Act nor the Regulations refers to studded belts. The Act refers to 'dangerous articles'. A dangerous article is an article that has been adapted so that it can be used as a weapon or carried with the intention of being used as a weapon. The Act also provides that it is a lawful excuse to carry a dangerous article if you use the article for 'the purpose that it is designed or intended for'.

Activity 9.5 Folio exercise

Statutory interpretation in action

Consider the decision of Justice Beach in the studded belt case and complete the following tasks:

1 Explain the role of the court in this case.
2 The studded belt case highlights one reason for the meaning of a statute not being clear. List and discuss two other reasons for an Act of Parliament being difficult to understand.
3 Outline the sources used by the judge to interpret the meaning of the word 'weapon'. What additional material could the judge have referred to in determining the meaning of 'weapon' for the purpose of the Act?
4 What impact do you think that the decision in this case may have had on changes made to the *Control of Weapons Act*?

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9.10 The ability of judges and courts to make law

Courts can set a new precedent when they hear a case on which there is no clear statement of law.

Sometimes a case comes before the courts concerning a matter on which there has been no clear statement of law, or where the existing principles of law are out of date and require change. In these circumstances, having the matter resolved by the courts may result in a change in the law. Recent examples of such issues include disputes about the rights of the unborn child, surrogacy, access to reproductive technologies and the recognition of Native Title.

However, not all cases which come before the courts result in 'law-making' by courts. The factors that affect the ability of the courts to make law can be said to relate to: the limitations of the doctrine of precedent, the willingness of judges to change existing law, the costs and time involved in bringing a case to court, and the requirement for 'standing'.

The doctrine of precedent

The courts are not free to make law in the same sense as parliament is. Unlike parliament, judges cannot make law as an immediate response to a community demand or when a general need is perceived. The courts can act only to declare the legal principles that apply to the facts of the cases before them. In the majority of cases, judges have no discretion to make law.

'Novel' cases

Courts need a 'novel' or test case before a new precedent can be made.

Before a court can declare a new legal principle, it must wait for a 'novel' case: a case concerned with a particular issue or legal question that has not been decided before in a court of superior record in the same hierarchy. A novel case is one in which the fact situation can be distinguished from the facts in previously decided cases (that is, the facts are different), and in which, therefore, no precedent applies. An example of a novel case is *Donoghue v Stevenson* (above). A novel case is also called a test case.

TEST CASES

Test cases are not common. First, the parties must have sufficient financial backing to bear the costs involved in taking a court action. As such a case is *res integra* (a case of first impression) there are no guarantees that their claim will be successful. If the party bringing the case to court is unsuccessful, they risk having to meet not only their own legal costs, but also the costs of the other party.

Higher courts

For a new legal principle to develop, the case must be heard by a higher court.

The operation of the doctrine of precedent may mean that lower courts are not in a position to develop a new legal principle. The operation of *stare decisis* means that, in effect, only higher courts can make or change a binding precedent. For a change to occur, the case presented before the higher court must concern a new fact situation to which no existing binding precedent applies. Even so, the court can only reach a decision in relation to the information presented in that individual case. It cannot change entire areas of law in the same way that parliament can.

Judicial conservatism or activism

The judge must be prepared to adopt a law-making role.

For a court to change the law, a case must come before a court in which the judges are prepared to adopt a law-making role. A conservative judge may declare that the plaintiff has no cause of action under common law and dismiss the case. But another judge may decide that there is nothing to prevent the court from deciding the case. Such a judge may be aware of the need to develop the law – this is sometimes referred to as judicial activism.

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WHAT IS JUDICIAL ACTIVISM?

Chief Justice RS French, in 'Judicial Activism – The boundaries of the judicial role', writes:

> Australian constitutional law academic, Professor Craven, has offered three definitions which are really one, relating respectively to the common law, the statute law and to the Constitution. Judicial activism in his view involves the conscious development of the common law according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy. It exists in relation to statute law where a court consciously adopts an interpretation of statutory language which goes well beyond the ordinary import of the words because the court believes that an extended interpretation is necessary to give effect to the true legislative intention or because it wishes to frustrate an unpalatable legislative intention. In connection with constitutional interpretation he appears to equate activism with 'progressivism'. This he describes as an approach to constitutional interpretation which requires continual updating of the Constitution in line with the perceived community and social expectations rather than according to its tenor or [in] conformity with the intentions of those who wrote it.

Over the years, the role of judges as law-makers has been debated at length. The degree to which judges are prepared to distinguish one case from previous cases will depend in part on the judges' view of their role in the law-making process, and some judges are reluctant to be seen as law-makers. In order for the courts to be properly involved in the law-making process, they must assert their power to bring about a change in the law.

The case of *Donoghue v Stevenson* ultimately resulted in judges looking beyond the contractual relationship between parties and considering the scope of the duty of care owed by one party to another. This case is a good example of judicial activism (but in the Australian context, it did rely on the judges in the *Grant v Australian Knitting Mills* case being prepared to follow the House of Lords' departure from the 'norm').

Courts can also be very conservative. In 1985, the Victorian County Court, hearing a marital rape case, applied an English precedent from the 1700s. This precedent stated that a 'husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract'.

It took less than a month for parliament to step in and amended the *Crimes Act* to remove the marital exemption to rape.

The case of *State Government Insurance Commission v Trigwell* 1979 CLR 617 is another example of judicial conservatism. In this case a 1947 English precedent that farmers did not owe a duty of care to road users if their stock strayed onto roads was upheld (see Legal brief 9.4, below).

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Costs

The parties must have the financial resources to take a case to court.

Court action, especially before our higher courts, is expensive. Individuals may therefore be reluctant to take novel cases to court due to the uncertainty of the outcome. There are court fees and legal costs. Court fees are payments to the court for the costs of legal proceedings. These include the costs of filing a writ, and other procedures requiring the services of a court officer.

Legal costs are the fees and charges of a solicitor for the legal services that they provide, which may include disbursement costs such as the barrister's fees and costs of expert reports. A Senior Counsel (a top-level barrister) may charge more than $300.00 an hour.

Table 9.5 Fees and charges

Supreme Court	
Jury Fees	
(a) on setting a proceeding down for trial by a jury in the Supreme Court or the County Court	$756.90
Juries (Fees) Regulations 2012	
(b) for each day after the first day of a trial not exceeding 6 days	$90.60 per juror
(c) for each day of a trial in excess of 6 days	$179.80 per juror
Administrative Expenses in respect of refund of fees	$64.10
Supreme court	
Part 1 – fees payable in the prothonotary's office	
Commencement of proceedings	
Commencement of any proceeding (other than an appeal) under Chapter I, Chapter II, Chapter IV, Chapter V, Chapter VII or Chapter VIII	$1044.10
Commencement of –	
(a) a counterclaim under Order 10 of Chapter I; or	$1044.10
(b) a third party proceeding; or	$1044.10
(c) a claim by a third or subsequent party under Order 11 of Chapter I	$1044.10
Hearing Fees	
For hearing a trial by Judge or by Judge with jury –	
(a) for days 2 to 4 – per day or part of a day;	$641.20
(b) for days 5 to 9 – per day or part of a day	$1070.60
(c) for day 10 and subsequent days – per day or part of a day	$1788.50
For every sitting of a court official at mediation –	
for every hour or part of an hour	$86.40
For every sitting of a court official at a pre-trial conference	$129.60

Source: Supreme Court of Victoria Part 1 – Fees payable in the Prothonotary's Office, 1 July 2016

A person taking a civil action may face considerable expense. The costs above are an indication of some of the costs of taking a civil action to court.

Time

For a new precedent to be set, the parties must be determined to proceed with the court action. However, some cases cannot proceed immediately after an injury or damage is suffered – time may needed for medical treatment or for an injury to stabilise. During this process, costs may be incurred.

The parties may also need time to seek legal advice, or to negotiate a resolution without taking legal action. The pre-trial procedures used to resolve civil disputes also take time. There can be delays at any stage of all these processes, and they all add to the time taken to resolve disputes.

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A decision by a court about what the law should be is not always reached quickly. Courts cannot reach a decision before they hear all the arguments put by both parties. In complex cases, this can take a considerable amount of time. A final determination as to what the law should be, may not be reached until after a case has been heard on appeal. This may take years – which means the law can be slow to change.

For more information about civil procedures see Chapter 5.

Standing

'Standing' (*locus standi*) is the right of a party to start a legal action in a court. A party will have standing if they have what is considered sufficient connection to, and interest in, the court action. To put it another way, a person has 'standing' if they are directly affected by an action which would continue unless relief is granted by an order of damages. That is, if the person does not stand to lose something, they do not have 'standing'.

DEMONSTRATING A SPECIAL INTEREST

Generally, a person's standing is clear and not in dispute. The common law test for standing is that the person has either a private right that is affected (such as a property right) or can demonstrate that they have a 'special interest' in the matter. When the standing of a party is disputed, the parties need to demonstrate that they have a special interest. The most common examples of a party claiming a special interest are:

- a public interest group challenging a policy of a government which is a concern for the group
- a trade union or association challenging a government decision that affects their members
- a commercial entity challenging a government decision that they claim is to the benefit of a competitor
- a person challenging a government decision that is a concern to them even though it does not affect their rights.

'Standing' is crucial in both common law and statute in Australia. The relevant statute law is the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the common law relating to standing is found in decisions of the High Court of Australia. When a party's standing is denied, the party may appeal, but this will happen only if the party is again prepared to risk the costs of such an action. As already mentioned, for any change to occur, the case may need to come before a judge who is willing to adopt a new direction in precedent.

The leading case in this area is *Australian Conservation Foundation v Commonwealth 1980* HCA 53. In this case the Australian Conservation Foundation objected to the approval of a proposal for a company to establish and operate a resort and tourist area at Farnborough, in Central Queensland. The case went all the way to the High Court, and the first issue for them was whether the Foundation had *locus standi*.

Gibbs J, in his judgment, indicated that the common law test for standing is whether the plaintiff has a 'special interest in the subject matter of the action'. He later concluded:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it. It is quite clear that when the rule is thus understood, the Foundation has no special interest in the preservation of the environment at Farnborough …

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Legal brief 9.4

Are farmers responsible for animals that stray?

Australian law about the liability of farmers for animals straying onto highways was based on a long-standing British precedent. This precedent dated back to the times when farms did not have fences, before the invention of cars or the development of major roads and highways. The legal principle was that owners of land adjoining a road were under no legal obligation to fence in animals to avoid their straying onto the road. Farmers did not 'owe a duty of care' to road users. This rule was upheld in the English case of *Searle v Wallbank* [1947] 1 All ER 12.

This law applied to all Australian States that had not passed legislation on the rights of farmers and road users. The application of the legal principles of *Searle v Wallbank* was challenged in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

Trigwell's case

In this case, a woman was travelling at night along a road in rural South Australia. When she saw a car approaching from the opposite direction she dipped her car headlights. However, as her headlights were on low, she did not see two sheep that had strayed onto the road from a nearby farm. In the collision with the sheep, the car swerved across the road and collided with the oncoming car, in which the Trigwell family was travelling. The woman driving the car was killed and members of the Trigwell family were seriously injured.

The Trigwells sued for the damages caused by the accident. They claimed that the accident was caused by the negligence of:

- the farmer in failing to ensure that his sheep did not escape through broken fences, and
- the driver of the other car.

The State Government Insurance Commission was the deceased driver's insurance company. They would be responsible for paying for any damages caused by the negligent actions of the driver. The Supreme Court of South Australia decided that the State Government Insurance Commission had to pay the Trigwells for the damages resulting from the negligent actions of the driver.

Evidence was presented to the court that indicated that the driver had not tried to slow down after hitting the sheep. This evidence was sufficient to convince the judges that there had been a failure on the part of the driver to exercise reasonable care. However, the court decided that the farmer, who had not repaired his fences and had thereby failed to stop the sheep from straying onto the road, was not liable, under the legal principles established in *Searle v Wallbank*.

The State Government Insurance Commission appealed to the High Court against the decision of the Supreme Court of South Australia.

The High Court decision

The High Court decided that the legal principles developed in *Searle v Wallbank* applied in Australia, and their decision in this case was a binding precedent on all State courts. Unless a State had legislated to override the common law relating to stray animals, the courts were bound to apply this precedent. To overcome this problem, the Victorian parliament later passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic). Similarly, the South Australian parliament legislated in 1983 to limit the application of the precedent in that State.

Are courts law-makers?

The statements made by the judges in Trigwell's case reveal the attitudes that some judges have to the role of the courts in changing the law.

The court is not a legislator

Justice Mason (who represented the majority view) stated:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle

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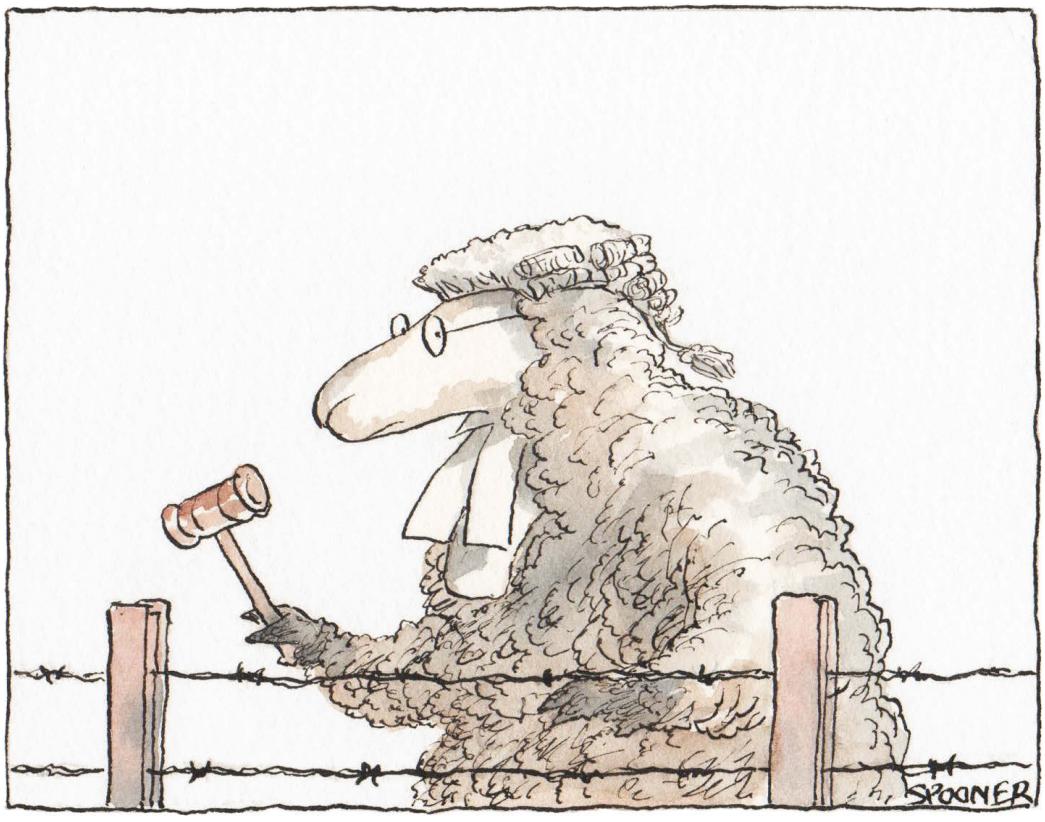
of common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular circumstances or conditions, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency.

Its responsibility is to decide cases by applying the law to the facts found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to the legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for and examine submissions from groups or individuals who may be vitally interested in the making of changes to the law.

Common law adapts to change

Justice Murphy, in his dissenting judgment, stated that:

a judge in a common law system may rightly refuse to follow precedent which is absurd, contrary to reason, or plainly inconvenient … The virtue of the common law is that it can be adapted day-to-day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that parliament must intervene. The extreme case is where the judiciary recognises that a rule adopted by its predecessors was either unjust or has become so and yet it still maintains it, suggesting that the legislature should correct it. This is a nadir of the judicial process. The results of legislative intervention often produce difficulties … because legislation does not fit easily with 'seamless fabric' of the common law.



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9.11 The relationship between courts and parliament

In contemporary Australian society, there is a complex range of laws. These laws are necessary to protect the rights of individuals and to achieve social cohesion. The dynamic relationship between parliament and the courts in law-making is crucial to maintaining the effectiveness of these laws.

Supremacy of parliament

As stated earlier, parliament is the supreme law-making authority, answerable to the people. It should be remembered that courts only exist because they were created by Acts of Parliament. For example, the High Court of Australia is provided for by the *Commonwealth of Australia Constitution Act 1900* (UK), and the Victorian Supreme Court, founded in 1852, derives its authority from the Victorian Constitution. A court's authority, including its jurisdictional limit, has been set by parliament. Since parliament can make or unmake any of its own laws (subject also to the relevant Constitution) it follows that, other than the High Court, a parliament can both limit the authority of a court and abolish it.

If parliament passes a law outside its constitutional power, the courts may declare it *ultra vires*: outside that body's law-making power.

Parliament can pass a law to override the common law made by the courts. The courts can declare a law made by parliament *ultra vires* when it exceeds the law-making authority set out in the Constitution.

The codification of common law

Parliament may decide to bring common law principles within statute law. This process is known as 'codification'. This means that the common law is restated in Acts and becomes statute law.

The abrogation of common law

Parliament may also abolish common law principles it disagrees with. This is referred to as 'abrogation'.

Justice Gibbs, in *The Australian Conservation Foundation v Commonwealth* [1980] HCA 53, clearly stated that it is the responsibility of parliament, not the courts, to abrogate:

> In any case, if the law is settled, it is our duty to apply it, not to abrogate it. It is for the Parliament, whose members are the elected representatives of the people, to change an established rule if they consider it to be undesirable, and not for judges, unelected and unrepresentative, to determine not what is, but what ought to be, the law.

Parliament's ability to codify and abrogate common law is an important aspect of the relationship between courts and parliaments as law-makers. The *Mabo* case and the *Native Title Act 1993* (Cth) (see 'Eddie Mabo's epic fight for land rights changed Australian law and history', on p.329) is an example of codification, and the Victorian parliament's response to Trigwell's case and the Widow's discount case are examples of abrogation.

Parliament can pass laws to either abrogate (override) or codify (restate) common law.

ANIMALS STRAYING ON HIGHWAYS – ABROGATION IN ACTION

After Trigwell's case (above) held that farmers were not responsible for the damage done by their animals that strayed onto roads, the Victorian parliament acted to abrogate (that is, legislatively abolish) this decision. It passed the *Wrongs (Animals Straying on Highways) Act 1984*, which altered the law so that farmers were responsible for the actions of their animals on the roads.

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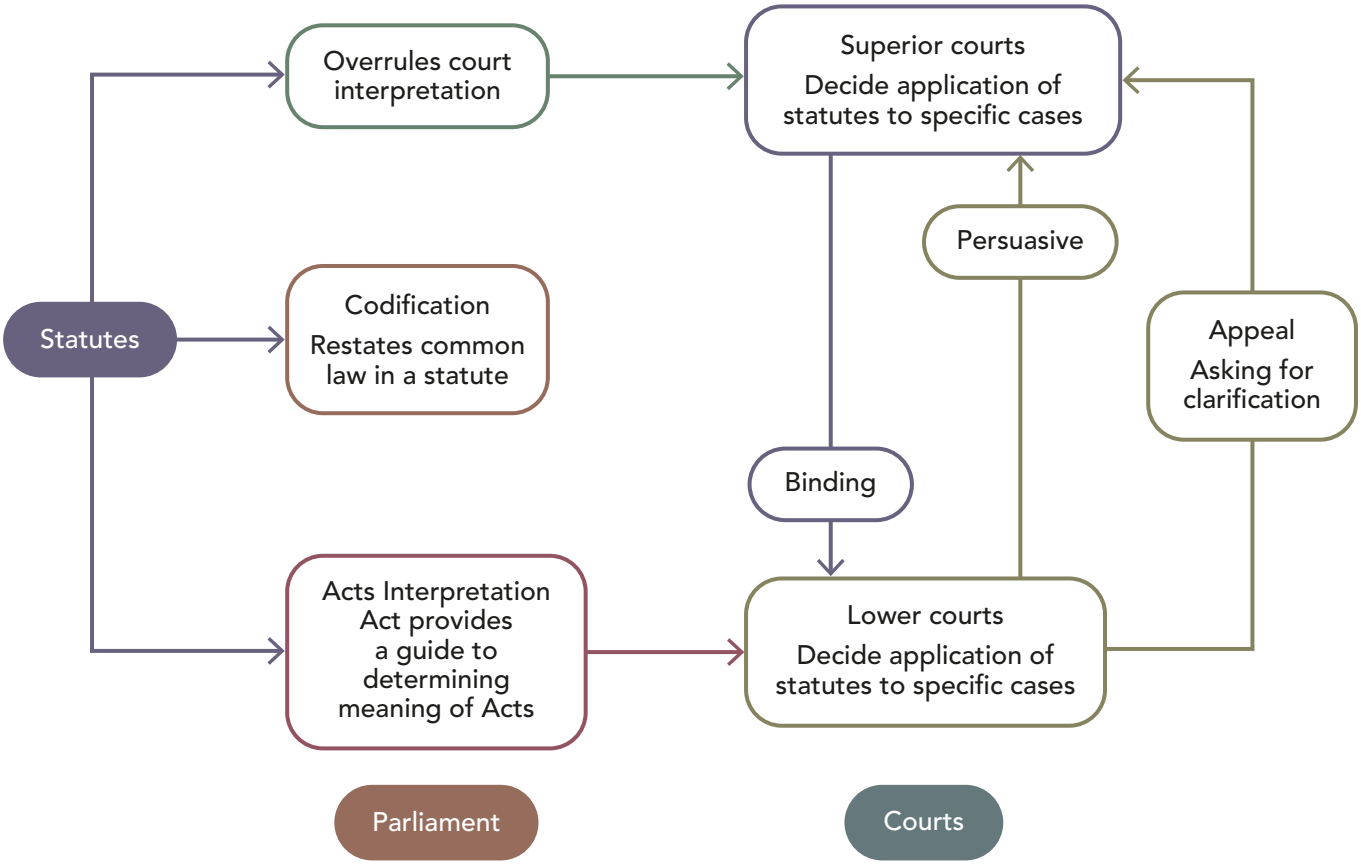

Figure 9.3 Relationship between parliament and the courts in law-making

WIDOW'S DISCOUNT

A Western Australian widow, Teresa de Sales, whose husband drowned, claimed damages under Western Australia's *Fatal Accidents Act 1959*. This Act gave widows access to compensation for economic or material disadvantage caused by the death of their spouse. In 2000, the WA District Court reduced the original compensation awarded to her by 5%. In an appeal to the Full Court of the Supreme Court of Western Australia, this reduction was increased to 20%. The Full Court cited 'remarriage contingency', known as the widow's discount, as the basis for the reduction.

The Full Court decision was based on a precedent set by an 1863 ruling in England and Australian legal precedents in the 1930s. England changed its law in 1971 to make remarriage prospects irrelevant in calculating compensation, but the precedent remained in Australia. Early last century, most women were financially dependent on their husbands and widows were expected to remarry to survive economically. Today, most people would see these assumptions as sexist and not consistent with our community values.

An appeal to the High Court in November 2002 reversed this decision, but there was still concern that the widow's discount could apply to other women in future cases. The Victorian parliament responded in 2004 by passing the *Wrongs (Remarriage Discount) Act* to clarify the law in Victoria.

Teresa de Sales outside the High Court

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9.12 The ability of courts to influence parliament

Courts can influence parliament.

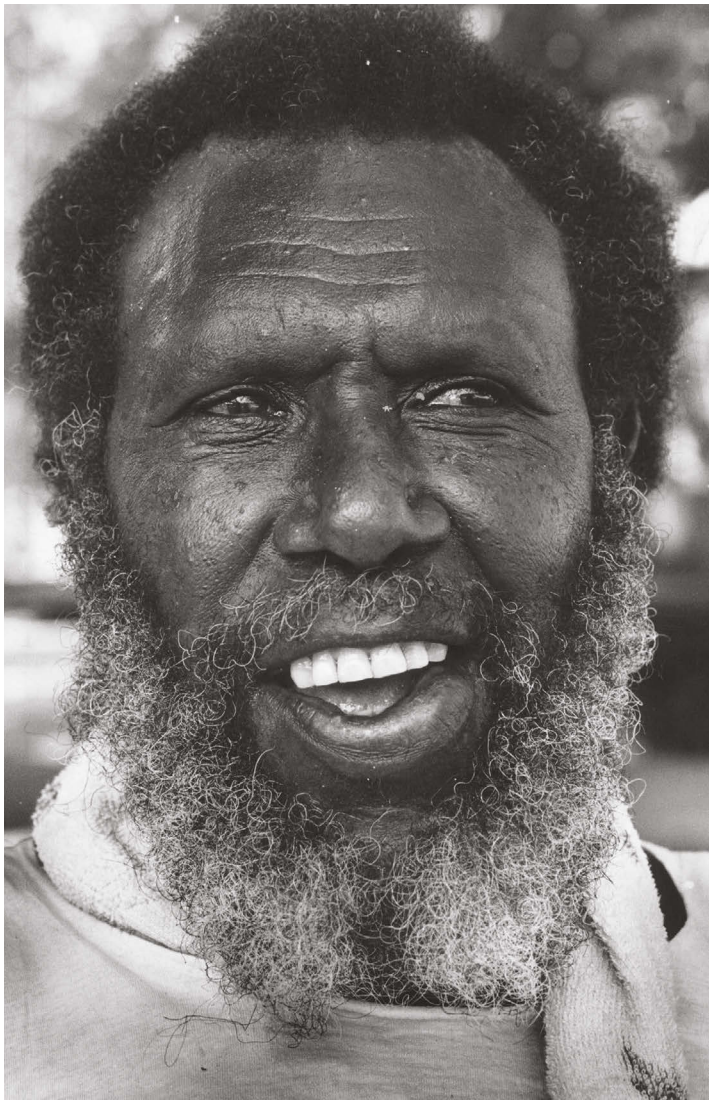
The courts are responsible for determining the day-to-day application of the law. Courts will do this in two ways. First, if a case comes before the court, the court will look at statute law to determine what the law is. In order to do this, the court will need to interpret or give meaning to the words used in Acts. Through interpretation of words in statutes challenged in court cases, courts are able to ascertain what parliament meant when passing that legislation, and then apply either a literal (narrow) or liberal (wide) interpretation. A court's reason for deciding the meaning of words or phrases in an Act also forms a *ratio decidendi*.

