



MAKING & BREAKING the LAW

VCE UNITS 1&2

2nd Edition

Tim Lee David Adam Julie Cain Nicholas Ford
Luisa Lipsia Angelos Mavridis Michael McCallum

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

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Angelos Mavridis and Michael McCallum 2018, 2020

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First published 2018

Second Edition 2020

20 19 18 17 16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

Cover and text designed by Cameron McPhail

Typeset by Integra Software Services Pvt. Ltd

Printed in China by C&C Offset Printing Co., Ltd

A catalogue record for this book is available from the National Library of Australia at www.nla.gov.au

ISBN 978-1-108-88719-9 Paperback

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About the authors

Tim Lee is an experienced and passionate VCE Legal Studies teacher and an avid reader of related professional literature. Tim has attended both domestic and international conferences on educational leadership and is enthusiastic about innovations that seek to enhance student engagement. He has also presented at VCTA's annual *Comview* conference. He completed his undergraduate and honours studies in Criminology and Political Science at the University of Melbourne before returning to university to complete his Master of Teaching. He is currently completing his Master of Education.

David Adam obtained his Juris Doctor from the University of Melbourne in 2014. David currently teaches Legal Studies and Humanities at Northcote High School. He has been extensively involved in the not-for-profit legal sector, where he volunteered for a number of Community Legal Centres. In recognition of his contribution to the Occupy Melbourne Legal Support Team, he was a joint recipient of the Tim McCoy award for outstanding achievement in human rights. He is passionate about the powerful role of community legal education in maintaining a just and equitable society.

Julie Cain is the Senior Campus Principal at Mount Waverley Secondary College. Julie is an experienced VCE Legal Studies, Business Management, Economics and Humanities teacher. During her career she has been Head of Senior School, Professional Learning Leader, a Teaching Fellow in the Master of Teaching program at the University of Melbourne and currently oversees Teaching and Learning. She regularly contributes to the VCTA journal *Compak* and presents at VCTA professional learning and student programs. She has obtained a Master of Education (Leadership and Management).

Nicholas Ford is a VCE Legal Studies teacher at Canterbury Girls' Secondary College, member of the VCTA Law Related Education Advisory Board, published contributor for Unit 3&4 Legal Studies to VCTA's online journal *Compak*, and presenter at VCTA's annual *Comview* conference on the subject of Legal Studies and Positive Relationships in the Classroom. He has worked as Unit Coordinator and Teaching Associate for Legal Studies Education in the Victorian Secondary Years at Monash University, Clayton for the past three years. He has a background in Special Developmental Education and Student Wellbeing, with a focus on positive psychology and behaviour management. He holds a Bachelor of Commerce, Graduate Diploma of Education (Secondary) and Master of Counselling, all from Monash University.

Luisa Lipsia is an accomplished VCE Legal Studies teacher and experienced Victorian Curriculum and Assessment Authority (VCAA) assessor. Luisa has also been employed through Monash University as an Associate Lecturer in the Education (Secondary) faculty, focusing on Legal Studies pre-service teachers. She has presented regularly at VCTA conferences and at professional development workshops for new and accomplished legal studies teachers. She has taken part in curriculum development and is active in her passion for engaging curriculum, particularly in human rights law, through partaking in events such as Model UN Conventions and Regional, State and National Constitutional Conventions. She has worked in various positions of leadership in her career, such as leader of the House System and Service Learning Co-ordinator where she works with and co-ordinates student leaders in her school. She has a keen interest in positive psychology in education and growth mindset awareness. Prior to becoming a teacher, she worked within the Supreme Court of Victoria as a trust officer for the Senior Master's (Funds in Court) Office. She has completed a Bachelor of Arts (Honours) at Monash University, majoring in Criminology and Philosophy/History.

Angelos Mavridis has been teaching since 1989. Angelos is an experienced VCE teacher, having taught at Haileybury since 1990, in the subject areas of Year 12 Legal Studies, English, EAL, National Politics and Global Politics. He completed a Bachelor of Arts (Honours) at Melbourne University, majoring in Criminology; and completed two Master of Education degrees, including TESOL (Teaching English to Students of Other Languages), from Monash University. He has co-authored books for Legal Studies and English, been a VCAA Legal Studies examiner, mentored Chinese teachers as part of Haileybury's VCE in China program, and lectured students and colleagues for VCE Legal Studies and English. As a Head of House and practising teacher, his passions focus on a strong sense of pastoral care coupled with a genuine love for learning.

Michael McCallum is an experienced VCE Legal Studies teacher, having taught the subject since 2000. Prior to that, Michael completed a Bachelor of Laws at the University of Melbourne and was a practising solicitor and partner in a law firm. After gaining his Diploma of Education in teaching, he also completed a Master of Education. He has been a marker for VCAA Units 3&4 Legal Studies exams as well as a regular presenter at teacher workshops and student revision lectures in Legal Studies. He is passionate about teaching Legal Studies and has been a VCE teacher, and held numerous leadership roles, at Clonard College, Geelong, for a number of years.

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UNIT 1

Guilt and liability



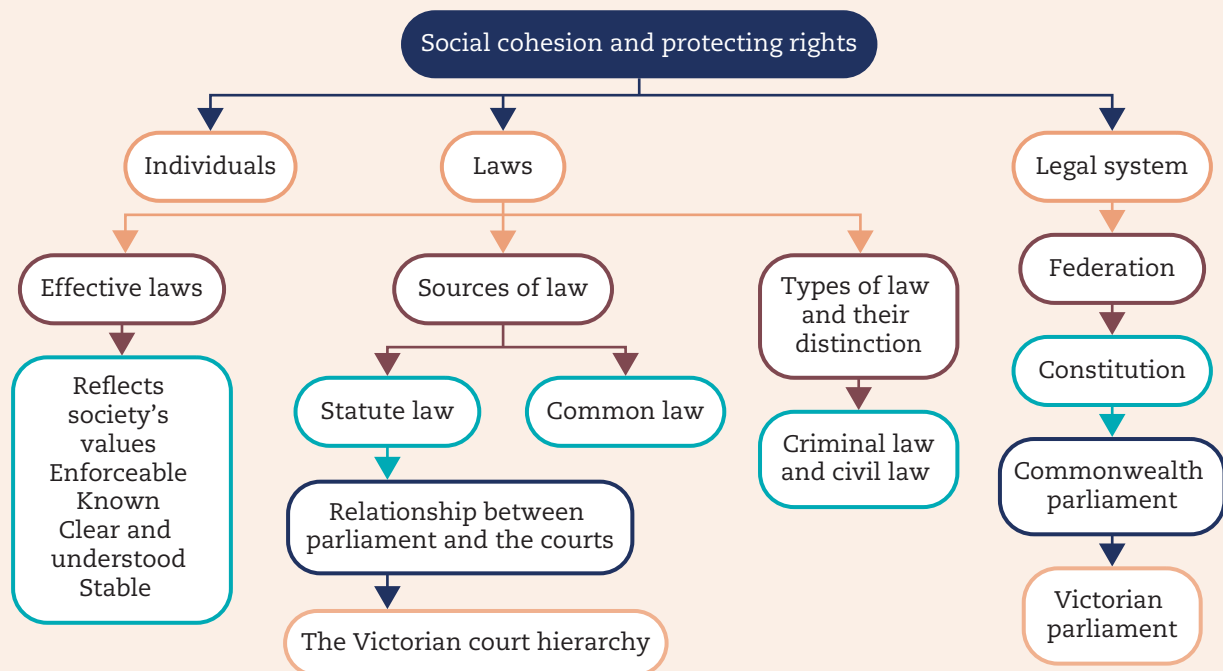
Chapter 1

Area of Study 1

Legal foundations

This chapter provides an understanding of laws and the Australian legal system to lay the foundations for the remainder of the unit. It will explore the role of laws, the legal system and individuals in achieving social cohesion and protecting rights. It will consider what makes an effective law, where these laws come from (statute law and common law), types of law (criminal and civil law) and their distinction. The principles of justice (fairness, equality and access), the relationship between parliament and the courts, and the reasons for a Victorian court hierarchy will be examined in relation to how they underpin the legal system.





Key terms

Bill a proposed law to be considered by parliament

binding precedent formed from the legal reasoning (or *ratio decidendi*): a precedent that must be followed by lower courts in the same hierarchy in matters of similar fact; for instance, a decision of the High Court is a precedent that must be followed

Cabinet the policy-making body of parliament comprising of the leader of the government and senior ministers

civil law laws regulating the behaviour of private individuals

common law law developed in the courts; also known as case law or judge-made law

concurrent powers specific law-making powers in the Constitution that may be exercised by both the Commonwealth and State parliaments; namely, shared law-making powers

constitution fundamental rules or principles and structures to which a nation is governed

Crown the authority of the monarch, represented in Australia by governors in each state and the Governor-General at the federal level

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)

exclusive powers law-making powers set out in the Constitution that may only be exercised by the Commonwealth parliament

government the ruling political party (or parties in coalition) that holds a majority of seats in the lower house

House of Representatives the lower house of the Commonwealth parliament

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

legislation an Act of Parliament, a statute or piece of delegated legislation

Legislative Assembly the lower house of the Victorian parliament

Legislative Council the upper house of the Victorian parliament

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

obiter dictum 'matters by the way'; a judge's statement of opinion or observation made during a judgment but not part of the reason for a decision; may be persuasive in future cases

parliament the supreme law-making body, consisting of elected representatives and the Crown

persuasive precedent the legal reasoning of a court: a court does not have to follow this reasoning, but it can be influential; applies to decisions of a lower court or a court at the same level

precedent law made by courts: a reported judgment of a court that establishes a point of law

ratio decidendi the legal reasoning, or rule, upon which a decision is based; forms a binding precedent

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

Senate the upper house of the Commonwealth parliament

separation of powers a principle established by the Australian Constitution that entails the division of powers of government among legislative, administrative and judicial bodies, to provide a system of checks and balances

stare decisis 'to stand by what has been decided'; the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

1.1 Role of individuals, laws and the legal system

A cohesive society is one in which individuals work together to ensure the safety and wellbeing of all members.

A cohesive society is one in which individuals work together to ensure the safety and wellbeing of all members. It recognises that all individuals are not equal and aims to address this imbalance to provide them with the opportunity to live in an inclusive and fair world. To help achieve social cohesion, certain guidelines must be set up to regulate the behaviour of individuals and, in turn, society as a whole. These guidelines help establish societal norms that attempt to uphold the fundamental principles of justice: fairness, equality and access. These guidelines are commonly referred to as 'rules'. Rules can be found at home, in schools, on sporting fields and so on. While not everyone will agree with every rule, it can be acknowledged that it is an impossible task to provide all members of society with the freedom to do as they please, while at the same time ensuring they do not impact the ability of others to do exactly this. This framework of acceptable behaviours helps to protect society as a whole and, in turn, individual rights of people within society. As such, to achieve a cohesive society, it is important that individual members of society work with the legal system to ensure that laws best reflect community values.

Lawmakers must create rules that are accepted by the majority of society. Those enforcing the law must be clear on what the laws are, and individual members of society must abide by these laws. In Australia, we live in a democratic society. This enables individuals to have input into how the country is run. Eligible citizens may vote in frequent state and federal elections, where their views will be represented by members of parliament (MPs). As **parliament** is the supreme lawmaker in Australia, democracy helps to create a legal system that best represents the people at a given time. In Australian society, our actions are regulated, and our rights and responsibilities are protected by **non-legal rules** and **legal rules**.

Non-legal rules

In day-to-day life, individual members of a society have to abide by a wide range of rules. Some of these rules are not legal. These are known as non-legal rules and can be found, for example, in the home, at school or on the sporting field.



Non-legal rules ensure the safety and wellbeing of all members of a society.

At home, parents generally set the rules. These rules set about establishing common expectations around behaviour of family members to ensure the family unit exists peacefully. Each household can have different rules that only apply to occupants of that house. For example, house A may allow their children 20 minutes screen time per day; whereas, house B may not have any rules regulating screen time. Consequences, usually called punishments, for not following rules will also differ. Parent A may choose to ban their child from screen time for a week if the child breaks their screen time rule, whereas parent B may take away their child's phone for excessive use.

Non-legal rules are also found in institutions such as schools. School rules are generally written and provided to all members of the school. There are rules relating to uniform, classroom and playground behaviour, late submission of work, specific behaviour in science laboratories, using sports equipment, computer usage and so on. Breaking school rules will result in some form of punishment; for example, if you are late to class twice in a week, you will be given a lunchtime detention.

Rules on the sporting field



A football game requires players, umpires and rules. The sporting body creates rules that guide how the game will be played. They set out how the field should be marked, such as boundary lines, centre circle, centre and goal squares, and 50 metre lines. They set out clear rules and regulations for players to follow and umpires to enforce. Players enter the sporting field aware of these rules, with the knowledge that there will be consequences for breaking them. Umpires are enforcers of the rules, ensuring players follow the rules, and applying consequences to those players who break the rules. For example, player A knows that if they push player B in the back, the umpire will award player B a free kick. For the game to function properly, it requires players, umpires and the sporting body to work together.

18.3 PROHIBITED CONTACT

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18.3.2 Free Kicks – Prohibited Contact

A field Umpire shall award a Free Kick against a Player when that Player makes any of the following Prohibited Contact with an opposition Player:

- a** executes a tackle that is not legal (refer to the definition of Legal Tackle);
- b** pushes an opposition Player in the back;
- c** makes high contact to an opposition Player (including the top of the shoulders) with any part of their body)
- d** holds an opposition Player who is not in possession of the football;

...

Source: *Laws of Australian Football 2020*

Activity 1.1 Class discussion

The importance of rules

Use the internet to research rules relating to your preferred sport. This can be followed by a class discussion on the importance of rules. Key points for discussion:

- Were you aware the sport had so many rules?
- Why do you think the sport needs so many rules?
- Are the rules easy to understand?
- Are the rules comprehensive? If so, why do you think this is?

Legal rules

Legal rules apply to all members of society and are known as laws. They are created to help regulate society's behaviour and guide the rights and responsibilities of each individual member in society. They help to ensure that individuals do not engage in behaviour that may negatively impact another individual's rights.

Most people associate legal rules with criminal law. News reports tend to focus on the more sensational breaches of law, such as violent crimes, drugs and theft. Criminal law is aimed at protecting the community by governing society's behaviour. Yet, there are also laws that govern the way in which individuals interact with each other. This is known as **civil law**. Civil law allows an individual who believes their rights have been infringed by another individual to take action. In effect, it balances an individual's right to freedom with their responsibility not to infringe other individuals' rights. An example of this is seen when someone fails to undertake a job they were contracted to complete. It can also be seen where a person does not satisfy their responsibility owed to another person (negligence). When individuals make public statements that lower the reputation of another individual (defamation), civil law provides an avenue for the defamed individual to seek compensation. Both criminal and civil law attempt to uphold the principles of justice.

Activity 1.2 Folio exercise

Non-legal and legal rules

Reflect on three examples of non-legal and legal rules, and complete the following tasks for each rule:

- Why is there a need for this rule?
- Who created the rule?
- Who enforces the rule?
- Give one example of a consequence of breaking this rule.

1.2 Principles of justice: fairness, equality and access

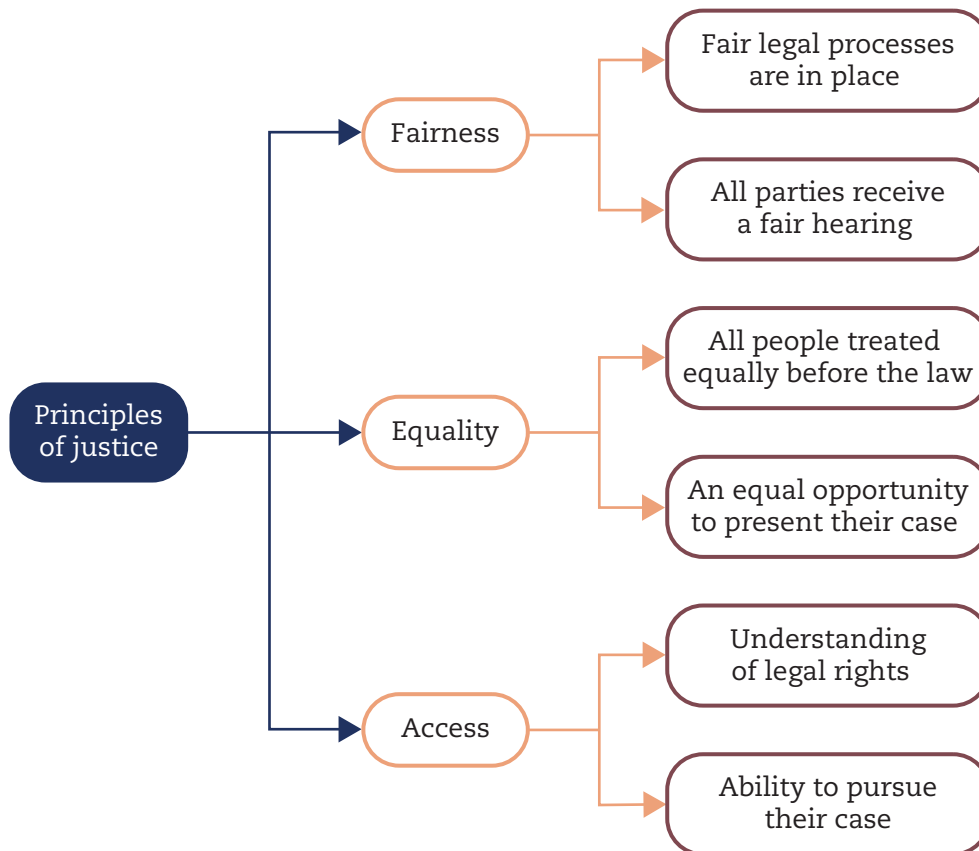


Figure 1.1 The principles of justice: fairness, equality and access

The Australian legal system is underpinned by the principles of justice. The principles of justice are fairness, equality and access:

- fairness: fair legal processes are in place, and all parties receive a fair hearing
- equality: all people are treated equally before the law, with an equal opportunity to present their case
- access: understanding of legal rights and ability to pursue their case.

The legal system aims to promote the fair and equal treatment of all members of society under the law. This includes recognising an individual's human rights as well as providing individuals with reasonable access to the legal system. To administer true justice, the legal system must delicately balance the right for all people to be treated equally with an understanding that each individual case will be unique.

Fairness

The principle of a fair and unbiased hearing is based on the idea of 'fair play' and 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, in all cases we should '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.

Equality

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 uniformly. This does not mean that all individuals are treated in exactly the same manner. The law recognises that there are differences between individuals. The law acknowledges these differences, and provides all individuals with an equal opportunity to exercise their rights. It is sometimes necessary to have laws that establish special procedures or facilities to assist individuals. The term 'equality' means the recognition of 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. It is one that is uniform in its operation or effect on people.

Recognition and equality before the law

- 1 Every person has the right to recognition as a person before the law.
- 2 Every person has the right to enjoy his or her human rights without discrimination.
- 3 Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- 4 Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Source: Section 8, Charter of Human Rights and Responsibilities Act 2006



Activity 1.3 Report

Achieving equality

Create a multimedia report on what could be done (or what is being done) to help a particular group be treated as equal members of society. Consider:

- history
- reasons for inequality
- key figures.

Access

Access to justice is a fundamental principle of the Australian legal system. Without the ability to access the legal system, it is impossible to access justice. Access includes access to:

- appropriate legal advice and assistance
- legal representation
- processes and procedures for the determination of criminal cases or resolution of civil claims
- legal institutions such as courts and tribunals.

Access to justice

The introduction of the Aboriginal Liaison Officer Program at the Melbourne Magistrates' Court, along with the introduction and expansion of the Koori Court in metropolitan and rural Victoria, have allowed greater access to justice for Indigenous Victorians. Additionally, initiatives such as the Neighbourhood Justice Centre in Collingwood aim to provide greater access to the legal system for socially disadvantaged people.

Victoria Legal Aid and the Magistrates' Courts of Victoria both assist Victorians who face language barriers (limited English or hearing/speech impairment). These services are provided free of charge and further promote access to justice.



Video



Video

1.3 Characteristics of an effective law

There are a number of characteristics required for a law to be truly effective.

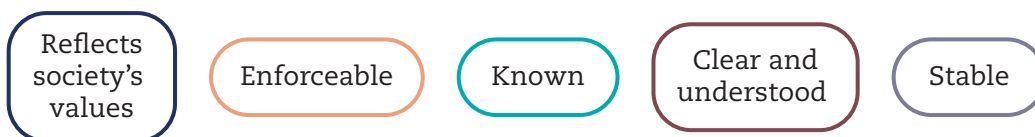


Figure 1.2 Characteristics of an effective law

The law must reflect society's values

In order for the law to operate effectively it must reflect the values of society and be acceptable to the majority. If individuals do not accept the law, they will not obey it. The law will be seen as acceptable if it reflects the values and morals of the community.

The law must be enforceable

If the law is not being enforced, or not able to be enforced, then it will not be able to regulate community behaviour.

The law must be known

Knowledge of the law means that members of society are less likely to break the law. The average person should ensure they have a broad knowledge of laws relating to their daily life.

The law must be clear and understood

Simple, clear language should be used when writing laws. This will result in the average member of society being able to understand what the law actually is, and how they are impacted. Rights and responsibilities of citizens must be explicit within the law, promoting equality, fairness and justice.

The law must be stable

Effective law should be stable, yet flexible enough to adapt to inevitable changes in society's values. Consistency helps society's members to have some clarity around what are expected behaviours. If laws were constantly changing, individuals would likely be ignorant, and could not reasonably be expected to know what is the actual law. Good laws should be clear enough to be understood by contemporary society, yet broad enough to provide scope to incorporate future concerns.

1.4 Parliament structures in Australia

After British colonisation and prior to Federation on 1 January 1901, each Australian state operated as a British colony. They were given powers by the British Government that enabled them to govern independently. As such, each colony had their own laws, and they were often different, leading to some confusion, especially when trading or travelling to another colony.

Federation was the unifying of these colonies under a shared central **government**. Law-making powers were divided between the federal parliament, its states and territories. Federal or Commonwealth parliament acted as a central parliament, overseeing the states and territories.

When dividing law-making powers, colonies had to determine which powers would be best dealt with by a central parliament. Law-making areas affecting the whole country, such as coining money, raising defence forces and immigration, were deemed best dealt with by federal parliament, to ensure a consistent nationwide approach. Further law-making powers were shared between the colonies and the Commonwealth parliament, with the remaining powers left with the colonies.

The Australian Constitution

Much discussion and debate was had by the colonies as to how best to implement Federation. In the end, these founding fathers developed what we know as the **Constitution** in the *Australian Constitution Act 1900*, setting out the legislative power of the Commonwealth parliament and the former colonies, known as states.

The Constitution sets out the law-making powers of the Commonwealth parliament.

Law-making powers of the Commonwealth parliament

The Constitution sets out the law-making powers of the Commonwealth parliament. These are known as specific powers (or enumerated powers) as they clearly specify or number the legislative powers that the Commonwealth parliament has authority to undertake.

Download a copy of the Australian Constitution from the Parliament of Australia website, www.aph.gov.au

Exclusive powers

Exclusive powers are specific law-making powers that can only be exercised by the Commonwealth parliament. Examples of exclusive powers include: currency, coinage and legal tender; weights and measures; and international trade.

Concurrent powers

Concurrent powers are specific law-making powers that are *shared* and can be exercised by both state and Commonwealth parliaments. Both state and Commonwealth parliaments are able to make laws relating to taxation. However, section 109 of the Constitution states that '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.' In simple terms, if state and Commonwealth governments make laws relating to the same area, Commonwealth law will override state law.

Residual powers

Residual powers are the powers that remained with the states after Federation. These powers are not specifically listed in the Constitution. An example of this is criminal law, which is the responsibility of each state.

Structure of parliament



Figure 1.3 Bicameral parliament

The British Westminster system of parliament is the foundation of the Australian parliamentary system at federal and state level. The main feature of the Westminster system is that it is bicameral, meaning it consists of two houses of parliament (upper and lower) and the **Crown**.



Australia's Parliament House

Commonwealth parliament

The Commonwealth parliament is a bicameral structure made up of a lower and upper house, and the Crown.

The lower house of Commonwealth parliament is often referred to as the 'People's House'.

The lower house (**House of Representatives**) is made up of 151 members, who are responsible for representing the 151 electorates throughout Australia. As such, it is also known as the 'People's House'. Each member represents an electorate that contains approximately the same size population.

The other roles of the House of Representatives include initiating a **Bill** (or making laws), providing for responsible and representative government, and scrutinising government. Another major role of the lower house is that of determining government through the majority party.



The House of Representatives (left) and the Senate (right)

The upper house (the **Senate**) contains 76 members. Each state elects 12 members, the territories two members, ensuring the interests of the states and territories are equally represented. As such, it is also referred to as the 'States' House'. The main role of the Senate is to review laws. Although most Bills are initiated in the lower house, members of the upper house may also initiate a Bill.

In order for a Bill to become law, both houses must pass it. As the government may not necessarily hold a majority in the upper house, this additional review means that for a Bill to pass it must satisfy both sides of politics.

The upper house is important as it represents the views of different regions equally, ensuring that passed laws are representative of community views and values. At federal level, this means that the interests of all states are protected.

The Crown is represented by the Governor-General, who exercises powers and functions given by the Constitution (e.g. the ability to dissolve government and bring about a new election), and acts on the advice of the ministers. The powers and roles of the Crown are listed in the Constitution.

The Governor-General has a number of roles in law-making. One role of the Crown is granting Royal assent on Bills passed by parliament. **Royal assent** means that the Crown's representative will sign the Bill, thus introducing it as law or an Act of Parliament.

Another role of the Crown in law-making is the ability to dissolve a parliament. If a parliament is not making laws in the interests of the majority of people, the Crown can dissolve parliament and bring about a new election.

Victorian parliament

The Victorian parliament is a bicameral structure made up of the Crown and an upper and lower house. The lower house (**Legislative Assembly**) consists of 88 members who are elected into parliament. They represent electorates that contain approximately an equal number of voters, so no community in the state has proportionately more representatives than another.

The upper house (**Legislative Council**) is made up of 40 members who represent the eight regions of Victoria. There are five members from each region, ensuring each electorate is fairly represented.

The Legislative Council reviews laws that have been passed in the Legislative Assembly and makes any necessary amendments. As such, it is commonly referred to as the 'House of Review'. The upper house can also initiate a Bill to parliament.

The Governor of Victoria who exercises powers and functions given by the Constitution (e.g. the ability to dissolve parliament and bring about a new election), represents the Crown.

Structural protections

Rather than draft an extensive Bill of Rights, such as in the United States, the authors of the Constitution embedded a series of mechanisms within the document aimed at protecting the rights of the Australian people. These structural protections act as a safeguard against the abuse of power and provide for 'good government'. These measures help to uphold the principles of justice: fairness, equality and access. The structural protections include representative government, responsible government and the **separation of powers**.

The upper house of Commonwealth parliament is often referred to as the 'States' House'.



Video



Go to the website of the Parliament of Victoria (www.parliament.vic.gov.au) for more information about the three bodies that make up the Victorian parliament.

The upper house of the Victorian parliament is commonly referred to as the 'House of Review'.

Structural protections act as a safeguard against abuse of power and provide for 'good government'.

Representative government

Representative government is a key foundation of democracy. Australia is known as a 'representative democracy'. Each citizen of Australia is allowed to vote for their candidate of choice, who they believe will best represent their interests. Sections 7 and 24 of the Constitution specify that both houses of federal parliament are to be chosen directly by the people.

Government is formed by the party or coalition of parties with the most seats in the lower house of parliament.

Members of parliament (MPs) are elected by the citizens of Australia through electoral voting. Voters choose the MP to represent their views in parliament. Government is determined by the political party or coalition of parties (agreement between parties to join and strengthen their position) with the support of the majority of MPs in the lower house of parliament. Ideally, the government is elected to represent the interests of the whole community. This is why the lower house of federal parliament is known as the 'House of Representatives'.

The upper house of federal parliament consists of MPs elected to represent the views of the states and territories; hence, it is commonly referred to as the 'States' House'.

Responsible government

Government is responsible to the parliament, which is responsible to the people.

Responsible government means being answerable and accountable to the parliament and, therefore, to the people. The government must act fairly and responsibly.

One way the Commonwealth Government adheres to the principle of responsible government is through public scrutiny. The public is allowed to view the parliamentary proceedings through sittings that are open. They can also ask questions on issues regarding their interests and values. Parliament is also televised and reported (online and in newspapers) and recorded in *Hansard*. Using these avenues, the public can scrutinise the operations of the parliament and the current government.

Hansard is the official record of what is said in parliament.

Commonwealth parliament also upholds the principle of responsible government through holding individual ministers (parliamentary members responsible for specific portfolios) accountable for their actions. Ministers must submit accounts for their department, to be scrutinised by other parliamentary members.

These members can ask the ministers questions regarding their area of responsibility and check their work (parliamentary scrutiny). If a minister proves to be incompetent or does not provide appropriate justifications, he/she can be forced to resign (breach of ministerial responsibility).

Separation of powers

Separation of powers is the dividing of government into different powers (executive, legislative and judicial). These divisions have unique functions and powers, ensuring a system of 'checks and balances' to prevent abuse of power. It ensures, for instance, that the people who put a policy into practice do not judge legal challenges to it. This structural protection acts as a safeguard against abuse of power by an individual or group and further aims to secure individual rights. We will revisit structural protections in Chapter 14 Rights.

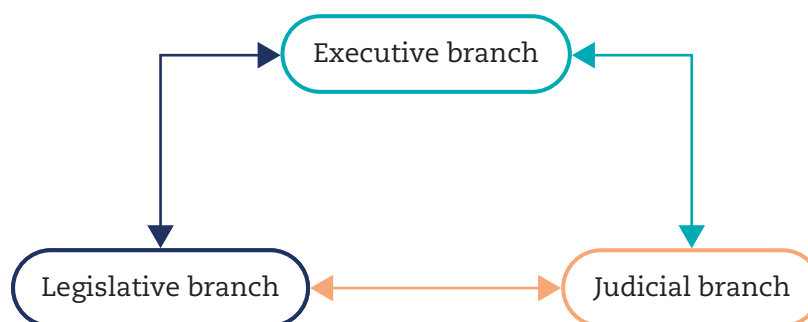


Figure 1.4 Separation of powers

Separation of powers

Branch of power	Who	Role
Legislative	Parliament (Senate, House of Representatives and Governor-General)	Make and amend law
Executive	Cabinet (Prime Minister and top ministers) and Governor-General	Put law into action
Judiciary	High Court and other federal courts	Interpret the law

In Australia, there is some overlap between the legislative and executive functions.

1.5 Sources of law

There are two main types of law in the Australian legal system: statute law (parliament-made laws) and **common law** (court-made laws).

Statute law

Most laws start off as an idea. It could come from a politician, a pressure group or individual members of society. A discussion will then be had by the political parties to decide whether this idea conforms to party policy. Further discussion and debate will occur between the parties, before **Cabinet** and Parliamentary Counsel, working in tandem, ensure that the Bill is drafted and approved before being introduced into parliament. A member of parliament or a senator who is not part of the executive may also, with the help of Parliamentary Counsel, introduce a Bill into parliament. This is called a private member's Bill.

A Bill is a proposed law.

The legislative process: how laws are made by parliament

Most Bills are initiated in the lower house. The upper house may also initiate a Bill, with the exception of a financial Bill.



Lower house

The stages in the legislative process are as follows. First, initiation and first reading – the minister responsible will request approval from the house to introduce the Bill for the first time. If permission is granted, the minister will then formally introduce the Bill and read the title. Copies of the Bill are distributed. A date will then be set for a second reading.

Second reading – the purpose of the second reading is to debate the Bill. The minister proposing the Bill states the function and purpose of the Bill, and an explanatory memorandum is handed out. In Victoria, there must be a Statement of Compatibility that addresses the Bill in relation to the *Victorian Charter of Human Rights and Responsibilities*.

A date is set for further reading, allowing for scrutiny. The opposition then returns with the shadow minister stating their intention to either support the Bill as presented, to reject it or to seek amendments to it. Further debate then takes place until a vote on the continuation of the Bill commences. This stage allows for scrutiny and long debate on the proposed Bill.

Consideration in detail (lower house)/‘Committee of the Whole’ stage (upper house) – this is an optional stage. The Bill will be considered in detail, section by section, clause by clause, and discussion and amendment may occur. After this, it will be returned to the house for a vote to determine whether the Bill will proceed.

Third reading – amendments from the committee are proposed, further amendments may be considered and the Bill is voted on.

Upper house

If the third reading vote is successful, the Bill is then passed to the upper house, where it follows the same process as it did in the lower house. If passed here, it will be forwarded to the Crown (Governor (state) or Governor-General (federal)).

Royal assent

After being approved by both houses, the responsible minister presents the Bill to the Crown for formal approval. The Crown will grant Royal assent on the advice of the Executive Council. The Bill will then be proclaimed on a date set within the Act or in the *Government Gazette*. If no date is set, the Bill will become law 28 days after Royal assent is granted.

Delegated legislation

The legislative process grants federal and state parliaments the power to pass on law-making powers to lower-level bodies such as local councils or government departments.

The main reasons for parliament handing over legislative power to a subordinate body are that parliament is restricted in its ability to create effective laws due to time constraints and lack of knowledge relating to specific government departments or local community needs.

At federal level, the Governor-General has the power to delegate **legislation** to statutory authorities, such as Australia Post; government departments such as the Department of Education; and the Executive Council, which is made up of the Governor-General, the Prime Minister and a selection of top ministers.

At state level, the Governor has the power to delegate legislation to local councils; statutory authorities, such as VicRoads; government departments, such as the Victorian Department of Education and Training; and the Executive Council, which is made up of the Governor, the Premier and a selection of top ministers.

When handing over power to make laws to bodies who have expertise in a specific area or local knowledge, parliament must pass an Act, known as an enabling Act. An enabling Act sets out the framework of legislative powers for which the subordinate body will be responsible.

Parliament may delegate or hand down law-making power to subordinate bodies such as local councils.

Activity 1.4 Classroom presentation

Local laws

Take a look at your local council website and list three areas that your local council has power to legislate on. In groups, discuss why you think laws in these areas are better dealt with by local council. Examine similarities and differences between local council laws. Share your findings in a presentation to the class.

Advantages and disadvantages of delegated legislation

Advantages

There are a number of advantages to delegated legislation. Delegated legislation allows the passing down of specific law-making powers so that they more effectively relate to the specific community, their needs and their values. For example, allowing local councils to make rules relating to their local community for issues such as parking restrictions, rubbish collection and footpath trading. Local councils help to relieve the time pressures on state parliament and are able to legislate with greater speed than state parliament. Delegated legislation also encourages greater community involvement, as community members have easier access to local councils than to state parliament. As a result, legislation is likely to be more effective, as rather than making blanket laws to encompass a variety of differing areas, subordinate authorities are able to make laws specific to particular requirements.

Disadvantages

Arguably, the greatest disadvantage of delegated legislation is that, with the exception of local councils, these subordinate bodies are not democratically elected. If the people in charge of making laws do not consult with the community, the ability to create effective laws that represent community views is hindered. Additionally, handing over power to various subordinate bodies can lead to confusion as to who is responsible for making laws and also as to when a law has changed. For example, community members can become confused because neighbouring councils can have different laws about the same area. As parliament is the supreme lawmaker, even though legislative power has been handed down, higher authority levels still have the ability to assess and change laws as necessary.

Common law

Courts and judges are vital to the law-making ability of Australia. We follow common law traditions allowing judges to do more than simply decide a case.

How laws are made: case law

Case law is developed by judges through decisions in court. When a similar case comes up, the previous case (the precedent) is applied, since it would be unfair to treat similar facts differently. Law-making is a partnership between the courts and parliament.

Common law is developed through judges' decisions in court.

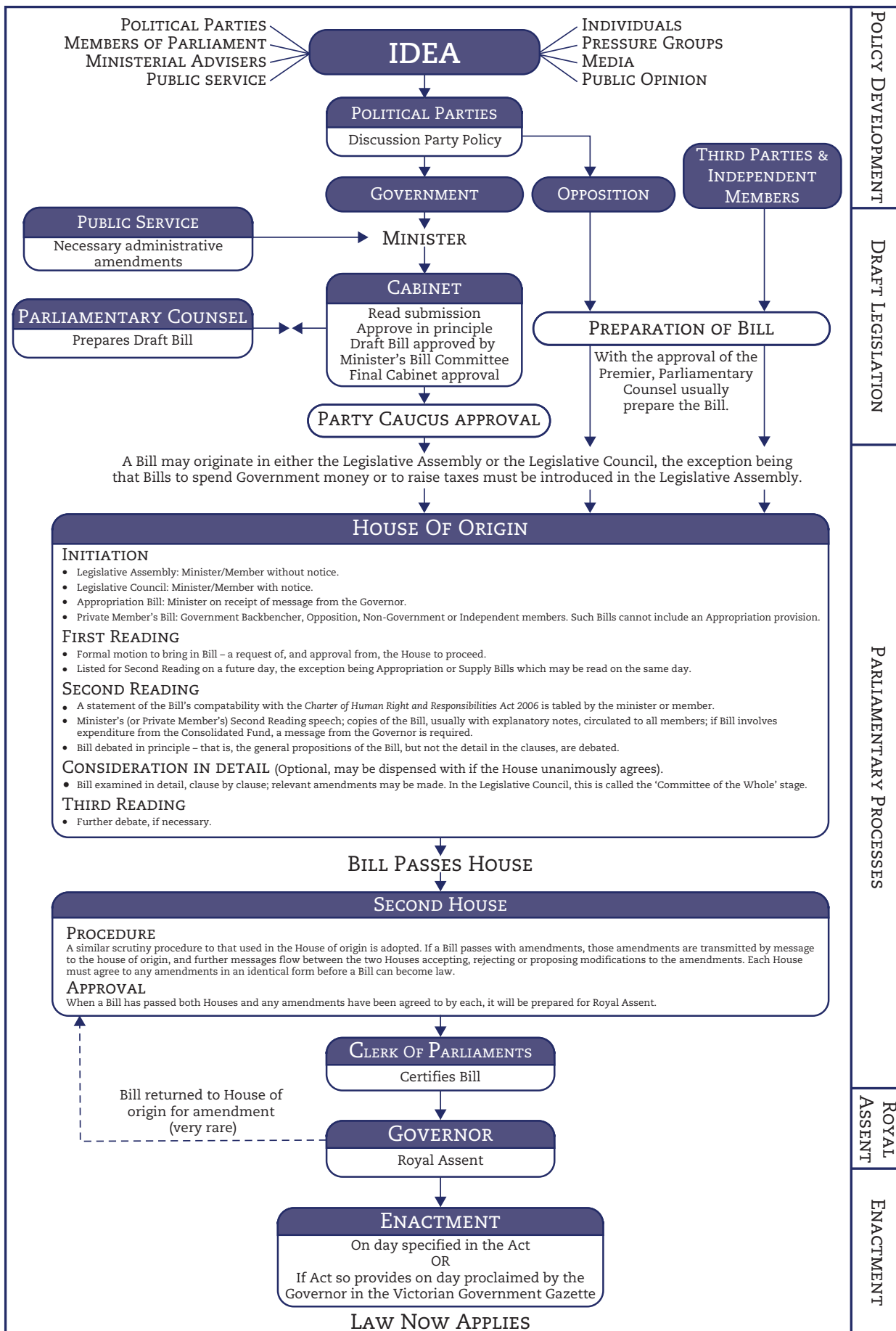
Doctrine of precedent

The **doctrine of precedent** works on the basis that 'like cases' will be treated the same. Courts that have similar issues in a case before them can follow **precedent**, allowing for a fair trial system. Precedent guides the law-making decision and is comprised of two parts.

- The first part is the **ratio decidendi** (the reason for the decision). This is the statement of legal principle that forms the binding part of the precedent.
- The second part is **stare decisis** (to stand by what has been decided); the principle that the doctrine of precedent is based on.

Obiter dictum (by the way) refers to statements made in the course of reaching a decision; however, these do not have a direct impact on the final outcome of the case. The doctrine of precedent states that judges must follow the reasons for past decisions, and the *obiter dictum* can be referred to in future cases as a source of persuasive precedent to help a judge understand the case better.

HOW A LAW IS MADE IN VICTORIA



Video

Figure 1.5 How a law is made in Victoria

Types of precedent

Precedent may be persuasive or binding.

- For **persuasive precedent**, judges are not obligated to follow the precedent but may choose to do so in their final decision. Persuasive precedent can include an *obiter dictum* statement and the decision of a lower court in the same court hierarchy.
- For **binding precedent**, judges must follow the precedent, as it is based on a case with facts that are similar and it is the decision of a superior court in the same hierarchy.

This approach allows the courts to constantly develop principles and apply the precedent to future cases, which creates consistency and fairness across cases. For example, the *Donoghue v Stevenson* [1932] All ER Rep 1 case, where a snail was found in a bottle of soft drink, established the law of negligence and created a precedent that has been used ever since.

Activity 1.5 Case study

Snail in a bottle

Research *Donoghue v Stevenson* [1932] All ER Rep 1 and complete the following tasks:

- Who was the plaintiff?
- Who was the defendant?
- Provide a brief overview of the facts of the case.
- If you purchased a bottle of soft drink for a friend, do you think that friend should be able to seek remedy for any injury or illness as a result of something being wrong with the soft drink?
- What was the principle established in the *Donoghue v Stevenson* case?
- Explain why you think this is a good or bad law.

Judges have limits placed on them in law-making, such as the position of their court in the hierarchy. Only superior courts in the hierarchy can create a precedent that becomes binding on every court below them. The type of case it is can also bind their powers. Precedent is usually only established in cases that are being appealed.

Activity 1.6 Folio exercise

Binding or persuasive?

Research the hierarchy of courts in Victoria. Complete the table below.

Original decision	Second similar case	Binding or persuasive	Reasons
Magistrates' Court (Vic)	County Court (Vic)		
Supreme Court – Trial division (Vic)	Magistrates' Court (Vic)		
Supreme Court – Trial Division (NSW)	County Court (Vic)		
Supreme Court – Court of Appeal (Vic)	Supreme Court – Trial Division (Vic)		
Supreme Court (US)	Magistrates' Court (Vic)		

Flexibility of precedents

Judges' decisions are based on judgment and do not have a specific 'equation' to follow for each case, as no two cases are exactly the same. This gives the courts some flexibility when it comes to precedent, which allows judges to keep up with our rapidly changing society.

Judges are afforded further flexibility as legal principles are based on words, which can often be debated and interpreted differently. Judges also do not always clearly state the basis

for their interpretations, allowing other courts to choose the principle for themselves. It is also possible to avoid following the precedent through reversing, overruling, disapproving and distinguishing it.

- **Reversing:** If a case is being appealed, the judge in a higher court can reverse the decision of the lower court, creating a new binding precedent that overrides the earlier precedent.
- **Overruling:** A judge of a higher court can overrule a decision of a judge in a lower court from an earlier and separate case.
- **Disapproving:** When two judges in the same court level have the same facts but reach two different decisions, these two decisions will both exist until a higher court judge decides which one is better.
- **Distinguishing:** When a judge can identify a difference in facts in the case they are hearing and can avoid using precedent because the facts are different.

Statutory interpretation

Judges may also have to use statutory interpretation to give meaning to words or terms within the Act. They may have to do this because the words in the Act are too broad and need to cover a range of situations. They must decide whether the situation applies to the Act. An example of this was the *Re Kevin* case, where a female who had undergone gender-reassignment surgery wanted to marry another female. They decided the word 'man' should be determined at the date of the marriage and he was allowed to marry her.

Giving meaning to words resolves disputes in court and can create new binding precedent for lower courts, as a *ratio decidendi* must be stated.

Impact of statutory interpretation

The immediate effect of statutory interpretation is that the particular wording or phrasing contained within an Act is given meaning, which is used to resolve the dispute before the court.

Statutory interpretation can also form a precedent, as a judge must provide reasoning (*ratio*) for why the interpretation resulted the way it did. This may form a binding precedent if the court that conducted the interpretation was a 'court of record', which means that lower courts will have to follow the interpretative decision of a higher court when interpreting the same Act.

1.6 Parliament and the courts

Parliament is the supreme lawmaker and gives courts their power.

A relationship exists between parliament and the courts as they work together to create our system of law. Parliament has sovereignty (supremacy) over the other lawmakers. Parliament, through the use of legislation, establishes courts and can override common law provided it is within parliament's constitutional rights. The High Court, which was set up through section 71 of the Constitution, enforces the Constitution.

The High Court makes sure that the Commonwealth acts within the Constitution and resolves any arguments between the Commonwealth and the states. The court's role is to apply the law to daily situations and to apply laws that the parliament creates. Courts must sometimes interpret statutes in order to make a decision. Courts give meaning to laws and can fill any holes that parliament might leave when drafting legislation.

Parliament's supremacy as lawmaker means it can abrogate or codify common law of the courts. Parliament can decide to remove common law through legislation (abrogating) but can also incorporate common law principles into legislation (codifying).

The court and law-making system is complex, but allows for the courts and parliament to work together, while giving the experts in the courts flexibility and limits when interpreting the laws created by parliament. This partnership forms our legal system and allows for a fair trial system.

Parliament creates courts through legislation

In effect, parliament gives ‘birth’ to courts. Parliament outlines what courts can and cannot do, by creating legislation that sets out clear rules by which courts must operate. Parliament can adjust the rules whenever necessary. This changing of rules is often a result of parliament perceiving a need for laws to be updated, so as to better reflect the views of the community or to enable the more effective operation of the legal system.

Legal brief 1.1

Creation of the Victorian Magistrates’ Court

In 1989, the Victorian parliament passed the *Magistrates’ Court Act 1989*, which established the Victorian Magistrates’ Court. The original legislation outlined the jurisdiction of this court; that is, setting out what type of criminal and civil cases the Victorian Magistrates’ Court is able to hear.

With parliament being the supreme lawmaker, it is able to change the law when it deems it necessary. This was seen in 2004, when parliament amended this Act to change the civil jurisdiction of the Victorian Magistrates’ Court.

The *Magistrates’ Court (Increased Civil Jurisdiction) Act 2004* was assented to on 19 October 2004.

Its purpose was to amend the *Magistrates’ Court Act 1989* so as –

- a to increase the jurisdictional limit in a civil proceeding; and
- b to increase the monetary limit for referral of small claims to arbitration.

Source: Magistrates’ Court (Increased Civil Jurisdiction) Act 2004, Act No. 68/2004

The jurisdictional limit in civil cases increased from \$40 000 to \$100 000. Additionally, there was an increase from \$5000 to \$10 000 in the claimed amount required before being referred to arbitration.

Courts interpret legislation

When legislation is not clear, courts act as interpreters to determine the intention of an Act. By interpreting the words and phrases in a statute, they do not change the actual words. They give meaning to words and phrases.

Courts’ primary function is to interpret and apply laws introduced by parliament. They may interpret the words of an Act to expand or restrict its meaning. Through interpreting a statute, the court may create precedent. An example of this can be seen in the ‘chroming case’ where the judge determined that chroming (inhaling solvents) was not ‘offensive’ behaviour under the *Summary Offences Act 1966*.

As discussed earlier in the chapter, when courts interpret statutes, the decision creates a precedent and becomes law that binds lower courts in the same hierarchy to use this interpretation in future cases. This law will remain until a similar case is heard in a higher court, or parliament intervenes and creates new legislation. Statements of a court can also influence parliament. A judge may make a *ratio decidendi* or *obiter dictum* regarding a relevant or controversial case, signifying to parliament that there is a need for change in a law.

 Go to the website of the Magistrates’ Court of Victoria (www.mcv.vic.gov.au) for more information about the functions of the Court.

Parliament can change laws created by courts

Parliament is Australia’s supreme law-making body and thus has the right to abrogate (remove or cancel) common law. An example of this is seen in the Trigwell case, where parliament chose to abrogate the decision by introducing the statute *Wrongs (Animals Straying on Highways) Act 1984*, which made livestock owners responsible for animals straying onto roads and causing accidents.

Parliament can codify laws made by courts

Parliament may also choose to codify common law. This involves incorporating common law into statute to strengthen the legal principles established in a case. The Australian parliament codified the common law involving native title (*Native Title Act 1993*) from the *Mabo and others v Queensland* (1992) 175 CLR 1 case. This is an example of courts and parliament working together in the law-making process.



High Court can rule that parliament is acting *ultra vires*

The High Court is set up as the guardian of the Constitution.

If parliament is legislating outside of its constitutional powers, the High Court may determine that it is acting *ultra vires* and declare the law invalid. A structural protection is in section 76 of the Constitution, outlining how the High Court is set up as the guardian of the Constitution, where it is able to determine if a federal or state parliament has acted *ultra vires* (outside of its Constitutional law-making powers).

1.7 Criminal law and civil law

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

Criminal law



Criminal law applies to the community as a whole, and sees the state prosecute individual community members who transgress the laws which the community has agreed to follow. In Australia, criminal law-making powers rest with the states. There is minimal difference in what is illegal in each state. All states consider murder, violence and sexual offending to be behaviour punishable by the state. Some criminal acts, such as terrorism, fall under the jurisdiction of the Commonwealth parliament, as they relate to the protection of the nation as a whole. The Director of Public Prosecutions (DPP) brings the case to court against the defendant and must prove that the defendant has broken the law. This is known as the burden of proof. The judge or jury must be satisfied beyond reasonable doubt that the defendant is guilty of the alleged crime. This is known as the standard of proof. Sanctions include imprisonment, community correction orders (CCOs) and fines. The primary aim of criminal sanctions is to punish offenders for breaking the law.

Criminal law involves the state prosecuting individual members of society.

Activity 1.7 Class debate

Pro-police or pro-youth?

Read News report 1.1 on the following page. Working in groups, mount an argument to support a response to the question: Does increased police presence at youth events help stop crime or inflame disenfranchised youth to act out?

News report 1.1

Police arrest rival teen gang members ahead of White Night festival

‘Over the course of White Night, we’re being supported by community leaders from the African community, from the Maori community and from the broader community. We will have a number of community leaders out with us on patrol Thursday, Friday and Saturday night,’ he said.

The riot at Moomba in 2016 involved scores of youths believed to be members of gangs then known as Apex and Islander 23. It is not known if members of the same gangs are involved in the current escalating tension.

‘These gangs have been with us for some time,’ Mr Hansen said.

‘They are fluid in size – they change – people come in and out of those gangs, so they morph quite a bit. They change names from time to time. There is a level of connection that occurs across social media predominantly.

‘Some of these relationships are born out of when kids are in custody.’

Mr Hansen said there would be ‘north of’ 500 officers on the ground in Melbourne’s CBD from Thursday night, in what he described as one of Victoria Police’s most ‘resource heavy’ events.

He warned people planning on causing trouble police would be waiting.

‘We aren’t scared of them, we aren’t afraid of them and if those people want to come into the city on the weekend and cause problems then ... we’ll be here waiting for you,’ he said.

‘We’re hopeful that the main players who we believe are going to cause a risk to community safety won’t be in a position to do that, through White Night,’ he said.

Police and event organisers have been developing a plan to thwart a potential riot or hostile vehicle attack since the beginning of the year, according to White Night director David Atkins.

Mr Atkins – who commended police for the arrests – said a ‘massive’ number of police officers and more than 200 event security staff will be watching for any disruptive behaviour.

Victoria Police will also launch Operation Omni on Friday and Saturday nights, giving police increased search powers in the CBD and festival area.

The powers will include increased powers to stop, search and ask for names and addresses, Mr Hansen said.

The police’s preparations for this weekend have been significant, Mr Hansen said, because of several prime time sporting events that are taking place alongside White Night, including two blockbuster AFL games at the MCG and the Boomers-USA basketball match at Marvel Stadium.

Mr Hansen said similar tactics employed by Victoria Police in the leadup to this year’s Moomba festival had been ‘really effective’, so much so that ‘we’ve deployed that model again for White Night’.

In a statement, Victoria Police told *The Age* that ‘the method of engaging and monitoring persons of interest is common practice across policing major events.’

Source: Alex Blain, Paul Sakkal and Erin Pearson, The Age, 20 August 2019

Civil law

Civil laws regulate the behaviour of private individuals.

Civil law applies to disputes between individual members of the community. If one individual feels wronged by another individual, they may attempt to resolve the matter through courts, tribunals or other forms of dispute resolution. Each party is responsible for preparing their own case and gathering their own evidence. A judge will listen to each party’s case and make an informed decision as to the outcome. The party bringing the case before the court (plaintiff) has the burden of proof and must convince the judge (or jury, if it has been requested by either party) that they have been wronged by the defendant. The standard of proof in a civil case is lower than criminal law. The judge (or jury) must be satisfied ‘on the balance of probabilities’ that the plaintiff has been wronged. Remedies include compensation and injunctions. The aim of civil remedies is to restore the plaintiff (the person who has been wronged) to their original position before the wrong had occurred.

Table 1.1 Main differences between criminal and civil law

	Criminal	Civil
Definition	Protecting community as a whole	Protecting private rights of the individual
Parties	State (DPP/police) versus individual	Individual versus individual
Transgression	Breaks law	Infringes rights of another
Outcome of trial	Guilty/innocent	Liable/not liable
Standard of proof	Beyond reasonable doubt	Balance of probabilities
Consequence	Sanctions	Remedies

News report 1.2

AFL player Toby Greene faces legal action over attack victim's PTSD

GWS Giants footballer Toby Greene is being sued over a drunken attack on a bouncer at a Melbourne bar more than five years ago that has left the victim unable to work.

Mornington man Terrence Payne was working as a security guard at Zagame's Caulfield restaurant in May 2014, when he was assaulted by Greene and a friend after they were refused service of alcohol.



Toby Greene faces legal action over a drunken attack on a bouncer.

According to a writ filed in the Victorian County Court, the brawl left Mr Payne with post-traumatic stress disorder and depression, as well as a fractured fourth finger that required surgery.

'The plaintiff was dragged down stairs, repeatedly punched and kicked, struck with a crutch, pushed to the ground, pinned on the ground, and placed in a choke-hold and/or headlock manoeuvre using legs,' the court documents show.

Greene pleaded guilty to unlawful assault in the Melbourne Magistrates' Court after a string of

other charges were dropped. No conviction was recorded.

As well as a court-imposed \$2500 fine, his club, Greater Western Sydney, imposed its own \$5000 penalty and a five-game suspension.

In a victim impact statement, the bouncer said he had suffered nightmares and believed that one more punch or kick could have killed him.

Mr Payne is alleging negligence by Greene, his co-offender Charles Haley, security company Secure Melbourne Protective Services, and Zagame Corporation.

At the time of the attack, Mr Payne was 45-years old and working full-time earning about \$47 000 a year. His writ states that he attempted to go back to work in October 2014 but had been unable to continue due to his injuries.

Mr Payne is seeking a payout for loss of income up until the age of 67, as well as medical expenses and other damages.

In his writ, Mr Payne makes 15 separate allegations of negligence against Zagame's and Secure Melbourne Protective Services.

They include failing to have a sufficient number of security staff working, failing to cut off Greene and Mr Haley from consuming alcohol and failing to provide adequate duties when he returned to work.

At the time, a magistrate said that Greene was expected to be a role model.

'Gratuitous street violence in this manner shouldn't be condoned,' the magistrate said.

Mr Payne did not want to comment when contacted by *The Age* through his lawyers.

GWS declined to make a statement. It is understood Greene believed the matter was fully dealt with in 2014.

Mr Haley, Secure Melbourne Protective Services and Zagame Corporation have been contacted for comment.

Source: Tom Cowie, *The Age*, 9 August 2019

Activity 1.8 Case study

Civil/criminal case: Toby Greene

Read News report 1.2 and identify the following:

- the parties (plaintiff and defendant) in the civil case
- the civil wrong relating to this case
- the standard of proof required in a civil case
- the civil remedy the plaintiffs are seeking (what is another civil remedy?)
- the standard of proof required in a civil trial
- the parties (prosecution and defendant) in the criminal case
- crimes the defendant was charged with
- sanctions imposed
- how the standard of proof in a criminal case differs from that in a civil case.

1.8 Victorian court hierarchy

The Victorian court system is hierarchical in structure. This means there are different levels relating to the seriousness of an offence. Less serious offences, known as summary offences, are dealt with in the Magistrates' Court, the lowest court in the hierarchy. The Magistrates' Court also hears bail applications, committal proceedings and warrant applications. Additionally, it has jurisdiction to hear civil claims up to \$100 000.

More serious criminal offences are known as indictable offences. The majority of indictable offences are heard in the County Court. The County Court has jurisdiction to hear civil cases of unlimited monetary amounts.

The Supreme Court is where only the most serious offences, such as murder and homicide related crimes and treason, are heard. It also has jurisdiction to hear civil cases of unlimited monetary amounts. The Supreme Court has two divisions: Trial Division and Court of Appeal.

Each state has their own court system, which sits under the Federal Court of the High Court of Australia.

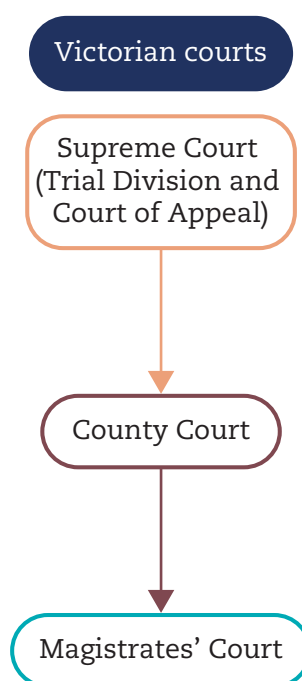


Figure 1.6 The Victorian court hierarchy

Reasons for a Victorian court hierarchy

The main reasons for a court hierarchy are specialisation, precedent, appeals, administrative convenience, time and money, expertise and experience, and minor matters determined locally.

Specialisation

The jurisdiction of each court is clearly set out, so that courts are able to deal with specific cases. This allows judges within the court to develop specialist knowledge and expertise in particular areas, so cases can be dealt with more quickly and effectively.

Precedent

The operation of the doctrine precedent would not be able to function without the existence of a court hierarchy. Precedents are established in superior courts, with the decision of the superior court binding on all courts lower in the hierarchy, which allows for consistency and fairness.

Appeals

Appeals would not be possible without the court hierarchy. Appeals allow for dissatisfied parties to have their case heard again in a superior court by a judge with specialist knowledge and expertise.

Administrative convenience

The court hierarchy allows parties to be directed to the appropriate court to resolve their case. Dividing up the ability for courts to hear certain cases ensures that relatively minor cases will be dealt with more quickly in lower courts, whereas more complex cases receive greater scrutiny and the expertise of specialised judges. This makes more efficient and effective use of limited court resources.

Time and money

A court hierarchy enables minor cases to be heard in the Magistrates' Court. This promotes timely and relatively inexpensive resolution of the majority of these matters. The Magistrates' Court hears numerous cases each day. Cases heard in the County Court and Supreme Court cost significantly more and may take months to determine.

Expertise and experience

As more serious cases are heard in higher courts, it makes sense to ensure that a more experienced or qualified judge hears these cases. Additionally, the complexity and technical issues involved in many cases and appeals allow parties to have their case adjudicated by someone with specific skills and experience in navigating such issues. Judges in higher courts have many years' experience in the legal profession before being appointed.

Minor matters determined locally

Allowing minor matters to be heard locally provides offenders with greater chances of having their matters heard close to the offender's home or where the alleged offence took place.

Key point summary

Do your notes cover all the following points?

- ❑ Individuals, laws and the legal system must work together to achieve social cohesion and protect rights.
- ❑ Principles of justice
 - Fairness
 - Equality
 - Access
- ❑ Characteristics of an effective law
 - Reflects society's values
 - Enforceable
 - Known
 - Clear and understood
 - Stable
- ❑ Parliament structures in Australia
 - The Constitution
 - Commonwealth parliament: House of Representatives, Senate, Governor-General
 - Victorian parliament: Legislative Assembly, Legislative Council, Governor
 - Structural protections: representative government, responsible government and separation of powers
- ❑ Sources of law
 - Statute law
 - The legislative process – how laws are made by parliament
 - Lower house
 - Upper house
 - Delegated legislation
 - Common law
 - Doctrine of precedent
 - Types of precedent: persuasive and binding
 - Flexibility of precedents: reversing, overruling, disapproving and distinguishing
 - Statutory interpretation
- ❑ Overview of the relationship between parliament and the courts
 - Parliament is the supreme lawmaker
 - Courts interpret legislation
 - Abrogate
 - Codify
 - *Ultra vires*
- ❑ Types of law and their distinction
 - Criminal law
 - Protecting community as a whole
 - State (DPP/police) versus individual
 - Breaks law
 - Guilty/innocent
 - Beyond reasonable doubt
 - Sanctions

- Civil law
 - Protecting private rights of individual
 - Individual versus individual
 - Infringes rights of another
 - Liable/not liable
 - Balance of probabilities
 - Remedies
- Overview of, and reasons for, the Victorian court hierarchy
 - Specialisation
 - Precedent
 - Appeals
 - Administrative convenience
 - Time and money
 - Expertise and experience
 - Minor matters determined locally

End-of-chapter questions

Revision questions

- 1 List two differences between legal and non-legal rules.
- 2 Explain why laws are needed.
- 3 What were states known as before Federation?
- 4 List the two types of legislative powers of the Commonwealth Government.
- 5 What is the difference between government and parliament?
- 6 Name the upper house and lower house of the Victorian parliament.
- 7 Name the upper house and lower house of the Commonwealth parliament.
- 8 Outline the process used by parliament to make laws.
- 9 What is the doctrine of precedent?
- 10 List the impacts of statutory interpretation.
- 11 Explain one part of the relationship between parliament and court.
- 12 What are the distinctions between civil and criminal law?
- 13 Provide an overview of the Victorian court hierarchy.

Practice exam questions

- 1 Define *stare decisis* and explain its importance in the operation of the doctrine of precedent. [3 marks]
- 2 Define *ratio decidendi* and explain how it upholds the principle of fairness. [3 marks]
- 3 Provide two reasons for the existence of a Victorian court hierarchy. [4 marks]
- 4 Outline the purpose of the second reading stage of the legislative process. [2 marks]

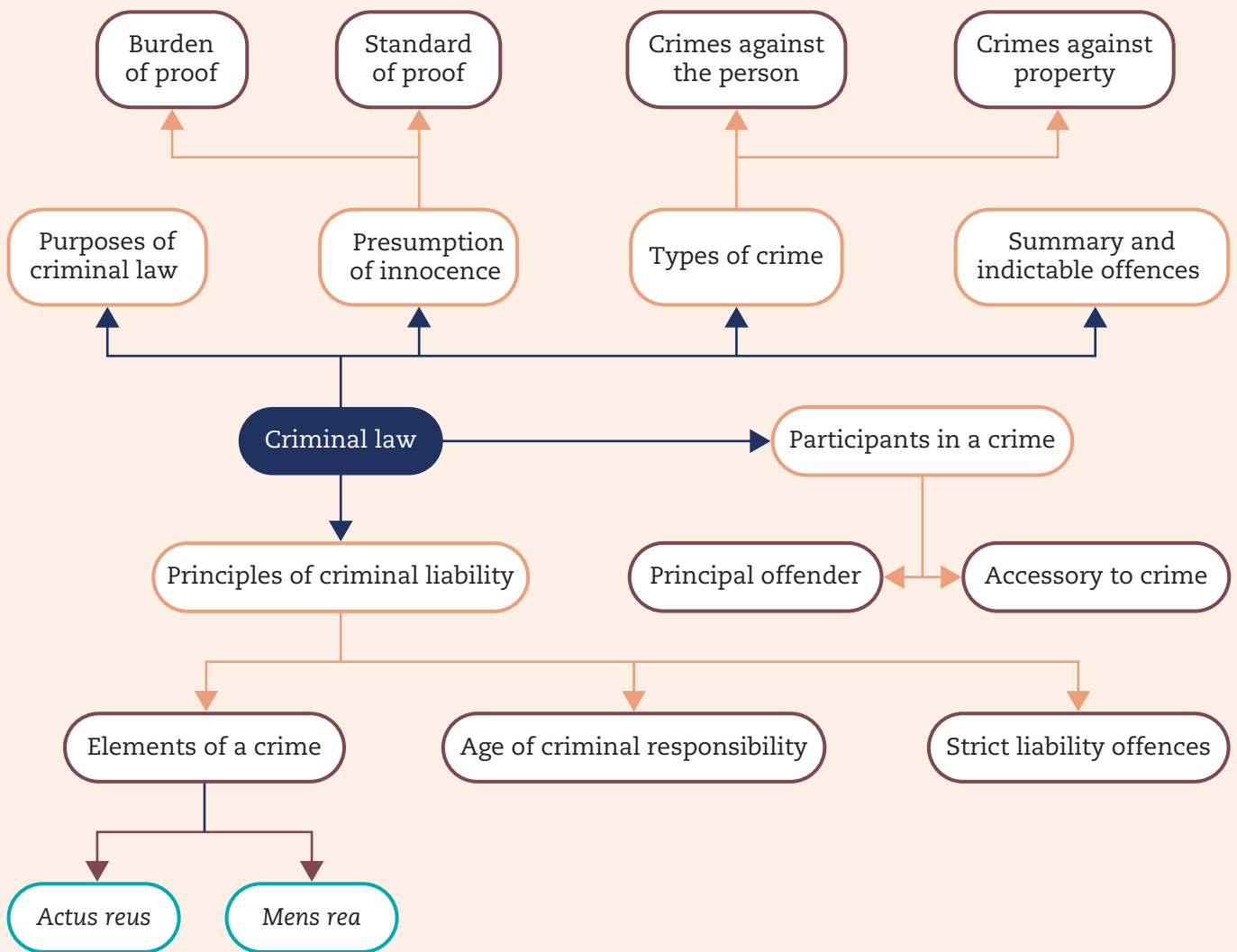
Chapter 2

Unit 1 – Area of Study 2

The presumption of innocence

When most people think about the law, the first thing that comes to mind will often be criminal law. We watch crime dramas and read murder mysteries. Our newspapers are rife with stories of murder, assault, rape and theft. Yet no matter what crimes one is accused of, the presumption of innocence sits at the heart of our criminal justice system. It guarantees that an accused is considered innocent until the charge against them has been proven beyond reasonable doubt. After reading this chapter and completing the activities, you should be able to demonstrate your knowledge of the purposes of criminal law, the presumption of innocence, key concepts of criminal law, the distinction between summary offences and indictable offences, and the different types of crime that can be committed. We will investigate the specifics of the law about crimes against the person – such as murder – and crimes against property – such as robbery and theft – including the elements of each offence and possible defences to these crimes.





Key terms

accessory a person who did not commit the crime themselves, but impedes the apprehension or prosecution of a principal offender

actus reus Latin for 'guilty act'; the action someone has taken to commit a crime

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

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

homicide the unlawful killing of another person

indictable offence a more serious criminal offence, usually heard before a judge and jury in the

County Court or Supreme Court (Trial Division)

indictable offence heard summarily an indictable offence that can be tried before a magistrate without a jury if the accused and the court agree

mens rea Latin for 'guilty mind'; the intention to commit a crime

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

principal offender the person who committed the *actus reus* of a crime, or assists in the commission of a crime

property a thing or things possessed by a person; it is divided into two categories: 'real property', which is the ownership of land, and 'personal property', which is the ownership of tangible things

sanction a penalty handed down by a court for someone found guilty of breaching a criminal law (for example, a fine or imprisonment); sometimes interchanged with 'sentence'

standard of proof the level of proof that must be reached to prove a case in court: in a criminal case, the standard of proof is 'beyond reasonable doubt'; in a civil case, the standard is 'on the balance of probabilities'

strict liability offence an offence for which the prosecution only has to prove that the accused carried out a criminal act, and does not have to prove they intended to commit that act

summary offence a less serious crime, heard and determined in the Magistrates' Court

2.1 Purposes of criminal law

The primary purposes of criminal law are to establish a code of conduct, resolve disputes and recognise individuals' rights.

One of the ways we ensure our society continues to operate in a safe and orderly way is by creating laws that make it clear which behaviours are not acceptable. The body of law that establishes which behaviours are unacceptable is called **criminal law**, and acts that are in breach of these laws are commonly known as 'crimes'.

Some of the primary purposes of criminal law are to:

- establish a code of conduct to regulate our behaviour
- create a system to resolve disputes when people are harmed
- recognise the rights of people within our society.

Criminal law keeps society safe by providing punishments for behaviours that are harmful to individuals or to our society. Without criminal law there would be no punishment for wrongdoings and society would be in chaos.

What is a crime?

A crime can be described as:

an offence punishable by the State on behalf of the general public whose standards do not permit the offending behaviour

Source: Blackstone's Australian Legal Words and Phrases Simplified, Blackstone Press, 1993

Based on this definition, we can explore four major features of crimes. Crimes are acts that are:

- against the law
- punishable
- against morality
- harmful.

Crimes are acts that are harmful, immoral, punishable and against the law.

Against the law

A crime is 'an offence', which means it is an act that is against a law. In other words, in order for an act to be a crime there has to be an existing law that makes that behaviour illegal. For example, it is a crime to commit robbery in Victoria because section 75(1) of the *Crimes Act 1958* (Vic) states that a person is guilty of robbery if they use or threaten to use force to steal something.

Punishable

A crime is an act that is 'punishable'. Crimes are punished by the State, which means if you have committed a crime you can be punished through the court system. This could involve a **sanction** such as a fine or imprisonment. This is different from breaking a non-legal rule; non-legal rules are also punishable, but not through the court system. For example, robbery is punishable by up to 15 years' imprisonment. In comparison, if you break a rule in a game of soccer (such as by committing a foul) you could still be punished, but not by the courts. You might get a red card, but would not receive a jail term.

Against morality

A crime is an act that is against morality, or, in other words, is against the 'standards' of society. Morality is the system of values a society promotes based on common beliefs about what is right or wrong. Most, if not all, modern societies value the preservation of human life. This is reflected in criminal laws that prohibit crimes such as murder and assault. Conflict can occur when societies are divided on issues of morality. Issues such as abortion, prostitution and drug use provide examples where there has been significant public debate over whether these acts should be considered crimes. Answering questions of morality is not always easy, and the answers may be different for different societies. In Australia,

for example, polygamous marriage (marriage to more than one person at the same time) is punishable by up to five years' imprisonment, but in Saudi Arabia polygamous marriage is an established and legal practice. Similarly, the values of a society can change over time. Until 1980, Victorian men could be sentenced to a maximum of 15 years in prison for committing offences related to homosexuality. These laws have since been abolished because as society's values change, so do our ideas about what behaviours should be considered criminal.

Harmful

The last major feature of a crime is that it is an act that causes harm. The most obvious way an act can cause harm is through physical injury. Offences such as murder and assault are crimes because they cause individuals to suffer physical harm. Crimes can also cause economic harm. Theft and robbery cause individuals to lose money or **property**, and suffer economic loss. Finally, a crime can cause harm to society itself; for example, pollution is a crime under Victoria's *Environmental Protection Act 1970* (Vic).

News report 2.1

Historic homosexuality convictions overturned

Society's attitudes towards same-sex relationships has changed dramatically over time, and this transformation in values has, in turn, influenced Australian law.

Until 1980, Victorian men could be sentenced to a maximum of 15 years' imprisonment for offences such as 'buggery', indecent assault on a male, and soliciting for homosexual purposes. It is thought that hundreds of these offences were reported each year. Yet in 2016, the Victorian Government issued a formal apology to those who had been convicted of these offences. Describing these laws as 'unjust' and 'nothing less than state-sanctioned homophobia', the Victorian Premier argued that parliament needed to be held formally accountable for the creation of these

laws. The apology came on the heels of changes made in 2015 to the *Sentencing Act 1991* (Vic), which provided for people convicted of these offences to have them struck from their criminal records. In 2017, the Commonwealth parliament passed the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* which legalised same-sex marriages within Australia. This Act was implemented following the results of a voluntary postal survey of all Australians, in which 61.6% of respondents supported the legalisation of same-sex marriage. The issue of same-sex relationships shows that legal change closely mirrors changes in societal values and attitudes. As society's values have become more accepting of same-sex relationships, so too have our laws.



Activity 2.1 Class discussion

Crime, morality and punishment

Consider the following situations and classify them as harmful, immoral or deserving of punishment. You may decide to place some situations into multiple categories. Discuss your answers with other members of the class.

Situations	Is it harmful?	Is it immoral?	Does it deserve punishment?	Is it a crime?
You see someone drop their wallet and you pick it up and keep it				
You see someone shoplifting and do not report it to anyone				
You receive extra change from the cashier, and do not give it back				
You eat some of the nuts in the shopping centre self-serve and do not pay for them				
You eat some of the nuts in the shopping centre self-serve, but then you pay for the rest on your way out				
You do not wait for the light at the school crossing				
You cross the road 20 metres from the school crossing				
You don't wear a seatbelt				
You assist a terminally ill person's request to help end their life				
You drink alcohol at a party while under the age of 18				
You post a cruel message on social media about somebody				
You cheat in a game of Monopoly with your family				
You cheat on a test at school				
You pretend you don't have any money to give to a homeless person				

Activity 2.2 Folio exercise

Changing the law

Read News report 2.1 and complete the following tasks:

- 1 Brainstorm a list of ways that societal values and attitudes have changed over recent decades.
- 2 Choose an area of law that has been changed by parliament or a law that people have proposed should change. Use the internet to find out more about this change or proposed change. Prepare a written report that responds to the following questions:
 - Using an example, explain why change in the law may be needed.
 - What actions have people taken to show demand for change?
 - How has parliament responded to demands for change?

2.2 Presumption of innocence

The **presumption of innocence** refers to the legal principle that a person accused of committing a crime is presumed innocent until proven guilty. The presumption of innocence is one of the fundamental principles of criminal law. Some of the major rationales behind the presumption of innocence include:

- the belief that it is better to let a guilty person walk free than to convict an innocent person
- the large imbalance between the resources available to a defendant and the comparatively larger resources available to the State
- the recognition of and respect for the importance of preserving individual liberty, dignity and autonomy.

While the Australian Constitution does not directly mention the presumption of innocence, the Court in *Carr v Western Australia* (2007) 232 CLR 138 recognised that the presumption was an essential part of receiving a fair trial, and the presumption has been inherited from the common law of England.

Burden of proof

In criminal trials, the prosecution bears the **burden of proof**, which is sometimes also called the 'onus of proof'. This means that the prosecution must prove that the defendant is guilty. The defendant does not have to prove or disprove anything. In *Sorby v The Commonwealth* (1983) 152 CLR 281, Chief Justice Gibbs described the burden of proof as 'a cardinal principle of our system of justice' and it is one of the primary ways our legal system ensures that the presumption of innocence is protected.

The burden of proof can be reversed by parliament, which means there are some circumstances in which the defendant will have the burden of proving or disproving certain facts. The circumstances in which parliament will choose to reverse the burden of proof for an offence tend to be quite limited. Further, when interpreting a law, courts will presume that parliament did not intend to reverse the burden of proof unless the law makes it very clear that that was the intention. The most common area in which state and Commonwealth parliaments have legislated to reverse the burden of proof is in drug offences.

Standard of proof

The **standard of proof** refers to the principle that the prosecution must prove the defendant guilty 'beyond reasonable doubt'. At a basic level, to be satisfied 'beyond reasonable doubt' means to be certain. Our society has decided that individual liberty and the costs of wrongly convicting a person are important enough that we should set a high standard of proof.

It is, however, difficult to precisely define what 'beyond reasonable doubt' means. In *Green v R* (1971) 126 CLR 28, the Court described the meaning of the phrase as:

A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances.

In a jury trial, judges are not allowed to explain to jurors the meaning of the phrase 'beyond reasonable doubt'. Instead, the jury must interpret it according to common sense, just like judges do.

A person accused of a crime is presumed innocent until proven guilty.

The burden of proof is on the prosecution to prove that the accused person is guilty.

The standard of proof in a criminal trial is 'beyond reasonable doubt'. This refers to how certain a judge or jury must be before convicting an accused.



Video

Legal brief 2.1

Momcilovic v The Queen (2011) 245 CLR 1

The most common area in which state and Commonwealth parliaments have legislated to reverse the burden of proof is in drug offences. The *Criminal Code Act 1995* (Cth) contains a number of provisions that have the effect of reversing the burden of proof. For example, when a defendant is found to possess more than a threshold quantity of drugs it is presumed that person intended to traffic those drugs. The defendant must then prove that they did not have the intention to traffic (sell) those drugs, which places the burden of proof on the defendant. This can have serious ramifications for a defendant, since trafficking offences carry higher penalties than possession for personal use.



The issue in *Momcilovic v The Queen* arose from a drug trafficking charge originally heard in the County Court of Victoria. Ms Vera Momcilovic was convicted of trafficking methamphetamine under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). Ms Momcilovic gave evidence that she had no knowledge of the drugs found in her apartment, and her partner admitted that the drugs were in fact his. Despite this, Ms Momcilovic was convicted because section 5 of the Act provided that a substance found on the premises of a person is deemed to be in their possession, unless they are able to prove otherwise. In other words, section 5 of the Act reversed the burden of proof so that the defendant had to disprove possession.

Ms Momcilovic appealed, arguing that section 5 of the Act was incompatible with her right to be presumed innocent under the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic). The High Court decision confirmed that parliament can choose to reverse the burden of proof, but ultimately upheld Ms Momcilovic's appeal and ordered a retrial on the basis that the County Court had misinterpreted some parts of the Act.

Activity 2.3 Structured questions

Apply your understanding

- 1 What is the presumption of innocence?
- 2 What is the difference between standard of proof and burden of proof?
- 3 Write down what 'beyond reasonable doubt' means to you. Discuss with your classmates the answers that they wrote down. Now answer the following:
 - Were your answers similar or different?
 - Explain whether you agree with leaving the definition of 'beyond reasonable doubt' to the jury's common sense.

Activity 2.4 Report

Justifying a reversed burden of proof

Read the Australian Law Reform Commission report *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129) and write a report on some of the reasons that are used to justify a reversal of the burden of proof.

Visit the website of the Australian Law Reform Commission at www.alrc.gov.au and search for the report *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129).

Activity 2.5 Class debate

Presumption of innocence

Run a class debate on one of following topics:

- It is better to let 100 guilty people escape justice than to wrongly punish even one innocent person?
- We should remove the presumption of innocence because protecting our community from criminals is more important than wrongly punishing a handful of innocent people.
- People found associating with terrorist organisations should have to prove that they did not intend to commit terrorist attacks.

Choose three speakers for and three speakers against the topic. Allow class time to research the topic. Allocate three adjudicators and use the following criteria to judge the winner of the debate.

Criteria		Speakers for			Speakers against		
		1	2	3	1	2	3
Content	Clarity of ideas						
	Strength of arguments						
	Structure						
Presentation	Voice						
	Body language						
	Timing						

2.3 Key concepts of criminal law

It is important to understand the key concepts of criminal law, which are:

- elements of a crime: *actus reus* and *mens rea*
- strict liability offences
- age of criminal responsibility.

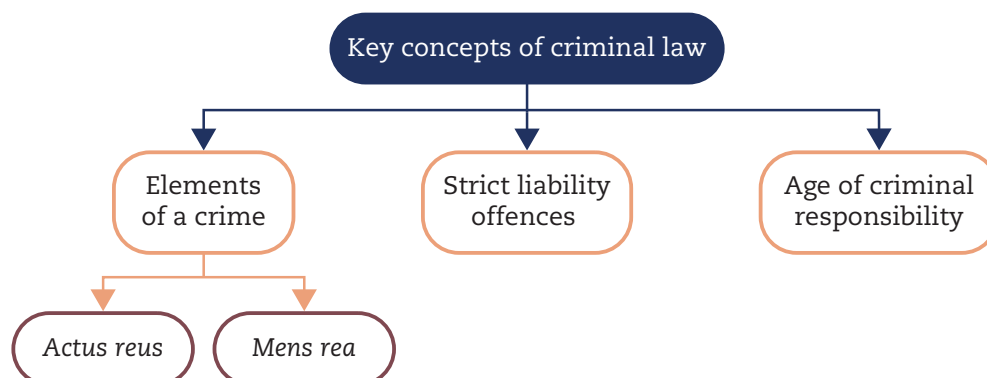


Figure 2.1 Key concepts of criminal law

Elements of a crime

Actus reus and *mens rea* refer to the guilty act and the guilty mind, respectively. Both elements need to be proven for an accused to be convicted of an offence.

There are two elements that must be proven before someone can be convicted of a crime:

- 1 **actus reus**, which is the Latin term for 'guilty act'
- 2 **mens rea**, which is the Latin term for 'guilty mind'.

These elements come from the Latin phrase '*actus non facit reum nisi mens sit rea*', which translates to 'an act does not make a person guilty unless their mind is also guilty'. In other words, for someone to be guilty of a crime they must have:

- 1 committed an act that is a crime (*actus reus* – the guilty act)
- 2 intended to commit that act (*mens rea* – the guilty mind).

If both elements can be proven, then that person is guilty of a crime. The logic behind being required to prove both *actus reus* and *mens rea* is that society usually wants to avoid punishing people for things they did not intend to do. Indeed, the requirement of *mens rea* is often considered to be one of the most fundamental protections in our criminal justice system.

Activity 2.6 Class discussion

The sin of omission: can inaction be a crime?

Consider the scenario below:

There is a runaway train heading down the railway tracks. On the tracks ahead there are five workers, who cannot see or hear the train approaching. The train is headed directly towards them. You are standing in the train depot nearby, next to a lever. If you pull this lever, the train will switch to a different track and avoid the five people. There is a person currently working on the other track. If you pull the lever, this person will certainly be hit by the train and die.

You have two options:

- 1 Do nothing, and the train kills the five people on the main track.
- 2 Pull the lever, diverting the train, where it kills one person.

Answer the following questions and discuss with other members of the class:

- 1 What decision would you make?
- 2 Brainstorm a list of possible crimes you could be accused of committing in this scenario.
- 3 If you chose to do nothing, would that be immoral? Would it be a crime?
- 4 If you chose to pull the lever, would that be immoral? Would it be a crime?



Legal brief 2.2

Fagan v Metropolitan Police Commissioner (1969) 1 QB 439

In this English case, the defendant, Mr Fagan, was being directed by a police officer to park his car. The officer instructed Mr Fagan to move his car. Mr Fagan reversed his car and accidentally drove onto the police officer's foot. The police officer, presumably in some pain, shouted at Mr Fagan to get off his foot. Instead, in an act of defiance Mr Fagan refused to move and told the police officer that he should wait. Mr Fagan was charged with assaulting a constable in execution of his duties.



The court had to decide on the question of whether the *actus reus* and the *mens rea* of a crime must occur at the same time. Mr Fagan argued that at the time he committed the *actus reus* of driving over the officer's foot, it was a complete accident and therefore there was no *mens rea* (no intent or 'guilty mind'). At the point when he did form the intent to harm the officer, he was no longer committing the *actus reus*; instead he was merely omitting (failing) to move his car. Since criminal liability for an omission is rare Mr Fagan argued that he could not be charged for assaulting the officer.

The court rejected Mr Fagan's argument and held that keeping the car on the officer's foot was not an omission, it was actually one long and continual assault. Therefore, when Mr Fagan did finally form the intention to harm the officer (the *mens rea*), he was still committing the *actus reus*.

This case confirmed two important points about *actus reus* and *mens rea*:

- An omission (failing to act) is in most circumstances not an *actus reus*, with some rare exceptions.
- The *actus reus* and the *mens rea* must occur at the same time.

Strict liability offences

Not all offences require the prosecution to prove *mens rea*. In some cases, the prosecution will only be required to show that a criminal act (*actus reus*) has taken place, and does not have to prove whether there was intent (*mens rea*) to commit that act. These types of offences are known as **strict liability offences**. The aim of strict liability offences is to set standards for behaviour. Any breach of that standard results in criminal liability, regardless of whether the person intended to do something illegal. An example of a strict liability offence is speeding. The police simply need to show that you broke the speed limit (the *actus reus*); and it does not matter whether you intended (*mens rea*) to do so. Other examples of strict liability offences include occupational health and safety offences, some regulations concerning pollution, and selling alcohol or cigarettes to minors.

Providing proof of a person's intentions can sometimes be quite difficult, which means strict liability offences make it much easier to convict a person of a crime, and provide less protection for the accused. Further, because they ignore the element of *mens rea*, it can be argued that strict liability offences punish people who are morally blameless.

As a result, strict liability offences tend to be limited to either minor offences or offences where the government wishes to maximise compliance with the law. Speeding offences, for example, are strict liability offences because it is a public safety issue for the government to ensure that everybody obeys the speed limits. Strict liability offences also have administrative advantages. They are much easier to prove, which can help the court system deal with a greater volume of offences.

Strict liability offences do not require the prosecution to prove intent.



Speeding offences are strict liability offences because it is a public safety issue.

Strict liability offences: are they justified?

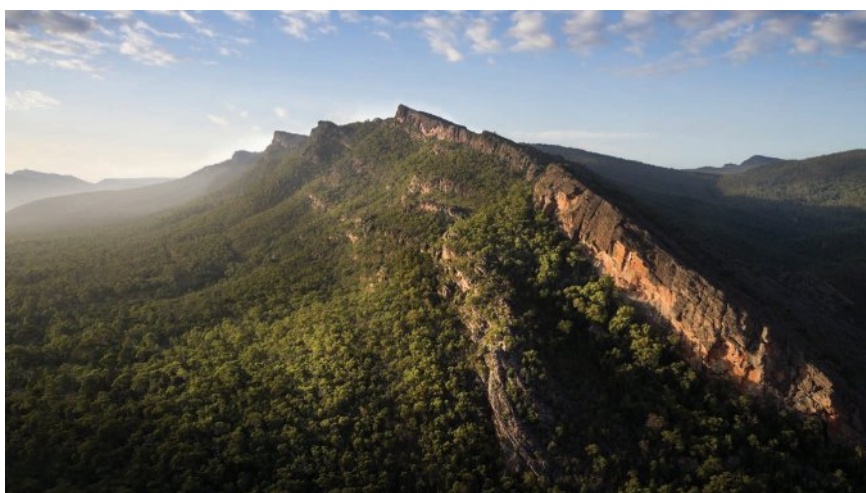
In March 2016, the Australian Law Reform Commission published a report examining Commonwealth laws that encroach on some of the rights and freedoms recognised by Australia's common law. One of the areas identified as potentially problematic was strict liability offences, where a person can be convicted without intending to do wrong or being at 'fault'.

There are a range of areas in which the Commonwealth has imposed strict liability offences, one of which is environmental protection. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the primary tool for environmental regulation and protection at the Commonwealth level. The Act contains a number of strict liability offences. The purpose of these strict liability offences is to ensure that the prosecution does not need to prove that defendants knew they were harming a protected species or operating in a protected place.

These strict liability offences were justified in three main ways:

- The Act aimed to protect matters of national environmental significance, meaning the imposition of strict liability is appropriate to ensure that people sufficiently respect that and observe the requirements of the laws.
- The requirement to prove *mens rea* in regard to issues such as whether a person knew a species was a threatened species was a substantial obstacle in successfully prosecuting these offences.
- Strict liability offences can also be justified on the basis that it prevents any arguments about whether the accused had knowledge of the law.

The Committee examining this issue accepted that in these circumstances a strict liability offence could be justified.



Activity 2.7 Structured questions

Check your understanding

- 1 What is a strict liability offence?
- 2 Who can create a strict liability offence?
- 3 Read the Australian Law Reform Commission report *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129) and complete the following tasks.
 - Create a list of strict liability offences which exist in Australia.
 - In what circumstances would strict liability offences be appropriate?
 - In what circumstances would strict liability offences be inappropriate?

Age of criminal responsibility

In Victoria, the minimum age at which you can be convicted of a crime is 10 years old. A child under the age of 10 years cannot commit a criminal offence. This is known as the ‘age of criminal responsibility’, and is determined by the *Children, Youth and Families Act 2005* (Vic). We also assume that children between the ages of 10 and 14 are incapable of committing a crime because they are not able to distinguish between right and wrong. This is known as the principle of *doli incapax*. The principle of *doli incapax* is a rebuttable presumption. We call this a rebuttable presumption because the starting position is to *presume* that children between 10 and 14 do not understand right and wrong, but this can be rebutted by evidence presented by the prosecution that the child did know the difference between right and wrong. If the prosecution can prove this, then a child between 10 and 14 can be prosecuted for committing a criminal offence. Children over 14 can be charged with crimes in the same way that adults can, but children (up to the age of 18) are dealt with by the Criminal Division of the Children’s Court.

The age of criminal responsibility is the minimum age at which a person can be convicted of a criminal offence. In Victoria this is 10 years of age.

News report 2.2

Amnesty International Australia says Australia’s breach of international standards on criminal responsibility age is ‘taking its toll’ on Indigenous children

In the early hours of the morning on 27 January 2016, an 11-year old Perth boy was involved in a fatal mob attack in Perth’s city centre. The boy was subsequently charged with the murder of a 26-year old man who died in the attack. He is the youngest known person in Australia’s recorded history to have been charged with murder.

Nyoongar elder, Ben Taylor, says that children are turning to alcohol and drugs in response to losing their culture. ‘There are scars, they’re scars of the White Australia policy, of being torn from your mother’s arms,’ the 76-year old says.

The 11-year old boy was eventually convicted of manslaughter, and sentenced to four years detention with the opportunity for early supervised parole. Two years into his sentence, the boy was released in February 2018. Just seven months after that, he was arrested after stealing a BMW and being involved in a high-speed police chase. The now 15-year old boy’s lawyer told the court that the offending was influenced by the boy’s lack of stable housing

or schooling, and the influence of the boy’s older cousins.

The case raises complex questions surrounding the age of criminal responsibility, the treatment of children within our justice system, and the role imprisonment in cases involving child offenders. Some question whether imprisonment is the right choice for young offenders, or whether it simply exacerbates problems that leads to offending in the first place.

Call to raise the age of criminal responsibility

In Australia, children can be held criminally responsible for their actions beginning at the age of 10. Australia has often been criticised for setting this age too low. The UN Committee on the Rights of the Child advised in a 2007 report that ‘a minimum age of criminal responsibility below the age of 12 years is considered by the committee not to be internationally acceptable’. A 2017 report by the Royal Commission into the Protection and Detention of Children in the

Northern Territory recommended raising the age of criminal responsibility to 12 and only allowing children under 14 years to be detained for serious crimes. Amnesty International Australia argues that the age of criminal responsibility should rise from age 10 to 12, in line with research on the brain development of adolescents. 'Australia is out of line with international standards in holding children as young as 10 criminally responsible for their actions,' it says. Amnesty says this particular case is 'terribly sad', and 'devastating for the victim's loved ones'. But even 'in a case as difficult as this', it believes international standards must be upheld. 'The case of the 11-year old boy in Western Australia is no exception. As a child under the age of 12 he should not be held criminally responsible, but Australia's out-of-step laws dictate that he will be.'

Calls for change ignored

Governments in all jurisdictions of Australia have ignored calls for change to the age of criminal responsibility. In response to this case, Western Australia Attorney-General Michael Mischin said that '... a child under the age of 14 years is not criminally responsible unless it can be proved beyond reasonable doubt that at the time of the alleged offence the accused child had the capacity to know that he or she ought not do the act or make the omission giving rise to the offence. In short, the law already takes into account the accused child's level of maturity and intellectual development.'



Legal and advocacy group members hold a protest with a replica child's prison cell on the steps of Parliament House in Melbourne on 30 November 2017.

Activity 2.8 Structured questions

Apply your understanding

Read News report 2.2 and complete the following tasks:

- 1 Explain what the 'age of criminal responsibility' means.
- 2 What is the principle of *doli incapax*, and why does our legal system apply this principle?
- 3 In what circumstances can a child between 10 and 14 years of age be convicted of a criminal offence?
- 4 Write an argument for or against raising the age of criminal responsibility to 12 years. Discuss your response with your classmates.

2.4 Types of crime

The term 'crime' can encompass a wide range of offences. Broadly speaking, criminal offences can be divided into two categories:

- 1 crimes against the person
- 2 crimes against property.

Distinction between crimes against the person and crimes against property

Crimes against the person involve physical harm to an individual or threats to cause harm. The most common crimes against the person include **homicide**, assault and sexual offences. Crimes against property involve taking or damaging a person's property. Some of the most common crimes against property include theft, property damage and burglary. Sometimes, the same act can be both a crime against the person as well as a crime against property. For example, robbery involves taking property from another person (a crime against property) but it also involves the use or threat of violence (a crime against the person).

Crimes against the person involve physical harm or threats of harm, whereas crimes against property involve taking or destroying property.

2.5 Summary offences and indictable offences

One way that crimes can be categorised is according to their severity, with less serious crimes being known as **summary offences** and more serious crimes being known as **indictable offences**.

Summary offences

A summary offence is a criminal offence that can be heard in the Magistrates' Court by a magistrate sitting alone, rather than by a judge and jury. A summary offence can even be heard in the absence of the accused. This means the defendant can be convicted even if they do not attend their court hearing. Many summary offences are found in the *Summary Offences Act 1966* (Vic). They are typically considered to be less serious offences such as:

- traffic offences (speeding, drink driving)
- offensive behaviour (disorderly conduct, public drunkenness)
- property damage (graffiti).

Although summary offences are considered less serious than indictable offences, and therefore attract less serious sanctions, the consequences can still be quite severe.

Under the *Sentencing Act 1991* (Vic), the maximum term of imprisonment for a summary offence is two years, but the magistrate could also choose to impose fines or a community correction order, as well as a variety of other sanctions.

Summary offences are less serious crimes heard by a magistrate.

Indictable offences

An indictable offence is a criminal offence heard in the County Court or Supreme Court by a judge and jury. Indictable offences are serious offences such as murder, rape, theft and robbery. Indictable offences cannot be heard in the absence of the accused. Further, section 80 of the Constitution guarantees that indictable offences shall be heard by a jury. These greater protections are to ensure that the defendant is treated fairly, since there are more serious sanctions available for indictable offences. The maximum term of imprisonment available for murder, for example, is life in prison.

Indictable offences are serious crimes heard by a judge and a jury.

Indictable offences heard summarily

Indictable offences heard summarily are serious offences that, with the consent of the accused, can be heard in the Magistrates' Court. For example, Schedule 2 of the *Criminal Procedure Act 2009* (Vic) allows theft to be heard summarily if the value of what is stolen does not exceed \$100 000. It can be beneficial for an accused to consent to an indictable offence being heard summarily, since the sanctions available in the Magistrates' Court are much less serious.

Activity 2.9 Structured questions

Check your understanding

- 1 What is the difference between a summary offence and an indictable offence?
- 2 Why would an offender choose to have an indictable offence heard summarily?
- 3 Distinguish between crimes against the person and crimes against property, using an example of each.
- 4 Fill out the following table:

Crime	Is this crime a summary offence or indictable offence?	Is this a crime against the person or crime against property?
Theft		
Murder		
Manslaughter		
Robbery		
Graffiti		
Rape		
Assault		

2.6 Participants in a crime

The possible participants in a crime can be divided into **principal offenders** and **accessories**.

Principal offender

The principal offender is the person who commits the *actus reus* of the crime. For example, in the case of a bank robbery, the person who actually took the money would be the principal offender. It is also possible to become a principal offender if you assist, encourage or direct the offence. For example, a person who stayed outside the bank and acted as a lookout could still be charged as a principal offender because they assisted in the offence.

A principal offender is a person who committed, assisted or encouraged the criminal offence.

Accessory to crime

An accessory is a person who impedes the apprehension, prosecution, conviction or punishment of a principal offender. In other words, if someone else commits a crime, you could be an accessory if you try to prevent them from facing justice. For example, if a person knowingly hides one of the bank robbers from a police search, they could become an accessory. You can only be charged as an accessory to a crime if the principal offender committed a serious indictable offence punishable by more than five years' imprisonment.

An accessory is a person who impedes the apprehension, prosecution or conviction of a principal offender.



Activity 2.10 Case studies

Types of offenders

In each of the following case studies, identify the principal offender and the accessory.

Case A

Nick and Harmeem rob a bank, while Lauren waits outside in the getaway car. Once they escape, Nick's mother offers to hide them while the police search.

Case B

Juliana has escaped from jail after being charged with drug trafficking. Her friend Zan refuses to let Juliana hide in his house. When the police interview Zan later, however, he never mentions seeing Juliana.

Case C

Sarah steals a pair of jeans from her favourite store, then posts on Facebook to all her friends about how easy it was to get away with.

Case D

Kelly pays a nine-year old child to egg the neighbour's house.

Key point summary

Do your notes cover all the following points?

- ❑ The purposes of criminal law
 - Establishing a code of conduct
 - Creating a system to resolve disputes
 - Recognising individuals' rights
- ❑ What is a crime?
 - Crimes are acts which are characterised as:
 - against the law
 - punishable
 - immoral
 - harmful.
- ❑ The presumption of innocence
 - A person accused of a crime is presumed innocent until proven guilty.
 - The burden of proof is on the prosecution to prove that the accused is guilty.
 - The standard of proof in a criminal trial is 'beyond reasonable doubt'. This refers to how certain a judge or jury must be before convicting an accused.
- ❑ Key concepts of criminal law
 - Elements of a crime
 - *Actus reus* is the criminal act associated with an offence.
 - *Mens rea* is the guilty mind or intent associated with an offence.
 - Both *actus reus* and *mens rea* must be proven for an accused to be convicted of an offence.
 - Strict liability offences do not require the prosecution to prove *mens rea* (intent to commit the crime).
 - The age of criminal responsibility is the minimum age at which a person can be convicted of a criminal offence. In Victoria this is 10 years of age. Children younger than this are considered incapable of understanding or committing a crime.
- ❑ Types of crime
 - Crimes against the person involve physical harm or threats of harm.
 - Some of the most common crimes against the person are homicide, assault and sexual offences.
 - Crimes against property involve the taking or destruction of property.
 - Some of the most common crimes against property are theft, burglary and property damage.
- ❑ Difference between summary and indictable offences
 - Summary offences are less serious crimes heard by a magistrate.
 - Indictable offences are serious crimes heard by a judge and a jury.
- ❑ Participants in a crime
 - A principal offender is a person who committed, assisted or encouraged the criminal offence.
 - An accessory is a person who impedes the apprehension, prosecution or conviction of a principal offender.

End-of-chapter questions

Revision questions

- 1 Explain the primary purposes of criminal law.
- 2 Explain the characteristics of a crime.
- 3 Why is the presumption of innocence considered to be a critical principle of criminal law?
- 4 What are the elements of a crime?
- 5 Use an example to explain the meaning of 'strict liability offence'.
- 6 Explain the difference between crimes against the property and crimes against the person.
- 7 Explain the difference between a summary offence, an indictable offence, and an indictable offence heard summarily. Provide an example of each type of offence.
- 8 Distinguish between a principal offender and an accessory.

Practice exam questions

- 1 Define the meaning of 'crime'. [1 mark]
- 2 Explain the difference between crimes against the person and crimes against property. Provide an example of each to show the differences. [3 marks]
- 3 Distinguish between a summary offence, an indictable offence and an indictable offence heard summarily. Provide an example of each type of offence to support your answer. [6 marks]
- 4 Larry and George are involved in a fight at the local pub. George says that he was minding his own business when Larry hit him in the back of the head with a pool cue. Larry claims he tripped over and that the blow was accidental. Police arrive on the scene and arrest Larry for assault. Larry's friend Jerry witnessed the whole incident but when police later question Jerry, he lies about being at the pub that night.
 - a Explain the two elements of a crime. Provide an example of each in this case. [4 marks]
 - b Is Jerry a principal offender or an accessory? Justify your response. [2 marks]
 - c The main purpose of criminal law is to create a code of conduct that regulates behaviour, ensures order and protects the community. To what extent does the law against assault achieve these purposes in this case? [5 marks]

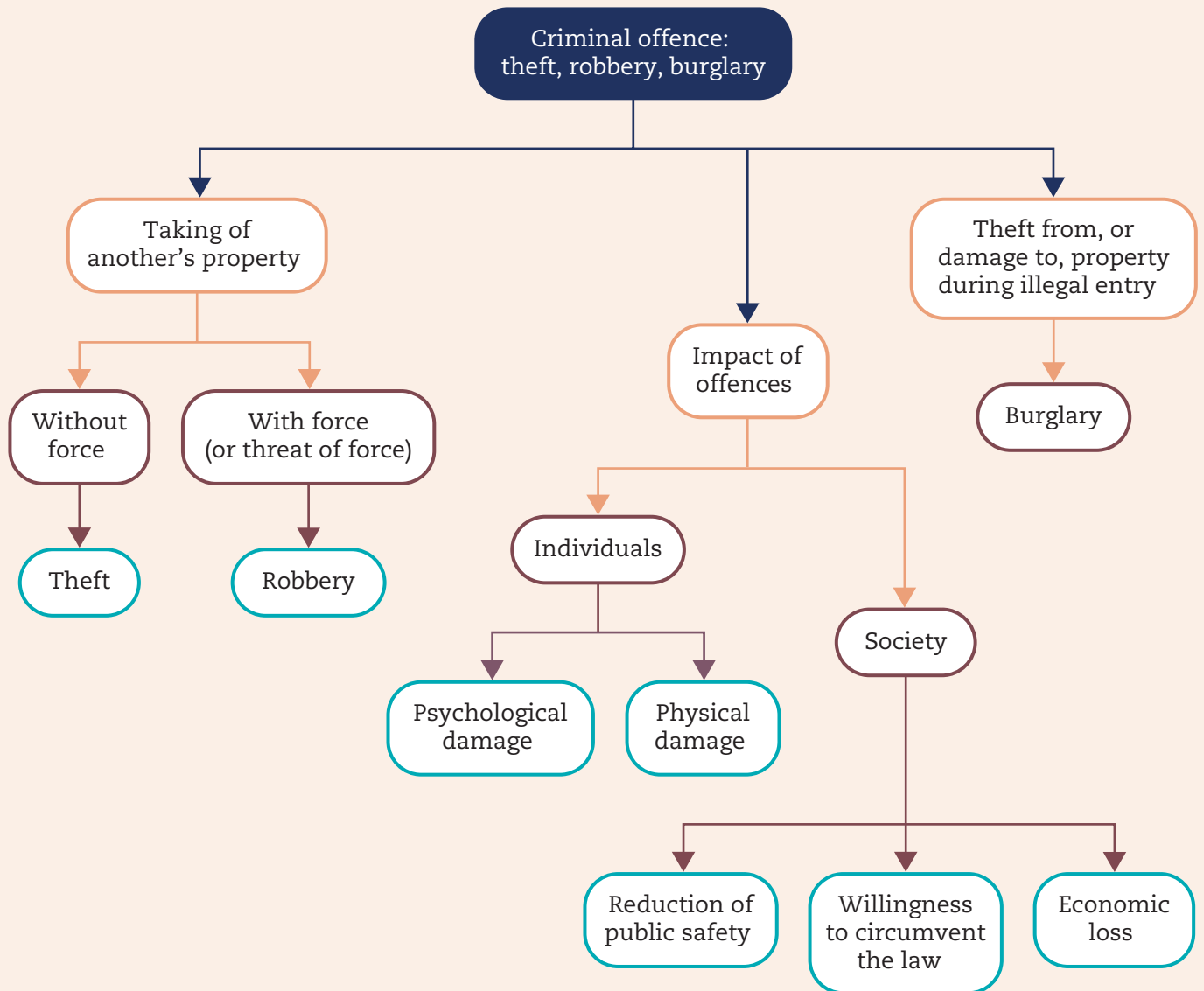
Chapter 3

Unit 1 – Area of Study 2

A criminal offence: theft, robbery and burglary

The offence of theft causes significant anxiety in our community due to both its impact on our personal safety and the way it affects the property we value – sometimes because of its economic value and other times because of its sentimental value. But theft is not the only offence that can lead to someone being dispossessed of their property. This chapter will explore the elements of and defences to theft and compare these with those for robbery and burglary, two other key offences against property. It will discuss the relationship between statute law and common law in relation to crimes against property. It will then examine the significance of this area of crime by looking at recent trends and statistics in Victoria and one other jurisdiction. Finally, we will reflect on how these crimes can affect society as a whole as well as individuals.





Key terms

armed robbery the use of a firearm or offensive weapon when carrying out a robbery

burglary unapproved entry into a building, or part of a building, that involves stolen property, damage or assault

common law law developed in the courts; also known as case law or judge-made law

possession occupation or control of a piece of property

proprietary owned by a private individual or business under a trademark or patent

retention the act of retaining

robbery the taking of another person's property via the use of force or threat of force

statute a law passed by parliament; legislation

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

theft dishonestly appropriating property belonging to another person with the intention of permanently depriving the person of the property

3.1 Elements of the offence

There are key elements of **theft**, **robbery** and **burglary**. The following definitions are based on the *Crimes Act 1958* (Vic) and subsequent amendments.

Theft

Essentially there are three key elements required to prove theft:

- 1 the accused acquired property belonging to another person
- 2 the accused did so with the intention of permanently depriving the other person of their property
- 3 there is an element of dishonesty to the accused's conduct.

As the burden of proof rests upon the prosecution, it is their job to prove that all three of these elements are proven beyond a reasonable doubt.

Potential sanction

Theft is a level 5 offence and may result in a maximum 10 years' imprisonment.

Robbery

Robbery involves the taking of another person's property with the use of force or threat of force.



The key factor that distinguishes theft from robbery is that robbery involves the threat or use of force.

More specifically, a person is guilty of robbery if they steal, and immediately before or at the time of doing so, and in order to do so, they use force on any person or put, or seek to put, any person in fear that they or another person will be then and there subjected to force.

While robbery is a crime against a person in the sense that the assailant directly confronts – and in some instances assaults – the victim, it is also a crime against property as one of the key objectives is the acquisition of the victim's property.

Armed robbery

Armed robbery is when, in the act of conducting a robbery, the offender uses a firearm or other offensive weapon.

Potential sanction

Robbery is a level 4 offence and may result in a maximum sentence of 15 years. Armed robbery is a level 2 offence and may result in a maximum sentence of 25 years.

Burglary

Burglary involves unapproved entry into a building or part of a building. The accused, in such circumstances, is considered a trespasser. A person may also be accused of burglary if they have:

- stolen property from a building or part of a building
- damaged the property or a part of the property
- committed an offence punishable by imprisonment of five years or more involving an assault on a person inside the building or in a part of the building.

The prosecution does not need to prove that the accused made a forced entry into the building. Evidence that they were in the building is sufficient. Furthermore, the offence of burglary is applicable also to vehicles and vessels when those vehicles and vessels are the person's source of habitation even when the person is not, at the time of the offence, present. An aggravated burglary is a burglary committed with an aggravating element, such as a firearm, explosives, or imitations of firearms or explosives, or if the burglar(s) knew or should have known that someone was present in the building.



Potential sanction

A person guilty of burglary is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum). A person guilty of aggravated burglary is liable to a maximum prison sentence of 25 years.

Rights protected by crimes against property

Why do we have specific offences concerning the movement of property? What do such laws seek to achieve? As with any law, the aim of legislators is to protect the rights of the community as well as the individuals who make up the community. Laws seek to regulate the behaviour of those who live in society so as to ensure social stability and enhance living conditions for all. Below are some of the particular rights protected.

Property

The offences examined in this chapter ultimately seek to protect people's right to enjoy their property free of trespass. Property is something that belongs to a person, group or company. It can include items such as land, buildings, machines, cars and electrical products, and also luxury items such as jewellery, clothing and cash.

Crimes such as theft, burglary and robbery ensure that people can purchase items and use them as they please without fear that someone will dispossess them of such use. They provide clear guidelines for when property can and cannot be transferred or taken and, thus, serve to deter potential offenders.



Personal safety

Crimes by their very nature are undesirable experiences. Crimes against property are no exception. Crimes such as robbery and armed robbery, in particular, can have enormous detrimental consequences for victims due to the experience of force or threat of force against them. Theft and burglary, too, leave victims feeling vulnerable and powerless.

Therefore, laws about property serve to protect people's rights to feel safe at home, at work, and in other public and private places.

Activity 3.1 Structured questions

Rights protected by crimes against property

- 1 Why do we have crimes against property?
- 2 Outline the rights protected by crimes against property.
- 3 Explain why it is important to respond quickly to offences such as theft, robbery and burglary.

Legal brief 3.1

Convenience store crime

In February 2019, two men entered the convenience store at approximately midnight. They then proceeded to produce a gun before stealing the alcohol and fleeing the scene.

Police released CCTV images of the men in the hope that this would assist with their investigation.



Activity 3.2 Case study

Convenience store crime

Read Legal brief 3.1 and complete the following tasks.

- 1 Identify the rights affected in this scenario.
- 2 Why is it important that the men be found and processed through the justice system?

3.2 Defences

A number of possible defences may be used to the offence of theft, robbery and burglary.

Theft

The following may be used as defences to the offence of theft:

- that the accused never actually took **possession** of the property
- that the property allegedly stolen was not actually 'property' in and of itself
- that the accused did not take the property with the intention of depriving the victim permanently of said property
- that the accused believed they had a legal right to the property.

The defence utilised will ultimately depend on the details of the particular case. The accused may use one or a combination of the defences listed above. The accused may also seek to dispute the accuracy of the facts presented by the prosecution.

Robbery

The accused may use a range of defences in response to robbery charges:

- *Mistaken identity*: The accused may argue that CCTV footage or witness testimony placing them at the scene of the crime is not accurate and that they actually depict another person. To corroborate this they may also present evidence that supports an alibi; that is, a competing explanation of their whereabouts. This may not be necessary though. Remember, it is the responsibility of the prosecution to prove beyond a reasonable doubt that the accused is indeed the person placed at the scene of the crime.
- *Mental impairment*: Those suffering from certain mental illnesses or disabilities are, to an extent, believed to possess a slightly diminished *mens rea*. They are seen as not necessarily being able to make as reasonable decisions as those without such impairments. These conditions need to be verified by an expert witness.
- *Duress*: If the accused can prove that they were coerced into carrying out the crime, due to a reasonable and honest belief that their life was at stake, they may be able to use the defence of duress.
- *Self-defence*: The defence of self-defence may be more difficult to utilise in response to the offence of robbery, as opposed to offences such as murder and assault, as it is difficult to prove that in trying to defend oneself a person needed to dispossess another person of their property – unless, of course, that person's property was some form of weapon. However, it will ultimately depend on the particulars of the case. The accused may argue that onlookers misunderstood the scenario or its context.
- *Factual dispute*: The accused may also argue that there is a contest over who actually owns the property or that force was never actually utilised.

Burglary

Often, with burglary, the defence/s used by the accused will depend on the circumstances unique to their case. During their case, the accused may:

- argue that they did not possess the requisite intent at the time of entry into the building (or part thereof) to steal property, damage property or assault persons within
- contend that the items in their possession when interviewed or arrested by police were actually their own and not from the building of concern
- argue that there was a case of mistaken identity and that they were not, in fact, ever present at the building.

Activity 3.3 Structured questions

Key elements and possible defences

- 1 Identify the key elements of theft.
- 2 What needs to be proven in order to convict an accused of burglary?
- 3 Define the term 'robbery'.
- 4 Distinguish between robbery and armed robbery.
- 5 Outline one potential defence for theft, burglary and robbery.
- 6 Consider whether a crime has occurred in the following scenarios. If so, identify the type of offence involved and a potential defence the accused might use. Try to utilise legal terminology such as *mens rea* and *actus rea* in your response.
 - a Amanda is a builder who stores her tools on the back of her vehicle. Upon returning to her vehicle at the end of a long work day, Amanda discovers that the tool box storing her tools has been forcibly removed.

- b Toby, aged 9, received a new drone as his Christmas present. Desperately wanting to test the capabilities of his gift, he decided to fly his drone over his neighbour's fence and take a sausage from the, at the time, unsupervised barbeque.
- c After finishing her last exam, Sarah decided to visit her friend Jessica at her home. However, when she arrived, no one was at home. Since they're good friends, Sarah decided to go around and enter the house via the back door and simply wait for Jessica to arrive home. Unfortunately for Sarah, though, she tripped an alarm and was arrested by the police, who responded after being called by concerned neighbours.
- d Two men dress as police and then enter a jewellery store in Melbourne's CBD. They take several expensive items from the shelves and then leave, arguing with the employees that they require the items as evidence for an ongoing investigation.
- e Tina borrows Javier's snowboard and skis but forgets to give them back. It has been two years since Tina first acquired them.
- f A group of four becomes bored during their dinner at a local takeaway store. They decide to cross the counter and begin impersonating the workers. They take food from the warmer and process transactions with customers while the timid employees struggle to react.
- g Chris finds a bicycle on the side of the road. He notices a lady walking away and asks her why she is abandoning it. The woman explains that the bicycle is broken. Chris explains to her that it could be easily fixed but she is not interested. Chris takes the bicycle home, fixes it, and then advertises it online. When Chris meets with a prospective buyer, though, he is arrested by an undercover policeman who proceeds to accuse him of stealing the bicycle.

3.3 Role of statute law and common law

The definitions of theft, burglary and robbery provided in the previous section are based on the *Crimes Act 1958* (Vic) and subsequent amendments. That is, they are based on statute law. However, as has been discussed in previous chapters, sometimes the facts presented in certain cases fail to match perfectly with the definitions in the **statute**. Thus, it is the responsibility of judges to interpret the law and consider what lawmakers in parliament had in mind when the Act was conceived. This is known as **statutory interpretation**.

Statutory interpretation is a pivotal part of the role of a judge. When the meanings of particular words are ambiguous, disputed or believed to have changed over time, judges need to make decisions about how such words should be interpreted. The reason for the judge's final decision on a case is known as the *ratio decidendi* and this will set either a persuasive or binding precedent – depending on the court's level in the court hierarchy – which may or must be followed by other judges.

When a judge is obliged to follow the precedent, it is referred to as *stare decisis*. If a precedent is established and then changed by a higher court (as a result of an appeal), this is known as reversal. A court may, however, change the precedent at a later point during a different case. If this occurs, it is referred to as overrule. This form of law-making is known as court made law or **common law**.

Does this mean that courts are the more important lawmakers? In short, no. It is important to remember that parliament is the ultimate lawmaker. If the parliament is unsatisfied with a court's interpretation of a statute, it can pass amendments that abrogate the ruling of the court. However, sometimes the parliament may be influenced by the courts. Ministers may find parts or all of a judge's *ratio decidendi* or *obiter dictum* influential and when passing new legislation may use the judge's words to help write the new Act. Thus, there exists a relationship between these two law-making powers.

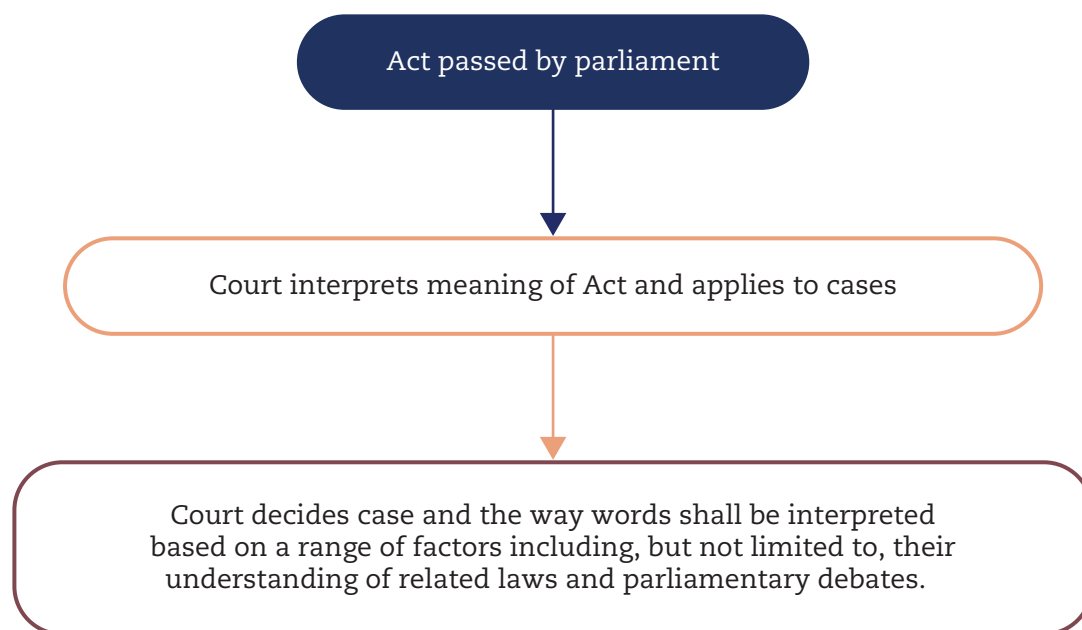


Figure 3.1 Passing a law

Crimes against property

One of the key elements of theft concerns the accused acquiring another's 'property'. There may, however, be conflict over what the term 'property' refers to and whether or not certain items can be considered as property.

The cases of *Doodeward v Spence* (1908) 6 CLR 406 and *Estate of the late Mark Edwards* [2011] NSWSC 478, for example, challenge typical notions of what is considered property.

Legal brief 3.2

Doodeward v Spence (1908) 6 CLR 406: Right over deceased body

In this somewhat bizarre case, a Dr Donoghue delivered a stillborn baby with two heads in 1868. Intrigued by the discovery, he decided to preserve the baby in a bottle stored in his surgery. After Dr Donoghue passed away in 1870, the baby was sold at auction and eventually came into the possession of Doodeward. Doodeward exhibited the baby for commercial gain until a police officer, Spence, arrested him and seized the baby. Doodeward, however, brought an action for repossession of the bottle and the body in the High Court, which ultimately decided in his favour. The decision of the High Court in this instance meant that one could establish a **proprietary** right over a deceased body:

When a person has by the lawful exercise of work or skill

so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its **retention** under the particular circumstances.

Since, in this instance, the corpse was not 'awaiting burial' and there was nothing in particular preventing its 'retention', Doodeward could indeed retake possession.

Legal brief 3.3

Re Edwards [2011] NSWSC 478: Right over a deceased man's sperm

This is a case in NSW law and concerns whether a woman cannot only require medical staff to remove sperm from her dead male partner, but whether she is justified in terms of law and international human rights to use it to create children.

In this case, the deceased, Mark Edwards, had been happily married to his wife Jocelyn Edwards and had intended to have children with her. On Valentine's Day in 2009, he had informed her that if anything happened to him – he had been diagnosed with cancer – he wanted a part of him to be with her in the form of a baby. On 5 August 2010, Mr Edwards died in a workplace accident. Unfortunately, Mr Edwards had passed away before he could sign the IVF consent forms. Thus, there was no written evidence of his consent to the IVF procedure. However, under court order, the sperm was still retrieved from the body and cryopreserved until further order.

With the support of Mr Edwards' family, Ms Edwards filed a notice before Hulme J in September 2010 that the sperm held in storage be released so that it could be used



for the purposes of assisting reproduction technology.

Using the decision in the *Doodeward* case, Hulme J decided that, with some conditions, the extraction procedure could give rise to a subsequent proprietary right in the sperm.

Since this case took place outside Victoria, it is important to note that it therefore acts only as a persuasive precedent. However, it is a very important and influential one. Many states in Australia, including Victoria, have laws and guidelines which require clearly expressed and witnessed consent for the appropriation of sperm but do not specify detailed consent requirements for sperm extracted from deceased persons. Thus, the reasons given for the judgment in this case could be drawn upon again should a similar case arise in Victoria.

Activity 3.4 Structured questions

Understanding statute law and common law

- 1 In your own words, describe the difference between a statute and statutory interpretation.
- 2 Explain why statutory interpretation is necessary.
- 3 How might common law influence lawmakers in parliament?
- 4 Evaluate why 'property' is such a contested term.
- 5 Identify a key word from the definitions of theft, robbery and burglary that might require a judge to interpret it. Suggest why the judge would need to interpret this word.

There may be conflict when considering whether or not the accused in a theft case acquired property 'dishonestly'. Indeed, it is up to judges in such circumstances to determine what constitutes dishonesty. What is duplicitous to some may appear as misguided or naive to another. Thus, judges need to be able to decide – or properly instruct juries, when applicable – on what factors would be indicative of improper behaviour on behalf of the accused and what a reasonable person would be expected to know and subsequently do in such circumstances.

Legal brief 3.4

Car theft

Jerry, 19, lives with his 22-year old brother Sam in a suburb of Melbourne. They regularly share their items in the house and go food shopping together. However, when Jerry's three-week holiday arrives, he decides to take Sam's car without

telling him, as they had had a fight the previous week and he's unsure of what Sam's mood may be. When Sam realises his car is missing, he immediately calls the police. Jerry is found with the car in a beach town along Victoria's west coast.

Activity 3.5 Case study

Car theft

Read Legal brief 3.4 and complete the following tasks.

- 1 Does this constitute theft? Does the fact that Jerry has taken the car without his brother's permission, and – in the police officers' minds – done so for an indefinite period, make this a clear offence? Explain why or why not.
- 2 Furthermore, has Jerry acted dishonestly? Or, does the closeness of the boys' relationship and their familiarity with each other warrant the sharing of Sam's car by Jerry and, thus, diminish the element of dishonesty in the act? Can we be sure that Jerry was indeed only going for the three weeks? Provide reasons for your own conclusion.
- 3 If Jerry were able to verify the short duration of this holiday, would this affect Jerry's level of 'honesty' as well as whether or not he sought to 'permanently deprive' Sam of his property?
- 4 Explain what you think the terms 'dishonesty', 'permanent' and 'deprive' mean.

3.4 Trends and statistics

The data and graphs in this section are sourced from Victoria's Crime Statistics Agency (CSA).

Factors affecting numbers reported

The following statistics point towards an undesirable increase in crimes against property. It is important to keep in mind the various factors that can affect the numbers reported.

Reporting

The crime statistics presented are dependent on people reporting the criminal incident. If, collectively, people in the community are less willing to report crime (due to a fear of the consequences of reporting, a belief that what was lost may not be worth reporting etc.), this may actually bring total numbers down. Sometimes, criminologists refer to the discrepancy between the reported number of crimes and the actual number of crimes as the 'dark figure of crime'. Conversely, if people in the community become more willing to report crime, in comparison to previous years, then the trend towards an increase may not actually be an increase; rather, a correction towards a more accurate depiction of crime than the previous period.

Growth in the population

As you can see in Table 3.1 on the following page, the incidents of crime are reported as a total number. While crime may increase, it is important to consider whether or not increases in the population have occurred as well. If crime has increased, but the population has increased as well, then the number of crimes committed per unit of the population may actually be the same. This is why, quite often, offences are reported as the average number per 100 000 people, as shown in Table 3.2.

Visit the website of Victoria's Crime Statistics Agency (www.crimestatistics.vic.gov.au) for more information about crime statistics.

Statistics are an excellent resource in measuring the occurrence of, and trends in, crime. Always be sure, though, to read through statistics critically before arriving at conclusions.

Table 3.1 Key movements in the number and rate of offences in Victoria

	June 2014 – June 2015	June 2015 – June 2016	June 2016 – June 2017	June 2017 – June 2018	June 2018 – June 2019
Theft	151,802	181,120	182,123	166,683	171,306
Robbery	2,530	2,887	3,196	3,180	3,429
Burglary	46,242	52,095	52,031	43,522	38,881

Source: Crime Statistics Agency

Table 3.2 Offence rate per 100 000 people of the population

	June 2014 – June 2015	June 2015 – June 2016	June 2016 – June 2017	June 2017 – June 2018	June 2018 – June 2019
Theft	2520.7	2934.0	2881.0	2580.0	2597.3
Robbery	42.0	46.8	50.6	49.2	52.0
Burglary	767.8	843.9	823.1	673.6	589.5

Source: Crime Statistics Agency

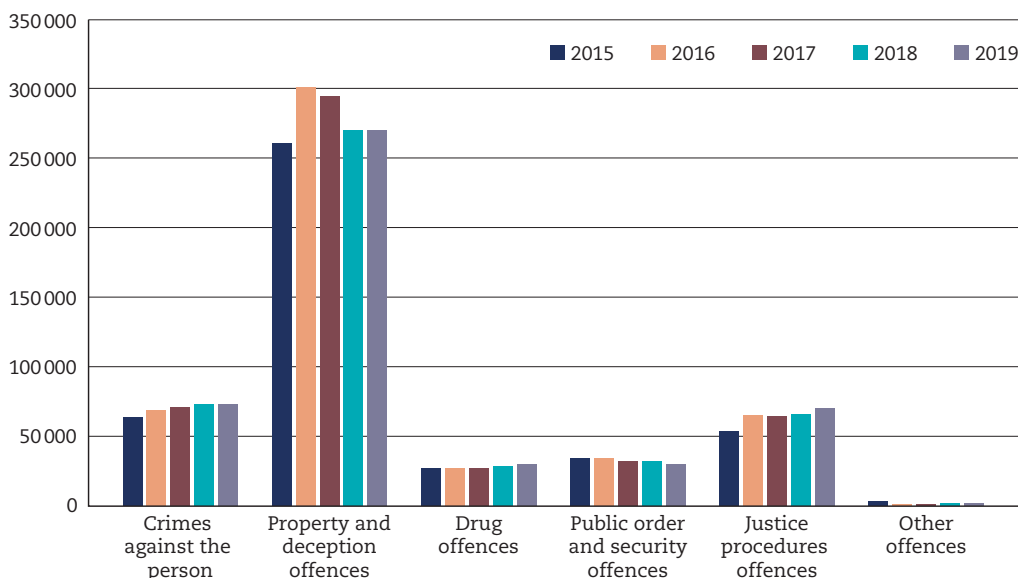
According to the CSA, and Table 3.2 in particular, there was a noticeable increase in rates of offending for Theft and Burglary in 2016 and 2017 before a return to 2015 levels in 2018 and 2019. According to Table 3.1, Robbery has increased from 2530 offences in 2014–15 to 3429 offences in 2018–19. This was the one offence that seemed to experience a trend upwards in rates of offending over the five years.

Changes in reporting practices

It is important to note that reporting practices and methods may be subject to change. Also, the responsibility for reporting on particular statistics may change as well. This is not to say that particular organisations or methods are necessarily better than others. However, this does need to be considered when analysing the meaning of the trends and hypothesising reasons for them.

Crimes against property versus other offences in Victoria

As can be seen in Figure 3.2, the number of property (and deception) offences are noticeably higher than those of every other type of offence. Not only are they higher, the increase for this type of offence for years 2016 and 2017 is much higher than for the other offences as well. However, there is also a noticeable drop in 2018 and 2019 whereas some of the other offences saw slight increases.

**Figure 3.2** Victorian offences recorded by offence category, July 2015 to June 2019

Note, however, that the property and deception offences area referred to on the previous page also includes offences such as arson, property damage, deception and bribery. That said, Table 3.3 below shows that these offences were relatively stable during the years mentioned. It is interesting to note that the growth areas are purely in burglary and theft.

Table 3.3 Property and deception offences

	June 2014 – June 2015	June 2015 – June 2016	June 2016 – June 2017	June 2017 – June 2018	June 2018 – June 2019
Arson	3,444	4,516	3,263	3,344	3,135
Property damage	42,544	43,484	42,379	40,962	39,235
Burglary / Break and enter	46,242	52,095	52,031	43,522	38,881
Theft	151,802	181,120	182,123	166,683	171,306
Deception	33,494	39,159	35,909	34,062	35,150
Bribery	41	26	6	7	9

Source: Crime Statistics Agency

Table 3.4 seeks to compare property offences with other offences. In this instance, however, the focus is on the follow-up to the offence. Offences may:

- result in arrest
- result in a summons to court
- result in a caution or official warning
- result in a penalty notice
- result in an intention to summons the accused to court
- be unsolved.

According to this source, almost two-thirds (62.2%) of crimes against property and deception offences were unsolved. This is quite a significant percentage, especially when compared to the other offences. This, ultimately, has significant repercussions for individuals as well as the broader community.

Table 3.4 Victorian offences recorded by investigation status, year ending June 2019

	Arrest/ summons	Caution/ official warning	Other	Intent to summons	Unsolved	Total
Number						
Crimes against the person	42,926	581	6,657	17,057	13,989	81,210
Property and deception offences	88,238	3,301	5,795	11,365	179,017	287,716
Drug offences	24,902	5,088	95	1,118	1,312	32,515
Public order and security offences	20,268	586	10,850	1,379	1,593	34,676
Justice procedures offences	61,109	65	2,384	6,586	6,736	76,880
Other offences	870	56	58	135	282	1,401
Total	238,313	9,677	25,839	37,640	202,929	514,398
Proportion (%)						
Crimes against the person	52.9%	0.7%	8.2%	21.0%	17.2%	100.0%
Property and deception offences	30.7%	1.1%	2.0%	4.0%	62.2%	100.0%
Drug offences	76.6%	15.6%	0.3%	3.4%	4.0%	100.0%
Public order and security offences	58.4%	1.7%	31.3%	4.0%	4.6%	100.0%
Justice procedures offences	79.5%	0.1%	3.1%	8.6%	8.8%	100.0%
Other offences	62.1%	4.0%	4.1%	9.6%	20.1%	100.0%
Total	46.3%	1.9%	5.0%	7.3%	39.4%	100.0%

Theft in one other jurisdiction: New South Wales

The data in this section is sourced from the New South Wales Bureau of Crime Statistics and Research (BOCSAR).

Comparing Victoria with New South Wales

Comparing Table 3.1 with Table 3.5 below reveals that it is quite difficult to complete a truly accurate comparison between the states. First, NSW's population of 7.6 million is higher than Victoria's 6.3 million, and this can have a significant impact on the findings. Second, NSW's classification appears to be slightly different from Victoria's. Victoria's data, as depicted in Table 3.1, focuses on theft, robbery and burglary quite generally, whereas NSW's data appears to break down these categories further.

One of the interesting trends between the jurisdictions concerns the upward movement of several offences during 2015 and 2016 and the slight downward trend in years 2018 and 2019.

Table 3.5 Key movements in the number and rate of offences in New South Wales

	June 2014 – June 2015	June 2015 – June 2016	June 2016 – June 2017	June 2017 – June 2018	June 2018 – June 2019
Steal from motor vehicle	42,264	39,848	40,070	38,309	38,063
Steal from retail store	21,299	22,735	24,053	24,341	26,033
Steal from dwelling	22,326	20,895	20,786	19,355	18,788
Steal from person	5,924	5,348	4,705	4,418	3,892
Robbery without a weapon	1,835	1,365	1,418	1,447	1,491
Robbery with a firearm	263	155	150	150	155
Robbery with a weapon not a firearm	1,074	842	791	876	910
Break and enter dwelling	32,746	30,436	28,969	27,130	25,508
Break and enter non-dwelling	12,902	11,376	11,040	10,377	9,991
Fraud	49,648	51,334	47,934	49,851	51,058
Other theft	31,042	29,743	28,042	27,129	27,074

Source: NSW Bureau of Crime Statistics and Research (BOCSAR)

Visit the website of the NSW Bureau of Crime Statistics and Research (www.bocsar.nsw.gov.au) for more information about crime statistics in NSW.

Activity 3.6 Structured questions

Identifying trends and analysing statistics

- Using Tables 3.1 and 3.2, describe the trend in the recorded number of incidents of theft, burglary and robbery over the past five years. What factors may have contributed to this trend?
- Compare theft and burglary to the other forms of crimes against property as recorded in Table 3.3. Is there a significant difference? If so, why do you think this is the case?
- Explain the key difference between 'Property damage and deception offences' and other types of offences in Table 3.3. Explain potential reasons for this noticeable difference.
- Identify the key difference/s between Victoria's stealing offences numbers in Table 3.1 and NSW's stealing offences in Table 3.5.
- Identify and explain two factors that make statistical comparisons between the states' offences difficult.

Activity 3.7 Report

Crime statistics comparison

Select another state in Australia or another country in the world and do the following:

- research the crime statistics for this place
- identify the total number of incidents of theft, robbery and burglary as a total and also by the number of incidents per 100 000 of the population
- compare the recorded number of incidents in Victoria with those in this place.

News report 3.1

‘We’ve not seen this gang-style activity’: surge in brazen phone thefts

A gang of seven Melbourne teens is the latest to be charged over a disturbing national trend of brazen phone smash-and-grab thefts from telco stores.

Police arrested the seven teenagers – all aged between 14 and 16 – and seized electronic devices in raids at three addresses at Point Cook, Tarneit and Truganina in Melbourne’s west on Tuesday and Wednesday.

The youths were charged with more than 16 offences of theft and are set to face a children’s court.

It follows the arrests of four other boys over similar alleged thefts last week.

The wave of recent arrests signals a major police crackdown on gangs that terrorise shoppers and workers by swarming phone and computer displays to rip away valuable goods.

Smash-and-grabs have become so common in Melbourne shopping malls that the big three Telcos have resorted to hiring security guards, equipping staff with personal distress beacons and removing expensive models from display.

Robberies at Optus, Telstra and Vodafone stores have skyrocketed this year, according to Chris Althaus, chief executive of peak industry body Australian Mobile Telecommunications Association.

The trend is so new neither police nor AMTA collect specific data about their frequency, but Mr Althaus estimated there had been more than 100 robberies combined across Melbourne, Sydney and Brisbane stores in the three months to May alone.

A typical attack might see a group of youths gather around a retail display and pull the products so hard the ties snap or the entire stand comes loose, before running away with the goods.

Mr Althaus said some offenders come armed with tools such as bolt cutters and pliers to cut the phones loose.

‘On a couple occasions staff have been assaulted trying to intervene,’ he said.

‘We’re very conscious that that not be the case. Typically these events thus far have not involved



weapons, but you don't need to be Einstein to see that's a possibility.'

Some stores are now putting 'dummy items' on display. Others hide their stock in the back rooms and bring them out only when a customer is interested, Mr Althaus said.

The thieves are brazen enough to work in busy shopping malls and often in clear view of CCTV.

Police have been making regular arrests this year before this week's raids, including six youths over a robbery in Point Cook, five following a robbery in Malvern and three youths over thefts in Waurn Ponds.

Police say thefts have also occurred at Thomastown, Sunshine, Airport West, Prahran, Brunswick and Altona North.

Victoria Police's North West Metro Region Commander Tim Hansen said police were working with telecommunications companies and small business owners to address the threat.

'We're treating these crimes very seriously and the community can be assured police are actively identifying and locating offenders, making swift arrests and putting them before the courts,' he said.

'Our regional crime squads are actively sharing information and intelligence in order to identify patterns in offending and quickly apprehend offenders who may be travelling across the city or into regional areas to commit these crimes.'

The Telcos are tight-lipped about specific security guard information, but all three are using contractors at many of their stores.

Mr Althaus said there was no standard approach across stores but all big three telcos were stepping up their preventative efforts because of the spike in attacks.

'There's always been the threat of this kind ... in stores, just like people steal sunglasses. But we've not seen this gang-style activity – that's the aspect that's quite new,' he said.

'When you compare the last six months and say to anyone in the industry, "what's the obvious change?" This would be one of them.'

Telcos can disable stolen phones and tablets, which means they cannot be used in Australia.

This has led to speculation the gangs are selling their loot overseas, but Mr Althaus said there was no specific intelligence to indicate this.

Source: Zach Hope, The Age, 18 July 2019

Activity 3.8 Folio exercise

Reporting on crime

Read News report 3.1 and complete the following tasks:

- 1 State the key findings concerning rates of theft and youth crime in this report.
- 2 According to the report, what is unique about this type of offending? What do the authorities believe the offenders are doing with the stolen goods? What are the implications of this?
- 3 Summarise the overall view of this article concerning rates of offending in Victoria. What other questions does it raise around crime in Victoria?
- 4 Reflect on your experiences around this type of offending. Do they reinforce or challenge the findings in this report?

3.5 Impact of the offence

Crimes against property can have a number of possible effects on individuals, such as physical loss and psychological damage, and on society, such as reduced public safety, increased willingness to circumvent the law and economic loss.

Impact on individuals

Crimes against property can be traumatic for individuals.

Physical loss

The physical loss of the item itself can be troubling for the victim. Property comes with sentimental, practical and financial benefits. Items such as computers contain all such benefits. A computer is used for a whole range of entertainment, business and personal purposes. There may also be personal information, photos and videos that are irreplaceable for the persons affected. Lastly, the computer itself may have a certain resale value, which the owner may have hoped to gain upon finishing with the item.

Computers are only one example. Other examples may include homewares, home electrics, cars, bikes, jewellery, clothing, hardware tools and building supplies. The loss of such items is both inconvenient and financially detrimental.

Psychological damage

Psychological damage can include trauma, anxiety and feelings of being unsafe. The psychological damage experienced will vary depending on the nature of the offences as well as the victims. The loss of significant items, such as cars and jewellery, are particularly traumatic due to the expense incurred in order to acquire them in the first place. However, the loss of smaller items can also lead to negative psychological effects. These are sometimes referred to as the 'intangible' costs of crime.

The experience of having someone forcibly take something that belongs to you in the act of robbery can leave people particularly traumatised. Victims may relive the encounter via their own memories. They may feel anxious about travelling outside their homes and, after an incident of burglary, feel concerned in their homes too. Overall, people who have been subjected to theft, robbery or burglary may be left continually doubting their personal safety. While the incident itself may have been quite brief, the effects may prove to be continual or long-term.

Impact on society

While the impact of crimes against property can be traumatic for individuals, it can also be detrimental to the community or society at large.

Reduces public safety overall

The fact that there are persons willing to break existing laws that protect the property of others indicates a reduction in public safety overall. Knowledge of a break-in at a neighbour's house or of an intimidating robbery creates fear, panic and anxiety among others. Citizens in the community may grow increasingly concerned about leaving their homes and interacting with others if they believe there is the possibility that they too will become subject to wrongful conduct.

Indication of willingness by some to circumvent the law

That others are willing to break codes of conduct can be especially worrisome if it is seen as setting an example for the conduct of other people in the community – like-minded or not. Crimes such as theft and burglary may, therefore, be seen as setting negative precedents which encourage lawlessness.

Some have talked before of the 'broken windows' theory whereby a person seeing a broken window is far more likely to be willing to break a window themselves due to the perception that such behaviour is the norm in this particular area. This contrasts with the street with no broken windows, where law adherence is perceived as the norm. Such an understanding is sometimes used by politicians pursuing tough or 'zero tolerance' practices. More research is required to verify its accuracy and plausibility.

Economic loss

With the loss of property and various items comes the monetary loss of the items as well as the ongoing costs of the police forces, security organisations, courts, insurance claims, corrections facilities and the organisations required to respond to such offending. When there is a perception of increased rates of theft, robbery and burglary – authenticated or not – there may be a decline in the willingness of individuals and businesses to engage in regular purchasing practices due to the potential to lose items – and encounter the trauma of losing such items – via crime.

According to the Australian Institute of Criminology (AIC), the total cost of crime in Australia was recorded at \$47.5 billion in 2011 or 3.4% of Australia's Gross Domestic Product (GDP). In a more recent report, the AIC estimated the cost of organised and serious crime in Australia in 2016–17 to be between \$23.8 billion and \$47.4 billion. Both are quite significant numbers. They include the direct costs of the offending as well as the costs of efforts by government agencies, businesses and individuals in trying to prevent and detect such criminal offending.


 Visit the website of the Australian Institute of Criminology (www.aic.gov.au) for more information on the estimated costs of crime in Australia.

Figure 3.3 depicts the estimated costs of individual crime types in Australia. Fraud contributes the most to the total costs of crime; recorded at \$6.1 billion. The offence of burglary, another noteworthy crime, contributed \$1.6 billion to the total costs. Thefts of motor vehicles were recorded at \$421 million and thefts from motor vehicles were recorded at \$677 million.

These are quite startling figures that reveal the enormous economic impact crime has on the community.