The decision of a court about the interpretations that should be applied to words or phrases in an Act therefore becomes a precedent, which will be used for later cases. Then the legislation and the precedent must be read together. In many instances, the court's interpretation may result in the need for amendment to the Act in question.

At times, the interpretation given to legislation may not be that foreseen by the parliament, or at least the government, when the legislation was introduced. However, parliament is the ultimate law-making body. If parliament does not agree with a court's interpretation of a statute, it can amend the statute to overrule the court's interpretation.

Where there is no existing statute law, judges may apply precedents.

Second, judges make law when deciding on a case for which there is no existing statute or common law. At these times, courts break new ground. The reason for the court's decision, the *ratio decidendi*, is then binding on lower courts in future cases. In some circumstances, parliament may have failed to legislate on an issue because of the issue's complexity or because it is controversial. Since courts are independent of the political process, they may be able to make laws that parliament finds difficult. Courts thus have an important role of 'filling the gaps' left by parliament. Parliament may later decide to legislate to fill the gaps. This occurred in the Mabo case (see 'Eddie Mabo's epic fight for land rights changed Australian law and history', on p.329).



Eddie Mabo

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NEWSREPORT 9.2

Eddie Mabo's epic fight for land rights changed Australian law and history

EDDIE MABO'S LOVE FOR HIS HOMELAND DROVE the proud Torres Strait Islander to undertake a 10-year legal battle that rewrote Australia's history.

Tragically, he would not live to see victory.

Just after his death in early 1992, the highest court in Australia ruled in his favour in a case that reshaped our laws and became synonymous with Mabo's name.

'Oh, the Aboriginal guy. Told the government to shove it.' Darryl Kerrigan, in The Castle.

Eddie Koiki Mabo was born on Murray Island, in the Torres Strait, on June 29, 1936.

A member of the Meriam people, who know the island as Mer, Mabo was adopted and raised by his uncle, from whom he took his name, after his mother's death.

He was expelled from the island for breaking customary laws when he was 16, and travelled around northern Queensland working various jobs.

He eventually settled in Townsville, where he married Bonita Nehow at age 23.

Bonita was a traditional owner of nearby Palm Island, and together they would have ten children.

Speaking in 1993, she said her husband started to question his rights in 1969, when he tried to return to Murray Island to visit his dying father, only to be refused entry by authorities who feared he was a troublemaker.

'That's when he started talking about "his land"', she said.

Mabo started work as a gardener at James Cook University when he was 31, and it was here a chance conversation would shake his understanding of his people's land to the core.

Having lunch in 1974 with historian Henry Reynolds and academic Noel Loos, Mabo was shocked when they explained that his people's traditional ownership of the island was not recognised by Australian law.

The courts worked on the principal that Australia was *terra nullius* – 'land belonging to no one' – prior to European settlement.

The State of Queensland annexed Murray and other Torres Strait islands in 1879, and according to *terra nullius*, owned that land.

Speaking to *The Australian* last year, Professor Reynolds remembered Mabo's reaction.

'He said, "Everybody knows it's Mabo land, it's been Mabo land for generations – no one would dream of trying to move in on it"', he said.

Professor Reynolds said the revelation 'struck the spark' for Mabo's legal battle.

In 1982, Mabo and four other Torres Strait Islanders – Celuia Mapo Salee, Sam Passi, Father Dave Passi and James Rice – started legal action against the State of Queensland to establish who owned the island.

Queensland's Bjelke-Petersen Government was so concerned by the case, [that] it passed laws to cement ownership of the Torres Strait Islands.

Those laws were squashed by the High Court in 1988 in what become known as Mabo I – the first step towards his ultimate victory.

In 1990, Justice Martin Moynihan of the Queensland Supreme Court handed down findings on a series of disputed facts involved in the case.

Justice Moynihan was highly critical of Mabo and rejected his claim to land on Murray Island.

He did conclude, however, that the Meriam people lived on the island prior to European settlement, in a society where land was divided and owned by individuals and families.

Those findings were then used in Mabo's favour when the case went to the High Court.

On June 3, 1992, ten years after the epic legal saga began, the High Court ruled by a six-to-one majority that the Meriam people held native title over Murray Island.

The decision ended the legal fiction of *terra nullius*, and was the first time Native Title was recognised in Australia.

The Prime Minister at the time, Paul Keating, applauded the decision, saying it removed the greatest barrier to reconciliation.

'By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for justice,' Mr Keating said in his historic speech at Sydney's Redfern Park.

'There is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians.'

In 1993 the Federal Parliament passed the *Native Title Act*, which established a legal framework for Native Title claims throughout the country.

But Mabo was not there to see his victory. He died of cancer, aged 55, just five months before the High Court's decision.

Only two of the original five Murray Island plaintiffs were alive by the time the ruling was handed down.

On the third anniversary of the decision, a traditional 'tombstone ceremony' was held at Mabo's grave in Townsville.

That night his grave was vandalised and painted with swastikas and racial slurs.

Mabo's body was moved to Murray Island, the land he dedicated his life to.

He was buried in a traditional ceremony reserved for Meriam Kings, which had not been performed for over 80 years.

Patrick Hatch, Herald Sun, *5 April 2013*

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NEWSREPORT 9.3

Why has the law about abortion been so slow to develop?

UNTIL 2008, SECTION 65 OF THE *CRIMES ACT 1958* (VIC) stated that procuring an 'unlawful' abortion was a serious crime. However, the Victorian parliament did not define when an abortion was 'unlawful'. It left the determination of this (that is, when an abortion was unlawful, and when it would be legal) to the courts. The courts came to hold that in Victoria, abortion was legal only in certain conditions – generally, where the health of the mother is 'in danger'. Thus, the real application of the law was set in precedent rather than in statute.

Menhennitt case

In a test case decided in 1969 (*R v Davidson* [1969] VR 667), Justice Menhennitt of the Victorian Supreme Court ruled that an abortion was lawful if the doctor 'honestly believed on reasonable grounds that the act done by him was … necessary to preserve the woman from a serious danger to her life or her physical or mental health'. Although in theory a higher court could overturn the ruling in this case at any time, it remained unchallenged for over 30 years.

Following the Menhennitt ruling, abortions were permitted where a doctor honestly believed that it was necessary to preserve the woman from serious danger to her life, or to her physical or mental health.

High Court appeal

In 1996, the High Court faced a potential test case on abortion when an appeal was lodged from a NSW medical negligence case. The case concerned a woman who became pregnant in the 1980s and gave birth to a healthy child. The single mother's pregnancy was not diagnosed by her clinic until it was too late for her to have an abortion. This, she claimed, deprived her of the right to have an abortion and forced her to have a child.

The woman sued for the costs relating to having and rearing a child. The NSW Supreme Court dismissed the case, ruling that the woman had no right to claim damages because abortion was illegal in that State. This decision was overturned by the NSW Court of Appeal.

A subsequent appeal was lodged with the High Court. The emergence of a High Court test case on abortion again fuelled community debate about the legal status of abortion.

The community debate

It has been suggested that it is not appropriate for the courts to decide cases such as this, which involve complex moral issues. The courts are not in a position to assess community attitudes and it is inappropriate for judges to impose their own personal standards on the community as law.

Others suggest that it is better that the courts interpret laws on abortion. It would be difficult to legislate to ensure that the law reflects the values of all sections of the community and adequately covers all circumstances.

Possible impacts

These difficulties are borne out by the events leading up to the High Court appeal. The Australian Catholic Health Care Association was given legal advice that the case could establish a precedent requiring the 57 Catholic hospitals throughout Australia to advise women about termination. This is something that Catholic hospitals are not required to do at the moment – and a legal condition they may find difficult to fulfil. The association applied to argue their position as a 'friend of the court' in the case. They argued that the court should not recognise a claim for the loss of an opportunity to terminate a pregnancy because it is not lawful to terminate.

The Abortion Providers Federation of Australasia also applied for status as a 'friend of the court'. They argued that 'if the status quo is to be disturbed it should be done by parliament, not judicial decision'.

So with powerful interest groups involved, a medical negligence case was poised to bring the whole abortion issue to a head in the High Court. The High Court was spared the difficult decision when the parties decided to settle the case out of court. However, for the medical profession the law was still unclear. Abortion remained a criminal offence except in the circumstances defined by the common law that made it lawful.

Review and reform

In 2007 Victorian MP Candy Broad proposed a private member's Bill to decriminalise abortion. The private member's Bill was withdrawn when the Victorian Premier, John Brumby, announced moves to refer the issue of abortion to the Victorian Law Reform Commission for investigation. The Victorian government undertook to act on the advice of the Victorian Law Reform Commission, which eventually reported back recommending its decriminalisation. On 10 October 2008 the Victorian parliament passed the *Abortion Law Reform Act 2008* (Vic), which gives women the right to an abortion, free from fear of criminal charge, until 24 weeks' gestation. After that, the Act states that abortions may still be performed, but that two doctors must believe it appropriate on medical grounds. Doctors with conscientious objections may refer women to another doctor who does perform abortions. There was strong pressure both for and against change in the law, with both pro-choice and anti-abortion protesters attempting to influence parliament.

While public protests continue – for example the annual 'March for Babies'– the basic tenet of the 2008 Act remains the law in Victoria. Victoria has the most liberal abortion laws in Australia.

A 2015 Bill – the Infant Viability Bill – proposed that abortions except for medical emergency be prohibited after 24 weeks and that abortions after 20 weeks only be performed in such a way as to give the preborn child the strongest chance of survival. Parliament did not pass this Bill.

In 2016 a successful amendment to the *Public Health and Wellbeing Act 2008* provided for safe access zones of 150 metres outside places where abortions are conducted. This change was brought about in response to long-standing harassment from protesters outside abortion clinics.

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Activity 9.6 Folio exercise

Making judgments on abortion

Read 'Why has the law about abortion been so slow to develop?' and complete the following tasks:

1 Briefly summarise the law concerning abortion before 2008. How has this been affected by judicial decision? Why do you think parliament left it to the courts to decide when an abortion was unlawful?
2 'Making and interpreting laws on abortion has been notoriously difficult.'
   a What do you think are the weaknesses of relying on court interpretations to determine when an abortion has been (or will be) unlawful?
   b If the community became dissatisfied with the way in which the courts have interpreted these laws, what action could be taken? What would be the effect?
3 It has been suggested that the independence of courts makes them the best law-makers to deal with controversial and divisive issues such as abortion.
   a What are the strengths of including the courts in the law-making process?
   b Do you agree with the above statement? Why/why not?

Activity 9.7 Folio exercise

Understanding native title

1 What was the legal principle of *terra nullius*?
2 What was the role of the High Court in determining whether or not native title existed?
3 Justice Brennan stated, in *Mabo and Others v State of Queensland (No. 2)* (1992) 175 CLR 1:

> It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in this land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.

   a What factors did the High Court take into consideration when deciding whether or not the common law concept of *terra nullius* should be applied?
   b Suggest why it is 'imperative in today's world' for the common law not to be seen to be 'frozen'.
   c How far does the set of rules that makes up the doctrine of precedent restrain the courts from changing the law to meet the changing needs of society?
4 What impact did the *Native Title Act* have on the High Court Mabo case ruling? In your answer you should refer to the term 'codification'. Explain the relationship between parliament and the courts in law-making.

Activity 9.8 Folio exercise

Judge-made law and change

A famous English judge, Lord Denning, described the role of judges in changing the law: 'On the one hand there were the timorous souls who were fearful of allowing a new course of action. On the other hand were the bold spirits who were ready to allow it if justice so required …'

1 What is 'judge-made' law? Explain the operation of the doctrine of precedent. How can it result in a change in the law?
2 What factors limit the effectiveness of the courts in bringing about a change in the law?
3 To what extent does the fact that a judge is a 'bold spirit' or 'timorous soul' affect the capacity of courts to change the law?
4 What is statutory interpretation? What is the relationship between the doctrine of precedent and statutory interpretation?
5 Describe the relationship between parliament and the courts in law-making.

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Key point summary

Do your notes cover all of the following points?

Courts play two roles in the law-making process.

Common law

Common law is the law that has evolved through the decisions of judges. Originally the term referred to the general principles of law that applied throughout the English courts. Common law was developed by judges looking back at previous decisions in past cases to determine what the law should be.

- A precedent is a reported judgment of a court that establishes a point of law.
  - A reported decision will contain three key elements:
    - a decision *inter partes* – the decision between the parties
    - the *ratio decidendi* – the legal principle the decision is based on
    - possibly *obiter dicta* – statements of opinion that do not form the legal reasoning for the current decision.
  - The operation of precedent is based on the principle of *stare decisis*.
- *Stare decisis*
  - *Stare decisis* means that a court will stand by what has been decided:
    - a precedent can only be set by a superior court in the same hierarchy
    - for a decision to be considered a 'binding precedent' it must be made by a superior court (usually in the exercise of its appellate [appeal] jurisdiction)
    - all lower courts are bound by the decisions of higher courts in the same hierarchy in like cases
    - decisions of courts at the same level are not binding.
- Binding precedent
  - A precedent will be considered to be binding if:
    - there is a 'like' fact situation
    - it is made by a superior court in the same hierarchy.
- Persuasive precedent
  - A persuasive precedent is a convincing argument. It does not have to be followed.
  - A precedent will be considered persuasive if:
    - it is the *ratio decidendi* of a court at the same level or lower level in the same hierarchy
    - it is the *ratio decidendi* of a court from another hierarchy.
- Flexibility in precedent
  - Following a precedent – where a later court hears a case and applies a precedent to resolve the dispute
  - Reversing a precedent – where a higher court hears a case on appeal and decides that the lower court has wrongly decided the case, it may reverse the decision
  - Overruling precedent – where a case coming before a higher court relies on a legal principle that has been formed in an earlier case decided in a lower court, the higher court may determine that the the earlier case was wrongly decided
  - Disapproving – where a judge refuses to follow the decision of another judge at the same level in an earlier case, or when a judge in a lower court expresses concerns about the application of a precedent but is still bound to apply it
  - Distinguishing – where a judge finds that the material facts of a case are different from the facts in an earlier case and decides that the precedent in the earlier case should not be applied

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Statutory interpretation

Statutory interpretation is the process by which courts determine the application of words, terms and phrases used in Acts of Parliament and delegated legislation. Statutory interpretation decisions are an example of courts making precedents, this time about the meaning of words in legislation.

- Reasons for statutory interpretation
  - problems in drafting a Bill:
    - inaccurate directions or instructions
    - difficulties in predicting future circumstances
    - time pressure may lead to errors or poor expression
    - lengthy Bills or numerous amendments may lead to inconsistencies
    - Bills may relate to a technical area in which the Parliamentary Counsel may not have expertise
    - lack of communication between the Parliamentary Counsel and the minister who is tasked with proposing the Bill.
- Wording and definitions:
  - disputes about the meaning of terms and phrases
  - words may have more than one meaning or the terms used may be too broad – the meaning of words and terms changes over time
  - a word may not encompass recent changes
  - possible conflicts with other Acts.
- Other reasons:
  - to avoid loopholes
  - to avoid contradictions between Acts
  - because legislation has become out of date and needs to be revised.
- Guides to interpreting statutes
  - Intrinsic – interpretation of sections within Acts
  - Extrinsic – sources outside the Act:
    - dictionaries
    - legislative guidelines: *Acts Interpretation Act* (Cth), *Interpretation of Legislation Act* (Vic)
    - previous decisions.
- The decisions made by courts about the meaning of terms, phrases or words in an Act form precedents to be followed in subsequent cases.
- Impact of statutory interpretation:
  - statutory interpretation does not amend or change the printed words
  - the immediate effect of statutory interpretation is that the meaning of the Act is determined in order to settle a dispute
  - other effects of statutory interpretation:
    - forms a precedent
    - limits the scope of the legislation
    - increases the scope of the legislation.

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Factors that affect the ability of courts to make law

The factors that affect the ability of the courts to make law can be said to relate to: the limitations of the doctrine of precedent, the willingness of the judges to change existing law, costs and time in bringing an action and the requirement for standing.

- Courts can only consider the law when a case comes before them for decision, and to break new ground the case has to be a novel (or test) case and heard by a higher court.
- The approach taken by judges can either hinder (by being too conservative) or assist (by being what is called 'activist') the capacity of courts to make law.
- Parties face considerable costs – legal costs and court costs – in bringing a case to court.
- It can take considerable time before a matter comes to court, then add the trial time and possibly time for an appeal. This, plus the high cost of litigation, can deter people from testing the law.
- All parties to a case must have sufficient connection to and interest in the court action to support their participation in a case. This is called having 'standing' to take a matter to court.

Relationship between courts and parliament in law-making

- Where statute law and common law conflict, statute law prevails. This is because parliament is the supreme law-making authority.
- Courts give meaning to the terms used in Acts in order to apply them to specific cases.
- The decisions made by courts about the meaning of terms used in an Act form a precedent for future cases. Parliament may legislate to abrogate or codify the decisions made by a court.

End-of-chapter questions

Revision questions

1 What is the doctrine of precedent?

2 Define the following terms:
- binding precedent
- persuasive precedent
- *stare decisis*
- *obiter dictum*
- *ratio decidendi*
- overruling
- reversing
- distinguishing
- disapproving.

3 Explain how the application of the doctrine of precedent can result in a change in the application of the law.

4 Define statutory interpretation.

5 Describe the role of the Parliamentary Counsel.

6 Outline reasons for an Act needing to be interpreted by a court.

7 List the guides or rules that judges use to help them in determining the meaning or purpose of an Act of parliament.

8 Describe the relationship between parliament and the courts as law-making bodies.

9 'A number of factors limit the ability of courts to make laws.' Discuss.

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Practice exam questions

1 Define the terms *ratio decidendi* and *obiter dicta*. [4 marks]

2 Under what circumstance can a judge distinguish a case? [2 marks]

3 A legal critic once said, 'Parliament cannot make laws that override decisions made by the Supreme Court of Victoria.' Is this statement correct or incorrect? Explain your answer. [3 marks]

4 Distinguish between a binding precedent and a persuasive precedent. [4 marks]

5 Explain why the principle of *stare decisis* is essential to the operation of the doctrine of precedent. [4 marks]

6 'In a recent decision the Supreme Court of Victoria (Trial Division) established a new precedent.' To what extent are judges bound to follow the new precedents in future cases with similar fact situations? [5 marks]

7 A man who started his car so that a friend could drive him home lost his appeal in the Supreme Court. The man, found by police sitting behind the driver's wheel with the engine running, had a blood alcohol concentration in excess of 0.05%. He claimed he was not attempting to drive the car. The Supreme Court was asked to consider whether the phrase 'start to drive' had the same meaning as 'attempting to drive'. The court found that the words 'start to drive' mean 'to cause the engine to fire'. As the man was sitting in the driver's seat and starting the engine, he was 'in charge of the vehicle' within the meaning of the *Road Safety Act 1986* (Vic).

   a Explain why a court may need to interpret legislation. [4 marks]

   b Outline the process and sources of information that the Supreme Court judge would have used to interpret the *Road Safety Act 1986* (Vic). [8 marks]

8 Other than statutory interpretation, describe one other relationship between courts and parliament in law-making. [2 marks]

9 Discuss the impact of judicial conservatism and judicial activism on the ability of the courts to make laws. In your response, refer to cases as examples. [8 marks]

10 'The system of precedent is undemocratic and inflexible.' Do you agree? In your answer, consider the factors that affect the ability of courts to make law. [8 marks]

11 Using examples, analyse the ability of courts to influence parliament to change the law. [6 marks]

12 'The role of the courts is to resolve disputes. The doctrine of precedent simply ensures that disputes are resolved fairly.' Referring to this statement, explain how courts make law. Include definitions of the terms 'reversing', 'overruling', 'distinguishing' and 'disapproving' in your answer. [10 marks]

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CHAPTER 10
REFORMING THE LAW

This chapter explores the influences on law reform. It includes examples that allow us to examine both why laws need to change and the ability of individuals and the media to influence such changes. We will look at recent examples – in the last 4 years – of law reform bodies recommending changes to the law.

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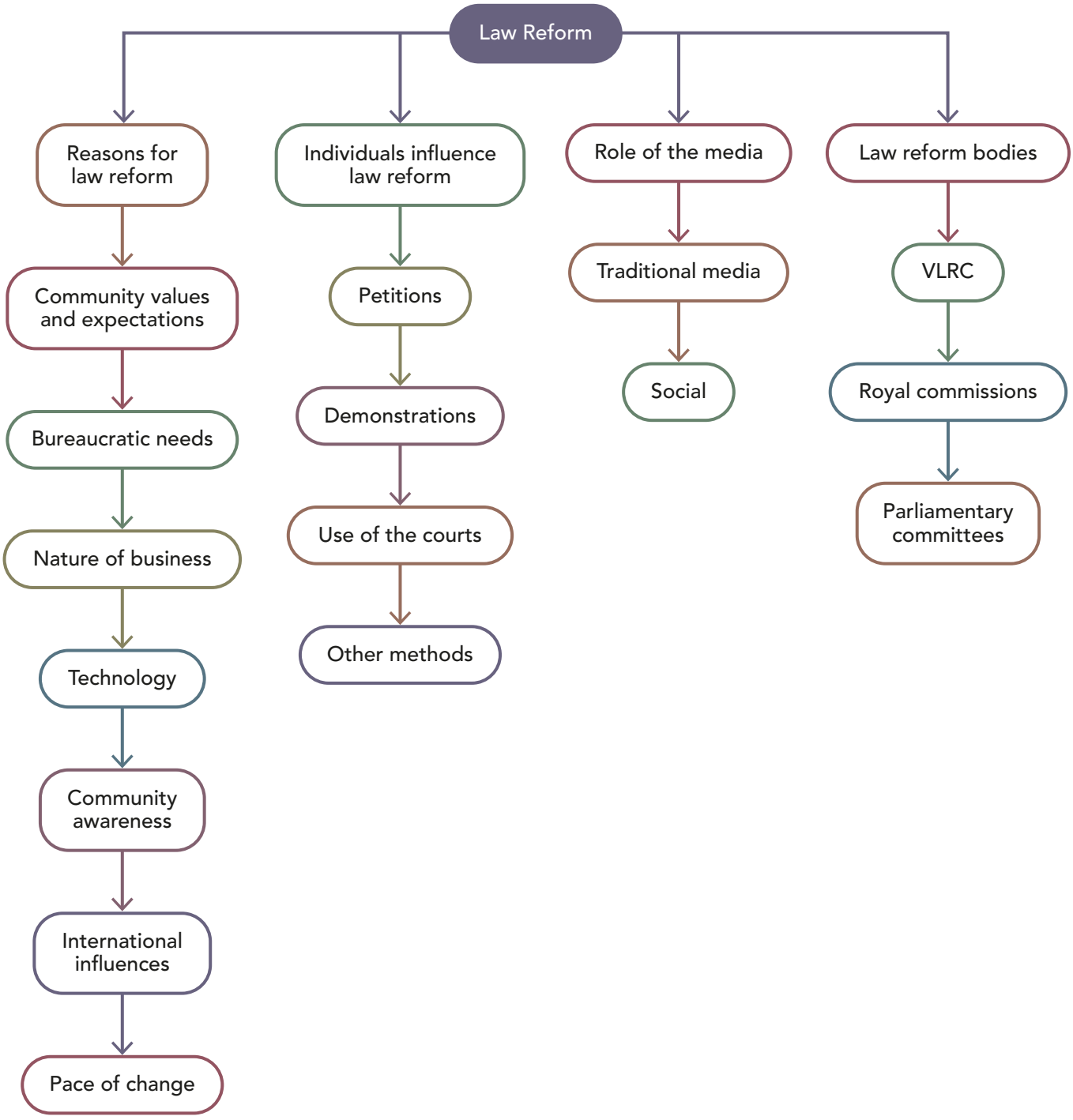

Key terms

Cabinet the leader of the government and the most senior ministers

demonstration a public exhibition of sympathy or support for/ opposition to a particular issue

parliamentary committees select, standing or joint committees made up of members of parliament, formed by the parliament for specific purposes

petition a written request that parliament take action

pressure group a group that acts to advance a particular issue or interest

royal commission an inquiry appointed by the Governor-General-in-Council (or the Governor-in-Council), with extensive powers of investigation

social media computer-based technology that can create and share information and ideas online to online networks and communities

Victorian Law Reform Commission (VLRC) a permanent body established by the Victorian parliament specifically to investigate the need for law reform

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10.1 Why laws need to change

Laws need to change to reflect the needs and values of the community.

There has never been a time in the history of Australia's legal system when the law has remained completely static. The legal system consists of institutions that interact with society as a whole. As society changes, it needs new and different laws. The law can operate effectively only if it reflects the needs and values of the community it seeks to serve. Therefore, the law must change as society's needs and values change.