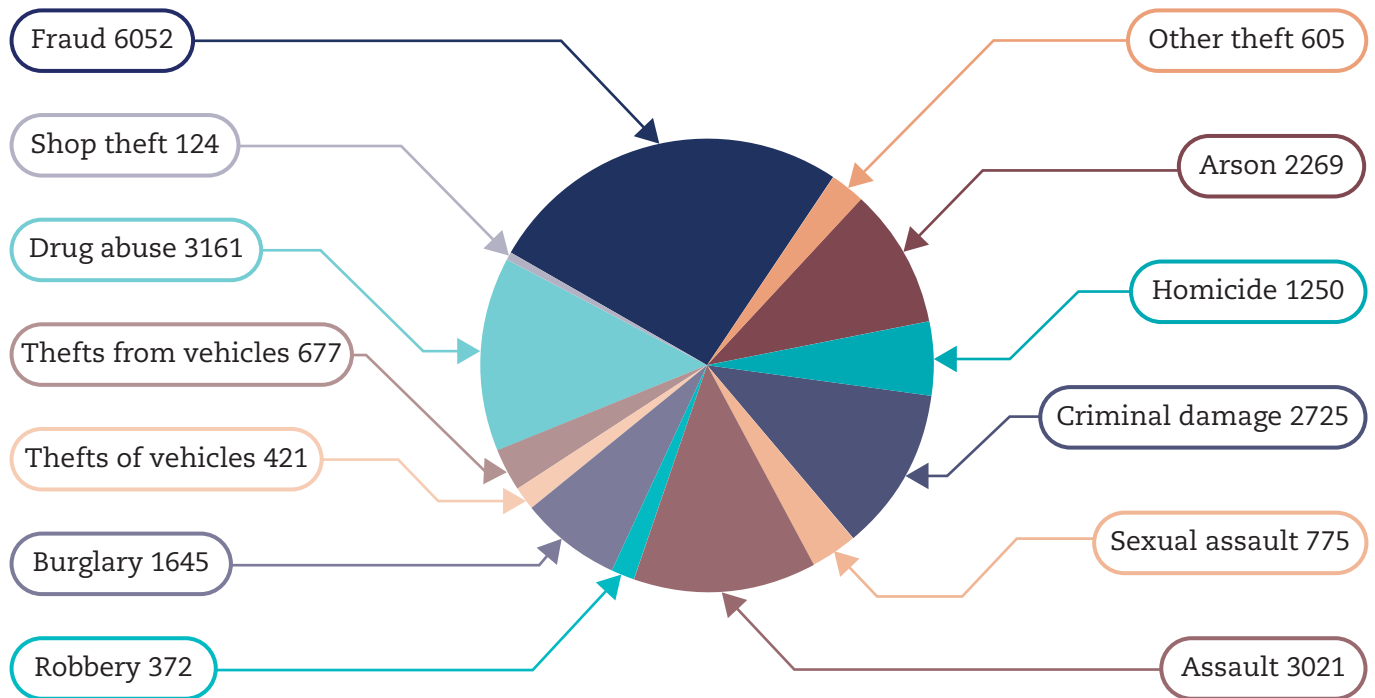


Figure 3.3 Estimated costs, in millions, of individual crime types

Figure 3.4 considers the effects of crimes a little differently by exploring the level of incidents for each type of crime with how much each incident costs.

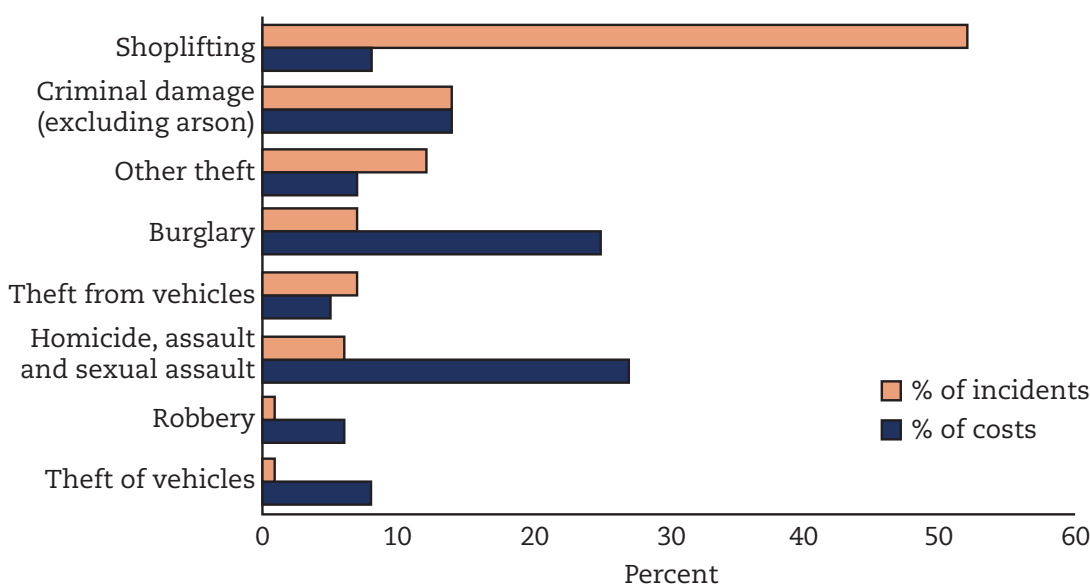


Figure 3.4 Percentage of incidents versus percentage of costs of crime

It is interesting to note that while Shoplifting contributes to well over half of the total number of offences, it only contributes to under 10% of the costs. In contrast, offences such as Burglary, Robbery, Theft of vehicles, Homicide, assault and sexual assault, which have much lower levels of total number of incidents, contribute much more to the total costs of crime; for example, Burglary (approximately 25%) and Homicide, assault and sexual assault (almost 30%). This speaks to the significant consequences such offences have on individuals, businesses, and the community more broadly. Fraud, a key factor in Figure 3.3, was not considered as a separate factor in this study; however, it would be interesting to consider this offence in such a manner also.



Legal brief 3.5

Melbourne woman's car stolen from car wash

A Melbourne woman's car was stolen from a car wash at a shopping centre in Melbourne. After dropping her car off at the venue, the woman returned approximately 90 minutes later to find her car missing. The attendants at the car wash told her that someone had already come to pick up the car and that

this person knew her full name and mobile number. After taking the car, the offenders went to her house where her children were. Initially, they banged on the front door and tried to gain entry. However, they had left by the time the woman or police arrived at the house.

Activity 3.9 Case study

Melbourne woman's car stolen from car wash

Read Legal brief 3.5 and complete the following tasks:

- 1 Identify the facts of this case.
- 2 Distinguish between the effects of this crime on the individuals involved and on the broader community.
- 3 What are the future dangers for the woman and the family involved?
- 4 How might the offenders have procured the woman's phone number? Why is this concerning?



Legal brief 3.6

Live broadcasting of crimes

Thirty minutes after an alleged late-night armed robbery in Melbourne's northern suburbs, three males under eighteen then made an attempt at another armed robbery, of a tobacconist. Police began to pursue the vehicle they believed was carrying the

suspects. The pursuit was broadcast live on a major media channel's Facebook page. The police were able to corner the car on the Westgate Bridge and, amid chaotic traffic conditions, arrest the three accused men.

Activity 3.10 Class debate

Live broadcasting of crimes

Read Legal brief 3.6 and conduct a class debate on the following question:

Does the live broadcast of crimes unfolding effectively warn the public of the immediate danger or serve only to glamorise the crime and inspire fear?

Respond to the following questions in the debate:

- Identify the offence involved in this case.
- Outline the ways the public was affected during this incident.
- How did the police ultimately bring the incident to a close? What obstacles did they face in doing so?
- Do you believe this incident had a successful solution? Explain why or why not.



Legal brief 3.7

Unfortunate end to holiday

The Jacksons went away over their annual Christmas break along the coast of Victoria for some much-needed rest. Upon returning to the city they were dismayed to find their home had been broken into. Most of their valuable electronic products and jewellery had been stolen. The house

had also been damaged. The Jacksons promptly called the police, who took fingerprints.

Two weeks later, two men were arrested after a dangerous nightclub brawl. The fingerprints of both men matched those taken from the Jacksons' home.

Activity 3.11 Case study

Unfortunate end to holiday

Read Legal brief 3.7 and complete the following tasks:

- 1 Forgetting about the brawl at the nightclub for the moment, what offence might these men be charged with?
- 2 Explain why the offence would not necessarily be theft.
- 3 Outline the facts for and against a guilty verdict in this case.
- 4 Outline the impact a crime such as this one might have on the Jacksons and on the broader community.
- 5 What, perhaps, could be done to help prevent crimes such as theft, burglary and robbery? Explain your answers.

Key point summary

Do your notes cover all the following points?

- ❑ Key offences against property
 - Theft is the acquirement of another person's property with the intention of doing so indefinitely.
 - Robbery is the acquirement of another's property via the use of force or the threat of force.
 - Robbery is a crime against the person (use or threat of force) and a crime against property (acquirement of another's property).
 - Armed robbery is when the assailant uses a firearm or other offensive weapon carrying out a robbery.
 - Burglary is the unauthorised entrance to, damage of, or stealing from a building or part of a building.
 - Aggravated burglary is a burglary committed with an aggravating element – such as a firearm, explosives, or imitations of firearms or explosives – or if the burglar(s) knew or should have known that someone was present in the building.
- ❑ A range of possible defences can be used in response to theft, robbery and burglary charges. Often these focus on disputing the facts of the case, claiming a mistaken identity, or challenging the concept of property itself.
- ❑ The role of statute law and common law in developing the elements of the offence and the defences:
 - The parliament is the ultimate lawmaker. However, it is up to the courts to interpret and clarify the meaning of Acts as well as particular words contained within them. This is known as statutory interpretation.
 - Courts make laws via the doctrine of precedent. Precedents may be adhered to (*stare decisis*), overruled, reversed, or departed from (distinguished) if the material facts of cases are different.
- ❑ Trends and statistics
 - The Crime Statistics Agency (CSA) indicates that there was a noticeable increase in rates of offending for Theft and Burglary in 2016 and 2017 before a return to 2015 levels in 2018 and 2019. Robbery appeared to be the one offence that seemed to experience a trend upwards in rates of offending over the five years of recorded data.
 - Statistics also show that crimes against property is the category with the highest rate of unresolved cases. It is worth considering why this might be the case.
- ❑ Theft, robbery and burglary offences have severe effects on individual victims and the community as a whole.

End-of-chapter questions

Revision questions

- 1 What needs to be proven in order to successfully convict an accused person of theft?
- 2 Draw a Venn diagram that compares and contrasts the offences of theft, burglary and robbery. Ensure that you make note of similarities as well as differences.
- 3 Identify and outline three possible defences an accused might utilise in response to a charge of theft.
- 4 If the parliament is responsible for passing laws in the forms of statutes, how is it possible and why is it necessary for courts to make laws too?
- 5 Identify and explain two factors that should be kept in mind when analysing crime statistics.
- 6 When a theft, robbery or burglary takes place it clearly has consequences for the victims; however, how does such activity also negatively impact on society more broadly?

Assessment

- 1 **Report:** Create a report that provides the most up-to-date statistics concerning crimes against property in your local area. Utilise statistics from Victoria Police and crimes statistics websites and support these further by writing a list of questions that you could ask a representative from your local police station during an interview. You might also ask permission from your school to interview class members or students from your school more broadly about their knowledge of and experiences with these types of crime.

When developing your report, consider structuring it in the following way:

- Introduction that includes an aim and an overview of the area of interest
 - Methodology that outlines how you went about your research and includes your various sources of information
 - Findings
 - Conclusion.
- 2 **Role-play: Mock trial**

The following case is fictional and any resemblance to real people is purely coincidental. The case and all relevant details are to be used in order to conduct a mock trial. Alternatively, the class may elect instead to simply have a debate concerning whether or not the accused are guilty or not guilty in relation to the evidence provided. If conducting a mock trial, your class will need to assign roles:

 - Prosecution team: at least two people
 - Defence team: at least two people
 - Judge
 - Clerk
 - Jury: 12 people (this may be adjusted if class is short on numbers; remember, this is a hypothetical case)
 - Defendant: Tony Blass
 - Defendant: Brad Briggams
 - Defence witness: Marilyn Blass
 - Prosecution witness: Mrs Dogherty
 - Prosecution witness: Lachlan Snow
 - Prosecution witness: Charlotte Snow

Legal teams are to work together in order to build their cases. They should, at least, prepare an opening statement, a list of questions for all witnesses, and a closing statement. Legal teams should also work closely with their respective witnesses in order to prepare questions that will reveal information that will enhance their prospects of winning the case.

The strict rules of evidence and procedure must apply throughout the trial. The class may choose to further investigate these in order to ensure their adherence to them throughout. The emphasis of this task, however, should be on application of the legal principles learned during the chapter and the debate between the two sides concerning the evidence. Good luck!

An unfortunate interruption

Lachlan and Charlotte had recently purchased a home in a new estate in the outer suburbs of Melbourne. Having recently lived in the inner city, the couple had decided on a change of scenery in favour of the extra space and, hopefully, less noise.

After the completion of the house's construction, the couple moved in quickly. Unfortunately, their house is still the only one on the street – being a new estate. Commencement of other new homes was expected shortly after their move. Despite feeling a little lonely, the couple enjoyed all that their new residence had to offer. Indeed, a new friendly dog was only a couple of weeks away from joining this humble abode.

One night, however, Lachlan found himself struggling to fall asleep. He and Charlotte had just had a small, albeit affecting, argument concerning the fact that he had forgotten to organise the home and contents insurance for the new place. Engrossed in an article from his favourite journal, Lachlan was interrupted by a slight thud emanating from the downstairs living room.

The noise also woke Charlotte. The pair looked at each other in a worried manner. Lachlan jumped out of bed and turned on the main bedroom and hallway lights and quickly made his way down the stairs.

Charlotte sprang into action as well. She dialled triple zero on her smartphone and, in a panic-stricken voice, demanded the urgent attention of the police. In the middle of explaining her plight, Charlotte heard her partner yell, "Take that!" She put her phone down, and ran downstairs to find her husband exasperated, albeit unharmed. However, there was quite a bit of mess around the living room, many items were missing, and their expensive bronze statue was lying next to a cracked wall.

The cost of replacing the missing items was estimated to be \$15 000 in various goods.

The police arrested two suspects, Tony Blass and Brad Briggams, about 15 minutes after the incident. The men were picked up in a black van almost seven kilometres from the couple's residence. The suspects were wearing dark clothing; however, no items were found on them or in their vehicle. Neither suspect could explain to the police why they were in the area. They both lived approximately 40 minutes' drive away.

Prosecution witnesses

Lachlan Snow

Lachlan was quite shaken after the incident and has attended counselling on a number of occasions. While it was quite dark when he confronted the assailants downstairs on the night of the alleged crime, he believes that Tony Blass and Brad Briggams were indeed the men he saw.

Charlotte Snow

Charlotte was also traumatised after the event. She claims she can vividly remember waking up to the sound of whispers and movement downstairs. Charlotte has been forced to use significant amounts of stress leave from her job and does not like being at home alone anymore. Charlotte has had a falling out with several of her friends since the incident.

Mrs Dogherty

Mrs Dogherty lives across the road from both Tony Blass and Brad Briggams (the two live next door to each other) and claims that she hears arguments between the two men and their respective partners reasonably regularly. Mrs Dogherty also claims that she hears cars going in and out of the residences late at night every now and then. She has never seen a black van outside of either man's house.

Defence witnesses

Tony Blass

Male, age 37. Currently unemployed but used to have a sales job in a nearby suburb. Details of why his employment ended are unknown. Tony claims that he and Brad had gotten lost on the way back from a friend's house on the night of the alleged crime. Their friend Jeremiah confirmed this alibi to police. However, there are no other witnesses other than the three men to confirm the claim.

Brad Briggams

Male, age 39. Currently employed as a security guard at an inner-city nightclub. Brad is also arguing that he and Tony had simply gotten lost on the way back from a friend's place. Brad has expressed deep concern over these allegations as he believes they will jeopardise his current job. He is worried about how he will support his partner and keep up to date with bills if he loses his job.

Marilyn Blass

Wife of Tony. Marilyn supports Tony and Brad's claims that they were simply visiting their friend Jeremiah on the night of their arrest. She is upset as she believes the police have routinely harassed her and her husband; unfairly suspecting them of a range of 'trivial offences' over the years leading up to the alleged night. Marilyn was not, however, able to explain where the black van came from or who it belonged to.

Chapter 4

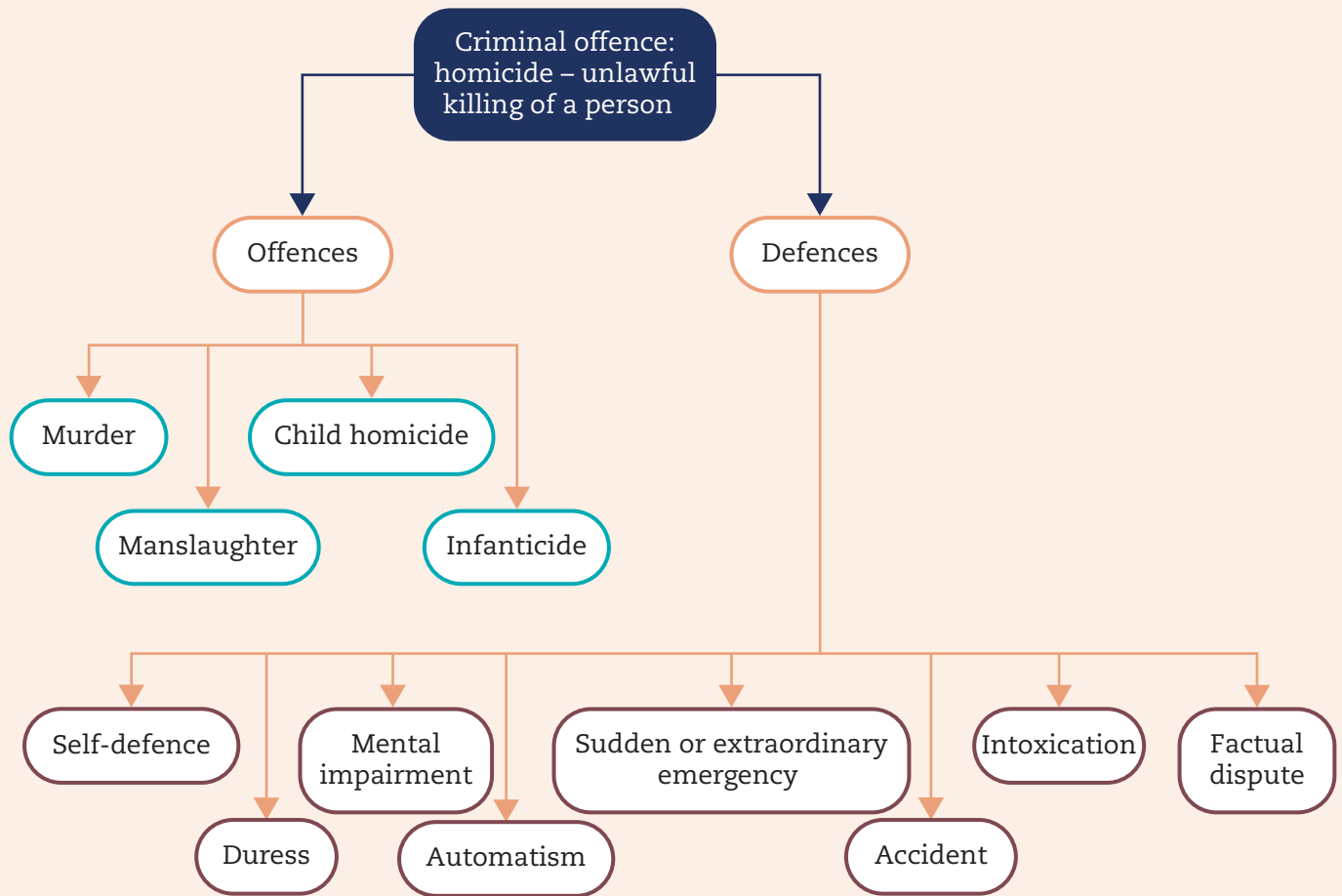
Unit 1 – Area of Study 2

A criminal offence: murder and other forms of homicide

Murder is society's most serious and most feared crime. Murders are the subject of numerous television shows, films, novels and a range of other media programs. A single murder will send shockwaves through a city and result in days, weeks, and sometimes years of media coverage. It has life-altering effects on the family members of the victims but also generates fear and anxiety for other citizens. While murder is, perhaps, the most severe of Victoria's offences, it is also one of the most rare. It is also important to note that murder is a form of homicide. Other forms of homicide include manslaughter, infanticide and child homicide. This chapter will examine the key elements of, and defences to, murder and compare these with the other forms of homicide. It will discuss the relationship between statute law and common law in relation to homicide. It will then examine the significance of this area of crime by looking at recent trends and statistics in Victoria and one other jurisdiction. Finally, we will reflect on how these crimes can affect society as a whole as well as the individuals concerned.

Mourners pay their respects at Royal Park in Melbourne on 31 May 2019 following the murder of Courtney Herron, whose body was found in the park.





Key terms

causation the need to determine whether there is a link between the action of the person or persons and the harm suffered by the person

child homicide where a person kills someone who is under the age of six in circumstances that would usually constitute manslaughter

common law law developed in the courts; also known as case law or judge-made law

culpable deserving of blame

homicide the unlawful killing of another person

infanticide where a woman kills her own child (under the age of two) in circumstances that would usually be considered murder, and, at the time, the balance of her mind was disturbed as a result of the birth of the child

malice aforethought the intention to kill or harm, which distinguishes murder from other forms of unlawful killing

manslaughter a form of homicide where the accused's actions are deemed to have been negligent and/or dangerous

murder the killing of another human being with malice aforethought, whether intentional or reckless

novus actus interveniens literally means 'new act intervening'; involves a new intervening act that breaks the chain of action between the defendant's conduct and the eventual result, thus diminishing the defendant's culpability

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

4.1 Elements of the offence

First, it is important to note that **murder** is a form of **homicide**. Homicide is the unlawful killing of another person. When exactly, you might ask, is an instance where a person's death could be seen to be lawful? Killings which take place during a time of war could be seen to be lawful. So too could a death by a police shooting if the police officer, or officers, in question can verify that their lives were at stake and that they had exhausted all other avenues before electing to shoot. This is quite a controversial issue as police do have other options, such as pepper spray and electric tasers. However, sometimes these tools are not seen to be enough, especially if the deceased was carrying a dangerous weapon at the time. The death penalty could also be viewed as a lawful killing if the state or country of concern permits such a punishment; Victoria, however, does not and has not since 1967.

In June of 2019, following an 18-month implementation period, the *Voluntary Assisted Dying Act 2017 (Vic)* came into effect. The law gives anyone suffering a terminal illness with less than six months to live the right to end their life. The conditions of this Act are quite rigorous. If they are followed, the people involved cannot be charged with homicide.

In this section, we will thoroughly examine the key elements of murder before considering the other forms of homicide.

Murder

As discussed in previous chapters, for an accused to be charged with an offence (except for strict liability offences), the prosecution must prove that there exist both *actus reus* (the accused committed the act) and *mens rea* (the accused intended to commit the act or was of sound mind yet committed it anyway). This is the same for murder. If convicted of murder (intentional or reckless), the defendant may be given a prison sentence of 25 years to life; this is the most serious of Victoria's sanctions.

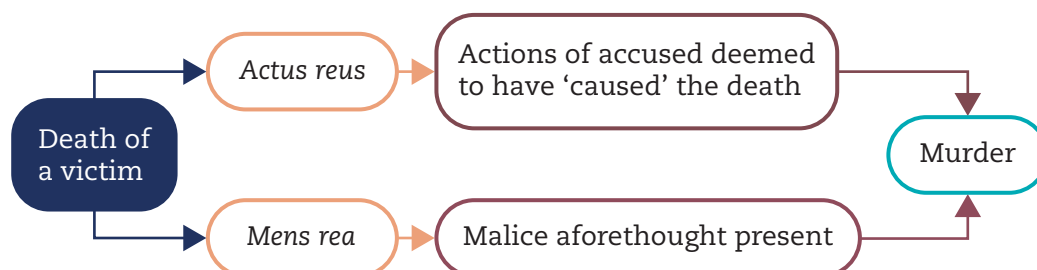


Figure 4.1 Deciding murder



Emergency services seen in Bourke Street on 9 November 2018 in Melbourne. A man was shot by police after setting his car on fire and stabbing several people in Bourke Street mall in Melbourne's CBD.

Proving mens rea

An accused must be proven to have both killed the victim (that is, the victim must be deceased) and have had the required mental characteristics (that is, they must be mentally **culpable**). For murder, we refer to this as **malice aforethought**. For a murder charge to be successful, the prosecution must show that the accused had malice aforethought.

In order to satisfy the requirements for malice aforethought, one of the following must be proven:

- The accused intended to kill the victim or intended to cause serious grievous harm to the victim, which then resulted in death.
- The accused acted with reckless indifference. That is, the accused acted in a way in which a reasonable person would be aware that death or grievous bodily harm would be the result.
- The accused intentionally carried out an act of violence on someone trying to make a legitimate arrest upon them.

The absence of malice aforethought would result in the accused being charged with another form of homicide, probably **manslaughter**.

Proving actus reus

As stated earlier, for the defendant to be convicted, the prosecution must prove *actus reus*. In a murder case, it must be proven that the defendant's conduct was the cause of the victim's death.

In many instances, where there are no complicating factors, factual causation on its own will be enough to establish a chain of causation. For example, James shoots Sam and Sam dies shortly after. However, in some cases, there may in fact be some complicating factors, and establishing a legal basis of **causation** may be more difficult. In such cases, it must be proven that the death was a result of a culpable act. The defendant does not necessarily need to be the sole cause of the death; however, there must be an uninterrupted chain between the act and the victim's death.

Acts that may distort the chain are known as **novus actus interveniens** and include:

- an act of a third party; for example, another person attacks the victim after the defendant had carried out the act
- an act of the victim; for example, if the victim acts in a way that is completely unforeseeable to the defendant and disproportionate to their conduct
- medical intervention; for example, a medical expert makes a mistake at the hospital where the victim is taken, which then results in death. This, however, does not apply to problems during complex medical operations or the termination of life support, because without such measures, the life of the victim would be at risk anyway.

Lastly, the defendant is also obliged to take the *victim as they find them*. This means that if the defendant happens (even without knowledge) to accost a particularly vulnerable victim, they are fully liable for the consequence to that victim even if an ordinary person would not have suffered such consequences. For example, Jane commits a minor offence on Trent, who has a heart condition, and Trent suffers a heart attack as a result and dies. Jane is responsible for the death of Trent even though a person without a heart condition, faced with the same minor offence, would not necessarily have suffered the same fate.

Attempted murder

Attempted murder is when a person has planned to kill another person but has been unsuccessful. Under **common law**, a person may be convicted of attempted murder if they intended to commit murder and believed a murder was to take place. It needs to be shown that they were more than simply planning to commit the murder. The *Crimes Act* does not specifically mention attempted murder; however, it does cover the general category of 'attempt'. Attempted murder is a level 2 offence and can result in a maximum of 25 years' imprisonment.

In Victoria, the law distinguishes between intentional and reckless murder. For reckless murder, the accused would have turned their mind to the potential risk and continued with the course of action anyway. With intentional murder, however, the accused purposely sets out to kill or cause serious bodily harm.

Activity 4.1 Structured questions

Understanding the elements of murder and homicide

- 1 Define homicide.
- 2 Define murder.
- 3 Explain what is meant by 'malice aforethought'. Why is this essential to the definition of murder?
- 4 Identify the key elements of malice aforethought.
- 5 Explain the difference between intentional murder and reckless murder.
- 6 What is meant by the 'chain of causation'? Why is this relevant to murder?
- 7 Define *novus actus interveniens* and identify three things that may be considered as breaking the chain of causation.

Legal brief 4.1

Causation

The accused, aged 31, had separated from his wife and formed a relationship with a 16-year old girl. The girl became pregnant. She finished the relationship when she was six months pregnant because he was violent towards her. He did not take the break-up well and drove to her parents' house armed with a shotgun. He shot the father in the leg and took the mother at gunpoint and demanded that she take him to where her daughter was. After using threatening and violent behaviour, he took the girl. He drove off with the mother and daughter. The police caught up with him and he kicked the mother out of the car and drove off with the daughter,

continuing to evade the police. He took her to a flat and kept her hostage. Armed police followed him. He used the girl as a shield as he came out of the flat and walked along the balcony. The police saw a figure walking towards them but could not see who it was. The accused fired shots at the police and the police returned fire. The police shot the girl, who died. The appellant was convicted of possession of a firearm with intent to endanger life, kidnap of the mother and daughter, attempted murder on the father and two police officers and the manslaughter of the girl. He appealed against the manslaughter conviction on the issue of causation.

Activity 4.2 Case study

Causation

Read Legal brief 4.1 and complete the following tasks:

- 1 Identify the facts in this case.
- 2 What was the accused charged with?
- 3 The accused appealed against the decision based on the issue of causation. Which of the three factors of *novus actus interveniens* do you think the accused would have claimed?
- 4 Explain why the defence believes the chain of causation was broken.
- 5 Explain whether or not you think this appeal would have been successful.



Legal brief 4.2

Illegal hunting

David likes to shoot at game. He goes into a nearby paddock to seek his prey. It is a public paddock and David is aware of the fact that children from the village often play there. However, it is early in the morning and a school day. David knows this, because he has just sent his daughter off to school.

David has been warned before by the local council that it is illegal for him to hunt in the paddock and that it is also dangerous to the public. He has a criminal record for discharging firearms in a public place. He sees an unusual movement in the bushes, accompanied by grunting sounds. Thinking

it might be his prey, he shoots. A heavy thud ensues. David is not quite sure what he has shot. At that moment, he hears a car nearby. David panics and runs home. In fact, he has shot a homeless man by the name of Stan. Some hours later he is watching a local news program on television that reports the death of a homeless person in the park. David realises that he has shot a man. However, he also thinks that no one saw him and does not tell anyone what has transpired. Stan dies. David comes to you for advice, posing what has happened in the form, 'I have a friend who ...' and so on.



Activity 4.3 Classroom presentation

Illegal hunting

Read Legal brief 4.2 and prepare a classroom presentation. Your presentation can be in the form of a PowerPoint, Prezi or short film. Respond to the following in your presentation:

- 1 Discuss whether or not there is any criminal liability for murder. Your answer should clearly identify the relevant type of murder, as well as the legal issues that are raised by the hypothetical problem.
- 2 Which specific crime do you think the prosecution would seek a conviction for in this case (that is, the one most likely to succeed)? What is the standard of proof for a case such as this?

News report 4.1

Jonas Black found guilty of attempted murder of Gippsland council workers over shed dispute

A Gippsland man who bashed two building site inspectors over the head with a piece of scaffolding in a long-running dispute about a shed has been found guilty of attempted murder.

The Supreme Court heard how Jonas Black, 46, invited the men to his Turtons Creek property last year to inspect the shed before attacking them.

In 2014 the South Gippsland Shire ordered Black to knock down sheds on his property that did not comply with planning regulations.

The Court was told when Matthew Patterson and Justin Eades visited his property on May 25 last year to inspect his progress, a scuffle broke out and Black hit the two men over the head with a section of scaffolding pipe.

Prosecutors said Black had lined the back of his four-wheel drive with a tarpaulin and dug a two-metre hole in nearby bushland in preparation for their death.

Mr Patterson earlier testified that Black told him: 'There's no way that you're getting out of here alive.'

The Court heard how Mr Patterson and Mr Eades ran away from the property but were followed by Black in his car.

He also asked his girlfriend to throw a pair of work boots away as he knew they would be used as evidence against him, the prosecution said.

Defence lawyer Sarah Leighfield told the Court while she did not deny Black struck the two inspectors, he had no intention of killing or seriously injuring the pair.

She said he had no knowledge of the hole.

But the jury found Black guilty of two counts of attempted murder and of perverting the course of justice.

He will be sentenced at a later date.

Source: Simon Galletta, ABC News, 24 June 2016

Activity 4.4 Structured questions

Attempted murder case

Read News report 4.1 and complete the following tasks:

- 1 Explain why the defendant was convicted of attempted murder.
- 2 What argument might the defence have made? Why do you think this was unsuccessful?

Other forms of homicide

There are a number of forms of unlawful killing that do not fit within the parameters of murder previously outlined. These include:

- manslaughter
- **child homicide**
- **infanticide.**

Manslaughter

In homicide cases where the intention of the accused is not proven to have been to kill or cause grievous bodily harm, a manslaughter charge will instead be sought. Manslaughter is defined in common law as circumstances where the accused kills someone either via criminal negligence or an unlawful and dangerous act. A person guilty of manslaughter is liable for a level 3 imprisonment of 20 years maximum.

Criminal negligence

The distinction between 'negligence' and 'recklessness' is essential in distinguishing between manslaughter and murder. Criminal negligence is when:

- the accused has a duty of care
- the accused fails to live up to the duty of care and, thus, a breach occurs
- some form of harm comes upon the victim (in the case of manslaughter, this harm is death)
- the death of the victim can be directly attributed to the breach of the duty of care.

A manslaughter charge occurs when a person dies as a result of another person's actions but the conditions of murder are not met. The *actus reus* may be the same as in a murder case; however, the *mens rea* is different.

Manslaughter by criminal negligence is, therefore, when the death of the victim comes about as a result of the accused behaving, or not behaving, in a manner that would be expected of a reasonable person and this behaviour results in death. An example of this could be parents neglecting their child when the child, in the eyes of a reasonable person, appears in need of medical assistance and the child dies as a result.

Unlawful and dangerous act

An unlawful and dangerous act occurs when the accused's conduct was unlawful and so dangerous that a reasonable person, in a similar situation, would know that serious injury or death would be the result.

This is different from murder in that the defendant, based on the evidence, did not 'intend' to cause serious harm or death to another person. Instead, they engaged in behaviour where a reasonable person would have suspected that serious injury or injury could occur. The key difference is in the 'intent'.

Child homicide

According to the *Crimes Act 1958* (Vic), a person who, by his or her conduct, kills a child who is under the age of 6 years in circumstances that would normally constitute manslaughter is guilty of child homicide, and not of manslaughter. If convicted, the defendant is liable to level 3 imprisonment of 20 years maximum.

Infanticide

According to the *Crimes Act 1958* (Vic), 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 due to:

- her not having fully recovered from the effect of giving birth to that child within the preceding two years; or
- a disorder that is a consequence of her giving birth to that child within the preceding two years,

then she is guilty of infanticide, not murder.

If convicted, the defendant is liable to a level 6 imprisonment of five years maximum.

It is important to note also that if a woman is charged with murder and found not guilty, she may still be found guilty of infanticide if the same conditions are met. Also, simply because this charge exists, a jury is not obliged to find a woman guilty of infanticide if the defence of mental impairment is met.

Activity 4.5 Structured questions

Murder and other forms of homicide

- 1 Provide a definition for 'manslaughter'.
- 2 Explain the difference between murder and manslaughter.
- 3 Under what conditions might a woman be charged with infanticide instead of murder?

Legal brief 4.3

Domestic abuse

In 2014, Dr Chamari Liyanage bludgeoned her husband to death with a mallet. During the subsequent trial, evidence was presented concerning the long-term abuse that she had suffered at the hands of her husband and the significant psychological impact this had on her. The court also heard that her husband had kept 13 terabytes of encrypted child

exploitation and bestiality images. Dr Liyanage initially abstained from an early parole hearing due to fears she would be sent back to Sri Lanka and face persecution following the cancellation of her visa. Ultimately, her visa was reinstated by the Department of Immigration and Liyanage was granted bail after serving two and a half years of her four-year sentence.

Activity 4.6 Case study

Domestic abuse

Read Legal brief 4.3 and complete the following tasks:

- 1 Why was the accused convicted of manslaughter and not murder?
- 2 Is it acceptable for long-term sufferers of abuse to resort to homicide? Why or why not? Should another offence be created to deal with such situations?
- 3 Explain why Dr Liyanage initially declined to attend her early parole meeting. Identify the different reasons for her level of fear.
- 4 Conduct additional research and try to identify:
 - a similar cases to the one outlined above. Were the sentences in these cases similar? Explain why/why not.
 - b what is being done in the community (on a local, state, and federal level) to reduce domestic violence rates.



Legal brief 4.4

Manslaughter case

Melbourne man Borce Ristevski pleaded guilty to manslaughter in 2019 following the death of his wife Karen Ristevski, whose body was found north-west of Melbourne eight months after she had initially been reported missing. Mr Ristevski was arrested after a police investigation that involved significant listening devices and CCTV footage.

During the pre-trial proceedings, the Court heard that the family was experiencing

financial strain at the time. It was alleged that after the killing Mr Ristevski used Ms Ristevski's car to transport her body and hide it in bushland, turning off the signals of both of their mobile phones along the way.

Mr Ristevski, 54, submitted his guilty plea to manslaughter just one day before a Supreme Court jury was expected to be empanelled for his murder trial, which was expected to last approximately five weeks.

Activity 4.7 Case study

Manslaughter case

Read Legal brief 4.4 and complete the following tasks:

- 1 Explain why this was a case of manslaughter and not murder.
- 2 What course of action could the offender have taken instead?

4.2 Defences

A number of possible defences may be used for the offence of murder and other forms of homicide.

Self-defence

The defence of self-defence can be used in circumstances where the accused can establish that their personal safety was in immediate and serious danger. The standard expected here is that of a reasonable person and whether such a reasonable person would, given the same circumstances, fear that their life is in danger. The accused here must be able to verify the extremity of the situation they were in. Otherwise, this defence will not stand up.

It is not enough to argue that because person A yelled at person B, person B therefore had the right to kill person A in self-defence. It might, however, be acceptable if person A physically attacked person B and, in defending themselves, person B struck person A once, who then fell to the ground, hit their head and died. Ultimately, it is up to the jury to decide whether or not the accused had grounds to fear for their life and react accordingly.



An accused must establish that their personal safety was in immediate and serious danger for a defence of self-defence.

Duress

The defence of duress may be used when the accused's personal safety is directly threatened by another person and, in order to avoid this serious threat to their personal safety, they were forced – by the attacker – to bring about harm to another person, which then results in death. In using this defence, the accused will need to verify the extremity of the situation and prove that there really were no other options available to them. It is essential that the jury believe that the conduct of the accused is reasonable given the circumstances they found themselves in.

Mental impairment

The defence of mental impairment may be used in cases where the accused was, at the time of the offence, suffering from a mental illness and as a result was:

- unaware of what they were doing as they had little comprehension of the nature of their action and its potential consequences; or
- unaware that their conduct was wrong or not conscious of the conduct in the same manner as an ordinary person.

Thus, mental impairment diminishes the accused's *mens rea* and their level of 'intentionality' to commit the offence. If the defence is successful, the court will find the accused not guilty due to mental impairment. For serious crimes, such as homicide – in particular, murder – which are heard in the higher courts such as the County Court or Supreme Court, the court may impose a custodial or non-custodial intervention order.

Mourners pay their respects during a vigil held in memory of murdered Melbourne comedian, 22-year-old Eurydice Dixon, at Princes Park on 18 June 2018 in Melbourne (top image). Dixon was murdered by Jaymes Todd as she walked home through the park. Jaymes Todd is lead into the Supreme Court of Victoria on 15 August 2019 in Melbourne (bottom image). His lawyer told the court he had been diagnosed with autism spectrum disorder. Todd lost a bid to reduce his time in prison, after Victoria's Court of Appeal upheld his life sentence.



Automatism

Automatism is considered a full defence to a charge of homicide. This defence may be used if the accused's conduct is found to be involuntary or a consequence of some form of impaired consciousness.

Involuntary

The conduct may be found to be involuntary if it were done by the muscles without any conscious control by the mind. Examples of this could be a spasm or a form of reflex action.

Impaired consciousness

This means that the conduct was carried out by someone who was, at the time, unaware of what they were doing. Examples could include sleepwalking or suffering from a form of concussion.

Sudden or extraordinary emergency

This defence may be used when a person reasonably believes that:

- there existed a sudden or extraordinary emergency
- their conduct was the only reasonable way to respond to the emergency.

This will change depending on the situation. Essentially, the accused will need to justify their actions as reasonable given the predicament they found themselves in.

Accident

This defence may be used if the defendant believes that they did not possess any *mens rea* and that their conduct was a result of a sudden emergency or in response to an accident where a reasonable person would act similarly or not be aware that death could be a consequence.

Intoxication

Intoxication can only be used as a defence to homicide under certain conditions. If the intoxication of the accused were undertaken voluntarily – meaning they chose to partake in the consumption of the legal or illegal drug – then the defence of intoxication cannot be used. If the consumption was not voluntary or self-administered, the court may consider the likely impact of the intoxication on the person's intention to commit crime. More specifically, to be able to use this as a defence, the accused must show that the intoxication was:

- involuntary
- a result of fraud, reasonable mistake, accident, extraordinary emergency, duress or force
- a result of proper usage of a prescription drug where the accused did not know of the drug's effects
- a result of using a non-prescription medication where the accused uses it in accordance with the manufacturer's advice and did not know of the medication's side effects.

Factual dispute

The defence may dispute different aspects of the prosecution's evidence in the case, which may diminish *actus reus* or *mens rea*.

For instance, the defence may claim a case of mistaken identity where security footage believed to show the accused is, in fact, incorrect. The defence might also argue that the series of facts and timeline assembled do not match up and verify the accused's presence at the crime scene or prove the accused's 'intent' in their conduct.

Activity 4.8 Structured questions

Understanding the different defences

- 1 Create a mind map that depicts all of the potential defences to homicide.
- 2 What must a defendant be able to show in order to use the defence of self-defence?
- 3 Distinguish between automatism and mental impairment as defences.
- 4 Could sleepwalking be used as a defence to a homicide charge? Explain why or why not.
- 5 Under what circumstance can a person use the defence of duress?
- 6 Reflect on whether intoxication can be used as a defence to homicide.



Legal brief 4.5

Baby in the car

A woman was in complete shock when she went to her baby's childcare centre in the afternoon and found out from the staff that she had never dropped her baby off. She ran out to her vehicle to find her baby, who was then taken inside the centre immediately. However, the baby had died as a result of being left in the vehicle during the hot day.

The woman had thought she had dropped the baby off after taking two of her four children to school in the morning. After dropping her third child at school, she returned home for the day and left her vehicle in the driveway. She was in extreme distress after the incident.

Activity 4.9 Case study

Baby in the car

Read Legal brief 4.5 and complete the following tasks:

- 1 Identify the baby's cause of death.
- 2 Does a case of homicide exist in this instance? Explain why or why not.
- 3 If the prosecution did proceed with charging the woman with a homicide offence, which would it be and which defence might the woman employ?
- 4 Analyse why the prosecution might not proceed with any charges against the woman.

Legal brief 4.6

Dam accident

On the evening of 4 September 2005, Robert Farquharson veered off the Princes Highway between Winchelsea and Geelong into a nearby paddock and crashed into a dam. While Mr Farquharson was able to pull himself from the car, his three sons were caught in the vehicle and drowned after its subsequent submersion in the dam.

After a lengthy police investigation, Mr Farquharson was charged with the murder of all three boys. The trial took place in the Supreme Court of Victoria. Throughout it, both the defendant and his ex-wife maintained his innocence. The defence counsel argued that Mr Farquharson had suffered an

uncontrollable coughing fit, which made him black out and then crash into the dam. However, the police gave evidence that such a swerve from the road would not be possible unless orchestrated on purpose and that a coughing fit was highly unlikely. Some witnesses also gave evidence that the defendant had expressed a desire to exact revenge on his ex-wife. This was seen later as key evidence against him.

Mr Farquharson was convicted by a jury on 5 October 2007. However, Mr Farquharson successfully appealed the decision and was awarded a retrial. After the second trial, he was again convicted and then sentenced to life imprisonment with a 33-year minimum.



Robert Farquharson with his legal defence team

Activity 4.10 Report

Dam accident

Read Legal brief 4.6 and research this case further on your own. Write notes you think are essential to the case. Then answer the following question in the form of a written report: What is your overall view on the case? Explain whether or not you believe justice was exacted.

Be sure to cover the following points in your report:

- Identify the key facts in this case.
- Which defence/s did the defence use? Explain the defence's position.
- What was the outcome of the case?
- Reflect on why the argument the defence used in this case proved unsuccessful.

Factual disputes

Many popular culture texts have focused on the issue of factual disputes within cases. Some include Fyodor Dostoyevsky's classic novel *Crime and Punishment*, Helen Garner's more recent non-fiction work *This House of Grief – The Story of a Murder Trial*, This American Life's podcast *Serial*, Australian True Crime podcast, Netflix's series *Unbelievable*, *When They See Us* and *Mindhunter*, and HBO's mini-series *The Night Of*. All of these cover the issue of evidence and evidence accuracy comprehensively.

Activity 4.11 Folio exercise

Crime and culture

In consultation with your teacher, select and research a text in popular culture that focuses on the issues of factual disputes within cases and complete the following tasks:

- 1 Write a summary of the text and the key issues it raises.
- 2 Identify and critically discuss the points raised about the use of evidence in cases.

4.3 Role of statute law and common law

The definitions included previously for murder and the other forms of homicide – as well as the various defences – are a combination of **statute law** and common law. Statute laws are those laws passed as Acts in parliament whereas common law is the development of law over time via the decisions of the court. Criminal offences are listed under the *Crimes Act 1958* (Vic) and subsequent amendments. While the crimes of homicide are mentioned in this Act, some are not listed in as much detail as others – as with manslaughter, for example. Therefore, it has been left to the courts to establish a more intricate understanding of what the various terms mean when an unlawful killing has taken place and in which form.

As discussed in previous chapters, sometimes the facts presented in certain cases fail to match up perfectly with the definitions in the statute. Thus, it is the responsibility of judges to interpret the law and consider what lawmakers in parliament had in mind when the Act was conceived. This is known as **statutory interpretation**.

Statutory interpretation is a pivotal part of the role of a judge. When the meanings of particular words are ambiguous, disputed, or believed to have changed over time (this is particularly true with words such as 'recklessness' and 'negligence', which can ultimately distinguish a murder case from a manslaughter case), judges need to make decisions about how

such words and acts should be interpreted. The reason for the judge's final decision in a case is known as the *ratio decidendi* and this will set either a persuasive or binding precedent – depending on the court's level in the court hierarchy – which may or must be followed by other judges.

A classic example of a case requiring interpretation from the courts is that of *Thabo Meli v R* [1954] 1 WLR 228. In this case, the defendants hit the victim over the head with the intention of killing him. Then, with the belief that they had indeed killed him, they proceeded to throw him off a cliff. However, the man was only unconscious at the time of being thrown off the cliff. Thus, he died instead of exposure. The men were ultimately found guilty of murder. This was significant, as it demonstrated that, in criminal law, it is possible to kill a dead man.

The issue the courts had to deal with, though, was the coordination of *mens rea* with *actus reus*: that is, whether the intent to kill the victim preceded and did not remain in effect at the time that they threw the victim off the cliff. In this instance, the court decided that the act of hitting over the head was *continuous* with the act of throwing off the cliff. Such cases illustrate the importance of courts in interpreting laws, since, one might imagine, it is difficult as a lawmaker to hypothesise such a peculiar situation when creating criminal statutes.

Legal brief 4.7

Causal links

After colliding on the water, two surfers break into a scuffle on the beach, each claiming that the other stole their wave. One of the surfers is hit hard on the head and then

left unconscious on the sand by the other. After the other surfer leaves, the unconscious surfer drowns in the now rising tide.

Activity 4.12 Case study

Causal links

Read Legal brief 4.7 and complete the following tasks:

- 1 Explain whether or not the surfer is liable for homicide. If so, which homicide offence would the surfer be charged with and why?
- 2 Which defence might the surfer use?
- 3 Suggest what you think the outcome of this case would be.

Legal brief 4.8

Principles of murder

In a bout of road rage on a bridge, two men set upon another for allegedly colliding with their car. They hit the man, who falls to the ground. The men believe he is dead and in order to conceal the incident they throw him from the bridge and onto the ground below. They are arrested

by police shortly after. The autopsy shows, however, that the man died from exposure and not from the initial assault. During the trial, they claim therefore they are not responsible for his death.

Activity 4.13 Report

Principles of murder

Read Legal brief 4.8 and complete the following task in the form of a written report.

Referring to the principles of murder explored in this chapter, critically discuss whether or not the men are liable for murder in this case.

4.4 Trends and statistics

The data and graphs in this section are sourced from the Victorian Crime Statistics Agency (CSA) webpage.

While statistics for other types of crimes against persons (for example, assault) and crimes against property (for example, theft and burglary) may have slight variations in numbers due to various factors such as changes in reporting numbers, population changes and changes in reporting practices, the same does not happen with homicide statistics. Indeed, homicide statistics are seen as one of the most reliable forms of crime statistics. Whenever someone dies, a reason needs to be given. Each death is investigated, often by the Coroner's Court, and accounted for. This is why homicide numbers are usually very accurate. That said, statistics between states and countries may differ as a result of which crimes the respective areas include within homicide as a whole. For example, some areas may not include driving causing death in total homicide numbers. However, this category has been included in the CSA data.

Increases in instances of homicide, particularly in murder, can be quite alarming, as they indicate to some extent an increased willingness by some among the population to engage in extremely violent and dangerous behaviour. However, as with all statistics, it is important to be looking for trends and not just anomalies.

Table 4.1 shows the total number of homicide offences recorded.

Table 4.1 Total homicide and related offences in Victoria, year ending in June

2015	2016	2017	2018	2019
174	211	233	219	185

Table 4.2 shows the number of offences recorded for each of the categories that make up the total number of homicides.

Table 4.2 Homicide and related offences per category in Victoria, year ending in June

	2015	2016	2017	2018	2019
Murder	50	66	56	61	53
Attempted murder	42	48	92	50	30
Manslaughter and accessory to or conspiracy to murder	17	13	13	13	17
Driving causing death	65	84	72	95	85
Subtotal	174	211	233	219	185

Table 4.3 shows the total number of offences for all offence categories as well as the total number of recorded offences.

Table 4.3 Total number of offences for all categories

	2015	2016	2017	2018	2019
Crimes against person	69 221	76 497	79 137	80 283	81 210
Property and deception offences	277 567	320 400	315 711	288 580	287 716
Drug offences	28 959	30 198	30 360	29 883	32 515
Public order and security offences	36 764	36 695	36 026	34 742	34 676
Justice procedure offences	58 152	70 628	69 924	71 126	76 880
Other offences	1 604	1 636	1 671	2 144	1 401
Total	472 267	536 054	532 829	506 758	514 398

View the website of the Victorian Crime Statistics Agency (CSA) (www.crimestatistics.vic.gov.au) for more information on the statistics of crime in Victoria.

Homicide in one other jurisdiction: New South Wales

View the website of the NSW Bureau of Crime Statistics and Research (BOCSAR) at www.bocsar.nsw.gov.au for more information about statistics of crime in NSW.

The data in this section is sourced from the NSW Bureau of Crime Statistics and Research (BOCSAR).

Table 4.4 shows the number of offences recorded for each of the categories that make up the total number of homicides in NSW.

Table 4.4 Homicide and related offences in NSW, year ending in June

	2015	2016	2017	2018	2019
Murder	94	61	74	55	75
Attempted murder	30	25	21	16	23
Accessory or conspiracy to murder	4	6	3	2	2
Manslaughter	3	7	10	10	9
Subtotal	131	99	108	83	109

Source: NSW Bureau of Crime Statistics and Research (BOCSAR)

Comparing Victoria with New South Wales

Comparing Table 4.2 with Table 4.4 reveals the following:

Murder

The total number of murders recorded was consistently higher in NSW than Victoria. However, neither state seemed to have significant increases in their recorded instances of murder. Both fluctuate up and down in number. It is important to remember also that NSW's population of 7.5 million is higher than Victoria's approximately 6.3 million. This, therefore, could have an impact on the total recorded numbers – higher population means the potential for a higher number of total crime.

Attempted murder

Interestingly, given that Victoria has a smaller population, Victoria consistently recorded a higher number of offences in this category. Further research into this discrepancy is warranted. This could also be a result of a tendency in NSW to process some crimes as a form of serious assault instead of attempted murder. A close examination of the difference between both states' Crimes Acts would be valuable in exploring such differences further.

Accessory or conspiracy to murder

Interestingly, given that Victoria has a smaller population, Victoria consistently recorded a higher number of offences in this category. Further research into this area and the reasons for this significant contrast is warranted.

Manslaughter and accessory or conspiracy to murder

Victoria's total number of recorded incidents is consistently higher than NSW's. Given NSW's total number of recorded murders was much higher than Victoria's, it would be worth exploring whether or not NSW's lower manslaughter rate is a result of a greater tendency to classify homicides as murder instead of manslaughter. This would help to explain some of the large variance in total number of murders recorded. Again, an examination of the difference between both states' Crimes Acts would be valuable in exploring such differences further.

Driving offences causing death

These offences are not listed with 'other homicide' offences in the NSW data. A comparison is therefore not possible.

Activity 4.14 Structured questions

Identifying trends and analysing statistics

- 1 Describe the trend for recorded murder offences over the five years in Table 4.2.
- 2 Compare the recorded number of murders in Table 4.2 with other forms of homicide listed in this table. What conclusions could be made from such a comparison?
- 3 Keeping in mind that homicide is a crime against the person, use Table 4.3 to compare the number of recorded offences for crimes against the person with the other categories. Which numbers, in particular, stand out to you?
- 4 Keeping in mind the total number of homicide offences from Table 4.2, compare this with the total number of criminal offences recorded in Table 4.3. Calculate a percentage to further your understanding.
- 5 Why do you think homicide, murder in particular, occupies so much of our public discussion of crime when it constitutes such a small percentage of total crime?
- 6 Compare the number of recorded murders in NSW in Table 4.4 with the number of murders in Victoria in Table 4.2. Suggest potential reasons for differences.
- 7 Compare the total number of recorded homicides in NSW in Table 4.4 with the number of homicides in Victoria in Table 4.2. Suggest potential reasons for differences.

Activity 4.15 Classroom presentation

Statistics research

Select another state in Australia or another country in the world and research the following:

- crime statistics for this place
- the number of recorded homicides as a total and by category
- compare the recorded number of homicides in Victoria with those in this place.

Then present your findings to the class in the form of PowerPoint, Prezi, short film or other medium as agreed with your teacher.

4.5 Impact of the offence

Murder and homicide have dire effects on individuals and the broader society.

Impact on individuals

Death in and of itself is traumatic due its finality. Victims of homicide are completely dispossessed of any potential future. Their death is made even more difficult by the pain, suffering and general trauma that they are subjected to prior to their death. This knowledge makes life even more difficult for the relatives and friends of victims of homicide, who must live their lives without their loved one. They are forced to deal with ongoing emotional pain and distress as a result of another person's maliciousness, recklessness or mere negligence. Their lives are indeed forever changed for the worse.

Thus, homicide – and particularly murder, due to its maliciousness – has the most dire effects on both victims and those connected to them. This is why it is essential that those culpable be brought to justice by the various parts of our justice system.

Impact on society

While crimes against people can be traumatic for individuals, they can also be detrimental to the community or society at large.

Spreading of fear and panic within the community

The extremity and finality of the offence of murder or another form of homicide creates a great deal of fear and anxiety in the community. Other citizens in the community may grow increasingly concerned about leaving their homes and interacting with others if they believe there is the possibility that they too could be the victim of such a heinous and fatal crime. People may also become more suspicious of each other. The horrific death of Jill Meagher in inner Melbourne in 2012 sent shockwaves through the entire Melbourne and Victorian community. The details of the crime were circulated via numerous media sources both nationally and internationally and, for some time, the whereabouts of the killer, Adrian Ernest Bayley, were unknown. Eventually, the killer was caught and several changes were made to Victoria's justice system, particularly its processes for parole. Overall, people's behaviour at home and beyond may become severely hindered after the commission of a murder.

Legal brief 4.9

Bourke Street murders: one of Australia's most horrific examples of mass murder

On 20 January 2017, James Gargasoulas drove his car at high speed down Bourke Street Mall between Swanston and Elizabeth Streets, one of Melbourne's busiest pedestrian areas, deliberately striking pedestrians along the strip. He killed six people and injured 27 others. Included among those killed was a three-month old baby and a 10-year-old primary school student.

Gargasoulas had been released on bail after being charged with driving and violence offences. He was then wanted by Police after he stabbed his brother. After leaving him in a critical condition, he kidnapped his pregnant girlfriend before eventually releasing her on the Bolte Bridge. Police had tailed him for 12 hours, while also

attempting to make contact with him via phone, prior to the fatal strikes.

Gargasoulas was given a life sentence with a non-parole period of 46 years by the judge who described the murders as among the worst in the country's history. The court received more than 50 victim impact statements during the sentencing stage. Many of the victims, as well as eyewitnesses, commented on the ongoing trauma that they continued to experience as a result of the crime. While prosecutors had asked for a life sentence with no possibility of parole, the judge ultimately gave some consideration to the offender's history of mental health problems when allowing for some possibility of parole.



A floral shrine in Bourke Street Mall in Melbourne on 24 January 2017, in remembrance of the victims of the 20 January car attack.

Activity 4.16 Case study

Bourke Street murders

Read Legal brief 4.9 and complete the following tasks:

- 1 Explain the effects of a crime such as this on both victims and their families and society as a whole.
- 2 Conduct additional research into this case and write down what you find.
- 3 Why do you think there was a significant push from the prosecution for a life sentence without parole?

News report 4.2

Murder of woman in park: Courtney Herron

Parkville murder accused Henry Hammond appears in Melbourne court charged with killing Courtney Herron.

A 27-year-old man has appeared in court charged with what police describe as a 'horrendous bashing' murder of a woman whose body was found in a major Melbourne park.

Courtney Herron, 25, was found dead by dogwalkers near a pile of logs in Royal Park, in Parkville just north of the CBD, about 9:25am on Saturday. Henry Hammond was arrested and interviewed on Sunday, and homicide squad detectives charged him with one count of murder overnight. Mr Hammond, 27 and of no fixed address, made a brief appearance at the Melbourne Magistrates' Court this morning and was remanded in custody until September.

The Court heard Mr Hammond may have autism and a 'delusional disorder'. He had been diagnosed with attention deficit hyperactivity disorder (ADHD) and prescribed an array of medications to treat it, the Court was told.

Magistrate Donna Bakos ordered a medical assessment be conducted as soon as possible. Police believe Ms Herron, who was homeless, was attacked in the park on Friday night or Saturday morning.

They said it was not clear whether a weapon was used and there was no evidence that she had been sexually assaulted.

'A heartbroken family'

Detective Inspector Andrew Stamper said Ms Herron had experienced issues with drugs and mental illness and had been couch surfing. He said she might have been sleeping rough but it was not clear whether she had been sleeping in the park.

She was last seen on May 14 in St Albans, in Melbourne's west, when she had contact with police. Detectives were trying to retrace her steps since then. Inspector Stamper said Ms Herron had lived a 'fairly transient lifestyle' and only had 'sporadic' contact with her family.



Messages at a makeshift shrine in remembrance of Courtney Herron at Royal Park on 31 May 2019 in Melbourne

'Family relationships can be fragmented, but I stress that doesn't mean families out there don't love their children,' he said on Sunday.

'We're dealing with a heartbroken family here.'

A GoFundMe fundraising webpage has been set up by the Melbourne Homeless Collective for donations for Ms Herron's family to put towards funeral costs.

Police have stepped up patrols in the park and members of the public left floral tributes at the spot where Ms Herron was found.

'You deserved so much better. May you rest in everlasting peace,' one note read.

Victorian Premier Daniel Andrews called Ms Herron's death a 'terrible, terrible tragedy' and said the Government would make any changes Victoria Police might recommend to improve public safety.

Challenging attitudes

Melburnians are reeling from a series of unrelated killings of women by men.

In several recent cases, the victims' bodies have been discovered in parks and other public places by passers-by.

Phil Cleary, an anti-violence campaigner whose sister was killed by her ex-partner, said there were complex social factors behind violence against women.

'It's a fundamental contradiction that we have here between the assertion of men's rights and women trying to find their rights in the aftermath of second-wave feminism,' he told ABC Radio Melbourne. 'What men are grappling with is their loss of power.'

The Council to Homeless Persons said homeless women were particularly at risk of violence.

'There are far too few housing options that women on low incomes can afford, and crisis accommodation and refuges are full of people who can't move on to permanent housing, because the affordable options just aren't there.'

Source: 'Parkville murder accused Henry Hammond appears in Melbourne court charged with killing Courtney Herron', Elias Clure and staff, ABC News, 27 May 2019

Activity 4.17 Case study

Courtney Herron murder case

Read News report 4.2 and complete the following tasks. You may need to conduct additional research in order to supplement your understanding.

- 1 Identify the facts in this case.
- 2 Why do you think this case received significant media attention?
- 3 Explain the impact of a crime such as this on the family and friends of the victim.
- 4 Explain how you think a crime such as this might impact on the psyche of citizens both in this area and the rest of Victoria.
- 5 Why might an incident such as this be particularly distressing for women?
- 6 Complete additional research on this case. Have there been any recent developments? If so, outline them.

A poem is read aloud at the vigil in remembrance of Courtney Herron at Royal Park in Melbourne on 31 May 2019.



News report 4.3

Three to go free over Salt Nightclub killing

Three men have been acquitted of hacking a man to death in South Yarra's brutal Salt Nightclub killings – and two others have been cleared of murdering his cousins, who drowned after diving into the Yarra River to escape the mob.

Hong Bui, Long Tran and Hoang Tran, all 26, will be released from custody after Victoria's Court of Appeal yesterday quashed their convictions for murdering James Huynh, 19, in company with five other men.

The violent altercation began inside the nightclub in the early hours of 8 July 2002, when James Huynh hit Hung Van, who was later convicted of his murder, over the head with a bottle on the dance floor.

Huynh left a trail of blood as he fled down Chapel Street chased by his attackers and collapsed on the corner of Alexandra Avenue, where the mob attacked him with machetes and swords.

The court ruling means no one has been convicted for murdering Huynh's cousins – Viet Huynh, 25, and Nam Huynh, 21 – who couldn't swim and drowned trying to flee. Court of Appeal judges Peter Buchanan, Frank Vincent and Murray Kellam said murder convictions for two men over the drowning deaths relied on just one witness whose evidence 'was too fragile a basis to enable a reasonable jury to conclude (guilt) beyond reasonable doubt'.

Jail terms for Cuong Lam, 29, and Hung Van, 32 – whom the prosecution accused of chasing the Huynhs to the river bank – have been substantially reduced. The men will each now serve 18 years, with a minimum of 15 years, for the hacking death of James Huynh. The Court of Appeal judges said the three men acquitted of James Huynh's murder did not intentionally contribute to his death.

The prosecution case was that three men inflicted the injuries that caused James Huynh's death, while the others encouraged them to commit the murder and drove them to and from the scene.

The judges said of the acquitted men: 'There was nothing save their background association with those engaged in the events, and their physical proximity to what occurred, that could suggest they played any role in the attack. They did nothing that could reasonably be seen as contributing to what took place in their presence.'

Long Tran's mother, Mai Tran, clapped and cried outside court as a lawyer explained that her son, who was sentenced in 2006 to a minimum of 11 years' jail, would go free.

Vien 'Vinnie' Tran, who was trying to phone Loddon prison to tell his brother the news, said the decision had 'restored my faith in Australia's justice system'. Asked if his family would be celebrating last night, he said 'bloody oath'.

Lawyer Gavin Meredith, for Hong Bui, whose conviction was also quashed, said his client had 'clearly spent a long time in custody and he'll have to come to terms with the decision'.

The Court of Appeal decision overturns jury verdicts in Victoria's longest-running murder trial.

Two other men jailed for the murder of James Huynh – Thanh Nha 'David' Nguyen and Linh Van 'Johnny' Nguyen, both 29 – had their appeals against conviction dismissed. An eighth man, Tuan Quoc Tran, 27, did not appeal.

Source: Kate Hagan, Sydney Morning Herald, 18 June 2008

Activity 4.18 Folio exercise

Salt Nightclub killing

Read News report 4.3 and complete the following tasks:

- 1 Locate where and when the fight broke out as well as where the murders took place. Use a map to develop more of an idea of where the crime took place.
- 2 Why did the fight originally break out?
- 3 How did the three victims die?
- 4 How many men were originally charged?
- 5 How many men were acquitted? For which particular murders were they acquitted and what were the reasons given by the Court of Appeal justices?
- 6 Do you agree with the reasons given for the acquittal? Explain your answer.
- 7 Identify all of the different parties affected by this event and describe how it has influenced their lives.

Key point summary

Do your notes cover all the following points?

- Homicide is the unlawful killing of another person or persons.
- Murder is the most severe form of homicide and may result in a life sentence.
- For a murder charge to be successful, the prosecution must prove the existence of malice aforethought. This may consist of:
 - the accused intended to kill the victim or intended to cause serious grievous harm to the victim, which then resulted in death
 - the accused acted with reckless indifference: that is, the accused acted in a way in which a reasonable person would be aware that death or grievous bodily harm would be the result
 - the accused intentionally carried out an act of violence on someone while trying to make a legitimate arrest.
- For a person to be culpable of homicide there must be an uninterrupted chain of causation between the act and the victim's death. Acts that may distort the chain are known as *novus actus interveniens* (new act intervening).
- Other forms of homicide include manslaughter, child homicide and infanticide.
- If the prosecution struggles to prove the accused had the intention to kill or cause serious bodily harm, a manslaughter charge might be more likely.
- More specifically, manslaughter is when the accused carries out a criminally negligent or unlawful and therefore dangerous act that results in the death of a person.
- Child homicide is similar to manslaughter; however, the victim is under the age of six.
- Infanticide is where a woman kills her own child (under the age of two) in circumstances that would usually be considered murder and, at the time, the balance of her mind was disturbed as a result of the birth of the child.
- Defences to homicide include self-defence, duress, mental impairment, automatism, sudden or extraordinary emergency, accident, intoxication and factual dispute.
- Homicide numbers of the past five years in Victoria appear to be relatively stable.
- Driving causing death offences are statistically more common than murder offences.
- Homicide has profoundly negative consequences on victims, their relatives and friends, as well as society as a whole.

End-of-chapter questions

Revision questions

- 1 Clearly explain why not all homicides are murders.
- 2 Create a visual diagram that defines the forms of homicide and distinguishes between them: murder, manslaughter, child homicide and infanticide.
- 3 Explain how *novus actus interveniens* may affect *actus reus* in a potential murder case. Which factors may break the chain of causation between an act and a victim's death?
- 4 Explain how the difference between recklessness and negligence may separate murder from manslaughter.
- 5 Can intoxication be used as a defence to homicide? Why/why not?
- 6 Identify and explain two potential defences to homicide.
- 7 How does common law contribute to the meanings of the various homicide offences?

Assessment

- 1 Report: Create a report that provides comprehensive coverage of one key murder or other homicide case. Aim to read through ten sources of information in order to learn about your selected case. Sources of information may include news reports, transcripts of judge decisions and information journal articles. When developing your report, ensure that you provide information on:
 - facts of the case
 - arguments made by the prosecution and by the defence
 - outcome of the case
 - how common such a case is within the community (examine statistics in order to work this out)
 - the effects of this case on the victims, their family and friends, as well as the community as a whole
 - whether or not there were any changes to the law, policing practices or any other aspects of the justice system as a result.
- 2 Role-play: Mock trial – Practising the craft of law.

Instructions

The following case is fictional and any resemblance to real people is purely coincidental.

The case and all relevant details are to be used in order to conduct a mock trial.

Alternatively, the class may elect instead to simply have a debate concerning whether the accused are guilty or not guilty in relation to the evidence provided. If conducting a mock trial, your class will need to assign roles:

- Prosecution team: at least two people
- Defence team: at least two people
- Judge
- Clerk
- Jury: 12 people (this may be adjusted if class is short on numbers – remember, this is a hypothetical case)

- ❑ Crown prosecutor's witness: Laurie Lannister
- ❑ Crown prosecutor's witness: Fredrick Grimes
- ❑ Accused's witness: Bob Snow
- ❑ Accused's witness: Rick Sandstone

Legal teams are to work together in order to build their cases. They should, at least, prepare an opening statement, a list of questions for all witnesses, as well as a closing statement. Legal teams should also work closely with their respective witnesses in order to prepare questions that will reveal information that will enhance their prospects of winning the case.

The strict rules of evidence and procedure must apply throughout the trial. The class may choose to further investigate these in order to ensure their adherence throughout. The emphasis of this task, however, should be on application of the legal principles learned during the chapter and the debate between the two sides concerning the evidence. Good luck!

Overview

- ❑ On 8 February, police responded to a complaint concerning a domestic dispute at 5 Downing St, Doncaster. The complaint was made by a neighbour at 11 p.m.
- ❑ Upon arriving at the designated address, constables Nick Harry and Beth Rumfield identified that the lights to the premises were turned off. The front door was partially open but there were no signs of forced entry.
- ❑ The constables moved into the house and, after a brief search, found the deceased, Shirley Sandstone (aged 36), lying face up on the kitchen floor with signs of blunt trauma to the head. There was subsequent excessive bleeding around the body.
- ❑ The officers checked for signs of life but found no pulse.
- ❑ The subsequent Coroner's report determined that Mrs Sandstone had died a short period after the attack, and approximately 15 minutes before the police officers had arrived. The trauma to the head was believed to have been caused by either human fists or a small, solid object. There were no signs of sexual assault.
- ❑ The interview with the next-door neighbour, who had lodged the complaint, revealed that the domestic dispute he had overheard was between a man and a woman. Mr Frederick Grimes stated that he overheard the words, 'You have no idea' and, 'Just give it up' from the male. The female is believed to have been Mrs Sandstone.
- ❑ An investigation of the crime scene found empty beer bottles (none broken) and toothpicks.
- ❑ Mrs Sandstone's pre-paid mobile phone was also missing and has not been found since.
- ❑ Shortly after examining the crime scene, Mr Rick Sandstone was interviewed and arrested by police officers.
- ❑ Police concluded that Mr Rick Sandstone (aged 36) had gone to his friend Bob Snow's residence for the night to drink beer and watch boxing. Allegedly, this had been a long-standing routine followed by the pair – one which ignited regular contestation between Rick and Shirley. At approximately 10 p.m., Rick decided to make his way home. Upon arrival he became involved in a heated, drunken dispute with his wife. This is believed to have then escalated to a physical confrontation, which resulted in the fatal attack.
- ❑ Rick has, however, protested the charges. He has claimed that he did not leave Bob's residence until 11:30 p.m. and, therefore, could not be responsible for the crime.
- ❑ While it was only the two men at the residence watching the boxing, Bob has attested to his ability to corroborate Rick's story.
- ❑ Trial to begin June 27.

Crown Prosecutor's witnesses

Laurie Lannister (Shirley's best friend)

- ❑ Laurie has been friends with Shirley for over 20 years.
- ❑ Laurie believes she has intimate knowledge of the Sandstones' relationship, and will testify to the fact that they have been involved in verbal disputes for quite some time (but did not necessarily know of any serious physical disputes).
- ❑ Laurie will also testify to Rick's problematic drinking patterns.
- ❑ She also suspects that Shirley may have been having an affair with an unknown man and that Rick may have discovered this.
- ❑ It is believed that Laurie has never liked Rick and has, in fact, been involved in verbal altercations with him herself.

Frederick Grimes (next-door neighbour)

- ❑ Frederick has been a neighbour to the Sandstones since they moved into the area six years prior to the murder.
- ❑ Frederick will testify to the fact that he has overheard yelling from his neighbours before. However, due to the lateness of the recent incident, and the fact that he had just woken up, he cannot guarantee that it was Rick's voice that he heard that night – although he believes it to be very likely.
- ❑ Frederick has never had a good relationship with the Sandstones, stemming largely from a disagreement over overhanging maple trees.
- ❑ Frederick lives alone, is 67, and occasionally wears hearing aids.