Over the past century we have witnessed rapid change in the structure of our society. The legal system sometimes finds it difficult to keep pace with the pressure for change. Every year, Commonwealth and State parliaments pass more than 1000 Acts. In addition, subordinate bodies make regulations that affect us all. The volume of law grows and the substance of the law changes.

There are several factors that tend to create a need for law reform:

- changing community attitudes and values
- changing expectations of the legal system
- community awareness around particular issues
- the changing needs of government departments
- the changing nature of business
- changing technology
- changes in our international relationships.

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Changing community attitudes and values

Changes in society and community attitudes can result in a need to change the law. There have been significant changes in the community over the past 100 years, including those listed in the table below.

Table 10.1 Some significant changes in the community over the past 100 years

Then	Now
Average life expectancy: 47 years	Average life expectancy: 80 years (men) and 84 years (women)
Horseback	Cars and aeroplanes
Gaslights	Electric streetlights
Pen and paper	Computers
Chalkboards	Interactive whiteboards and e-learning systems
Board games	Electronic games – Wii and X-box
Silent movies	Digital TV, DVDs, iPhones, tablets and the internet
Compass	GPS navigation systems
Wood-burning stoves	Microwave ovens

Laws need to change to reflect the changing social, moral, economic and political values of the community.

Along with these changes, there have also been changes in community attitudes and values. For instance, 100 years ago, marriage was valued as a lifelong commitment. Under the *Matrimonial Causes Act 1959* (Cth), divorce was a matter of attributing fault to one of the parties.

Today we recognise that marriage breakdown is not necessarily the fault of one person. The *Family Law Act 1975* (Cth) altered the law on divorce to recognise this change in attitude. Today a divorce can be obtained if the marriage has 'irretrievably broken down', as evidenced by a separation of 12 months. Changing attitudes to relationships are also reflected in the increasing recognition of de facto and same-sex relationships in our laws.

Over 100 years ago children were seen almost as the property of their parents. Children could be put to work at an early age. Today we value the rights of children as being separate from, and different from, the rights of parents. Today our courts see the interests of the child as paramount in determining parenting issues. Various laws have been introduced to protect children from abuse and provide for access to education.

In recent years there has also been increasing concern for the protection of the environment.

NewsReport 10.1

Endangered species list grows

FORTY-NINE PLANTS AND ANIMALS on the brink of extinction have been added to the Federal government's endangered species list.

This means that they are given extra protection under Australian environmental laws. If a species is likely to be affected by a proposed development, the development must be submitted to the Federal Minister for the Environment and Energy for assessment.

The animals on the list include the greater glider, the yellow-footed wallaby, the swift parrot and the Leadbeater's possum.

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Australia is witnessing changes in political values. Despite the failed referendum of 1999, the republic debate continues. We are also seeing growing community support for the concept of a Bill of Rights. In 2006, the Victorian parliament passed the Charter of Human Rights and Responsibilities, which recognised the basic rights of people living in Victoria.

Laws need to change to reflect community expectations that the law will regulate behaviour and protect the community from harm.

Sometimes an event occurs which is not consistent with the values of the community. Such an event can result in demands for changes in the law. For instance, the tragic events in Bourke Street in January 2017 resulted in demands to protect the community from harm.

NewsReport 10.2

Reviewing Victoria's bail law

IN JANUARY 2017, THE VICTORIAN GOVERNMENT ANNOUNCED THAT THE BAIL laws were being examined by a former Supreme Court judge. This review followed the deaths of and injuries to a number of pedestrians who were struck by a car on Bourke Street Mall and other sections of the street.

Police alleged that the driver, Dimitrious Gargasoulas, 26, deliberately struck the people.

Despite police objections, Gargasoulas had been granted bail by a bail justice 6 days earlier. For more than 20 years bail justices – a uniquely Victorian system – have been used for after-hours bail applications. They are trained volunteers who must be Australian citizens and not insolvent.

Following the tragedy, the Police Association called for bail justices to be replaced by on-call magistrates. The *Herald Sun* newspaper asked readers to 'join our fight to fix bail laws'. The government announced the establishment of a night court for magistrates to hear after-hours bail requests.

State Coroner Sara Hinchey investigated the tragedy, including how Gargasoulas had been released on bail and the justice system.

It has been claimed that Victoria has one of the lowest remand-in-custody rates in Australia because of the bail justice system. It has also been said that denial of bail is a factor in Australia's growing prisoner numbers. In the September 2016 quarter, the average number of full-time prisoners in Australia was almost 39,000 – of these, 32% are classified as unsentenced (that is, they had been confined to custody or supervision awaiting the outcome of their trial).

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Changing expectations of the legal system

Our attitude to the role of law and government in the community is also changing. One hundred years ago the community expected the law to clearly regulate behaviour – that is, to set out what could and could not be done. Today we expect the legal system to take a far more active role – not only stating the rights of individuals but also protecting individuals from harm.

An example of this is the compulsory wearing of bicycle helmets for cyclists. The law cannot stop all road accidents; however, wearing helmets can minimise the harm. These laws are enforced by the police and are generally recognised by the community as a justifiable intrusion on their personal liberty. However, not all countries have compulsory helmet legislation. For instance, in the United States, only 22 States have bicycle helmet laws. Although the positive effects of wearing helmets are recognised, there is strong community resistance. This resistance reflects a different community attitude to the role of government. That attitude is that government (or law) should not interfere with personal liberty – that is, the personal right to decide whether or not to wear a helmet.

NewsReport 10.3

Tobacco in Victoria

SINCE THE PASSING OF VICTORIA'S *TOBACCO ACT 1987*, parliament has acted to increase the number of smoke-free areas in Victoria.

Increasing the number of smoke-free areas in Victoria is seen as one way to provide a healthy environment for the community. Further moves to regulate smoke-free environments recognise that there is no safe level of exposure to second-hand smoke.

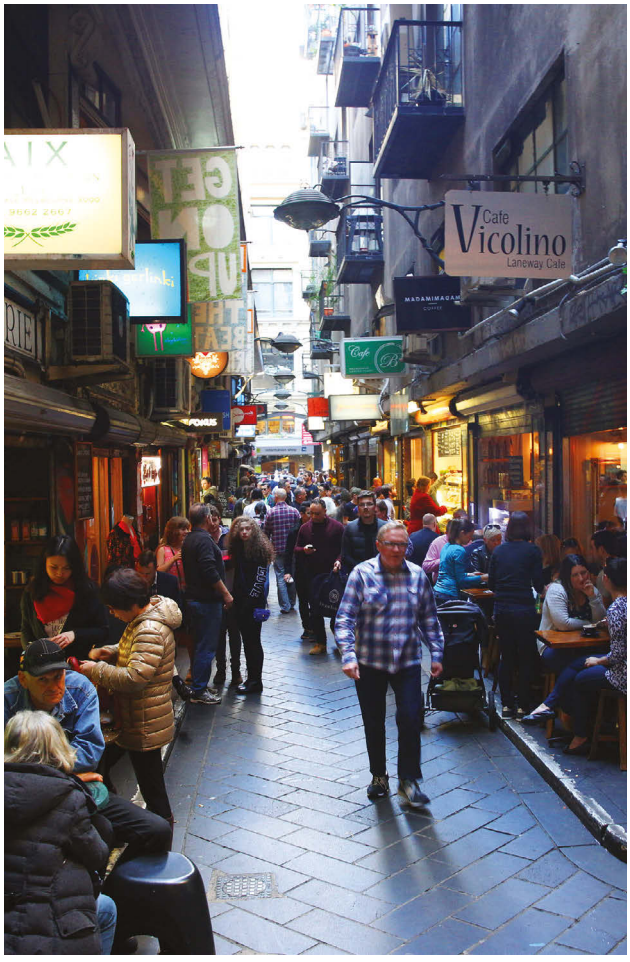
As Ms Hennessy (Minister for Health) stated:

> "Let me be clear, our objective is to strive for a smoke-free Victoria to reduce the impact of smoking, which touches us all. This means we will make every effort to stop Victorians taking up smoking, and to create environments that support smokers to quit and stay quit".

The *Tobacco Amendment Act 2016* amended the 1987 *Tobacco Act* to introduce a ban on smoking in outdoor dining areas. This means that diners in outdoor areas can now enjoy a meal without being subjected to second-hand smoke. Outdoor dining areas include:

- restaurants
- cafes
- takeaway shops
- licensed premises, including beer gardens
- courtyards
- footpath dining
- food fairs
- street festivals.

These reforms, came into force on 1 August 2017. They also regulate the sale, use and promotion of e-cigarettes.



ISBN 978-1-316-64754-7

Changing community awareness

Laws need to change to reflect the increasing community awareness of rights and demands for access to the law.

People are better educated and informed than they were 100 years ago. Individuals are more aware of their legal rights and responsibilities. They are therefore more likely to question the law. Today we do not automatically comply with the law or accept the application of outmoded legal principles. Individuals now demand greater involvement in the processes of decision-making about the law and its institutions. It is inevitable that this will result in challenges to the law and changes to the law.

Changing community awareness of individual rights has also resulted in increased community demand for access to the law. This can be seen in the growth in the use of alternative dispute resolution methods in areas such as neighbourhood disputes, consumer claims and tenancy. Tribunals have been introduced to meet these demands. There have also been increased demands for legal advice and assistance.

NewsReport 10.4

More than a roof over their heads

TRADITIONALLY, ROOMING (BOARDING) HOUSES have provided shelter to some of our most vulnerable people. Over a number of years there have been growing concerns about substandard rooming houses.

The unscrupulous conduct of some operators, who prey on those unable to find housing alternatives, had been the subject of regular media reports. Anyone could run a rooming house provided it was registered with the local council and met a range of other legal requirements.

In 2009 the Victorian government established the Rooming House Standards Taskforce. The Taskforce reported serious concerns about the rooming house industry, including overcrowding, illegal modifications of buildings in order to house more people, excessive rents, inadequate repairs and squalid conditions.

A key recommendation of the Taskforce was for rooming house operators to be registered. This increased regulation would make the operators more accountable.

The *Rooming House Operators Act 2015* was passed in 2016. It established a licensing scheme for rooming house operators. Only those people who can satisfy the 'fit and proper person' test are eligible to be licensed, or to have their existing licences renewed.

The criteria for who is a fit and proper person excludes:

- people who have convictions for certain serious offences: for example, those convicted of offences involving drugs, violence or dishonesty are not eligible to be licensed, where those convictions were recorded in the 10 years preceding an application for a licence
- people with convictions for other serious offences, including sexual and child pornography offences
- rooming house operators who have been found by a court to have contravened specific rooming house-related laws within the preceding 5 years.

Those operating without a licence face significant penalties.

Changing needs of government departments

Laws may need to change because of the administrative needs of a government department.

Government departments are responsible for the day-to-day administration of government policies. They have the power to make a range of important decisions that may affect the rights and responsibilities of individuals. These decisions include matters such as pension entitlements, taxation assessments and health benefits. Government departments can identify difficulties in the operation of the law and recommend changes to overcome the problems.

ISBN 978-1-316-64754-7

The changing nature of business

Laws need to change because of economic changes, and changes in the nature of business and trade.

The changing nature of business has resulted in changes in the law. Changes in the way we produce and sell goods have resulted in the need for more protection for consumers. Consumer rights are protected by consumer protection and trade practices legislation.

One hundred years ago, if you wanted to buy something in a shop you would most likely pay cash. Today consumers can use electronic credit or payment facilities. Both the Commonwealth and State parliaments have passed laws to regulate electronic transactions.

These laws reflect the changing nature of industry and trade. The growth in business done over the internet (e-commerce) is bringing new questions about how the law operates in relation to consumer protection, digital and electronic signatures, internet banking, copyright, trademarks, privacy, censorship and taxation. The growth in e-commerce has outstripped the growth in the law in many of these areas.

Changing technology

Technology has resulted in changes in the way business operates, and in communication and transportation. The law needs to change to meet the new demands created by new technologies.

The introduction of the car is a good example of how new technology results in the need to change the law. At the turn of the last century we did not need extensive regulations to control road users. However, the number of people driving cars has grown and the speed at which cars travel has increased. As a result, the number of conflicts between individuals about the use of motor vehicles has also increased. This has resulted in the need for more laws to regulate the buying and driving of cars.

ISBN 978-1-316-64754-7

NewsReport 10.5
Laws for driverless cars

OWNING A HORSE THAT WAS USED ONLY FOR transport was once a status symbol. Then came the car. At first in the UK, a person carrying a red flag had to precede the vehicle. Now come … driverless vehicles.

Driverless cars are designed to have almost human-like ability to recognise the world around them. Using sensors to gather data around them, they can seamlessly operate in a constantly changing environment.

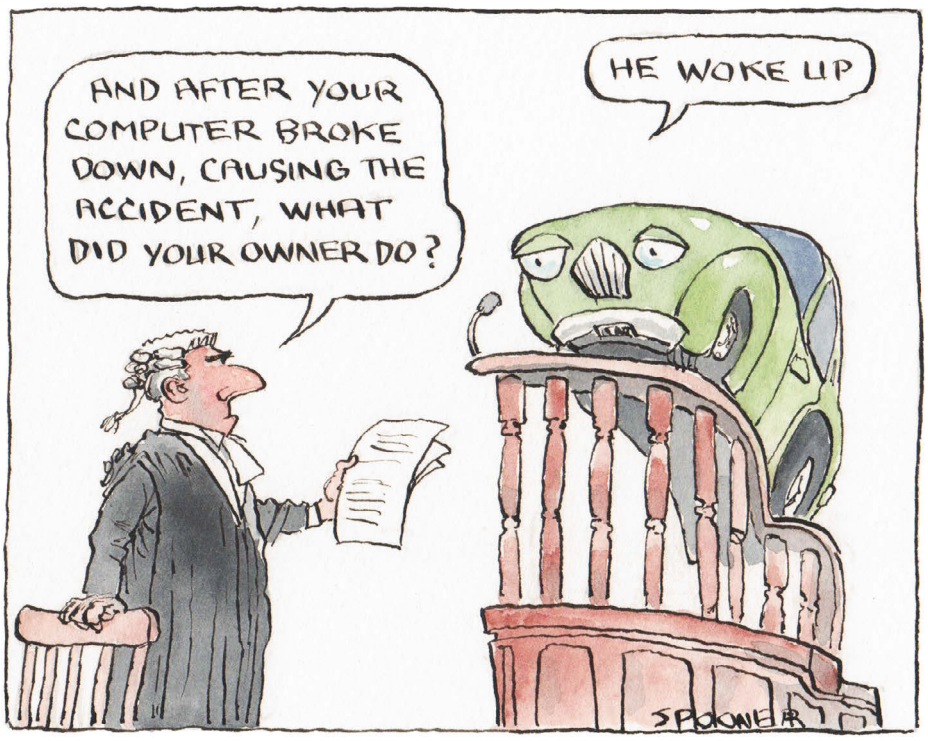
The National Transport Commission released a discussion paper about what this new technology could offer – improved road safety, better mobility, and productivity and environmental gains. The Commission later released a discussion paper on trialling driverless vehicles, to be considered by transport ministers. South Australia has legislation granting conditional exemptions on a case-by-case basis for testing automated vehicles. Victoria alerted people to a driverless car being tested on freeways over a holiday period.

Calling for submissions, the regulatory options paper sought to:

- understand how current regulations could support increased vehicle automation;
- identify legal barriers to driverless vehicles; and
- support a nationally consistent regulatory framework.

Law firm Clayton Utz considered the report and built on it, offering further options and making a number of recommendations. These include:

- immediately amending the Australian road rules and other laws to clarify the concept of 'driver' and 'driving' – the person sitting in the driver's seat is still driving when the automated system is operating; the interpretation of 'proper control' may need to be adjusted too, as the driver may not need to have hands on the steering wheel at all times.
- for conditionally automated vehicles, legal responsibility for traffic infringements and accidents should remain with the person in the driver's seat.
- for highly automated and fully automated vehicles, the concepts of 'driver' and 'control' may need to be redefined, resulting in knock-on effects:
  - road rules and the consequences when breached;
  - apportioning liability for accidents between driver, insurer, suppliers and manufacturers; and
  - the scope and operation of current schemes for compulsory insurance and deemed liability compensation for accidents.
- consideration by legislators of who bears liability for crashes caused when the automated system fails:
  - the registered operator of the vehicle;
  - the person operating the vehicle, whether in the driver's seat or not; and/or
  - the natural person or corporation that manufactures, supplies, installs and/or maintains the automated driving system?
- insurance:
  - whether there ought to be required minimum levels of insurance cover to protect the public;
  - whether the injured party is not required to establish fault (or another form of liability) on the manufacturer, supplier or maintainer.
- cyberspace attacks – new safety standards may be needed to address risk and ensure that automated vehicles can safely communicate with other vehicles and road safety infrastructure.



ISBN 978-1-316-64754-7

Other laws have changed because of technology. The law defining criminal fraud also needed revision because of the introduction of computer technology. Changes in the law about cybercrime were introduced to update existing Commonwealth laws on computer-related crime. Laws about stalking have been extended to include cyber-stalking. Changes in communication technologies and the development of the internet have increased concerns about privacy. The increased use of the internet is also making it more difficult for individual States or nations to enforce laws on pornography.

Laws need to change due to changes in technology.

NewsReport 10.6

Technology: what are your rights?

DID YOU KNOW THAT WHEN A COMPANY LIKE Amazon 'sells' an eBook, the purchaser is not 'buying' the book but rather 'taking a licence to a limited set of uses' for the book? When you buy a printed book, it comes with all kinds of rights, such as the right to sell or give the book away. However, an eBook comes with a very small subset of rights in a 'licence agreement'. These conditional licences are policed and can be revoked at the discretion of the eBook retailer. A Norwegian Kindle customer discovered this when they allegedly violated Amazon's terms and conditions and had their digital library deleted. (It was later reinstated.)

Do you know who owns material on the internet? Copyright is about the rights of authors and creators to control how material they produce is used (intellectual property rights) and about how they are attributed as authors of their works (moral rights). Traditionally, copyright is a form of intellectual property. However, technology has brought new means of quickly and cheaply downloading, copying and distributing material. Do our copyright laws adequately balance the rights of authors and creators and the rights of users of new technologies?

In 2012, the Australian Law Reform Commission conducted an inquiry looking at copyright and the digital economy. The inquiry looked at whether our laws allow for appropriate access, use, interaction and production of copyright material online. The ALRC report was tabled on 13 February 2014. In August, 2015 the Productivity Commission was asked to inquire into Australia's intellectual property system. The Productivity Commission report was publicly released on 20 December 2016.

Changes in our international relationships

Laws need to change due to changes in international relationships or events.

Over the past century there have been dramatic changes in the relationships between nations. Over 40 years ago, Professor of Law CG Weeramantry wrote:

> Increasingly nations are dependent on international agreements and cooperation to achieve change. It makes little sense to regulate satellite transmissions, atmospheric pollution, DNA research or nuclear proliferation nationally, when all that one nation may do can be negated by its neighbour. It makes little sense to look at global problems such as desertification or regulation of transnational corporations from the narrow standpoint of national interests. Yet legal systems are still hemmed in and circumscribed by the notion of the nation state.

The Commonwealth government has the power to enter into international agreements (or treaties) under section 51 of the Constitution. However, these international agreements generally do not become law in Australia unless the Commonwealth parliament passes a law giving force to the agreement. The Australian Treaties Library lists over 3000 treaties in force in Australia.

International affairs can also influence the need to change the law in Australia. Following terrorist attacks in the United States in 2001, the Commonwealth parliament introduced laws giving police new powers to investigate suspected terrorists. In recent years there has been an increase in the number of refugees arriving by boat in Australia. This has resulted in ongoing debate about the extent to which Australian migration laws reflect our obligations as a signatory to the United Nations High Commission for Refugees' (UNHCR's) 1951 Refugee Convention and how our laws deal with asylum-seekers. There have been a number of changes in the law relating to off-shore processing of refugee claims and mandatory detention of asylum-seekers.

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Pace of change

Changes in society alter our perception of the rights and responsibilities of individuals. Changes in society also change the types of disputes that may arise and the methods used to resolve those disputes. New laws develop or existing laws expand to meet these changing needs.

In some instances, the law may provide an impetus for social change. For example, equal opportunity and anti-discrimination legislation passed in the 1970s and 1980s changed social attitudes to equality. These laws made it an offence to discriminate against a person on the grounds of sex, race or religion: initially, the laws focused on discrimination in employment. Since these laws were first passed, the categories of discrimination have expanded as society's attitudes to discrimination have changed.

If the law does not adapt to changing demands it cannot provide for social order.

Over the past century, increased mobility and education, and the changing nature of commerce and technology, have all brought about a need to change laws and to develop new ones. For example, changes in the nature of production and the sale of goods resulted in the need for new laws. These laws set out the rights and responsibilities of consumers, traders and manufacturers in Acts such as the *Competition and Consumer Act 2010* (Cth), the *Consumer Credit (Victoria) and Other Acts Amendment Act 2008* (Vic) and the Australian Consumer Law. The common law of the duty of care developed to extend the rights of consumers.

When the law fails to respond to demands for change, the result is a loss of respect for our legal institutions. The public becomes less likely to adhere to the law, and therefore the law cannot provide for social order.

10.2 Influencing law reform

Individuals, media and law reform bodies can influence the law.

Action that influences law-making bodies to bring about a change in the law can come from a range of sources: individuals, the media and law reform bodies.

Individuals (as well as groups of individuals) can attempt to influence law-makers to change the law. These groups are outside the formal structures of parliament and government. They may take a number of different types of actions to influence a change: petitions, writing articles to newspapers, creating awareness of an issue using **social media**, or by demonstrating. Sometimes the media can create pressure by demanding that a law change. Individuals can also use the courts to try to change the law.

The actions of law reform bodies can also have a significant influence. The **Victorian Law Reform Commission** was established to assess the need for law reform. **Parliamentary committees** can be asked by parliament to review an area of law with a view to what changes are needed. **Royal commissions** can be appointed by the government to review issues. As a result of these reviews, changes in the law may be recommended.

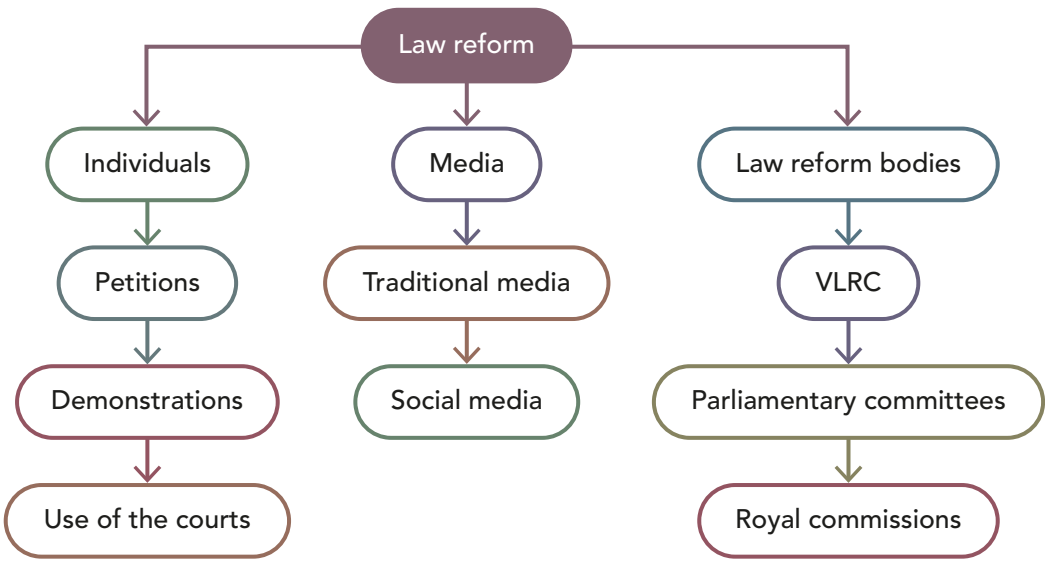

Figure 10.1 Influences on law reform

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Cambridge University Press

10.3 Individuals and law reform

Individuals and groups can act informally to bring about a change in law in a number of ways. For example, an individual who seeks to bring about a change in a law can raise awareness through social media, organise a petition, write letters and approach their member of parliament. Individuals or groups can also contribute to the public debate on a particular issue by writing articles, commenting on social media, or writing letters to newspapers.

Individuals and groups often act outside the formal structures of parliament to influence law reform.

Individuals or groups can also act to increase public awareness of a particular issue. This can put pressure on individuals within the law-making process, such as members of parliament. Individuals or groups can influence government policies or present submissions for consideration by formal groups. Groups of individuals who act collectively to raise awareness of the need for law reform are known as **pressure groups**. For example, a pressure group may present a submission to a parliamentary committee on a proposed change.

To make effective laws, parliament must determine not only what is acceptable to individuals within society but also what is acceptable to society as a whole. As a democratically elected law-making body, parliament is more likely to respond to views that are perceived to be held by the majority of the community. Therefore, the more people there are who appear to be in favour of a particular change, the greater is the likelihood of success.

Change is therefore likely to occur where groups of individuals take action.

Individuals

Although individuals or groups may raise awareness of the need for change, parliament must still assess whether these views reflect those of the majority of the community. For instance, an individual who protests outside parliament about the need for a particular law to be changed may effectively gain the attention of members of parliament. However, does that person represent the interests of the majority of people?

An individual has a limited influence on changing the law, as parliament reflects majority views.

While everyone has the right to present a reasoned argument for a change in the law, individuals acting alone are likely to have a limited impact on changing the law.