Accused's witnesses

Bob Snow (Rick's best mate)

- ❑ Bob and Rick have been good friends since they were both six years of age.
- ❑ Bob will testify that Rick had come to his place at 6 p.m., the night of the murder, and stayed until 11:30 p.m. He admits that he cannot remember how many beers the pair consumed each, but can loosely recall highlights from the match.
- ❑ Rick and Bob's friendship, in its long history, had only had one period of turmoil. This was when the pair were both 21, and Bob had been convicted of a series of liquor store thefts.

Rick Sandstone (witness for self)

- ❑ Rick owns his own business as a carpet specialist. He has done so for approximately 7 years. Prior to this, he worked for Preston's Super Carpets for almost 11 years.
- ❑ While the business is not exceedingly profitable, it has proven to be sustainable. Mr Sandstone's income had been the major component in the mortgage repayments for the Sandstones' three-bedroom Doncaster home.
- ❑ Rick claims that, while he and his wife did not always get along, he did truly love her and is devastated by her murder. He is upset that the police are not tracking down the 'real killer'.

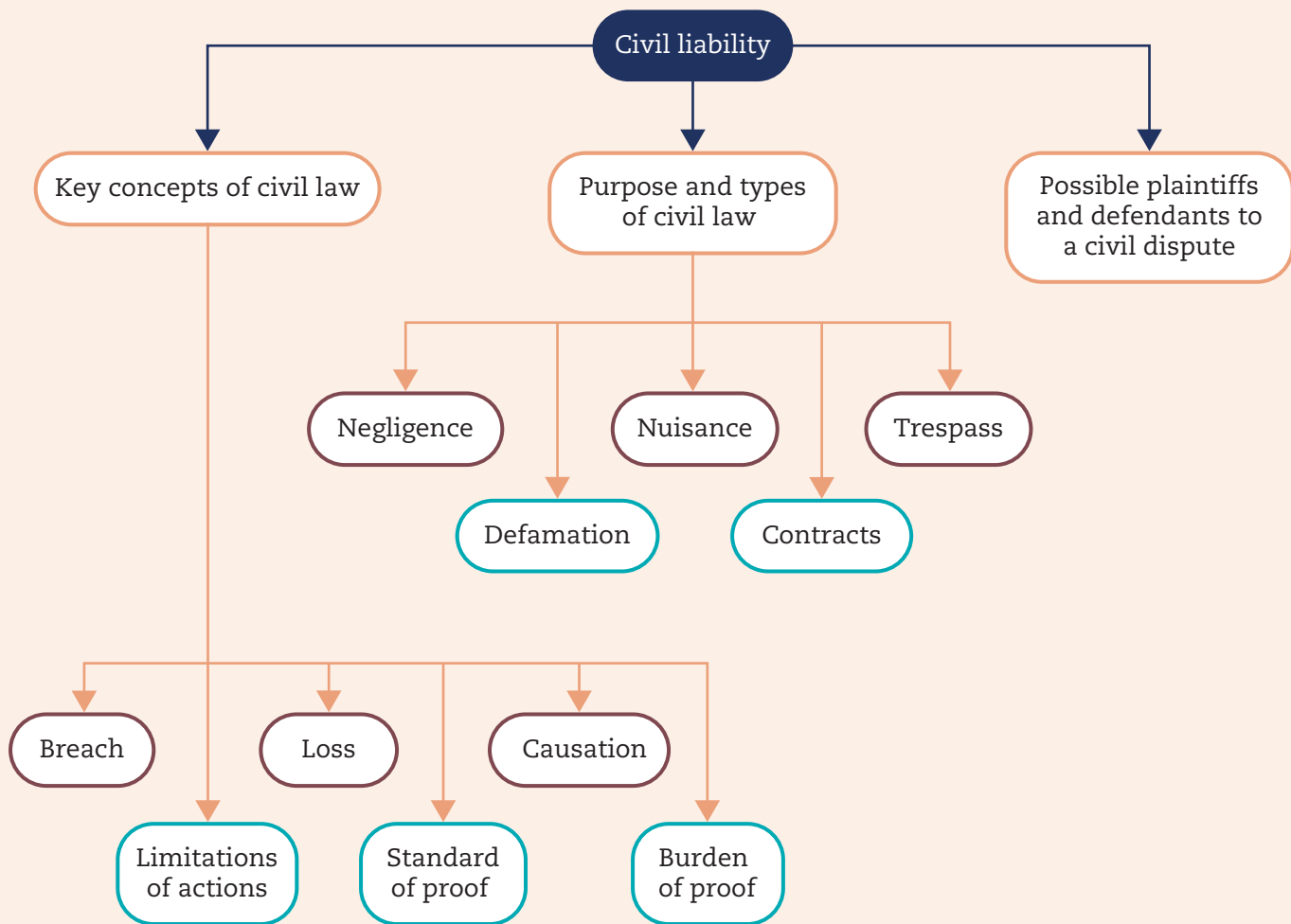
Chapter 5

Unit 1 – Area of Study 3

Civil liability

This chapter provides an introduction to the purposes and types of civil law. It will look at a number of key concepts relating to civil law including breach, causation, loss, limitation of actions, and the burden and standard of proof. Civil law aims to protect the rights of individuals, groups and organisations. It provides opportunities for a wronged party to seek redress for a breach of civil law. The chapter will also examine possible plaintiffs and defendants to a civil dispute.





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

breach of civil law an action committed by a person, group or organisation that has impacted on someone in a way that has caused them some type of harm or loss

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

civil law laws regulating the behaviour of private individuals

factual causation causation that passes the 'but for' test of necessity: if not for the action, there would have been no harm

limitation of actions legislation limiting the time allowed for a civil case to be initiated after the action causing harm or loss

loss monetary, psychological, physical or reputational damage as the result of another person's actions

plaintiff the party who initiates a civil action

standard of proof the level of proof that must be reached to prove a case in court: in a criminal case, the standard of proof is 'beyond reasonable doubt'; in a civil case, the standard is 'on the balance of probabilities'

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

5.1 Purposes and types of civil law

A breach of a civil right or law can have both civil and criminal consequences.

Civil law focuses on the rights and responsibilities of individuals, government bodies and private organisations and how they interact with each other. A **breach of civil law** may or may not lead to a criminal prosecution or action. Civil law focuses on protecting the rights of people within society and provides opportunities for a wronged party to seek redress for a breach of civil law. There are a number of areas of civil law, such as negligence, defamation, nuisance, trespass and contracts.

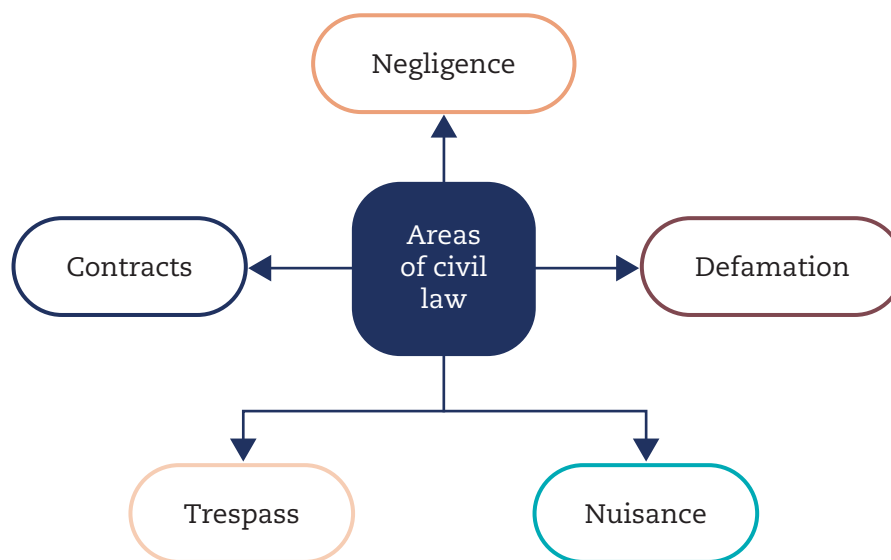


Figure 5.1 Areas of civil law

Tort law and contract law

Tort law

A **tort** is a law or area of law that focuses on an 'actionable wrong'. This type of civil action is based on some kind of loss or injury (psychological, physical or monetary) and looks at compensating someone through a monetary amount or some other kind of legal redress. The law of torts includes actions for negligence, defamation, nuisance and trespass.

Contract law

On the other hand, contract law deals with the formation, drafting and consequences of a legally binding agreement between two parties. In contract law, a number of elements have to be present for a contract to be valid.

Table 5.1 The difference between civil and criminal law

Civil law	Criminal law
An individual, group or company can sue and be sued under civil law.	A person cannot be sued in criminal law (although an act can have both civil and criminal outcomes).
Civil law is not enforced by the police. It is up to an individual to take civil action.	It is enforced by the police and sanctions are determined by the courts.
Some civil law is covered by legislation such as contract law. Other areas of civil law have evolved through court decisions (known as precedent).	Parliament passes legislation to ensure that there are laws relating to offences or acts. Most legislation is found in the Crimes Act.
Individuals, groups or companies can sue for damages – usually monetary compensation for injury, pain, loss or suffering.	Sanctions include fines, community-based orders and imprisonment.

5.2 Key concepts of civil law

A number of key concepts relate to civil law, including breach, causation, **loss**, **limitation of actions**, **burden of proof** and **standard of proof**.

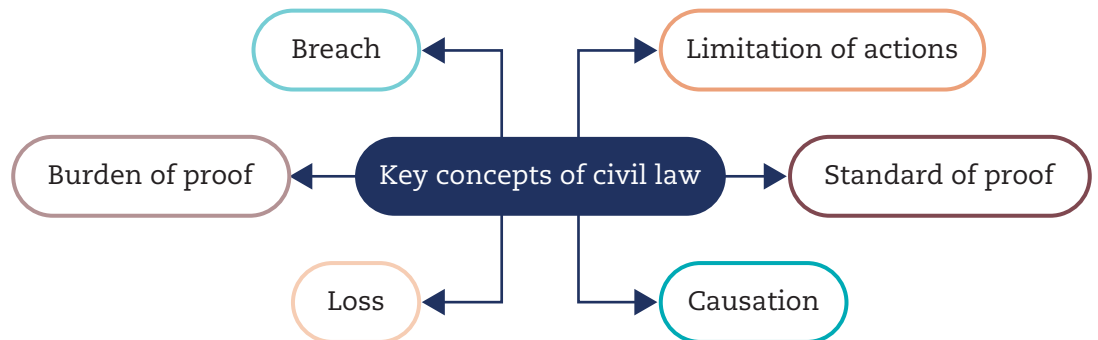


Figure 5.2 Key concepts of civil law

Breach

In a civil case, it has to be proven that there has been a breach of civil law and that the actions of a person have led to an injury or loss to another.

A breach of civil law means that a person or group has committed an action that has impacted on someone in a way that has caused them some type of harm or loss. A breach of a civil law must be proven to have occurred and is established through the decisions of a court. There has to be a relationship or link between the action or act and the damages or negative impact of the action for a breach of civil law to occur. The negative impact may include a physical or psychological injury, a financial loss or some negative impact on an individual's or group's reputation.



Harm has been suffered; the next question is, has there been a breach of civil law by any party responsible for safety, e.g. through negligence?

Causation

A number of states in Australia have passed legislation to clarify what is meant by 'causation' in a civil case. 'Causation' can be defined as the relationship between action and loss where the action causes the loss. Civil law cases determine whether the action of a person or organisation actually caused the harm or damage to the person or organisation who has initiated the civil action. It also links to the notion of '**factual causation**' (causation that passes the 'but for' test of necessity: if not for the action, there would have been no harm) and the 'scope of liability' (the action was the immediate or direct cause of the harm).

Here is an example of the 'but for' test. Adam is a builder who employs Bob as a carpenter and supplies him with a stepladder for his work. Another employee tells Adam that a step on the ladder is loose and may fail, but Adam neglects to do anything. Bob has a fall when the step breaks on the ladder. But for Adam's negligence in failing to repair the ladder, Bob would not have suffered harm. The 'but for' test is passed and factual causation is established.

Most states in Australia have legislation that clarifies the issues and ideas being dealt with in the courts during civil cases. Issues that have been clarified include the fact that negligence needs to be part of the cause of any harm that occurred. 'Scope of liability' considers what is the 'proximate' (nearest or most immediate cause) and circumstances that may increase or decrease liability, such as multiple causes, foreseeability and the likelihood of any damage suffered.

Civil law is also clarified by judges setting precedents in civil cases. One important case in 2013 that helped clarify the concept of causation was *Wallace v Kam* [2013] HCA 19. This case involved medical negligence (the tort of negligence is outlined in more detail in Chapter 6) and centred on the doctor's failure to warn the patient of potential risks of an operation. Mr Wallace underwent a surgical procedure to eliminate pain in his lower spine. There were two risks involved in the operation, and Mr Wallace was not advised that he may suffer temporary damage to nerves in his thighs or that there was a one in twenty chance that he could have permanent paralysis due to damage to his spinal nerves. After the operation, Mr Wallace suffered severe pain in his thighs.

The High Court had to consider the question of whether Dr Kam had been negligent in not informing Mr Wallace of the two risks. The High Court determined that Dr Kam had been negligent in failing to tell Mr Wallace about the risks. However, the court found that it was likely that Mr Wallace would have had the operation anyway if he had known about the possible pain he may have suffered after the operation. It was therefore not possible to say 'but for Dr Kam's negligence, Mr Wallace would not have had post-operative pain'. By failing this 'but for' test, there was no 'factual causation'.

In 2009, the High Court further clarified the concept of factual causation. A restaurant (Adeels Palace) was open for New Year's Eve. In the early hours of 2003, there was a dispute between two patrons on the dance floor. One of the men was punched in the face and left the restaurant. He returned later with a gun and shot one man in the leg and the other (the man who hit him) in the stomach. The two injured men sought damages from Adeels Palace on the basis of negligence: insufficient security at the function. Their claim was supported by the New South Wales District Court and on appeal in the New South Wales Court of Appeal. The High Court allowed the appeal by Adeels Palace and it found that while Adeels Palace owed a duty of care to patrons, it could not be responsible for the criminal actions of a third person, it could not foresee a risk of this kind and the situation failed the 'but for' test (even if security had been there the incident may still have taken place).

In another case in 2012 (*Strong v Woolworths Limited* [2012] HCA 5), the High Court had to determine whether factual causation under the *Civil Liability Act 2002* (NSW) excluded the notion of 'material contribution' (meaning causation by another factor) and whether the appellant had proved factual causation. The appellant suffered serious spinal injury when she slipped and fell while at a shopping centre. At the time she was in the sidewalk sales area outside the entrance to a Big W store. The area was under the control of Woolworths. The appellant (Strong) is disabled and she walks with the aid of crutches. The crutch slipped on a hot chip that was on the floor and she fell heavily. She sought damages from Woolworths and CPT Manager Limited (the owner of the shopping centre). The claim against Woolworths was accepted and she was awarded more than \$500,000; however, the claim against CPT Manager Limited was dismissed.

Woolworths appealed the decision. The New South Wales Court of Appeal held that the appellant had not proved that Woolworths' negligence had caused her injury. The case was then heard in the High Court which set aside the New South Wales Court of Appeal decision and stated that there was sufficient factual causation to decide that 'but for' conditions

A number of states in Australia have passed legislation to clarify what is meant by 'causation' in a civil case.

existed. It ruled that but for Woolworths' failure to keep the sidewalk clean and safe, the injury would not have happened. It passed the 'but for' test.

Activity 5.2 Structured questions

Breach and causation

- 1 Define the following concepts:
 - a causation
 - b breach.
- 2 Distinguish between civil and criminal law.
- 3 Read the following scenarios and determine whether there is 'factual causation' between the actions of the person and the resulting harm:
 - a Sammy was a shop assistant in a jewellery store. A customer purchased a diamond ring and later decided that he did not want it. He was given a credit note from the store but wanted his money back. The manager refused. While Sammy was closing up the store one evening, the customer came back and pushed her over. This resulted in a broken leg. Sammy argued that her manager was responsible as he would not give the customer a refund. She sought, and received, some compensation. The manager is appealing the decision.
 - b Jeremy is an assistant in a pharmacy. He gave advice to a customer who was having trouble with her skin. He recommended a skin cream and moisturiser. The customer developed a reaction to the cream and ended up in hospital with a skin infection. She sought compensation stating that Jeremy did not warn her that this could be a possible side effect of the cream.

Loss

Loss in a civil law case includes monetary, physical injury, harm or suffering, financial loss and damage to a person's reputation.

Loss in civil law includes a range of things. Loss can be monetary, physical injury, harm or suffering, psychological harm, financial loss, damage to a person's reputation or other economic loss.

The **plaintiff** (the person bringing the action) must show that they have suffered some loss caused by the defendant. Claims for damages are generally heard in the Supreme Court or County Court, but on some occasions can be heard in the Magistrates' Court.



Loss or damages are generally assessed as a lump sum on a 'once and for all' basis. Such an assessment finalises the injured party's rights and there is no right to come back to court at a later date for further damages. Damages are broken into special and general damages. Special damages generally cover out-of-pocket expenses, such as medical fees, loss of earnings, ambulance fees and may also cover incidental expenses such as home help. Usually these damages are easily quantified and calculated. General damages, on the other hand, cover loss of earning capacity in the future, pain and suffering, loss of enjoyment of life and other impacts such as disfigurement. If a person has died as a result of an incident, then the dependants can make a claim.

Limitation of actions

In Victoria, legislation that covers actions taken in civil cases includes the *Limitations of Actions Act 1958* (Vic). In contract law and torts (civil wrongs), there is generally a limit or expiration date of three years since the incident occurred for legal action to be taken. In contract law, the action is limited to claims in a contract, actions to enforce an award, and actions to recover a sum of money or for defamation (a one-year time limit).

Vicarious liability

Vicarious liability is an important part of negligence. It occurs when one person is held liable for the negligent actions of another. It is often seen in cases where an employee has been negligent and the employer is held liable. An organisation, for example, can be liable for the wellbeing of an employee and must ensure that all employees are safe and not subject to discrimination or sexual harassment. An employer may be held legally responsible for the actions of employees if these occur in the workplace or in connection with a person's employment. In one case, *Blake v JR Perry Nominees Pty Ltd* [2012] VSCA 122, a truck driver was injured as the result of another employee's actions when they were 'playing around' while waiting for work. In this case, the Court of Appeal found that the actions of the employee were beyond the control of the employer. In other cases, employers have been found to be responsible for the actions of their employees, for example, if a complaint is made by an employee about racial discrimination and it is not prevented or responded to then the employer is vicariously liable. If a person is subject to discrimination based on age or race, for example, then the employer must ensure that this does not recur and investigate any complaints.

Burden of proof

The burden of proof is the duty or requirement placed upon a party to prove or disprove a disputed fact. In a criminal case, the burden of proof is placed on the prosecution, who must demonstrate that the defendant or accused is guilty before a jury can convict him or her. In a criminal case, the prosecution must prove the defendant's guilt (before a judge or Magistrate or jury) beyond reasonable doubt. In civil law, the burden of proof lies with the plaintiff (the person/s who has initiated the civil action).

Standard of proof

The level or standard of proof is lower in a civil case and is/may be based on the '**balance of probabilities**' (which version of the story is more likely to be true). It is still up to the plaintiff to show the court why their version of events is more likely and prove any harm they may have suffered.

The court may also take into account the nature and gravity of the subject matter when deciding whether the standard of proof has been met. There are a number of matters to consider when determining whether a case can be proved on the balance of probabilities. These include:

- the nature of the cause of action or defence
- the nature of the subject matter of the proceeding
- the gravity of the matters alleged.

The graver the consequences of a particular finding, the stronger the evidence needs to be in order to conclude that the allegation is established. If a civil case also involves criminal allegations, the standard of proof still remains the balance of probabilities.

The standard of proof in a civil case is lower than a criminal case. In a civil case, the test used is the 'balance of probabilities'; in other words, which version is more likely to be true.

Activity 5.3 Structured questions

Burden of proof and standard of proof

- 1 Describe what is meant by the 'burden of proof' in both civil and criminal cases.
- 2 Outline the standard of proof required in a civil case.
- 3 Explain why the standard of proof in a criminal case is higher than in a civil case.

5.3 Plaintiffs and defendants

A plaintiff in a civil case is the party who initiates the legal action. A defendant in a civil case has civil proceedings taken against them. There are a number of people who may be defendants in a civil case. Generally, a plaintiff will take action against an individual, a group of people, a business or company, or a government organisation or body. In most cases, the parties involved will try to resolve the concern or complaint before the case goes to court.

Key point summary

Do your notes cover all the following points?

- ❑ Civil law aims to:
 - protect the rights of individuals, groups and organisations
 - provide opportunities for a wronged party to seek redress for a breach.
- ❑ Areas of civil law include negligence, defamation, nuisance, trespass and contracts.
- ❑ Key concepts of civil law:
 - Breach
 - Causation
 - Loss
 - Vicarious liability
 - Limitation of actions
 - The burden of proof
 - The standard of proof.
- ❑ The burden of proof in a civil case lies with the plaintiff.
- ❑ The standard of proof in civil law is the balance of probabilities. This is a lower standard than is needed for a criminal case.
- ❑ Civil case outcomes are determined on which version of events – the plaintiff ‘s or defendant’s – is more likely to be correct or true.
- ❑ A plaintiff in a civil case is the party who initiates the legal action.
- ❑ A defendant in a civil case has civil proceedings taken against them.

End-of-chapter questions

Revision questions

- 1 Match the definition with the correct term.

	Term	Definition	Correct answer
A	Civil law	A person who has civil proceedings initiated against them	
B	Balance of probabilities	A person who is initiating a civil case	
C	Standard of proof	Protects the rights of individuals, groups and organisations	
D	Defendant	The more likely version of events in a civil case	
E	Plaintiff	The level of proof that must be satisfied in order to determine liability	

- 2 Identify the purposes of civil law.
- 3 Outline three differences between civil and criminal law.
- 4 Outline three similarities between civil and criminal law.
- 5 Explain the following concepts:
- breach
 - causation
 - loss
 - vicarious liability
 - limitation of actions
 - the burden of proof
 - the standard of proof.
- 6 Why is it important to establish causation in civil cases?
- 7 Identify two different areas of civil law and explain what they cover.
- 8 Read the case study and answer the questions below.

An employee of an airline made remarks about another employee which were considered to be racist. The remarks were made in the presence of a manager and therefore were considered to be condoned by the employer.

- Which area of civil law would this be covered by?
- Why would the employer be found to be liable for the actions of employees?

Current issues folio

Visit the County Court website (www.countycourt.vic.gov.au) and find the court schedule to examine the civil list for the day.

Chapter 6

Unit 1 – Area of Study 3

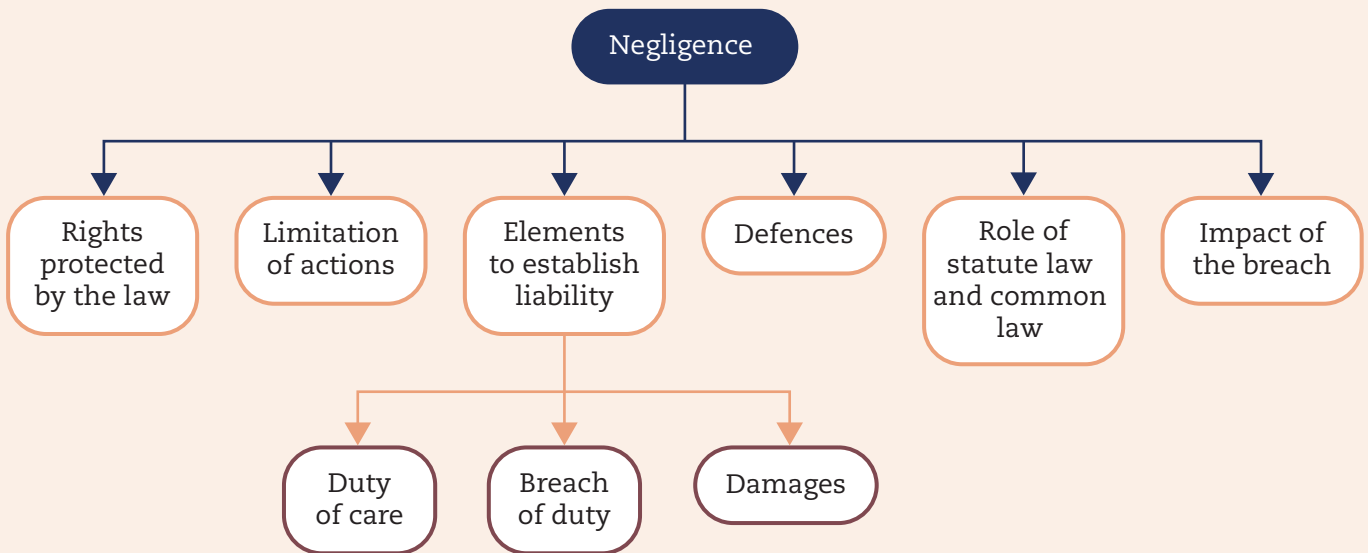
An area of civil law: negligence

This chapter provides an introduction to the tort of negligence, including the rights protected by the law, the elements required to establish liability, the limitation of actions and possible defences. It will also explore the role of both statute law and common law in developing the elements and defences and the impact of a breach of negligence on the parties involved.

Negligence occurs when someone acts in a careless way that causes or results in harm to another person. Harm may be physical, psychological or financial. Usually the aggrieved person sues to obtain monetary compensation or damages for their loss, injury or pain and suffering. As an individual, you are able to take action against a person if you have been injured or adversely affected in some way by that person's actions.

Negligence can lead to physical harm in the workplace.





Key terms

breach of duty occurs when a person has a duty of care to another and that other person is injured or harmed due to this person's actions

contributory negligence where the defendant is at fault, but the behaviour and conduct of the plaintiff has contributed to their loss or suffering

damages a monetary award; this is the most common outcome of a civil case

duty of care a legal obligation to avoid causing harm; can arise when the harm is 'reasonably foreseeable' if care is not taken

negligence where the act or omission of one party affects the rights of another

standard of care the degree of care expected from a reasonable person in the same circumstances



Some professions owe a duty of care.

6.1 Rights protected by the law

The tort of negligence ensures that people injured in some way are able to seek redress, as the courts will recognise the loss suffered and that other people in society need to be protected.

All individuals in society expect to have their rights protected by the law, and if these rights are violated and they suffer in some way they expect to be able to seek legal redress. The tort of **negligence** provides people with an avenue to seek recompense for any injury or loss they have suffered due to the actions of one or more other people.

The tort of negligence has grown to cover many different aspects of people's lives. Much of the area of civil law and torts has developed through judge-made (or case) law. The courts have used prior cases' decisions and reasoning to determine the case in front of them. This has led to a range of judgments that have developed and refined the area of negligence. This area of law has continued to grow a long way past the initial cases and decisions. Parliament has also passed laws to clarify and support this area of civil law.

Negligence consists of three elements: **duty of care**, **breach of duty** and **damages**. The law tries to ensure that people can seek redress if damaged or injured in some way; however, it also means that there are checks in place to ensure that people are not subject to frivolous legal action in the course of their normal life and activities. The fact that a plaintiff has to prove each of the elements of negligence means that there must be some evidence before an action can be initiated.



The courts have used previous cases to develop civil law and torts.

6.2 Elements to establish liability

The tort of negligence has three elements that must be present if an action is to be successful:

- 1 Duty of care: was there a duty of care involved in the case?
- 2 Breach of duty: if there was a duty, was it breached?
- 3 Damages: was there any damage or injury as a result of the action or actions in the case?

Duty of care

A duty of care is a legal obligation to avoid causing harm, and can arise when the harm is 'reasonably foreseeable' if care is not taken. There must also be a relationship between the two people for a duty of care to exist. There are some qualifications (or restrictions) on a duty of care. 'Good Samaritans' (someone who has assisted another; for example, at the scene of an accident) are generally exempt from liability as they have assisted a person in need.

Negligence cases are based on a non-contractual relationship between the parties involved. Sometimes the defendant and plaintiff are known to each other (for example, a doctor and patient), and in other cases there may be no relationship (for example, a person falls over on a slippery floor in a shopping centre). For a negligence case to be successful it has to be established that a duty of care existed.

The **standard of care** is what would be expected from a 'reasonable person' and what they would have done or not done in the same circumstances. However, this may vary depending on the age of a person or a person's experience. If the actions of the defendant are less than what a reasonable person would do, then it may be found that they have breached their duty of care. Let's use a road user as an example to examine standard of care required. If a pedestrian is on their mobile phone, for example, and not paying attention to their surroundings or if a motorist sits too close to another vehicle and runs into it, they would be found to have a duty of care that has been breached. A 'reasonable person', for example, would also be someone who sees a person is injured and assists or calls for help. An unreasonable person would be someone who stole the handbag of that person while they were injured.

In a negligence case the plaintiff (person/s bringing the action) must establish that the defendant (the person defending the action) owed a duty of care. The tort of negligence has developed very slowly over time and a number of cases and decisions have led to the development of current principles as well as some legislation passed by governments. In the British case of *Langridge v Levy* (1837) 150 ER 863, a father bought a gun for himself and his three sons. The seller told him that a famous gun-maker made the gun and guaranteed its safety. When one of the sons used the gun, it exploded, leading to the mutilation of his arm. The son was not part of the original contract (the sale of the gun) and could not make a claim under contract law. The Court, however, decided that the seller should pay damages for the injury as there had been a type of fraud when the seller sold a gun that he knew was faulty.



In negligence cases, the duty of care must be assessed.

Activity 6.1 Debate

You be the judge

In groups, determine whether a person has a duty of care to the other person/s in the following situations:

- 1 A teacher and students in their class
- 2 A bus driver and passengers on the bus
- 3 A lawyer and their client
- 4 A person who is first-aid trained and a person who has fallen over in the street
- 5 A doctor and her patient
- 6 Two customers in a shop waiting to be served.



Does a teacher have a duty of care to the students in their class?

In the British case of *George v Skivington* [1869] ER448, a man bought hair wash (shampoo) from a seller/manufacture for his wife. When she used it, she suffered a scalp disorder and some of her hair fell out. She was successful in suing and received damages as the court decided that the seller knew the product was negligently made.

Until the famous British case of *Donoghue v Stevenson* [1932] AC 562, the concept of modern negligence had not been developed. In this case, a person purchased a bottle of ginger beer in an opaque (non-transparent) bottle. She drank most of the drink, and when she poured the last of the liquid into her glass she found the remains of a snail. As a result, she was ill. She sued the manufacturer of the ginger beer. Prior to this, there was no concept of a manufacturer's liability. The Court found that the manufacturer of the ginger beer owed a duty of care to the consumer and the woman was awarded monetary compensation (damages).

A famous Australian case that established the area of negligence in this country was *Grant v Australian Knitting Mills* [1936] AC 85. Grant purchased underwear, but after wearing it he suffered from a rash and dermatitis. It was found that the manufacturer of the underwear had left sulphite, a chemical, in the material. Grant sued the manufacturer for negligence. The Court looked at the case of *Donoghue v Stevenson* and decided that the manufacturer was negligent.

In the case of *Nettleship v Weston* [1971] 2 QB 691, a learner driver injured her instructor when they were involved in a car accident. The driving instructor tried to claim against the learner driver due to negligence. The Court had to consider the question regarding the 'standard of care' that would be expected from a learner driver. The question centred on whether it was reasonable to expect a learner driver to be as careful as a more experienced driver. The Court of Appeal said that the duty of care was that of a competent and careful driver and therefore the learner driver had to pay damages for the instructor's loss because he could not work after the accident.

Other cases expanded the concept of negligence to cover financial and other professional advice as well as products. In a famous UK case, *Caparo Industries plc v Dickman* [1990] UKHL 2, the plaintiffs were shareholders in a company and the defendants were the company's auditors (who check the accounting records and procedures of a company). The plaintiffs relied on the audited accounts and purchased more shares in the company with the idea of a takeover. After the company was taken over, the plaintiffs found that the company had made a £400 000 loss rather than the £1.2 million profit shown by the auditor's report. The House of Lords (at the time, the final stage in a case or appeal in the UK) held that the requirements for a duty of care did exist. It stated that the harm was foreseeable; however, the House of Lords concluded that the relationship was between the company and the auditors. It also found that the potential investors and those shareholders who wanted to expand their investment were not owed a duty of care. Therefore, the auditors were not liable as there was not a duty of care between them and these individual shareholders.

In the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the company received a large order from a customer. Hedley Byrne wanted to check the company's financial position before going ahead with the order. The bank stated that the customer was considered to 'be good' and added in a clause stating that the statement was given 'without responsibility on the part of the bank'. The company subsequently went into liquidation and Hedley Byrne sued the bank, claiming that the information given to them was misleading. While there was a contract between the plaintiff and the bank, the contract had an exclusion clause in the credit reference, which meant the defendant was not found to be liable or negligent.

In relation to negligence, issues of causation (see Chapter 5) and remoteness (closeness to the plaintiff) tend to be considered separately. The key test for causation is known as the 'but for' test, which basically asks whether the loss would have been sustained 'but for' the defendant's negligence. One famous UK case is *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 428. The claimant arrived at the hospital emergency department complaining of stomach pains. He was sent home without being examined and subsequently died. Even though the doctor owed the patient a duty of care and had breached the duty, the breach of duty had not caused the patient's death, since the poisoning was so advanced by the time the patient arrived at the hospital that he could not have been saved even with prompt treatment. The defendant was therefore not liable.

The key test for remoteness in negligence is one of foreseeability. In *The Wagon Mound* [1961] UKPC 2, the defendants negligently allowed oil to spill into Sydney Harbour. The plaintiffs were welding, but stopped when they saw the oil in the water. They were advised that the sparks from their welding would not ignite the oil lying on the surface of the water so they started working again. Once they did this, the sparks ignited in the water and their wharf was burned down. The Court found that the defendants could not foresee this happening and that the only consequence they could foresee was the pollution due to the oil spill.



A case against a learner driver by their instructor was overturned in 1971.



A case against a hospital was important in how it applied the 'but for' test of causation.



The *Wagon Mound* case occurred in Sydney.

In contrast, in *Jolley v London Borough of Sutton* [2000] 1 WLR 1082, a local authority failed to remove an abandoned boat for two years. A 14-year old was seriously injured when he tried to jack up the boat in order to repair it. The authority was found liable since it knew that children regularly played on the boat, so it was foreseeable that a child would be injured. It did not matter that the precise nature of the injury could not be foreseen.

Activity 6.2 Debate

Is there a duty of care?

In groups of two, decide whether there was a duty of care in the following cases:

Case A	Jamee purchased some perfume from a market stall. The perfume reacted badly with her skin and caused a rash and blistering. She had the perfume tested and found that it contained chemicals that could react with a person's skin.
Case B	Hamish got a tip from his plumber Fred about a company. He was told that the shares were undervalued and worth buying. Hamish invested \$7000 in the company and the shares were worth 60% less than he paid for them in five months.
Case C	Angelo went to a coffee shop with Sasha. He purchased a coffee and a salad sandwich and found half a worm in the sandwich when he ate the last part of it.
Case D	The local council left an old tractor near the council-owned playground. A 12-year old girl climbed on the front of the bonnet and badly gashed her leg and required hospital treatment.
Case E	Franca, a qualified financial planner, gave advice to two clients without checking the circumstances of the investment. Both clients lost money.

Breach of duty

A breach of duty can be defined as a situation where a person causes some kind of damage to another person in a situation where a duty of care has been established.

If a duty of care has been established, then it is up to the court to establish whether the conduct or actions of the person (defendant) has breached the duty. The case is usually decided on the basis of common sense, what a 'reasonable person' would do in the same circumstances, and whether the damage, injury or harm was foreseeable and was it likely that this harm would have occurred due to the action/s of the defendant.

For a negligence case to be successful, the person suing (the plaintiff) must prove that the other person was negligent. It must also be proven that a person acted without reasonable care in the circumstances. If a person is under 18 and is being sued, it may be appropriate for an adult to be the 'case guardian' to assist in the process. For a plaintiff to be successful in a negligence case, it must be proven that there was a duty of care owed and that this duty was breached or broken. It also must be proven that the duty and actions of the defendant were what a 'reasonable person' would do and whether the injury or harm was foreseeable.

In one famous UK case, *Paris v Stepney Borough Council* [1951] AC 367, the plaintiff, a fitter and turner, only had sight in one eye. While using a hammer at work, a splinter of metal flew into his good eye, leaving him blind. Safety glasses were not provided. The court found that the council should have realised that while the chance of injury was remote it would have devastating consequences for the plaintiff. The employer was found to be negligent.

The second element of negligence is a breach of duty. It must be proven that there was a duty of care which has been breached by the defendant.

In another case, *Bolton v Stone* [1951] AC 850, a person was struck by a cricket ball while walking past a cricket ground. The ball had travelled nearly 70 metres before going over the 5-metre fence and travelling another 20 metres before hitting the plaintiff. The court found that the manager at the cricket ground could not have foreseen a person outside the cricket ground being hit, therefore the action was not successful.

Employers have a duty of care to their employees and need to ensure that they support their employees in ensuring a safe and positive workplace.



Safety at work is essential.

News report 6.1

Chemical spray damage results in record \$7m negligence court payout

A farmer has been awarded \$7 million in damages for losses caused by a neighbour's negligent spraying.

For grape grower Tony Caccaviello, it has been a four-year legal fight for compensation, after a mix of toxic chemicals destroyed his vineyard in northern Victoria.

In 2013, Mr Caccaviello noticed his vineyard, near Swan Hill, looked different. The leaves were 'translucent' and covered in yellow spots. He initially thought the vineyard had been hit by a bad frost. The Supreme Court of Victoria later heard a cloud of agricultural chemicals, all deadly to grapevines, had blown across the vineyard from his neighbour, Rodney Hayden's, property. The chemicals involved – 2,4-D, glyphosate and metsulfuron-methyl – are toxic to grapevines and never used in vineyards.

In Mr Caccaviello's case, the Supreme Court was convinced the herbicides had come from Mr Caccaviello's neighbour, Rodney Hayden, whose nearby vetch crop had been sprayed on 30 September 2013.

The final damages claim of \$6 543 626.10, plus \$704 587.66 in interest included the cost of rehabilitating the land, Mr Caccaviello's loss of grape sales, the cost of re-establishing the vineyard and the future loss of grape sales while the vines regrow.

Mr Caccaviello's lawyer, Howard Chait, stated, 'This is I believe, the first time that a court, and a superior court like the Supreme Court of Victoria, has awarded such damages to a claimant – it is a significant amount of money.'

Source: Clint Jasper, ABC News, 11 August 2017

Activity 6.3 Folio exercise

Negligence payout

Read News report 6.1 and complete the following tasks:

- 1 List three facts of the case.
- 2 What was the outcome of the case?
- 3 Explain why the plaintiff was awarded such a large amount of damages.



Spray drift is not uncommon for farmers but this case resulted in a record payout.

Legal brief 6.1

Smith v State Of Victoria* [2018] VSC 475

Justice John Dixon in the Victorian Supreme Court has cleared the way for a woman and her children, who were all violently assaulted and threatened by the children's father, to sue the State of Victoria for negligence and breaches of alleged duties of care for failing to enforce repeated breaches of intervention orders.

The woman and her children, who cannot be named, allege that police officers in two regional Victorian towns repeatedly failed over a nine-year period to take action against the father when he assaulted them and that police failed to protect them. They also assert that the failure by police amounted to a breach of their human rights and a breach of the public authorities' obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The State of Victoria had asked the Supreme Court for either a summary dismissal of the case before it goes to trial or for

the Court to strike out the claims alleging that they owed a common law duty of care. In rejecting the application by the State of Victoria, Justice Dixon said a summary dismissal would be an 'extreme measure', one that would 'forever shut out' the plaintiffs from seeking to prove the claim at trial.

Justice Dixon said the issue of whether a police officer does owe a duty of care, at least in the terms as described in this case, must be determined on close analysis of the facts underpinning the relationship between the plaintiff and the defendants.

Justice Dixon said the case was 'fact rich and fact intensive' and the State had not persuaded him that no duty of care could arise.

* A pseudonym

Source: <https://www.supremecourt.vic.gov.au/node/3482>

Activity 6.4 Structured questions

Smith v State Of Victoria [2018] VSC 475

Read Legal brief 6.1 and complete the following tasks:

- 1 Identify the plaintiff and the defendant in this case.
- 2 Explain why there was a move by the defendant to have the case dismissed.
- 3 What are the possible implications of the case if it is found that a duty of care was owed in this case?

Damages

The last element of negligence is damages. For a plaintiff to be successful in suing the defendant for negligence, it must be shown that the person suffered some type of damage as a result of the breach of duty. The courts will need to determine the extent of the damages and how a person suffered physically, emotionally and/or financially, and how long term the suffering has been and will be. Damages are usually a monetary compensation where pain and suffering and any economic loss are calculated. It is often difficult when a person has suffered physical and emotional injuries, as the courts have to try to place a monetary value on this.

When a plaintiff has been successful, there is a need to calculate damages. In all cases, the courts will look at whether a person (plaintiff) has acted in a way that contributed to the damage, pain or suffering. This is known as **contributory negligence** – even though the defendant is at fault, the behaviour and conduct of the plaintiff has contributed to their loss. If this is the case, then the amount awarded in damages will be reduced. In *Sayers v Harlow UDC* [1958] 1 WLR 623, the plaintiff was trapped in a public toilet due to a defective lock. She was injured trying to climb out of a window and the court found that she had contributed to her own injuries and therefore there was contributory negligence.

There have been a number of cases in Australia that have further refined the formulation and calculation of damages and the tort of negligence. In the case of *Duffy v Salvation Army (Vic) Property Trust* [2013] VSCA 253, the Court of Appeal in Victoria heard the appeal. The appellant (original plaintiff) was a disability support pensioner and a shearer by occupation. He alleged that he injured his left shoulder while working at the Salvation Army's Bairnsdale premises as part of the Work for the Dole Program. He claimed that he caught a large mirror that had fallen from a vanity unit while it was being unloaded, and dislocated his shoulder in the process. He was not asked to assist with the unloading. He went to lunch afterwards and did a few light jobs in the afternoon. The next day he told his manager that he was in pain and had had trouble sleeping. The manager filled out a handwritten note about the incident.

Damages are claimed in a negligence case. This is usually monetary compensation for loss suffered by the plaintiff.

Sometimes when a defendant has been found to be liable, the actions of the plaintiff contributed to their loss or injury. This is known as contributory negligence and the amount of damages is often reduced.



Damages can be physical, emotional or financial suffering.

The plaintiff claimed that as a result of the shoulder injury he was no longer able to work. He alleged that the Salvation Army was negligent and sought damages for pain and suffering, future medical expenses and loss of past and future earnings as a successful shearer. The defendant accepted that it owed a duty of care but denied negligence, stating that the plaintiff's action caused his injuries. On appeal, it was found that the defendant was negligent and the plaintiff was awarded damages.

In some cases, it is difficult to prove and determine the rights of individuals in the workplace. In the case *Swan v Monash Law Book Co-operative* [2013] VSC 326, the plaintiff alleged that her employer, Legibook (a non-profit organisation that sold law books at discounted prices), was negligent as she had been exposed to an unsafe workplace and had been subjected to bullying, harassment and intimidating conduct. The plaintiff, Ms Swan, had been employed as an assistant for six years. The other employee, the manager, was alleged to have bullied and harassed the plaintiff. Ms Swan believed she was employed as a retail sales assistant, although there was no formal job description or employment contract. She was invited to board meetings and encouraged to make suggestions and participate in discussions about the business.

The plaintiff reported to the board some of the difficulties she had with the manager. However, the board did not follow through with any recommendations that had been made. Tensions continued to brew and in July 2007 the plaintiff left work in a distressed state and suffered a breakdown. The Court found that the manager did intimidate the plaintiff and that the board was responsible as the managers of the workplace.



Legal brief 6.2

Damages awarded in Murray River houseboat case

The Victorian Supreme Court awarded a plaintiff \$4 million in damages against the driver of a houseboat who negligently reversed the houseboat over the plaintiff, causing his legs to be struck by the boat's propellers and consequently suffering catastrophic injuries.

In 2014, a group of friends arranged to spend a weekend on the Murray River in a houseboat. The Court found that the driver of the houseboat was negligent in failing to warn the plaintiff that he was going to reverse the houseboat and failing to check that no one was behind the houseboat. The actual facts of the house boat were controversial and the presiding judge had to make a number of factual findings, including that someone on the houseboat said to 'reverse it up'. At the same time, the plaintiff sat on the jet ski. On hearing the words 'reverse it up', the defendant reversed the houseboat and the plaintiff and another person were dislodged from the jet ski and were drawn under the houseboat.

The Court found that there was a risk involved in retrieving the jet ski while the houseboat was reversing and the defendant was on the upper deck and could not see the jet ski on the lower deck.

The Court found that the defendant could have taken steps to ensure that no one was behind the houseboat, moved to the lower deck controls, not reversed while there were people behind it, and warned the plaintiff of his intention to reverse the houseboat. The Court found that this was not onerous and such actions would have avoided the risk of harm.

The defendant argued that he did not have to warn the plaintiff, as the plaintiff decided to enter the lower deck and go onto the jet ski.

The Court found that the plaintiff would not have realised that he could have been injured at the time. However, the Court found that the plaintiff had contributed to his accident as there was a sign stating that there was no access to the swim deck while the motor was operating. In this instance, it was found that the defendant was 95% to blame, and the plaintiff contributed 5% to his injuries.

Activity 6.5 Case study

Damages awarded in Murray River houseboat case

Read Legal brief 6.2 and complete the following tasks:

- 1 Identify the plaintiff and the defendant in this case.
- 2 Outline the main aspects of the case.
- 3 Why was this case difficult to determine?
- 4 What was the outcome of the case? Explain the implications that this case might have for other cases.

News report 6.2

Falls Festival pays out first stampede victims in multi-million dollar class action

Falls Festival has reached a settlement with the first members of what is expected to be a multi-million dollar class action following a crowd crush at the 2016 event that led some attendees to believe they would die.

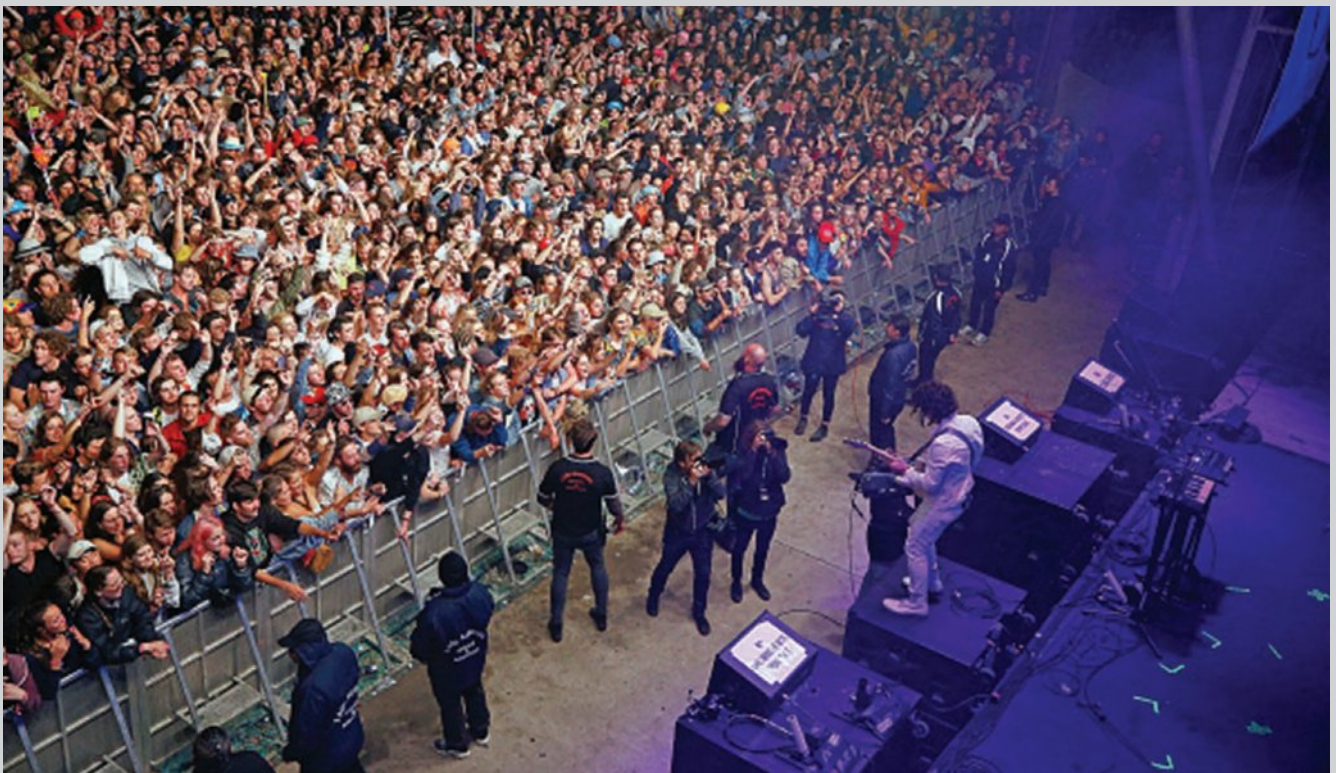
Seventy-six people were involved in a class action against festival organisers Ash Sounds Pty Ltd. All are suing and up to 25 people are suing for 'significant injury'.

On New Year's Eve in 2016, hundreds of festival attendees became caught in a crush as they rushed

from an indoor tent to another stage at the annual Lorne event. Twenty-nine people were hospitalised. Injuries to people caught in the crush included open fractures, permanent scarring and psychological impact, the Court previously heard.

Ash Sounds Pty Ltd admitted negligence in November, but were unable to agree on payouts until now. Mr Pendergast said many of the members of the class action experienced a 'terrifying event'.

Source: Michael Fowler, The Age, 11 June 2019



Festival organisers have a duty of care to attendees.

Activity 6.6 Folio exercise

Falls Festival pays out first stampede victims in multi-million dollar class action

Read News report 6.2 and complete the following tasks:

- 1 Identify the plaintiffs and defendant in this case.
- 2 Outline the duty of care and breach of duty alleged in this case.
- 3 Some of the claims have already been settled. Explain why this may have happened.

6.3 Limitation of actions

There are limitations on a plaintiff for when they consider starting legal proceedings in a negligence case.

There are a number of limitations for negligence actions in Australia and Victoria. As described earlier in the chapter, in some instances there is contributory negligence, which means that the plaintiff has contributed to their injuries or trauma due to their actions. In these instances, there may still be a case of negligence and damages can be awarded, but generally these damages will be reduced as the court will determine how much the plaintiff's actions have led to the injuries and then take this into account.



There can be a time limit on claims for personal injury.

There are also statutory requirements that impact on negligence actions. In most Australian states, there is a time limit on a claim for personal injury and documents must be filed at least 90 days before the time limit expires. In the case of people under 18, the time limits for legal action generally do not start until a person turns 18.

Under the *Limitations of Actions Act 1958* (Vic), the limitations are prescribed. The reasons for the time limitations include:

- over time some relevant evidence may be lost
- it may be unfair to a defendant to have action brought against them so long after an event has occurred
- limitation periods give certainty to people in arranging their affairs
- it is in the public interest to settle disputes as quickly as possible.

There are also a number of Acts that have been passed by parliament that impact on the tort of negligence and other torts and civil law areas. Most states have limitations of actions Acts that define and clarify the requirements and rights of people considering legal action. Terms such as 'personal property', 'personal injuries', 'land' and 'rent' are all defined to ensure that any legal action fits into the definitions and requirements.

6.4 Defences

In order for a negligence action to be successful, it is necessary for the plaintiff to prove all elements of negligence. There must be a duty of care established, it must be demonstrated that there is a breach of that duty and that some type of damage has been suffered by the plaintiff. In some instances, it may be that the actions of the plaintiff have contributed to the damages suffered. The court will take into account contributory negligence if damages are going to be awarded.

In some instances, the defendant may argue that there was not a duty of care in the first place or, in some instances, a plaintiff has signed a waiver or an agreement that they indemnify (agree to protect) the defendant as the activity may be dangerous. In some activities, there is an assumption of risk that gives the courts some discretion regarding the reduction of damages payable to a plaintiff who may have contributed to the negligence. The voluntary assumption of risk can be used as a defence by the defendant in a negligence case. A successful defence denies the plaintiff the right to sue for negligence because it can be argued that the plaintiff agreed to take responsibility for the risk involved. If a defendant is to successfully argue this, then it must be proven that the injured person was aware of the risk, its nature and extent, and willingly accepted the risk. While this is an acknowledgement of the possibility of injury occurring, it does not mean that the defendant is free of any responsibility and precautions must still be in place. In some instances where the assumption of risk is established, the plaintiff may have the amount of damages awarded to them reduced.

As discussed earlier, it is up to the plaintiff to prove that they have suffered due to a breach of duty. They must prove their case on the 'balance of probabilities'. The defendant does not have to prove that they are not negligent.

In some instances, the amount of damages a plaintiff receives may be reduced because of their acceptance of the level of risk associated with the activity undertaken.

Activity 6.7 Debate

Negligence actions?

In groups of two, debate whether the following plaintiffs could take their claims to court. Provide a reason/s for your response.

Case A	Sameer was injured when he was 13 years old when a person threw a full can of soft drink at a local football match. He has just turned 18.
Case B	Andrew is suing his former manager for damages due to alleged harassment when he worked in a café seven years ago.
Case C	Sophie wants to sue the driver of a car who ran over her when she stepped out on a pedestrian crossing that had a 'Don't Walk' signal. She was sending a text message on her phone at the time.
Case D	Amelia is considering suing the driver of a car who reversed into her in the local shopping centre carpark.

6.5 Role of statute law and common law

While many areas of civil law have developed over time and through the decisions of the courts, there are also a number of laws and statutes in Victoria and federally that have clarified the law. In most states and federally, parliament has created and introduced statutes (formally approved laws) that override common law that has developed through the use of precedent (judge-made law). The introduction of the Limitations of Actions Acts that have prescribed time limits for claims has also influenced the types of action that can be taken through the courts.

Statute law has also developed as a way to ensure that everyone taking action against another party through a tort is treated equitably. In most states and at the federal level, there are a number of pieces of legislation that have impacted on the tort of negligence and precedent or judge-made law. Legislation has been passed in some states to clarify the idea of a duty of care to ensure consistency, and often laws have been passed to extend and

supplement decisions made by the courts. Some of the laws that have been passed in various states in the area of negligence include:

- apportionment for contributory negligence (it was previously a defence)
- more flexibility to seek compensation from ‘wrongdoers’
- legislation to make the state liable for the actions of its employees.

There is a link between the decisions made by the courts and legislation. The courts are able to use the statutes and interpret their meaning in particular cases that come before them – although they are guided by the legislation and the intention of parliament in specific areas. Some reforms for the area of negligence have included:

- abolition of exemplary or aggravated damages for personal injury caused by negligence
- Good Samaritans are protected when acting
- contributory negligence is taken into account and may negate a damages claim.

In Victoria, reforms have also tried to clarify the meaning of ‘insignificant risk’ to ensure that risks are not far-fetched and to assist courts in determining a ‘common sense’ approach.

Frivolous lawsuits against fast-food chains

Over time, there have been a number of frivolous lawsuits that have made the area of negligence more difficult. Some of these cases are outlined below.

Starbucks gets sued for putting ice in iced drinks

Following a case complaining that Starbucks did not fill its hot drinks all the way to the top, the coffee chain received two more cases against its iced drinks. Both cases argued that because Starbucks put ice in its iced tea and coffee beverages, customers weren’t receiving the full volume of coffee they had paid for. One case was heard and dismissed.

Man sues Papa John’s for texting him too much

In California one man is taking pizza chain Papa John’s to court for texting him too many pizza offers via an automated marketing system. This case may be legally valid: Because Anozie texted ‘STOP’ to the robo-text system and the messages kept coming. The plaintiff argued the texts cause him ‘to suffer a significant amount of anxiety, frustration, and annoyance’.

Couple sues Burger King for \$17

After being double-charged for a meal at Burger King, a Pennsylvania couple demanded a refund. While the store agreed, it didn’t come through, so they took Burger King to small claims court. They received their \$17.35 refund, but then demanded that Burger King cover their court fees; a judge agreed.

Man sues Popeye’s for giving him a spork instead of a knife

In 2016, a Mississippi man claimed that he choked on a piece of Popeye’s fried chicken because his drive-thru order came without a knife. The man had to undergo emergency surgery to get the chicken out of his throat.

Subway gets sued over 11-inch sandwiches

In perhaps one of the longest-running lawsuits, an Australian man posted a picture of a Subway footlong next to a ruler, showing the sandwich to be only 11 inches long. This led two New Jersey men to take America’s number one sandwich-oriented champion of the Imperial system to court, as it snowballed into a 10-person class action.

They eventually won \$500 each plus legal fees. Subway took the case to an appeals court, demanding it be dismissed as a frivolous lawsuit, saying that the company had promised to fix its sandwich-length issues in 2013, when the issue first came to light.

Activity 6.8 Classroom presentation

Frivolous lawsuits

In a group of three or four, put together an argument for or against the cases. Present this to the rest of the class. In your arguments, you should consider whether:

- the elements of negligence were demonstrated in each case
- a justification for your opinion
- the possible impact of this decision on future cases.

Activity 6.9 Report

The right to take action

Evaluate the two statements:

‘The actions of a few in pursuing frivolous law suits makes it difficult for people who are suffering from genuine injuries or hardships.’

‘Everyone in a civilised society has the right to take action against others who have infringed on their rights.’

Your response should be written as a report and should contain:

- a title
- summary or overview
- introduction
- main body (separate paragraphs for each new point)
- conclusion.

6.6 Impact of the breach

The impact of negligence on the plaintiff relates to the damage done to them by the actions of the defendant. This damage can be broad ranging and may include one or more of the following: physical injury, psychological injury, medical costs, economic or financial loss and loss of present and future earnings. The court will evaluate the impact of the breach, due to negligence, on the plaintiff and award an appropriate monetary amount. The objective of damages is to ‘return’ the plaintiff to where they were before the incident or event.

The amount of monetary damages awarded to a successful plaintiff in a negligence case will be related to the amount of harm caused by the action or actions of the defendant. The amount of damages awarded for economic losses is uncapped and limited only by the extent of the harm caused. The amount of damages that can be awarded will also be dependent on the court the case is heard in. The court hierarchy has maximum amounts that can be awarded. The Magistrates’ Court can hear cases seeking damages of up to \$100 000. In the County Court the amount is over \$100 000 and in the Supreme Court it is over \$200 000.

News report 6.3

Close case set to present a legal headache for the AFL

Last week, ex-Brisbane Lions footballer Michael Close commenced legal action against his former club, the AFL, and Etihad Stadium following a knee injury sustained during a match in 2015. His anterior cruciate ligament (ACL) injury resulted from him sliding toward an uneven patch of synthetic turf close to the interchange gates at Etihad Stadium; it kept him out of action for a year.

Brisbane first raised concerns about the role the stadium's turf played in the injury in the days following the match. The club had also considered their own legal action.

The legal claim

As the AFL and Etihad Stadium never budged on Brisbane's demands for compensation, Close has now launched his own legal action. A writ filed in the Victorian Supreme Court last week states:

During the second-round match, in the course of his employment, Michael Close

when attempting to mark the football, fell on unstable and irregular playing surface of the arena at Etihad Stadium and twisted or overextended his left knee.

The writ also says the Stadium failed to provide a safe working environment. Following the incident, Close was delisted at the end of the 2017 season.

Close's claim is based on the tort of negligence and that the Stadium was an unsafe place and that there was a likelihood of injury. Close's action is against the Brisbane Lions as his employer at the time, the AFL, and Etihad Stadium. The case is significant as the incident occurred at Etihad Stadium, which has been criticised for its surface since 2000.

In April 2019, Close reached a confidential settlement with the AFL.

Source (abridged and adapted): Liam Elphick and Antonio De Paulo Buti, The Conversation, 1 March 2018



Michael Close reacts in pain after a knee injury during the round two AFL match between the North Melbourne Kangaroos and the Brisbane Lions at Etihad Stadium.

Activity 6.10 Folio exercise

Close case set to present a legal headache for the AFL

Read News report 6.3 and complete the following tasks:

- 1 Identify who is being sued in this case. Why is this unusual?
- 2 Outline the arguments around the case for damages.
- 3 Explain the types of damages the plaintiff would be seeking in this court case. Why could this case be an important one for professional sports people?

Key point summary

Do your notes cover all the following points?

- ❑ Negligence occurs when someone acts in a careless way that causes or results in harm to another person.
- ❑ The tort of negligence provides people with an avenue to seek redress for any injury or loss they have suffered due to the actions of one or more other people. The aggrieved person can sue to obtain monetary compensation or damages.
- ❑ Elements required to establish liability:
 - Duty of care: was there a duty of care involved in the case?
 - A duty of care is a legal obligation to avoid causing harm and there must be a relationship between the two people for a duty of care to exist.
 - For a negligence case to be successful, it has to be established that a duty of care exists.
 - The standard of care is what would be expected from a 'reasonable person'.
 - In a negligence case, the plaintiff (person/s bringing the action) must establish that the defendant (the persons defending the action) owed a duty of care.
 - Breach of duty: if there was a duty was it breached?
 - A breach of duty can be defined as a situation where a person causes some kind of damage to another where they are in a situation in which a duty of care has been established.
 - The case is usually decided on the basis of common sense, what a 'reasonable person' would do in the same circumstances and whether the damage, injury or harm was foreseeable: was it likely that this harm would have occurred due to the action of the defendant?
 - For a negligence case to be successful, the person suing (the plaintiff) must prove that the other person was negligent.
 - Damages: was there any damage or injury as a result of the action or actions in the case?
 - For a plaintiff to be successful in suing the defendant for negligence, it must be shown that the person suffered some type of damage as a result of the breach of duty.
 - Damages are usually a monetary compensation where pain and suffering and any economic loss are calculated.
- ❑ There are a number of limitations for negligence actions in Australia and Victoria, such as contributory negligence and time limitations.
- ❑ Defences
 - In some instances, it may be that the actions of the plaintiff have contributed to the damages suffered. The court will take into account contributory negligence if damages are going to be awarded.
 - The defendant may argue that there was not a duty of care in the first place or a plaintiff has signed a waiver or an agreement that they indemnify the defendant as the activity may be dangerous.
 - The voluntary assumption of risk can be used as a defence by the defendant in a negligence case.
- ❑ The tort of negligence has developed very slowly over time and a number of cases and decisions have led to the development of current principles as well as to some legislation passed by governments.
- ❑ The impact of negligence on the plaintiff relates to the damage done to them by the actions of the defendant. This damage can be broad ranging and may include one or more of the following: physical injury, psychological injury, medical costs, economic or financial loss and loss of present and future earnings.

End-of-chapter questions

Revision questions

- 1 Describe the three elements of negligence.
- 2 Why is it important for a plaintiff to establish a duty of care with the defendant in a negligence case?
- 3 Outline the case of *Donoghue v Stevenson*. Why is it an important case in the area of negligence?
- 4 Explain the concept of a 'reasonable person'. What is the importance of the concept in the tort of negligence?
- 5 List the types of damages a plaintiff may be awarded in a successful case.
- 6 Define 'contributory negligence'.
- 7 Why are there time limitations in negligence cases?
- 8 Explain the role of laws in the development of civil law, including negligence.

Current issues folio

Research two negligence cases reported in the media.

- 1 For each case, identify:
 - the plaintiff
 - the defendant
 - the main facts or claims of the case
 - the court the case has been heard in
 - the outcome (if available).
- 2 Design a poster or blog to explain the main elements of the tort of negligence.



SUPREME COURT OF VICTORIA

The Supreme Court of Victoria can deal with cases where damages are \$200 000 or more.

C 4-6
20-4 1P
60-70 METER
70-75
P5 P
20-4 METER
20-4
2P 70-75

SUPREME COURT

SUPREME COURT

Chapter 7

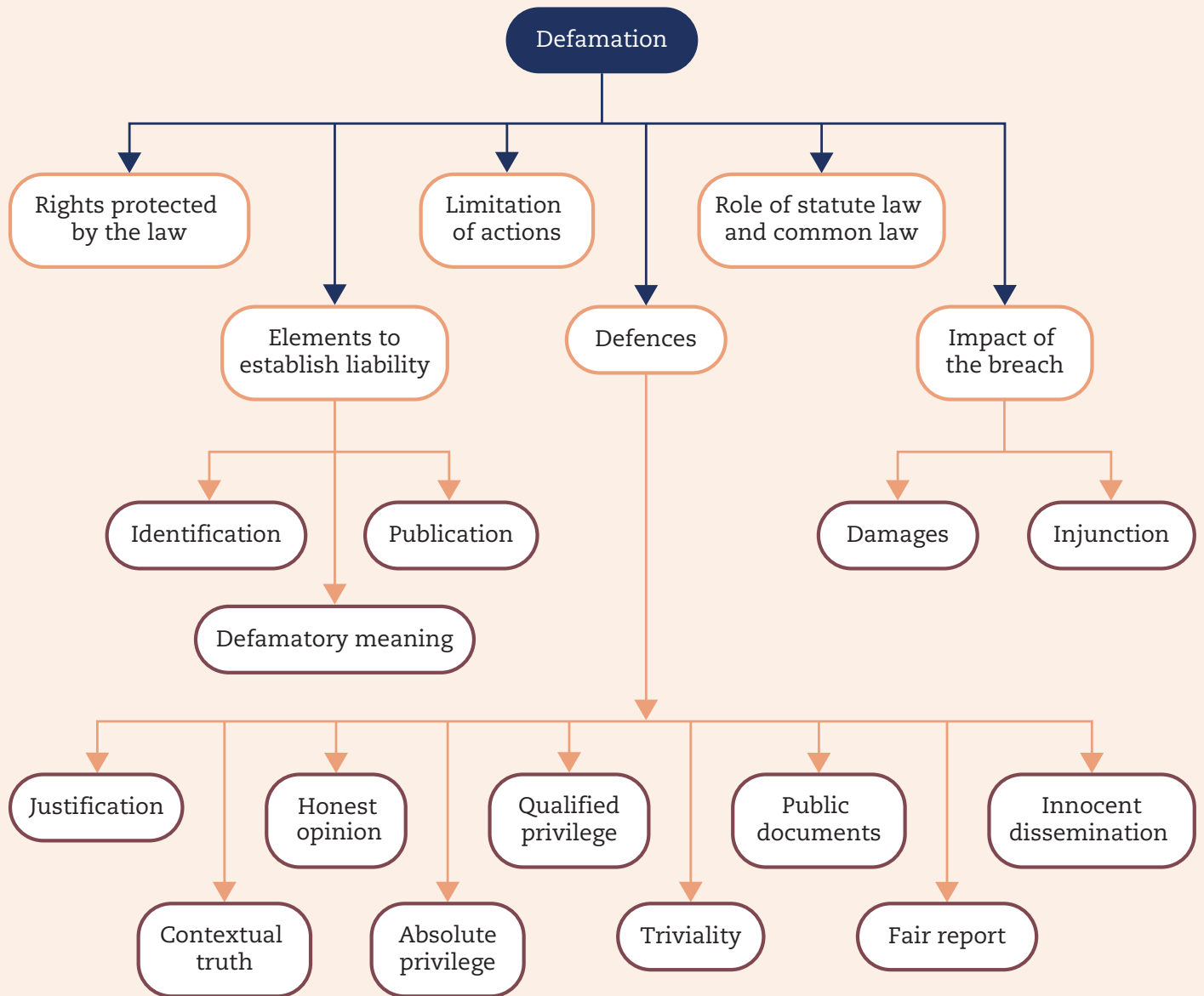
Unit 1 – Area of Study 3

An area of civil law: defamation

This chapter provides an introduction to the tort of defamation, including the rights protected by the law, the elements required to establish liability, the limitation of actions and the possible defences. It will also explore the role of both statute law and common law in developing the elements and defences and the impact of the breach on the parties involved. Defamation protects people from wrongful attacks on their reputation. A person commits defamation if they make a statement that identifies the plaintiff in some way and causes the plaintiff's reputation to be damaged. Defamation can occur through written or verbal statements, as long as they result in damage to the plaintiff's reputation.

Actress Rebel Wilson leaves the Supreme Court of Victoria on 24 May 2017 after attending court during her defamation case against Bauer Media.





Key terms

codified where common law developments are formally adopted into a statute

defamation the publication of a statement that damages a person's reputation

imputation an implied meaning; a defamatory imputation is an interpretation of the words of a publication that gives it a defamatory meaning

parliamentary privilege legal immunity that ensures that any statements made during the course of parliamentary proceedings are protected from liability for defamation

standing where a party has been directly affected by matters and so has the right to take legal action; also known as *locus standi*

subordinate distributor a person who is not the author, did not have any editorial control, and is not the primary distributor of a publication; a secondary publisher

7.1 Rights protected by the law

Defamation must strike a balance between protecting the right to reputation and the right to freedom of speech.

Defamation law balances two competing interests. On the one hand is the right to reputation, which is the idea that people should be safe from unjustified claims that might negatively affect what others think of them. On the other hand is the right to freedom of speech, which is the idea that people should be free to express their opinions. Defamation law must balance these competing interests, because the more the law protects the right to reputation, the less it protects the right to freedom of speech.

As we will see in this chapter, Australian defamation law strikes a balance that favours the protection of reputation. Different legal systems, however, strike a different balance. The USA, for example, has defamation laws that substantially favour freedom of speech, and only weakly protect the right to reputation. The balance struck between these rights can have a visible impact on the operation of the media within a country. The USA and the UK, for example, are often known for their celebrity gossip stories. Australia, in comparison, must be more careful with the type of celebrity news stories they run because Australian law strongly protects the right to reputation.