Parliament responds to what are perceived to be the demands of the majority of people. Therefore, the greater the number of people who appear to be in favour of a particular change, the greater the likelihood of success.

NewsReport 10.7

Long walk for war powers reform

AUSTRALIA'S CONSTITUTION DOES not require parliamentary approval to go to war or send troops overseas.

Following the Westminster tradition, Australia's Federal executive government – the Prime Minister and **Cabinet** – has the ultimate responsibility for these decisions.

The UK has recently developed the practice of seeking the authorisation of the House of Commons, requiring a parliamentary debate before any decision to deploy military force is made.

A Victorian man, journalist Michael Smith, believes Australia should review its approach to this. Representing Australians for War Powers Reform, he walked from his hometown, Chewton, to Canberra, carrying proposed legislation drafted by a team of international lawyers. It states that a resolution to go to war or deploy forces overseas must be approved by both houses of parliament.

Several politicians greeted him in Canberra, with Labor's Lisa Chesters later in the day delivering a speech in parliament commending Mr Smith's efforts and urging discussion of the war power issue.

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Another difficulty experienced by individuals who want to change the law is knowing the appropriate law-making body. For example, a person wanting to change the law on the importation of hazardous wastes would need to know who makes that law: the Commonwealth parliament or a State parliament? They would also need to be aware of the government policies in the area of law that they wish to change.

The standing of the person in the community may also be important. A person who is a recognised authority on a subject may have a great influence in bringing about a change. For example, the opinions of an environmental scientist may be highly influential in bringing about a reform in the law that protects endangered species. Members of the legal profession deal with the law on a day-to-day basis; they are likely to be aware of the need for law reform and may comment on the effectiveness of a particular law by writing articles in newspapers or professional journals.

Pressure groups

Groups of individuals acting together are more likely to influence a change in the law. These groups are known as pressure groups.

Change is more likely to occur if people act together. Pressure groups can use many of the methods used by individuals. The advantage of a pressure group is that the spokesperson can claim that they represent a large proportion of the community; this may mean that it is more likely that the law-making body will take action. Pressure groups take a variety of forms. They may be small groups, or they may be large organisations. Pressure groups are sometimes called lobby groups.

Interest groups

There are pressure groups that represent a particular cause or issue. An example of a single-issue pressure group is the Sea Shepherd Conservation Society, which uses direct action tactics to protect marine life. Animal Rights Victoria campaigns against the abuse of animals. Amnesty International Australia is a pressure group concerned with human rights. Amnesty campaigns for changes in Australia's anti-terrorism laws and for a Human Rights Act.

AMNESTY INTERNATIONAL AUSTRALIA

Amnesty International Australia is part of a global movement defending human rights. To do this, we mobilise people, campaign, conduct research and raise money for our work. We are promoting a culture where human rights are embraced, valued and protected.

For more information about Amnesty International Australia, go to https://www.amnesty.org.au.

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Industry groups

Some pressure groups, such as Clubs Australia, representing licensed clubs, represent the interests of a particular industry group. In its efforts to oppose further legal controls on gambling, the organisation ran a 'Part of the Solution' campaign, telling the public about the actions the industry takes to reduce problem gambling: staff training, self-exclusion programs, no credit betting and counselling services, for example.

Professional groups

Professional groups are also concerned with changes in the law in their area. For instance, the Australian Medical Association (AMA) represents the interests of doctors. It has expressed views on a range of medical issues, such as laws relating to child abuse, access to health care and health policies.

The legal profession also influences change in the legal system. Lawyers are represented by organisations such as the Victorian Bar, the Criminal Bar Association and the Law Institute of Victoria. These associations can become aware of a need for a change in the law, and draw the attention of the government to this need. They can also act against a proposed change. Lawyers throughout Australia are also members of the Law Council of Australia, which performs a similar function at a Commonwealth level.

THE CLIMATE AND HEALTH ALLIANCE

The Climate and Health Alliance (CAHA) is a coalition of health care stakeholders who work together to see the threat to human health from climate change and ecological degradation addressed through prompt policy action. The membership of CAHA includes organisations and individuals from across the health sector, with organisations representing health care professionals from medicine, nursing, public health, social work and psychology, as well as health care service providers, research and academic institutions, and health consumers.

From www.caha.org.au

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NewsReport 10.8

How effective are pressure groups?

The effectiveness of action taken by pressure groups depends on a variety of factors. These factors include the determination of the pressure group, the strength of resistance, the degree of media coverage and the level of public sympathy. For example, in March 2011 Animals Australia* ('the voice for animals') investigator Lyn White visited 11 abattoirs to assess the treatment and slaughter of Australian cattle in four Indonesian cities. Footage shot by Ms White of animals being inhumanely slaughtered was screened on the current affairs program *Four Corners*. The ensuing scandal sent shockwaves from the plains of the outback to the highest office of politics. Within days, a Federal government decree – ceasing to issue export licences – brought Australia's lucrative live cattle trade to Indonesia to a shuddering halt. The fallout continues in both countries. Though the export ban was short-lived, it fractured crucial trade relations, cost the industry untold millions, and caused cultural offence to our near neighbours. Since then, Animals Australia and the RSPCA have actively campaigned for further restrictions on the export of live animals. In 2016, newly elected Senator Derryn Hinch affirmed his position on animal welfare:

> Seeing our cattle being sledgehammered to death in Vietnam was an atrocity … I've had all the arguments put forward to me, but I still believe we should keep building the frozen export industry.

His stance is hardly a surprise – Sen. Hinch delivered his first petition calling for an end to live exports in 1981 – but he's also a realist: 'It ain't going to change anytime soon, not with Barnyard Barnaby in there now,' he says breezily, of the federal Agriculture Minister. 'I'm fairly practical, I know what can and cannot happen … but I will be pushing it.'

**See Animals Australia and RSPCA Australia joint campaign website: www.banliveexport.com.*

10.4 Methods used by individuals and groups

Individuals and groups use a variety of methods to influence a change in the law.

A number of methods may be used. They include:

- signing a petition to parliament
- participating in **demonstrations**
- taking cases to court
- using the media, including social media.

Other actions to influence a change in the law include:

- preparing submissions to law reform bodies, parliamentary committees or other bodies investigating changes in the law
- civil disobedience
- political action
- direct approaches to members of parliament (lobbying).

Petitions

Petitions are a formal request for parliament to take action on an issue.

Individuals and groups can use petitions to influence parliament to change the law. A **petition** is a written request that parliament or the government take action on an issue. In both the Commonwealth and State parliament a member of parliament may present a petition to parliament on behalf of the people in their electorate. During each sitting of parliament, the president or speaker will ask members to read out petitions. These are recorded in *Hansard*.

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NewsReport 10.9

The right to petition parliament

SINCE KING EDWARD I IN THE 13TH century, citizens have had the right to petition the Crown and parliament. Since then, parliaments under the Westminster system have been petitioned for action. The petition must:

- relate to a matter parliament has the power to act on
- set out the facts clearly
- use respectful and moderate language
- contain a request for action.

A petition only requires one signature. However, when a petition is signed by a large number of people it demonstrates to parliament the level of community support for an issue. The number of people who have signed a petition is recorded in Hansard.

There are rules about how the petition is presented. For instance, the House of Representatives accepts electronic or internet-based petitions. The Senate allows electronic petitions only if a senator certifies that the text was available to all signatories, and it must be lodged as a paper document.

More than 50,000 petitions to the House of Representatives have been lodged since Federation. The first petition lodged was by two members of the Presbyterian Church, calling for prayers to be said at the opening of parliament each day. Petitions have been lodged on a piece of bark (a land rights request) and a jacket (textile workers opposed to tariff cuts). The largest petition was organised by brewers, who urged beer drinkers to protest about a broken government tax promise.

The diagram in this NewsReport is an example of the format for petitions accepted by the House of Representatives.

SAMPLE PETITION

This form is designed to help you prepare the front page of a petition. Subsequent pages need to include only the 'request' of the petition, with names and signatures below it.

For more information contact the Petitions Committee
petitions.committee.reps@aph.gov.au or by phone (02) 6277 2152

TO THE HONOURABLE THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES

ADDRESS
*Petitions **must** be addressed to the House of Representatives*

This petition of …

Here insert words describing who the petition is from, e.g. 'Certain citizens of Australia'

draws to the attention of the House:

REASON
This must be a matter on which the House has power to act - a Commonwealth legislative or administrative matter

We therefore ask the House to:

REQUEST
***Note:** the address, reason and the request together comprise the 'terms' of the petition and together must **not** exceed 250 words*

PRINCIPAL PETITIONER

Name: _____ Signature: _____

Address: _____

_____ Postcode: _____

Email (if available): _____ Telephone: _____

CONTACT DETAILS for PRINCIPAL PETITIONER
This information is only for the use of the Petitions Committee. It will not be published, however once the petition is presented it will be available for public perusal

NAME AND SIGNATURE

1.
2.
3.
4.
5.
6.
7.
8.
9.
10.

SIGNATURES OF OTHER PETITIONERS
- *If required, attach additional pages for signatures*
- *The request must appear at the top of each additional page*
- *Other information such as postal addresses may also be provided but they are not required. As such, petitions seeking this information should note a 'voluntary' field*
- *Signatures on the reverse of a petition, or on a blank page, will **not** be counted*

To the Legislative Assembly of Victoria:

This petition of residents of Victoria draws to the attention of the house their collective concerns with respect to the proposed amendments to the *Domestic Animals Act 1994*.

We are passionate about animal welfare. We do not believe the proposed changes will solve the problems they are intended to address; however, we do believe that these changes will negatively impact both animal welfare and the pet industry.

This petition therefore requests that the Legislative Assembly of Victoria not support the aforementioned changes to the *Domestic Animals Act 1994* and instead call for the Bill to be referred to a parliamentary inquiry or the relevant upper house committee to review so that an evidence-based approach to issues around animal welfare and the pet industry can be achieved.

By Mr BURGESS (Hastings) (50 signatures).

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E-petitions

E-petition systems allow individuals to submit petitions, to share information about petitions on social networks and to sign existing petitions online. Both e-petitions and paper petitions must be set out according to the rules set by the relevant parliament.

E-petitions are also used by groups in the community to demonstrate general support for particular issues in the community. Online sites such as Change.org. and GetUp have been instrumental in influencing change. Change.org claimed that 174,979,035 people had taken action on their site by December 2016. For instance, a petition supporting the legalisation of the right of same-sex couples in South Australia to adopt children gained the support of 27,000 people. In December 2016 South Australia changed the law to allow same-sex adoption.

The Commonwealth House of Representatives allows individuals to create a petition on the House's e-petition website. The Petitions Committee checks petitions to make sure that they comply with the rules. The petition is then placed on the House's e-petition website for 4 weeks, to collect signatures. When the e-petition closes, it will be presented to the House of Representatives by the Chair of the Petitions Committee or your local member.

In November 2016, the Procedures Committee of the Victorian Legislative Council reported on the adoption of e-petitions. The Committee recommended an online process that replicated the existing paper petitions process. The Committee proposed a pilot program, to be reviewed after 12 months. Under this pilot, an individual can create and lodge an e-petition request online via the Victorian parliament's website. Publication of a new e-petition is reviewed by the Clerk to ensure that it complies with the rules. The e-petition is posted on the Victorian parliament's website for a period of not less than 1 week and not more than 6 months.

Demonstrations

Individuals and groups can hold demonstrations, such as rallies or marches, to influence a change in the law.

Individuals or groups may also organise a demonstration, perhaps taking the form of a march or a rally. Australia has a long history of demonstrations as a means of expressing a political opinion. Following the 1854 Eureka uprising, 10,000 people protested in the streets of Melbourne. (At that time 10,000 people was about one-third of the total population of Melbourne.) Anti-Vietnam War marches in the 1970s attracted up to 100,000 protesters and had a significant impact on Australian political policies.

Figure 10.2 Lawyers rally for legal aid justice

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In another example, in 2016, lawyers joined with retired Supreme Court Justice Betty King to protest over proposed changes to legal aid. Lawyers rallied in Melbourne's CBD to demonstrate their concerns about successive cuts to Legal Aid and community legal services. In addressing the protest, Justice King spoke about the impact of the cuts on those who are vulnerable:

> It cannot be a fair system when only one side gets the money to be represented in court. The Commonwealth continues to increase funding to investigating organisations such as the AFP, ASIC or even creating new paramilitary organisations such as Border Force. But it continues to reduce the funding that could remotely balance that system.

Boycotts

A boycott is another type of group action, but it is one that is invisible on the streets. A boycott may be a refusal to buy an item or to participate in a particular activity. For instance, the RSPCA (Royal Society for the Prevention of Cruelty to Animals) encouraged people not to buy puppies from puppy farms. The State parliament reacted by introducing the *Domestic Animals Amendment (Puppy Farms and Pet Shops) Bill 2016*. This Bill proposed to:

- regulate the number of fertile female dogs kept by breeding domestic animal businesses
- further regulate the breeding of dogs and cats and sale of dogs and cats in pet shops
- provide for the registration of foster carers and single-use permits to sell certain animals.

Individuals and groups may defy the law to demonstrate their disapproval of a law.

Demonstrations may be legal or they may involve behaviour that is outside the law. Violent demonstrations are a violation of the law and can represent a danger to the wider community.

The use of the courts

Parliament is the supreme law-making body. Reforming the law is not the primary role of the courts. The role of courts in law-making is discussed in more detail in Chapter 9. However, there are a number of ways in which individuals can use the courts to try to change the law.

An individual can take a case for which there is no applicable precedent or statute law to court. Courts can perform a law-making role when hearing a case where no legislation or binding precedent applies. In these cases, the courts will make a decision as to the principles that should be applied in order to resolve the dispute. The decision in the case is binding on the parties to the dispute, and the principles applied are a guide as to how future disputes will be decided.

An individual can take a case for which there is no applicable precedent or statute law to court.

Until a new precedent is set, or parliament passes a law in relation to that particular matter, the precedent applies only to future 'like' cases. Through judicial decisions the courts can reform the law. The rules of common law allow judges to reform laws by setting new precedents when an appropriate case comes before them.

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Individuals can use courts by taking a case to court so that the meaning or application of a statute can be clarified.

Individuals can also use courts by taking a case to court so that the meaning or application of a statute can be clarified. By interpreting the law the courts can either expand or limit the circumstances in which the law applies. One role of the courts is to interpret the laws made by parliament. If parliament does not agree with the court's interpretation it can pass a law to override the court decision or clarify the law.

Individuals can also use courts by challenging the validity of legislation there.

Individuals can also use the court by challenging the validity of legislation there. Parliaments must act within their constitutional law-making powers. If a court determines that an Act is outside the law-making power of the parliament, the court can declare the legislation *ultra vires*, which means it is 'outside the law' and cannot be applied.

NewsReport 10.10

Uber wins landmark Melbourne court battle over driver Nathan Brenner's fine

UBER HAS WON A LANDMARK TEST CASE, reversing a decision that effectively made the controversial ride-sharing service illegal.

Uber was effectively outlawed in Victoria in December when driver Nathan Brenner was found guilty of driving a hire car without a licence or accreditation.

Mr Brenner, a former manager of rock groups Split Enz and Men at Work, appealed against the $900 fine in the County Court.

Today Judge Geoff Chettle dismissed the charges against him.

Uber Victoria's general manager, Matt Denman, welcomed the decision. 'We are delighted that our driver-partner Mr Brenner won his appeal today in the County Court of Victoria, and was awarded costs.

'The time for excuses is over,' Mr Denman said. 'The Andrews Government needs to listen to the hundreds of thousands of Victorians who are choosing ride-sharing every week and introduce sensible, safety-based regulations without delay.'

Mr Brenner was charged after responding to an Uber booking to take two men, taxi service commission investigators, from the Hilton in East Melbourne to Hotel Como in South Yarra – a $9 fare – on August 21, 2014.

He was charged with operating a commercial passenger vehicle without being authorised.

Mr Brenner was one of 12 drivers charged in a case Uber feared could set a legal precedent that would damage its successful business model.

Judge Chettle today set aside the magistrate's decision and dismissed both charges against Mr Brenner, ordering the Taxi Services Commission to pay his costs for the County Court hearing.

Mr Brenner is also likely to have his legal costs covered for the bungled prosecution case in the Magistrates' Court.

Judge Chettle applauded defence lawyer Neil Clelland, QC, for identifying the key part of legislation that highlighted the bungled police case.

'Thank God for Mr Clelland. He put his finger on the key point,' he said.

Mr Clelland lashed out at the prosecution for failing to identify the relevant section of the Transport Act that proved his client innocent.

'The prosecution failed to prove the case … one would have thought they'd paid attention to the Act,' he said.

In making his ruling, Judge Chettle said if it wasn't for a particular section of the Act, he would have found Mr Brenner guilty.

'If not for section 159 I'd find the case proven,' he said.

He told the court he was satisfied Mr Brenner had been driving for a financial reward, despite the money going directly to Uber. 'I don't need to determine he was paid,' Judge Chettle said. 'He was not driving the informant out of generosity.'

Judge Chettle said it was not his role to meddle with the legislation, but to give meaning to it.

Mr Clelland successfully argued that legislation which applied to commercial passenger vehicles excluded Uber arrangements.

'A number of the definitions … are antiquated,' Mr Clelland said. 'The legislation couldn't contemplate or wouldn't have been able to contemplate the so-called Uber arrangements.'

He relied on legislation dating back to 1941, and case law from 1929, to prove that Mr Brenner had not operated a commercial passenger vehicle as defined by law.

Mr Clelland said a 1941 definition of such a vehicle required that an operator was paid individual fares by multiple passengers.

Opposition Transport spokesman David Hodgett said today's court case underlined the need for new laws to deal with Uber.

Shannon Deery and Wayne Flower, Herald Sun, *17 May 2016*

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GetUp!

We're taking it to court

The extraordinary fundraising effort of GetUp members means we're now able to fund a second court case for the Reef.

Members have already committed $150,000 to support North Queensland Conservation Council challenge the sea dumping permit at Abbot Point in court.

Now, we are able to commit a further $150,000 to help Mackay Conservation Group challenge Greg Hunt's approval to dredge 3 million cubic metres Reef World Heritage Area seabed.

The fight to protect our Reef isn't going to be easy. Today we took another huge step, but there's still a lot of work to be done.

Whether it's launching further legal challenges, running high-impact television or newspaper ads or another strategic campaign, let's be ready for whatever comes next.

Can you chip-in to the citizen-led Reef Fighting Fund?

Sometimes, in making a decision a judge can express dissatisfaction with the current law. Although the judge cannot change the law, the statement can influence parliament to take action. Decisions made by judges can identify weaknesses in the law. From time to time a judge may, in a decision, make specific reference to the need for a law to change.

Statements made by judges can influence law reform.

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NewsReport 10.11

Irreversible adoption prompts judge to seek law change in ACT

A CANBERRA JUDGE HAS CALLED FOR CHANGES TO ACT LAWS AFTER HE WAS unable to reverse an adoption from the 1980s.

The case involves a man who wants his adoption by his former stepfather undone, so he can be legally recognised as the son of his biological father.

The Supreme Court heard that the man no longer had any contact with his adoptive father, but had connected with his biological father in Germany, and had changed his surname to match his parent.

The relationship was confirmed by DNA tests but the German courts would not recognise it without a ruling from the ACT Supreme Court dissolving the original adoption.

That move was stalled when Associate Justice David Mossop found a legislative change in 2008 accidentally removed the power of the courts to reverse an adoption.

'Sometimes when cleaning up you throw out something useful,' he told the court. 'Amendments to clean up and improve the ACT statute book have involved the amendment of provisions in a manner which has disabled the court from being able to properly deal with adoption orders made under a repealed Act.'

He noted that it was an important entitlement. 'I accept that formal recognition of the plaintiff's parentage is a matter of significance to him,' he said. 'It has been significant enough to him and his wife to change their family name to match the plaintiff's father.

'The importance of that issue to the plaintiff is understandable in circumstances where he has an ongoing relationship with his biological father but little, if any, ongoing relationship with his adoptive father.'

As a result of the case, Associate Justice Mossop has called for the Legislative Assembly to take prompt action on the law.

He has now placed the case in a holding pattern, not delivering a final finding pending any changes.

Elizabeth Byrne, www.abc.net.au, 9 December 2016

10.5 The media and law reform

Individuals and groups can use the media to communicate their views to others.

The media are often used to help influence a change in the law. People contact newspapers with their concerns, writing a letter to the editor. They may also participate in television or radio interviews and discussions.

A spokesperson for a pressure group may be interviewed for a current affairs television program, or their actions may be reported as part of regular news broadcasts. Alternatively, a pressure group can raise enough money to mount a media campaign of its own, running advertisements in newspapers and magazines or television, or arranging for material to be delivered by mail.

Social media is a powerful influence, increasing access and allowing individuals greater scope to express their views.

In recent years social media has emerged as a powerful tool to influence reforms in the law. Groups and individuals participate in blogs and discussion forums and can set up websites to promote discussion of issues. Social networking sites, such as Facebook, can also be used to gather support for a change in the law.

The media can also form a pressure group acting to bring about change.

Sometimes the media itself acts as a pressure group to help bring about a change in the law. From time to time newspapers and current affairs radio and television programs conduct special investigations into issues of concern.

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How the personal has become political in the fight over same-sex marriage.

Four Corners (For Better or Worse, 10 October 2016)

New Victorian law will create legal same-sex marriages

The Age (18 August 2016)

Sparks fly as panel discusses same-sex marriage and Safe Schools program

Q&A wrap (ABC News, 1 March 2016)

Dying with dignity: let's focus more on the latter

ABC News (*The Drum*, Stella Young
http://www.abc.net.au/news/2014-11-14/young-dying-with-dignity/5888844?pfmredir=sm)

Letter to the editor of *The Age*, 10 December 2016:

Suffering is part of the human condition

I strongly oppose the proposed assisted suicide legislation. I write from the perspective of an 87-year-old Christian Brother. Although I am 'one fall away' from the need for palliative care, I accept the fact that pain and suffering are a part of the human condition. I am heartened by the opposition to the proposed legislation, including by some doctors.

Brother Matt Ryan, East St Kilda

(http://www.theage.com.au/comment/the-age-letters/assisted-dying-it-is-our-right-to-make-an-informed-choice-20161208-gt7ge6.html)

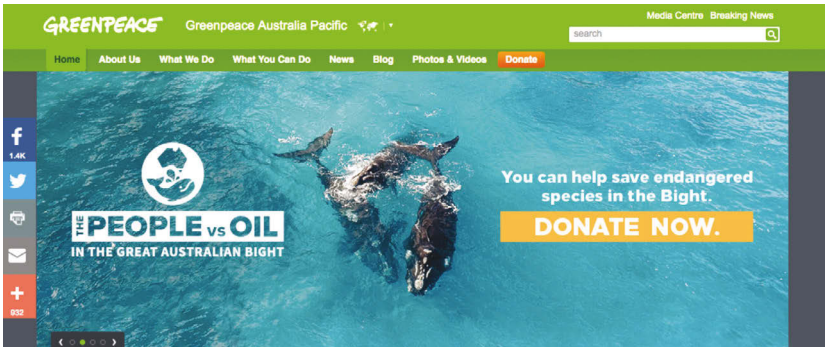
Figure 10.3 Influences on law reform

NewsReport 10.12

Using the media

GREEENPEACE AUSTRALIA PACIFIC, a not-for-profit organisation, strives to protect the environment in a peaceful and non-violent way. The organisation has worked for over 40 years to raise awareness and educate the community on environmental issues, including issues relating to:

- climate change
- forest destruction
- oceans
- sustainable agricultural and farming practices.



The Greenpeace Australia Pacific webpage (http://www.greenpeace.org/australia/en/) is an essential communication tool. Linking through to social media, Greenpeace uses Twitter, Facebook, Instagram, YouTube and email to interact with the Greenpeace community. The blog section features breaking news, commentary and tips. This highlights the range of issues the organisation is tackling, from alternatives to the use of shark nets to calling on the Australian government to increase the level of protection for Australia's oceans.

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NewsReport 10.13

About GetUp

GETUP IS AN INDEPENDENT, GRASSROOTS COMMUNITY ADVOCACY organisation. It gives everyday Australians the opportunity to get involved and to hold politicians to account on important issues.

Whether it is sending an email to a member of parliament, engaging with the media, attending an event or helping to get a television ad to air, GetUp members take targeted, coordinated and strategic action to effect change.

GetUp does not back any particular political party, but aims to build an accountable and progressive parliament. GetUp is a not-for-profit organisation and relies solely on funds and in-kind donations from the Australian public. GetUp has more than 1,076,628 Australian members.

The GetUp website, www.getup.org.au, allows individuals to set up their own campaigns, which can then be shared via Facebook, Twitter, YouTube and email.

Activity 10.1 Folio exercise

Changing the law

1 Read 'Going to the dogs - greyhound racing changes' on the next page, then use the following links to find out more about greyhound racing.

https://www.rspca.org.au/greyhound-industry

http://greyhoundcruelty.com/ [WARNING – The link to the Animals Australia/ Animal Liberation Queensland investigations contains some distressing scenes.]

https://www.gopetition.com/petitions/dont-ban-greyhound-racing-in-nsw.html.

2 Explain why individuals and groups believe that the laws on greyhound racing need to change.

3 Draw up a chart like the one below. Using the links above, identify several ways in which the media have been used to influence a change in the law. Explain why these actions could influence a change.

Media used	How would this influence a change in the law?

4 Describe two other methods that individuals and groups can use to influence change. Assess how these methods may be more effective than using the media.

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NEWSREPORT 10.14

Going to the dogs – greyhound racing changes

The issue

TWO TV INVESTIGATIVE PROGRAMS FOUND widespread cheating threatened the welfare of greyhounds and other animals.

Background

Greyhound racing was brought to its knees following two TV investigative programs. At one stage, NSW legislated to ban greyhound racing.

The ABC's *Four Corners* probe found widespread cheating threatened the welfare of the dogs and other animals. The program showed live piglets, possums and rabbits being fixed to mechanical lures to be chased and eventually killed by dogs.

With some $4 billion being bet each year on more than 40,000 races featuring over 300,000 dogs, the Australian industry had to be cleaned up.

Following the *Four Corners* program, the RSPCA, in conjunction with police in NSW, Queensland and Victoria, raided five properties. As a result, people were prosecuted for using live bait. This is cheating under the laws of greyhound racing.

Later, an investigation by ABC's *7.30* found that hundreds of Australian greyhounds deemed to be too slow were exported to Asia, breaching racing rules.

Reactions

Following the *Four Corners* program, the NSW government set up an inquiry. The inquiry found that live baiting was 'rampant and chronic' and 'firmly enmeshed'. It also found that 50–70% of dogs born in the past 12 months had been killed because they never, or no longer, were capable of being competitive.

The NSW government acted, legislating to ban greyhound racing, threatening the livelihoods of thousands of people – from racecourse staff to pet food suppliers. The NSW Greyhound Racing Industry Alliance was formed to fight the NSW government decision. The united industry bodies included the NSW Greyhound Breeders, Owners and Trainers' Association, all independent racing clubs, and other industry participants. The alliance, representing about 15,000 people, organised rallies, used social media to spread its message, and actively campaigned in a by-election.

Although almost two-thirds of people in NSW and the ACT supported the ban, the decision became a political hot potato. The Baird Government, surprisingly, did a backflip and reversed the ban following industry and political pressure. The government announced a suite of changes, ranging from life bans and increased jail terms for live baiting to additional resources for enforcement and prosecution of wrongdoers. But this reversal was too late to save the National Party's seat of Orange in a by-election – the Shooters, Fishers and Farmers Party won its first seat in the Lower House. This by-election reflected the discontent of rural voters and sent shockwaves across the nation.

Across the Murray, the Coalition for the Protection of Greyhounds ran an online petition calling for a ban on the Victorian greyhound industry.

The Greyhound Racing Victoria (GRV) board resigned after the *Four Corners* report. The Victorian government established two independent inquiries with the reports tabled in parliament. The report of the Racing Integrity Commissioner recommended removing integrity and regulatory functions from GRV and establishing an authority to perform this function for all three racing codes. At least one member of the GRV board should also be required to have animal welfare expertise.

The Chief Veterinary Officer's report emphasised the need for auditing and inspection to be undertaken by an independent inspectorate, as well as strengthening the powers of inspectors under the *Domestic Animals Act 1994* and the *Prevention of Cruelty to Animals Act 1986*, and requiring greyhound racing participants to register with municipal councils as domestic animal businesses.

Outcomes in Victoria

The government responded to the inquiries by passing the *Racing and Other Acts Amendment (Greyhound Racing and Welfare Reform) Act 2015*, which sets out the functions and rules of Greyhound Racing Victoria, and makes changes to its constitution and its appeals and disciplinary board, sets out additional functions for the Racing Integrity Commissioner regarding animal welfare, creates offences relating to using animals as lures in greyhound races, makes a range of changes to animal welfare arrangements in the greyhound racing sector, and makes other miscellaneous amendments.

Subsequently Greyhound Racing Victoria addressed the 68 recommendations made in the two reports. These included a 400% increase in animal welfare inspectors, a new investigations unit, a doubling of sampling for prohibited substances, a crackdown on greyhound exports, and a substantial program of engagement with industry participants.

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NewsReport 10.15

Newspaper's electronic campaign to send drug drivers to jail

ONE OF THE GREATEST NEWSPAPER CAMPAIGNS waged in Australia was 'Declare War on 1034'. Conducted by the *Sun News-Pictorial* (now the *Herald Sun*), the figure 1034 was the number of people killed on Victoria's roads in 1969. It went to 1061 the following year but then trended down. The campaign led to the passage of .05% blood-alcohol laws, random breath testing and compulsory seatbelts.

Since then there have been public action and education programs targeting speed, drink and drug-affected driving and fatigue, and the Arrive Alive strategy, which included plans to make roads and vehicles safer.

In 2016 there were 291 fatalities, an increase of 15.5% on the previous year.

The change sparked a new campaign by the newspaper. Claiming that drug-drivers are behind the increase because of a legal loophole, the *Herald Sun* mounted a campaign to have drug-driver laws changed.

The campaign asked readers to sign an online petition. It also used social media platforms such as Twitter.

The newspaper published figures for 2015–16: of 8536 drug-drivers caught, 40% (3477) had a prior conviction for the same offence; 45 drivers killed in road crashed in 2015 had drugs in their system, compared with 26 drunk-drivers. In the same year, 632 drivers were seriously injured after being involved in a crash while on drugs.

The centrepiece of the campaign was the newspaper's claim that sentencing laws do not allow magistrates to put repeat drug-drivers in jail, regardless of how many times they offend. Recidivist drink-drivers can be sentenced to jail after repeatedly being caught over the .05 limit. Drink-drivers with readings between .07 and .10 can be disqualified from driving for 6 months, while drug-drivers lose their licence for 3 months. Drink-drivers also have their licence suspended on the spot while drug-drivers don't.

However, the online Victorian Traffic Law Forum challenged the campaign. The forum, which provides discussion of road and vehicle-related issues, said there were laws to jail people who drive while drug-affected. It cited:

- *Road Safety Act* s 49(1)(a) – a serious drug-driving offence can carry 3 months' imprisonment for a first offence, and up to 18 months' imprisonment if there is more than one prior driving or drug-driving offence;
- *Road Safety Act* s 49(1)(ba) – 12 months' jail for any previous drink or drug-driving offences, and 18 months' jail if there are two or more drink or drug-driving prior offences;
- there are jail options for 'cocktail law' breaches;
- a 4-year interlock is possible, but only for someone who has prior offences in the last 10 years; and
- a 6–18 month jail term can be imposed on someone who has had any prior offences, no matter when.

The forum believes that the *Herald Sun*'s argument is about the oral fluid test – people cannot go to jail no matter how many times they fail this test. The test is designed to detect trace elements of drugs in a person's body. It is not designed to determine whether or not the drug impairs a person. The organisation says that until the concentration of a drug can be equated to a level of impairment, it is unrealistic to jail people who may be unaware that their body contains trace elements of a drug that could have been taken some days earlier.

Roads Minister Luke Donnellan said any change in law needed to be 'bulletproof' to avoid challenges in court.

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10.6 Other ways of influencing change

There are several other actions that individuals and groups can take to influence a change in the law. Individuals or groups can make direct approaches to members of parliament to express their views on an issue. Alternatively, they can prepare submissions to parliamentary inquiries or law reform bodies. In some instances, individuals or groups may express their disapproval for a law by not obeying the law (civil disobedience). Individuals can also take political actions such as voting, joining a political party or standing for parliament.

Direct approaches

An individual or group may approach a member of parliament to express their concerns about the need for action.

Direct approaches include personal contact, letters, emails and phone calls.

This direct approach method is also known as lobbying. Sometimes organisations and pressure groups employ professional lobbyists to make direct approaches and present arguments for change.

Preparing submissions

Any individual or group trying to influence change can write submissions to various organisations. Formal bodies are set up by governments and parliaments to review the need for changes in the law. These include law reform commissions, royal commissions, boards of inquiry and parliamentary committees. Before a new inquiry begins, an announcement will often be made in newspapers. It will explain the purpose of the inquiry and invite any interested people to make submissions.

Individuals and groups can write submissions to formal law reform bodies.

Although these bodies cannot directly change the law, they can and do make recommendations based on the submissions they receive.

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Civil disobedience

In demonstrating their view on an issue, some groups may deliberately break the law. This is sometimes done in order to bring attention to their cause. When there is a large group of people dissatisfied with an issue, civil disobedience can become so disruptive that the government is forced to respond. However, groups pursuing such action take a risk. If the community perceives their actions as violent, threatening or unacceptable, they may lose support for their cause. Furthermore, if their actions are unlawful they may end up in court facing criminal charges.

NEWSREPORT 10.16

Garden goes to pot

FOR AT LEAST 6 YEARS HUNDREDS OF PEOPLE WOULD GATHER IN MELBOURNE'S Flagstaff Gardens to take part in pot-smoking picnics, run by pro-legislation campaigners Free Cannabis Community.

Although it is illegal to smoke cannabis, police liaised with the organisers and used their discretion to let the picnics run until … calls from the community, the opposition and the media pressured Victoria Police to act and stop the event.

Participating in the political process

An individual can try to influence a change in the law by directly participating in the political process. This can include voting, joining a political party and standing for election.

Individuals can use political processes – such as voting, joining or forming a political party, and standing for election – to influence the law.

Voting

An individual can demonstrate support for a change in the law at an election. When we vote for a candidate we demonstrate support for the policies they have presented to the electorate. When they are elected to parliament we expect that they will implement those policies, which sometimes means changing the law.

Standing for election

An individual who wants to influence change in the law may stand for election to State or Federal parliament. They can be either an independent candidate or a representative of a political party.

Joining or forming a political party

An individual does not have to stand for election to influence the decisions made by political parties; they can join a political party. Joining a political party gives the individual two ways of influencing change:

- by influencing the types of policies that are developed by the political party, and
- by becoming involved in the process used to select candidates to represent the party at the next election.

Alternatively, an individual can form a political party with the express purpose of influencing a change in the law. For instance, the Shooters Party promotes the right to own and use a firearm for legitimate purposes, including self-defence.

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Table 10.2 Taking action to influence change – an overview

Action taken	Explanation	Likely effectiveness
Petition	A written statement calling on parliament to change a law and listing the signatures of those in support of the change. The petition is presented to parliament by a member of parliament. The petition and the number of signatures are recorded in *Hansard*.	Petitions are easy to organise and provide for a peaceful means to influence change. A petition can draw parliament's attention to an issue. However, once a petition has been presented there is no guarantee that parliament will take any further action. The number of signatures indicating support for the petition may influence members of parliament.
Demonstrations	Taking action to publicly display support for a particular issue. This may take the form of a march or rally. A boycott – a refusal to buy an item or participate in a particular activity – is another way to demonstrate dissatisfaction and press for a change to the law.	Demonstrations draw attention to an issue, demonstrate the extent of public support and attract media attention. However, if the demonstration involves acts of violence or unlawful acts it may result in adverse media attention and reduce community support. Boycotts are only effective if a large number of people agree to take the action.
Use of the courts	An individual could: • challenge the validity of legislation • challenge the interpretation of the law • take a case to court that sets a new precedent. A judge hearing a case may identify a problem and call for a reform in the law.	Effectiveness is likely to be limited by costs, time and opportunity to take a court action. Usually only wealthy or large bodies have the resources to challenge the law. Alternatively, an individual may be a member of a class action. Court decisions may highlight the need for a reform in the law but it is parliament that has to respond. The conservative nature of some judges may limit the capacity of the courts to reform the law.
Role of the media, including social media: • letter to the editor • article • participating in radio or television interviews and debates • taking out advertisements • creating a webpage, blog, YouTube video etc	Creating public awareness of a point of view to inform a broader audience of your views and to raise awareness of an issue.	The use of the media can create public awareness of an issue and increase support. By using the media, individuals and groups can demonstrate public support for their view. The effectiveness of this method may be limited because: • there are some controls on traditional media and they do not always publish or broadcast the views of all groups or consider particular issues. However, online media provide opportunities for individuals to self-publish their views • views expressed in the media may reflect the views of vocal minorities • the argument may not be expressed well or persuasively.
Direct approach	Making direct contact with a member of parliament and expressing your concern. This may include: • speaking with a member of parliament • writing to or emailing a member of parliament • professional lobbyists directly approaching members of parliament to represent the interests of groups or organisations.	This method is effective if the member of parliament takes the issue to parliament. It is likely to be more effective if the member of parliament believes that there is great support for the issue in the community. Professional lobbyists have experience in presenting a point of view and know the most appropriate ways to influence the law-making process. However, professional lobbyists are expensive.
Civil disobedience	Demonstrating dissatisfaction with the law by breaking the law.	This draws attention to the issue, demonstrates a strong commitment and may gain media attention. However, an individual who breaks the law may face prosecution.
Submissions	Presenting a written statement on an issue to a formal law reform body.	A submission makes your view known to a formal body involved in the law reform process. A formal law reform body is more likely to be influenced by submissions that represent authoritative groups or have broad public support.
Taking political action: • voting • joining a political party/ pressure group • standing for election	Voting demonstrates support for a particular view. The aim is for those elected to bring about a change in the law once they are in parliament. Joining a party/pressure group that shares the same views and supporting the actions taken to bring about a change.	Voting does not necessarily result in a change in the law, but if you are elected you can demonstrate that there is support for your issue. In order to change the law you will also require the support of the majority of members in both houses. By joining a pressure group or political party you can get involved in action to demonstrate widespread support for an issue. Political parties/pressure groups generally have greater resources for this than individuals.

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NewsReport 10.17

Pressure for change

MEMBERS OF PARLIAMENT ARE USED TO BEING pressured. Being a decision-maker in a governing body means being exposed to pressure from a broad range of pressure groups. These groups are a way for ordinary citizens to influence the decision-making process. Similarly, parliament can be better informed of the electorate's sensitivities to issues because of the arguments put by these groups.

How pressure groups work

Pressure groups use a variety of methods to pursue their goals:

- lobbying politicians and parliament using petitions, letters and deputations (usually politicians gauge community interest through emails and letters – each letter/email received represents the concerns of approximately 100 constituents)
- consulting with ministers or senior public servants
- hiring professional lobbyists
- taking legal action through injunctions or appeals to higher courts
- campaigning for or opposing certain candidates at elections
- demonstrating outside parliament and government offices or marching in the streets.

Governments respond to pressure

The fingerprints of some pressure groups can be seen on particular pieces of legislation. For instance, our shop trading laws have been influenced by various groups. Under these laws, Good Friday is a public holiday and shops are not permitted to open. Easter Saturday is also a public holiday, but all shops may trade. Easter Sunday is not a public holiday but is a non-trading day, with special exceptions applying. On Easter Sunday, cafes, takeaway food outlets, video shops, hardware stores, chemists, nurseries and service stations may open. Major retailers, such as supermarkets and department stores, may not. These restrictions reflect the views of trade unions and church groups regarding a 'balance between work and family life'.

Lobbying for influence

Lobbying also works internationally. London-based Amnesty International seeks to bring about change over time to governments that infringe human rights. This non-political body also tries to stop the abuse of prisoners.

Animal advocates from Australia to the United States called for a boycott of the South Korean products and of the PyeongChang 2018 Winter Olympic Games in South Korea because of the country's trade in cat and dog meat.

Animal welfare advocates continue a campaign against Canada's commercial baby seal hunt. The United States, 28 countries in the European Union, Mexico, Russia and Taiwan have all prohibited trade in products that come from commercial seal hunts. In the 1970s and 1980s animal welfare advocates roused the world by distributing grim films of Canadian seal hunters clubbing white-coated seal pups not yet weaned and then skinning some alive. The United States

Activity 10.2 Folio exercise

Influencing change

Read 'Pressure for change' and complete the following tasks:

1 The article states that pressure groups provide 'a way for ordinary citizens to influence the decision-making process'. Explain.

2 There are a number of ways in which individuals and groups can act to influence a change in the law or government policy.

a Create a table like the one below. In the first column list the types of actions that may be taken by individuals and groups to influence a change in the law. In the second column provide a recent example.

Action for change	Recent example

b Identify the most effective way in which an individual or group could influence change. Justify your answer.

3 The article presents a number of criticisms of the influence of pressure groups. Explain two of these.

4 The article says that 'freedom to organise and engage in peaceful political activity is an essential part of democracy'. Do you agree with this statement? Discuss with reference to the principles of the Australian parliamentary system.

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banned the importation of all seal products in 1972 and the European Union banned the importation of white pelts of the youngest pups in 1983. An embarrassed Canadian government banned the killing of 'whitecoats' – pups up to 12 days old. Now only seals that have shed their white coats, which they do at about 3 weeks old, are killed.

Canada spends around $2.5 million a year to monitor seal hunts. By comparison, the 2014 export figure for seal products was just $500,000. Canada claimed that seal hunting is still worth about US$35 million in knock-on benefits to the country's economy.

Public or self-interest?

The impact of pressure groups on major changes in our laws should not be underestimated. Some of the achievements that have been made possible with the aid of pressure groups include:

- the right of women to vote
- the recognition of Indigenous land rights
- the protection of Tasmania's rainforest and Franklin River.

However, pressure groups can be criticised on the grounds that they:

- may be selfish and self-interested
- may be too powerful and not acting in the public interest
- sometimes adopt undesirable tactics
- represent wealthy sections of society who have a distinct advantage, as they have access to greater funds and are thus able to be better organised.

On the other hand, a study for MPs on relationships between nationally organised pressure groups and the Commonwealth parliament had some positive findings. It found:

- pressure groups are not all-powerful
- governments and public departments are sufficiently powerful to counter the influence of pressure groups and can scrutinise their demands in accordance with public interest
- pressure groups do not bypass parliament to influence policy outcomes
- self-interest claims are 'vacuous'.

The study recognised that freedom to organise and engage in peaceful political activity is an essential part of democracy. The report concluded that pressure groups provide for peaceful political discussion and promote social cohesion. Consultation with pressure groups leads to popular acceptance of the political decisions made by governments and the laws made by parliament.

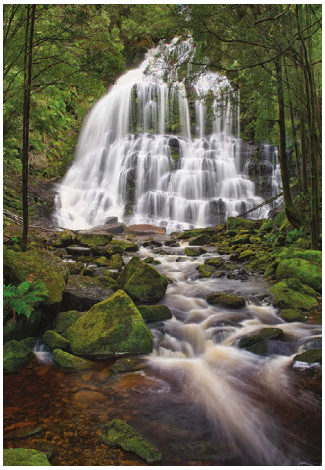

Figure 10.4: Franklin-Gordon Wild Rivers National Park, Tasmania

Activity 10.3 Folio exercise

Legislative change

Choose an area of law that has been changed by parliament or is currently under consideration for change.

Use the internet to find out more about the change or proposed change. Use parliament homepages to access *Hansard* and committee reports as part of your research. During your research you should note:

- why the law needed (or needs) to be changed
- the action taken by individuals or groups to bring about the change
- the response of parliament to the demands for change.

Prepare a written response to each of the following points. (Your research report can be completed in a written format or as a multimedia report.)

1 Identify the parliament that considered or is considering the reform in the law that you have investigated. Describe the structure of that parliament.

2 Using an example, analyse why changes in this law were or may be needed.

3 Critically evaluate the ability and the means by which individuals can influence law reform. In your response you should refer to the actions of groups or individuals in the example you have selected.

4 Evaluate the factors affecting the likelihood that the actions of individuals and groups will succeed in bringing about change, or have been successful in bringing about change, in the example that you have studied.

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10.7 Law reform bodies

One way in which parliament can respond to pressures for change is to refer the matter to a law reform body. This body can undertake a detailed investigation into the need for a change in the law. A law reform body can assess community attitudes and opinions, and report on the need for change. However, this body only makes recommendations for action. If the recommendations are accepted, parliament may change the law. Law reform bodies include the Victorian Law Reform Commission, royal commissions and parliamentary committees.

10.8 Victorian Law Reform Commission (VLRC)

The VLRC will investigate issues referred to it by the Victorian Attorney-General or community law reform projects.

The Victorian Law Reform Commission (VLRC) was established in 2001 by the *Victorian Law Reform Commission Act 2000* (Vic). The VLRC is an independent, government-funded body responsible for developing, monitoring and coordinating law reform activity in Victoria.

The VLRC was established by the Victorian parliament to investigate issues and recommend possible changes in the law. It consists of a full-time chairperson, full-time and part-time members, and support staff. The commission may also employ consultants to assist in the preparation of inquiries.

Role

Generally, the role of the VLRC is to:

- examine, report and make recommendations to the Attorney-General on any proposal or matter relating to law reform in Victoria that is referred to the commission by the Attorney-General
- examine, report and make recommendations to the Attorney-General on any matter that the commission believes raises relatively minor legal issues that are of general community concern
- present to the Attorney-General a proposal or matter relating to law reform in Victoria.

The VLRC also has a role in providing educational programs in relation to law reform and possible changes in the law. The commission may also supply information to parliament and parliamentary committees.

Table 10.3 VLRC inquiries

Current projects	Examples of completed projects
• Adoption Act • Victims of Crime Assistance Act and Victims of Family Violence • Access to Justice: Litigation Funding and Group Proceedings	• Abortion • Assistance Animals • Assisted Reproductive Technology & Adoption • Bail • Child Protection • Civil Justice • Crimes (Mental Impairment) • Defences to Homicide • Evidence • Failure to Appear in Court in Response to Bail • Family Violence • Funeral and Burial Instructions • Intellectual Disabilities • Jury Directions • Jury Empanelment • Medicinal Cannabis • Regulatory Regimes Preventing Sexual Offences • Victims of Crime in the Criminal Trial Process

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Process

The VLRC uses extensive consultation processes to assess the need for change. An investigation may be initiated in several ways.

The VLRC process allows for extensive consultation.

In most instances, the Victorian Attorney-General will refer an issue to the VLRC for investigation. The Attorney-General will set out the issues to be investigated in a statement known as a reference.

Members of the community can initiate community law reform projects. Individuals or groups may identify minor problems in the law. The commission will consider whether the matter is in the public interest and whether it can be undertaken as a community law reform project. Alternatively, the commission may refer the matter to the Attorney-General as a possible reference.

The commission consults widely with people who may be affected by proposed reforms, and with individuals and groups who have expertise in the area. The commission uses a variety of approaches to assess community views, including:

For more information on the VLRC, go to www.lawreform.vic.gov.au.

- preparing discussion papers
- publishing issues papers
- preparing research papers
- conducting surveys
- engaging specialist consultants
- inviting public submissions
- conducting private and public meetings
- conducting personal interviews.

The commission reports to the Attorney-General on law reform proposals. The Attorney-General tables the commission's reports in parliament.

Reports from the VLRC are submitted to the Attorney-General, who must table the report in parliament.

Information about consultation strategies, timelines and progress reports is publicised on the VLRC's homepage. Individuals can lodge submissions electronically via the website.

Figure 10.5 VLRC law reform poster (to view in full please go to www.lawreform.vic.gov.au).

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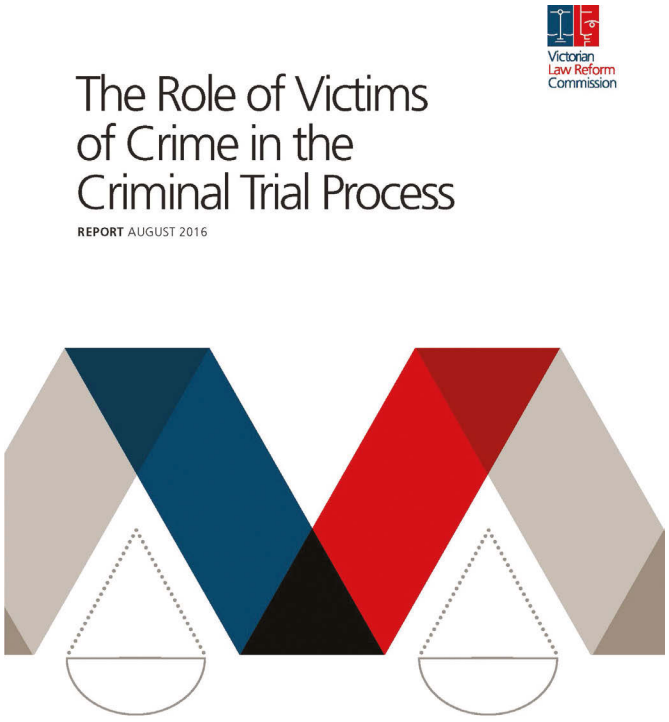
Legal brief 10.1

Victims of crime in the criminal trial process, a VLRC inquiry



The issue

The experience of victims of crime in the criminal justice system, and their confidence in it, appear to have improved over the past 30 years. However, there is a significant disparity between the victim's role as conveyed in legislation and the victim's experience in practice. Victims may feel that they are not respected in court, and they often feel traumatised all over again as a result of the trial process.

Inquiry's Terms of Reference

The VLRC was asked by the government to review and report on the role of victims of crime in the criminal process.

In conducting the review, the Terms of Reference were:

- the historical development of the criminal trial process in England and other common law jurisdictions
- a comparative analysis of the criminal trial process, particularly in civil law jurisdictions
- recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions
- the role of victims in the criminal trial itself
- the role of victims in the sentencing process and other trial outcomes
- the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- support for victims in relation to the criminal trial process.

Definitions

Victim – A person who has directly suffered harm through the action of the offender; includes a parent of a child victim or a family member of a homicide victim.

Criminal trial – Proceedings involving the prosecution of indictable offences from the point when the Director of Public Prosecutions commences or takes over a prosecution. It includes committal proceedings in the Magistrates' Court, trials and sentencing proceedings in the Supreme or County Courts, related applications for compensation and restitution orders, and appeals to the Court of Appeal. It does not include criminal offences that are prosecuted summarily within the jurisdiction of the Magistrates' Court or the Children's Court.

Timeline

The Commission was asked to conduct the inquiry on 27 October 2014. The final report was handed to the Attorney-General, Martin Pakula, on time, on 1 September 2016, and was tabled in Parliament on 22 November 2016.