Activity 7.1 Class debate

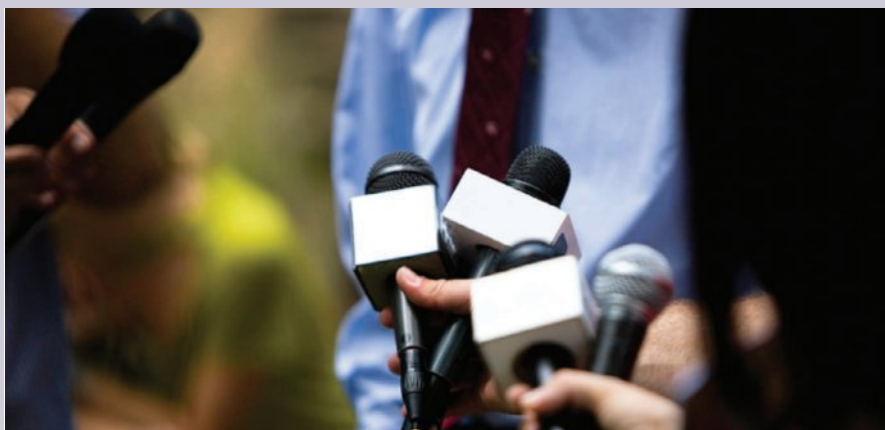
Freedom of speech versus the right to reputation

Run a class debate on one of the following topics:

- There are some things people should not be allowed to say.
- Protecting freedom of speech is far more important than protecting hurt feelings.
- Is it ever right for the government to restrict freedom of speech?

Choose three speakers for and three speakers against the topic. Allow class time to research the topic. Allocate three adjudicators and use the following criteria to judge the winner of the debate.

Criteria		Speakers for			Speakers against		
		1	2	3	1	2	3
Content	Clarity of ideas						
	Strength of arguments						
	Structure						
Presentation	Voice						
	Body language						
	Timing						



Australian defamation law favours the protection of reputation.

7.2 Elements to establish liability

Defamation law originally developed through the common law and is now largely contained within the *Defamation Act 2005* (Vic). To succeed in a cause of action for defamation, the plaintiff must prove the three elements of: publication, identification, and defamatory meaning.

The elements required to establish liability for defamation are publication, identification and defamatory meaning.

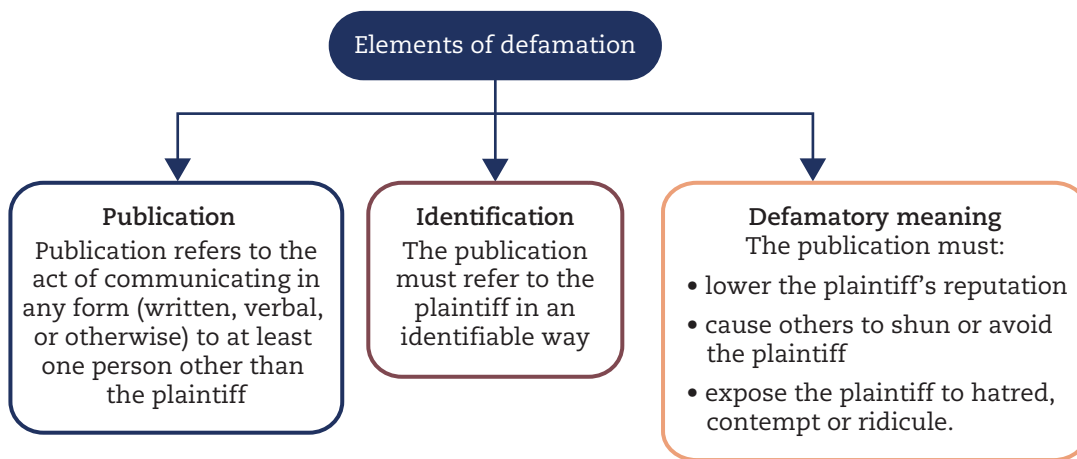


Figure 7.1 Elements of defamation

Publication

The first element of defamation is publication. This element requires that the publication is communicated to at least one person other than the plaintiff. For example, if you wrote a letter containing false statements about someone, and then gave your letter directly to that person, it would not count as publication. This is because you have not communicated with a person other than the plaintiff. If you sent that same letter to a friend, or the local newspaper, you would have published it because you communicated with a person other than the plaintiff.

Publication can take any form of verbal and written communication. Consider the scenarios above, but this time rather than writing a letter you had a private conversation with a friend of yours, during which you verbally spoke the false statements. This would still count as publication. It does not matter whether you have written or verbalised the false statement. Both would count as publication because what matters is that you have communicated your publication to someone other than the plaintiff.

Publication refers to the act of communicating a statement (written or verbal) to at least one person other than the plaintiff.

Identification

Identification is the second element of defamation. Identification requires that the publication refers to the plaintiff in an identifiable way. There are two ways to satisfy this test:

- 1 Direct identification: An ordinary, reasonable person would be able to tell that the plaintiff was the person being referred to in the publication. For example, if the publication referred to the plaintiff by:
 - their name
 - a title that a reasonable person would know, such as Prime Minister
 - the plaintiff's physical characteristics, such as unique facial features.
- 2 Indirect identification: The published material could identify the plaintiff, if someone reading the publication had sufficient outside knowledge or context; for example, publishing a photo of a person's husband would not directly identify the wife. But a person with the knowledge that those people were married would be able to indirectly identify the wife.

Identification requires that the plaintiff has been referred to either directly or indirectly in a way that would be recognisable to a reasonable person.

Where a defamatory publication refers to a group of people, the group is generally unable to sue for defamation. That is, defamation can only apply to individuals. For example, a statement that 'all lawyers are liars' applies to such a large group that no individual lawyer could claim they have been identified and defamed. The only situation when a group could sue for defamation is if the group is so small that, by identifying the group, you are actually identifying individuals. Consider the facts of Legal brief 7.1 below.

Legal brief 7.1

Bjelke-Petersen v Warburton & Burns [1987] 2 Qd R 465

In 1987, Mr Bjelke-Petersen was the Premier of Queensland. The Deputy Leader of the Queensland Opposition at the time, Mr Burns, made statements to a television reporter that 'Bjelke-Petersen and his corrupt government [should] be swept from office', and claimed that 'Ministers had their hands in the till'. This statement was broadcast during the television's news program. Each member of the Queensland Cabinet sued the Deputy Leader of the Opposition, claiming that the Deputy Leader had defamed each and every one of them by his allegation of corruption.

It was clear that Mr Bjelke-Petersen had been directly identified in these statements. The issue considered by the court was whether these allegations were sufficient to identify each of the members of the Queensland Cabinet. Typically, defamatory statements made about a group of people will not sufficiently identify a specific plaintiff.

The Court held that these statements had defamed each member of the Queensland Cabinet. The judgment held that this group of people was sufficiently narrow for each member of the group to complain that the allegations of corruption may reasonably be taken to refer to him or her. Some of the relevant factors in determining whether a defamatory statement about a group sufficiently identifies individual plaintiffs are:

- size of the class of people
- generality of the charge
- extravagance of the accusation.



Mr Bjelke-Petersen



Mr Burns (second from left)

Defamatory meaning

The third element of defamation is defamatory meaning. This element is about the type or quality of statement that was made. In order to satisfy the element of defamatory meaning, the publication must achieve at least one of the following:

- lowers the plaintiff's reputation among the general community – this test requires the statement to assign some moral blame to the plaintiff
- causes others to shun or avoid the plaintiff
- exposes the plaintiff to hatred, contempt or ridicule.

This element ensures that it is not sufficient simply to have published a statement that identifies the plaintiff. It is possible, for example, to publish a statement that very clearly identifies the plaintiff, but says only positive things about them. This will not be defamation. To satisfy this third element, the publication must impact on the plaintiff in a negative way.

Defamatory meaning requires that the plaintiff's reputation has been lowered, or people have begun to shun or avoid them, or the plaintiff has experienced ridicule.

Legal brief 7.2

Boyd v Mirror Newspapers Ltd [1980] 2 NSWLR 449: Lowering the plaintiff's reputation – what does moral blame look like?

The plaintiff in this case, Boyd, was a successful rugby player. The *Daily Mirror* published an article that said that 'Boyd is fat, slow and predictable'. Boyd argued that there were three distinct imputations within the article:

- Boyd was fat and slow and could not properly play in his position
- Boyd was so fat he looked ridiculous playing first-class rugby
- Boyd had allowed his physical condition to deteriorate so that he was a hopeless second-row forward in first-class rugby.

In his judgment, Justice Hunt found that in a defamation case the question asked by the court will be whether the published matter is likely to lead an ordinary reasonable

person to think less of a plaintiff. Justice Hunt further held that, in general, in order for an imputation to be defamatory it must be disparaging, which requires some element of blameworthiness to be assigned to the plaintiff.

In regard to imputation (b), the judge held that it was capable of being disparaging as claims such as that Boyd 'waddled' implied that Boyd looked ridiculous. Imputation (c) also had the capacity to disparage as it implied that it was the plaintiff's fault that he had allowed his physical condition to deteriorate. Conversely, imputation (a) was found to be incapable of holding a defamatory meaning because it did not assign any moral blame to the plaintiff.



Boyd v Mirror Newspapers Ltd brought into question what newspapers could publish.

Legal brief 7.3

Berkoff v Burchill [1996] 4 All ER 1008: What does it mean to shun or avoid?

In this English case, the plaintiff, Mr Berkoff, was an actor, director and writer. The defendant, Ms Burchill, was a journalist for the *Sunday Times*. On 30 January 1994, Ms Burchill wrote a review in which she commented that 'film directors, from Hitchcock to Berkoff, are notoriously hideous-looking people ...'. On 6 November 1994, Ms Burchill wrote in a review of a horror film that 'the Creature ... it's a lot like Stephen Berkoff, only marginally better-looking'. Mr Berkoff brought proceedings for defamation and alleged that the statements

in the two articles carried the imputation that Mr Berkoff was hideously ugly. The main issue considered by the court was whether this imputation was capable of being defamatory. In the judgment delivered by Lord Justice Neil, he held that in this context, the remarks made about Mr Berkoff gave the impression that he was not merely physically unattractive, but actually repulsive. This would cause others to shun or avoid him and thus the imputations were capable of being defamatory.



Steven Berkoff

Legal brief 7.4

Ettinghausen v Australian Consolidated Press Ltd (1991) 23 NSWLR 443: What does it mean to expose the plaintiff to hatred, ridicule or contempt?

In the *Ettinghausen* case, a nude photograph of rugby league player Andrew Ettinghausen was shown in the defendant's magazine. The photograph was of three men in the shower after training and showed Mr Ettinghausen's genitals. Mr Ettinghausen sued for defamation, alleging that the publication of the photo exposed him to ridicule. The court

held that the publication of the photo was 'capable of subjecting the entirely blameless plaintiff to a more than trivial degree of ridicule'. Mr Ettinghausen was originally awarded \$350 000 in damages, but this amount was lowered by the New South Wales Court of Appeal, which held that the jury had awarded an excessive amount of damages.

Activity 7.2 Case studies

Defamation

Consider Legal briefs 7.2 to 7.4 and decide for yourself whether the published statements have a defamatory meaning.

Activity 7.3 Classroom presentation

Elements of defamation

For each of the following cases, discuss with a partner whether the plaintiff could successfully prove all elements of defamation. Present your conclusions to the class.

Case A

Sarah has just started a new job. Her friend Ben becomes jealous of her success and starts spreading rumours that Sarah has a contagious disease. As a result, Sarah's colleagues start to avoid being in the same room as her.

Case B

A newspaper publishes an article claiming that a prominent politician is 'for sale' and that access to the politician's time and influence can be purchased via political donations. The politician makes a public statement that they are a person of integrity and are appalled at allegations that they are corrupt. The politician sues the newspaper for defamation.

Case C

A newspaper article alleges that all priests in a local parish church were complicit in child abuse. The paper mentions no names, but only five priests work in the church.

Case D

Zan and Dave are both students in the same class. Dave received full marks for the previous test, and Zan suspects that he cheated. Zan passes Dave a note that reads 'You are a cheater and a liar. You're dumber than a sack of bricks, there is no way you could have got full marks without cheating. I'm on to you.'

Case E

An angry hospital patient writes a blog post that claims 'I went in for surgery last week and they amputated the wrong leg! Every single doctor working at Sunnyside Hospital is completely incompetent! Not a single one of them should be trusted with people's lives, and every doctor who works there should have their medical licence revoked.'

Determining liability: who are the potential defendants?

If all three elements (publication, identification and defamatory meaning) can be proved, the plaintiff is likely to be successful in their claim of defamation. Before they launch their case, however, an important practical consideration is to determine who the plaintiff should sue.

Liability for defamatory statements extends to every person who contributes to the publication, or authorises it, regardless of their precise degree of involvement. For example, authors, editors, publishers, printers, distributors or vendors could all be liable for the publication of a single defamatory statement. Liability can even extend to someone who has failed to remove defamatory material. This could include a club member failing to remove a defamatory notice on their notice board, a website allowing defamatory material online or even the administrator of a Facebook page failing to remove a defamatory post. The net of liability for defamation is wide, but in practice what this means is that a plaintiff will seek to sue the defendant with the most assets and ability to pay damages.

Legal brief 7.5

Von Marburg v Aldred & Anor [2015] VSC 467

In this Victorian Supreme Court case, Justice Dixon considered whether an administrator of a Facebook page could be liable for comments posted by another user. The plaintiff, Mr Von Marburg, was a medical practitioner and the defendant, Mr Aldred, was an administrator of a Facebook page called 'Rights to Privacy Albury'. On 16 October 2014, a post was made to the defendant's Facebook page that included a photograph of the plaintiff and the following statement:

Here is a photo of the only doctor in Albury Wodonga who would stand outside a legal, Women's Health Clinic, violating women's privacy! This is, in our opinion, highly unethical ... This is why the petition to NSW Government banning anti-abortion protesters outside Women's Health Clinics MUST succeed.

The plaintiff sued for defamation, alleging that:

- The defendant knew the substance of the publication from at least 16 October 2014.

- The defendant had the opportunity to remove the publications from the Facebook page from 16 October 2014.
- The defendant approved, ratified or adopted the publication.

Justice Dixon held that the defendant, as an administrator of the Facebook page, could be liable as a secondary publisher since they had the power to remove the comments.

This case merely confirmed that the long-established principles of defamation law can be applied to new and emerging forms of technology. When a person is responsible for a physical wall and someone puts something defamatory on it, if they are told about the defamatory content and choose not to remove it, the law will find them liable. This case shows us that defamation law applies just as well to the virtual wall of a Facebook user as it does to a physical wall.



Defamation law also applies to social media posts.

Activity 7.4 Case study

Technology and defamation

Read Legal brief 7.5 and complete the following tasks:

- 1 Describe how this case demonstrates the impact of new technology on the operation of defamation law.
- 2 Reflect on the impact this decision might have on:
 - a Facebook
 - b Facebook users
 - c Victims of online defamation.
- 3 Evaluate whether you think the decision in this case was appropriate. Why or why not?

7.3 Limitation of actions

There are a number of limitations on the ability to sue for defamation. These limitations serve to restrict the type of people who can sue for defamation, how long you can wait before suing for defamation and the upper limit of damages that can be obtained for suing in defamation.

Standing

Section 10 of the *Defamation Act 2005 (Vic)* provides that no action lies for defamation of the dead. This means that a person cannot sue in relation to the publication of defamatory material about a deceased person. This is the case regardless of whether the material was published before or after the person's death. This means that beneficiaries of a dead person's estate cannot sue for defamation of the now deceased person. The effect of section 10 is that only living people can be defamed.

Corporations also do not have **standing** to pursue a defamation action. The right for corporations to sue for defamation was abolished in Victoria in 2006 with the introduction of the *Defamation Act 2005 (Vic)*. If someone publishes defamatory material about a corporation, the corporation cannot sue them for defamation. Under section 9 of the *Defamation Act 2005 (Vic)*, the only exceptions to this are if the corporation is a not-for-profit corporation or if they employ fewer than 10 people.

Limitation period

An action for defamation can only be brought within one year of the publication of defamatory material.

Statutory cap on damages

The *Defamation Act 2005 (Vic)* places a statutory cap of \$250 000 (adjusted annually for inflation) on the compensation that can be awarded for non-economic loss caused by defamation. This means that there is a clear limit on damages for concepts that cannot be specifically quantified, such as injury to reputation and damages for hurt feelings.

The statutory cap of \$250 000 will not apply, however, if the defendant aggravates the damages. Aggravated damages apply when the defendant's conduct is found to be particularly blameworthy, such as if it lacked good faith, was motivated by malice or spite, or was unjustifiable. For example, if a newspaper published false claims which it knew to be false, and which it then refused to apologise for, the plaintiff could seek aggravated damages above the statutory cap of \$250 000.

Plaintiffs can also receive an uncapped amount of damages in relation to economic loss, such as for loss of income caused by defamation.

Defamation as a cause of action is limited by restrictions on standing, a limitation period of one year and a statutory cap on damages of \$250 000, adjusted annually for inflation. As of June 2019, the value of the statutory cap is \$407 500.

News report 7.1

Court of Appeal reduces Rebel Wilson's record setting defamation payout

In 2017, actress Rebel Wilson won a record-setting \$4.5 million in damages against Bauer Media in the largest defamation payout ever ordered by an Australian court, but a new decision by Victoria's Court of Appeal has seen that number slashed to just \$600 000.

In 2017, Rebel Wilson sued the *Woman's Day* magazine and Bauer Media in the Supreme Court of Victoria over a number of articles published in 2015 – one in the printed edition of *Woman's Day*, and several others published online. The primary claim made by these articles was that Rebel Wilson was a 'serial liar' who had made up stories about her

past, and who could not be trusted. *Woman's Day* argued the defences of truth, qualified privilege, and triviality, and all defences failed; the jury found that each of the articles had been defamatory, which left Justice Dixon to determine the damages that should be awarded.

Justice Dixon held that much of *Woman's Day's* conduct was aggravating. This means that its behaviour was particularly blameworthy and unacceptable. For example, it was held that *Woman's Day* failed to properly investigate the defamatory allegations before publishing, it published allegations which it knew were false, it refused to offer any

apology at any stage, and it sent a series of insulting and harassing messages to Ms Wilson and her family. Since Justice Dixon was awarding aggravated damages in this case, this allowed him to make an award of \$650 000 for Ms Wilson's humiliation and distress, which was above the statutory cap on damages for non-economic loss. Justice Dixon also awarded Ms Wilson special damages for lost movie roles as a result of the defamatory articles: he calculated the value of those lost roles to be \$3.9 million in damages for economic loss. Putting these two together, Ms Wilson was awarded an overall total of \$4.5 million in damages. This was the first time that the statutory cap on damages for non-economic loss had ever been exceeded since the Act was introduced in 2005.

Bauer Media appealed the judgment to Victoria's Court of Appeal, arguing that the trial judge had misinterpreted how the statutory cap on damages applied, and that the evidence did not support Ms Wilson's special damages claim relating to lost employment and movie roles. In relation to the statutory cap, the Court of Appeal held that Justice Dixon's reasoning had been correct and that if a court found that there had been aggravating conduct, they could award damages that exceeded the statutory cap. In relation to the special damages that Ms Wilson claimed for the loss of movie roles, the Court of Appeal held that there was insufficient evidence to show that the defamatory articles had caused Ms Wilson to lose any roles. Thus, although Ms Wilson won the legal argument relating to damages exceeding the statutory cap, she lost the factual argument related to lost employment and her

damages were ultimately slashed to just \$600 000 as a result. This award was far lower than the original \$4.5 million sum, but still above the statutory cap at the time. Ms Wilson sought special leave to appeal the Court of Appeal's decision to the High Court, which was rejected. Although Ms Wilson failed in her bid to have the full \$4.5 million award reinstated, the decision in the Wilson case remains significant because it confirms that the court is permitted to make awards that exceed the statutory cap when defendants have engaged in aggravating conduct.

Since Ms Wilson's case was heard by the Court of Appeal, a number of other cases have set new records for defamation payouts. In 2017, shortly after Ms Wilson's payout was reduced, Perth barrister Lloyd Rayney was awarded \$2.6 million after police named him as the 'prime' and 'only' suspect in the murder of his wife. In 2018, broadcaster Alan Jones and radio stations 2GB and 4BC were ordered to pay \$3.7 million in damages over defamatory comments made on air about four members of the Wagner family, which totalled damages of \$938 746 per plaintiff. In 2019, Geoffrey Rush earned the record for the largest payout to a single plaintiff after he was awarded \$2.87 million over defamatory allegations that he had committed sexual harassment. These cases all fall short of Ms Wilson's original payout of \$4.5 million, but each of them greatly exceeds the statutory cap on damages for non-economic loss. Whilst *Woman's Day* would have been pleased not to pay the full \$4.5 million in damages to Ms Wilson, it seems that when it comes to defamation law the media may have won the battle but lost the war.



In 2019, Geoffrey Rush (pictured here with his wife, Jane Menelaus) earned the record for the largest payout to a single plaintiff over defamatory allegations that he had committed sexual harassment.

7.4 Defences

The defences to defamation have developed through common law, and many of them have also been **codified** in the *Defamation Act 2005* (Vic). These defences are outlined below.

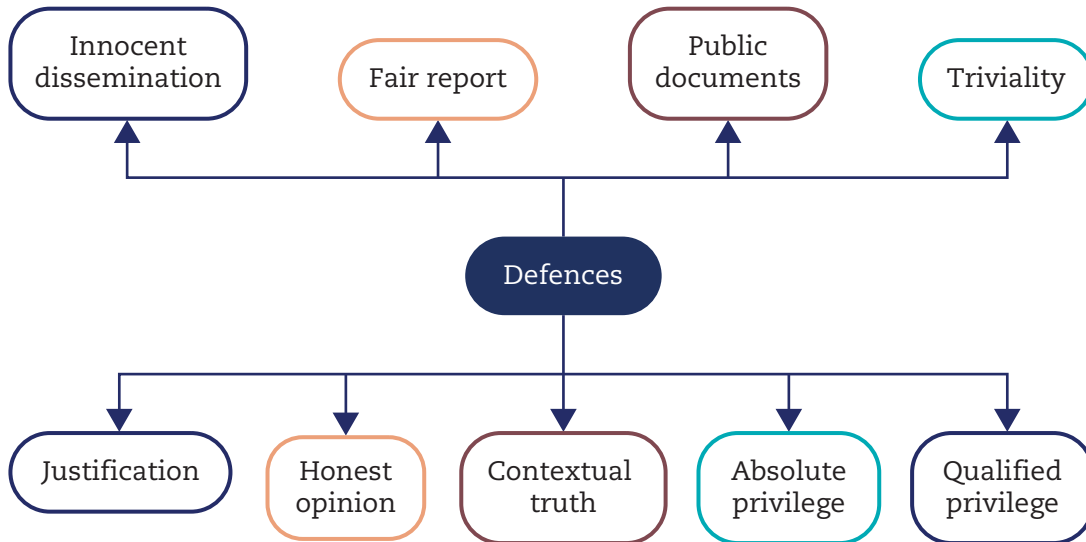


Figure 7.2 Defences to defamation

Justification: truth

The defence of justification is intended to protect defendants who have told the truth. Under section 25 of the *Defamation Act 2005* (Vic), if the defendant proves that the defamatory statements are substantially true, then they will not be liable for defamation. Substantially true means that the statement was ‘true in substance’ or ‘not materially different from the truth’. This means that minor inaccuracies will not defeat the defence. For example, publishing a statement that somebody served a jail term of three weeks when in fact they only served two weeks is still substantially true. If the defendant raises this defence, the onus is on the defendant to prove that their statements were substantially true on the balance of probabilities.

The defence of justification protects defendants who have told the truth.

Contextual truth

The defence of contextual truth is intended to protect defendants who have published some defamatory statements, but have substantially told the truth when considering a big picture view of the publication.

Under section 26 of the *Defamation Act 2005* (Vic), the defence of contextual truth will apply when:

- the plaintiff complains of a defamatory **imputation** within the publication
- the publication contains additional defamatory imputations (known as the ‘contextual imputations’)
- the contextual imputations are substantially true
- the defamatory imputation does no further harm to the plaintiff’s reputation, because of the substantial truth of the contextual implications.

The defence of contextual truth is best illustrated with an example. By pleading the contextual truth defence, the defendant is saying to the court:

The plaintiff is claiming that I called him a thief, which he isn’t. I did call him a thief, but I also called him a murderer, which is much worse – and true! Calling him a thief won’t do any extra damage to his reputation because being a murderer is worse. So, if you look at the whole context of what I said, it is substantially true.

The defence of contextual truth protects defendants who have published some defamatory statements as part of a larger, substantially true, publication.

Honest opinion

The defence of honest opinion protects those who offer reviews or commentary on matters of public interest.

The defence of honest opinion, referred to as 'fair comment' under the common law, protects the words of reviewers and commentators who present their opinions.

Under section 31 of the *Defamation Act 2005* (Vic), it is a defence to defamation if the defendant proves that:

- the publication was an expression of opinion rather than a statement of fact
 - an opinion includes a deduction, inference, conclusion, criticism, judgment, remark or observation, but merely prefacing a statement with 'it seems to me' or 'in my opinion' will not turn a statement of fact into an opinion
- the opinion related to a matter of public interest
 - the court adopts a broad interpretation of 'public interest', such as reviews of restaurants, books and movies, but a matter will not qualify as public interest merely because the plaintiff is a public figure such as a celebrity
- the opinion is based on proper material, meaning it is based on:
 - material that is substantially true
 - material that was published under absolute or qualified privilege
 - material that would itself qualify as honest opinion
 - public documents produced by parliamentary or judicial bodies.

This defence will fail if the publication was motivated by malice or ill intentions, or if the defendant did not honestly hold the opinion at the time of publication.

Legal brief 7.6

Gacic v John Fairfax Publications Pty Ltd [2009] NSWSC 1403

In September 2003, food critic Matthew Evans dined in the newly opened restaurant *Coco Roco*. Mr Evans published a review in Fairfax media's *Sydney Morning Herald*, which gave the restaurant a rating of 9/20. Throughout the course of the review, Mr Evans mentions 'unpalatable dishes' such as oysters that 'jangle like a car crash', and pork belly that was 'the porcine equal of a parched Weetbix'. He describes the owners as incompetent, and the chef and service as terrible. He concludes by stating that '*Coco Roco* is a bleak spot on the culinary landscape'. The restaurant closed within six months of the review. The owners of the restaurant, Aleksandra Gacic, Ljiljana Gacic and Branislav Ciric, sued the publisher for defamation.

The review was found to convey three defamatory imputations:

- the restaurant sold some unpalatable food
- the restaurant provided some bad service
- the owners were incompetent as restaurateurs.

The defendant claimed the defences of honest opinion and justification. At the original trial, Justice Harrison of the New South Wales Supreme Court found in favour of the defendant. As a restaurant critic, Evans was able to rely on the defence of honest opinion. Justice Harrison also held that the defence of truth had been established in relation to the bad service.

On appeal to the New South Wales Court of Appeal, the plaintiffs argued that the restaurant was actually two restaurants: '*Coco*' was the expensive option upstairs, and '*Roco*'

was the cheaper dining option downstairs. Evans only ate at *Coco* and had never dined at *Roco*. The Court held that it was open to the jury to conclude that an ordinary reasonable reader would have read the matter as referring to both restaurants. Therefore, Evans could not argue honest opinion because the review was not based on accurate material. The Court of Appeal accepted this argument and returned the case to the Supreme Court for an assessment of damages.

The case, which began in 2003, reached its final conclusion in 2014 when the NSW Supreme Court made a ruling on damages and interest. The court reached a final figure of \$623 526 plus costs.



Ljiljana Gacic and Branislav Ciric, two owners of the *Coco Roco* restaurant, leave court after giving evidence.

Activity 7.5 Case study

Honest opinion

Read Legal brief 7.6 and complete the following tasks:

- 1 Identify the parties involved in this case.
- 2 Outline the defamatory statements in this case.
- 3 Explain the defences that were relevant to this case.
- 4 Do you think the final judgment was appropriate? Why or why not?

Absolute privilege

In certain situations, the law recognises that people should be wholly immune from fear of being sued for defamation. These situations are referred to as absolute privilege. The two primary situations in which absolute privilege applies are:

- statements made during the course of parliamentary proceedings (often called **parliamentary privilege**)
- statements made during the course of Australian court proceedings.

Absolute privilege is based on the belief that people should be able to speak with absolute freedom during some specific circumstances. Parliamentarians should be allowed to speak freely during parliamentary sittings, so that they can discuss and scrutinise the actions of others. Allowing parliament to act as an open forum is intended to serve the best interests of the public. Similarly, the proceedings of a court case are protected by absolute privilege because it is believed that total freedom of speech is necessary in order to facilitate the court's attempt to arrive at the truth.

The defence of absolute privilege protects people from being sued for defamation for statements made in parliament or the courts.

Activity 7.6 Report

Use and abuse of parliamentary privilege

Using your local library and the internet, find news articles reporting on situations where politicians have used parliamentary privilege or been accused of abusing parliamentary privilege to make otherwise defamatory comments. Draw up a table similar to the one below and complete it using the information from your research.

Parties involved	Facts of the situation	Do you think this situation was a use or an abuse of parliamentary privilege?

Once you have finished your research, discuss your findings with your classmates and answer the following question in the form of a short report: Do you think absolute privilege should continue to be a defence to defamation? Why or why not?



Audio

Qualified privilege

The defence of qualified privilege applies when the recipient of the publication has a particular interest in that information.

There are further situations where the law recognises that a publisher has a reason for publishing that outweighs the plaintiff's right to an unsullied reputation. This is referred to as 'qualified' privilege rather than 'absolute' privilege because the privilege may be lost under certain circumstances. Qualified privilege often allows the media to republish allegations that have been made by other people (such as politicians) under absolute privilege.

Under section 30 of the *Defamation Act 2005* (Vic), the defence of qualified privilege applies when:

- the recipient of the publication has a particular interest in having information about the subject of the publication
 - This applies in situations such as comments between teachers and parents, statements made to police and employment references. The media can also make use of this defence, but must be able to show that their audience had an interest in the information published. Read the box 'What does it mean to have an "interest" in a subject?' below to find out more.
- the matter is published in the course of giving information to the recipient
- the conduct of the publisher in publishing the matter is reasonable, which will include factors such as:
 - the extent to which the matter published is of public interest
 - the seriousness of any defamatory imputation published
 - the extent to which the publication distinguishes between suspicions, allegations and proven facts
 - the sources of the information in the matter published and the integrity of those sources
 - whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person
 - any other circumstances that the court considers relevant.

This defence will be defeated if the defendant published the matter out of malice or ill intent.

What does it mean to have an 'interest' in a subject?

In the case of *Barbaro v Amalgamated TV Services Pty Ltd* (1985) 1 NSWLR 30, the Court considered the question of what qualified as having a legal 'interest' in a subject. The Court held that: 'the interest must be in knowing a particular fact, not simply as a matter of curiosity but as a matter of substance apart from its mere quality as news.'

What does this mean in practice?

In previous cases, the audience of media publishers have been found to have an interest in:

- Information relating to the disappearance of a well-known anti-drug campaigner, and the liberty of six men identified as being responsible for his murder (*Barbaro v Amalgamated TV Services Pty Ltd* (1985) 1 NSWLR 30)
- The training regime for a rugby league team (*Austin v Mirror Newspapers* (1986) 1 AC 299)
- Proposed changes to a government scheme for home buyers (*Smith v John Fairfax & Sons Ltd* (1987) 86 FLR 343)
- The competence of a business consultant (*Morgan v John Fairfax & Sons Ltd* (1991) 23 NSWLR 374).

As can be seen from these examples, the court adopts a relatively broad interpretation of what it means to have an 'interest' in a subject.

Fair report of proceedings of public concern

This defence is intended to protect people who report on the statements and actions of parliament and the courts. Under section 29 of the *Defamation Act 2005* (Vic), it is a defence to defamation if the defendant can prove that the publication was a fair report of any proceeding of public concern.

The defence of fair reporting protects publications reporting on matters of public concern such as the proceedings of parliament or the courts.

Table 7.1 Definitions relating to a fair report

What is fair?	The question the court will ask is whether the publication substantially records what was said and done, not whether it is fair to any particular person. In judging fairness, particular attention is given to headlines and graphics. Misleading graphics or headlines may be interpreted by the court as commentary or opinion, which could strip the publication of the fairness it relies on for this defence.
What is a report?	A report is primarily descriptive, and is limited to an account of events which have happened. It cannot include the independent opinions, comments or interpretations of the reporter.
What is a proceeding of public concern?	There is a wide definition of proceedings of public concern. It includes any proceedings of parliament, the courts, local government bodies, international organisations, tribunals, law reform bodies, public corporations and other similar proceedings.

The defence of fair reporting is defeated if the publication was not published honestly for the information of the public or the advancement of education.

Publication of public documents

This defence protects those who publish, or republish, certain public documents. Under section 28 of the *Defamation Act 2005* (Vic), it is a defence to defamation if the defendant can prove that the defamatory matter was contained in:

- a public document
- a fair copy, summary or extract of a public document.

In this context, a public document refers to any paper or report published by a parliamentary body, any judgment or order of a court, or any document issued by the government.

This defence is defeated if the publication was not published honestly for the information of the public or the advancement of education.

Innocent dissemination

The defence of innocent dissemination is intended to protect unknowing distributors of defamatory publications.

Under section 32 of the *Defamation Act 2005* (Vic), it is a defence to defamation if the defendant proves that they:

- published the matter as a **subordinate distributor**; and
- did not know that the matter was defamatory, or it was not reasonable for them to know; and
- the defendant's lack of knowledge was not due to any negligence on their part.

This defence generally applies to content providers such as internet service providers, newsstands, libraries, book stores, and even truck drivers delivering papers.

The defence of publication of public documents protects the publication and republication of documents created by public bodies such as parliament and the courts.

The defence of innocent dissemination protects unknowing distributors of defamatory publications.

Activity 7.7 Case study

The internet and defamation

Read News report 7.2 on the next page and complete the following tasks:

- 1 Outline the elements of defamation.
- 2 Describe the defamation case against Google. Why did the plaintiff choose to sue Google?
- 3 Explain the defence used by Google in this case. Could Google have used any other defences in this case?
- 4 'Defamation law must balance the right to freedom of speech with the right to reputation.' With reference to the Google case, discuss whether or not defamation law has achieved an appropriate balance.

 View the website of Electronic Frontiers Australia at www.efa.org.au and search 'Defamation laws and the internet'.

News report 7.2

Google hit with \$200 000 damages bill over Mokbel shots

A Melbourne man who won a defamation case against search engine giant Google has been awarded \$200 000 in damages. Milorad Trkulja, also known as Michael, sued the multinational over images of him alongside a well-known underworld figure that appeared in its search results.

A six-person Supreme Court jury found last month that Mr Trkulja had been defamed by the images, which he first contacted Google about removing in 2009. The images were posted after Mr Trkulja was shot in the back by an unknown gunman while eating with his elderly mother at a St Albans restaurant in June 2004. When Mr Trkulja's name was typed into Google's image search, photos had appeared of him alongside gangland figure Tony Mokbel. Google search results also linked to a page on a now defunct website, Melbourne Crime, which had published photos labelled with his name.

Mr Trkulja said he had never initially intended to sue Google but had been galvanised into action after his request for the content to be removed from its searches in 2009 was not granted. Supreme Court Justice David Beach this morning said in awarding the damages that the case was about 'vindication' and 'nailing the lie'. Mr Trkulja, an elder at a Serbian Orthodox Church in Springvale, also won \$225 000 in damages from Yahoo earlier this year over the same matter.

Google's lawyers argued that the search engine was not the publisher of the material and was only indexing the link to the website and the images in its results. The company used the 'innocent dissemination' defence, arguing that it was providing links to the content without knowing that the material was defamatory.

However, the jury found that Google's defence of the images broke down because it did not take any steps to remove the images from its searches once Mr Trkulja's lawyers contacted the company. The jury found that the search engine was not liable for the search results themselves, as Mr Trkulja had incorrectly filled out a form for reporting offensive material by not including the URL of the content to which he objected. The website that hosted the image has since been taken down and the images or the article are no longer indexed by Google's search engine.

A Google spokesman said in response to the ruling: 'Google's search results are a reflection of the content and information that is available on the web. The sites in Google's search results are controlled by those sites' webmasters, not by Google.'

Source: Dan Oakes, Sydney Morning Herald, 12 November 2012



Google was awarded \$200 000 in damages in a defamation case.

Triviality

The defence of triviality protects defendants who have published a defamatory statement but have done so in such trivial circumstances that it is unlikely to cause the plaintiff any harm.

This defence applies to the *circumstances* of the publication, not to the content of the publication. This means the defence does not provide protection for trivial allegations. Instead the defence might apply to protect a publication distributed to, for example, a small group of friends. It would protect this publication because in those circumstances, where only close friends saw the publication, the plaintiff would be unlikely to suffer any harm.

The defence of triviality protects defendants who publish defamatory material in circumstances that are unlikely to cause any harm to the plaintiff.

Activity 7.8 Classroom presentation

Defamation defences

For each of the following cases, identify with a partner the possible defendants and discuss whether they would have a defence to defamation. Present your conclusions to the class.

Case A

A prominent politician uses parliamentary question time to accuse a priest of committing sexual offences. The politician names the priest specifically. The next day a newspaper reprints these allegations.

Case B

A newspaper runs a story about the recent conviction of a serial killer. The article describes the killer's past convictions for theft, robbery and sexual assault. The killer sues for defamation, claiming he has never been convicted of any sexual assault offences.

Case C

Aly the film critic writes a review of a new arthouse movie. It is published online on her website. She writes 'I really wanted to like this movie, but the performance of lead actress Hannah was wooden and unconvincing. At first I thought I had wandered into a zombie horror movie by mistake, but then I realised Hannah's acting was just that lifeless. Her lack of talent guarantees this film will be a failure. I rate this movie one star, do not watch.'

Case D

A magazine is published containing a scandalous story about a celebrity. The celebrity happens to see the magazine while buying some gum from a newsagency, and becomes outraged that the newsagent would 'sell such filth'. The celebrity sues the newsagent for defamation.

Case E

During parliamentary Question Time, a politician accuses a member of the opposition of accepting bribes and attempting to sell political favours. It later becomes apparent that these allegations were untrue.

7.5 Role of statute law and common law

Australian defamation law is derived from English common law. The elements and defences developed over hundreds of years as new cases were heard. Beginning in the 1840s, the Australian colonies began to pass their own defamation laws. This resulted in substantially different systems of defamation law operating in each state and territory of Australia. The widespread development of national newspapers, radio, television broadcasts, and the internet made this system increasingly unworkable. In 2004, the Commonwealth Attorney-General proposed the creation of uniform national defamation laws. All states and territories prepared to pass uniform national defamation laws, and in 2006 Victoria's defamation laws were codified by the *Defamation Act 2005* (Vic), with all other states and territories following suit shortly thereafter.

The Council of Attorneys-General has initiated a review of Australia's uniform defamation laws, with the aim of providing a model for reform to be presented to Parliament midway through 2020. The proposed changes include:

- stronger protections for public interest reporting
- the introduction of a serious harm threshold which would deter some people from litigating in more minor matters
- clarifications to the statutory cap on damages
- changes to how the statute of limitations is calculated for the publication of online defamation, so that time limits will start running from when the matter is first uploaded. Under the existing law, the time limit for litigation restarts every new time something is downloaded for the internet, which can lead to online publishers being under perpetual threat of litigation.

The earliest Australian defamation legislation was the *Slander and Libel Act 1847* (NSW). Conversely, Victoria's defamation law derived primarily from the common law until the enactment of the *Defamation Act 2005* (Vic).

7.6 Impact of the breach

Defamation can result in both economic loss (such as loss of income) and non-economic loss (such as damage to reputation).

The impact of defamation on the plaintiff relates to the damage done to their reputation. This can cause economic losses (such as loss of income) as well as non-economic losses (such as injury to reputation or hurt feelings). The court will evaluate the impact of the defamation on the plaintiff and award an appropriate remedy.

Damages

Damages and injunctions are the two main remedies available to the court in a defamation case.

The amount of monetary damages awarded to a successful plaintiff in a defamation proceeding will be related to the amount of harm caused by the defamatory statement. For example, the plaintiff may have experienced economic loss if the defamation caused them to lose their job. As a result, they may receive an amount of damages related to lost income. The amount of damages awarded for economic losses is uncapped, and limited only by the extent of the harm caused.

It is also possible to receive damages for non-economic loss. This includes damages for concepts that cannot be specifically quantified such as injury to reputation and damages for hurt feelings. This category includes the anxiety that a plaintiff might have felt due to being forced to litigate their claim and restore their reputation. The *Defamation Act 2005 (Vic)* places a statutory cap of \$250 000 (adjusted annually for inflation) on the compensation that can be awarded for non-economic loss caused by defamation. The Act also prohibits exemplary or punitive damages, which means a judge or jury cannot award extra damages as a way of punishing the defendant.

When determining the amount of damages to award, the court will consider whether the defendant has published a retraction or an apology. These can act as mitigating factors that may reduce the amount of damages awarded.



Money cannot always undo the damage caused by defamation.

Injunction

A successful plaintiff in a defamation action may ask the court to grant an injunction preventing any further publication of the defamatory material.

Legal brief 7.7

Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158

John Marsden was a respected New South Wales solicitor, head of the Law Society, and President of the New South Wales Council for Civil Liberties. Mr Marsden was also openly homosexual. In 1994, a politician claimed, while under parliamentary privilege, that Mr Marsden had engaged in sexual acts with underage boys. In 1995, Channel 7's *Today Tonight* broadcast these allegations and alleged that Mr Marsden paid underage boys for sex. Against the advice of friends, and a number of leading lawyers, Mr Marsden sued for defamation. Channel 7 claimed the defence of justification (truth).

Mr Marsden expected the trial to last for six weeks. Instead, the *Marsden* case took over six years and \$6 million to reach its final conclusion. The trial ran for 229 hearing days, during which 113 witnesses gave evidence. It became one of the largest, longest and most comprehensive defamation cases in

Australian history. Throughout the duration of the trial, Channel 7 continued to publish details of the allegations.

Mr Marsden was ultimately successful and was awarded \$525 000 plus legal costs. Despite his legal victory, Mr Marsden's life had been ruined. Following the verdict, Marsden issued this public statement:

Although I have won, I have lost ...
No amount of money can compensate the anguish, the pain and humiliation of the past few years ... It's probably totally ruined my life and my health ...
No sum will restore me in any way to the position I was in before these outrageous allegations ...

The *Marsden* case demonstrates the extraordinary impact that defamation and litigation can have on a victim; the costs involved in bringing a case to court are not always just monetary.



Mr Marsden

Key point summary

Do your notes cover all the following points?

- ❑ A person commits defamation if they make a statement that identifies the plaintiff in some way and causes the plaintiff's reputation to be damaged.
- ❑ Defamation must strike a balance between protecting:
 - the right to reputation
 - the right to freedom of speech.
- ❑ The elements required to establish liability
 - Publication: a statement is communicated to a person other than the plaintiff
 - Identification: the plaintiff is directly or indirectly identified by the publication
 - Defamatory meaning: the statement lowers the reputation of the plaintiff.
- ❑ The limitations of actions
 - Standing: dead people and corporations cannot sue for defamation
 - Limitation period: a cause of action for defamation must be brought within one year of the publication of the defamatory matter
 - Damages: there is a statutory cap of \$250 000 for non-economic loss.
- ❑ Defences
 - Justification: protects defendants who have told the truth
 - Contextual truth: protects defendants who have published some defamatory statements as part of a larger, substantially true, publication
 - Honest opinion: protects those who offer reviews or commentary on matters of public interest
 - Absolute privilege: protects people from being sued for defamation for statements made in parliament or the courts
 - Qualified privilege: applies when the recipient of the publication has a particular interest in that information
 - Fair reporting of proceedings of public concern: protects publications reporting on matters of public concern, such as the proceedings of parliament or the courts
 - Publication of public documents: protects the publication and republication of documents created by public bodies such as parliament and the courts
 - Innocent dissemination: protects unknowing distributors of defamatory publications
 - Triviality: protects defendants who publish defamatory material in circumstances that are unlikely to cause any harm to the plaintiff.
- ❑ The role of statute law and common law in developing the elements and defences
 - Defamation law developed through the common law until it was codified in the *Defamation Act 2005* (Vic).
- ❑ The impact of the breach on an aggrieved party
 - Defamation can result in both economic loss (such as loss of income) and non-economic loss (such as damage to reputation and hurt feelings)
 - The law seeks to remedy this through damages (the award of money) or injunctions (preventing further publication of the defamatory publication).

End-of-chapter questions

Revision questions

- 1 Define the term 'defamation'.
- 2 Which rights does the law of defamation seek to balance?
- 3 Identify the elements that must be proved for a person to be successful in a case for defamation.
- 4 Identify one limitation of defamation as a cause of action.
- 5 Outline four defences to defamation.
- 6 What is the source of Victorian defamation law?
- 7 Other than damages, describe one remedy available to a plaintiff in a defamation case.

Practice exam questions

Aly publishes an investigative piece about drug use in football. In the article she never mentions anyone by name, but describes one of the involved players as the 'captain of this year's premiership-winning team'. The article alleges that this player took performance-enhancing substances at the club, and also illegal drugs such as cocaine during their leisure time. The player sues Aly, who is able to present evidence at trial that he did in fact use illegal drugs such as cocaine, but she is unable to present any evidence that he used performance enhancing drugs.

- 1 Discuss whether Aly has any defences available to her in this case. Justify your answer. [4 marks]
- 2 Evaluate whether the elements for defamation could be proven in this case. Justify your answer. [6 marks]

Current issues folio

Research two defamation cases reported in the media.

- 1 For each case, identify:
 - the plaintiff
 - the defendant
 - the main facts or claims of the case
 - the court the case has been heard in
 - the outcome (if available).
- 2 Design a poster or blog to explain the main elements of the tort of defamation.



Senator Sarah Hanson-Young in parliament on 25 November 2019 after winning her defamation case against former senator David Leyonhjelm over comments he made suggesting she was a misandrist and a hypocrite

UNIT 2

Sanctions, remedies and rights



Chapter 8

Area of Study 1

Sanctions

Unit 2 focuses on the enforcement of criminal law and civil law, the methods and institutions that may be used to determine a criminal case or resolve a civil dispute, and the purposes and types of sanctions and remedies and their effectiveness.

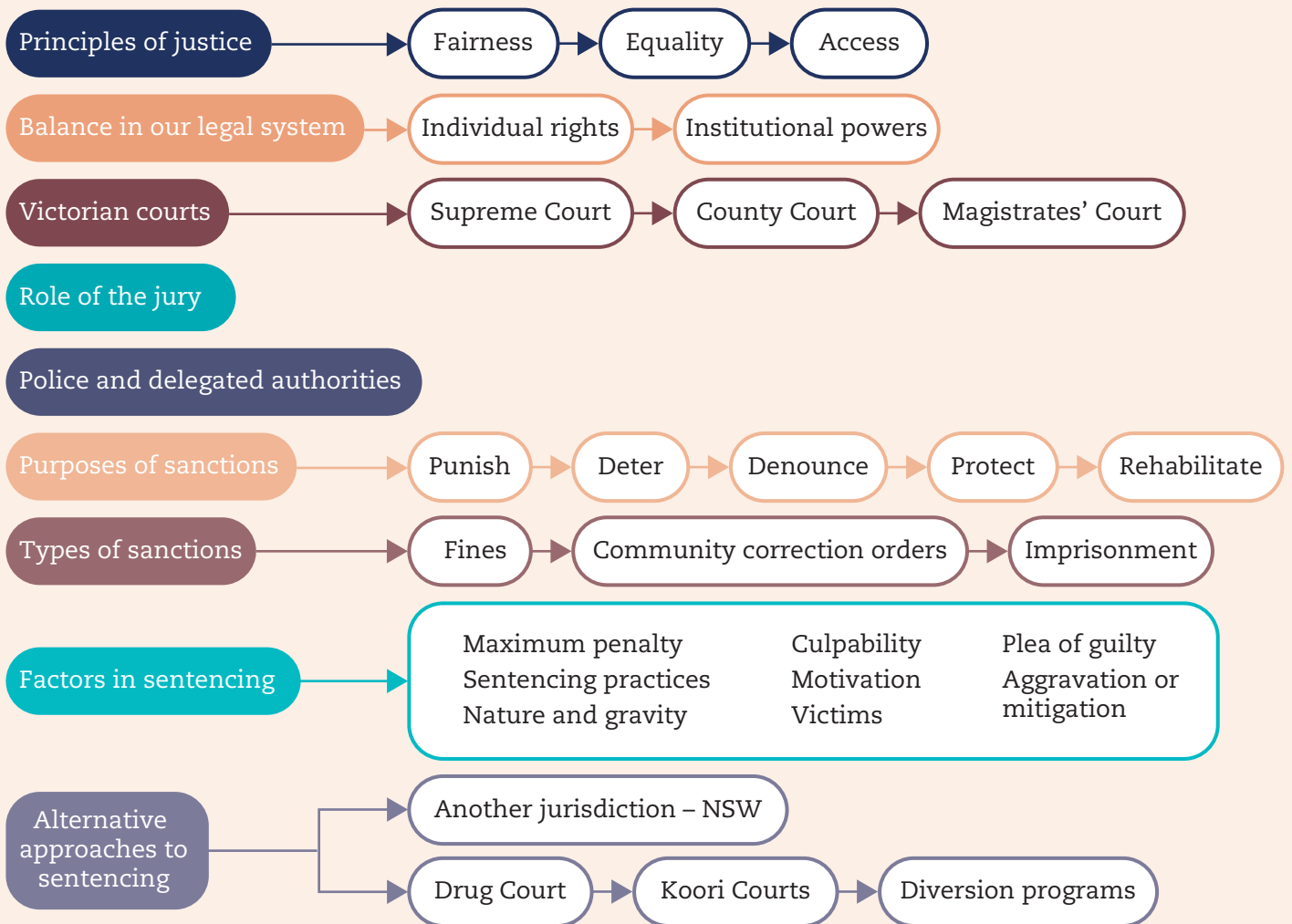
This chapter examines the key concepts in the determination of a criminal case by providing an introduction to sanctions and an exploration of the important principles of justice behind our legal system (fairness, equality and access).

We will investigate the enforcement of criminal law and the balance between institutional powers and individual rights. The role and criminal jurisdictions of the Victorian courts and the role of the jury in a criminal trial will also be considered before looking at the purposes and types of sanctions in Victoria.

Factors to be taken into account in sentencing any offender will be explained, and the practice of sentencing in Victoria will then be considered in light of sentencing in one other jurisdiction (New South Wales).

We will finish with a consideration of alternative approaches to sentencing, such as the use of the Drug Court, the Koori Courts and diversion programs.





Key terms

aggravating factors evidence presented that increases the seriousness of the offence and so contributes to a harsher sentence; for example, use of a weapon, prior convictions

community correction order (CCO) a sentencing order requiring an offender to comply with conditions while in the community; can include unpaid community work, drug/alcohol treatment or curfews

concurrent sentence where the defendant is sentenced to serve two terms but the lesser is to be served at the same time as the larger term rather than the terms being added together

cumulative sentence where the defendant is sentenced to serve two terms and these are added together to create one total term

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)

denunciation the expression by the sentencing judge or magistrate, through comments or the sanction set, that the offence is condemned by society

deterrence discouraging a person from making a certain decision or following a certain course of action

fine an order to pay a sum of money as a punishment under the law

hung jury a jury that cannot agree upon a verdict after an extended deliberation time and is unable to reach the necessary majority or unanimity required under the law

imprisonment the holding of a convicted person in custody (i.e. a prison) for a certain term

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court (Trial Division)

indictable offence heard summarily an indictable offence that can be

tried before a magistrate without a jury if the accused and the court agree

majority verdict where one fewer than the total of the jury members need to agree

mitigating factors evidence presented that reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

non-parole period the portion of a custodial sentence to be served in prison

parole the conditional and supervised release of a prisoner before the end of their sentence; it allows a prisoner to serve part of their sentence of imprisonment in the community

summary offence a less serious crime, heard and determined in the Magistrates' Court

unanimous verdict where all jurors on the jury panel agree on the verdict

8.1 Principles of justice: fairness, equality and access

There are many considerations when we reflect on what makes our legal system, laws and procedures just or unjust. Three of these are fundamental principles that are used to measure justice: fairness, equality and access.

Fairness

One of the key principles of our legal system is that of fairness. This is achieved when fair legal processes are in place and all parties receive a fair and unbiased hearing. The following are some examples of how the aim of fairness is enshrined as one of the key principles of our legal system:

- the regulation of police questioning and the right to silence in criminal cases
- an entitlement for an accused to know details of charges against them
- the right to a trial before an independent judge and jury
- specialist courts and tribunals
- the strict rules of evidence at trial
- the rules of procedure that allow an accused to hear the criminal case against them.

Image A



Image B



Image C



Image D



Image E



Image F



Image G

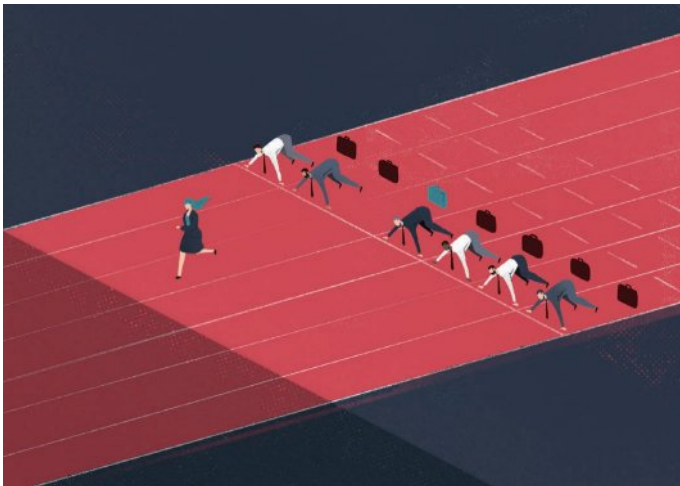


Image H

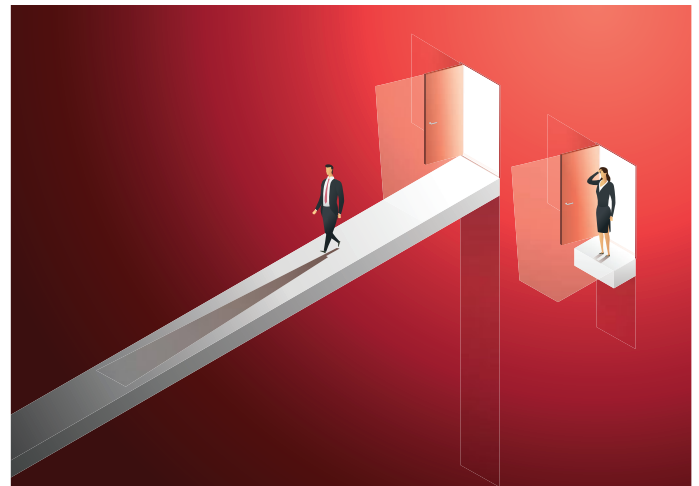


Image I



Image J



Activity 8.1 Folio exercise

Exploring the principle of justice: fairness

Refer to the above images (Image A through to Image J). Working in pairs or as individuals, suggest an explanation of any connection between each image and the principle of justice: fairness.

View the website of the Victorian Equal Opportunity and Human Rights Commission at www.humanrightscommission.vic.gov.au and review 'Victoria's Charter of Human Rights and Responsibilities'.

Legislation also promotes the principle of fairness in our system.

Section 1 of the *Sentencing Act 1991* (Vic), for example, records that one of the purposes of the Act is 'to provide fair procedures ... for imposing sentences'.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') is also a Victorian law that promotes fairness. The Charter provides, in section 24, that a person has a right to a fair hearing.

Equality

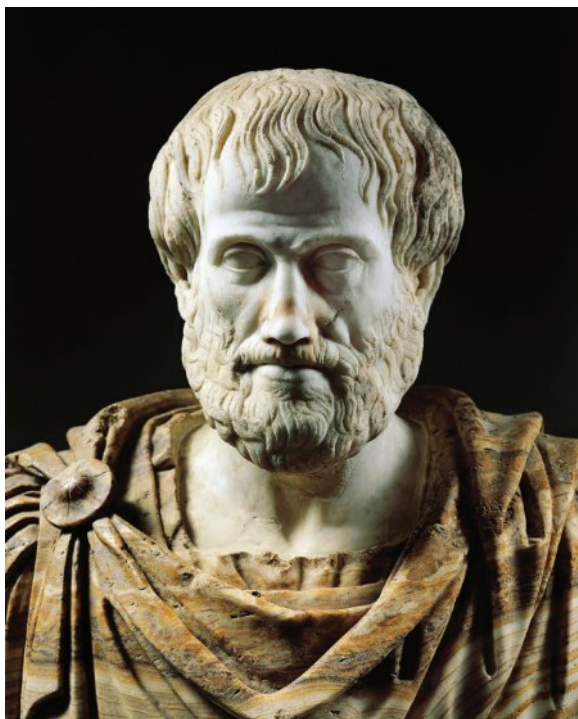
The principle of equality is considered fundamental to the achievement of justice. The justice system strives to achieve equality by treating all individuals uniformly. As with 'fairness', the principle of equality is recognised and protected by our laws. The Charter recognises this principle specifically in section 8(3), which states that every person 'is equal before the law and is entitled to the equal protection of the law without discrimination'.



The principle of equality was also behind the creation of the Victorian Equal Opportunity and Human Rights Commission, an independent body created by the Victorian parliament with responsibilities under laws including the *Equal Opportunity Act 2010* (Vic), the *Racial and Religious Tolerance Act 2001* (Vic) and the Charter itself.

Australians also have a measure of protection against inequality through anti-discrimination laws including:

- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Equal Opportunity Act 2010* (Vic).



The concept of equality before the law is not new. In fact it was recognised as far back as the times of Aristotle, who lived 384 – 323 BC. Aristotle, a Greek philosopher, argued that the key element of justice was ‘treating all cases alike’.

However, treating all cases alike is not that simple. Is it just, for example, to treat a child in the same way as an adult where the same charge is involved? Is it just that we sentence a person addicted to drugs or alcohol differently from the way we would sentence a person without such addictions? Shouldn’t they be equals?


Equality therefore is a basic, yet not simple, principle underpinning our legal system. Perhaps it is best to say our legal system strives to create a system that allows for equality, while recognising individual facts and circumstances of people within our society.

Access

Our legal system, even if it was seen as fair and even if it provided equal treatment, would not be regarded as effective if people could not access the system. Access refers to:

- a person’s ability to obtain legal advice in a language they understand (through multilingual brochures and websites providing advice in a range of languages)
- a person’s ability to receive legal advice or to be represented even if they are financially disadvantaged
- a person’s ability to attend a court close to their home.

Aristotle (384 – 323 BC) argued that all cases should be treated alike.

 The Victoria Legal Aid website (www.legalaid.vic.gov.au) provides legal advice in over 24 languages. View the website and click the link to ‘More languages’ (top right) to see the list of languages available.





The homeless and the elderly are two groups who cannot always easily access the legal system.

Activity 8.3 Structured questions

Justice Connect

A body such as Justice Connect goes some way to improving access for disadvantaged groups in society such as the homeless and the elderly. Explore their website and complete the following tasks:

- 1 What is meant by the 'pro-bono' offering of services? (You may need to research beyond this site for this term.)
- 2 Summarise the Legal Services that Justice Connect offer (look under the 'What we do' and the 'Get help' tabs).
- 3 Identify the groups in society that Justice Connect focuses on. Why?
- 4 Scroll down to 'Our Stories' to find a number of stories about people assisted by Justice Connect. Select one of these stories and summarise it in your own words.
- 5 Reflect on how Justice Connect contributes to each of the principles of fairness, equality and access under the law.



View the website for Justice Connect at justiceconnect.org.au for information to assist in Activity 8.3.

8.2 Institutions that enforce criminal law

There are layers of institutions that are responsible for the enforcement of criminal law, including the police and delegated bodies.

Police

Police have a number of roles in our society, including protecting life and property, detecting and investigating crimes, apprehending offenders and helping those in need of assistance. Each state in Australia has its own police force. Victoria Police are responsible for enforcing criminal laws within Victoria.

In addition to the state police forces, Australia has the Australian Federal Police, who are responsible for enforcing federal laws (such as those relating to customs and terrorism).

Delegated bodies

View the website for the Environment Protection Authority at www.epa.vic.gov.au for more information about their regulation responsibilities.

View the website for VicRoads at www.vicroads.vic.gov.au for more information about their responsibilities.

Another layer of enforcement also exists and this is overseen by bodies to whom our federal or state/territory governments have delegated (or handed over) law enforcement responsibilities.

One example of a delegated authority in Victoria is the Environmental Protection Authority (EPA). The EPA is given the responsibility to regulate all things that impact upon the environment in Victoria. The EPA can, for example, prosecute offenders for littering, for dumping rubbish, for polluting rivers or for excessive noise.

Another example in Victoria is VicRoads, also created as a delegated authority by the Victorian parliament. VicRoads is responsible for, among other things, traffic, roads and licensing of drivers, and enforcing regulations in these areas.



VicRoads is one example of a delegated authority in Victoria.

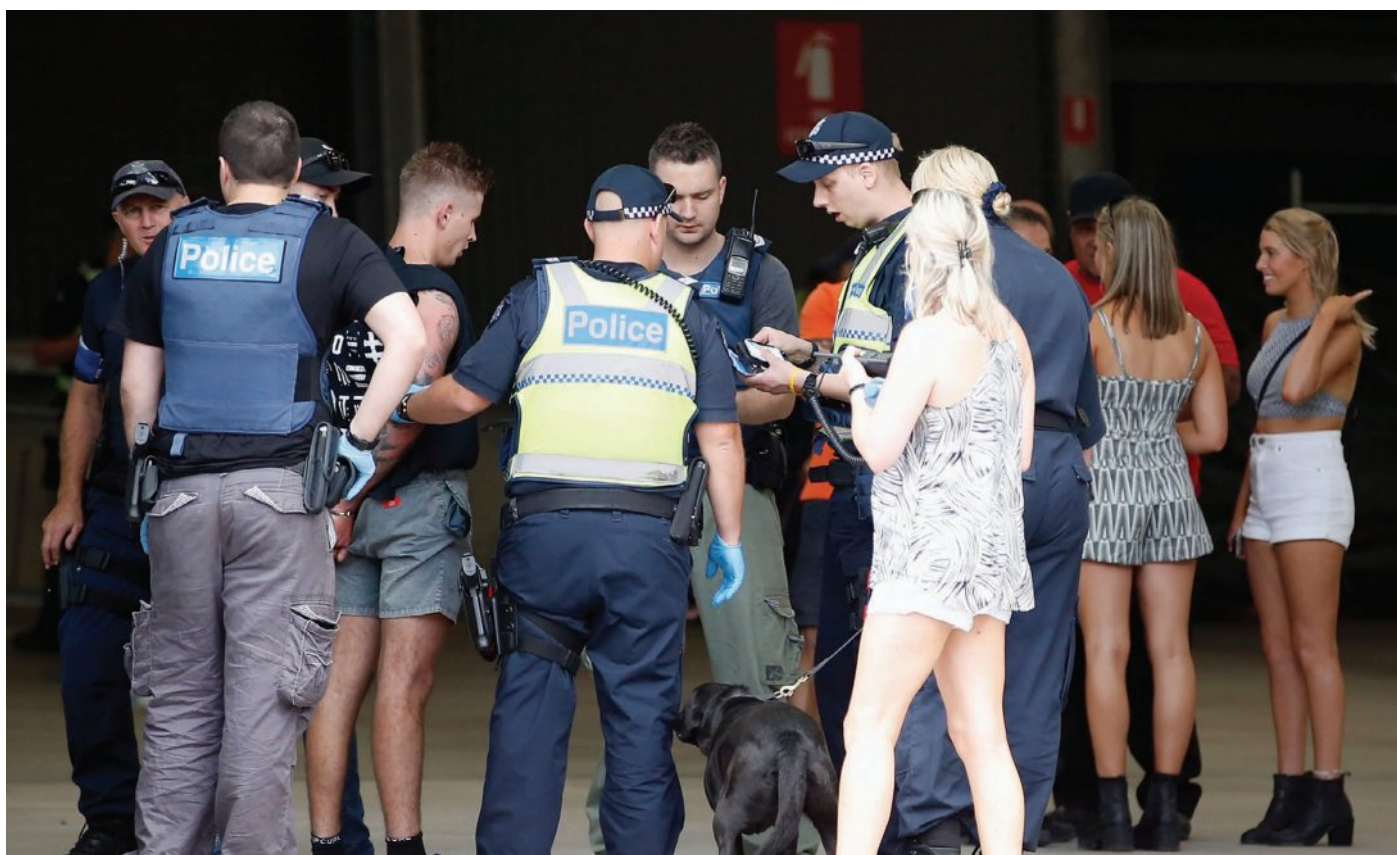
8.3 Institutional powers and individual rights

As our legal system adjusts and adapts to changing community values and the key principles of fairness, equality and access, there needs to be a balance kept between powers held by institutions and the rights of individuals. On the one hand, we do not want individual rights to privacy or freedom of religion or debate stifled or crushed by our laws. On the other hand, there is some need to balance these with the need to protect the rights of others in our community.

The balance that needs to be struck is a subject of ongoing debate. One example of this balancing act relates to the rights and powers of police and individual rights. Our police need powers to question, search and arrest suspects, but if they are given too much power, the rights of individuals (for example, the right to silence, the right to legal advice, the right to know details of charges they could be facing) are compromised and they may be treated unjustly and unfairly. However, if police powers are reduced or removed, laws may become unenforceable and thus ineffective.



Police are stationed in the Melbourne CBD on 24 May 2019 to keep an eye on environmental activists staging a peaceful protest drawing attention to the Earth's sixth mass extinction.



Police detain a patron before entry into the Stereosonic music festival at Melbourne Showgrounds on 5 December 2015.



Police powers include those to question, search and arrest.

8.4 Role and criminal jurisdictions of the Victorian courts

The courts in Victoria are arranged in a hierarchy.

Supreme Court (Trial Division and Court of Appeal)

County Court

Magistrates' Court

Figure 8.1 The Victorian court hierarchy

Supreme Court of Victoria

The Supreme Court is the highest court in the Victorian court hierarchy.

The Supreme Court hears the most serious criminal cases in the state. It has two divisions: the Trial Division and the Court of Appeal.

View the website of the Supreme Court of Victoria at www.supremecourt.vic.gov.au for more information about 'How the court works'.



Trial Division

The Trial Division of the Supreme Court hears the most serious **indictable offences** in Victoria. Among cases heard here are those involving murder, attempted murder and treason. If the accused pleads 'not guilty', the case is heard before a judge and jury (otherwise, a judge alone conducts the case).

Court of Appeal

The Court of Appeal only hears appeals. In hearing an appeal, usually heard by three Supreme Court judges, the court needs to rule on whether or not a trial was conducted fairly and whether or not the law was correctly applied.

The Court of Appeal hears appeals from criminal or civil cases heard in the County Court or Supreme Court Trial Division. It also hears some appeals from the Victorian Civil and Administrative Tribunal (VCAT).



Former Supreme Court Judge, Justice Cummins

County Court of Victoria

As the main trial court in Victoria, the Victorian County Court has jurisdiction to hear a broad range of criminal cases and some appeals.

The County Court can hear all indictable offences, except those that are reserved for the Supreme Court (such as treason, murder and related offences). Examples of criminal offences heard by the County Court include armed robbery, culpable driving, drug trafficking and sexual offences.

The County Court also hears appeals in criminal cases from the Magistrates' Court and the criminal and family divisions of the Children's Court.

View the website of the County Court of Victoria at www.countycourt.vic.gov.au for more information about its functions.



Magistrates' Court of Victoria

View the website of the Magistrates' Court of Victoria at www.mcv.vic.gov.au for more information about its functions.

The Magistrates' Court's primary role in relation to criminal law is to resolve relatively minor criminal cases. It hears all **summary offences** and some indictable offences.

In addition to hearing summary offences (such as 0.05% charges, speeding, unregistered vehicles, drunk in public place), the Magistrates' Court also hears some **indictable offences heard summarily** (where the defendant agrees). Examples include minor theft or drug offences, burglary and offences punishable by imprisonment for up to 10 years.

The court also plays an important role in conducting committal hearings (to determine if there is sufficient evidence to justify a trial being held in a higher court) and hearing applications for bail as well as applications for warrants for search or arrest.

All of these cases are heard by a magistrate alone (no jury is used in the Magistrates' Court).



8.5 Role of the jury in a criminal trial

The jury is a decider of facts. This group of 12 people, randomly chosen, are intended to be representative of the community.

The jury members in a criminal trial must listen to and understand the evidence. The jury must then apply the evidence to the law as explained by the judge. In order to do this, the jury must put aside prejudices, understand points of law explained and ultimately come up with a verdict solely based on those facts.



A jury is asked to focus solely on the evidence established during the trial.

Contempt of court (interfering with the court's authority) is an offence that carries jail as a possible penalty, or steep fines.

Legal brief 8.1

Publication of information outside court led to Ballarat murder trial being aborted and jury being dismissed after 'reckless' TV report

In June 2019 the trial of a man accused of murdering a Victorian grandmother was aborted after a local TV news bulletin broadcast inaccurate information and details that had not been heard by the jury. The Supreme Court, sitting in Ballarat, had been hearing the trial of Ben Wardlaw in relation to the fatal stabbing of Karen Ashcroft, 52, in the central Victorian town of Maryborough in May 2018. After three completed days of the trial, which included the giving of evidence by eight witnesses, Justice John Champion dismissed the jury after an application from defence lawyer Malcolm Thomas, who told the Court a WIN news report,

broadcast the previous night, included inaccurate information and evidence that was inadmissible in court and had not been heard by the jury.

Justice Champion, describing the news reporting as 'reckless', told the Court there was a high risk that members of the jury would have seen the report and may therefore speculate based on the information. Mr Wardlaw was remanded in custody for a retrial. It was noted that the publication of prejudicial material can give rise to a charge of contempt of court and that lawyers may seek costs from the television network.

Activity 8.4 Case study

Publication of information

Read Legal brief 8.1 and answer the following questions:

- 1 Why was the trial brought to an end after the court learned of the publication of material by the television network?
- 2 What is the risk if the media publishes information that the jury does not hear during the trial?

In a criminal trial, the prosecution presents evidence to support the criminal charges against the accused. The presumption of innocence of the accused means the burden of proving the guilt of the accused is on the prosecution. This burden is only satisfied if the prosecution can prove the guilt 'beyond reasonable doubt'. This means that if the prosecution case leaves doubt in the minds of the jury members, then the jury must find the accused 'not guilty'.