The spark for the review started in February 2013, when the then Attorney-General, Robert Clark, established the Victims of Crime Consultative Committee, an independent entity consisting of victim representatives, Victoria Police, the Office of Public Prosecutions, the judiciary, the Adult Parole Board, the Victims of Crime Assistance Tribunal and victim service agencies. The committee continues to operate.

Hearings and submissions

Across the State, the commission met 57 times and conducted 18 roundtable discussions. During the inquiry, the VLRC spoke to many victims and their families, the police, lawyers, judges, victim support agencies, and experts in the field of victims' rights.

Some 43 written submissions were received. They included submissions from individuals, from various organisations and entities, including the Director of

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Public Prosecutions, the Law Institute of Victoria, RMIT's Centre for Innovative Justice, the Office of the Public Advocate, Victorian Legal Aid, the Victorian Bar and Criminal Bar Association, Liberty Victoria, the Loddon Campaspe Centre Against Sexual Assault, the Victims of Crime Commissioner, Youthlaw and academics from the UK's Nottingham Trent University and the University of Illinois at Chicago.

Papers

The VLRC published four information papers that discussed victims' needs, victims' rights, the development and fundamental principles of Victoria's adversarial criminal trial process, and considered, as a case study, the role of victims in the International Criminal Court. They were produced to reinforce an approach informed by theory and practice and an awareness of how they are interrelated. They do not contain any reform proposals.

The consultation paper set out each step of the criminal trial process and compared current law and practice in Victoria with other common law jurisdictions, civil law jurisdictions in Europe and the International Criminal Court. It posed an extensive range of questions that guided the consultation process and aided submission writers.

Recommendations

The Commission's 296-page final report contained 51 recommendations, aimed to give victims information and support, more opportunities to participate, and protection from trauma and intimidation during a trial.

The VLRC recommended amending Victoria's Human Rights Charter (*Charter of Human Rights and Responsibilities Act 2006*) to give victims the right to be acknowledged, treated with respect, and protected from unnecessary trauma during the criminal trial process. (If enacted, Victoria would be the first State to do this.) The Victims Charter would also be amended to recognise that victims have an inherent interest in the criminal trial process.

The report states that victims of crime should be defined as participants in the trial process, though they should not be able to call witnesses or cross-examine the defendant. This would involve amending the *Victims' Charter Act 2006*.

It called for cultural change within the criminal justice system to ensure that victims are properly acknowledged and respected.

Acknowledging that the defence has the right to ask questions of the victim to test their evidence, it was felt that there must be respect in the courtroom. The counsel must not humiliate, bully or demean the witness, and if they do, the judge or magistrate must step in. The report recommended that the *Evidence Act 2008* be amended to require a judicial officer to disallow improper questioning in relation to all victims. This would match Uniform Evidence Act provisions adopted by NSW, Tasmania and the ACT.

The inquiry found that victims should be told what is happening at all stages – what the changes are, the time and place of the trial, what the victim is expected to do and what their rights are.

The report recommended that there should be a process to make it easier for victims to receive adequate, realistic compensation, and that offenders should take some responsibility for this, rather than leaving it to the State.

Regarding legal advice and assistance for victims, it was recommended that Victoria Legal Aid be funded to establish a service for victims of violent indictable crimes. This service should be modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW.

The VLRC recommended a phased introduction of restorative justice conferencing for indictable offences. The process should include:

- voluntary and informed consent from victims and offenders
- full acceptance by offenders of responsibility for the crimes charged
- rigorous processes to assess the suitability of restorative justice based on the individuals involved and the circumstances of each case
- skilled and impartial facilitators
- safeguards to protect the interests and integrity of victims and offenders.

Sentence levels and outcomes were not referred to the VLRC for review.

Summary

The report states that the time has come for the proper interests of the victim as a participant – whether a witness or not – in the criminal trial process to be recognised. The VLRC believes that this report shows how the rights of victims as participants in the modern criminal trial can be secured.

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Activity 10.4 Folio exercise

VLRC – assessing the need for change

1 Outline the role and structure of the VLRC.
2 Describe the processes used by the VLRC to assess the need for change in the law.
3 Explain how these processes provide an effective means of reviewing the need for change.
4 Outline the relationship between the Victorian parliament and the VLRC.
5 Carefully read 'VLRC – effective law reform?' (below). Evaluate the extent to which you think that the VLRC is effective in influencing reform in the law.
6 Could the Victorian parliament make effective laws without the VLRC?

NewsReport 10.18

The VLRC – effective law reform?

THE VLRC HAS A LEADING ROLE IN THE REFORM OF LAW IN VICTORIA. ITS MAIN aims are to review the law and to suggest possible reforms to the law. The VLRC is committed to providing inclusive law reform, independent of the political process. To achieve this aim, the VLRC publishes reports and discussion papers on matters referred to it for consideration. The VLRC can also consider community law reform projects.

Why do we need a law reform commission?

First, we need a law reform commission to provide for a full investigation of the law. We need to understand the content of the law and the fundamental legal principles. The VLRC can provide a comprehensive investigation of an entire area of law.

Also, a law reform commission allows for a broadly based public consultation process. The process aims to enhance the cohesiveness of the law. It strengthens legal principles and improves people's understanding of the law. People can then feel confident that parliament is making laws that represent the will of the people.

The VLRC uses a community consultation approach to assessing the need for change in the law. Community consultation includes submissions, public hearings and community education. At the same time, it draws upon the work of specialists, academic lawyers and legal practitioners.

Has it been successful?

How successful has the VLRC been? It is difficult to measure. It is important to remember that the VLRC is a law reform body, but it cannot change the law. The Attorney-General refers matters to the VLRC and therefore the investigations of the VLRC are likely to have government support. The VLRC makes recommendations for actions in its reports. However, investigations can take time and a change in the law only occurs if parliament passes legislation to implement the recommendations.

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10.9 Royal commissions

Royal Commissions of Inquiry, commonly referred to as royal commissions, are inquiries appointed by the Crown on the recommendation of the government. Traditionally, the term 'royal' is used when the body has been established under the authority of a Governor or Governor-General. These inquiries are temporary, and are made by a body appointed by the government to provide advice on, or to investigate, a particular issue. These inquiries are usually open to the public and seek input from the community. The reports of royal commissions are tabled in parliament.

A royal commission is an inquiry appointed by the Crown on the recommendation of the government.

Royal commissions may be called by:

- the Commonwealth government;
- the State government; or
- the Commonwealth government and State government.

The Commonwealth government has the power to establish a royal commission under the *Royal Commissions Act 1902* (Cth). The Victorian government can establish a royal commission under the *Inquiries Act 2014* (Vic).

Role

A royal commission can be established for a number of reasons. It may be established to draw upon expert opinion about the approach that should be adopted by the government on an issue. In many instances, the issues considered may relate to a controversial issue that the government has been unable, or unwilling, to resolve.

In political terms, a royal commission may be used by a government to shift the decision-making responsibility in controversial areas from the government to another body, to avoid public criticism. At times, this creates a significant delay in the decision-making process. Royal commissions can also perform an educative function: they allow various views to be published and the reasons for government action to be known to the community.

Process

A royal commission is established when the Governor-General or Governor issues 'Letters Patent'. Letters Patent are issued under the Public Seal of State. The Letters Patent will state who will form part of the royal commission, who will chair the royal commission and the terms of reference. The terms of reference may also set the time by which the royal commission is to report.

The scope of a royal commission is set out in the Letters Patent.

Royal commissions have specific powers of investigation. They include wide-ranging coercive powers of investigation, such as the ability to summons and cross-examine witnesses, and to obtain evidence. Royal commissions can also apply for warrants to search and to seize evidence.

A royal commission has extensive powers, including coercive powers, and can apply for warrants to search and seize.

A royal commission has extensive powers to conduct hearings. These hearings are usually formal in nature and involve interviewing witnesses and taking evidence. A royal commission is not bound by the same rules of procedure and evidence as a courtroom. However, it has the power to compel people to appear before the hearings and to give evidence (usually under oath). It can also compel a witness to produce documents.

A royal commission is not bound by the same rules of evidence as a court.

A royal commission can also provide protection to witnesses. Penalties can be imposed for non-compliance with a summons from a royal commission.

Often a royal commission is chaired by a retired or serving judge or a Senior Counsel. The chair of the commission will be assisted by legal counsel and staff. The processes used by royal commissions to investigate an issue may vary. However, the process will usually involve:

Royal commissions can prepare and release issues papers, conduct consultations, call for written submissions and hold public hearings.

- research, and the release of an issues paper
- consultations with experts and stakeholder groups
- calls for written submissions
- community consultations and public hearings.

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The findings of royal commissions are published in reports. The reports are formally submitted to the Governor-General or the Governor.

The findings of Royal Commissions are published in reports that are formally submitted to the Governor-General or the Governor. The report is tabled in parliament, but there is no requirement for parliament to adopt any of the recommendations made.

However, these reports are often quite influential, with the government enacting some or all recommendations into law. On the other hand, it should be noted that the work of some royal commissions has had limited impact.

These letters patent are issued under the Public Seal of the State.

WITNESS His Excellency the Honourable Alex Chernov, Companion of the Order of Australia, one of Her Majesty's Counsel, Governor of the State of Victoria in the Commonwealth of Australia at Melbourne this 22nd day of February two thousand and fifteen.

Alex Chernov

By His Excellency's Command

The Honourable Daniel Andrews MP
Premier of Victoria

Entered on the record by me in the Register of Patents Book No 46 Page No 33 on the 22nd day of February 2015.

Secretary, Department of Premier and Cabinet

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The pros and cons

Royal commissions are official inquiries into matters of public concern, and are typically called whenever there is a question of ongoing impropriety, illegal activity or gross administrative incompetence. A royal commission can inquire into any area of Australian life: for instance, the Inquiry into certain Australian companies in relation to the UN Oil-For-Food-Program 2005–06. They can also be called in the wake of natural disasters and accidents, such as after Victoria's 2009 'Black Saturday' bushfires.

Commonwealth royal commissions are conducted under the *Royal Commissions Act 1902* (Cth). This Act has been amended more than 20 times since its enactment. The last amendment was in 2013, and allowed for private sessions to be conducted by the Child Sexual Abuse Royal Commission.

Royal commissions do have a number of benefits and a number of disadvantages. Here are some:

Pros

- They are the highest form of inquiry on matters of public importance.
- They have unique and coercive powers of investigation, including the power to summon witnesses to give evidence under oath or to produce documents.
- They have many powers under the Act, extending beyond those available to ordinary courts.
- Royal commissions can be established at any time and have a single purpose.
- Royal commission reports are tabled in parliament and, generally, are made public. The 1916 Royal Commission into the administration of the Northern Territory was tabled in parliament. However, the parliament did not order that the report be printed.
- Royal commissions are not passive – they make recommendations of a non-binding nature relating to the issue under inquiry.
- Royal commissions can seek expert advice from a range of sources.
- Royal commissions serve an important democratic function. The participation of the public in royal commissions serves as a 'counterbalance' to the 'centralising trends' of government.
- Royal commissions are capable of managing competing interests and political turmoil.
- There is a degree of public acceptance of the work of royal commissions, the independence of the commissioners, and ultimately the independence of report findings.

Cons

- The *Royal Commission Act* has caused difficulties in some inquiries because of:
  - a lack of power to investigate breaches of the Act
  - the inadequacy of penalties for a failure to comply with the Act
  - the inability of royal commissions to communicate information about unlawful behaviour to law enforcement bodies
  - expense: more than $500 million has been spent on the Royal Commission into Institutional Responses to Child Sexual Abuse
  - the possibility that the legitimacy and authority of royal commissions may diminish if inquiries are established too quickly (the Royal Commission into Institutional Responses to Child Sexual Abuse is the 130th inquiry since 1902)
  - their inability to provide a means for compensation or prosecution.
- Royal commissions are sometimes criticised for taking too long (the Aboriginal Deaths in Custody hearings were in 1987–9; the report was not published until 1991). Part of the time is taken in creating a commission: engaging personnel, finding premises, purchasing or renting office furniture and equipment, seeing

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to the formation of an administrative structure, and recruiting a team of lawyers to handle the evidence and to present witnesses at public hearings.

- There may be difficulty in finding lawyers who are prepared to leave or disrupt their practices for a prolonged period of time.
- The appointment of commissioners may create problems, particularly where the issues to be investigated involve a mixture of law and policy or policy alone (as distinct from investigation of facts or an inquiry into the existing state of the law).
- The appointment of judges to royal commissions may have implications for judicial independence.
- Investigatory functions can resemble adversarial contests, like courts, which sometimes leads to allegations being unresolved.
- Media reporting may result in serious damage to the reputations and interests of individuals, particularly at the investigation stage, where individuals have limited or no opportunity to participate.
- The government doesn't have to follow royal commission recommendations.
- If at the next election a different political party wins government, they can get rid of (by repealing them) all the laws previously made based on the commission's recommendations.

TWO TIERS OF INQUIRIES?

The Australian Law Reform Commission looked into whether there was any need to develop an alternative form or forms of Commonwealth executive inquiry. These alternatives would be established by statute to provide more flexibility, less formality and greater cost-effectiveness than a royal commission.

It made 111 recommendations, including:

- The *Royal Commission Act* should be amended and renamed the *Inquiries Act* to establish two tiers of public inquiry – royal commissions and official inquiries.
- Royal commissions should be the highest form of inquiry, established to look into matters of substantial public importance.
- Official inquiries should be established by a minister to look into matters of public importance.
- Both royal commissions and official inquiries should have the power to:
  - require the production of documents and other items;
  - require the attendance or appearance to answer questions (on oath or affirmation if so directed by the inquiry); and
  - inspect, retain and copy any documents or other item.
- Royal commission and official inquiry reports should be tabled promptly in parliament, within 15 sitting days of receipt of the inquiry's final report.
- A framework should be developed for the protection of national security information utilised in inquiries.
- Inquiries that may have a significant effect on Indigenous peoples should be required to consult with Indigenous groups, individuals and organisations to assist in the development of procedures for the inquiry.
- The Federal government should develop and publish and an inquiries handbook to ensure that the institutional knowledge of those who have established, conducted and administered inquiries can be passed on.
- The government should publish an update on implementation of all the recommendations of an inquiry that it accepts: one year after the tabling of the final report of a royal commission or official inquiry; and periodically thereafter to reflect any ongoing implementation activity.
- A summary of the cost of each royal commission and official inquiry should be published within a reasonable time of the inquiry being completed.

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Legal brief 10.2

Royal Commission into Family Violence

The issue

A number of high-profile family violence incidents, including the murder of schoolboy Luke Batty at the hands of his father, became the catalyst for a royal commission into domestic violence in Victoria.

Action

The State government established a royal commission, appointing Justice Marcia Neave AO as commissioner.

It investigated the entire family violence support system and justice system from the ground up. This included government and non-government organisations, courts, prosecutors, police, corrections and child protection. The focus was on preventing family violence, increasing early intervention, improving victim support, making perpetrators accountable and helping agencies coordinate their responses better. According to the terms of reference, family violence made up a third of all police work in the State and cost the economy more than $3 billion every year.

The Commission received over 1000 written submissions, and worked for 13 months, hearing evidence from more than 200 family violence stakeholders, experts and victims. Survivors told harrowing stories. A total of 44 group consultations were conducted. Approximately 850 people participated in those consultation sessions. The Commission received informal expert briefings and conducted site visits.

Outcome

The Commission's findings were tabled in parliament in March 2016. It made a total of 227 recommendations. The final report was published as seven volumes, a total of more than 1900 pages. Recommendations included:

- Emphasising breaking down a siloed system to increase transparency and cooperation between sectors. Numerous recommendations aimed at holding the performance of sectors working with family violence cases to account. Transparency and accountability of the system, including police responses, were highlighted.
- Removing the burden from victims in getting help and placing accountability on the shoulders of perpetrators was a strong focus of the report. There is also a role for the State government in lobbying the Federal government for change.
- The right of perpetrators to experience privacy through the court system should not override the right of victims to be safe.

The recommendations were broken down into sections: risk management and assessment, information sharing, specialist family violence services, children and young people, sexual assault, pathways to services, police, court-based responses, offences and sentencing, perpetrators, the role of the health system, family violence and diversity, Aboriginal and Torres Strait Islander people, older people, people from culturally diverse communities, lesbian, gay, bisexual, transgender and intersex communities, people with disabilities, male victims, women in prison, women working in the sex industry, prevention, the workplace, sustainable governance data, research and evaluation, investment, and industry planning.

Government action

The government accepted all the recommendations and pledged $572 million to combat domestic violence over 10 years, to ensure that successive governments would be forced to act and implement change. The government also created the portfolio of the Minister for the Prevention of Family Violence. The minister is responsible for implementing the recommendations.

Some reforms were immediately initiated after the report.

The government promised reforms would be introduced to parliament to strengthen intervention orders, tighten up the bail process and allow better information sharing between police and other agencies to ensure that perpetrators' privacy is not protected ahead of keeping women and children safe.

The *Family Violence Reform Implementation Monitor Act 2016* (Vic) was introduced. This Act establishes an independent monitoring authority to report on the implementation of the Commission's recommendations and the government's family violence action plan.

The recommendations affected the *National Domestic Violence Order Scheme Bill 2016* (Cth) (a national scheme for domestic violence orders) and the *Corrections Legislation Amendment Bill 2016* (Vic), which ensures that prisoners who are unlawfully released from prison can be returned to custody by police officers. They also broaden and clarify the grounds for information sharing about offenders – for the purposes of the working with children scheme – with corrections and parole authorities nationally and overseas.

One major recommendation was to establish a secure central information point. This would store information from the Department of Health and Human Services and the Department of Justice databases so that perpetrators can be tracked.

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Activity 10.5 Folio exercise

Royal commissions

1 Outline the role and structure of a royal commission.
2 Describe the processes used by royal commissions to assess the need to reform the law.
3 Assess the extent to which these processes provide an effective means of reviewing the need for change.
4 Describe the relationship between the Victorian parliament and a royal commission.
5 Evaluate the extent to which you think that a royal commission is effective in influencing a law reform.

10.10 Parliamentary committees

A parliamentary committee is a committee formed by members of parliament, appointed by one or both houses of parliament, to undertake specific tasks.

A parliamentary committee is formed by members of parliament appointed by one house (or both houses) of parliament to undertake a specified task. The committee will include government members of parliament and non-government members (opposition and cross-bencher members of parliament). Both the State and Commonwealth parliament have a committee system.

Table 10.4 Types of parliamentary committees

Standing committees	Committees appointed for the life of a parliament. These committees are usually re-established in some form after each election. These committees are established by the house at the commencement of each parliament to inquire into and report upon any matters referred to them. These committees specialise by subject area.
Select committees	Committees appointed as the need arises for a specific purpose; they have a limited life.
Joint committees	Committees made up of members from both houses of parliament. They report to both houses of parliament.
Statutory committees	Committees established by an Act of Parliament.
Domestic or internal committees	Committees concerned with the powers and procedures of the house or the administration of parliament.
Estimates committees	Committees that usually meet three times a year to scrutinise how the government has spent Budget funds.

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Role

Parliamentary committees can investigate:

- specific matters of policy
- government administration or performance.

Parliamentary committees can be asked to investigate particular issues.

Committees are designed to provide parliament with advice on issues. They can draw on expertise from outside parliament and assess community views. Committees are able to conduct inquiries to find out the facts of a case or issue, gathering evidence from expert groups or individuals. They make recommendations in a final report. The use of committees provides for a broad range of views to be represented.

Process

Committees have considerable powers. These powers may include the power to order people to attend by summons to give evidence and to produce documents. Committee proceedings are considered 'proceedings in parliament', which means they are 'privileged': members and witnesses cannot be sued or prosecuted for anything they say during a committee hearing. These powers ensure that committees are able to get a comprehensive view of an issue.

Terms of reference set out the purpose of each committee inquiry. Depending on the type of committee, the terms of reference may be set by the house, by a minister, by statute, or by the committee itself.

The scope of a parliamentary committee inquiry is set out in its terms of reference.

The committee will advertise its terms of reference in the media and on the internet so that it can receive evidence and submissions from interested parties. Stakeholders or people with particular expertise or interest may be directly approached to make a submission.

Legal advisers and research officers are employed by parliament to work with committees. They often produce a discussion paper. The research officers will also analyse evidence in submissions and evidence presented at public hearings.

As well as running public hearings, seminars, public meetings, focus groups and roundtable discussions, committees may also inspect facilities or visit places relevant to the inquiry. Hearings are generally open to the public, but in special circumstances evidence may be heard in private. *Hansard* provides a transcript of evidence taken at public hearings. Evidence taken in private is not disclosed or published.

Parliamentary committees can have public hearings, seminars, public meetings, focus groups, roundtable discussions, publish interim reports and conduct site visits.

After examining all the evidence, the committee will prepare a report setting out its conclusions and making recommendations. This report is presented to the house that initiated the inquiry, or to both houses in the case of a joint committee. Sometimes some members of a committee do not agree with all recommendations in the report. If a member of the committee does not agree with the majority of the committee, they may publish a minority or dissenting report.

The committee will prepare a report which is presented to parliament; the government generally has 6 months to respond to the report.

The government will respond to the committee report by presenting a statement in parliament. In this statement the government may accept all (or some) of the committee's recommendations, and announce its intention to take certain actions. Generally, the government is required to respond within 6 months. Often the recommendations lead to changes in the law.

In recent times, committees have increasingly used social media to seek community participation in the inquiry process. The Commonwealth parliament publicises inquiries and committee activities through the 'About the House' Twitter and Facebook accounts.

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Legal brief 10.3

End of life choices – A parliamentary committee inquiry

The issue

The need for laws to allow citizens to make informed decisions regarding the end of their life. Victoria's laws regarding providing assistance to die are inconsistent, and there is no legal framework surrounding how decisions are made. Despite significant examples of death taking place in the shadows of the law, prosecutions are rare and the penalties applied are generally so light as to risk undermining the law. Between 2009 and 2013, 240 people experiencing debilitating physical decline took their own lives. Most were over the age of 65.

Shortcomings of the law

The committee considered the shortcomings of the State's laws. In the case of *DPP v Rolfe* [2008] VSC 528, Justice Cummins said to Bernard Rolfe, after Rolfe pleaded guilty to manslaughter and received a 2-year suspended sentence, 'your actions do not warrant denunciation; you should not be punished; there is no need to deter you from future offences'. Mr Rolfe was 81 years old, and he and his wife had made a suicide pact, because she was going to be placed in an aged care facility and they did not want to be separated. They attempted joint suicide by gassing themselves, but only she died. Mr Rolfe was found to have been suffering severe psychiatric stress and depression at the time.

While some argue that people's needs can be addressed with appropriate palliative care and mental health services, the Coroner said that even so, 'people who have invariably lived a long, loving life surrounded by family die in circumstances of fear and isolation' and that 'The only assistance that could be offered is to meet their wishes, not to prolong their life.' As former Supreme Court Judge John Coldrey said:

> these cases don't sit comfortably in a court setting. The person goes out into society labelled a murderer when their motive has been compassion and love … I'd like to see a regime where people who act in this way are not put at risk of criminal charges.

Timeline

On 7 May 2015 Victoria's Legislative Council agreed that the Legal and Social Issues Committee inquire into, consider and report on the need for laws to allow citizens to make informed decisions regarding their own end of life choices, no later than 31 May 2016. The final report was tabled on 9 June 2016.

Terms of reference

The terms of reference were:

- assess the practices currently being utilised within the medical community to assist a person to exercise their preferences for the way they want to manage their end of life, including the role of palliative care;
- review the current framework of legislation, proposed legislation and other relevant reports and materials in other Australian States and Territories and overseas jurisdictions; and
- consider what type of legislative change may be required, including an examination of any Federal laws that may impact on such legislation.

Despite the terms of reference not mentioning the words 'assisted dying', almost all submissions either supported or opposed the legalisation of voluntary euthanasia or physician-assisted dying.

Submissions and hearings

The committee received 1037 submissions, 925 from individuals in a private capacity, and 112 from organisations. The organisations included the Anglican Diocese of Melbourne, the Australian Catholic Bishops Conference, the Australian College of Nursing, the Australian Medical Association (Victoria), various Dying with Dignity groups, the Eastern Palliative Care Association, the Ethics Committee of the Christian Medical and Dental Fellowship of Australia, the Law Institute of Victoria, the Commissioner for Senior Victorians, Palliative Care Australia, the Royal Australasian College of Physicians, the Presbyterian Church of Victoria, and the Rationalist Society of Australia.

The overwhelming majority of individual submissions discussed assisted dying. Only a small number focused solely on palliative care.

The committee conducted an extensive program of site visits and public hearings around Victoria between July 2015 and February 2016. The committee held 17 days of public hearings and heard from 154 witnesses.

The committee also travelled to the Netherlands, Switzerland, the Canadian province of Québec, Canada and Oregon, US to speak to stakeholders about their jurisdiction's assisted dying framework. Each of these jurisdictions has a legal framework permitting assisted dying.

Key findings

The committee found that death is considered a taboo subject, and so is not talked about, which inhibits planning for end of life care, and may result in a person's end of life wishes not being followed. Other findings were:

- Although most people in Victoria wish to die at home, in reality most of them will die in hospital.
- Demand for palliative care is steadily increasing, and is expected to continue to do so. At the same time, palliative care patients' diseases and needs have increased in complexity. Victoria's palliative care sector is overburdened and needs better support from government.
- Despite Victoria having good palliative care services available, those who could benefit the most often receive care too late.
- Carers and the volunteer workforce are integral to Victoria's palliative care system.
- Although the advance care planning process has proven benefits, there are low awareness and implementation rates for advance care plans in Victoria and Australia.
- Existing end of life care legislation is confusing in many ways, and causes uncertainty, particularly for health practitioners.