Although a criminal trial usually has 12 jury members forming the jury panel, there can be situations (e.g. illness) where a decision is made to continue the trial with one, two or (and this would be very rare) three fewer jurors. In that case, section 46(1) of the *Juries Act 2000* (Vic) allows 11:12, 10:11 or even 9:10 to be a **majority verdict** accepted by the court.



A jury in a criminal trial in Victoria usually comprises 12 jurors.

Although some critics argue that a majority verdict should be extended to murder trials, it is also argued that having one juror doubt the guilt of an accused is not 'beyond reasonable doubt'.

However, as the standard of proof in criminal trials is 'beyond reasonable doubt', a court will not allow a majority verdict easily, as this suggests some doubt, even if only in the mind of one juror.

The jury must try to reach a **unanimous verdict**, but if this cannot be achieved after 6 hours, a majority of 11 out of 12 can be accepted.

The further exception to the reaching of a verdict by a jury is that majority verdicts are not accepted for charges of murder or treason or certain serious drug offences or an offence 'against a law of the Commonwealth' (e.g. terrorism charges). In these cases, the decision of a jury must be unanimous (*Juries Act 2000* (Vic) section 46(4)). This means that in the most serious cases, such as murder, if a unanimous verdict (12/12) is not reached, there will be a **hung jury** and the trial will need to start afresh, with a new jury panel.

The *Juries Act* provides further guidance by making it clear (section 46(5)) that it is 'possible for a jury to return a verdict of not guilty of the offence charged but guilty of another offence with which the accused has not been charged'.

The most common example of this would be in a murder trial – the jury may, based on directions from the trial judge, not agree that the accused has been proven guilty

beyond reasonable doubt of murder but agree that he/she is guilty of a lesser charge of manslaughter.

Juries are only to be used in the County and Supreme Court when the accused pleads not guilty. The jury plays no role in the sentencing of an accused.

8.6 Purposes of sanctions

The law concerning sentencing in Victorian criminal trials is largely governed by the *Sentencing Act 1991* (Vic). Section 5(1) of that Act provides that the only purposes for which sentences may be imposed are just punishment, general deterrence, specific deterrence, denunciation, protection of the community and rehabilitation. It is these purposes that judges and magistrates turn to when considering an appropriate form of sanction.

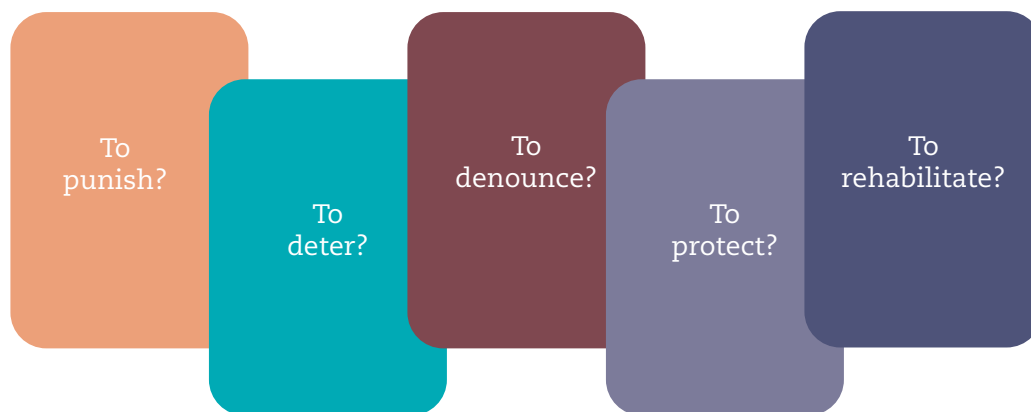


Figure 8.2 A serious card game: each judge/magistrate will ask themselves the same question prior to sentencing an offender: which purpose (or combination of purposes) should I focus upon in sentencing *this* offender in *this* case?

Punishment

The purpose of just punishment refers to a form of punishment that is not unduly harsh or barbaric. In some countries, the use of the cane to strike an offender is used. Other countries reportedly still use amputation or stoning as forms of punishment. The last person legally executed in Australia was Ronald Ryan in February 1967. The public response immediately before and after the Ryan hanging was a turning point in Australia's attitude to the death penalty.

Deterrence

Courts take into account the two forms of **deterrence** when sentencing:

- 1 specific deterrence: to discourage the offender from committing a similar offence in the future
- 2 general deterrence: to discourage others in the community from committing the same offence.

Denunciation

To 'denounce' refers to the condemning of an act seen as totally unacceptable.

Denunciation therefore is a factor that courts take into account that aims to ensure the offender, and the community generally, understands that this offence is totally unacceptable to society.

Protection

Protection usually means that society needs to be secure in the knowledge the offender cannot re-offend in the same manner in the foreseeable future. This usually leads to the conclusion that a term of imprisonment is warranted.



Rehabilitation

Also factored into setting an appropriate sanction is rehabilitation. Rehabilitation is considered on two levels:

- 1 through a sentence that encourages an offender to 'mend their ways'
- 2 through actively supporting an offender, usually done through ordering the offender to undergo prescribed alcohol/drug counselling or an anger management course.



8.7 Types of sanctions

The *Sentencing Act 1991* (Vic) specifies that courts must, in considering a range of sentences, have regard to a certain 'hierarchy' of offences under the Act.

As a starting point, courts should not sentence a defendant to a term of imprisonment if the purposes behind the sentencing (e.g. deterrence, rehabilitation) can be met by a non-custodial sentence (e.g. a **community correction order (CCO)** or a **fine**).

Our parliament is always examining different sanctions that can improve outcomes for society. Community correction orders were introduced in Victoria in 2012.



The *Sentencing Act 1991* (Vic) is an important piece of legislation passed by the Victorian Parliament. It affects sentencing in Victorian courts.

The *Sentencing Act 1991* (Vic) then goes on to provide that, specifically, a defendant should not be sentenced to a term of imprisonment unless it considers that the purposes of sentencing cannot be achieved by a drug treatment order (section 5(4B)) or a community correction order (CCO) (section 5(4C)).

This means the courts are given a 'hierarchy' of sanctions to consider, and only when one or more do not achieve the purposes for which the sentence is to be imposed can the court move to the next sanction.

A hierarchy of sanctions

In sentencing a defendant in Victoria, the only purposes for which sentences may be imposed are:

- to punish the offender to an extent and in a manner which is just in all the circumstances; or
- to deter the offender or other persons from committing offences of the same or a similar character; or
- to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- to protect the community from the offender; or
- a combination of two or more of those purposes.

Source: *Sentencing Act 1991* (Vic), section 5

Based on the most applicable/appropriate of these, the court must then work through the following range of sanctions to determine which sanction, or combination of sanctions, is most suitable to achieve the selected purposes of sentencing in that specific case.

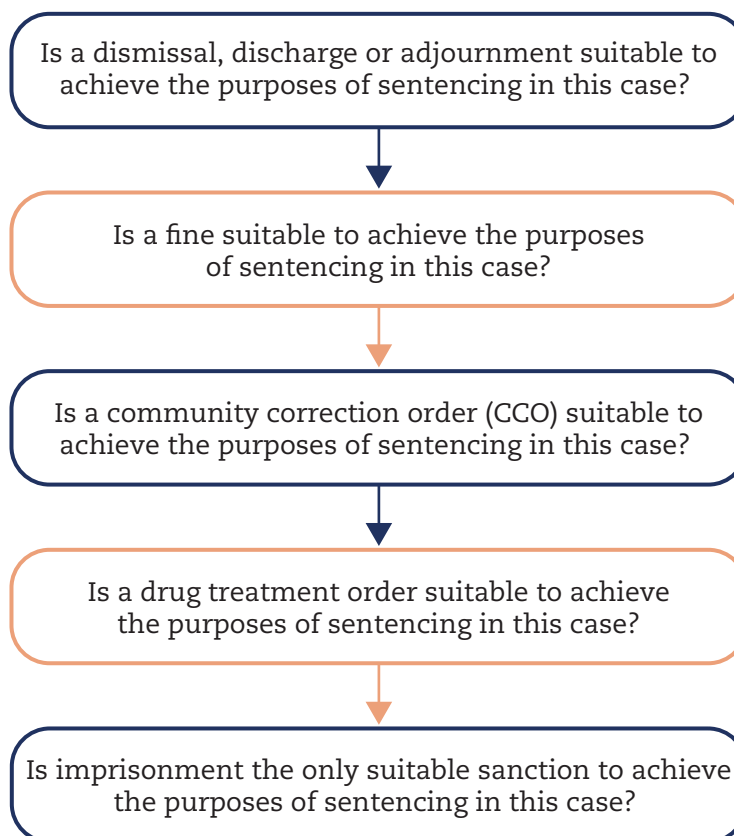


Figure 8.3 Range of sanctions available to a court

Starting at the top, with the option considering the dismissal, discharge or adjournment of the charges, a court will work through the options until it comes to the most suitable sanction (or combination) to meet the purpose (or purposes) in that particular case. Note that exceptions do exist.

Exceptions: where ‘custodial sentences’ must be imposed

In sentencing an offender to a term of imprisonment, the court specifies the **non-parole period**. Once this has expired, the offender is eligible to apply for **parole** to serve the unexpired portion of their sentence in the community.

It is argued that parole serves a number of main purposes. Parole is said to offer incentive to change and to undertake programs in prison to avoid re-offending. It is also seen as a form of supported release from prison, reducing the risk that an offender who is released will re-offend.

However, there are a number of exceptions to the general ‘hierarchy’ of sentencing approach. From time to time, parliaments specify that where a person is found guilty of a certain offence or range of offences, the courts must impose a **custodial sentence**.

Under sections 9 and 10 of the *Sentencing Act*, for example, custodial sentences must be imposed where a person is found guilty of:

- manslaughter in circumstances of gross violence (section 9B)
- manslaughter by single punch or strike (section 9C)
- causing serious injury in circumstances of gross violence (section 10)
- certain offences against emergency workers on duty (section 10AA)
- aggravated home invasion (section 10AC) or carjacking (section 10AD).

The allowing of prisoners to be released on parole has been criticised in recent years after some people on parole have re-offended. However, this must be weighed against the need to provide for supported release of prisoners and the offering of some incentive for them while in prison.

View the website of Corrections, Prisons & Parole Victoria at www.corrections.vic.gov.au for more information about parole conditions.

Fines

A fine is a court order to pay a monetary penalty. They tend to be expressed in an Act of Parliament as 'penalty units'. For the period of 1 July 2019 until 30 June 2020, the value of one penalty unit in Victoria was \$165.22 (the value is updated each year). So, if, for example, an offence carried a penalty of three penalty units, the total fine would be \$496 (rounded up).

An order to pay a fine will generally have a far greater impact and cause greater inconvenience to low-income earners than to those on high incomes. However, a court must take into account the financial circumstances of an offender as well as other relevant matters in determining the amount of a fine.

People who have been issued with, or ordered to pay, a fine can apply for a payment plan or apply for an extension of time.

View the website of Fines Victoria at online.fines.vic.gov.au for more information.



Fines and the purposes of sanctions

Fines would most likely meet the following 'purposes' of sanctions:

- to *deter*: fines are likely to deter the offender (specific deterrence) and others in the community (general deterrence)
- to *punish*: the offender will be punished by a fine
- depending on the level of the fine, it may act to *denounce* the crime.

On the other hand, a fine is unlikely to meet any of the other purposes of sanctions, such as:

- to assist in the *rehabilitation* of the offender
- to *protect society*.

Community correction orders

A community correction order (CCO) is an order that is satisfied by the offender in the community on a number of conditions.

Mandatory terms of a CCO

Offenders sentenced to a CCO must agree to the order and to abide by a number of mandatory terms such as:

- not re-offending
- not leaving Victoria without permission
- reporting to a community corrections centre.

Range of additional conditions that a court may order as part of a CCO

Other conditions that can also be ordered as part of the CCO are that the offender:

- undertake medical treatment or other rehabilitation
- not enter, remain within, or consume alcohol in licensed premises
- complete unpaid community work up to a total of 600 hours
- be supervised, monitored and managed by a corrections worker
- not contact or associate with certain people; for example, co-offenders
- live (or not live) at a specified address
- abide by a curfew.

An offender who breaches a condition of a CCO may be resentenced for the original offence and may face up to three months additional imprisonment for the breach.



An additional condition which may be imposed under a CCO is to perform supervised community work.

CCOs and the purposes of sanctions

CCOs would be most likely to meet the following 'purposes' of sanctions:

- to assist in the *rehabilitation* of the offender, particularly if the offender is ordered to undergo/continue counselling/rehabilitation
- to *deter* the offender, particularly where conditions such as a curfew, regular reporting to a corrections officer and unpaid community work are added
- to *punish* the offender, particularly if the conditions of the CCO are a curfew or unpaid community work
- depending on the conditions attached, to *denounce* the crime.

On the other hand, a CCO is unlikely to *protect society*, although curfews and other restrictions may provide a limited level of protection for the community.

View the website of the Sentencing Council Victoria at www.sentencingcouncil.vic.gov.au to search for 'Sentencing options for adults – community correction orders (CCOs)' for more information.

Imprisonment

As we have seen, in the scheme of sentencing that generally operates in Victoria, **imprisonment** is seen as the sanction of last resort. This means courts should and will only order a term of imprisonment where there are no alternatives suitable in the circumstances. It is the most serious sanction as it removes the offender from society and everything they know.



The exterior of Risdon Prison in Hobart, Tasmania, where convicted mass murderer Martin Bryant is serving a life sentence for shooting and killing 35 people on 28 April 1996 at the historic Port Arthur site.



The exterior of Dame Phyllis Frost Centre, a correctional facility for women in Deer Park, Victoria.

Where a court considers that the sanction of imprisonment is appropriate, a number of decisions need to be made.

As we have seen, one of the factors to be considered in sentencing is the maximum sentence for the offence. Different offences, depending on their level of seriousness, have different 'maximum' sentences set under legislation.

Maximum penalties and imprisonment

The legislation that defines each offence specifies the maximum penalty that courts can impose on anyone convicted of that offence. Maximum penalties are reserved for the worst, most serious examples of an offence. For a single offence, judges and magistrates may not impose a heavier sentence than the maximum penalty for that offence.

The maximum penalty reflects parliament's view of the seriousness of the offence. Table 8.1 shows some examples of offences with their maximum terms of imprisonment.

Table 8.1 Maximum penalties in Victoria

Maximum penalties in Victoria	
Offences	Maximum term of imprisonment
Murder Trafficking drug of dependence (large commercial quantity)	Life imprisonment
Rape Sexual penetration of a child under 12 years Armed robbery Aggravated burglary Arson causing death	25 years
Manslaughter Intentionally causing serious injury Culpable driving causing death	20 years
Recklessly causing serious injury Handling stolen goods Trafficking drug of dependence (not a commercial quantity) Arson	15 years
Threats to kill Indecent assault Theft Negligently causing serious injury	10 years
Recklessly causing injury Knowingly possess child pornography Possession of a drug of dependence (for the purpose of trafficking)	5 years
Going equipped to steal	2 years
Cultivation of a narcotic plant (not for the purpose of trafficking) Possession of a drug of dependence (not for the purpose of trafficking)	1 year
Obstructing a police officer	6 months

Source: <https://www.sentencingcouncil.vic.gov.au/about-sentencing/maximum-penalties>

Activity 8.5 Structured questions

Maximum penalties for offences in Victoria

Look at Table 8.1 and complete the following tasks:

- Are there any offences that you believe should have a greater maximum penalty than that specified? Select any two and explain your views.
- Are there any offences that you believe should have a lesser maximum penalty than that specified? Select any two and explain your views.
- What is the difference in the maximum sentences for:
 - trafficking a drug of 'commercial quantity'?
 - trafficking a drug not of 'commercial quantity'?
- You are a criminal lawyer who has been consulted by a client arrested for trafficking 95 kilograms of cannabis. Assume the definition of a 'commercial quantity' of cannabis under the law is 100 kilograms. In a brief summary, outline to your client the sentence range likely to apply in his case and how things might have been different had the amount of cannabis he was found with been slightly higher.

Imprisonment and concurrent versus cumulative sentences

The court, in factoring in the maximum term and setting the term appropriate in the case before it, must also consider the length of any non-parole period to be ordered.

Another consideration for the court is where there is more than one offence for which a defendant is to be sentenced. A judge may note that a suitable term of imprisonment for 'Offence A' is 8 years and for 'Offence B' is 3 years. The next decision is whether to impose the two sentences as a **concurrent sentence** or **cumulative sentence** (or a combination of the two).

Where there are a number of sentences arising from the one incident (such as an assault or theft), the general approach of the courts is to sentence the offender to serve the terms concurrently. A cumulative sentence will generally only be ordered where the sentences relate to offences arising from separate incidents. In that case, a cumulative sentence is believed to be better at reflecting the increase or decrease in criminal activity over a longer time period.

View the website of the Sentencing Advisory Council Victoria at www.sentencingcouncil.vic.gov.au and search 'Concurrency and cumulation in sentencing' for more information.

Imprisonment and the purposes of sanctions

Imprisonment is most likely to meet the following purposes of sanctions:

- to *protect* society as the offender is removed from society and held in custody
- to *punish* the offender, who is removed from society
- to *deter* both the offender (specific deterrence) and society (general deterrence) from committing the same crime in the future
- it will usually act to *denounce* the crime.

On the other hand, it is argued that imprisonment does far less to *rehabilitate* an offender because an offender has less free access to programs and counselling.



8.8 Factors considered by judges in sentencing

Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the factors that must be taken into account when sentencing an adult for a crime in Victoria. These factors include maximum penalty; current sentencing practices; nature and gravity; culpability; motivation by hatred or prejudice; impact of the offence; personal circumstances of any victim; injury, loss or damage resulting directly from the offence; guilty pleas; offender's previous character; and any aggravating or mitigating factors.

Maximum penalty for the offence

Taking into account any maximum sentence for the offence (along with other factors), the sentencing judge/magistrate is able to assess the level of seriousness of the offence and then sentence the offender accordingly.

Current sentencing practices

The sentencing judge/magistrate may examine statistics for sentencing over the past 2–3 years. The Sentencing Advisory Council publishes 'Sentencing Snapshots' that sum up statistics for the sentencing of offenders for a range of offences in the preceding year or years and these are valuable sources for our courts.

Nature and gravity of the offence

It is also helpful for judges and magistrates to put into perspective the nature and seriousness of the offence in question. Particularly violent offences or offences impacting on the vulnerable in our community are considered particularly serious, as are offences where offenders act 'in company' with others.

Offender's culpability

The offender's culpability (blameworthiness) is the degree to which they should be held responsible for the offence. On occasion, the offender is 100% to blame for the offence in question, but where an offender was acting in self-defence or was provoked, the level of blame is less than for an unprovoked or random attack.

Motivated by hatred or prejudice

A crime flowing from hatred or prejudice is now factored into sentencing as a specific focus to be taken into account.



Impact of the offence

The voices and rights of victims also are now recognised after this factor and the following two factors were added to the *Sentencing Act*. Victims may now file a victim impact statement (see Chapter 10 for further information). This allows the sentencing judge or magistrate to take into account the impacts on victims (including family members) and the damage and loss flowing from the offence.



Personal circumstances of any victim

See 'Impact of the offence' above.

Injury, loss or damage resulting directly from the offence

See 'Impact of the offence' above.

Guilty pleas

A person charged with an offence may plead guilty at any point in the proceedings, including after the trial has commenced. However, an early plea of guilty is a factor that tends to reduce the severity of any later sentence as it suggests remorse by the offender. It also saves families of victims in particular from having to undergo the stress and anxiety of a trial.

Since 2008, Victorian courts (under section 6AAA of the *Sentencing Act*) are required to announce and provide a specified sentence discount (known as a 'section 6AAA declaration') when an offender pleads guilty and where the judge or magistrate imposes a less severe sentence because the offender has pleaded guilty. This announcement requires the judge or magistrate to state what sentence would have been imposed had the offender not pleaded guilty. This acts as a guide to others in the community and is an incentive to offenders to make an early plea of guilty.

Offender's previous character

In order to set an appropriate sanction, the court also examines the previous character of the offender: their criminal history (if any), their work and family history, as well as evidence of their character from others in the community.

Presence of any aggravating or mitigating factors

At a plea hearing following a decision by a jury that the offender is guilty, or where an offender pleads guilty, the prosecution may raise any **aggravating factors** that the court should take into account in sentencing the defendant. These may be factors such as the use or threat of violence, the use or threatened use of a weapon, the use of explosives, the abuse of a position of trust or authority, or the age or vulnerability of the victim.

The defence, on the other hand, may make submissions about **mitigating factors** where relevant, such as the young age of the defendant, the mental capacity of the defendant, whether or not the defendant acted in self-defence, whether he or she was provoked or acted in the 'heat of the moment', or any remorse or regret expressed.

8.9 Aspects of sentencing

Sentencing of offenders for state offences (and most crimes are defined and prosecuted under state laws) differ from state to state. Each state has, since Federation in 1901, tended to focus on defining and refining approaches to the sentencing of offenders in their own state based on state needs, demands and recurrence of offences. As a result, there continue to be many differences between sentencing in Victoria and sentencing in other state jurisdictions. To consider this we will examine the approaches of Victoria and one other state (NSW) in relation to two aspects: mandatory sentencing and maximum sentencing for domestic violence offences.

Mandatory sentencing

A mandatory sentence, also known as a mandatory minimum sentence, is one that provides a minimum sentence that a person must receive when convicted of a crime. One example has been in relation to one-punch assaults causing death.

Mandatory sentencing in Victoria

In Victoria, mandatory sentencing applies in the case of an offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence. 'Gross violence' is defined (in part) as being premeditated, committed 'in-company' (i.e. with others) or continuing the act of violence once a person is incapacitated. In those instances, the *Crimes Amendment (Gross Violence Offences) Act 2013 (Vic)* provides for mandatory imprisonment with a minimum four-year non-parole period for adults who commit an offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence. Exemptions may be granted at the court's discretion for 'special reasons', such as if the offender provides assistance to law enforcement authorities, is below 21 years of age or has impaired mental functioning (as occurs in New South Wales).

View the news website for *The Age* (www.theage.com.au) and read the article 'Mandatory sentencing collapses amid politicians' tough talk'.

Mandatory sentencing in New South Wales



As a result of a series of 'one-punch' alcohol-fuelled assaults and concern about growing violence in Sydney CBD, the NSW Government proposed the introduction of sentencing for a number of offences.

There are two offences in NSW to which mandatory sentencing applies as from 2014: murdering a police officer and assault causing death when intoxicated. Where an offender is convicted in NSW of murdering a police officer, the court must (one exception is an adult with 'significant' mental impairment) impose a life sentence. In the case of assault causing death while intoxicated, the court must, upon conviction, (with the same exception about mental impairment) sentence the offender to a minimum sentence of eight years' imprisonment.

However, in September 2018, the NSW parliament introduced additional reforms to give courts, in relation to a broader range of offences, greater flexibility to grant CCOs and Intensive Corrections Orders (ICOs) to add conditions when sentencing offenders to serve their sentence in the community (as opposed to a term of imprisonment) such as home detention, electronic monitoring, curfews and community service work (which is no longer a mandatory condition). These changes reflect concerns that in NSW the prison population was expected to reach 14 200 by the middle of 2019. (See the *Bureau of Crime Statistics and Research (BOCSAR) report, New South Wales Custody Statistics, Quarterly Update, June 2018*.) In fact, according to the latest *BOCSAR Quarterly Update* at the time of publication, the prison population was at its highest level (13 635) in the last quarter of 2019 and dropped to 13 525 in the first quarter of 2020, suggesting some stability in the prison population. (See the *BOCSAR report Quarterly Update, March 2020*). Interestingly, a further report relating to the impact of the COVID-19 pandemic on crime (June 2020) indicated that crime in NSW fell sharply in April 2020, coinciding with strict social isolation strategies, as follows:

- robbery – down 42%
- non-domestic assault – down 39%
- sexual offences – down 32%
- breaking and entering: dwelling – down 29%, non-dwelling – down 25%
- stealing from a motor vehicle – down 34%; car theft – down 24%
- shoplifting – down 55%

Questions have also been raised as to whether short-term jail sentences actually reduce the risk of reoffending. The above-mentioned BOCSAR research has shown that offenders who receive community-based sentences like an ICO are less likely to reoffend than those people who have been sentenced to a short term in prison. Added to this fact is the estimated cost factor – it has been estimated that the cost of keeping someone in custody is approximately \$292.51 a day, as against \$28.75 per day for someone on a community-based order.

Sentencing for domestic violence offences under ‘protection orders’

Protection orders, which have different names in each state, are court orders that aim to stop violence and intimidation. The sentencing for breaches of these orders differs across states.

Penalties and sentencing for breach of protection orders in Victoria

Protection orders in Victoria are known as Family Violence Intervention Orders (FVIOs). As in NSW, it is a criminal offence to disobey an FVIO.

The Victorian legislation (the *Family Violence Protection Act 2008 (Vic)*) sets the following maximum penalties for breach of an FVIO: imprisonment for two years or 240 penalty units (\$39 652.80 based on one penalty unit being \$165.22 in Victoria) or both (section 123).

Penalties and sentencing for breach of protection orders in New South Wales

Protection orders in NSW are known as Apprehended Domestic Violence Orders (ADVOs). As in other states, it is a criminal offence to disobey an ADVO.

In NSW, the penalty for breaching an ADVO is imprisonment for two years or 50 penalty units (\$5500, one penalty unit in NSW is \$110) or both.

A person who is convicted of breaching an ADVO ‘must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence’ (section 14(4) *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*), although this does not apply if the offender was under 18 (section 14(5)).

In any case, where a court decides not to impose a sentence of imprisonment, it must give its reasons for not doing so (section 14(6)).

Visit the BOCSAR website at www.bocsar.nsw.gov.au to view the most recent *Bureau of Crime Statistics and Research (BOCSAR) report, New South Wales Custody Statistics, Quarterly Updates*.

View the NSW Parliament website at www.parliament.nsw.gov.au and read the document ‘Mandatory sentencing laws’.

View the website of the Australian Law Reform Commission (www.alrc.gov.au) and read the publication ‘Breach of protection orders’.

Conclusions about sentencing

Just as the definitions of various crimes differ across states, so too do the sentencing guidelines and requirements. There have been some steps to unify laws on a national basis, particularly in relation to having a common approach to family violence, but this is still in the investigation phase.

8.10 Alternative approaches to sentencing

Based on the recognition that not all offenders or offences are the same, there have been moves to establish specialist courts in Victoria.

Victorian Drug Court

Drug courts have been established in most Australian states, in the US, Canada and the UK. The Victorian Drug Court, based in Dandenong, is a division of the Magistrates' Court of Victoria. The Drug Court provides for the sentencing and supervision of the treatment of offenders who have a drug and/or alcohol dependency and who have committed an offence under the influence of drugs or alcohol (or to support a drug or alcohol habit). The focus of the Drug Court is on the rehabilitation of offenders and on improving safety for the community through this rehabilitation.


The Drug Court is able to make a Drug Treatment Order (DTO) for a term of two years.

A DTO combines a community-based sentence with conditions such as:

- regular drug testing
- attending a meeting with a case manager
- drug and alcohol counselling
- regular attendances before the Drug Court Magistrate.

The offender must be dependent on drugs and/or alcohol and this must have contributed to the offences committed. Persons who are facing charges that relate to sexual offences or the infliction of actual bodily harm are not eligible for a DTO; nor is an offender who is already on parole.

If the magistrate determines that the defendant is not suitable for a DTO, they may impose a sentence at that time or refer the matter back to the Magistrates' Court for sentencing.

 View the website for the Magistrates' Court of Victoria at www.mcv.vic.gov.au for further information about The Victorian Drug Court.

Activity 8.6 Folio exercise

Apply your understanding

Read News report 8.1 on the next page and complete the following tasks:

- 1 How does Chief Magistrate Peter Lauritsen justify the creation and work of the Drug Court?
- 2 Explain what Chief Magistrate Peter Lauritsen means when he states: 'In fact the recidivism rate is very high.'
- 3 What statistic does he suggest about recidivism rates?
- 4 The News report refers to orders able to be made by the Drug Court being 'considerably cheaper' than an equivalent term of imprisonment. Discuss this statement.
- 5 Summarise, using two key reasons, why the Drug Court plays a key role as a specialised court in Victoria.

News report 8.1

Drug Court the ‘only way’ to help drug-addicted criminals

Victoria’s Chief Magistrate says that only drug treatment orders – which help addicts get off drugs – can change their behaviour outside of prison.

The orders are only available at the Dandenong Drug Court, which has helped almost 200 people cut their drug use and crime since 2002. Both sides of government have ignored repeated calls to expand the court across the state since then.

The Drug Court is available for offenders from Dandenong facing prison sentences for crimes related to their drug or alcohol dependence. Instead of going to prison, they can apply to be placed on a two-year drug treatment order, during which their prison sentence is suspended and they are given rehabilitation treatment and supervised in a program designed for them by housing, employment and drug addiction specialists.

Speaking at the launch of the first government review of the court on Thursday, Chief Magistrate Peter Lauritsen delivered the strongest endorsement yet for its expansion beyond Dandenong.

‘The Drug Court and the drug treatment order aims at a very difficult group of people. It is those people with entrenched addictions and long-term criminal behaviour,’ he said. A drug treatment order lasts two years ‘because it takes a lot of time in order to change people’s behaviour in respect of drug addiction’.

‘In my view, as a magistrate with long experience in the criminal area – and I think this is shared by my colleagues – no other non-custodial sentence could work with this group.’

Serious drug-addicted criminals would probably breach a community corrections order: ‘This is no criticism of Corrections Victoria, but there is really no capacity within a community corrections order to bring treatment of such intensity and immediacy to bear upon these people.’

Given that magistrates did not give people sentences that are ‘likely to fail’, prison was the only other punishment available to such offenders: ‘But to sentence these people to prison doesn’t mean they will stop offending. In fact the recidivism rate is very high.’

The parliamentary committee investigating ice use last year recommended the Drug Court be expanded to places including Sunshine and Geelong.

Mr Lauritsen told an audience including Attorney-General Martin Pakula: ‘The court is ready, willing and able to work with the executive government and, in particular, the good people in the Department of Justice to expand the Drug Court for the good of the community.’

The review, by KPMG, said the court’s orders were ‘considerably cheaper’ than an equivalent term of imprisonment, with participants who went on to re-offend doing so less frequently and committing less serious crimes. The court produced a 29% reduction in recidivism two years later and a \$50 million saving in prison costs for Corrections Victoria. Prisoners have a 40% recidivism rate, revealed by *The Age* in January to be the highest in 10 years.

Drug Court participants also committed 90% fewer drug trafficking offences after a drug treatment order, compared to a ‘control’ group released from prison after two years, who committed 71% more.

Earlier, Mr Pakula did not address plans for the court’s future but spoke about its work in glowing terms, saying the report provided ‘some statistical basis for the belief that many of us have intuitively about the effectiveness of this court and others like it.’

‘There is a whole group of people who might otherwise become much more hardened and well-trained crooks if it weren’t for the fact that this court diverts them from a life of crime and gives them the treatment they need,’ he said.

‘When you see that over the last five years the recidivism rate has gradually but consistently risen to something approaching 40%, having a court which has those numbers moving in the other direction is a very important outcome but also a very important pointer to what the rest of the system could look like.’

Source: Jane Lee, The Age, 12 March 2015

Victorian Koori Courts

In Victoria, there are three Koori Courts:

- 1 The Koori Magistrates' Court (created under the *Magistrates' Court Act 1989 (Vic)*)
- 2 The Koori Children's Court (established under the *Children, Youth and Families Act 2005 (Vic)*)
- 3 The Koori County Court (established in 2008).

We will examine the Koori Magistrates' Court as one example of a specialist court.

After considering the over-representation of Koori people in the Victorian criminal justice system (12 times more likely than non-Indigenous people to be placed in an adult prison) and acknowledging how alienating, from a cultural perspective, the traditional courts were, the Koori Magistrates' Court was created.



The opening of the Koori court at Broadmeadows Court on 4 March 2003

The Koori Court is for Koori defendants who:

- plead guilty to an offence
- have shown an intention to take responsibility for their actions
- elect to appear before the court
- may appear before the Koori Court.

Apart from family violence and sex offences, the Koori Court hears all offences that can be heard by the Magistrates' Court.

The Koori Court takes a specialised approach to the sentencing of an offender. Koori Elders are able to appear and provide advice to the court on cultural matters and the sentencing magistrate is able to take this into account. Although the magistrate has the power to make all orders that can be made in the Magistrates' Court (such as imprisonment), the focus of the court is on making culturally appropriate orders that benefit not only the offender but also the wider community in the longer term.

In October 2019, a new Koori Court was announced as part of the County Court that sits on circuit in Warrnambool. At the opening of this new Court Chief Judge Peter Kidd spoke about the importance of incorporating culture into the Koori Court process.



Chief Judge Peter Kidd launched the new Koori Court on circuit in Warrnambool in partnership with the Warrnambool Koori community in October 2019.

Diversion programs in Victoria

Generally speaking, diversion programs are processes that allow an offender to be diverted from criminal activities on the basis that they make amends for their actions. Diversion can range from the police use of cautioning an offender through to formal programs operating in the courts.

Criminal Justice Diversion Program in the Magistrates' Court

The Criminal Justice Diversion Program (governed by section 59 of the *Criminal Procedure Act 2009 (Vic)*) provides mainly first-time offenders with the opportunity to avoid a criminal record by complying with certain conditions. Launched as a pilot program at the Broadmeadows Magistrates' Court in 1997, the program is now available to all Magistrates' Courts throughout Victoria. The program aims to develop an alternative to normal sentencing processes and involves victims as well as the offender.

It is seen to benefit victims as they are able to take part in the hearing and to inform the court and the offender how the offence has impacted on them. An offender who actively participates is able to avoid a criminal record and access rehabilitation and counselling while undertaking unpaid community work or making donations. The community also benefits from the unpaid work and a lesser chance of the defendant re-offending.

Diversion in the Children's Court

Sentencing orders are made in the Children's Court under the *Children, Youth and Families Act 2005 (Vic)*. Under this Act a range of diverting sentencing options exist.

- Undertakings in the Children's Court:
 - Undertakings are an order for up to one year requiring agreement from the child to abide by certain conditions. At the end of the order, the court dismisses the charge for which the child has been found guilty, provided the order is not breached.
- Good behaviour bonds in the Children's Court:
 - The use of a good behaviour bond allows the court to postpone the sentencing of the child for up to one year (during which the child must be of good behaviour and meet any special condition imposed by the court). An amount of money is set as a bond and this must be paid if the bond is breached. If, however, the child complies with the order, the court dismisses the charge, does not record a conviction and does not require the child to pay the bond.

Key point summary

Do your notes cover all the following points?

- ❑ Important principles that underpin sentencing of offenders and our legal system generally are fairness, equality and access.
- ❑ Criminal law is enforced by institutions such as police and delegated bodies.
- ❑ There is a need to balance institutional powers, such as the powers of police and other enforcement authorities, with individual rights.
- ❑ The role and criminal jurisdictions of the Victorian courts:
 - Supreme Court – Court of Appeal
 - Supreme Court – Trial Division
 - County Court
 - Magistrates' Court
- ❑ Role of the jury in a criminal trial – reach a verdict solely based on the facts presented to them
- ❑ Purposes of sanctions
 - Punishment
 - Deterrence
 - Denunciation
 - Protection
 - Rehabilitation
- ❑ Types of sanctions
 - Fines
 - Community correction orders (CCOs)
 - Imprisonment
- ❑ Factors to be taken into account when sentencing any offender
 - Maximum penalty for the offence
 - Current sentencing practices
 - Nature and gravity of the offence
 - Offender's culpability
 - Whether the crime was motivated by hatred or prejudice
 - Impact of the offence on any victim
 - Personal circumstances of any victim
 - Any injury, loss, or damage resulting directly from the offence
 - Guilty pleas
 - Offender's previous character
 - Presence of any aggravating or mitigating factors
- ❑ A comparison of sentencing in Victoria with sentencing in one other jurisdiction (NSW)
 - Mandatory sentencing and maximum sentencing for domestic violence offences differ between Victoria and NSW
 - Just as the definitions of various crimes differ across states, so too do the sentencing guidelines and requirements
- ❑ Alternative approaches to sentencing
 - The Drug Court
 - The Koori Courts
 - Diversion programs

End-of-chapter questions

Revision questions

- 1 Explain:
 - a one of the three key principles of our legal system; and
 - b how the absence of this principle would mean our system would be unjust.
- 2 Outline the role and criminal jurisdiction of the Trial Division of the Supreme Court of Victoria.
- 3 Describe a community correction order (CCO). To what extent does a CCO meet the purposes of sanctions?
- 4 Using an example, explain the difference between a concurrent and a cumulative term of imprisonment.
- 5 Explain two differences in sentencing between courts in Victoria and courts in NSW.
- 6 What reasons were given, in examining mandatory sentencing in NSW (and subsequent changes to introduce more community corrections orders rather than imprisonment), as to why imprisonment should be reconsidered in the case of some offenders?
- 7 Why was the Drug Court created? To what extent does the creation and operation of this court contribute to the principle of fairness?
- 8 Why have the Koori Courts been created? To what extent does the creation and operation of this court contribute to the principle of equality?
- 9 Account for the existence of diversion programs in Victoria. Explain who might most benefit from the existence of these.

Practice exam questions

- 1 A recent media report included a comment by a police spokesperson that 'police need more powers to do their job effectively'. Discuss the balance we need in society, between having a police force with sufficient powers to enforce criminal laws and the rights of individuals. [6 marks]
- 2 In Victoria, we have three main courts: the Supreme Court (with two divisions), the County Court and the Magistrates' Court. Select one of these courts and explain the role and criminal jurisdiction of the court. [3 marks]
- 3 A friend who knows you have studied the role of the jury in a criminal trial has been told she would be required to appear for jury duty. Explain to her the role a jury plays in a criminal trial. [4 marks]
- 4 One of the curriculum focus areas at Year 9 in your school this year has been 'justice'. You have been approached by the Year 9 coordinator to prepare a written overview to present to the Year 9 students on the purposes behind sentencing an offender. Outline these purposes. [5 marks]
- 5 Our courts take into account a wide variety of factors when sentencing an offender. Explain any three of these, justifying why a court should take each into account before sentencing an offender. [2 + 2 + 2 = 6 marks]

Chapter 9

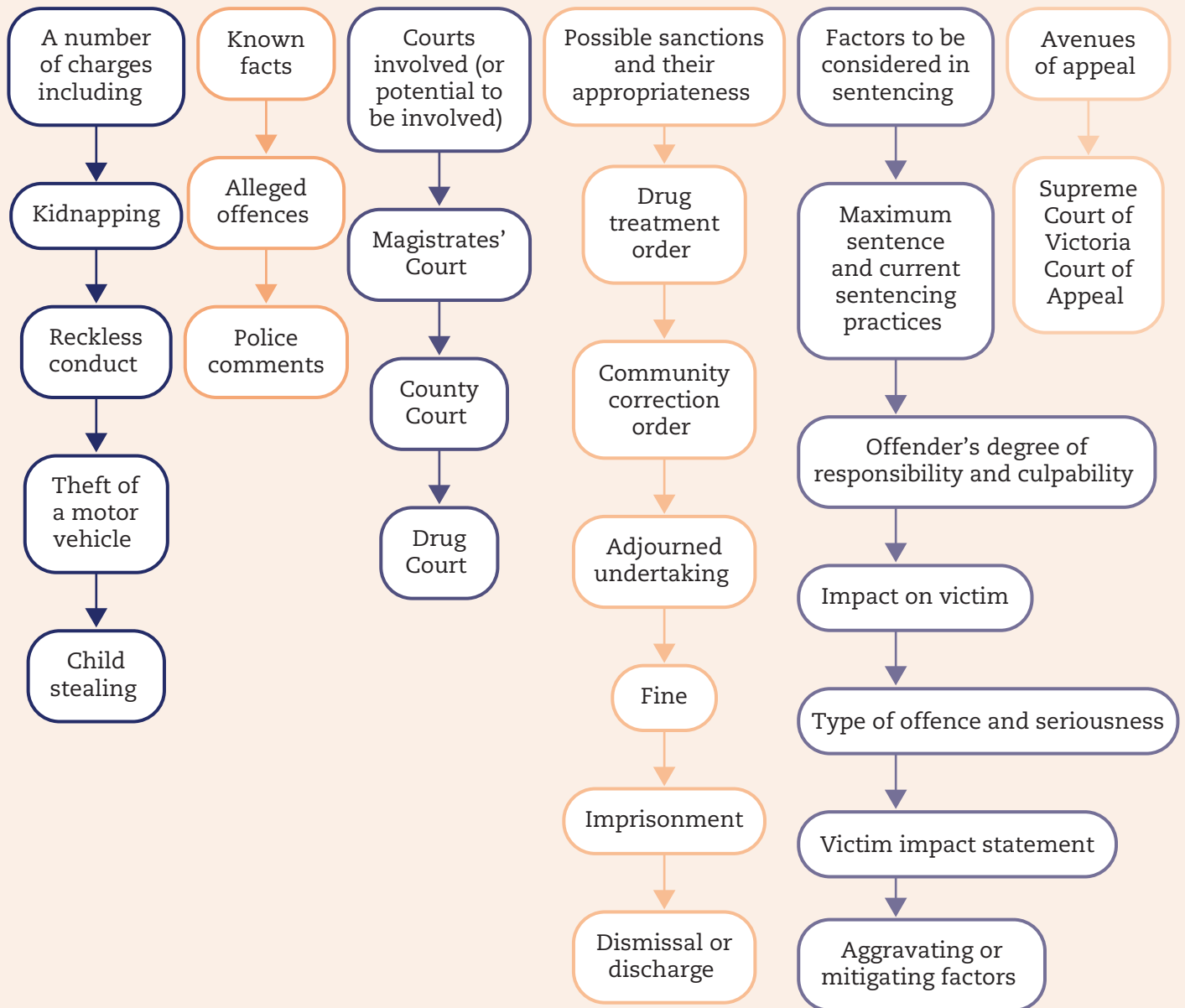
Unit 2 – Area of Study 1

A criminal case: theft of car with baby inside – *DPP v Yildirim* [2017] VCC 1668 (13 November 2017)

This chapter provides an examination of one criminal case, *DPP v Yildirim* [2017] VCC 1668 (13 November 2017). The case was initially heard in the Melbourne Magistrates' Court. The chapter will commence with an overview of the charges and the facts of the case, followed by reviewing the courts involved, and the sanctions imposed and their appropriateness. Factors in sentencing will then be considered, as will possible avenues of appeal. It will conclude with an overview of the extent to which the principles of justice were achieved in this case.



Theft of car with baby inside



Key terms

aggravating factors evidence presented that increases the seriousness of the offence and so contributes to a harsher sentence; for example, use of a weapon, prior convictions

bail the release of an accused back into society while awaiting his or her next hearing or trial; conditions may be attached

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to establish a prima facie case and support a conviction

community correction order (CCO) a sentencing order requiring an offender to comply with conditions while in the community; can include unpaid community work, drug/alcohol treatment or curfews

culpability the level of blame or responsibility for a wrongful act or omission

Director of Public Prosecutions (DPP) department in Victoria responsible for overseeing and prosecuting criminal charges on behalf of the state

drug treatment order (DTO) sentencing option available to the Drug Court to assist in rehabilitating offenders with drug issues

fine an order to pay a sum of money as a punishment under the law

mitigating factors evidence presented that reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

remand the holding of an accused in custody while awaiting his or her next hearing or trial as bail has not been granted

9.1 Charges and facts of the case

On 9 November 2016, a young mother endured a terrifying afternoon school pickup. As she stood near her car talking to another school parent, two men slipped past them and one of them entered her vehicle. It was alleged that the man immediately locked the doors and closed the windows. Realising what was happening, the mother and her friend attempted to get into the car and thumped the doors, windows and bonnet. The mother was screaming that her baby was inside.

The man, Gurkan Yildirim, 25, of Coburg, was accused of then driving off with a friend of the mother clinging to the bonnet of the car. In his efforts to quickly flee the scene and release the mother's friend from the bonnet, Yildirim crashed into another car, sending the friend tumbling to the bitumen. The friend was taken to hospital for further assessment, suffering minor cuts and bruises. It was also reported that the mother was seen limping down the road, with her foot allegedly having been run over by her own car, driven by Yildirim.

Other parents who had witnessed the carjacking attempted to comfort the distraught mother as they waited for police and ambulance workers to attend the scene. The baby girl was found safe shortly after the incident, with the car being abandoned in a nearby alleyway. Local parents were shocked and concerned that something like this could happen in their community.

Video footage of the incident was captured by the school's CCTV and was viewed by police. Police prosecutor Detective Senior Constable Virginia Creece told reporters that they had used CCTV to identify Yildirim. She also explained that he was on **bail** at the time of the alleged offending, and appeared to be under the influence of illicit drugs when taken into custody at Fawkner Police Station.



Yildrim was charged with a number of offences including kidnapping (taking someone without consent and holding for ransom or other advantage), child stealing (taking a child under 16 without parent/guardian consent), theft of a motor vehicle and reckless conduct. He attended an out-of-sessions bail hearing at Melbourne Magistrates' Court on 11 November 2016, where police opposed bail, stating that they believed he was a danger to the community. Yildrim pleaded with the magistrate to grant him bail, claiming that he had recently begun medication for mental illness related to severe depression and anxiety. The bail justice deemed Yildrim too great a risk and ordered that he be remanded in custody awaiting a committal mention hearing on 12 November 2016.

At the brief committal mention hearing, Yildrim stated that he would plead not guilty and questioned the video evidence, claiming it was 'blurry' and that the person was not him.

On 15 November 2016, Yildrim appeared via video-link at the Melbourne Magistrates' Court. He did not apply for bail, claiming that due to lack of legal representation he was not in a position to do so. His case was adjourned until a committal mention set for 8 February 2017.

After being committed to stand trial, Yildrim ultimately pleaded guilty to a number of charges before Magistrate Suzanne Cameron at the Magistrates' Court on 21 March 2017.

He was eventually sentenced by Judge Tinney at the Victorian County Court on 13 November 2017 to a total effective sentence of 3 years and 5 months:

Final charges

[...]

76. On Charge 1, that is the theft of the motor vehicle, I convict and sentence you to 18 months' imprisonment.

77. On Charge 2, conduct endangering life, you are convicted and sentenced to two years' and nine months' imprisonment. (33 months)

78. On Charge 3 and 4, they are the charges of criminal damage, in each case I convict and sentence you to two months' imprisonment.

79. On the final charge on the indictment, that is, conduct endangering serious injury, you are convicted and sentenced to eight months' imprisonment.

Summary offences

80. I turn to the summary matters. On the summary offence of committing an offence on bail, I convict and sentence you to seven days' imprisonment.

81. On the charge of driving whilst suspended, I convict and sentence you to 14 days' imprisonment.

82. On the fail to stop, you are convicted and sentenced to 14 days' imprisonment.

83. On the dangerous driving, you are convicted and sentenced to seven days' imprisonment...

Activity 9.1 Report

A chronology of the Yildrim case

Create a written report setting out the chronological order of events for the Yildrim case including (use the following as sub-headings in your chronology):

- the date of the alleged offending
- an overview of crimes Yildrim is alleged to have committed
- the arrest of Yildrim
- the bail hearing date for Yildrim
- committal mention and hearing dates for Yildrim
- date of sentencing
- eligibility for parole
- any further sanctions imposed
- what is meant by 'total effective sentence'.

9.2 Courts involved

The case involved the Magistrates' Court of Victoria and the County Court of Victoria.

Magistrates' Court

The Magistrates' Court has original criminal jurisdiction covering summary offences, indictable offences heard summarily, committal proceedings, warrants and bail applications, and special courts and lists.

The Magistrates' Court is the lowest in the Victorian Court hierarchy. It hears committal proceedings for all serious offences.

Bail application

Yildrim attended a bail application hearing.

When a person is charged with a criminal offence, two options are available. The first option is that the accused may be granted bail, which is the conditional release of the accused into the community until they are due to next appear in court. The second option is the accused is remanded in custody, which sees the accused detained (imprisoned) until the time of their trial. A person may be remanded if they are denied bail or are unable to satisfy the conditions of bail.

Bail is not simply giving money to the court. Money (surety) may be one of numerous bail conditions imposed on an offender.



Bail conditions in Victoria are categorised into two types: financial and conduct.

Financial bail conditions may include a surety, which is most commonly a monetary deposit to the court (or police station) to ensure that the accused attends court on a set date. If the accused does not attend, the surety is forfeited.

Conduct bail conditions may include surrendering of passport, reporting to a police station regularly, obeying a curfew, not contacting specific persons, not consuming alcohol or drugs, or not entering certain areas at certain times.

Yildrim was already on bail at the time the alleged offending took place.

Section 30B of the *Bail Act 1977 (Vic)* states that it is an offence to commit an indictable offence while on bail, and that a penalty of 30 penalty units, or three months' imprisonment, may be imposed.

Judge Tinney convicted and sentenced Yildrim to 7 days' imprisonment for the summary offence of committing an offence on bail.

Yildrim also pleaded guilty to and was sentenced for a further three summary offences: one charge of dangerous driving (convicted and sentenced to 7 days' imprisonment), one charge of driving while suspended (convicted and sentenced to 7 days' imprisonment) and one charge of failing to stop (convicted and sentenced to 7 days' imprisonment).

Yildrim was denied bail, with police believing he was a 'danger to the community'.

Section 4(3) of the *Bail Act 1977* (Vic) requires the bail justice to consider the seriousness and nature of the offence, history of previous grants of bail and previous offences. Of particular note to this case, section 4(4)(bc) of the *Bail Act 1977* (Vic) requires the court to consider whether the accused has been charged:

with an offence of aggravated burglary under section 77 of the *Crimes Act 1958*, an offence of home invasion under section 77A of that Act, an offence of aggravated home invasion under section 77B of that Act or an offence of aggravated carjacking under section 79A of that Act.

Activity 9.2 Structured questions

Bail

- 1 Use the internet to research one Victorian case and one case from another Australian state where an accused was denied bail. Identify why the accused was denied bail and analyse any differences in bail approaches between the states.
- 2 Use the internet to research one Victorian case and one case from another Australian state where an accused was granted bail. Identify why the accused was granted bail and analyse any differences in bail approaches between the states.

Committal proceedings

Yildrim's case was adjourned until a committal mention set for 8 February 2017.

A committal mention is the first stage in a variety of criminal pre-trial proceedings, undertaken when an offender has been charged with an indictable offence. Indictable offences are more serious criminal offences. If the accused pleads not guilty, the case is heard before a judge and jury of 12. A guilty plea would result in the role of the jury in a criminal case being void. Committal mentions take place at the Magistrates' Court. The main purpose of a committal mention is to ascertain whether the defendant will plead guilty or not guilty to the charges against them.

Yildrim originally planned to plead not guilty prior to the committal mention, which would have meant he was contesting the committal. However, he eventually changed his mind and pleaded guilty at the committal mention on 21 March 2017. As Yildrim pleaded guilty, the presiding magistrate set a date (21 July 2017) at which Yildrim would be sentenced in a higher court, the Victorian County Court. Yildrim was eventually sentenced on 13 November 2017.

If Yildrim had maintained his innocence and entered a plea of not guilty at the committal mention, the magistrate would have had to consider the estimated length of proceedings and set a date for a full **committal hearing**. When estimating the length of proceedings, a magistrate will evaluate the complexity of the case, as well as the number of witnesses who will be required if the case were to go to trial.

The main purpose of a committal hearing is to ensure that the prosecution has sufficient evidence to support a conviction at trial in a higher court. The prosecution must prove to the court that they have a strong case based on gathered evidence and information. In this case, this would probably have included a summary of witness statements and analysis of CCTV footage of the alleged crime, as well as statements of the arresting officers and any information Yildrim or his friend had provided police during his arrest and subsequent questioning. The court would have determined whether or not the **Director of Public Prosecutions (DPP)** had sufficient evidence to support a conviction at trial in a higher court. If this was so, then this case would have proceeded to a directions hearing and ultimately a trial at the Victorian County Court.

If prosecution does not provide sufficient evidence, it is likely that a case against a defendant would be dropped.

County Court of Victoria

The County Court has jurisdiction to hear a majority of indictable criminal offences.

If an accused pleads guilty, there is no need for a trial; hence, no need for a jury.

The County Court has original criminal jurisdiction to hear all serious criminal offences, with the exception of murder, murder-related offences (such as manslaughter) and treason. On a day-to-day basis, the County Court deals with more serious common crimes, including physical and sexual assault, aggravated or armed robbery, drug trafficking or manufacturing, and driving-related offences.

If Yildrim had pleaded not guilty during the committal proceedings, he would have been committed to stand trial before a judge and jury of 12. As Yildrim ultimately decided to enter a plea of guilty, there was no need for a trial, so a date (21 July 2017) was set for sentencing in the County Court. Yildrim was eventually sentenced on 13 November 2017.

Victorian Drug Court

Police prosecutor Detective Senior Constable Virginia Greece stated that Yildrim appeared to be under the influence of illicit drugs when he was apprehended.

As such, it needed to be considered whether Yildrim would be suitable (and eligible) to have his case determined by the Victorian Drug Court.

View the website of the Magistrates' Court of Victoria at www.mcv.vic.gov.au for further information about the Victorian Drug Court.



To be eligible to have his case determined by the Victorian Drug Court, Yildrim would have had to satisfy a variety of strict criteria.

CRITERION: The offender must plead guilty.

Arguably the most important criteria requiring satisfaction is that the offender must plead guilty. As Yildrim did plead guilty, he was potentially eligible to have his case heard in the Drug Court.

CRITERION: On the balance of probabilities the Drug Court must be satisfied that:

- the offender is dependent on drugs or alcohol; and
- the offender's dependency contributed to the commission of the offence.

Yildrim would have had to satisfy the Court that he had a dependence on drugs. To do this, it is likely he would have required extensive documentation to support any claims of drug dependency. Such documentation could have been historical case reports from social workers, drug support workers, psychologists, psychiatrists or other medical professionals. Yildrim claimed in court that he had 'recently begun medication for mental illness related to severe depression and anxiety'. Such a claim by itself is unlikely to have been sufficient

evidence to satisfy the above criterion. If further evidence had been provided by medical professionals, stating that Yildrim's mental illness was due to some form of drug-related issues, it is possible he could have been considered to have met this criterion for having his case determined by the Victorian Drug Court.

CRITERION: Previous criminal behaviour is taken into account.

If an offender has been found guilty on previous occasions of an offence where drug and alcohol dependency contributed, a **drug treatment order (DTO)** can still be made. A DTO can also be imposed regardless of whether or not the offender has previously served a term of imprisonment.

As ascertained from police statements relating to Yildrim being on bail at the time of the alleged offending, it was clear that he had a history of (alleged) criminal behaviour. This would not have disqualified him from being eligible for a DTO, even if he had previously been given a custodial sentence. As no further details of Yildrim's previous criminal behaviour were disclosed, it is difficult to determine whether it related to drug or alcohol dependency.

CRITERION: The offender must be willing to consent, in writing, to such a DTO.

For Yildrim to be eligible for a DTO, he would have had to willingly consent to it.

CRITERION: The offence must be within the jurisdiction of the Magistrates' Court and punishable upon conviction by up to two years' imprisonment.

As Yildrim's alleged offending resulted in charges for indictable offences, it would have seemed likely that the available punishment would exceed two years imprisonment. This would have suggested that Yildrim would not be eligible to be considered for a DTO.

CRITERION: The offender's usual place of residence must be within a postcode area serviced by the Drug Court as specified in the Government Gazette.

The Victorian Drug Court only operates out of the south-east Melbourne suburb of Dandenong. As such, it has been determined that limits must be placed on offenders' eligibility based on residence, so as to ensure that there is capacity for those with reasonable access to the Drug Court. The catchment area covers predominantly the south-east of Greater Melbourne, stretching from Chadstone to Gembrook to Nar Nar Goon to Frankston. As Yildrim's primary residence was in the north-west Melbourne suburb of Coburg, he did not fall in the catchment area and therefore could not have been considered eligible.

This could be considered a weakness of the Drug Court, as it is limited in its ability to treat all offenders with drug-related issues. Geography determines whether or not you are eligible, which is why there are many supporters of this rehabilitative approach advocating for its expansion into other regions of Victoria.

9.3 Sanctions imposed and their appropriateness

Victorian courts have a number of options available when sentencing convicted adult offenders. The *Sentencing Act 1991 (Vic)* provides a list of possible sentence orders that may be imposed by courts, which include:

- imprisonment
- drug treatment order (DTO)
- **community correction order (CCO)**
- **fine**
- adjourned undertaking
- dismissal or discharge.



Imprisonment

Imprisonment is the removal of an offender from the greater community. The offender is denied their liberty by being placed in prison. Imprisonment is the most serious of all sanctions, and is seen as a last resort when sentencing.

Imprisonment is the most likely sanction to be imposed in a case as serious as Yildrim's offending. Due to the accused being deemed an unacceptable risk to the community by the magistrate during his bail application, it could be assumed that if found guilty, Yildrim would face the prospect of imprisonment when sentenced.

When considering the type and number of charges laid against Yildrim, and recent sentencing trends, imprisonment would be an appropriate sanction.

Drug treatment order

In the case of Yildrim, it has been established that he would not have been eligible to have his case heard in the Victorian Drug Court, and as such would have been ineligible to have a drug treatment order (DTO) imposed as a sanction.

What is a drug treatment order?

A drug treatment order (DTO) is a sentencing option available to Drug Court magistrates under section 18 of the *Sentencing Act 1991 (Vic)*:

A DTO is scheduled for two years and is made up of two sections:

- **custodial:** this involves the offender serving a custodial period within the greater community while undertaking the DTO
- **supervision and treatment conditions:** this part of the DTO relates to addressing the offender's drug issues and involves regular drug testing, counselling support via a variety of healthcare professionals, and regular reporting to the Drug Court Magistrate.

Conditions of a DTO

There are strict conditions in place to monitor offenders so as to ensure that they are accountable for their actions in the community. If offenders fail to comply with conditions, they will probably have their DTO varied by the magistrate at one of the regular review hearings. Variations may involve imposing stricter or additional conditions, or even revoking the DTO and having the offender imprisoned if alternative options are considered not suitable.

Core conditions of a DTO

All DTOs contain what are known as ‘core conditions’, which aim to ensure that offenders have the best chance of successfully completing a DTO.

These conditions include: not committing further offences; attending scheduled meetings at Drug Court, a community corrections centre or another specified support service; undergoing treatment specified in the order; notifying the support team of any change of address prior to the change; and not travelling interstate or overseas without the permission of the support team.

Program conditions of a DTO

All DTOs will have at least one ‘program condition’ attached, which will be related to optimising the offender’s rehabilitation. Examples of the types of conditions that may be attached are: offender submitting to drug/alcohol testing, offender attending specific program (vocational, educational, employment) and offender not associating with specified persons.

**Activity 9.3** Structured questions**Strengths and weaknesses of the Drug Court**

- 1 Identify the strengths of the Drug Court.
- 2 Identify the weaknesses of the Drug Court.
- 3 Justify whether or not you think the Drug Court should be expanded into further areas in Victoria. Give reasons for and against the expansion of the Drug Court.

Community correction order

A community correction order (CCO) is another sentencing option available to courts in Victoria. A CCO allows the offender to remain in the greater community, and it can be ordered in conjunction with a prison sentence and/or fine or as a standalone sanction.

Based on the allegations and charges laid against Yildrim, it would be unlikely for a court to impose a CCO as a standalone sanction. Due to the nature of the alleged offending, it would be more appropriate to incorporate a CCO into sanctioning via an addition to a term of imprisonment. Yildrim's legal team had sought for him to be sentenced to a term of imprisonment, combined with Yildrim being released onto a community corrections order. However, Judge Tinney did not believe that such an outcome was appropriate given the crimes committed, and considering the purposes of sentencing.

In higher courts, such as the County Court, a judge is able to impose a maximum length of CCO equivalent to the maximum term of imprisonment for the same offence. In the case of Yildrim, one of the charges he was facing was reckless conduct endangering life. Reckless conduct endangering life is an indictable offence in Victoria as listed under section 22 of the *Crimes Act 1958* (Vic). It carries with it a maximum penalty of level 5 imprisonment (10 years maximum). As such, a County Court judge like Judge Tinney could have potentially ordered a CCO of up to 10 years.

The Sentencing Council of Victoria outlines a number of strict core terms for offenders sentenced to a CCO, which include:

- not re-offending
- not leaving Victoria without permission
- reporting to a community corrections centre
- complying with written directions from the Secretary of the Department of Justice.

Additionally, each CCO must have at least one further condition, which can span the entire length of time of the CCO or just a portion.

Fine

A fine is another sanction that could have been imposed by Victorian courts on Yildrim. Such a sanction is a financial penalty, whereby the court orders the offender to pay money. In this case, it would have been appropriate for any fine handed down by the judge to be paid to the victim(s) of the crimes that Yildrim accepted he committed. If such a sanction had been imposed, Yildrim would have paid the monetary amount directly to the court, which would have then transferred these funds to the victim.

Fines may be ordered in conjunction with other sanctions, or as a standalone penalty. A standalone fine was deemed not to be an appropriate sanction based on the charges Yildrim pleaded guilty to.



Failure to pay a court-ordered fine will result in a sheriff executing a warrant for the offender's arrest. When imposing fines as a sanction, judges should consider the ability of an offender to pay. An offender may apply to pay a fine in instalments or request that their fine be converted to community work.

Adjourned undertaking

An adjourned undertaking is a sentencing option that allows a judge or magistrate to release an offender into the community unsupervised for up to five years. Conditions will be imposed on an offender, such as not committing further offences. This is commonly known as a 'good behaviour bond'. It would have been highly inappropriate for the judge to have ordered Yildrim an adjourned undertaking. Based on his previous criminal history, and his alleged offending occurring while he was on bail pending other charges, it seems reasonable that a court would not allow Yildrim to be released into the community unsupervised for any period of time.

Dismissal or discharge

As Yildrim pleaded guilty to all of the offences he was charged with, it would have been unlikely for any judge to either dismiss or discharge him. As all charges were of a serious criminal nature, Judge Tinney clearly felt a conviction without further penalty would be an inadequate sanction in this case.

9.4 Factors taken into consideration in sentencing

As previously discussed in Chapter 8, section 5(2) of the *Sentencing Act 1991 (Vic)* sets out the factors that must be taken into account when sentencing an adult for a crime in Victoria.

These factors include:

- the maximum penalty for the offence
- current sentencing practices
- the nature and gravity of the offence
- the offender's **culpability** (blameworthiness); that is, the degree to which they should be held responsible for the offence
- whether the crime was motivated by hatred or prejudice
- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence
- any injury, loss or damage resulting directly from the offence
- whether the offender pleaded guilty to the offence
- the offender's previous character
- the presence of any aggravating or mitigating factors.

The following is a consideration of some of these factors in relation to the Yildrim case.

Factor #1: Maximum penalty and current sentencing practices

A key factor that must be taken into account by a magistrate or judge when sentencing is what the maximum penalty available is, as well as current sentencing practices. This helps to ensure fairness and consistency so that offenders receive sentences in keeping with the present community and legal environment.

In sentencing Yildrim, Judge Tinney made comment of his consideration of current sentencing practices, stating that 'every case and every offender is different.'

The charges in this case were: one charge of theft of a car, one charge of conduct endangering life, two charges of criminal damage and one charge of conduct endangering serious injury.

Go to the website of the Sentencing Advisory Council of Victoria (www.sentencingcouncil.vic.gov.au) and read the document 'Sentencing principles, purposes, factors'.

Criminal damage

Criminal damage, or destroying or damaging property, is an indictable offence in Victoria, and is listed under section 197 of the *Crimes Act 1958* (Vic). It carries with it a maximum penalty of level 5 imprisonment (10 years maximum).

The Sentencing Council provides statistics relating to criminal damage crimes in Victoria between July 2013 and July 2018. During that time, 65.6% of criminal damage cases in Victoria resulted in the offender being imprisoned.

The most common custodial sentence for this crime was between 0 and 1 year, with more than half of all sentences falling within this range (60.1%). Taken further, 70% of offenders received a prison sentence of between 0 and 2 years. Based on these statistics, it is fair and consistent that Judge Tinney sentenced Yildirim to a term of two months' imprisonment for each of the two charges.

Theft of motor vehicle

Theft of a motor vehicle is an indictable offence in Victoria, and is listed under section 74 of the *Crimes Act 1958* (Vic). It carries with it a maximum penalty of level 5 imprisonment (10 years maximum).

The Sentencing Council provides statistics relating to theft of motor vehicle crimes in Victoria between July 2013 and July 2018. During that time, 72.6% of motor vehicle theft cases in Victoria resulted in the offender being imprisoned.

The most common custodial sentence for this crime was between 0 and 1 year, with more than half of all sentences falling within this range (67.6%). Taken further, almost 80% of offenders received a prison sentence of between 0 and 2 years. Based on these statistics, it is fair and consistent that Judge Tinney sentenced Yildirim to a term of 18 months' imprisonment.



Reckless conduct endangering life

Reckless conduct endangering life is an indictable offence in Victoria, and is listed under section 22 of the *Crimes Act 1958* (Vic). It carries with it a maximum penalty of level 5 imprisonment (10 years maximum).

The Sentencing Council provides statistics relating to reckless conduct endangering person crimes in Victoria between July 2013 and July 2018. During that time, 84.6% of reckless conduct endangering person criminal cases in Victoria resulted in the offender being imprisoned.

The most common custodial sentence for this crime was between 3 and 4 years, with 22.3% of all sentences falling within this range. Taken further, over 60% of offenders received a prison sentence of between 1 and 4 years. Based on these statistics, it is fair and consistent that Judge Tinney sentenced Yildirim to a term of 2 years and 9 months' imprisonment.

Reckless conduct endangering person (serious injury)

Reckless conduct endangering person is an indictable offence in Victoria, and is listed under section 23 of the *Crimes Act 1958* (Vic). It carries with it a maximum penalty of level 6 imprisonment (5 years maximum).

The Sentencing Council provides statistics relating to reckless conduct endangering person crimes in Victoria between July 2013 and July 2018. During that time, 82.6% of reckless conduct endangering person criminal cases in Victoria resulted in the offender being imprisoned.

The most common custodial sentence for this crime was between 1 and 2 years, with 35.5% of all sentences falling within this range. Taken further, over 60% of offenders received a prison sentence of between 1 and 2 years. Based on these statistics, it is fair and consistent that Judge Tinney sentenced Yildrim to a term of 8 months' imprisonment.

Factor #2: Type of offence and seriousness

Not all offences are the same, and even when offences are identical on the face of it, each case brings with it a unique set of background circumstances. As such, when sentencing, magistrates and judges must look at a number of variables in order to determine the severity of an offence. The more serious the offence, the greater likelihood of a more severe sentence.

Judge Tinney commented on Yildrim's offending being 'extraordinary' and 'audacious'. The reality that it was conducted in broad daylight, in a public area with numerous bystanders, combined with a mother's distress at seeing her baby being driven away, made Yildrim's offending extremely serious.

Offender's intent

It is uncertain if Yildrim was aware that there was child in the car. However, witnesses did report the car owner and others banging on the car and yelling that there was a baby inside the car. Justice Tinney was of the belief that Yildrim had no intention of abducting the child.

Effects of crime

The most significant effect of this crime was on the mother of the baby. Watching her car be driven away while her baby was inside undoubtedly caused significant emotional trauma. Judge Tinney commented that 'for a mother, or a parent, it was the stuff of nightmare.' It was also reported that the mother's foot was run over as she attempted to stop Yildrim from driving off, thus a physical injury was another effect. Additionally, the danger posed to other community members within the vicinity of the alleged crimes needed to be considered.

Method undertaken

Theft of a motor vehicle was brazen and undertaken in broad daylight in highly public place.

Motive for engaging in offence

Unknown. Possibilities may have included: payment for outstanding debt related to drug use, thrill seeking, or involvement in 'rebirthing' of luxury cars.

Any weapons used

Use of vehicle to run over the mother's foot could potentially have been considered a weapon, as it was used to inflict bodily harm.

Role offender played: principal/accessory

Based on the evidence at hand, Yildrim was the principal offender.



Serious offenders

'Serious offenders' are defined in Part 2A of the *Sentencing Act 1991* (Vic). They include serious sexual offenders, serious arson offenders, serious drug offenders and serious violent offenders.

When sentencing a serious offender to imprisonment for more than one offence, the court must order each sentence to be served cumulatively (one after the other), unless it directs otherwise.

The courts must regard community protection as the primary purpose of sentencing serious offenders. For this reason, the court may impose a longer prison sentence on a serious offender than is proportionate to the gravity of the offence.

Source: <https://www.sentencingcouncil.vic.gov.au/about-sentencing/imprisonment>

Activity 9.4 Structured questions

The Yildrim case

- 1 Outline the known facts relating to this case.
- 2 Discuss what you consider to be the impact of the crime on the victim(s).
- 3 Identify which courts were involved.
- 4 Outline the original criminal jurisdiction of each court involved in this case
- 5 Evaluate whether it is fair that serious offenders serve sentences cumulatively rather than concurrently.
- 6 Evaluate whether it is fair that courts are able to impose longer prison sentences on serious offenders.

Factor #3: Offender's degree of responsibility and culpability

Another key factor that a magistrate or judge must consider in sentencing is the degree to which an offender is responsible and culpable for the crime they have been found guilty of committing. The offender's mental capacity at the time of the crime plays a significant role in guiding sentencing, as it assists in determining the best choice of rehabilitation based on the offender's potential mental health or drug issues. The key element of crime *mens rea* (guilty mind) is considered here.

Age/mental capacity of offender

It has been reported that Yildrim was 25 years old at the time of the alleged offence. Yildrim claimed that he suffered from mental health issues relating to depression and anxiety, and that he had recently started taking medication. It is a possibility that a combination of mental health issues and medication may have adversely impacted his mental capacity at the time of the alleged offending.

Previous offending

As it was reported that Yildrim was on bail at the time of the alleged offence, it could be deduced that he had previously transgressed the law.

Cultural/racial background

There is no information providing specifics about Yildrim's cultural or racial background.

Influence of alcohol/drugs

Detective Senior Constable Virginia Creece stated that Yildrim appeared to be under the influence of illicit drugs when taken into custody. As such, it can be assumed that Yildrim's mental state was adversely affected.

Personal circumstances

Judge Tinney considered Yildrim's circumstances in the time preceding the offending. It appeared Yildrim was deeply affected by the death of a friend. There was also mention of his drug use likely a result of unresolved personal or family issues, as well as a depressive disorder that Yildrim had developed. Mr Yildrim was also the father of a young daughter, and due to the initial charges including intentionally taking a child, prison authorities had prohibited Mr Yildrim contact with his child. Judge Tinney removed this order.

Acknowledgment of guilt

Initially, Yildrim stated that he would plead not guilty. He also openly questioned the video evidence, claiming it was 'blurry' and that the person was not him. As such, he refused to acknowledge any guilt. However, at his committal mention on 21 March 2017 he entered a guilty plea before the magistrate, thus saving the time, cost and stress of having to undergo a trial.

Factor #4: Impact on victim

Of great importance when sentencing is how the victim or victims have been affected by the offender's actions. Physical injuries are generally obvious and medical professionals are able to provide clear timelines for recovery. Additionally, financial loss is usually a straightforward calculation of what the victim has lost financially as a result of the offence. More difficult to measure is the psychological/emotional impact of an offence on a victim. Sometimes it may be obvious and immediate. Other times, the mental scarring may lay dormant and a victim may seem not to be adversely affected.

Judge Tinney stated:

You are a father yourself. Place yourself, or place your wife for that matter, in the mother's position at the scene and not just at the scene, but also for the half hour or so until the child was recovered, when they had no idea what had become of the child. What a horrific event for a mother and for the friend trying to save the infant. They will never forget this day for as long as they live... In any event, I take into account the impact of these crimes.

Physical

The owner of the car was alleged to have had her foot broken as Yildrim drove over it with her car. Additionally, her friend attended hospital after being thrown off the moving car, after it had crashed into a parked car. It was reported the friend suffered minor cuts and bruises. It was also reported that the baby in the car was found safe, so it can be assumed no physical injuries were suffered. In his judgment, Judge Tinney stated, 'No one was badly hurt and the baby and the car recovered within about half an hour or so.'

Emotional/psychological

It is difficult to measure the emotional impact of crimes on victims. Based on witness statements relating to the mother's actions, as well as the actions of witnesses themselves, it is clear that the mother endured significant psychological trauma as a direct result of Yildrim's alleged actions. Other school parents and onlookers were also likely to have suffered psychological distress having witnessed the incident. Judge Tinney stated, 'It was an extraordinary incident. Your victims will never forget this day, ever. For a mother, or a parent, it was the stuff of nightmares.'

Financial impact

This is unclear. There was no mention of financial impact in the sentencing report, yet it can be assumed that out-of-pocket expenses would include: medical bills relating to hospital assessment of mother, baby and friend, and psychological support for victims via appropriate counselling services. In addition, as it was reported that Yildrim had crashed into a parked car, it can be reasonably assumed there were likely to be repair bills for damage to the car resulting from this incident.

Factor #5: Victim impact statement

A victim impact statement (VIS) plays a crucial part in sentencing. A VIS allows a victim of a crime to detail how the offence has personally affected them. A VIS can be confronting for the victim, as it encourages them to detail the physical, financial and emotional trauma that has resulted due to the offender's actions. It provides a key plank in sentencing, as it allows a magistrate or judge to gain a firsthand insight into what the victim is feeling; also, importantly, it allows the offender to hear directly how their actions have impacted on another person.

There were no victim impact statements in this case.

Factor #6: Aggravating or mitigating factors

As we know, each crime is different, due to the circumstances behind it. Some crimes are committed out of a perceived necessity, whereas others are undertaken out of hate. It is important that driving factors behind the crime be considered when sentencing, to help ensure fairness. **Aggravating factors** are those that increase the severity of a crime, and **mitigating factors** are those that lessen the severity of a crime.

Aggravating

Arguably, the most significant aggravating factor is that a baby was in the car. This dramatically increased the severity of the crime, as one victim was helpless, having no ability to remove themselves from the situation. However, the Judge accepted that Yildrim had had no intention of taking the baby, and as such decided not to sentence him for the related crime. Further exacerbating this factor was the distress caused to the mother of the baby, along with the allegation that the offender seemed drug affected at the time. This added to the seriousness of offending by further increasing the risk of harm to the baby, due to driving under the influence of drugs. Another aggravating factor related to the brazenness of the alleged offence, which took place in broad daylight outside a primary school, with numerous children and parents witnessing the crime. Dangerous driving in the form of crashing into another car, in an attempt to throw off the friend who had grabbed onto the bonnet of the car, was likely to further increase how the severity of this offending was perceived.

Judge Tinney stated, '[A]n obvious feature of aggravation is that you were on bail at the time for a variety of offences, including dishonesty offences and offending whilst on bail. Additionally, you were on a community corrections order as well, one imposed in September 2016 for a number of charges, including car theft.'

Mitigating

The fact that the baby was found unharmed is arguably the most significant mitigating factor. Additionally, Yildrim could have claimed he was affected by medication he had recently started taking to assist with mental health issues relating to depression and anxiety. As such, his culpability for the crime could be lessened due to limited mental capacity. Along with this, Yildrim could have claimed to be dependent on illicit drugs, again lessening his culpability, and he could have claimed intoxication as a form of defence. Such claims would have needed to be supported by a medical professional to ensure their validity. This would probably have involved a court assessment order.

Mr Yildrim's legal representative, Ms Franjic, put forward various reasons that she hoped Judge Tinney would consider in sentencing. These included: Yildrim's early guilty plea, his remorse, his age, and the likelihood that he could be rehabilitated.

The guilty plea was a significant mitigating factor, with Judge Tinney commenting, 'Had you been found guilty of these matters following a "not guilty" plea and a jury trial, I would have imposed a longer sentence. I would have sent you to prison for five and a half years. I would have fixed a non-parole period of three years and ten months. That is to be noted in the records of the court.'

Activity 9.5 Case studies

Mitigating and aggravating factors in sentencing

Read the following case studies and decide whether there are any aggravating or mitigating factors:

Case A

Harry has a serious drug habit. He needs his next fix and doesn't have any money, having turned his apartment inside out. Harry takes a kitchen knife and puts it down his pants. He leaves the house and sees an 80-year old lady walking up the stairs of the apartment building. Harry pulls the knife from his pants, puts it to the old lady's throat, and steals her handbag.

Case B

Vasko is woken one night by a crashing sound coming from downstairs. He rushes down to his 10-year-old daughter's bedroom, where he sees an intruder. Vasko grabs the nearest object, his daughter's tennis racquet, and starts attacking the intruder. The intruder is left with severe brain damage and Vasko is charged with intentionally causing serious injury.

Case C

Isaac and Charlie have been drinking at a friend's 18th birthday party. Isaac decides he is going to do some burnouts in his car to impress the partygoers. He tells everyone in the party to come out the front. Charlie tells him to stop being an idiot and tries to take his keys. Isaac pushes Charlie over and swears at him, then jumps in his car and revs the engine. As he presses his foot to the accelerator, he loses control and smashes the car into the front room of the house.

Case D


Lena is hungry. She was kicked out of home four days ago, after her parents found she had lied to them about being at a friend's house studying, when she was actually with her boyfriend Joel. Walking past a bakery, Lena walks in and asks for a sausage roll and a choc-jam donut. She then runs out of the store without paying for the food. She is caught by police a few hundred metres down the street and charged with theft.

Activity 9.6 Classroom presentation

Mental impairment and sentencing

Read the section 'Mental Impairment' relating to sentencing on the Sentencing Council of Victoria website and complete the following tasks:

- 1 Define the term 'mental impairment'.
- 2 Define the term 'mental illness'.
- 3 Identify the two Acts to which the definition of mental illness applies.
- 4 Explain what a court assessment order is.
- 5 Explain what a court secure treatment order is.
- 6 Research a criminal case where the offender has been mentally impaired, and outline the facts and issues of the case.
- 7 Then, in small groups, prepare a classroom presentation to address the following topic:
Do you believe offenders with mental health issues should be treated differently from 'normal' offenders? Is prison the best option?

 Go to the website of the Sentencing Advisory Council at www.sentencingcouncil.vic.gov.au of Victoria and read the document 'Mental impairment and sentencing'.

Purposes of sentencing

Section 5(1): Sentencing Act 1991 (Vic)

The only purposes for which sentences may be imposed are:

- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances;
- (b) to deter the offender or other persons from committing offences of the same or a similar character;
- (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated;
- (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged;
- (e) to protect the community from the offender; or
- (f) a combination of two or more of those purposes.

Just punishment

Just punishment means that when considering a sentence, a court must impose a penalty that is fair and reasonable. Judge Tinney commented, 'I am also required to punish you. That is a significant sentencing purpose in this case.' In relation to Yildrim's offences, the recent sentencing statistics suggest that imprisonment would be considered a just punishment for these crimes.

Deterrence

Victoria has seen a dramatic increase in vehicle theft and drug related crime. As a result, the court would wish to prevent others in the community from engaging in such activities. A sentence of imprisonment would be likely to discourage community members from undertaking similar crimes. Judge Tinney explained, '... as to general deterrence, well that is an important purpose of sentencing in this case. The court is required to send a loud and clear message to other individuals in the community, those who might be minded to commit this sort of serious offending, that is, risky driving of such a magnitude as to lead to some danger of death'.

Judge Tinney also sought to specifically deter Yildrim from committing further crimes, stating, 'I must try to deter you from future offending. I must give that principle of specific deterrence some weight in my sentencing task.'

Rehabilitation

Detective Senior Constable Virginia Creece told reporters that it appeared Yildrim was under the influence of drugs at the time of the alleged offending. Additionally, Mr Yildrim himself stated that he had recently begun medication for mental illness related to severe depression and anxiety.

Judge Tinney commented, 'I must consider your rehabilitation and I do, I have commented on those prospects. I think you do have, at least, decent prospects. Your relative youth has been raised by counsel and it is not unimportant. Your counsel has referred to the case of Mills, though accepts that it has to be read in light of your actual age. You are no teenager and nor are you a first offender. Still, you are quite young and you have no sizeable criminal record, so quite naturally there is a greater regard paid to rehabilitation of such a person.'

With this information, any sentence should incorporate some form of rehabilitation relating to substance abuse and mental health treatment.

Rehabilitation in prison

A 2015 Victorian Ombudsman *Investigation Into the Rehabilitation and Reintegration of Prisoners in Victoria* found that over 75% of males and at least 83% of females in Victorian prisons reported previous illicit drug use.

The investigation found a strong link between drug and alcohol issues and recidivism, and strong links between drug and alcohol use and adverse mental health.

Sentenced prisoners in Victoria are able to access programs relating to health, which assist prisoners understand the reasons for their substance abuse, as well as the risks and harms of their abuse. These programs also aim to promote improved physical and mental health and better prepare offenders for reintegration into the wider community.

Additionally, there are criminogenic programs, which are group programs aimed at targeting the interconnection between drug and alcohol abuse and criminal offending.

The investigation also found that there was a high demand and long waiting lists for alcohol and other drug (AOD) programs, as a result of the increase in prisoner numbers. This is reflected in the large volume of complaints from prisoners about delays in accessing AOD programs, which are often required for parole eligibility.

The investigation outlined issues relating to mental health support in the prison system. It highlighted that the prison system has significantly higher rates of mental illness when compared with the broader community.

Limited resources were again highlighted, with the investigation finding numerous prisoners requiring specialised mental health treatment were unable to access it, due to demand for services greatly outweighing the Victorian prison system's ability to supply them.

As such, a majority of male prisoners assessed as having a serious psychiatric condition remained in mainstream prisons, due to the lack of appropriate facilities.

Activity 9.7 Assignment

Rehabilitation program

- Using the internet, research and find a current rehabilitation program being used in Victorian prisons.
- Discuss the importance of such programs in upholding the principles of justice and achieving the purposes of sanctioning.

Denunciation

Judge Tinney stated, 'I must denounce your conduct and I do. Again, that is important. This was pretty outrageous conduct on your behalf.' This suggests his sentencing aimed to make a strong statement regarding Yildrim's actions. Recent crime trends in Victoria has seen a spike in drug related crimes and car thefts. Widespread media coverage has led to strong responses from the community, the police and the government. A lengthy sentence of imprisonment would be likely to send a strong message to the community that the courts do accept this type of behaviour.

Protection of the community

Another purpose of Yildrim's sentencing considered by the courts was the protection of the community. Judge Tinney weighed up the backgrounded of charges and Yildrim's intent in his sentencing, expressing, 'I also must give some weight to community protection, though people must not lose sight of the fact, I am not dealing with you in any way for kidnapping or child stealing. They are not the charges and they were not your intent. Community protection would be a much stronger element of sentencing, had this been some exercise to take the child, but it so obviously was not.'

9.5 Avenues of appeal

Since Yildrim was sentenced in the County Court, any appeal he could have made would have been heard by the Supreme Court of Victoria – Court of Appeal. The Court of Appeal hears appeals against convictions and sentences imposed by the County Court and Trial Division of the Supreme Court.

All appeals by defendants convicted or sentenced require leave (permission) of the Court of Appeal, involving the filing of an application with the Court within 28 days of the date of sentence.

As such, if he was unhappy with any sentence or conviction imposed at sentencing, Yildrim would have been required to lodge an appeal within 28 days of being sentenced. This would have had to specify whether he was appealing against the conviction and/or the sentence imposed. Yildrim did not appeal.

An application for leave to appeal is usually presided over by a single Judge of Appeal. A defendant's application can be denied should it be deemed that there is no reasonable likelihood that the Court of Appeal would impose a sentence less severe than the original sentence handed down in the County Court.

In addition to a defendant seeking leave to appeal, the Director of Public Prosecutions (DPP) is also able to appeal against a sentence under section 287 of the *Criminal Procedure Act 2009* (Vic) where there is seen to be an error in sentencing and where it is in the public interest to appeal.

In the event that the DPP did appeal and was successful, the Court of Appeal would set aside the original sentence and impose a new sentence.



Activity 9.8 Case studies

Appeals: where do I go?

Consider the following case studies and determine which court the person should appeal to:

Case A

Harry was sentenced in the Magistrates' Court to three years imprisonment for selling two grams of heroin to an undercover police officer. Harry believes his sentence is too severe.

Case B

Francis was caught with an illegal firearm. He received a two year sentence from the County Court. The prosecution feels the sentence was far too lenient and wishes to appeal.

Case C

Nevenka was found guilty of theft and sentenced to a six month CCO. Her lawyer suggests that there was an error made relating to a point of law.

Case D

Megan and Jeffery were co-defendants in an assault case against an assistant principal from the school where they were Year 12 students. The magistrate recorded a conviction against them and fined each \$1000. They accept that they did wrong, yet wish to appeal their conviction.

9.6 Principles of justice achieved

We will now explore the extent to which the principles of justice were achieved in this case.

Fairness

There are numerous ways in which criminal pre-trial, trial and post-trial procedures promote the ideal of fairness. This is best shown through the fundamental principle of 'presumption of innocence' – a defendant is deemed innocent until proven guilty in a court of law. This promotes fairness as it ensures that the accuser must prove the guilt of the accused, thus making sure that frivolous accusations are limited.

Another way fairness is promoted is by not allowing an accused's prior convictions to be disclosed before sentencing. This promotes the ideal that each case is to be judged on its own merits. Limiting the disclosure of previous convictions helps avoid bias by a judge, magistrate or jury.

In the Yildrim case, the accused had prior convictions. These convictions were not able to be disclosed to the court prior to sentencing. This encouraged the judge to deal with the facts of the accused crimes, without prejudice. This allowed for fairness for Yildrim.

On the other hand, it could be argued that the court should be aware of similar previous crimes as this arguably promotes greater protection of the community, by not ignoring pattern through criminal behaviour.

The bail process further supports the principle of fairness, by weighing up a person's innocence (they are yet to be found guilty in court of law) and freedom to prepare their case, with the protection of the community. The decision to grant bail or hold an accused in **remand**, results from examining the rights of the accused and also those of the victim and wider community. As evidenced with Yildrim, the accused was denied bail as police deemed him too great a risk to the community, which was felt to outweigh his claims of innocence.

The committal process also assists in ensuring fairness, by acting as a filter of cases without enough evidence to gain conviction at trial. This means that only cases with sufficient evidence will be directed to trial, saving extensive time, money and stress for those who have been charged with a crime where there is limited chance of conviction.

Yildrim pleaded guilty to all charges at his committal mention. Had he pleaded not guilty, further investigation would have been required to determine if a *prima facie* case existed against Yildrim. Witnesses would have been questioned and further evidence would have been gathered and examined to ensure that the case would only continue should there be a likelihood of conviction at trial.

When sentencing, a judge will take into consideration any aggravating or mitigating factors related to the crime. This helps to support the principle of fairness as each case is considered on its own merits. Actions that increase the severity of a crime should be dealt with more severely, to help protect the community and deter potential offenders. In Yildrim's case, a number of aggravating factors, such as a baby being in the car and the fact that the incident happened outside a school, would have undoubtedly weighed heavily on a judge/jury if this case had gone to trial. Mitigating factors, such as Yildrim's claimed drug problems and mental health issues, must also be considered to ensure that any potential sanction is fair and best serves in rehabilitating the offender.

The right to appeal an unfair decision (conviction or sentence) to a higher court further assists in achieving fairness. Yildrim had the option of appealing his sentence and/or conviction if he felt it was unfair. Additionally, fairness is promoted the other way, by allowing the prosecution to appeal had they seen the sentences imposed on Yildrim as being too lenient.

Equality

All cases cannot be treated alike, as each will have unique fact situations. Yildrim may have committed the same offences as numerous others, yet the circumstances surrounding the actual offence, as well as Yildrim's unique personal background, makes this case different. In the Australian legal system, equality is achieved by allowing each individual charged with a crime the same opportunity to put forward their case. The set of procedures for pre-trial, trial and post-trial criminal offences provide structures that assist in providing all members of society with the same basic rights, and thus promote equality.

Sentencing guidelines also support equality, as they provide a clear framework for judges to use when sentencing. By providing a universal sentencing framework, individual judges are arguably able to limit personal bias from impacting on decisions. In the context of criminal sentencing, equality could be defined as allowing each individual charged with a crime the same opportunity to re-enter the community with the best possible chance of success. In the case of Yildrim, Judge Tinney considered his history of drug use and accepted that Yildrim had obtained some treatment and medication in an effort to rehabilitate and to aid himself in making a successful re-entry into society. In contrast, an offender found guilty of the same/similar offences as Yildrim, yet without a history of drug abuse and criminal activity, is likely to be given a different sentence, in order to provide them with the best opportunity of successfully re-entering the community.

Access

Access to the law is a fundamental principle of justice. Lack of understanding of the law and its procedures can significantly limit justice.

Legal aid can provide access to justice for those who could not otherwise afford legal representation. However, due to limited legal aid funding, there are strict means and merit tests, somewhat limiting access. Due to the severity of the crimes, it is possible that Yildrim might have qualified for legal aid. It is unclear whether or not he applied for and was granted Legal Aid funding. Initially, Yildrim represented himself, which might have led to an unfair sentence as it can be reasonably assumed his legal knowledge was limited. It seems he was able to engage an experienced prosecution legal team which likely was to his advantage in being able to present an excellent plea.

Interpreters for those with language barriers, or who are hearing or vision impaired, or intellectually disabled, help to support access to the criminal justice system. Had Yildrim had difficulty understanding English, he would have been afforded an interpreter in his preferred language. This promotes fairness as it ensures that offenders have the best chance of comprehending the complex legal system and therefore navigating it.

Jury service is another way that the legal system allows for access. Defendants who have been charged with indictable offences are entitled to a trial by jury. A random selection of eligible citizens ensures that the community has further access to participating in and understanding the legal system. As Yildrim pleaded guilty to all charges, a jury was not necessary. Had he pleaded not guilty, the committal proceedings would have determined if there was sufficient evidence to gain conviction at trial, and he would have faced a trial with a judge and jury.

Activity 9.9 Analysis

Principles of justice

Essay: To what extent were or could the principles of justice (fairness, equality and access) be achieved in the Yildrim case?



Key point summary

Do your notes cover all the following points?

- ❑ Charges faced by the offender
 - Theft of a car
 - Conduct endangering life
 - Criminal damage
 - Conduct endangering serious injury.
- ❑ Facts of the case
 - Alleged offending
 - Police comments
- ❑ Courts that may have been or were involved
 - Criminal jurisdiction of Magistrates' Court
 - Criminal jurisdiction of County Court
 - Victorian Drug Court
- ❑ Sanctions that could have been imposed and their appropriateness
 - Imprisonment
 - Drug treatment order (DTO)
 - Community correction order (CCO)
 - Fine
 - Adjourned undertaking
 - Dismissal or discharge
- ❑ Factors that may have been taken into consideration in sentencing
 - Maximum penalty and current sentencing practices
 - Type of offence and seriousness
 - Offender's degree of responsibility and culpability
 - Impact on victim
 - Victim impact statement
 - Aggravating or mitigating factors
 - Purposes of sentencing
 - Just punishment
 - Deterrence
 - Rehabilitation
 - Denunciation
 - Community protection
- ❑ Possible avenues of appeal
 - Likely to be heard in the County Court; any appeal will be heard by the Supreme Court of Victoria – Court of Appeal
- ❑ Extent to which principles of justice achieved
 - Fairness
 - Equality
 - Access

End-of-chapter questions

Revision questions

- 1 Explain the crime(s) that Yildrim was charged with.
- 2 Provide two reasons why you think Yildrim was denied bail.
- 3 In which court was this case heard? Outline the original jurisdiction and appellate jurisdiction of this court.
- 4 Provide two reasons why Yildrim was ineligible to be referred to the Victorian Drug Court.
- 5 Outline how committal proceedings contribute to the promotion of the principles of justice.
- 6 Define the sanction of imprisonment, and with reference to the Yildrim case, explain how it could achieve the purposes of sentencing.

Practice exam questions

- 1 Explain the purpose of bail. [2 marks]
- 2 Define 'remand'. [1 mark]
- 3 What is the original criminal jurisdiction of the Melbourne Magistrates' Court? [3 marks]
- 4 Define two sanctions (other than imprisonment) and explain how they achieve one purpose of sentencing. [4 marks]

Chapter 10

Unit 2 – Area of Study 1

A criminal case: shooting murder of an unarmed man – *DPP v Chaouk* [2019] VSC 381 (13 June 2019)

Unit 2 focuses on the enforcement of criminal law and civil law, the methods and institutions that may be used to determine a criminal case or resolve a civil dispute, and the purposes and types of sanctions and remedies and their effectiveness.

Area of Study 1, entitled ‘Sanctions’, provides for the study and investigation of two criminal cases from the past four years, either decided or still being decided. Using these cases, students explore the extent to which the principles of justice were or could be achieved.

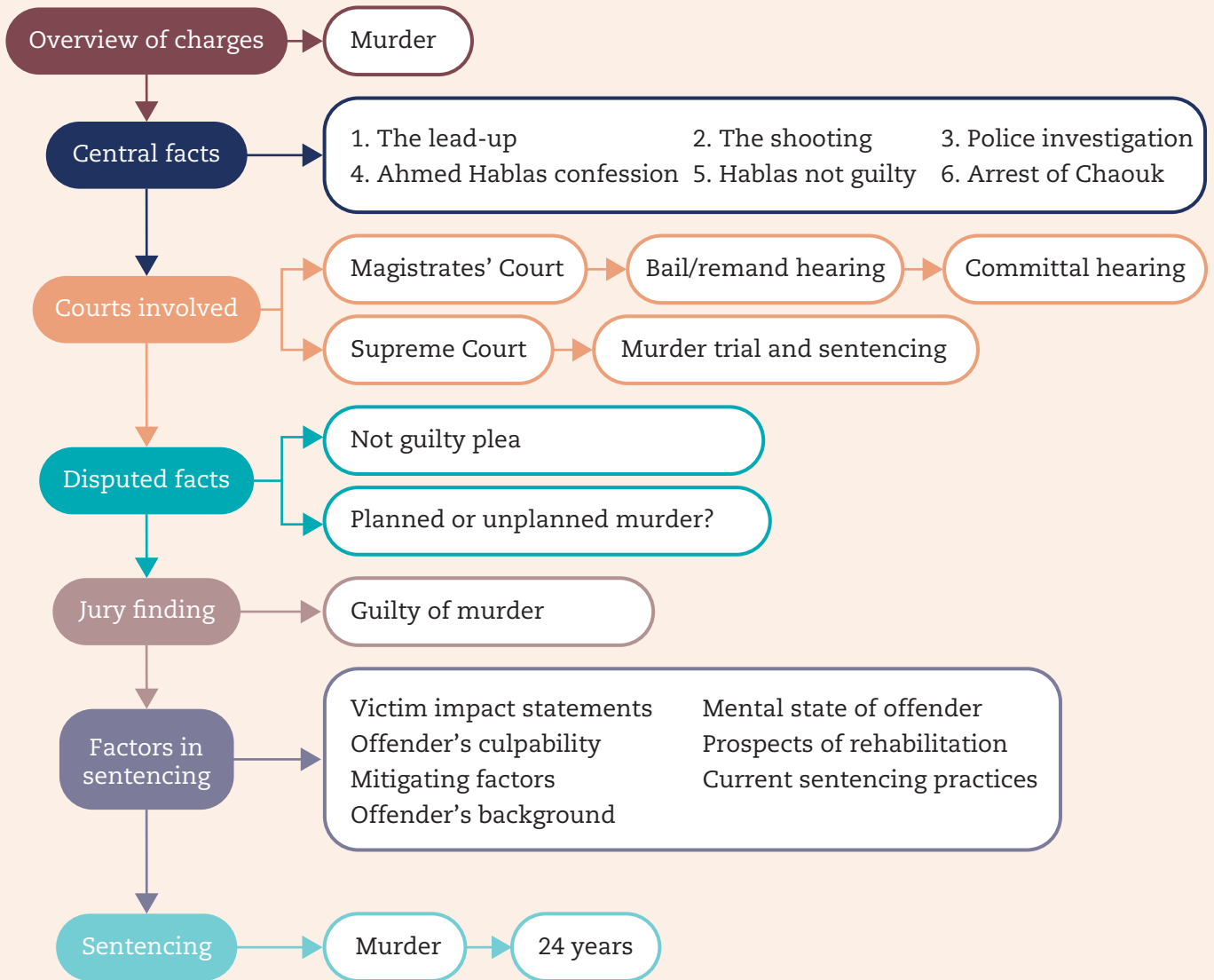
This chapter provides an examination of one criminal case. The case, heard in the Trial Division of the Supreme Court of Victoria, is *DPP v Chaouk* [2019] VSC 381 (the sentencing hearing for which took place on 13 June 2019).

This chapter will commence with an overview of the charges and the facts of the case, followed by a review of the courts involved and the sanctions imposed and their appropriateness. Factors in sentencing will then be considered, as will possible avenues of appeal. It will then conclude with an overview of the extent to which the principles of justice were achieved in this case.

The accused, Ali Chaouk



Shooting murder of an unarmed man



Key terms

aggravating factors evidence presented that increases the seriousness of the offence and so contributes to a harsher sentence; for example, use of a weapon, prior convictions

bail the release of an accused back into society while awaiting his or her next hearing or trial; conditions may be attached

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to establish a *prima facie* case and support a conviction

culpability level of blame or responsibility for a wrongful act or omission

Director of Public Prosecutions (DPP) department in Victoria responsible for overseeing and prosecuting criminal charges on behalf of the state

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court (Trial Division)

mitigating factors evidence presented that reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

murder the killing of another human being with malice aforethought, whether intentional or reckless

reckless behaviour that is undertaken despite knowing the possible consequences

remand the holding of an accused in custody while awaiting his or her next hearing or trial as bail has not been granted

sanction a penalty handed down by a court for someone found guilty of breaching a criminal law (for example, a fine or imprisonment); sometimes interchanged with 'sentence'

10.1 Charges and facts of the case

It is common for courts, particularly in more serious cases, to delay the announcing of a sentence until after a later plea hearing (at which lawyers for both parties present their submissions concerning appropriate sentencing in the case).

Ali Chaouk ('Chaouk'), aged 39, was found guilty of **murder** by a 12-person jury after a 22-day trial in the Victorian Supreme Court in December 2018.

Chaouk pleaded not guilty to the charge of murdering Mohammed Haddara at Altona North on 20 June 2009. After a pre-sentence hearing on 21 and 23 May 2019, Chaouk was sentenced to a term of imprisonment on 13 June 2019 (24 years imprisonment, with a non-parole period of 18 years). The trial was heard before Justice Bell in December 2018.



The trial judge, Justice Kevin Bell

As Justice Bell commented in sentencing Chaouk, his murder of an unarmed man in a public place meant the community needed to be protected from him.

A closer look at the key facts

The facts of any criminal case need to be considered in light of not only the events in the minutes leading up to the crime but also the days, weeks and months prior. These background facts give the judge and jury a more complete picture and, for the judge, further understanding for the purposes of sentencing where an accused is found guilty. The facts following the crime might also add insight into the intentions of an accused. Any remorse they express will also become relevant to sentencing.

In this case, the central facts may be further broken down into:

- (a) the dispute between Chaouk and the victim
- (b) the evening of the shooting
- (c) the shooting
- (d) the autopsy and police investigation
- (e) the subsequent confession of Ahmed Hablas, who was later charged, tried and acquitted by a jury in respect of the victim's murder
- (f) the arrest of Chaouk.

Each of the above will now be examined in turn.

(a) The dispute between Chaouk and the victim

The jury were informed of the 'great animosity' which existed between Chaouk and the victim, Mohammed Haddara. The jury heard that this animosity and anger was obvious in telephone exchanges occurring between Chaouk and the victim shortly before the murder.

(b) The evening of the shooting

It was alleged by the prosecution during the trial that Chaouk shot the victim after organising to meet him to discuss an incident involving one of the victim's friends. Prosecutors alleged the meeting between the victim and Chaouk was arranged after the victim and his cousin allegedly forced a friend of Chaouk, Ahmed Hablas, into their car and started questioning him about 'hanging around with the Chaouk family'.

In the last conversation between Chaouk and the victim, it was agreed that they would meet 'one-on-one'. Chaouk took along a gun. Justice Hill stated, in his sentencing of Chaouk, that he could not be satisfied beyond reasonable doubt that, when Chaouk decided to take the gun with him, it was because Chaouk had already formed the intention to kill the victim. Justice Hill stated the gun could have been taken along by Chaouk for his 'own protection'. It was noted that Chaouk could not have been sure if the victim would be on his own when they met.

(c) The shooting

Chaouk arrived at the scene, a street near the victim's family home, in a motor vehicle at about 7.30pm on 20 June 2009. The victim was already standing there alone, unarmed. The jury was told that Chaouk alighted from his vehicle and shot the victim five times. There were no other people present.

(d) The autopsy and police investigation

The pathology evidence established that the shots were fired twice to the victim's side and three times to his back, one of those five when he was lying on the road.

(e) The subsequent confession of Ahmed Hablas, who was later charged, tried and acquitted by a jury in respect of the victim's murder

Chaouk was the second man to stand trial charged with the victim's murder. His friend and wife's cousin, Ahmed Hablas, initially confessed to the shooting but later withdrew his confession. It was alleged at trial that, after the shooting, Chaouk and Hablas met with a solicitor to write up a false statement in which Hablas confessed to the shooting.

Although sent to trial, Hablas was acquitted by a jury in 2011. In the later trial of Chaouk, the Crown prosecutor Patrick Bourke told the jury Hablas had initially falsely confessed to the shooting out of 'fear, intimidation, by the accused and his family'.

(f) The arrest of Chaouk

Following the trial against Hablas the police arrested Chaouk. Hablas then became the main witness for the prosecution in the case against Chaouk.

Activity 10.1 Report

Chronology of the Chaouk case

Based on the dates contained in the introduction to the Chaouk case, create a brief written report setting out the chronological order of events for this case. Use the following as sub-headings in your chronology:

- 1 The date of the shooting
- 2 The confession of Hablas
- 3 The trial of Hablas
- 4 The trial of Chaouk
- 5 The plea hearing date for Chaouk
- 6 The sentencing date for Chaouk
- 7 The most likely release from custody date for Chaouk. For this you will need to consider:
 - a when he was sentenced;
 - b time already served in custody prior to being sentenced: the judge recording that the 'number of days of pre-sentence detention is 843' (this pre-sentence detention period is deducted from an offender's sentence); and
 - c the term of imprisonment he would need to serve before being eligible for parole.

10.2 Courts involved

The Chaouk case involved two courts: the Magistrates' Court of Victoria and the Supreme Court of Victoria.

Magistrates' Court

The Magistrates' Court was involved for the purposes of two separate proceedings: a **bail** hearing and **committal hearing**.

Bail hearing in the Magistrates' Court

Persons charged with offences who are held in custody can be released upon entering an undertaking called bail to appear before the court at a later date.

In some circumstances, a police sergeant or the officer in charge of a police station may grant bail to a person held in custody; otherwise, the person held in custody must be brought before a court (or a bail justice if outside court sitting hours) to determine whether bail should be granted or refused.

Under section 4 of the *Bail Act 1977* (Vic), the general rule is that any person accused of an offence and being held in custody in relation to that offence pending trial shall be granted bail (section 4(1)). There are, however, a number of exceptions to this general rule. Some of these are:

- 1 Where the defendant has been charged with murder or treason, bail is to be granted only if the court is satisfied that exceptional circumstances exist (section 4(2)(a) and section 13)
- 2 The court will refuse bail if there is an unacceptable risk that the person charged will not appear on the specified day at court (section 4(2)(d) and (3))
- 3 When it is thought that the person may commit other offences while on bail, endanger the public, interfere with witnesses or otherwise obstruct the course of justice.

In the Chaouk case, as the defendant was charged with murder (see exception 1 above) and no 'exceptional circumstances' were found to exist, bail was refused. Where bail is refused, the defendant will be held on **remand**.

In this case, Chaouk appeared before the Magistrates' Court and was formally remanded in custody.

Committal hearing in the Magistrates' Court

An **indictable offence** is, generally speaking, a serious criminal offence (e.g. murder, armed robbery, rape) where the trial will take place in the County Court or the Supreme Court.

However, before the trial for an indictable offence, a defendant will usually face a committal hearing. This hearing is heard in the Magistrates' Court, and its purpose is to rule on whether the prosecution evidence is sufficient to put the accused on trial. The decision the magistrate must make at a committal hearing, after hearing the prosecution case, is to decide whether a properly instructed jury would convict the accused. As the prosecution must convince the magistrate that a trial should be held, a committal hearing also allows the defendant to understand fully the case against him/her and, if they wish, to test the evidence of the prosecution by, for example, cross-examining prosecution witnesses.

A person charged with an indictable offence will therefore generally not go to trial unless the Crown has sufficient evidence to justify a trial. The defendant is then 'committed to stand trial'. In this case, Chaouk was charged with murder, an indictable offence. He faced a committal hearing by a magistrate and was committed to stand trial. His trial was subsequently heard by judge and jury in the Supreme Court of Victoria.

A committal hearing in the Magistrates' Court gives an accused a chance to consider the full prosecution case against them before they enter a plea of guilty or not guilty. The decision to be made is whether or not to commit the accused to trial.

Supreme Court of Victoria

The Trial Division of the Supreme Court of Victoria has jurisdiction to hear the most serious criminal cases, such as cases involving murder, attempted murder and treason. As Chaouk was charged with murder, his trial was conducted before the Supreme Court of Victoria.



10.3 Sanctions imposed and their appropriateness

In assessing the appropriateness of sentencing, many factors must be taken into account by the sentencing court.

Often in the media, particularly in social media, courts are criticised for ‘inappropriate’ or ‘easy’ sentencing when most of the factors behind the final sentencing are not known to the public. There are many factors to be taken into account in sentencing but two of the key criteria involve the determination of the level of seriousness of the crime and the intent, the *mens rea*, of the defendant.

It is rare for two crimes to be the same. In some instances, crimes are pre-meditated (planned) and harm or endanger many members of the public as well as the intended victim. In other instances, a crime is committed with very little planning. This does not mean the accused is not guilty, but the level of seriousness when comparing one criminal act to other similar acts must be considered, as should the premeditated acts and steps taken by the accused.

In the Chaouk case, a number of rulings had to be made by the Supreme Court on disputed facts to further classify the crime. The Court needed to rule on to what degree the murder was planned or unplanned. This would then allow the judge to give clear directions to the jury on the law applying to the crime.

Disputed facts relevant to sentencing: Planned or unplanned murder?

The **Director of Public Prosecutions (DPP)** argued that the murder was not spontaneous but, rather, was planned, relying on, among other things, the planning involved in taking a loaded handgun to the scene.

While Chaouk’s lawyer accepted that there was some planning involved in the attack, they argued that the killing was not planned but, rather, was the result of a spontaneous act.

Justice Bell ruled that Chaouk formed the intention to use the firearm to kill the victim when he confronted him, not before. He added that using the firearm as he did was the product of great animosity and uncontrolled anger and impulse, but not prior planning to kill (known as ‘premeditation’).

Appropriateness of sanctions

We will turn to the question of appropriateness of **sanctions** after we have considered the jury directions and factors taken into account in sentencing, and the sentencing itself.

Directions to the jury

The jury was directed by the judge, Justice Bell, that if they were satisfied beyond reasonable doubt that Chaouk deliberately fired the shot that killed the victim, then Chaouk could be guilty of murder if they were also satisfied beyond reasonable doubt that he fired the shots either:

- with the intention of killing the victim or causing him really serious injury; or
- with **recklessness** as to killing the victim or causing him really serious injury.

Findings by the jury

A jury in a criminal trial does not publish or announce the reasoning behind its rulings. It receives directions on the law from the judge and makes a ruling as to whether they find, based on the facts and the directions concerning the law, the accused is guilty or not guilty on each charge.

In sentencing Chaouk, Justice Bell stated that the jury’s verdict reflected the view that Chaouk had intended to kill the victim.

Explanatory remarks by the judge immediately prior to sentencing

Justice Bell told the court that the victim was shot five times as he tried to run away, striking the victim twice in the side and three times in his back, with one shot being fired while the victim was lying on the road. Noting that the shooting was in a public place in a ‘suburban street, near a park’, Justice Bell commented prior to sentencing Chaouk that the murder was particularly serious and would have ‘terrified the community’.

10.4 Factors taken into consideration in sentencing

As previously discussed in Chapters 8 and 9, section 5(2) of the *Sentencing Act 1991* (Vic) sets out the factors that must be taken into account when sentencing an adult for a crime in Victoria. These factors are:

- the maximum penalty for the offence
- current sentencing practices
- the nature and gravity of the offence
- the offender’s **culpability** (blameworthiness); that is, the degree to which they should be held responsible for the offence
- whether the crime was motivated by hatred or prejudice
- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence
- any injury, loss or damage resulting directly from the offence
- whether the offender pleaded guilty to the offence
- the offender’s previous character
- the presence of any aggravating or **mitigating factors**.

In any criminal case, the sentencing judge, while considering each of the above factors generally, will also specifically discuss and explore the application of certain factors in their published court judgment. These ‘focus’ factors are those which are considered in depth and in a certain order due to the particular facts and circumstances of the case. In other words, judges do not always follow the above listed order of factors in their written judgment as some factors may require more analysis or are more of an area of immediate concern or focus. This is not to say the factors are not all seen as being important – it is just that judges will naturally focus on particular factors to discuss in greater length because of what has occurred in any given case. The following are the factors which were specifically discussed in particular depth (and in the following order) in Justice Bell’s reported judgment in the Chaouk case.

Factor #1: Victim impact statements

As noted previously, three of the factors under section 5(2) of the *Sentencing Act 1991* (Vic) are:

- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence
- any injury, loss or damage resulting directly from the offence.

Any person who is a victim of crime in Victoria is able to make a victim impact statement about how they have been affected by the crime.

👉 Go to the website of the Sentencing Advisory Council of Victoria (www.sentencingcouncil.vic.gov.au) and read the sections ‘Sentencing principles, purposes, factors’ and ‘Victims and sentencing’.

The victim impact statement may be partly or wholly read or presented to the court at sentencing. The statement may include photographs, drawings, poems and other material relating to the impact of the offence on the victim. Although the statement does not directly affect a sentence, it helps complete the picture of the crime for the sentencing judge or magistrate.

In the Chaouk case, Justice Bell recounted the facts that the victim was married and the couple had two young children, with a third on the way. Justice Bell further recounted that as was ‘movingly explained’ by the spouse in her victim impact statement, which was read to the court, the victim was a young husband and father when he died. The family were about to start life in a new home. The spouse experienced her husband’s violent death and the birth of another child in rapid succession. The three children lost their father and the spouse lost her husband. She was left with lifelong grief and the heavy responsibility of explaining the cause of Mr Haddara’s death to his three children as they gradually become old enough to understand. Further details of ‘the heavy emotional and financial impact of the crime’ were contained in the spouse’s victim impact statement.

In addition, the man initially charged and tried for the murder of the victim, Mr Hablas, also gave a victim impact statement to the court which disclosed the ‘severe impact of the crime’ upon him.

Go to the website of Legal Aid Victoria (www.legalaid.vic.gov.au) to read the section on ‘Victim Impact Statements’.

Factor #2: The nature and gravity of the offence and the offender’s culpability

Also taken into account by the court, under section 5(2) of the *Sentencing Act*, was the nature and gravity of, and Chaouk’s culpability and degree of responsibility for, the offence. Justice Bell considered each of these factors before sentencing Chaouk.

It is a common practice for parliaments to set maximum penalties for crimes that reflect fair and just sentencing principles and the demands and values of society.

Section 3 of the *Crimes Act 1958* (Vic) provides that the maximum penalty in Victoria for murder, being the most serious criminal offence in Victoria, is imprisonment for life.

Justice Bell made a number of points in factoring in the nature and gravity of the murder by Chaouk:

- He stated that Chaouk formed the intention to use the firearm to kill the victim when he confronted him, not before. Using the firearm in that way was ‘utterly reprehensible’, but it was the product of great animosity and ‘uncontrolled anger and impulse, not premeditation’. Therefore he was not satisfied that the killing was planned as the meeting with the victim took place soon after the final phone call. It was not known at the time whether the victim would be alone and it was agreed that Chaouk could have brought the gun for his ‘own protection’.
- For the purposes of sentencing, an unplanned but intentional murder should be treated differently from a planned intentional murder.
- This was not to say the offence was not serious. Justice Bell noted that the actions by Chaouk were extremely dangerous and that the offence was committed in public on a suburban street close to housing and a park.

In reaching his conclusions as to the nature and gravity of the offence of murder by Chaouk, Justice Bell recorded his concluding views that the offence was a ‘serious example of this crime which must be reflected in the punishment to be imposed. That punishment must be a substantial period of imprisonment. It must be one that reflects the grave nature of the offending (taking the aggravating circumstances into account). It must also be one that manifests the court’s strong and unequivocal condemnation of crimes of violence, especially where the unarmed deceased person was callously gunned down in a public place, causing children to lose their father and a wife her husband, and causing suffering to others as well.’

Factor #3: Aggravating factors

Justice Bell considered and explained a number of factors he regarded as aggravating circumstances in the case. He referred to evidence considered by the jury and which they 'must have accepted' in the following categories:

- steps taken by Chaouk immediately after offending to conceal his involvement (particularly allegations concerning destroying his clothing), including steps taken with others
- intimidating Mr Hablas to 'take the rap' (as the saying goes) by making a false statement and giving a false account of what happened to Mr Haddara in an interview with police
- making a false statement to police in the days following the murder.

These considerations, in Justice Bell's ruling, made 'an already serious example of the crime of murder all the more serious'. He further factored in the consideration that 'at no stage' had Chaouk 'demonstrated remorse or any sense of personal responsibility' for the loss of the victim's life and its consequences.

Factor #4: Mitigating factors

Along with the seriousness of the offence, the level of planning or premeditation, the impact on victims and their families and **aggravating factors** as outlined above, mitigating factors under the *Sentencing Act 1991* (Vic) are to be taken into account.

In the Chaouk case, a number of points were made as 'mitigating factors', which were considered by Justice Bell prior to sentencing:

- the serious risk that imprisonment will significantly and adversely affect Chaouk's mental health
- three psychiatric and neuropsychological reports which gave a consistent account of Chaouk's several physical and mental health conditions
- the danger of Chaouk, who had 'spent so much' of his 'adult life in prison', becoming 'so institutionalised by further imprisonment' that he would be 'unable to function in society' upon his ultimate release
- that Chaouk had 'some prospects for rehabilitation'.

Justice Bell noted that these mitigating considerations were 'reflected somewhat in the period of the head sentence but most especially in the non-parole period'.

Activity 10.2 Case studies

Mitigating and aggravating factors in sentencing

Define 'mitigating' and 'aggravating' factors

Based on the following fictional case examples, list any mitigating and/or aggravating factors that could be taken into account in sentencing D, the Defendant. In some cases, there may be no aggravating factors that can be identified.

Case A

D (a female, aged 18) kills V (a female, aged 15) after spiking a can of soft drink that V was consuming. While V was unconscious, D smothered her with a pillow and then hid the body under her house. D then sent messages to V's family to the effect that she (V) was running away. She denied having seen V when approached by police and continued sending text messages in the hope that police would give up the investigation. D explained later that V had criticised her hair and clothing but pleaded not guilty on the basis that it was an accident. Evidence was given that D had a very low mental capacity and had been abused as a child.

Case B

D (a male, aged 16) kills V (a male, aged 32). Evidence was given that V was a friend of D's step-father and was staying at D's house. D was otherwise alone in the house. V had been drinking and had taken D's phone. V forcefully struck D twice to the head in the hour before the killing and had threatened D again with more violence. He had also threatened to harm D's mother when she returned from work. D killed V with a gun that V had shown him. The day before, D had seen V physically assault a man who had simply looked in V's direction.

Factor #5: Personal circumstances of Chaouk and his criminal history

Justice Bell also took into account the personal circumstances of Chaouk, including:

- When aged about 10 years, he witnessed his father shoot another man.
- Chaouk 'left school early and tried several kinds of work without success'.
- His father was imprisoned when Chaouk was aged 18 years, at which time Chaouk became disengaged from his family and 'started abusing drugs and alcohol'.
- When aged about 25, his brother was shot dead by police during a raid in April 2005.
- His father was killed in August 2010 in a highly publicised shooting when Chaouk was 30.

Justice Bell also commented on Chaouk's long criminal record, mostly for drug-related offences but also including crimes of violence, which began in 1999 when he was aged about 20 years. Justice Bell noted Chaouk had 'spent 13 of the past 14 years in prison'.



Mourners arrive to attend the funeral for Chaouk's father at Preston Mosque.

Factor #6: Sentencing purposes

Section 5(1) of the *Sentencing Act 1991* (Vic) provides that the only purposes for which a sentence may be imposed are general deterrence, specific deterrence, denunciation, protection of the community, just punishment and rehabilitation.

Justice Bell's judgment suggests that the main purposes he focussed on after considering each of the above were punishment, denunciation and rehabilitation.

A point form summary of Justice Bell's comments relevant to these sentencing purposes are as follows:

Punishment

- 'The murder of Mr Haddara was a serious example of this crime which must be reflected in the punishment to be imposed. That punishment must be a substantial

period of imprisonment. It must be one that reflects the grave nature of the offending (taking the aggravating circumstances into account).'

Denunciation

- 'The sentence ... must also be one that manifests the court's strong and unequivocal condemnation of crimes of violence, especially where the unarmed deceased person was callously gunned down in a public place, causing children to lose their father and a wife her husband, and causing suffering to others as well.'

Rehabilitation

- 'On the prospects for your rehabilitation, there is reason to think, and certainly to hope, that you wish to lead a decent and lawful life after your eventual release.'
- 'You have engaged very fully with your forensic neuropsychologists and given the court insight into your medical issues which, beside the mental ill-health I have mentioned, include chronic back pain and severe migraines.'
- 'Despite your imprisonment, you have maintained a positive relationship with your wife and son.'
- 'I do not consider you to be completely beyond redemption, although I must be guarded about the prospects for your ultimate rehabilitation.'

Protection

- 'The restrictive nature of your custody is for your protection, not the protection of others.'

Factor #7: Current sentencing practices

The Court also factored in current sentencing practices and statistics for the offence of murder.

Sentencing statistics showed that the average non-life sentence for murder ranged from about 18.5 years' imprisonment in 2009–2010 to about 22 years' imprisonment in 2013–2014.

Sentencing statistics also showed that, for the period from 2008–2009 to 2012–2013, of the 23% of cases in which immediate jail terms were imposed in the County Court and the Supreme Court for recklessly causing injury, the average ranged from 10 months' imprisonment in 2008–2009 to 14 months' imprisonment in 2012–2013.

Sentencing for murder in the USA

The United States Sentencing Commission has published a sentencing manual to act as a guide and to assist judges to sentence offenders across a broad range of offences.

There are, generally speaking, two main classes of murder in the United States of America: second degree murder (where a death results from an assault that is likely to cause death) and first degree murder (murder that is planned and intentional, and results from another violent act such as rape or armed robbery).

Under the US sentencing guidelines, the recommended sentence for second degree murder is 19–25 years (where the offender has no prior offences) and 30 years to life in the case of serious past offences. There is no federal parole for murder.

In the case of first degree murder, the recommended sentence is the death penalty or life imprisonment without parole (note that this is applied differently state by state as some states in the United States do not have the death penalty).

Activity 10.3 Structured questions

Sentencing for murder in the USA

- 1 Compare these sentencing guidelines with the statistics considered by Justice Bell in the Chaouk case: how do they differ?
- 2 Should Australia adopt the non-parole guideline for murder offences? Would this be just and fair in all cases?

Sentencing of Chaouk and appropriateness of the sanction

Balancing the previously outlined factors, Justice Bell announced sentencing as follows:

For the murder of the deceased, Chaouk was convicted and sentenced to 24 years' imprisonment. A non-parole period of 18 years was fixed.



Justice Bell further added that, as Chaouk had already been in custody for 843 days prior to sentencing, this time would be regarded as time already served under the sentence.



Police stand guard outside the Melbourne Magistrates' Court.

Appropriateness of sanction: a test

The question of whether or not a particular sanction is appropriate refers to whether it is fitting or appropriate in all the circumstances. This does not mean it must be beyond all criticism, but it must, at a minimum, involve a 'yes' response to each of the following questions:

- 1 Does the sanction ordered reflect a careful consideration and weighing up of each of the purposes of sanctions?
- 2 Does the sanction ordered meet more of the purposes of sanctions than any other sanction available to the court?
- 3 Has the court, in sentencing the offender, considered all the factors in sentencing as required under the *Sentencing Act 1991* (Vic)?

In this case the purposes of sentencing were considered, with the court making particular mention of the need to not only punish Chaouk and to protect society but also to denounce such a serious crimes as that found to have been committed by him. Prospects for Chaouk's rehabilitation were also factored into the reasoning by Justice Bell, which appeared both thorough and balanced.

After considering the above test, the sentence of 24 years' imprisonment (with a non-parole period of 18 years) appears to be an appropriate sentence.

Activity 10.4 Class debate

Appropriateness of sanctions

For each of the following three cases, debate whether or not (based on the previously mentioned test of appropriateness) the sentence may be considered appropriate. Justify your response (include, in expressing your view, three facts from the scenario being considered that support your view as to the appropriateness of the sanction ordered). If you do not have sufficient facts at your disposal, explain in your response what factors you would need to know to truly measure appropriateness.

- 1 Clarence was charged with armed robbery and assault with a weapon. He used a gun and fired a shot into the ceiling in the shop he robbed (which was in a busy shopping centre). He also held the gun at the head of one of the female staff, who was only 17 at the time. Clarence's defence was that he had split from his girlfriend and was an 'emotional wreck' at the time. He had sent a letter of apology to each of his victims in the shop. He was 21 years of age when he committed the crime. He was given an \$800 fine.
- 2 Chloe has just turned 18. She has been charged with assault. She had verbally threatened Steph, a student from her Year 12 class, because she believed Steph had taken her notes from the photocopier in the school library to copy. When Chloe saw Steph at a party that weekend, she punched her in the head from behind, causing Steph to fall and hit her head on a coffee table. Steph died from her injuries. Chloe was sentenced to 20 years in prison.
- 3 Harvey was 23 and had been driving home from his work as a delivery driver when he saw police in his rear view mirror. He feared he had been speeding and, not wanting to pay a fine, increased his speed and turned into a residential street to avoid the police. The police noticed his car and gave chase. At times, Harvey increased his speed to 80 km/h. As the police continued to chase him, he pulled over and told police he had 'just panicked' and was sorry. He had no prior convictions. At court, his driver's licence was suspended for 12 months and he was ordered to complete 500 hours volunteer work as a condition of a community correction order.

10.5 Avenues of appeal

The Supreme Court, the superior court in the Victorian court hierarchy, has two divisions, the Trial Division and the Court of Appeal.

Go to the website of the Supreme Court (Court of Appeal) of Victoria (www.supremecourt.vic.gov.au) and read the section on 'Criminal Appeals'.

The Chaouk trial was heard in the Trial Division of the Victorian Supreme Court.

The Court of Appeal is also part of the Supreme Court. The Court of Appeal hears appeals against convictions and sentences imposed by the County Court and by the Trial Division of the Supreme Court.

All appeals by defendants convicted or sentenced require leave (permission) of the Court of Appeal, involving the filing of an application with the court within 28 days of the date of sentence.

Therefore, Chaouk could have lodged an appeal, but he would have needed to file an application seeking leave to appeal within 28 days of being sentenced. This would have had to specify whether he was appealing against the conviction and/or the sentence imposed.

In addition to a defendant seeking leave to appeal, the DPP is also able to appeal against a sentence under section 287 of the *Criminal Procedure Act 2009* (Vic) where there is seen to be an error in sentencing and where it is in the public interest to appeal.

In the event that the DPP did appeal and was successful, the Court of Appeal would have set aside the original sentence and imposed a new sentence.

Any appeal from the Supreme Court in the Chaouk case could therefore have been heard in the Court of Appeal.

No appeal was lodged by Chaouk or the DPP in this case.

10.6 Principles of justice achieved

We will now explore the extent to which the principles of justice were achieved in this case.

Fairness

There are a number of factors that suggest that the trial and outcome in the Chaouk case were fair.

Knowledge of charges

Chaouk knew of the charges against him. He was provided details of the charges and attended the committal hearing at which the prosecution case against him was heard. He was therefore able to fully prepare for the eventual trial.

Own lawyer

Chaouk was represented by his own lawyer and was thus able to not only receive independent, expert advice prior to trial but was also able to be represented and advised during the trial itself.

Presence of jury and independent, unbiased judge

Following his plea of not guilty on the murder charge, Chaouk's trial was heard before an unbiased judge, Justice Bell, an experienced judge in the Supreme Court. The trial also involved a jury of 12 independent, randomly selected members of the community.

Pre-sentencing submissions: mitigating factors were heard and considered

Through his lawyer, Chaouk was able to make submissions about mitigating factors, which the court was urged to take into account in sentencing him. These were considered by the court prior to sentence being passed.

Sentencing factors and considerations

Justice Bell took into account the purposes of sanctions and considered each in light of the facts of the case. A broad range of factors under the *Sentencing Act 1991* (Vic) were also taken into account before sentence was passed.

Right to appeal

Although not exercised in this case, Chaouk had the legal right to appeal the outcome of the case. He elected not to do so.

The above factors allow the conclusion that the trial was a fair outcome to be reached.

Equality

Equality refers to a right to be treated the same as others while also recognising individual facts and circumstances involved.

In this case, Chaouk had the following rights, being those to which other defendants are also entitled:

- right to know the full extent of charges against him
- right to legal advice and representation
- right to silence during police questioning
- right to apply for bail (even though he was not successful in this case, Chaouk had the right to apply for bail and argue why it could be granted – in this case before an independent magistrate).

In addition to being treated the same as other defendants in his position, Chaouk was also able to have his individual circumstances considered at a plea hearing, including:

- his age
- his mental condition
- the likelihood of his further offending
- his prospects for rehabilitation.

We can therefore conclude that, as Chaouk:

- was entitled, and able, to exercise the same rights as others in the same circumstances
- was not discriminated against in the case
- was able to have the court hear and consider facts and circumstances relevant to his own position

the principle of equality was also achieved in this case.



Access

Access refers to an offender being able to overcome a number of barriers, such as:

- financial barriers
- educational/knowledge barriers
- cultural barriers
- physical/geographical barriers.

In this case, it is not clear if Chaouk was the beneficiary of legal aid to allow him to be represented, but in any event he was represented and advised by a legal firm and had a barrister appear on his behalf in court.

He had no apparent cultural barriers in this case and was not too physically distant from a court; nor was he physically disabled, to impact on this measure of 'justice' in this case. We can therefore conclude that he was able to also access justice in this case.

Activity 10.5 Analysis

Principles of justice

Essay: To what extent were the principles of justice (fairness, equality and access) achieved in the Chaouk case?

Key point summary

Do your notes cover all the following points?

- ❑ Charges faced by the offender
 - Murder
- ❑ Facts of the case
 - The background
 - The shooting
 - Involvement/false confession and trial of Hablas
- ❑ Courts involved
 - Magistrates' Court: the bail/remand hearing
 - Magistrates' Court: the committal hearing
 - Supreme Court: the trial
- ❑ Sanctions imposed and their appropriateness
 - Imprisonment
 - Test of appropriateness of sanction
- ❑ Factors taken into account in sentencing
 - The maximum penalty for the offence
 - Sentencing practices for a murder charge
 - The nature and gravity of the offence
 - The offender's culpability
 - The impact of the offence on victims
 - Whether the offender pleaded guilty to the offence
 - The offender's previous character and likelihood of re-offending
 - The presence of any aggravating or mitigating factors
- ❑ Avenues of appeal
 - To the Court of Appeal (right to appeal not exercised)
- ❑ Extent to which principles of justice achieved
 - Fairness
 - Equality
 - Access

End-of-chapter questions

Revision questions

- 1 List reasons why Hablas may have confessed to the killing of the victim initially.
- 2 Explain the difference between bail and remand.
- 3 Suggest two reasons why a person charged with murder will usually not be granted bail.
- 4 In which court is a committal hearing conducted? Why are committal hearings held before the trial for an indictable offence in Victoria?
- 5 Explain the difference between an 'intentional' murder and a 'reckless' murder.
- 6 Justice Bell suggests a number of reasons for believing that the killing was not planned/premeditated despite it being intentional. You have been asked to speak to a Year 10 class on intention in crimes using this case as an example. Select two reasons why the judge ruled that the killing was not planned in the Chaouk case. Prepare a brief written summary or PowerPoint that could be used to explain to the Year 10 class the key reasons for the ruling in the Chaouk case.
- 7 Justice Bell classified the murder as 'a serious example of this crime'. What was the purpose of Justice Bell coming to this classification?

Practice exam questions

- 1 Using the Chaouk case to illustrate, explain the role of the jury in a criminal trial in Victoria. [5 marks]
- 2 In the Chaouk case, the defendant was not granted bail. Explain: [2 + 3 = 5 marks]
 - a the presumption of bail that exists in Victoria
 - b three reasons a person may not be granted bail.
- 3 Emma has read media reports concerning the Chaouk case and is confused as to why a person charged with murder would appear before the lowest court in Victoria, the Magistrates' Court. Explain two reasons why Chaouk appeared before the Magistrates' Court. [4 marks]
- 4 Use the Chaouk case to illustrate the following: [6 marks]
 - a What is a 'victim impact statement'?
 - b Who may make a victim impact statement?
 - c Why are they used?
- 5 Using one of the criminal cases you have examined in this unit of study: [6 + 4 = 10 marks]
 - a Explain the difficulties a member of the public may have in understanding why a person convicted of murder in one case is sentenced to 18 years and another offender convicted of murder is sentenced to 30 years' imprisonment.
 - b Explain any four factors that a court takes into account before sentencing an accused in Victoria.
- 6 Explain, with the use of examples from a criminal case you have studied this year, the difference between mitigating and aggravating factors in sentencing. [6 marks]
- 7 Refer to the Chaouk case. What was the final sentence imposed on the defendant in the case? Do you think the sentence was appropriate in all the circumstances? Explain why/why not. [6 marks]

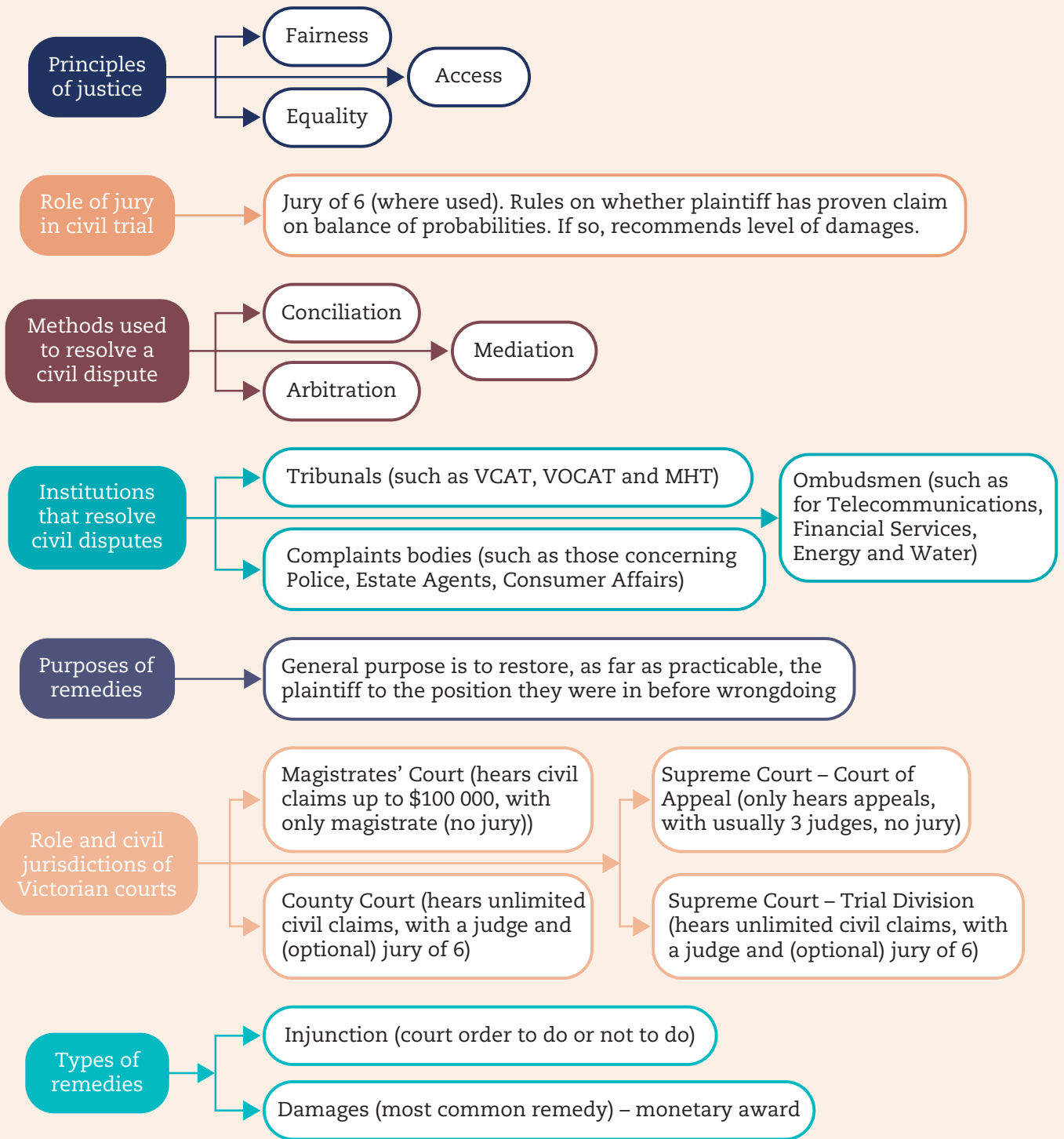
Chapter 11

Unit 2 – Area of Study 2

Remedies

This chapter provides an introduction to remedies and explores the important principles of justice behind our legal system (fairness, equality and access). It will investigate the methods used to resolve a civil dispute, such as mediation, conciliation and arbitration, and the institutions that resolve these disputes, such as tribunals, ombudsmen and complaints bodies. The role and civil jurisdictions of the Victorian courts will be outlined, as will the role of a jury in a civil trial. This chapter will finish with a consideration of the purposes of civil remedies, followed by an examination of two common remedies in civil law (damages and injunctions).





Key terms

arbitration a method of dispute resolution whereby an independent third party (known as an arbitrator) is appointed to listen to the evidence of both parties and make a binding decision

conciliation a method of dispute resolution whereby a third party assists the disputing parties to reach their own decision; the conciliator can offer advice and make suggestions to assist parties

damages a monetary award; this is the most common outcome of a civil case

injunction a remedy in civil law that is 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

mediation a method of dispute resolution with a structured negotiation process, comprising

an independent person (mediator) assisting parties to identify and assess options and negotiate an agreement to resolve their dispute

remedy any means by which a civil wrong is redressed

tribunal a body whose function is to settle disputes or grant rights under the law as an alternative to the courts; generally specialised in a defined area of the law

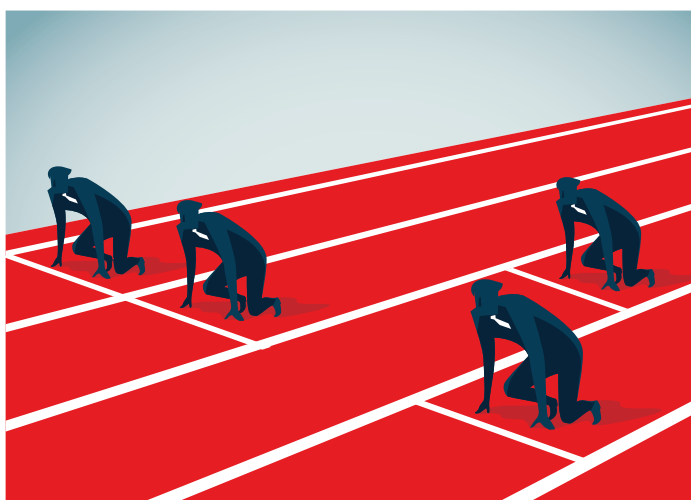
11.1 Principles of justice: fairness, equality and access

As with criminal law, the aim of civil law is to protect the rights of individuals in society. Where a person's civil rights have been infringed, the person who has been wronged may choose to take action in an effort to have their rights restored. Often it is not simply a matter of only wanting rights recognised – people who have had their rights infringed will usually also seek an outcome, known as a **remedy**. This may range from a court order requiring a party to cease doing something (such as an order to stop building work), an order that a party take particular action (such as publishing an apology), or an order for an award of money (known as damages). A person who has had their civil rights infringed may consider a range of methods for resolving their dispute and may prefer, for a number of reasons, to seek a resolution of their dispute outside the court system. In any case, the three guiding principles of fairness, equality and access remain important measures of whether or not justice is being achieved.

Fairness

Fairness is achieved when fair legal processes are in place and all parties receive an unbiased hearing. The following are some examples of how the principle of fairness is maintained in civil law:

- a defendant must be given full details of any claim or action against them
- a defendant and a plaintiff have rights to be represented and advised in any civil action
- methods such as mediation and conciliation encourage the parties to resolve the dispute themselves as opposed to having a decision made for them
- **tribunals** have been created as specialised forums for resolving disputes between parties, usually without the high costs associated with courts
- there are strict rules of evidence and procedure at any civil trial, and they apply to both parties.



Fairness is more than treating someone the same. It involves removing inequalities and bias, allowing people to understand their rights, and to be heard.

Over the years, our courts have developed a body of law – known as ‘common law’ – which has protected and preserved people’s rights. It has allowed the protection of these rights through the development and application of remedies the courts have allowed and ordered in favour of parties ‘wronged’ by the actions or omissions of others. The common law, together with statute law and the creation of tribunals, complaints bodies and the development of court procedures designed to promote justice and equity, have allowed steps to be taken toward a fair system. Keep this principle of fairness in mind as you read about civil law and the range of remedies provided.

Equality

Another important principle that must be considered in our civil law is that of equality; to be treated the same as others and without discrimination.

In addition to a measure of protection Australians have under anti-discrimination laws (such as the *Age Discrimination Act 2004* (Cth) and the *Equal Opportunity Act 2010* (Vic)), our civil law has evolved with a focus on eliminating bias, discrimination and prejudice – all factors that stand in the way of any system allowing true equality.

For people to be equal before the law, our legal system needs to provide for all people to be heard and for all to be able to access the legal system without barriers that are too difficult to overcome. It is also important that any outcome within our legal system is based on the law, not on a person's characteristics, culture, beliefs, social status, gender etc.



Equality involves recognising people as individuals and allowing each to exercise their rights regardless of differences, appearances, beliefs or gender.

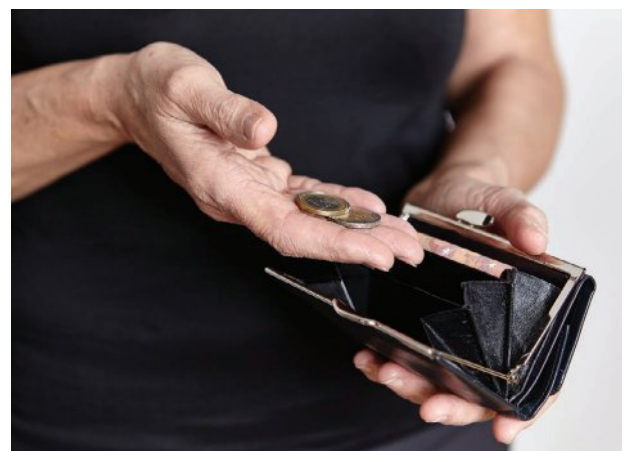
Access

Access is another key guiding principle underpinning our legal system. People need access to information, support and assistance in the recognition and protection of their civil rights under the law.

As we have seen, access can refer to a person's ability to obtain information and advice in a language they understand, a person's ability to receive legal advice or to be represented even where they are financially disadvantaged, and even to a person's ability to attend a court or to obtain advice within a geographically accessible region.

Our legal system can also improve a person's access through:

- methods of dispute resolution which allow views to be heard and allow the parties to reach their own agreement, where possible
- the creation of complaints bodies and websites that provide guidance about rights
- tribunals that are specialised and effective in dealing with civil disputes
- a court system in which courts are arranged in a court hierarchy to provide some degree of specialisation
- providing low-cost alternatives to the traditional court system (such as tribunals and complaints bodies).



An inability to pay for legal advice and or representation can impact a person's ability to truly access the justice system.



11.2 Methods used to resolve civil disputes

As we consider the methods used to resolve civil disputes, it is important to keep in mind a number of factors that influence why a person who has been wronged may seek one dispute resolution method over another.