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- The legal framework for advance care planning spans several Acts and some legal issues may rely on common law rulings. Substitute decision-making provisions are confusing and poorly understood by doctors. In addition, the law does not provide certainty that a person's wishes, even when they are detailed in an advance care plan, will be carried out when they lose capacity.
- Prohibition of assisted dying is causing some people great pain and suffering. It is also leading some to end their lives prematurely and in distressing ways.
- Instances of assisted dying are rare, even in jurisdictions where it is legal. Assistance in dying is, in the vast majority of cases, provided to people in what would otherwise be the final weeks of their lives.
- Government support and funding of palliative care has not declined when assisted dying frameworks have been introduced.
- Courts invariably impose lenient penalties without jail time on people who assist a loved one to end their life. This is true in Australia and in similar overseas jurisdictions.
- Everyone's end of life care needs differ. It is important that Victoria has a system in place to cater for the needs of individuals, whilst ensuring that there are safeguards in place to protect vulnerable people.

Recommendations

There were 49 recommendations. Twenty-nine recommendations related to palliative care and 18 recommendations related to advance care planning and the need for statutory recognition of advance care directives.

The major recommendation was to legislate to allow assisted dying in certain circumstances:

> Recommendation 49: The Government should introduce legislation to allow adults with decision making capacity, suffering from a serious and incurable condition who are at the end of life to be provided assistance to die in certain circumstances.

This recommendation includes safeguards:

- Eligibility: A mentally competent adult experiencing intolerable and unrelievable suffering, with weeks or months to live. Must be ordinarily resident in Victoria and an Australian citizen or permanent resident.
- A process by which requests may be made (and rescinded).
- Checks and tests to ensure that relevant criteria have been met.
- Establishment of an authority to receive reports of assisted dying and present reports to parliament.
- Conscientious objection (to not participate) is protected.
- In cases where a patient cannot self-administer lethal medication, a doctor may do so at the patient's request.

Government response

The government said that the implementation of the Victorian End of Life and Palliative Care Framework, and the *Medical Treatment Planning and Decisions Act 2016* (Vic), address a significant number of the recommendations made by the committee.

The government supported 44 of the recommendations, identified three recommendations (numbers 28, 29 and 49) requiring further work, and did not support two (numbers 27 and 43).

Recommendations 28 and 29 concern legislative provisions for the doctrine of 'double effect' and the withholding and withdrawing of futile treatment. The legal doctrine of 'double effect' justifies giving pain relief treatment, provided it is given with the main intention to relieve pain – it excuses any unavoidable, but unwanted, life-shortening effect of giving that treatment.

The government agreed to prepare a Bill to legalise voluntary assisted dying, consistent with the committee's proposed assisted dying framework. Expert legal advice and a Ministerial Advisory Panel (MAP), providing advice on the practical and clinical implications of the Bill, will support the preparation of the Bill.

The MAP will work with key stakeholders on the development and implementation of an assisted dying framework, and to provide perspectives on the access, safeguards, and practical considerations that are needed.

Recommendation 27 requires that all cases of continuous palliative sedation are reported to, and published by, the Department of Health and Human Services. The government did not support this because testimony from clinicians quoted in the report did not reveal any concern about the use of sedation to manage symptoms. The term 'continuous palliative sedation' has various definitions, so it was also not clear how it would be reported.

One of the key findings of the committee was that Victoria's medical treatment laws were overly complex and needed to be simplified.

The committee also recommended the introduction of legislation to recognise advance care directives: the *Medical Treatment Planning and Decisions Act 2016* (Vic) was the government's response to this. This Act does not require registration of advance care directives or a central registry, but is designed to consolidate existing laws. It makes key changes around practices that allow people to make decisions about their medical treatment, as medical practice today already accommodates a range of decision-making processes. The Act also recognises the importance of supported decision-making to help a person make their own decisions for as long as they are able.

Voluntary assisted dying

The Bill to legalise voluntary assisted dying will be put to a conscience vote in the second half of 2017.

Sources: Inquiry Into End of Life Choices – Final Report, press reports and *Hansard* transcripts

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Activity 10.6 Folio exercise

End of life choices

1 Outline the role and structure of the parliamentary committee set up for the 'End of life choices' inquiry.
2 Describe the processes used by the parliamentary committee to assess the need for a reform in the law.
3 Evaluate whether these processes provide an effective means of reviewing the need for change.
4 Explain whether or not parliament has to respond to the report of the committee.
5 Evaluate the extent to which you think that a parliamentary committee is effective in influencing law reform.

NEWSREPORT 10.19

How do committees inform the legislative process?

The role of committees

Both the Commonwealth and the Victorian parliaments use committees to assess community opinions on proposed changes in the law. The committees promote public debate on the proposed changes, and allow community groups or individuals to have their say on issues being considered by parliament. This ensures that the laws made represent the views of the community.

A parliamentary committee is made up of both government and opposition members of parliament. Committees investigate and examine specific issues, gather evidence from experts, community groups or individuals, and then report to the parliament. With the support of parliamentary staff, each committee focuses on a defined area and builds up expertise and specialised knowledge.

Committees represent a significant strength of the parliamentary process for changing the law because they undertake extended investigations that cannot be performed in the parliament during the legislative process.

Committees contribute significantly to the functions of government. They allow for better policy-making. The work of committees enables members of parliament to be better informed on issues. This improves their contribution to policy and legislative review. Committees generate discussion of issues across party lines. Finally, inquiries can increase public awareness of the work of parliament.

The Senate as a 'house of review'

The importance of the role of committees in the review of legislation is well illustrated by the processes adopted in the Senate.

Senate committees

The Scrutiny of Bills Committee examines each Bill that comes before the Senate to ensure that legislation does not impinge unduly on the fundamental rights and liberties of citizens. When the committee identifies a potential problem with a Bill, it alerts the Senate and the responsible minister. After considering the minister's response, the committee reports back to the Senate. Based on the issues raised by the committee, individual senators may propose amendments to the Bill. These amendments may be dealt with in the Committee of the Whole stage.

The role of the Senate as a 'house of review' is also evident in the work of its legislative and general purpose standing committees. The Selection of Bills Committee considers all Bills (except appropriation Bills) before the Senate and decides which Bills should be referred to a Senate committee for further consideration and which Bills should be debated by the Senate in the usual way. If Bills are complex, controversial or contentious they are usually referred to Senate committees. This will often happen before the second reading.

If a Bill is referred to a Senate committee, that committee will examine the Bill in detail. The committee may call for submissions and witnesses from interested bodies or government departments to give evidence. Through this process, previously unforeseen problems may be identified or misunderstandings about the impact of the Bill resolved. After its investigations, the committee reports back to the Senate. The report may contain recommendations for amendments or changes to the Bill. Of course, other amendments may be put forward by the Senate during the Committee of the Whole stage.

Approximately 20% of Bills have been referred to standing committees using this process. This process prevents time being wasted on lengthy debate and ensures that all Bills are examined in detail. In theory, this process should result in better quality legislation.

This system gives senators the opportunity to have a thorough look at the legislation. Committees can hear submissions from groups and individuals interested in the legislation. The public has the opportunity to contribute to the legislative process.

It is important to note, however, that even after a Bill has been referred to a Senate committee and returned to the Senate for debate, it may still be considered by the Committee of the Whole.

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Activity 10.7 Folio exercise

The role of committees in the legislative process

Read 'How do committees inform the legislative process?' and complete the following tasks:

1 Define a parliamentary committee.
2 Describe the impact that the work of parliamentary committees have on the legislative process.
3 Explain the main advantages of the committee system used by parliament.
4 Explain the key advantages of the Bills going to committee processes used by the Senate.
5 One criticism of this process is that it can result in delays in the legislative process.
   a Account for any delays that might occur.
   b Assess what would be the impact of such delays on the effectiveness of parliament.

Activity 10.8 Structured questions

Committees in action

1 Define what is a parliamentary committee.
2 Describe the process used by either a Commonwealth or State parliamentary committee in assessing the need for a change in the law.
3 Undertake research into a parliamentary committee using the homepage of either the Commonwealth parliament (www.aph.gov.au) or the Victorian parliament (www.parliament.vic.gov.au).
   a Select a committee. Describe the role and function of that committee.
   b Select an inquiry concerned with the need to change the law.
      i Outline the area of law being discussed in the inquiry.
      ii Explain why the law needed to change.
      iii Describe the action taken by the committee to review the need for a change in the law.

   Prepare a 1–2 page summary of your findings.
4 Design a diagram to illustrate the process used by parliamentary committees for reviewing the need to reform the law.
5 Describe the contribution of parliamentary committees to parliament's effectiveness of a law-maker.

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Key point summary

Do your notes cover all the following points?

Need for change

- Factors that may result in a need for law reform:
  - community values
  - expectations of the legal system
  - the needs of government departments
  - the nature of business
  - technology
  - community awareness
  - international relationships.

Parliament and change

- Actions that may influence law reform:
  - Actions taken by individuals:
    - petitions
    - demonstrations
    - use of the courts.
    - You should be able to give examples of these actions.
  - See Figure 10.1 on p.346.
  - Use of the media, including social media – to report on the actions of others or act directly to influence public opinion on a selected issue. You should be able to give examples.
- The Victorian Law Reform Commission examines, reports and makes recommendations to the Attorney-General on areas referred to the Commission by the Attorney-General, and on minor legal issues of general community concern, suggests to the Attorney-General proposed law reform issues and educates the community on law reform issues. You should be able to give a recent example (within the last 4 years).
- Royal commissions examine, report and make recommendations to the Crown on areas referred to the commission by the Crown in the Letters Patent. They have special powers. Royal commissions can prepare and release issues papers, conduct consultations, call for written submissions and hold public hearings. You should be able to give a recent example (within the last four years).
- The role of a parliamentary committee is to examine, report and make recommendations to the parliament on areas referred to the committee in the terms of reference. Parliamentary committees can conduct public hearings, seminars, public meetings, focus groups, roundtable discussions, and site visits. They can also publish interim reports. Committee reports are presented to parliament and the government generally has 6 months to respond to the report. You should be able to give a recent example (within the last 4 years).

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End-of-chapter questions

Revision questions

1 Explain why the law may need to change.

2 List the methods individuals can use to influence changes to the law.

3 Comment on the effectiveness of each method you discussed in question 2.

4 Describe how the media can be used to influence changes to the law.

5 Using examples, analyse how social media can be used to influence changes to the law.

6 Using a recent example, describe the role of the Victorian Law Reform Commission in influencing changes to the law.

7 Evaluate the role of the Victorian Law Reform Commission in influencing changes to the law.

8 Evaluate the role of either a royal commission or a parliamentary committee in influencing changes to the law. In your response you should refer to a recent example (within the last 4 years).

Practice exam questions

1 Changes in technology are one reason for the law needing to change. Explain two other reasons for the law needing to change, giving one example of each. [4 marks]

2 You are upset about a recent proposal to change the law. Propose the most effective way to let parliament know your views. Justify your decision to use this approach. [5 marks]

3 Evaluate two other methods that an individual may use to influence a change to the law. [6 marks]

4 Using a recent example, explain the role of the Victorian Law Reform Commission. Is the Victorian Law Reform Commission effective in influencing changes to the law? [8 marks]

5 Evaluate the role of a parliamentary committee or a royal commission in influencing changes to the law. [6 marks]

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CHAPTER 11
PARLIAMENT AND THE COURTS: AN EVALUATION

To understand the operation of Australia's laws and legal system we need to appreciate the institutions that make and reform our laws, as well as the relationship between the Australian people, the Australian Constitution and law-making bodies. In this chapter we bring together this study to evaluate the ability of parliament and the courts to respond to the need for changes to the law.

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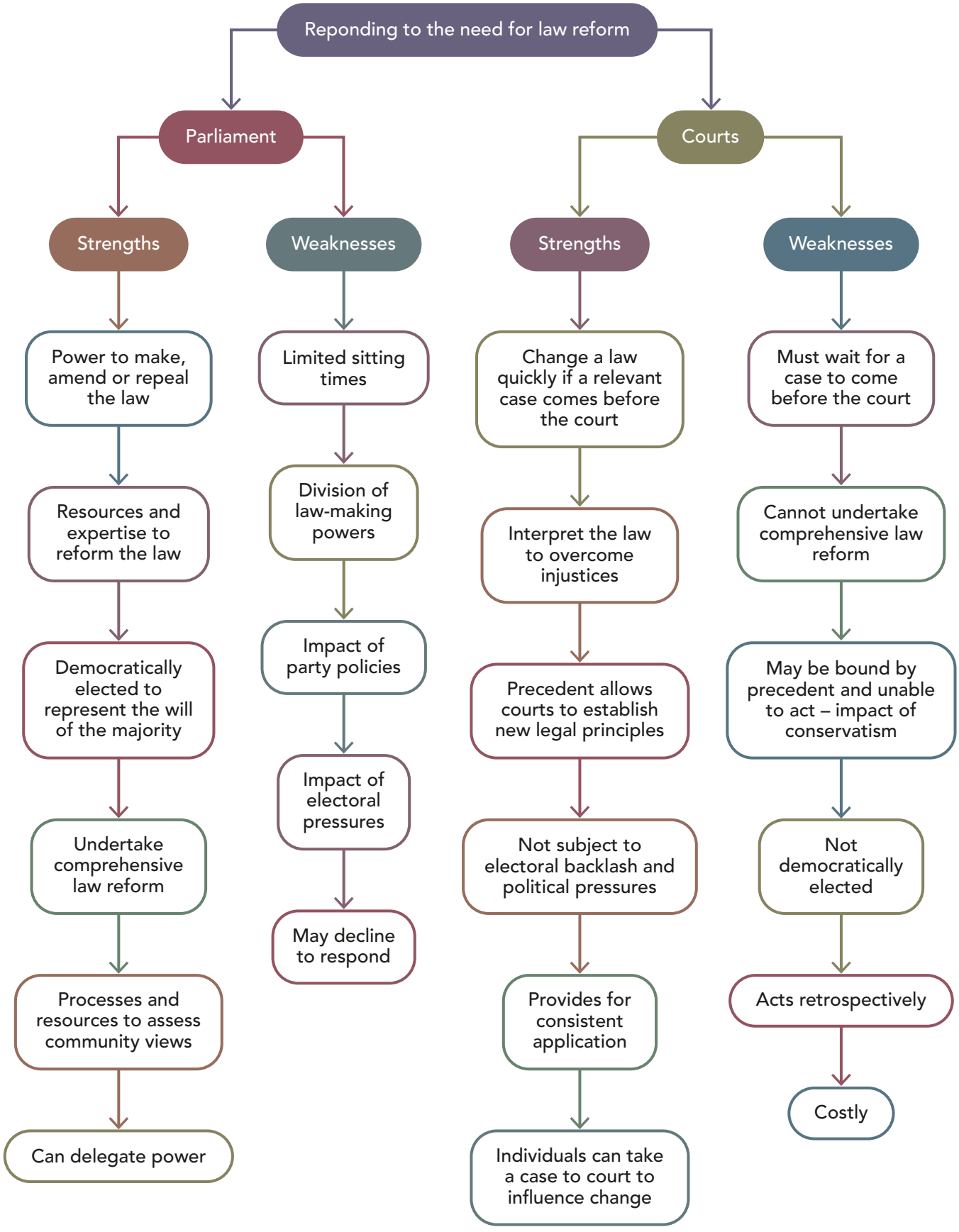

Key terms

amend to make changes to legislation

delegated legislation law-making powers given by parliament to subordinate bodies such as local councils, government departments and statutory authorities

ex post facto a term used to refer to a law being made to establish a legal consequence for a situation that has already occurred

repeal to remove or annul a law or an Act of Parliament

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11.1 The role of parliament and courts in law reform

Although a significant feature of the law is that it is stable and predictable, the law is not rigid and fixed. The law is a reflection of the society in which it operates. The law must be able to evolve and change to meet the changing needs of society. There is always a need for changes to the law – to examine the law, to revise it and to keep it relevant to the changes that take place in our community.

Reform in the law can come about through court decisions and by parliament passing legislation. Parliament is the supreme law-making body. Therefore it is appropriate that most changes in the law are as a result of legislation. However, it is important to recognise that the courts have a complementary role in law-making. Courts can make laws through the operation of the doctrine of precedent and through statutory interpretation.

11.2 Parliament as a law-maker

As stated earlier, the main purpose of parliament is to make laws. If a statute law and common law conflict, statute law will prevail. Parliament has many strengths as a democratic law-making body.

Strengths

Provided that the parliament is making laws within its constitutional limits, it has the ultimate power to make, amend or repeal law.

The primary role of parliament is to make laws. Parliament can make laws to remedy existing problems or in anticipation of future problems (*in futuro*). Parliament can also respond to the need to change the law by **repealing** or **amending** a law. Alternatively, parliament can undertake substantial reform of the law. Provided that parliament is operating within its constitutional limits, it can make, amend or repeal law.

Resources for law-making

Parliament has the resources and expertise to change the law.

Parliament is an elected and representative body. It has the resources and expertise necessary for the drafting of legislation. Ministers may call on the specialist knowledge of members of their departments to advise on the content of proposed laws and on the need to change the law. Parliament can form committees, working parties and special bodies to assess the need for change and make recommendations for change. As parliament has access to expert information, it is able to keep up with changes in society and monitor the need for reform in the law.

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Democratically elected

Parliament is democratically elected. This process aims to ensure that legislation reflects the will of the majority of people and the changing needs of society. Governments that ignore the community's wishes to change unpopular laws may suffer the consequences at election time.

Parliament is democratically elected to represent the will of the majority.

Parliament can adjourn debates to allow for further time to consider the views of the community. Parliament can also refer a Bill to a parliamentary committee for more detailed consideration.

The government may sometimes delay passing a Bill to allow time for public reaction and debate. Individuals and groups can seek to influence change in the law by directly approaching members of parliament or through petitions, demonstrations or the media. Members of parliament are responsible and answerable to the people. As noted above, if voters are dissatisfied with the laws that they make, there can be an electoral backlash.

Comprehensive law reform

Parliament is capable of undertaking comprehensive law reform. It may legislate to cover entire areas of public policy. It may establish moral obligations. Alternatively, legislation may act to support community attitudes, such as when the Victorian parliament acted to restrict smoking within 4 metres of school entrances.

Parliament can undertake large-scale reform of entire areas of law.

Provides for debate

The legislative process has many stages. These stages allow members to be informed about proposed changes and to express their views. The use of parliamentary committees allows for a detailed review of complex or controversial legislation. The debates of parliament are broadcast, streamed online and published in *Hansard*. In theory, members of the public can follow the parliamentary debates; they can certainly express their concerns to their local member. This means that the laws passed by parliament have been fully considered and represent the views of the community.

The legislative process ensures that views about proposed changes in the law are reflected in parliamentary debates.

Delegation of power

Parliament may authorise subordinate bodies (such as local councils, government departments and statutory authorities) to make what is called '**delegated legislation**' by passing an enabling Act. This aims to allow law-making to be more flexible and efficient. By delegating authority, parliament allows law-making to be directly responsive to local needs or specialist demands. For instance, local councils can make laws to meet specific needs in their local area. Statutory authorities are bodies established by an Act of Parliament. The Victorian Curriculum and Assessment Authority (VCAA) is a statutory authority. VCAA has been given the power to set rules for the conduct of assessments including examinations.

Parliament can delegate law-making powers.

Weaknesses

Although parliament has significant strengths as a law-making body, there are also some limitations on parliament's ability to respond to the need for changes to the law.

Delays in law-making

Although parliament can change the law at any time, in order to do that parliament must be meeting. These times are known as sittings. Parliament does not sit every day of the year. Generally, parliaments tend to sit 40–70 days a year. During non-sitting periods, members of parliament work on committees and/or in their electorates.

Parliament can only change the law when it is sitting.

Federal system

In a federal system, there may be some confusion about the division of law-making responsibilities between the Federal and State levels of government. This division of powers may result in a failure to legislate to cover a community need, or in the passing of conflicting legislation.

The division of powers may result in confusion and inconsistencies.

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In some instances, both the Commonwealth and a State parliament need to pass laws to effectively regulate an issue. For example, the regulation of gun ownership requires cooperation between States and Territories and the Commonwealth government: the Commonwealth parliament can make laws about the importation of guns, but the ownership, possession and use of firearms is regulated by State laws.

Impact of party politics

Members of parliament may represent the views of their political parties rather than of their electorates.

Members of parliament are elected to represent the interests of the people in their electorate. However, most members of parliament are also members of a political party. Political parties can exercise strong discipline over their members of parliament. Members of parliament are expected to vote according to their party's policy.

Party politics also impact on the function of the upper house. Although the upper house is intended to represent the interests of regions or States, it also acts as a house of review. A hostile upper house can frustrate the government's legislative agenda. This can occur when the government, which of course has a majority in the lower house, does not also have a majority in the upper house. Alternatively, if the government does have a majority in the upper house, the upper house may become a 'rubber stamp' and automatically approve government Bills.

Impact of political pressures

Parliament may be reluctant to act on controversial issues due to the government's wish to remain in government at the next election – this is called 'electoral pressure'.

The legislative process is dominated by the government, through the Cabinet, as it is Cabinet's legislative proposals that generally make up the majority of the parliament's law-making work. The government, through Cabinet, may be reluctant to take a stand – propose legislation – in relation to issues where there is no dominant community view (there may be several equally strongly held views), or where its own party policy is considered to be different from the dominant community view. These electoral pressures mean that some issues are not dealt with at all in parliament.

Delegating law-making power

Parliament may not have adequate control of delegated legislation.

Parliament has adopted the practice of delegating legislative power for the sake of administrative efficiency. However, it often fails to adequately supervise delegated legislation, and has created a vast range of subordinate authorities that act with the authority of parliament. This lessens the extent to which parliament can be said to be the prime source of law.

Slow to change

Parliament may be slow to take action when the law has become out of date.

There are many stages in making a new law. The process of investigating and passing a new law can be time-consuming. This can result in delays in changing the law.

Parliament has the power to amend and to change any law within its constitutional power. However, it may be slow to repeal legislation that is obsolete. For instance, the Statute Law Revision Bill 2016 (Cth) proposed:

- making minor amendments to 20 statutes to correct various technical errors as a result of drafting and clerical mistakes
- updating some expressions to accord with contemporary drafting practice
- repealing obsolete provisions in two Acts.

Activity 11.1 Folio exercise

Parliament and law-making

1 What factors affect the ability of parliament to make laws?
2 What do you consider to be the three most important advantages of the ability of parliament to respond to the need for changes to the law? Justify your view.
3 What do you consider to be the three most important disadvantages of the ability of parliament to respond to the need for changes to the law? Justify your view.

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11.3 Courts as law-makers

The main role of the courts is to resolve disputes. Precedent develops as judges reach decisions in the disputes they hear in court, and laws are made as a result. In this sense, law-making is a by-product of the dispute resolution procedures used by courts.

A court has to administer the law, but courts also have the power to interpret statutes. When dealing with precedent, the courts will usually just modify the existing principles. When there is a conflict between judge-made law and statute law, statute law will prevail.

Strengths

Courts can change a law quickly

The primary role of the courts is to settle disputes. In the process of resolving a dispute, courts can provide an immediate response to what the law should be in relation to a particular case.

A court can change a law quickly if a relevant case is brought before it.

In applying the law day-to-day, the courts determine how the law is applied.

This means that justice can be achieved in individual cases by interpreting the law as it relates to the facts of that case. Courts can distinguish, reverse or overrule decisions, and this can result in a change in precedent.

Courts can also interpret the meaning of words in statutes to overcome injustices.

Flexibility

Through the application of precedent, courts provide considerable flexibility for the law to adapt to the changing needs of society. For example, the *ratio decidendi* of *Donoghue v Stevenson* has been extended to apply to a variety of situations involving negligence. By distinguishing past cases or reversing or overruling past decisions, a court can change an established legal principle.

By distinguishing past cases or reversing or overruling past decisions, a court may change an established legal principle.

Independent of the political process

Courts are not subject to political pressures. They need only consider the submissions put forward by counsel acting on behalf of the parties. Courts may consider the changed values in our society; however, there is far less pressure on them than on members of parliament to do so. The judiciary is independent. Although judges are not elected, they are in an informed position to determine the law. Each party to a dispute has a responsibility to prepare and present their own case to the judge, and each will research and debate the need for change or for a new interpretation in order to win their case. Judges can maintain or change the law as required, without the fear of an electoral backlash.

Judges can maintain or change the law as required, without the fear of an electoral backlash.

Consistency and fairness

The courts provide consistent application of precedent and interpretation of legislation. The application of the doctrine of precedent ensures that cases relating to similar legal issues are decided in a predictable manner. This is a fundamental aspect of fairness.

Courts provide consistent application of precedent and interpretation of legislation.

Predictability

Parties can reasonably predict how the law will apply by looking at previous decisions of the courts in similar cases.

Access to change

Any individual has the right to take a case to court, provided they have standing. This means that they need to be able to show the court that they are directly affected by the issues. Therefore, in theory, we all have the opportunity in matters that directly affect us to take a case that may change the law to court.

In theory, we all have the opportunity in matters that directly affect us to take a case that may change the law to court.

Courts can identify needs for reform

Judges deal with the day-to-day application of the law and can identify areas of the law that are in need of reform. Judicial decisions are free from outside pressure and therefore judges can, if an appropriate case comes before the court, deal with controversial issues without the fear of electoral backlash. In making a decision, a judge may highlight the need for parliament to change the law.

Judicial decisions are free from outside pressure.

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Efficiency of operation

The doctrine of precedent provides judges and the legal profession with principles of law. Consequently, courts and lawyers can refer to previous cases in reaching their decisions. The system ensures that judges are protected from professional criticism, as their decisions have been made while taking earlier precedents into account.

Weaknesses

The role of the courts in reforming the law has a number of weaknesses. These include the following.

A case must come before the courts

Courts must wait until a legal action is brought before them.

Courts must wait until a legal action is brought before them. Even then, the law-making power of the courts is restricted by the nature of the dispute: that is, whether there is any existing common law or legislation in the area. Therefore, the ability of the courts to respond to the need for changes to the law may be slow and spasmodic.

The decision in a case only directly affects the parties

Judge-made law does not have the same wide-reaching effect as laws made by parliament.

Judge-made law cannot have the same wide-reaching effect as laws made by parliament because the decision in a case directly affects only the parties to the case. However, the reason for the decision in a case can act as an important influence on people considering a similar action.

Time-consuming process

A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take years.

A decision by a court about what the law should be is not always reached quickly. Courts cannot reach a decision before they hear all the arguments put by both parties. In complex cases, this can take a considerable amount of time. A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take years.

Rigidity

A court may be bound by precedent, whether or not the judge agrees with the outcome of the application of those principles.

The doctrine of precedent binds courts to decisions made in superior courts. Unless a court is considering a new or novel situation, it must apply the existing precedent. A court may be bound by precedent, whether or not the judge agrees with the outcome of the application of those principles. The doctrine of precedent implies not only consistency, but also some rigidity. However, parliament can override a precedent established by the courts. When a precedent becomes out of date, for example, parliament can make a law to change it.

Undemocratic

Courts are not democratically elected or representative law-making bodies.

Courts are not representative of the community, because they are appointed: they are not elected. This means that members of the community do not know what the values and attitudes of judges are. Judges are independent of parliament and government, and are not directly answerable to the electorate. Only in very rare circumstances will a judge be removed from office.

Retrospective

Courts act retrospectively – after a dispute has occurred.

The primary role of courts is to settle disputes. Courts decide a case 'after the event'. They are always acting retrospectively; that is, they look at an existing problem and decide how this problem can be overcome. In law, this is known as acting ***ex post facto***, or 'after the fact'. As the individual parties to a civil dispute bear the costs of the action, this is a costly way for individuals to find out what the law should be.

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Precedent may be slow to change

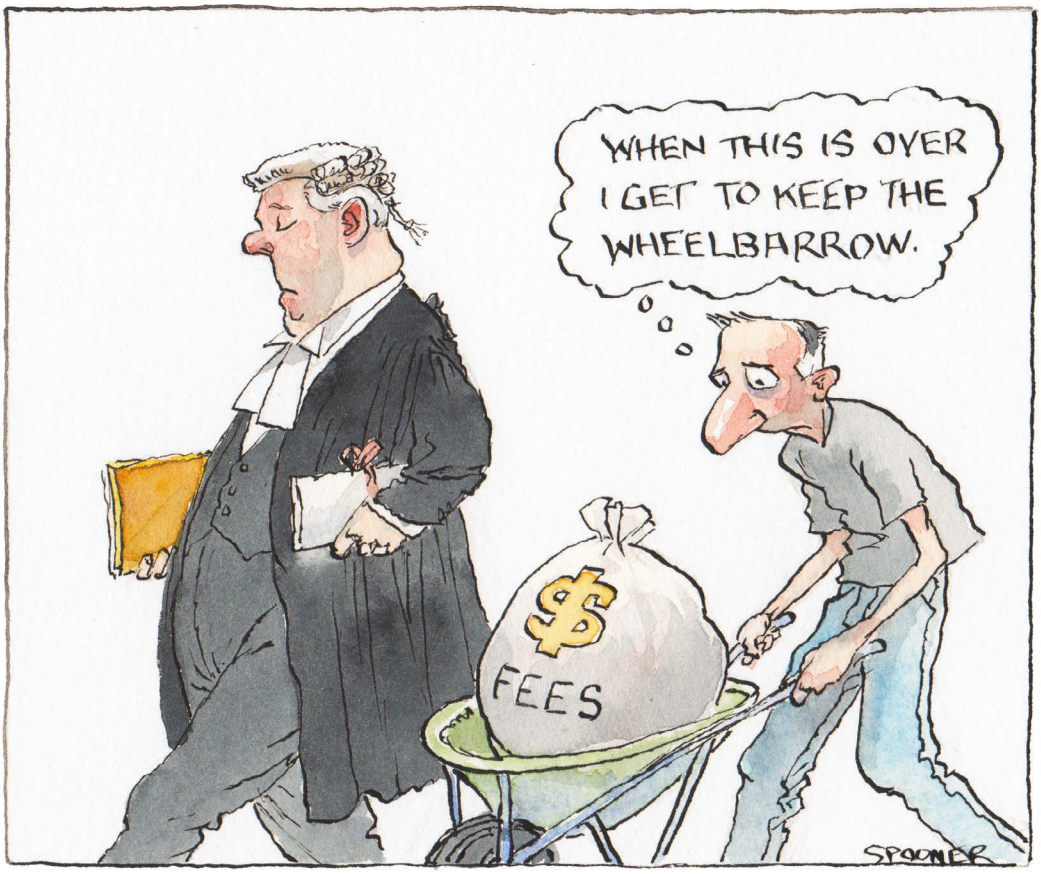
The development of the law is dependent on a case being taken to court. The more conservative judges may be reluctant to change the law by departing from the precedents, whether or not the precedent is generally considered to be outdated. Even where a new precedent is created it only applies to a limited set of circumstances (as all precedents do), and it may take many years for a whole area of law to develop. An excellent example of where the courts continued to be bound to an outmoded and unjust precedent was the law relating to the Widow's discount (see Chapter 9).

Conservative judges may be reluctant to depart from precedents even when they are outdated.

Costly

The high cost of preparing a court case may prevent individuals from seeking to change the law by taking a case to court. If an individual seeking to bring about a change in the law through the courts loses, they risk paying not only their own costs but the costs of the defendant and of the court.

Individuals may be reluctant to seek to influence a change in the law by taking a case to court because of the costs.



Lack of certainty

Precedent is based on previous court decisions with facts that are similar, but there may still be uncertainty for litigants, as no two cases are exactly the same. The court may decide that there are sufficient differences to distinguish the present case from earlier cases. Also, a precedent may be overruled, disapproved or reversed. It is often necessary to examine a number of cases to determine precisely the legal principle that is applicable; this may lead to further uncertainty, as the outcome of each case may vary slightly, resulting in some conflict within the law.

Precedent is not a concise statement of law, but is based on previous court decisions where the facts of a case are similar. This may result in uncertainty, as no two cases are exactly the same.

Courts do not have the resources to research the need for change

Courts can only focus on issues presented by parties to a dispute, and must rely on the information presented to them in court. They cannot comprehensively research and review the need for law reform. Courts make rulings on the legal issues relevant to the case before them. They cannot seek public opinion, form committees or refer matters to law reform bodies before making a decision.

Courts cannot comprehensively research and review the need for law reform in the same way as parliament.

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NEWSREPORT 11.1

Courts do make law

COURTS DO MAKE LAW. SOME MAY ARGUE THAT courts simply declare what the law is: in other words, when the law is unclear, the courts hear legal arguments and apply strict legal logic to resolve the dispute, and declare what the law is. These people believe that any change in the law should be left to the elected parliament. However, it is now widely accepted that in resolving disputes, judges exercise a wide range of choices and are making laws, not merely declaring legal principles. In doing so, judges are subject to many constraints. They are accountable in ways that are different from the ways an elected parliament is accountable.

Interpretation and change

Through the process of statutory interpretation, the courts tell us what parliament meant in Acts. When a judge is faced with circumstances in a case that were not anticipated by parliament, the judge is clearly making law when deciding upon a particular interpretation of the legislation. Bishop Hoadly, in 1717, said, 'whosoever hath the power to interpret the law hath the power to make it'. Should parliament be dissatisfied with the meanings construed by the courts, it can pass legislation to change the interpretation.

Common law and change

However, it is in the field of common law that the law-making role of the courts is highlighted. The common law has evolved from thousands of decisions over hundreds of years. It forms a body of law much larger than all the statutes passed by Australian parliaments. Common law covers areas as diverse as contract, negligence and nuisance – and it has been made by unelected judges for almost 1000 years.

When a judge decides that an established principle of law applies to a particular set of facts, and a court has not considered that question in the past, the judge is making law. The decision made by the judge adds to the body of the law to be used and applied in future cases.

The High Court and change

Sometimes higher courts, particularly the High Court, go further than making incremental changes to existing legal principles. The High Court can overrule previous understandings of the common law and establish new principles. Even in this area, the power of the courts to make law is subject to constraints: parliament can pass laws to change common law principles.

The common law develops in a sequential and systematic manner. It is formed by the application of existing rules to a series of fact situations, with existing principles being adapted to new situations. It changes and adapts gradually over time. Comprehensive, wholesale change to an area of law is left to parliament. Courts do not have the facilities, techniques or procedures to undertake comprehensive review of the need for change in entire areas of law.

However, there are numerous cases where the High Court has 'modernised' the common law, such as abolishing the marital exemption to rape and recognising Native Title in the Mabo case.

In the Mabo case the High Court decided that the common-law principle of *terra nullius* was no longer law.

Activity 11.2 Folio exercise

Courts as law-makers

Read 'Courts do make laws' and complete the following tasks:

1 Explain the operation of the doctrine of precedent and the role of the courts in the interpretation of legislation.
2 The article refers to the High Court as a law-maker. Explain the significance of the High Court in the law-making process.
3 What limits the capacity of courts to change the law?
4 Analyse two strengths of the courts in the law-making process.
5 The article concludes that parliament and the courts are accountable in law-making but in different ways. Explain.

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The High Court recognised that Native Title exists. This decision exemplifies an important constraint on courts in law-making. The Mabo case was decided in relation to a specific set of circumstances. Although the court formulated a principle to resolve that dispute, it did not provide a comprehensive code for the regulation of Native Title disputes. It was parliament that introduced legislation to codify Native Title law, for the broader recognition of Native Title in future cases and to establish a dispute resolution process.

Novel cases and change

The operation of the doctrine of precedent provides for continuity and consistency in the application of law to new circumstances. However, it is when a novel situation arises that the law-making role of the courts is most evident and controversial. In the case of *Cattanach v Melchior* [2003] 215 CLR 1, the High Court considered whether damages could be recovered by parents for the cost of raising a healthy child born after a failed sterilisation procedure. The case was based on a claim that the surgeon who performed the sterilisation had been negligent. The court decided that the parents could claim damages. The case was decided by a majority of four to three. The majority judgment declared that the principles of negligence applied and that the recovery of economic loss was therefore also recognised by the law. The case resulted in considerable public comment and criticism. Critics argued that it was not consistent with community values to allow parents to recover damages for the costs of raising a healthy child.

Should courts change the law?

What should a court do when faced with a choice between maintaining an existing legal principle and establishing a new rule? Many would argue that the courts have an obligation to maintain the status quo.

This approach places value on the certainty and stability inherent in the doctrine of precedent as well as on the need for substantial change in the law to take into account community views. However, others argue that it is appropriate for the courts to take a more active role in changing the law given that parliament can take action to change it if necessary.

Parliaments have acted to impose limitations on the common law. They have replaced common law rights with statutory schemes for compensation, set caps on the award of damages and established exclusions.

Both parliament and the courts are accountable for their law-making, but in different ways. Parliament is accountable through the electoral process. Courts are also accountable: they are open to the public and publish reasons for their decisions. This means that our courts are open to scrutiny and criticism. Professor Michael Coper suggests that parliament and the courts are partners in law-making:

> although their respective roles can bring them into conflict. In particular, they act as a brake on each other, the court interpreting and even invalidating the legislation of parliament, and the parliament modifying and even abolishing parts of the common law when it finds the court to have been too bold or not bold enough.

Activity 11.3 Essay

Law-making by the courts

'The concept that the courts merely apply the law is a fairytale. The role of the courts in reforming the law is crucial to the smooth functioning of the law.'

Considering the quote above, complete the following tasks:

1 Describe how a superior court can respond to the need to change the law.
2 Analyse two strengths and two weaknesses of the ability of the courts to respond to the need to change the law.
3 Why is the role of the courts important in the law-making process?

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Key point summary

Do your notes cover all the following points?

- The ability of parliament to respond to the need for changes to the law

Strengths	Weaknesses
• Provided that the parliament is making laws within its constitutional limits, it has the ultimate power to make, amend or repeal the law. • Parliament has the resources and expertise to change the law. • Parliament is democratically elected to represent the will of the majority. • Parliament can undertake large-scale reform of entire areas of law. • The legislative process ensures that the views of the community about proposed changes in the law are reflected in parliamentary debates. • Parliament can delegate law-making powers.	• Parliament can only change the law when it is sitting. • The division of powers may result in confusion and inconsistencies. • Members of parliament may represent the views of their political parties rather than their electorates. • Parliament may be reluctant to act on controversial issues due to electoral pressures. • Parliament may not have adequate control of delegated legislation. • Parliament may be slow to take action when the law has become out of date.

- Strengths and weaknesses of courts in reforming the law

Strengths	Weaknesses
• Courts can change a law quickly if a relevant case is brought before them. • Courts can also interpret the meaning of words in statutes to overcome injustices. • By distinguishing past cases or reversing or overruling past decisions, a court may change an established legal principle. • Judges can maintain or change the law as required, without the fear of an electoral backlash. • The courts provide for the consistent application of precedent and interpretation of legislation. • In theory, we all have the opportunity in matters that directly affect us to take a case that may change the law to court. • Judicial decisions are free from outside pressure.	• Courts must wait until a legal action is brought before them. • Judge-made law may not be seen to have the same wide-reaching effect as laws made by parliament, as it directly affects only the parties in the particular case. • A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take years. • A court may be bound by precedent, whether or not the judge agrees with the outcome of the application of the precedent. • Courts are not democratically elected or representative law-making bodies. • Courts act retrospectively – after a dispute has occurred. • Conservative judges may be reluctant to depart from outdated precedents and therefore the law may be slow to change. • Individuals may be reluctant to seek to influence a change in the law by taking a case to court due to the costs. • There is no certainty of success when seeking to influence a change in the law through the courts. • Courts cannot comprehensively research and review the need for changes to the law in the same way as parliament.

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End-of-chapter questions

Revision questions

1 What factors affect the ability of parliament to make the law?

2 Describe four strengths and four weaknesses of parliament's role in responding to the need for law reform.

3 What factors affect the ability of courts to make the law?

4 Describe four strengths and four weaknesses of the courts' capacity to respond to the need for law reform.

5 'The law-making process of parliament provides an effective means to respond to the need for change in the law.' Present two arguments to support this statement.

6 'Courts are not elected or representative bodies. The role of the courts is to apply the law, not to make laws.' Discuss.

Practice exam questions

1 Justify the continuing role of the courts in responding to the need for reform in the law. [6 marks]

2 What do you consider to be the two most important weaknesses of the courts' role in responding to the need for law reform? [6 marks]

3 How effective is an individual likely to be in bringing about a reform of the law through a court action? [8 marks]

4 Read this set of study notes, which lists the following points as weaknesses of parliament's capacity to respond to the need for law reform.

- Parliament is too slow to repeal antiquated laws.
- Parliament responds more to the demands of political parties than to the needs of the community.
- Parliamentarians are not willing to tackle controversial issues.
- In reality, Cabinet, not parliament, decides what the law will be.
- The upper house is nothing more than a 'rubber stamp', agreeing with the government rather than reviewing the law.
- In reality, most of our laws are not made by parliament.

a Select three of the points listed above and explain why they are weaknesses in parliament's ability to respond to the need for law reform. [6 marks]

b What do you consider to be the major strengths of parliament's role in responding to the need for law reform? [8 marks]

5 Both parliaments and the courts have an important role in law reform. Which of the two means of bringing about a change in the law is likely to be the most significant, and for what reason? [6 marks]

6 To what extent is the ability of the courts to respond to the need for law reform different from the ability of parliament to respond to the need for law reform? [10 marks]

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Glossary

accused the person charged with an indictable offence and committed for trial

acquittal when a defendant is found not guilty by a court

Act a law passed by parliament

aggravating factors evidence presented which increases the seriousness of the offence and so contributes to a harsher sentence: for example, use of a weapon

amend to make changes to legislation

appellate jurisdiction the power of a court to hear and determine an appeal

arraignment the formal reading of the charges against an accused person – this happens in court

bail allows a person to be released into the community while he or she awaits trial or the next hearing; conditions are often attached

balance of probabilities the standard of proof required in a civil case; to be successful, litigants must prove that their case, their version of the facts, is more probable than the other party's version

bicameral a parliament with an upper and a lower house

Bill a proposed law to be considered by parliament

binding precedent a precedent that must be followed – for instance, a decision of the Supreme or High Court

burden of proof the party who has the responsibility, or onus, of proving the case: in a criminal matter, the burden of proof rests with the prosecution

Cabinet the leader of the government and the most senior ministers

charge sheet the written statement of the charges to be laid against an accused person

civil law laws regulating the behaviour of private individuals

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to commit the accused to trial in a higher court

committal proceedings the first time an accused person appears in court: the time at which the accused is formally charged

common law case law developed in the courts – this term is sometimes used to describe all case law or judge-made law

Community Correction Order (CCO) a sentencing order requiring an offender to undertake conditions while in the community: can include doing unpaid community work, and/or drug/alcohol treatment or curfews

concurrent powers specific law-making powers in the Constitution that may be exercised by both the Commonwealth and State parliaments

constitution a set of rules or principles according to which a state or other organisation is governed

contract a legally enforceable agreement

counter-claim a cross-action that, although capable of supporting an independent action, is pleaded in an existing claim

court hierarchy a ranking of courts from inferior to superior

criminal law laws concerned not only with the rights of individuals directly involved but also with the welfare of society as a whole

Crown the authority of the monarch, represented in Australia by Governors and the Governor-General

custodial sentence a sentence handed down by a magistrate or judge that consists of the custody of an accused in a prison or another institution (such as Thomas Embling Hospital)

damages a monetary award: this is the most common outcome of a civil case

defendant in criminal law, a person who has been brought to court charged with a criminal offence

delegated legislation law-making powers given by parliament to subordinate bodies such as local councils, government departments and statutory authorities

demonstration a public exhibition of sympathy or support for/opposition to a particular issue

directions hearing a hearing conducted by a judge that allows the court to establish timelines for the completion of the pre-trial stages in a civil matter

discovery the pre-hearing stage in civil proceedings where the parties exchange further details and information: it may include documents, written interrogatories (questions) and/or an oral examination

division of powers the system in which law-making powers are divided between the Commonwealth and the States

doctrine of precedent the system used by courts to make law: judgments of superior courts are written and reported in law reports, and applied to future cases with similar facts. Note: the expression 'doctrine of precedent' refers to the overall system used to create law in courts, not to specific judgments

double majority for a referendum to be passed it must have a 'yes' vote from the majority of electors overall, plus a 'yes' vote from the majority of electors in the majority of States

ejusdem generis a legal maxim used in the interpretation of statutes – it means 'of the same kind': when a general term will be interpreted to include the category indicated by the specific terms that precede it. The rule is that the general words are limited in meaning to the same kinds of things as appear in the specific words in the list. For example, if a statute applied to tigers, lions, leopards and other animals it could

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be assumed that a panther would be included as another animal, but not a cow. The list must contain at least two specific words before the general word or phrase for this rule to operate.

Executive Council the ministers and parliamentary secretaries in the Commonwealth parliament

ex post facto a term used to refer to when a law that is made to establish a legal consequence for a situation that has already occurred

exclusive powers law-making powers set out in the Australian Constitution that may only be exercised by the Commonwealth parliament

express rights a right that is entrenched within the Australian Constitution

extrinsic sources in the context of interpreting an Act, includes dictionaries, second reading speeches, legislative guidelines and previous decisions

Federation the joining together of separate States to form one nation

financial Bill a proposed law concerned with government spending

government the party (or parties in coalition) holding a majority of seats in the lower house

Hansard the transcript of the proceedings of both houses of the Commonwealth and all State parliaments and their parliamentary committees

High Court the highest court in Australia, established by the Constitution, and the only court with the authority to interpret the Constitution

House of Representatives the lower house of the Commonwealth parliament

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court: an example is murder

indictable offence heard summarily an indictable offence triable before a magistrate without a jury

indictment a formal accusation

injunction an order for a party to do, or refrain from doing, a particular action; a court order for an action to be taken or for the deferment of an action

inter partes a decision between the parties, in which one wins and one loses

interrogatories written pre-trial questions sent by one party to another to find out the basis of a civil dispute

intrinsic sources in the context of an Act, includes margin notes, footnotes, the definition sections and the object or purpose clause

judge-made law the development of legal principles through the declaration of common law or the interpretation of statutes

jurisdiction which courts have the power to hear and determine which offences

legal maxim a traditional rule, convention or practice

legal rules laws created by institutions within the legal system and enforced by the legal system

legislation an Act of Parliament or piece of delegated legislation

Legislative Assembly the lower house of the Victorian parliament

Legislative Council the upper house of the Victorian parliament

legislative process the process used by parliament to make laws

listing the setting of dates for future hearings

litigation engaging in court action over a civil matter

mitigating factors evidence presented which reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

non-legal rules rules established within a group but not generally enforceable in the community

norms social expectations within social groups

oath a verbal promise to tell the truth: oaths are made while holding the Bible, the New Testament or the Old Testament, or the Qur'an, but can be sworn on another relevant religious text or even without a religious text

obiter dictum a judge's statement of opinion or observation made during a judgment but not part of the reason for a decision

offender a person who has been convicted of breaching a criminal law

original jurisdiction the authority of a court to hear and determine a case in the first instance

parliament the supreme law-making body, consisting of elected representatives and the Crown

parliamentary committees select, standing or joint committees composed of members of parliament, formed by the parliament for specific purposes

parole the conditional release of a prisoner before the end of the original sentence

persuasive precedent a precedent that a court does not have to follow but which is nevertheless very influential – applies to decisions of a lower court or a court at the same level

petition a written request that parliament take action

plaintiff the party who initiates a civil action

plea negotiation where the defence counsel and prosecutor negotiate as to which charges will stand up in court and/or the defendant's plea

precedent law made by courts: it may refer to a single judgment ('a precedent') or several judgments ('precedent'), and is taken to be the law for that situation in future similar cases

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pressure group a group that acts to advance a particular issue or interest

presumption of innocence a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law

primary victim the person who directly had a crime committed against them

principles of sentencing long-established values, prescribed in legislation, to be considered by courts when sentencing (for example, it should be fair and proportional)

private member's Bill a proposed law introduced by a member of parliament without Cabinet approval

pro bono legal work undertaken for free

proportional representation system in multi-member electorates (such as the States, in the Commonwealth parliament, and the regions, in Victoria), groups and independent candidates are elected in proportion to the number of votes they receive

prosecution bringing a criminal charge, supported by evidence, to court: a prosecution may be initiated by a police prosecutor, or by the Office of Public Prosecutions on behalf of the Crown

ratio decidendi the legal reasoning, or rule, upon which a decision is based

recidivism a person relapsing into criminal behaviour

referendum the process set out in section 128 of the Constitution to allow the Constitution to be formally altered

remand to hold an accused in custody until their trial or next hearing

remedy broadly, any means by which a wrong is redressed

repeal to remove or annul a law or an Act of Parliament

residual powers law-making powers that remained with the State parliaments after Federation

royal assent the final stage in the approval of a Bill: after a Bill has been passed by both houses it must be approved by the Crown

royal commission an inquiry appointed by the Governor-General-in-Council (or the Governor-in-Council), with extensive powers of investigation

sanction a penalty handed down by a court for someone found guilty of breaching a law; for example, a fine or imprisonment (sometimes interchanged with 'sentence')

Senate the upper house of the Commonwealth parliament

sentence a penalty handed down by a court for someone found guilty of breaching a law in a criminal trial: to declare a sentence on a guilty person (sometimes interchanged with 'sanction')

sentence hearing a post-trial procedure in which the offender is given a sentence by the magistrate or judge

sentencing indication where the defence requests a statement from the court as to whether the accused is likely to receive a custodial or a non-custodial sentence; if it is custodial, the indication can include what the sentence is likely to be

separation of powers the division of the powers of government among legislative, administrative and judicial bodies to provide a system of checks and balances

social media computer-based technology that can create and share information and ideas online to online networks and communities

specific powers the legislative powers of the Commonwealth parliament stated (specified) in the Australian Constitution

specified sentence discount scheme a procedure whereby a court imposes a less severe sentence because the offender pleaded guilty

standard of proof the level of proof that must be satisfied in order to determine guilt or liability: in a criminal case, the standard of proof is 'beyond reasonable doubt'

stare decisis the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

statement of claim a document in which the plaintiff sets out the facts they are relying on in the claim against the defendant, together with the relief they are seeking

statute law Acts of Parliament

statutory interpretation the process of judges giving meaning to words within an Act where there is a dispute as to the application of the Act

summary offence a less serious crime, heard in the Magistrates' Court; for example, a minor traffic offence

surety a person who provides security (an amount of money) to the court to ensure that the person charged appears at court: if the person fails to appear, the surety loses their money

tort a civil wrong that amounts to an act or failure to act that infringes on the rights of an individual; for example, negligence, trespass and nuisance

Victorian Law Reform Commission (VLRC) a permanent body established by the Victorian parliament specifically to investigate the need for law reform

writ the originating document used to begin a civil claim

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