For example, where both parties are still talking to each other and wish to resolve the dispute so their relationship can continue, they may follow a method that allows them to openly discuss their perspective on what is in dispute. This open discussion, which may or may not involve an independent third party, will be undertaken in the hope of finding some common ground and, in turn, an agreement. This may be the case with neighbours who are in dispute but who also recognise that they need to resolve the dispute in a way that allows them to maintain some form of relationship in the future.

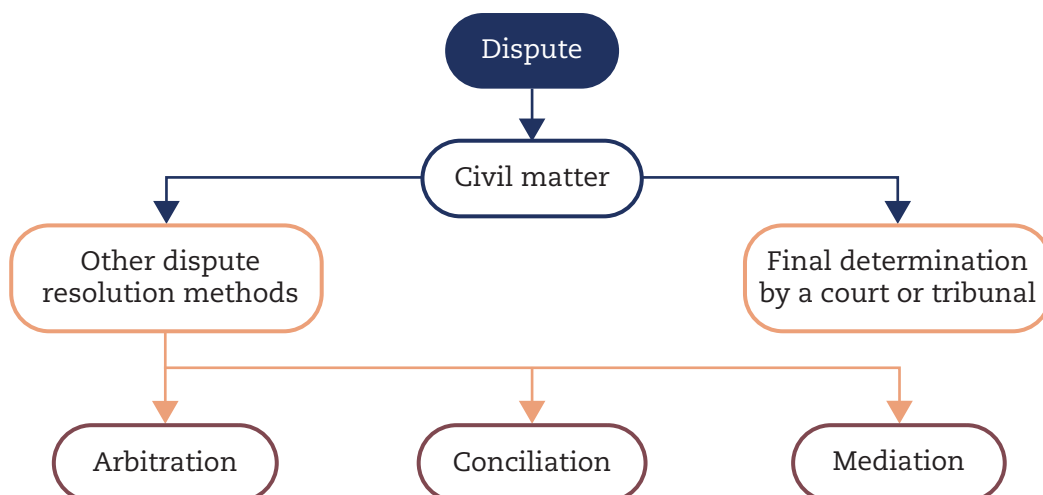


Figure 11.1 Methods used to resolve a civil dispute

In other disputes, however, the parties may be completely in disagreement or one party may be refusing to even discuss the issues causing the other to feel aggrieved. This type of dispute, such as a workplace dispute or shop lease dispute, may mean a third party needs to be involved to make a decision for the parties.

It is also important to keep in mind the overall purpose of civil remedies when considering the best method to employ in resolving a civil dispute. Generally speaking, the purpose of civil remedies is to restore the wronged parties to their original position; that is, prior to the wrongdoing. The party who has been wronged needs to keep in mind which method will most likely lead to the restoration of their position before the wrongdoing took place.

Mediation

Going to court will generally be a last resort for parties. In order to avoid the costs, stress and intimidating formalities many associate with a court case, individuals will often seek methods to resolve their civil dispute themselves. They may try **mediation**. In most cases before the courts or Victorian Civil and Administrative Tribunal (VCAT), the parties will be first ordered to undergo mediation if they have not explored this option themselves. Originally an alternative to civil courts, mediation may now be part of the court process too – this applies to conciliation and arbitration as well. It is recognised as a beneficial method for the parties to use, before all decision-making is taken out of their hands.

Mediation involves a trained, independent mediator, who meets with the parties and helps them to negotiate with each other in order to resolve their dispute. It is confidential and will only work effectively if all parties are willing participants. It is voluntary and involves a face-to-face meeting. The mediator oversees and controls discussions, but this is done with the aim of identifying issues – the mediator does not make suggestions or try to put forward solutions. This is not their role: making suggestions to one party may be seen as taking sides and so may limit any chance of the parties being able to cooperate and to understand the views of the other party.

The parties in mediation are encouraged to take an active part in the process.

Mediation focuses mainly on the parties (their needs and interests) rather than formal rules of procedure. The mediator is trained to manage and control discussions and interactions between the parties without providing advice as to how the parties should resolve their dispute. The mediator's role is to structure the meeting in such a way as to allow the parties to discuss and consider the issues in dispute and, in particular, possible solutions.

The focus in mediation therefore is on assisting the parties to come to their own agreement whenever possible. In other words, the mediator does not make or impose a decision – it is up to the parties themselves to reach their own agreement.

Examples of when mediation can be used are when people have a business or workplace disagreement or neighbours are in conflict with one another.

Mediation is not only for use in relation to disputes outside the court system. As noted previously, the Magistrates' Court, the County Court and the Supreme Court in Victoria all use mediation as a step in resolving civil disputes before them. As we will see, Victoria's largest tribunal, VCAT, also uses mediation. It is also compulsory to use mediation in a pilot scheme in certain Magistrates' Courts (for example, Broadmeadows, Ballarat) where civil claims are under \$40000.

Dispute resolution methods, such as mediation, conciliation and arbitration, are no longer alternatives to the courts but are now used by the courts also to resolve disputes.

Go to the website of the Magistrates' Court of Victoria (www.mcv.vic.gov.au) and read the section 'Mediation pilot program'.





Mediation helps to resolve disputes in many areas, including neighbourhood disputes.

Conciliation

People in dispute will sometimes benefit from advice to assist them in coming to an agreed resolution of their dispute. This can be achieved through the dispute resolution process known as **conciliation**.



Conciliation involves a trained third party who can provide advice on possible solutions to a dispute.

Conciliation, like mediation, is a process in which the parties concerned agree to meet with an independent, trained person (a conciliator) to discuss the issues in dispute. The conciliator is usually a specialist or has experience in the field of the dispute and so can offer constructive guidance as to how the parties might consider settling the dispute themselves.

As with mediation, conciliation:

- can only work if both parties are prepared to work towards a resolution
- is confidential
- involves no decision being made for the parties – any agreement is up to the parties at the end of the conciliation process.

Conciliation can be used for disputes where advice or recommendations as to a possible settlement may be useful, such as in family law, consumer disputes or discrimination complaints. For example, people who make a claim to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) with a discrimination complaint (for example, they have been sacked from their employment, or not hired, due to discrimination) will often have their dispute conciliated; that is, a conciliator from VEOHRC will endeavour to see if the dispute can be solved by conciliation before the dispute, if necessary, is taken to VCAT.

In a Family Court case, parties who are in dispute over parenting agreements for the child or children of their relationship will generally be required to show that they have taken part in Compulsory Family Dispute Resolution before the Family Court will hear their case.

Go to the website of the Family Court (www.familycourt.gov.au) and read the publication 'Applying to the court for orders'.



The Family Court of Australia in Melbourne is housed in the Commonwealth Law Courts building, on the corner of La Trobe Street and William Street.

This can involve the parties meeting with a trained conciliator. The conciliator will set up a structured session for the parties to discuss the issues in dispute. The conciliator will also provide advice as to possible solutions (including possible orders that the Family Court could make if the parties proceed) so the parties can consider these when reaching any agreement between themselves. This is aimed at not only encouraging parents to take a cooperative approach to their dispute and the future but also allowing them the benefit of advice and recommendations from a trained and experienced conciliator.

The key difference therefore between mediation and conciliation is that in conciliation the conciliator offers expert advice and recommends a possible solution (based on their expertise); whereas this does not occur in mediation.

Arbitration

At times, the parties need a formal process where a decision is made for them, rather than by agreement between them. One suitable process in this instance is **arbitration**.

Arbitration may be a process that both parties to a dispute agree to take part in. People may agree to arbitration and on their choice of arbitrator, but often one person will apply for arbitration and the other person is obliged to participate. This process involves the parties in dispute presenting their case and evidence to the arbitrator.

The arbitrator makes a determination and the parties are bound by the arbitrator's decision. This means the decision is enforceable if one party does not comply with the terms of the arbitrator's decision.

Arbitration is often used in disputes involving contracts, such as a building or lease contract, and requires both parties to take part in the process as one of the terms of the contract. For example, a lease agreement for a shop in a shopping centre can specify that arbitration is to be used if the parties disagree about rent payable by the tenant. If the tenant disagrees with a rent increase suggested by the landlord, the parties may be required (under the lease agreement) to take part in a process of arbitration. A valuer experienced in shopping centre rental amounts may be appointed as an arbitrator and will, after listening to arguments or submissions by both parties, make a ruling on the rent payable by the tenant.

Like mediation and conciliation, arbitration is confidential. This means the people taking part will not have their dispute reported in the media (as often occurs with cases before the courts). Unlike mediation and conciliation:

- arbitration is compulsory
- arbitration is more formal (with evidence being presented to an arbitrator as opposed to a round table discussion)
- a decision is made for the parties in arbitration.

Arbitration is also used where a civil claim is lodged in the Victorian Magistrates' Court for an amount less than \$10000. In this case, the court will arrange an arbitration hearing, often before a court registrar and usually in one of the meeting rooms in the court building.



Activity 11.1 Structured questions

Methods used to resolve civil disputes

- 1 Describe the main differences between mediation and conciliation.
- 2 Describe the similarities between mediation and conciliation.
- 3 Recount an example of when each of the following methods may be used:
 - a mediation
 - b conciliation
 - c arbitration.

11.3 Institutions that resolve civil disputes

Not all civil disputes can be resolved by the parties themselves and, as noted previously, courts are often seen as a last resort (a final option) in resolving such disputes. This is mainly due to the desire of most individuals to avoid the costs, stress and time taken to have a case heard before a court. In order to allow for an efficient system of dispute resolution, a number of alternative forums for resolving disputes have evolved in Victoria, including tribunals, ombudsmen and a range of complaints bodies.

Tribunals

The term 'tribunal' comes from the time of the Roman empire and the use of a tribune, who stood as an alternative for common citizens to resolve their disputes through, rather than having a formal hearing before a magistrate (who tended to come from the ruling class and so was often seen as out of touch with common values and aspirations).

Tribunals have evolved therefore as alternative forums for the resolution of disputes in certain specialised areas of the law. They can be administrative or civil. Administrative tribunals focus upon actions or decisions of government and the consequences of government legislation or regulation, whereas civil tribunals have been created to resolve disputes involving individual or private rights.

Examples of Commonwealth tribunals include the Administrative Appeals Tribunal (which can hear claims concerning social security and taxation) and the National Native Title Tribunal. In Victoria, three tribunals are the Victorian Civil and Administrative Tribunal, the Victims of Crime Assistance Tribunal and the Mental Health Tribunal.

Victorian Civil and Administrative Tribunal



The owner of this Camberwell home took his builders to VCAT in relation to a building dispute.

In Victoria, the largest tribunal is the Victorian Civil and Administrative Tribunal (VCAT), which can review decisions of the Victorian Government as well as resolve civil disputes, such as civil claims and planning, building and tenancy disputes.

VCAT is widely regarded as the busiest tribunal in Australia, hearing more than 85 000 cases each year. Created in 1998, VCAT is made up of a large number of specialised areas known as 'lists'; for example, planning disputes are heard by the Planning and Environment List, discrimination complaints are heard by the Human Rights List.



Video

Over the years, VCAT has established a process of resolving disputes that is timely (i.e. with a minimum of delays) and cost effective. For a broad range of disputes, there is either a one-off low application fee or, for claims under the Human Rights List, no fee. VCAT is generally less formal than a court. In most cases, you do not need a lawyer or professional representative. In fact, in most cases you must ask VCAT's permission to have a legal representative. Mediation is used in an effort to see if the parties can agree about how to best resolve their dispute. If this cannot occur, a decision is made by the Tribunal member hearing the case, after hearing from each party and considering the evidence.

Go to the VCAT website at www.vcat.vic.gov.au for more information about its functions.



At 86 years of age, Hazel Smith challenged Yarra Trams in VCAT regarding the provision of trams that could be accessed by the elderly.

Since its creation under an Act of the Victorian parliament, the jurisdiction of VCAT has expanded steadily. This is because over time parliament has moved particular types of disputes away from the courts and added them to the jurisdiction of VCAT. The main reasons this steady expansion of VCAT's jurisdiction has occurred are:

- **Specialisation:** by setting up a tribunal list that can deal with specific disputes (e.g. in the area of building contracts or planning disputes), the dispute will hopefully be resolved in a more satisfactory manner for the parties. The application process can be streamlined by the use of online applications, which people can fill out without legal advice.
- **Time:** removing certain disputes to fit within the jurisdiction of VCAT not only frees up the time of the courts to deal with other disputes, including criminal cases, but improves the timely resolution of disputes.
- **Cost:** one of the greatest criticisms of our courts is the expense involved with any court action. By providing VCAT with the jurisdiction to hear disputes, the costs can be kept to a minimum. Generally speaking, VCAT is far less formal than the courts in terms of processes, forms and even the need for legal representation, and so can offer a forum for dispute resolution that costs less than court action. This is not to say VCAT is a cheap alternative in all cases. Some planning appeals before VCAT, for example, can involve fees and costs in the thousands of dollars. However, for many civil disputes and contractual cases involving leases or building contracts, the costs of proceeding via VCAT are significantly lower than those that would be associated with a court case. Many claims to VCAT, such as those to the Human Rights List, are free of any application fee.

VCAT has four Divisions – Administrative, Civil, Human Rights and Residential Tenancies – and hears similar cases within specialised lists within each division.



Figure 11.2 The four divisions of VCAT

Table 11.1 VCAT divisions, claims heard and examples of claims

Division of VCAT	Range of claims heard	Examples of claims/cases
Administrative Division	<p>The Administrative Division deals with inquiries concerning the professional conduct of certain professionals such as lawyers, as well as applications to review decisions made by government and other authorities.</p> <p>Administrative Division has three lists:</p> <ul style="list-style-type: none"> • Legal Practice • Planning and Environment • Review and Regulation 	<p>The Law Institute, which is responsible for the registration of lawyers in Victoria, has banned Anna from practising as a lawyer as she has allegedly been involved in criminal activity. Although charged with offences, her case has not yet been heard by a court. Anna claims the offences are baseless and wishes to keep practising as a solicitor.</p>
Civil Division	<p>The Civil Division rules on a range of civil disputes, including consumer disputes, private home/unit (domestic) building work, shop/business leases (retail tenancies) and the sale and ownership of property.</p> <p>Civil Division has three lists:</p> <ul style="list-style-type: none"> • Civil Claims • Building and Property • Owners Corporations 	<p>Emma leases a shop in a shopping centre. She is told by Centre Management that she must stay open until 10 p.m. Monday to Friday although this is not in her lease. Emma has been threatened with eviction.</p>
Human Rights Division	<p>The Human Rights Division deals with claims or complaints about guardianship and administration, equal opportunity, racial and religious vilification, health and privacy information, disability claims and decisions made by the Mental Health Tribunal.</p> <p>Human Rights Division has two lists:</p> <ul style="list-style-type: none"> • Guardianship (including Powers of Attorney) • Human Rights 	<p>Joe is sacked from his position as a gardener at a local council after his supervisor discovered he had joined a union.</p>
Residential Tenancies Division	<p>The Residential Tenancies Division rules in relation to disputes concerning:</p> <ul style="list-style-type: none"> • residential tenants and landlords • public housing tenants • caravan park owners and residents <p>Residential Tenancies Division has one list:</p> <ul style="list-style-type: none"> • Residential Tenancies 	<p>Rupert rents a home in Parkville. His landlord, Leslie, has refused to repair a hot water service at the home rented by Rupert, leaving Rupert unhappy and having cold showers.</p>

Victims of Crime Assistance Tribunal

Tribunals such as VCAT and VOCAT offer alternative forums for resolving disputes in society.

The Victims of Crime Assistance Tribunal (VOCAT) was created by an Act of the Victorian parliament as a specialised forum in Victoria to receive applications by victims of violent crime (committed in Victoria) and to provide financial assistance to those victims.

A claim to VOCAT can assist victims by providing financial aid for present and possible future expenses directly flowing from a crime. A person hit by a 'coward punch', for example, may experience not only the physical injuries in the attack but also substantial medical bills, as well as loss of an income or the need for ongoing medical or dental treatment. In that instance, VOCAT can provide financial assistance.



Victims of crime can seek financial assistance from VOCAT.

Go to the website of Victims of Crime Assistance Tribunal (VOCAT) at www.vocat.vic.gov.au for more information about assistance available.

The *Victims of Crime Assistance Act 1996* (Vic) defines who is a 'victim' for the purposes of a claim: this includes any person against whom a violent crime was committed in Victoria. They may be:

- the direct victim (the primary victim – the person directly injured or harmed)
- a secondary victim – for example, a person present at the scene as a witness to a violent crime
- a related victim – a person who, at the time of the violent crime:
 - was a close family member of a deceased primary victim (such as a spouse, parent or guardian)
 - was a dependent of a deceased primary victim
 - had an 'intimate personal relationship' with a deceased primary victim
- a person who has incurred funeral expenses as a direct result of the death of a primary victim.

The *Justice Legislation Amendment (Victims) Act 2018* (Vic) has brought about the following changes to the *Victims of Crime Assistance Act 1996* (Vic):

- There was formerly a two year time limit for victims of acts of violence (consisting of physical or sexual abuse), where at the time of the offence the victim was under the age of 18 years – this has now been abolished. Such applications may be made at any time after the offence.
- In addition, recent changes also allow victims of child abuse material offences and sexual servitude offences to be eligible for VOCAT assistance.

Financial assistance may include the costs of counselling, medical expenses, loss of earnings, assistance for funeral expenses and, for related victims, assistance for dependants of a deceased victim.



VOCAT awards can include amounts to cover funeral and counselling expenses.

The Mental Health Tribunal

A third example of a tribunal operating in Victoria with a specialised jurisdiction is the Mental Health Tribunal (MHT).

Under the *Mental Health Act 2014 (Vic)*, the MHT has the main function of ruling whether criteria for ‘compulsory mental health treatment’ apply to a particular person. The tribunal may make a treatment order for a person if all the criteria in the legislation apply to that person.

If a person has been diagnosed with a mental illness, a recommendation may be made (e.g. by a treating psychiatrist) that treatment is necessary for that illness. Where the person diagnosed does not agree to receive treatment, an order can be made by the MHT (provided certain criteria are met).

The main role of the Tribunal is to decide whether mental health patients need compulsory treatment to prevent a serious deterioration in their mental health or physical health, or serious harm to themselves or someone else. Hearings are kept as informal as possible, are conducted in private and may take place in a hospital or via video conferencing. The person who could be affected by an order is entitled to ask for legal advice and representation at the hearing and to full details of the application being made. Interpreters are also provided if the person requires one.

What is involved at a hearing of the MHT?

The Tribunal hearing of the MHT will involve three Tribunal members, made up of a legal practitioner (experienced in mental health law), a psychiatrist member or medical member and an ordinary member of the community. The MHT is an independent tribunal and aims to ensure the hearing is fair for the patient.

The MHT members will read:

- a report from the applicant’s treating team and relevant information from their medical file
- any information the applicant wishes to provide.

The Tribunal members will then have a discussion with the applicant and their treating team. They ask the applicant about their views and any preferences they have.

After the above process the MHT then makes a decision, based on criteria in the *Mental Health Act 2014 (Vic)*, on whether or not the applicant’s treatment will be compulsory. The MHT then informs the applicant of this decision. Hearings, which are private and confidential, usually take about an hour.

Go to the website of the Mental Health Tribunal (MHT) at www.mht.vic.gov.au for more information.



Video

Activity 11.2 Structured questions

Tribunals

- 1 Outline two reasons why tribunals such as VOCAT and VCAT have been created.
- 2 What advantages might there be for a person wishing to claim for harm, by proceeding to VOCAT rather than suing the alleged offender in a civil court case?
- 3 Explain the need for a tribunal such as the MHT.

Ombudsmen

Go to the website of the Telecommunications Industry Ombudsman at www.tio.com.au for more information about their role.

Go to the website of the Australian Financial Complaints Authority at www.afca.org.au for more information about their role.

An ombudsman is a person appointed by, but independent of, the government. They are, generally speaking, given the power to investigate complaints and publish recommendations in respect of certain areas of government, the public service and industry, and they may also act on behalf of consumers. The services offered include receiving a person's complaint and taking up the issues raised, on the person's behalf, with the provider in an effort to resolve the dispute.

One example is the Telecommunications Industry Ombudsman, which provides a service to deal with complaints by businesses and residents about their internet or telephone service.

Another example is the Australian Financial Complaints Authority, which, as the title suggests, offers the service of resolving disputes between consumers and financial service providers such as banks, credit providers, insurance companies and financial planners.

A third example is the Energy and Water Ombudsman, which has been created to resolve disputes concerning electricity, gas or water supplies and bills.

In addition to these specific ombudsmen, Victoria also has the office of the Victorian Ombudsman, which deals with complaints about government actions or decisions (at both local government and state government levels). The Victorian Ombudsman can investigate the complaint and advise whether the action or decision was reasonable or not. They can also make recommendations to the department concerned to make changes to policies and procedures to avoid the problem in the future.

When you make a complaint to the Ombudsman about a government action or decision, they can investigate the complaint and advise you about what occurred and whether it was reasonable or unreasonable.

Complaints bodies

A number of other complaints bodies have also been created in Victoria.

Victoria Police has a complaints service to deal with complaints about police officers, such as allegations about improper or unprofessional conduct.

Consumer Affairs Victoria was created to deal with the many varied disputes and complaints to do with consumer affairs. It deals with a broad range of inquiries and complaints concerning businesses, housing and accommodation, shopping, and the purchase, sale and rental of cars.

Information, advice, complaints and, where necessary, dispute resolution services concerning real estate agents regarding the purchase, sale and management of property are handled by Consumer Affairs Victoria within their 'Resolve your problem or complaint' service.

Go to the website of the Victorian Ombudsman at www.ombudsman.vic.gov.au for more information about their role.

Go to the website of the Victoria Police at www.police.vic.gov.au for more information about reporting police complaints.

Go to the website of Consumer Affairs Victoria at www.consumer.vic.gov.au for information on real estate agents in the 'Complaint handling and dispute resolution – estate agent obligations' section.

Go to the website of Consumer Affairs Victoria for more information on how to 'Resolve your problem or complaint' when shopping.



11.4 Role and civil jurisdictions of the Victorian courts

Courts also play a vital role in dispute resolution and the making of orders for civil remedies where applicable in Victoria. Courts in Victoria are arranged in a hierarchy.

Supreme Court of Victoria

The Victorian Supreme Court was established by Victorian legislation in 1852 and has acted as Victoria's superior court since that year.



The Supreme Court hears the most serious criminal and complex civil cases in the state. It also hears some appeals from Victorian courts and tribunals. As the Supreme Court is the highest Victorian court, the only court that can review its decisions is the High Court of Australia.

The Supreme Court has two divisions: the Court of Appeal and the Trial Division.

Court of Appeal

The Court of Appeal only hears appeals. In hearing an appeal, usually heard by three Supreme Court judges, the court needs to rule whether or not a trial was conducted fairly and whether the law was correctly applied.

The Court of Appeal hears appeals from criminal or civil cases heard in the County Court or Supreme Court Trial Division. It also hears some appeals from VCAT.

In hearing an appeal, the Court of Appeal may:

- order the case be re-tried
- change the decision in the case (as an example, the Court of Appeal may increase or reduce the damages ordered at the trial)
- decide that there was no error made by the lower court and rule that the lower court's original decision stands.

Although most Supreme Court cases are heard in the Supreme Court in Melbourne, the court also hears cases in many larger regional locations, such as Ballarat, Mildura, Geelong, Warrnambool and Sale.

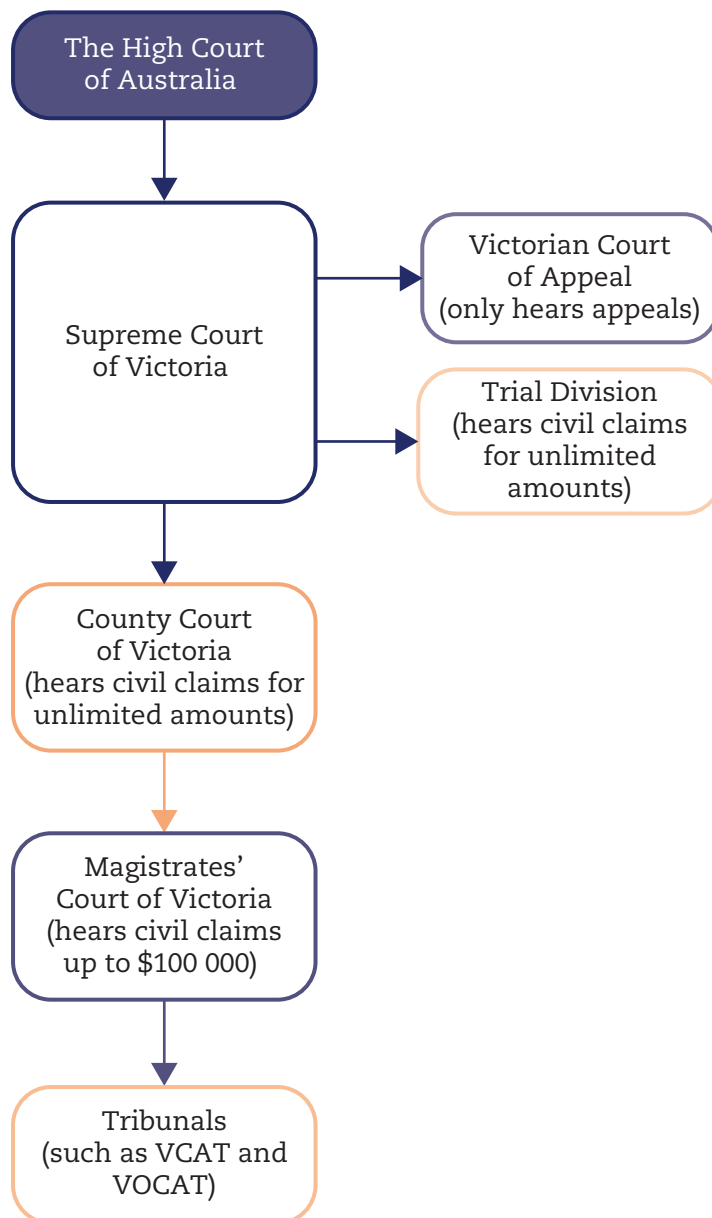


Figure 11.3 Civil jurisdictions of courts and tribunals in Victoria

Trial Division

The Trial Division hears some of the most serious criminal and civil cases in Victoria. Among cases heard here are:

- criminal cases such as those involving murder, attempted murder and treason
- civil cases (with no limit on the amount claimed)
- appeals from the Magistrates' Court and VCAT
- urgent applications for injunctions (for example, a court order that a party stop certain action until a trial can be heard).

Civil cases in the Supreme Court of Victoria Trial Division

In civil cases, one person (or organisation or company) takes civil action against another party whom they consider has breached their civil rights or entitlements under the law. There is no limit on the dollar amount of a civil claim before the Supreme Court of Victoria (the Court is said to have an 'unlimited civil jurisdiction'). A civil claim in this court may be heard by either a judge and jury or a judge alone.

Go to the website of the Supreme Court at www.supremecourt.vic.gov.au and read the section 'How the court works'.

County Court of Victoria

As the main trial court in Victoria, the Victorian County Court has jurisdiction to hear a broad range of criminal and civil cases.

Like the Supreme Court, the County Court has an unlimited civil jurisdiction and hears cases involving building disputes and claims for damages arising from a wide range of incidents, including medical negligence, serious injury and defamation cases.

Go to the website the County Court of Victoria at www.countycourt.vic.gov.au for more information.

Magistrates' Court of Victoria

The primary role of the Magistrates' Court is to resolve local civil disputes and relatively minor criminal cases. It hears the most cases of all Victorian courts. The Magistrates' Court is the first level of the Victorian court system. Sitting in 51 locations, it hears most matters that reach court. There is no jury and each matter is heard and determined by a 'judicial officer' (a term which includes magistrates and judicial registrars).

The jurisdiction of the Magistrates' Court means it hears cases across many areas, including:

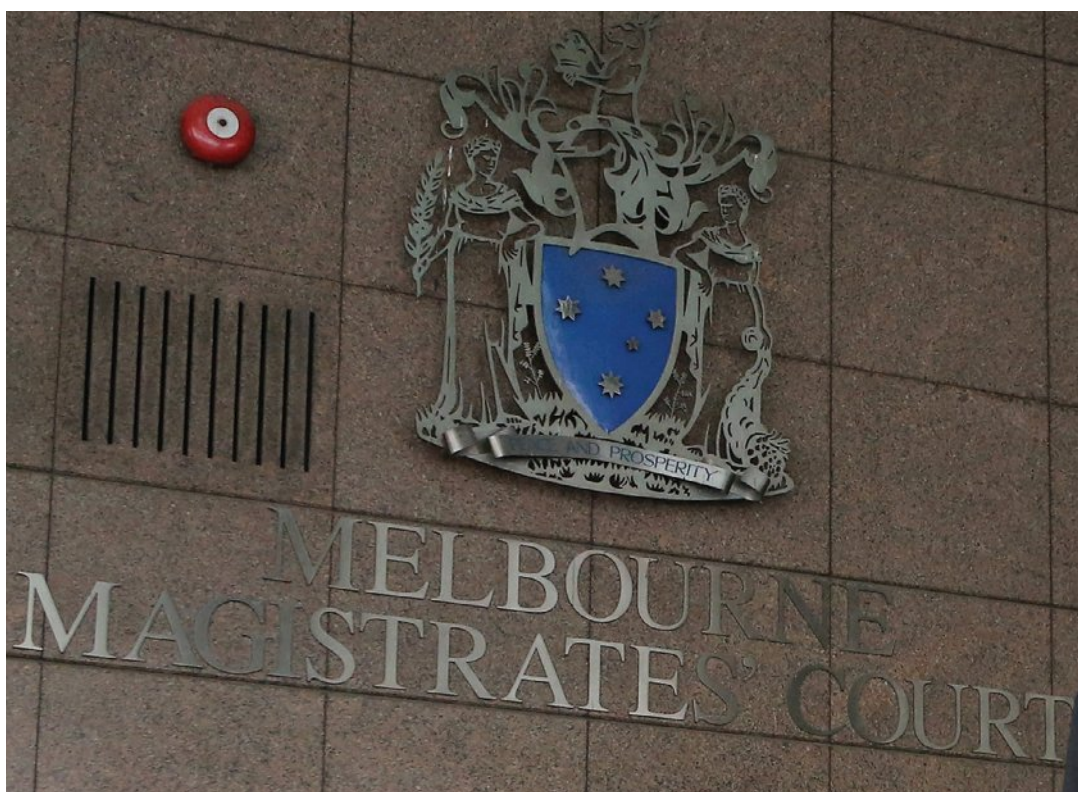
- intervention orders (for example, orders to avoid coming within 50 metres of the victim)
- criminal and traffic cases (for example, drink driving, speeding or careless driving charges)
- civil cases.

The Magistrates' Court can rule on most civil disputes over money or property up to the value of \$100,000. It hears civil claims for debts, damages for breach of contract, damage to property or for injury (e.g. car collisions) and fencing disputes. It also hears claims under the *Fair Work Act 2009* (Cth) and claims for compensation for workplace injuries.

Claims in civil cases up to \$10,000 are referred to arbitration. This means they are dealt with by an arbitrator, usually a member of the court staff such as a court registrar, rather than a magistrate. Arbitration for such claims is less formal than a court hearing.



The County Court of Victoria is the main trial court in Victoria.



Go to the website of the Magistrates' Court of Victoria at www.mcv.vic.gov.au for more information.

11.5 Role of the jury in a civil trial

Juries are only used in civil cases in the County Court and the Supreme Court and are optional. As most civil claims are settled 'out of court', civil juries are far less common than those in criminal cases.

As noted earlier in this chapter, a jury may be present in some civil cases in Victoria. A jury is only used in some civil cases in the County or Supreme Court, not in the Magistrates' Court (where a hearing will always be before a magistrate sitting alone).

In Victoria, the law regulating jury trials is the *Juries Act 2000 (Vic)*. The *Juries Act* sets out who is eligible for jury duty, how a jury is to be selected and empanelled, and how a jury is to operate.

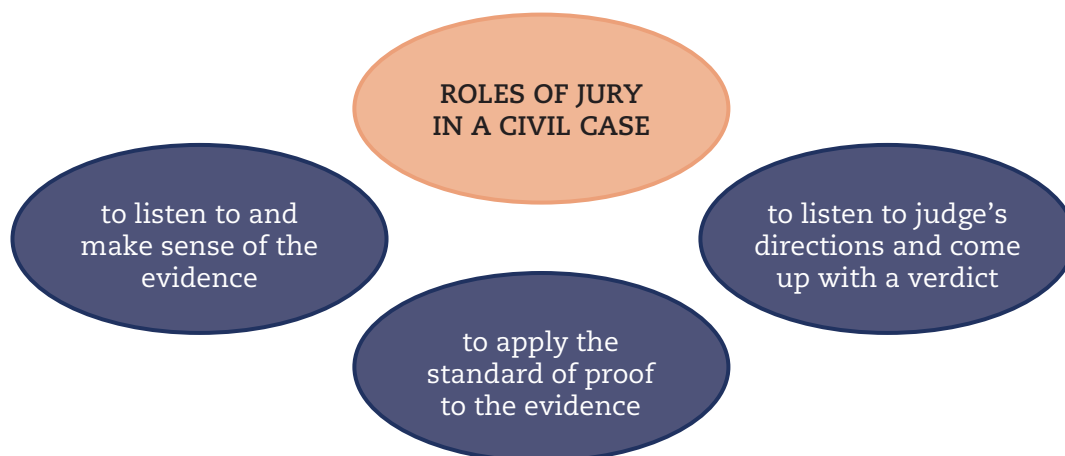


Figure 11.4 The general roles of a jury in a civil case.

The jury is a decider of facts. The jury must listen to and understand the facts and apply these facts to the law as explained by the judge. In order to decide on the facts placed in front of them, the jury must put aside prejudices, understand points of law explained and ultimately come up with a verdict based solely on those facts.

Specifically, the role of a jury in a civil trial is to make a decision about whether or not the plaintiff has proven their case on the balance of probabilities.

A jury of six persons (not 12, as is used in criminal trials) is optional in civil cases and only used if either party requests one. They are only used in the County and Supreme courts and have the additional role of recommending the amount of damages to be paid to the successful plaintiffs.

11.6 Purposes of remedies

The ultimate aim of any civil action is for the person who has been wronged and who has commenced the civil action (the plaintiff) to obtain some form of relief or an order that rectifies the wrong alleged by the plaintiff.

There are a number of purposes of civil remedies. The general aim of civil remedies is to restore, as far as practicable, the plaintiff to the position they were in prior to the wrongdoing occurring. This can be further broken down into a variety of purposes, including:

- to compensate the plaintiff for harm and loss caused (current and future predicted losses; e.g. future loss of income due to a physical injury)
- to stop a wrongful act from continuing
- to stop further wrongdoing in the future
- to require the wrongdoer to complete an act or contractual obligation
- to cancel a contractual obligation for the plaintiff
- to punish the wrongdoer or deter the wrongdoer from such wrongful acts or omissions in the future.

11.7 Types of remedies

There are two common types of remedies ordered in civil cases in Victoria: damages and injunctions.

Damages

Damages are a monetary award. They may be further classified as compensatory, nominal, aggravated and exemplary.

Compensatory damages

Compensatory damages are aimed at restoring the plaintiff to their former position.

Amounts paid can be very large, depending on the damages claimed and the opinion of the judge and the jury on the damages to be awarded. Compensatory damages may be further classified into one of the following sub-categories:

- 1 Special damages (those which can be calculated to a dollar amount, such as to cover medical expenses, repairs to cover property damage and lost wages)
- 2 General damages (those which can only be estimated, such as for future loss of wages or 'pain and suffering', or loss and enjoyment of life).

Nominal damages

Nominal damages are awarded where the plaintiff is successful and the court orders damages to be awarded to the plaintiff, but the plaintiff has suffered no real monetary loss although their rights have been infringed. Rather than offering a large sum of money nominal damages are used to demonstrate to the defendant that they have infringed the plaintiff's rights.

Aggravated damages

Aggravated damages compensate the plaintiff who has suffered an injury that has been aggravated by the motives or the conduct of the defendant; for example, where a defendant intentionally delays submitting documents sought in discovery. Damages may be awarded for the cost of delays or to cover additional costs incurred such as cost of legal representation.

Exemplary damages

Exemplary damages are awarded against the defendant in order to make an example of the person. Exemplary damages also aim to deter others from committing the same civil wrong.

For example, if a defendant company has caused large-scale pollution, the court may order exemplary damages. This aims to make an example of the defendant and to discourage others from doing the same thing.



Legal brief 11.1

Mullet action stalled

A judge in a NSW court has ordered a plaintiff to revise his claim in relation to legal action against a number of media organisations that had posted a photo of his 'mullet' hairstyle. The photo had been taken at a birthday party in Sydney in 2015 and uploaded to Facebook.

The plaintiff complained that his name had been tarnished and his reputation affected after his photo was not only posted and shared thousands of times, but

edited for memes and headlines, which made the plaintiff out to look ugly and be 'a joke'. The photo attracted thousands of comments. However, the judge ruled the memes, headlines and comments were more humorous and satirical than aimed at harming the plaintiff's reputation or status.

The plaintiff was ordered to file amended court documents if he wanted to continue with his claim for damages.

Activity 11.3 Case study

Mullet action stalled

Read Legal brief 11.1. In small groups, discuss the following points and see if your group can reach any consensus. Be ready to justify your findings.

- 1 Identify the loss or damage allegedly suffered by the plaintiff in the case.
- 2 Explain whether the law should allow media organisations to be sued for loss of reputation claims.
- 3 Should private individuals who post opinions or photos on social media that taunt or ridicule others be able to be sued?
- 4 Should people who re-post or share comments/posts about others be able to be sued?
- 5 Consider whether it matters if the person suing has no previous public profile or whether these claims should be limited to only allowing known celebrities to sue for loss of reputation.

News report 11.1

Former policeman succeeds in \$1 million claim from driver's insurer after fatal crash

A former Queensland police officer, David Paul Caffrey, left traumatised by a fatal car accident scene has successfully sued the dead driver's insurer for more than \$1 million.

The Supreme Court in Queensland found that a driver, Byron Williams, who was killed, after speeding and intoxicated with amphetamines and cannabis, when his car hit a tree on the Sunshine Coast in 2013, had a legal duty of care to the police officer. The Court accepted the argument by Caffrey's legal team that he suffered 'psychiatric injury' in the form of post-traumatic stress disorder (PTSD) after his experiences at the scene, including trying to keep Mr Williams alive with first aid and encouragement. Caffrey also had to lead the parents of the deceased to farewell their son shortly before his death.

Mr Caffrey was the first emergency services officer at the scene and climbed on the wreckage to find Mr Williams's legs were crushed. He cleared Mr Williams's airway and cradled his head, encouraging him to cling to life and speaking with him for some time before Mr Williams died.

Following the tragedy, Mr Caffrey was suicidal and was sacked from the police service in 2014.

The defence lawyers for Mr Williams's insurance company argued it was not his duty or responsibility to take reasonable steps to avoid exposing officers to psychiatric harm as a result of his death or suffering. They argued most people would expect that emergency service officers such as police were trained to avoid harm and psychiatric injuries at accident scenes.

However, Justice Peter Flanagan found that a person who causes through negligence a car accident

'must have in contemplation the fact that police officers are human and ... not entirely immune to psychiatric injury'.

In a ruling on January 30 2019, Justice Flanagan said nobody was 'entitled to drive in any manner he wishes, without regard to police officers who may attend at an accident he may cause ...'.

Justice Flanagan ordered the insurer pay \$1 092 948 in damages. The damages to Mr Caffrey included \$318 262 for past economic loss and \$469 490 for future loss of earning capacity.

Personal injury law expert Travis Schultz is reported to have commented that this case was unusual and was not likely to set a precedent as the law would not recognise a claim from a passerby or a police officer who had a 'more distant involvement with an accident scene', such as setting up a cordon or controlling traffic.



Justice Peter Flanagan

Activity 11.4 Folio exercise

Apply your understanding

Read News report 11.1 and complete the following tasks:

- 1 Note the award of damages in this case. If this case was in Victoria where the plaintiff had sought that amount, with which court or courts could they lodge their negligence claim?
- 2 The order for damages was said to cover Mr Caffrey's 'past economic loss' and 'loss of future earning capacity'. Identify the category or categories of damages these would fall into and justify your response.
- 3 Provide an example of how the case addressed each of the following principles:
 - a fairness
 - b equality
 - c access.

Injunctions

An **injunction** is a court order to do or stop doing something. It may be an order to do something, such as an injunction to:

- remove an illegally built fence
- stop the publication of a book that contains defamatory material about the plaintiff
- publish an apology in the media.

Alternatively, it may be an order to NOT do something, such as an injunction to:

- not demolish a protected house or building
- not withdraw funds from a bank account where ownership of the funds is disputed
- not continue further construction of an extension to a house.

An injunction may be granted in cases where the following conditions are fulfilled:

- Money damages would not be a sufficient or appropriate remedy on its own.
- The order is one that the court can effectively enforce.

Often an injunction is sought as a remedy in addition to damages.

Activity 11.5 Case study

Consumer Affairs Victoria

Consumer Affairs Victoria has reported that it had obtained an injunction against a door-to-door salesman who had used 'high pressure' tactics, often against the elderly, in selling carpet and cleaning products. The solution to the tactics of the salesman in the case was for Consumer Affairs Victoria to obtain an injunction against the salesman.

Why do you think the individuals affected left this issue to be dealt with by Consumer Affairs Victoria rather than taking their own individual cases to court? Discuss.

Key point summary

Do your notes cover all the following points?

- ❑ Important principles that form the basis for the resolution of civil disputes and our legal system are fairness, equality and access.
- ❑ Methods used to resolve a civil dispute
 - Mediation (mediator facilitates process but does not suggest resolution)
 - Conciliation (expert conciliator suggests resolutions)
 - Arbitration (arbitrator determines a compulsory resolution)
- ❑ Institutions that resolve civil disputes
 - Tribunals
 - Ombudsmen
 - Complaints bodies
- ❑ Victorian courts
 - The Supreme Court
 - The County Court
 - The Magistrates' Court
- ❑ Role of a jury in a civil trial: make a decision about whether or not the plaintiff has proven their case on the balance of probabilities
- ❑ Purposes of civil remedies: to restore the plaintiff to the position they were in prior to the wrongdoing occurring
- ❑ Types of civil remedies
 - Damages
 - Injunctions

End-of-chapter questions

Revision questions

- 1 Provide a definition of (and one example where the method may be used) for each of the following dispute resolution methods:
 - a mediation
 - b conciliation
 - c arbitration.
- 2 Name one of the tribunals you have studied in this chapter. Suggest three ways in which the resolution of disputes by that tribunal differs from the resolution of disputes by a court.
- 3 What role do ombudsmen play in the resolution of disputes in our society? Explain, using one example in your response.
- 4 What role do complaints bodies play in the resolution of disputes in our society? Explain, using one example in your response.

- 5 What is the upper limit for claims in each of the following courts in Victoria?
 - a Magistrates' Court
 - b County Court
 - c Supreme Court Trial Division.
- 6 Suggest three key things a jury must do in a civil trial in Victoria.
- 7 Outline the **general** purpose of civil remedies.
- 8 Define the civil remedy of 'damages'. Provide a (fictional) scenario illustrating why a plaintiff may seek damages.
- 9 Define the civil remedy of an 'injunction'. Provide a (fictional) scenario illustrating why a plaintiff may seek an injunction.

Practice exam questions

- 1 There are three key principles you have studied that underpin our legal system. Explain any one of these, showing its relevance to a civil case being heard by a Victorian court. [4 marks]
- 2 Read the following fictional case studies. [4 + 4 = 8 marks]

Case 1

Bill and Betty are seeking a divorce but also wish to divide the property from their marriage. They cannot agree on how to best divide the property.

Case 2

Gertrude and Gary are neighbours. Gary likes to have noisy late-night parties and when Gertrude complains Gary just tells her to 'put in ear plugs and go to sleep'. Gertrude is very frustrated, and when Gary tries to talk it through, Gertrude just screams at him about lack of sleep.

For each case:

- a Suggest one possible dispute resolution method that you studied in this unit that could be used in an effort to resolve the dispute.
 - b Define the dispute resolution method suggested in part a above.
 - c Justify your selection of the dispute resolution method for the scenario.
- 3 Outline the role and jurisdiction of one of the tribunals you have studied in this unit. [5 marks]
- 4 Using an example to illustrate, what is the role of an ombudsman? [3 marks]
- 5 In which Victorian court or courts could a person commence civil action if they wish to sue for the following amounts? Justify your selection. [2 + 2 + 2 = 6 marks]
 - a \$50 000
 - b \$90 000
 - c \$490 000
- 6 Using three key points in your response, explain the role of a jury in a civil trial in Victoria. [3 marks]
- 7 Explain the purpose of civil remedies. [2 marks]
- 8 Defining each remedy in your response, suggest how the remedy of damages differs from the remedy of an injunction. [4 marks]

Chapter 12

Unit 2 – Area of Study 2

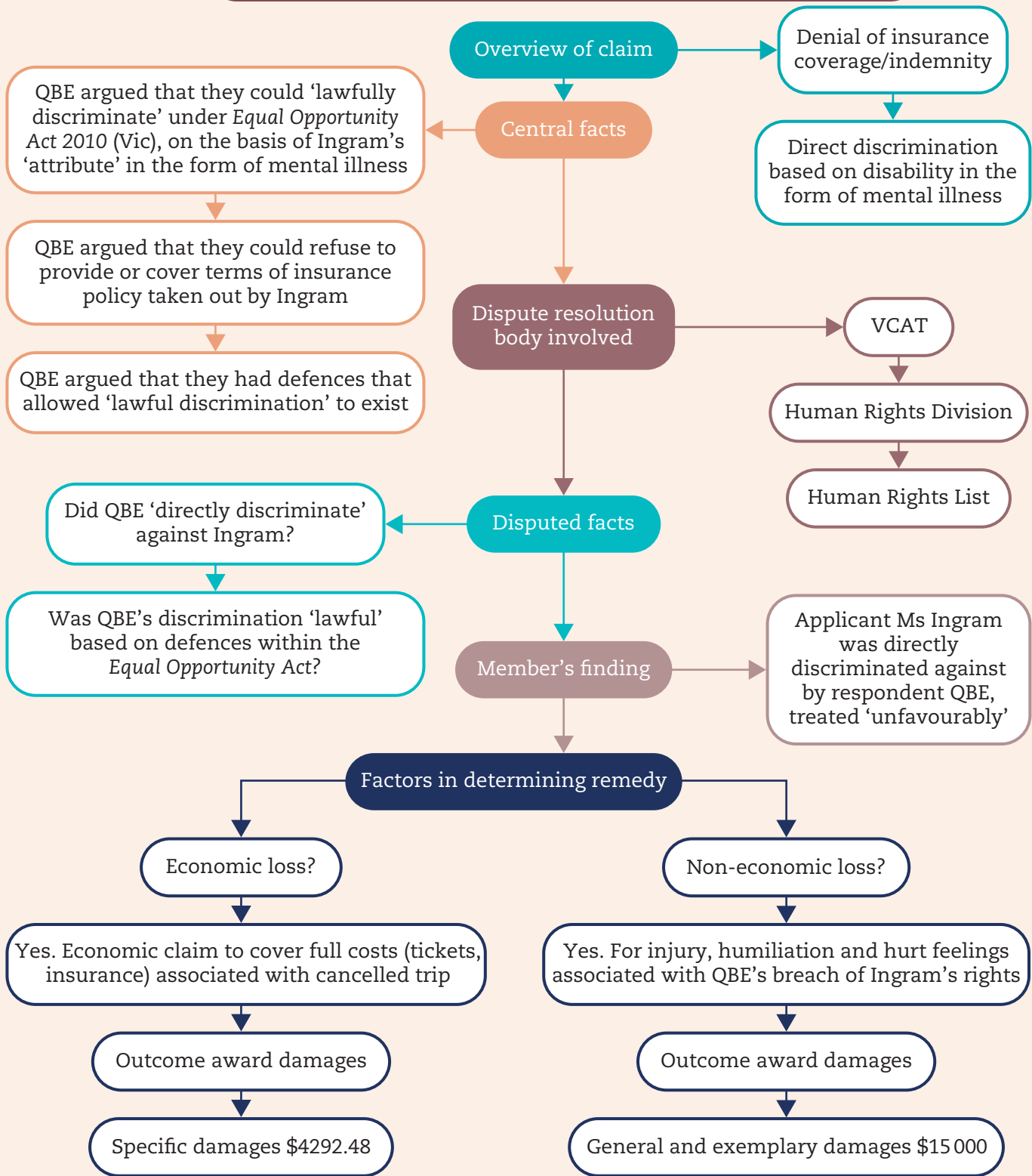
A civil case: mental health exclusion in travel insurance leads to discrimination – *Ingram v QBE Insurance (Australia) Limited (Human Rights)* [2015] VCAT 1936 (18 December 2015)

This chapter provides an examination of a civil case. The case, heard in the Victorian Civil and Administration Tribunal (VCAT), is *Ingram v QBE Insurance (Australia) Limited (Human Rights)* [2015] VCAT 1936 (18 December 2015). This chapter will commence with an overview of the claim and the facts of the case, followed by a review of VCAT, the methods of dispute resolution considered and their appropriateness. Remedies that were awarded and their appropriateness will then be considered, as will possible avenues of appeal. It will then conclude with an overview of the extent to which the principles of justice were achieved in this case.

Ella Ingram took QBE to court in 2015 after the insurance company refused to cover her cancelled trip. (ABC News: Amy Bainbridge).



Mental health exclusion in travel insurance leads to discrimination



Key terms

applicant the party to a VCAT hearing who applies to commence legal proceedings

declaration a document outlining that material provided to the court or VCAT by the parties is true and correct; parties are aware that if they make a false declaration, they are liable to penalties for perjury

member a qualified, expert, experienced and independent third party that oversees the hearing in a VCAT List

order a legal decision or instruction by the member to the parties designed to resolve the case; for example, pay damages

remedy any means by which a civil wrong is redressed

respondent the party in a VCAT hearing against whom legal proceedings have been commenced; they will respond to the claims

12.1 Claim and facts of the case

Lists are parts of a VCAT Division that specialise in hearing specific types of civil disputes and utilise the expertise of a member.

A member is different from a judicial member, in the form of a VCAT president, who is a Supreme Court justice who oversees operations within VCAT.

Go to the website of the Victorian Civil and Administrative Tribunal (VCAT) at www.vcat.vic.gov.au for more information.

The *Disability Discrimination Act 1992* (Vic) aims to prevent people or companies from discriminating against people with disabilities.

The *Equal Opportunity Act 2010* (Vic) aims to prevent discrimination, harassment and victimisation. It also aims to protect people from retaliation when they speak up regarding their rights.

On 18 December 2015, **Member** Ms Anna Dea of the Human Rights List within the Victorian Civil and Administrative Tribunal (VCAT) reached what Beyond Blue has hailed as a 'landmark' ruling. Member Dea made **orders** that QBE Insurance (Australia) Ltd (QBE), valued at \$18.5 billion, had a blanket mental health exclusion clause within its travel insurance policy that amounted to direct discrimination against 21-year-old Ms Ella Ingram.

The three-day hearing occurred in late October 2015, resulting in the first ruling of its kind. Member Dea found that QBE relied upon a mental illness exclusion clause in its travel insurance policy to refuse Ms Ingram (and her mother, Ms Linda Darragh) a reimbursement for a 2012 school trip to New York. This was after Ms Ingram was diagnosed with severe depression while in Year 12. Ms Ingram successfully challenged QBE for failing to honour their policy, in a case that could affect the entire insurance industry.

Central facts of the case

In late 2011, Ms Ingram was a Year 11 student. She booked a 12-day school tour to New York that would take place in 2012 with her Year 12 class. Ms Ingram's trip was paid for in full. She had also purchased a travel insurance policy from QBE.

In January 2012, Ms Ingram started feeling unwell. She was medically diagnosed as suffering severe depression that required hospitalisation. Based on advice from medical staff and her mother, Ms Darragh, Ms Ingram cancelled her trip. Ms Ingram had not suffered from a mental illness in the past.

Ms Ingram's mother made enquiries in April 2012 and lodged a claim in May 2012 under QBE's policy for the costs of the cancelled trip. QBE denied the claim in August 2012. This was confirmed by letter in December 2012.

Relevant law

The relevant law at the time was the *Equal Opportunity Act 2010* (Vic), seen as 'protective legislation', and the *Disability Discrimination Act 1992* (Cth). Both Acts prohibit discrimination because of a person's disability when providing goods and services.

However, under section 47 of the *Equal Opportunity Act*, an insurer bears the onus or responsibility of proving that they can lawfully discriminate against another person on the basis of an attribute – in this case, a disability. QBE (or, by implication, any insurer) could refuse to provide an insurance policy or cover the terms under which an insurance policy is provided if they could prove one of two defences:

- 1 the discrimination is reasonable, based on reasonable actuarial and statistical data and other relevant factors;
- or
- 2 avoiding the discrimination would cause an unjustifiable hardship on the insurer.

The applicant (Ms Ella Ingram)

The **applicant**, Ms Ingram, commenced legal proceedings in VCAT, within its Human Rights Division. The hearing was conducted on 27–29 October 2015. Ms Ingram claimed that:

- 1 QBE directly discriminated against her by issuing a travel insurance policy on terms that excluded all claims arising from mental illness, thereby breaching section 44 of the *Equal Opportunity Act 2010* (Vic).
- 2 QBE directly discriminated against her because at the time the insurance policy was issued, Ms Ingram was a person who held the attribute of a disability as outlined in section 4 of the *Equal Opportunity Act 2010* (Vic). This section defines a disability as including a disability that may exist in the future.
- 3 QBE breached section 44(1)(a) of the *Equal Opportunity Act 2010* (Vic) by declining to provide her cover, therefore treating her unfavourably.

In her particulars of claim, Ms Ingram sought the following remedies:

- a **declaration** that QBE unlawfully discriminated against her
- compensation for economic loss
- compensation for non-economic loss
- costs.

The respondent (QBE Insurance (Australia) Limited)

The **respondent**, QBE, offered the following:

- 1 QBE denied the claim, relying on clauses in the *Equal Opportunity Act 2010* (Vic) and the *Disability Discrimination Act 1992* (Vic) that excluded any claim directly or indirectly caused by a mental illness.
- 2 QBE claimed the policy was based on detailed statistical modelling and an analysis of claims arising from a range of causes including mental illness, which showed that there is a high risk of cancellation by reason of mental illness.
- 3 QBE claimed that even if it had discriminated against Ms Ingram (which it denied), the discrimination was lawful by reason of statutory exceptions under discrimination laws.



Hearing focused on the policy

QBE's policy came into operation in March 2010. The policy covered claims for the costs of cancelled trips due to a sudden serious illness requiring hospitalisation or confinement. The policy had many general discriminatory exclusion clauses; for example, QBE's policy did not cover those who experienced signs or symptoms of an illness they were aware of prior to travelling.

Furthermore, a general exclusion that applied for the purposes of Ms Ingram's claim related to mental illness. Page 33 of QBE's policy cover did not extend to those suffering mental illness which included 'dementia, depression, anxiety, panic attack, stress, bipolar, mania, schizophrenia or other nervous disorder'.

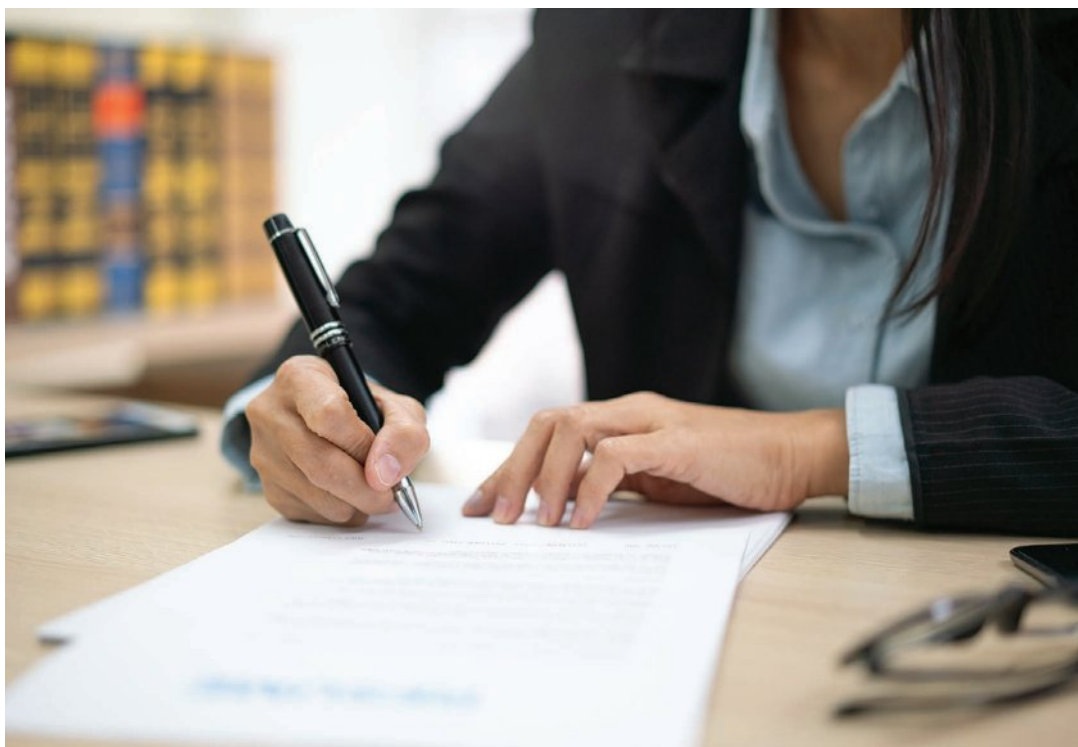
QBE's defence

In its defence, QBE submitted:

- at the time the travel insurance policy was issued, Ms Ingram did not have a disability and therefore her claim for direct discrimination could not succeed
- when Ms Ingram made her claim in May 2012 that QBE treated her unfavourably, QBE was permitted to do so under section 47 of the *Equal Opportunity Act 2010* (Vic) and sections 29A and 46(2)(f) of the *Disability Discrimination Act 1992* (Vic).

Under these sections 'it is not unlawful for a person to discriminate against another person on the ground of disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator'.

QBE argued that these Acts allowed them as insurers to discriminate against Ms Ingram. They argued that they could decline to provide insurance cover to Ms Ingram and others suffering from a disability on the basis of actuarial or statistical data. With this data, QBE believed it had enough evidence to work out the risk of insuring people with disabilities. By considering the premiums or money paid by people seeking insurance and the risk of claims being made, QBE could determine whether people would be insured and how much the premium would cost. For QBE, it was reasonable to discriminate against Ms Ingram by not providing insurance, since to do so would be an 'unjustifiable hardship'. In other words, QBE's profits would be negatively affected since there would be an increased chance of people with disabilities in the form of mental illness making claims. The fact remains that insurers like QBE have been unwilling to disclose or publish the data that is used to justify their premiums and identify who is exempted from accessing certain types of insurance.



During the three-day hearing, the parties focused on whether actuarial or statistical data applied, therefore creating an exemption. Ms Ingram argued that the exemption did not apply because the act of discrimination concerned QBE's decision to refuse indemnity; that is, insurance designed to protect Ms Ingram from financial loss (for example, the cost of her tickets) if she was too unwell to go on her trip.

Member Dea agreed that the exception applies since an insurance policy is a contract that contains terms that exist for the duration of the policy and can be relied upon at a later point in time. Consequently, QBE's mental illness exclusion clause became operative when Ms Ingram made her claim.

VCAT decisions are made at hearings, not at formal trials heard in court. Hearings are less formal but can also result in a legal outcome that can affect the rights of parties involved in the civil dispute.

Therefore, QBE had to prove that it could lawfully discriminate against Ms Ingram and others since there was an ‘unjustifiable hardship exception’. However, according to Member Dea, QBE lacked relevant statistical evidence or actuarial data at the time the mental illness exclusion was written into the policy, in 2010.

How did QBE try to overcome this hurdle?

QBE relied upon a report prepared in 2015 for the purposes of the hearing by Associate Professor David Pitt and Dr Timothy King. It was argued that this statistical report justified the mental illness exclusion clause that was written into the original policy. This is because under section 29A of the *Disability Discrimination Act 1992* (Vic), QBE argued that it was not unlawful to discriminate against Ms Ingram because avoiding the discrimination would have imposed an ‘unjustifiable hardship’.

Member Dea had to assess what the ongoing financial effect would be of removing the mental illness exclusion clause from all policies, not just Ms Ingram’s policy.

Member Dea considered factors in section 11 of the *Disability Discrimination Act 1992* (Vic) to determine whether QBE would suffer ‘unjustifiable hardship’. These factors included:

- the nature of the benefit or detriment likely to accrue to or be suffered by any person concerned
- the effect of the disability of any person concerned
- the financial circumstances and estimated amount of expenditure.

QBE argued that allowing claims arising from mental illness would lead to increased losses for QBE, estimated at between 2% and 7%, and would therefore justify increased premiums for travel and other insurance policies.

Member Dea’s findings

Ms Ingram’s claim that she was directly discriminated against by QBE was supported by VCAT on two grounds:

- 1 The mental illness exclusion clause unfavourably treated Ms Ingram who developed a mental illness at some time in the future during the life of the policy and made a claim on that basis.

QBE conceded that Ms Ingram had a ‘disability’ when it denied her claim, but argued that she did not have a disability at the time the insurance policy was issued, as Ms Ingram did not have depression at that stage. VCAT agreed that the definition of discrimination applied to Ms Ingram, who was a person for whom a disability may exist in the future. It didn’t matter that neither QBE or Ms Ingram were aware that she might develop a mental illness when the policy was issued. VCAT held that under section 4 of the *Equal Opportunity Act 2010* (Vic), all that mattered was that Ms Ingram was a person for whom a disability, in this case mental illness, ‘may exist in the future’.

- 2 Ms Ingram was given unfavourable treatment by QBE, who tried to deny her indemnity or insurance because of disability, in this case, her mental illness.

VCAT Member Dea found that Ms Ingram has a disability within the meaning of section 4 of the *Equal Opportunity Act 2010* (Vic). Crucially, this definition must be interpreted in a way that is compatible with the right to equality as required under section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Therefore, Member Dea was in keeping with the *Equal Opportunity Act* and its broader implication of eliminating discrimination to the greatest possible extent.

VCAT was satisfied that Ms Ingram had been directly discriminated against. It then considered and rejected QBE’s two defences:

- 1 The actuarial or statistical data exception

VCAT determined that QBE was unable to rely on statistical data, including the 2015 Pitt/King report, as it was not available at the time QBE decided on the terms or wording to be included in their insurance policy (2010) or at the time it denied indemnity (2012).

Therefore, VCAT found that QBE could not, in the words of Member Dea, 'rely upon the statutory exceptions to excuse the discrimination because ... QBE has not produced evidence to prove it is more probable than not that the acts of discrimination by QBE were based on actuarial or statistical data'. In other words, there was insufficient evidence or data to justify the wording of its discriminatory policy.

Accordingly, QBE failed to satisfy this exception.

2 'Unjustifiable hardship' exception

In weighing up whether QBE was entitled to the 'unjustifiable hardship' exception, VCAT found that it didn't on two grounds:

- a VCAT decided that the 'unjustifiable hardship exception' under section 29A of the *Disability Discrimination Act 1992 (Vic)* did not apply.

There was no proof that insurers would have to increase the price of travel insurance or bear losses for offering insurance at the current premium rates if the clause was removed. VCAT was not satisfied that QBE would suffer an absolute financial loss in the range of 2%–7% (as claimed) if the mental health exclusion clause was omitted. Consequently, Member Dea found it 'not reasonable' for QBE to exclude mental health illness-related claims from their travel insurance policies.

- b The community would benefit from the clause's removal because this would lessen the stigmatising effect of negative attitudes towards mental illness.

VCAT found that the 'unjustifiable hardship' defence did not apply and '[t]he scales weigh in favour of people ... being able to be properly assessed on their policy claims in the same way people with physical disabilities are assessed'.

Remedies

Ms Ingram sought a declaration that QBE discriminated against her for the reason that the mental illness exclusion clause remains in QBE's policies and affects many consumers. She was awarded damages for economic loss and non-economic loss.

Declarations

Ms Ingram sought a clear public statement that QBE discriminated against her. However, VCAT did not make that declaration, as it did not want to express publicly that its decision automatically extends beyond the dispute between the parties and it did want, in particular, to avoid an impression that its decision applies to all insurers.

Damages

The Tribunal awarded Ms Ingram damages for economic loss and non-economic loss to a value of \$19 292.48.

Economic loss claim

The Tribunal awarded Ms Ingram \$4292.48, which was the full amount claimed for economic loss and included costs associated with her cancelled trip after taking account of a refund from the credit provider.

Non-economic loss claim

VCAT awarded Ms Ingram \$15 000 for non-economic loss in accordance with section 125 of the *Equal Opportunity Act 2010 (Vic)*, which provides that compensation can be awarded for psychological injury, humiliation and hurt feelings provided there is a causal link between the breach and the claimed loss, damage or injury.

Damages, in the form of monetary compensation, will be determined by the member presiding over the hearing in the VCAT List.

Activity 12.1 Structured questions

Apply your understanding

- 1 Identify which VCAT List presided over the *Ingram v QBE* case.
- 2 If the two Acts relevant to this case prohibited discrimination, why would insurance companies have an exemption or defence that could be seen as reasonable and justifiable?
- 3 Briefly list the three claims Ms Ingram used to justify her legal action against QBE.
- 4 Explain why a person would claim monetary compensation, in the form of damages, for economic and non-economic loss. What difficulty do you think a person claiming for non-economic loss would have in justifying damages?
- 5 Who pays the legal costs of parties in a civil dispute heard in our courts? Do you think this is appropriate?
- 6 List the claims QBE used in their defence.
- 7 Why wouldn't QBE's policy extend to those with a mental illness?
- 8 Complete a summary of Member Dea's two grounds or legal justifications for her decision. Use the template below:

Ground 1

Establish the key ground: for example, QBE exclusion clause was discriminatory.

Outline the KEY points to justify this key ground: for example, discrimination may exist in the future, therefore ...

Identify the relevant Act and section used by Member Dea to support her decision: for example, section 4 of the *Equal Opportunity Act* outlined that ...

Ground 2

Now it's your turn.

- 9 What statistical evidence did QBE need to provide to support its defence? Why was evidence from 2010 and 2015 irrelevant?
- 10 How did QBE try to support the defence of 'unjustifiable hardship'? Is this fair considering they were worth an estimated \$18 billion at the time of this hearing?
- 11 Why didn't Member Dea support Ms Ingram's desire for a declaration to be made that extends to all insurance companies? To what extent could such a declaration have been positive for all people suffering a mental illness?
- 12 Do you agree with Member Dea's order that Ms Ingram suffered non-economic losses to the value of \$15 000?



12.2 Dispute resolution bodies involved

VCAT was established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) in response to the public's demand for more accessible and affordable justice. VCAT'S purpose, as a dispute resolution body, has been to provide Victorians with a fair, accessible, low cost, efficient and independent tribunal delivering high quality dispute resolution, suitable for a broad range of civil disputes. The *Ingram v QBE* case was one such case.

As a dispute resolution body, VCAT has been viewed as a success for four main reasons:

- 1 VCAT is a tribunal that resolves nearly 90 000 civil and administrative legal cases annually in its nearly 50 venues across Victoria. These cases might otherwise be abandoned by parties whose rights have been infringed or the parties would need to seek justice through the expensive court system.
- 2 VCAT's nominal or non-existent fees, coupled with the non-requirement for legal representatives in most hearings, makes it substantially cheaper than the courts.
- 3 VCAT is a less formal dispute resolution body than our formal courts. VCAT encourages parties to reach agreement through processes of mediation and compulsory conferences. Unlike the courts, VCAT does not rely on complex rules of evidence and procedure.
- 4 VCAT members who preside over each case heard within a List are experts who will make a binding decision or final determination in the case at a hearing if the parties are unable or unwilling to agree to settle their dispute.

As the Honourable Justice Greg Garde, former Supreme Court judge and VCAT President, highlighted, 'the obligation to provide a *fair hearing* is an important component and obligation of the Tribunal's function'.

VCAT aims to fulfil the key principles of justice by:

- acting fairly and according to the merits of the case in all proceedings
- being bound by the rules of natural justice
- conducting each proceeding with as little formality and technicality as possible, and determining each proceeding with as much speed as possible
- holding all hearings in public unless directed that a hearing is to be held in private
- allowing parties a reasonable opportunity to call or give evidence, question witnesses and make submissions to the Tribunal.

VCAT's duty is also evident under section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). According to the Charter, all Victorian Acts must be compatible with a fair hearing involving:

- the provision of a reasonable opportunity to put your case
- the right to be heard
- the right to have your case determined according to law
- the right to have your case determined by a competent, independent and impartial tribunal.



Protesters in the Victorian suburb of Tecoma demonstrate against the opening of a 24-hour McDonald's restaurant. In 2012, VCAT overruled the local council's original decision to reject McDonald's plans to operate in the suburb, prompting the argument that VCAT should place a greater emphasis on community concerns in its decision-making.



Trainer Danny O'Brien (centre) and his wife Nina after his successful appeal against suspension for using cobalt, photographed leaving VCAT on 17 March 2017 in Melbourne

A fair hearing

What are some of the practical ways VCAT attempts to fulfil its obligation for a fair hearing?

- 1 VCAT provides a *free interpreter service* as part of its obligation to provide a fair hearing. Requests by a party can be made either in writing or by phone when lodging an application or after being notified of the hearing date.
- 2 Members of the Tribunal have a responsibility to ensure that all parties receive a fair hearing and are treated respectfully. This requires members to:
 - a *identify difficulties* experienced by any party, whether due to lack of representation, literacy, ethnic origin, religion, disability or any other cause
 - b *assist parties* by implementing methods to help the equal participation of people who might otherwise be prevented from fully participating in VCAT's process
 - c *explain relevant legislation* and *identify relevant issues* central to their determination or decision
 - d *intervene* if necessary in order to ensure that hearings are conducted efficiently, costs are kept to a minimum, parties and witnesses are asked questions to clarify relevant issues and inappropriate behaviour is dealt with
 - e *assist self-represented parties* (also called litigants in person) by referring them to a duty lawyer or for *pro bono* legal services; for example, a person may become homeless if evicted under an order within the Residential Tenancies List
 - f *remain impartial* in the interests of all parties.

Activity 12.2 Analysis

A fair hearing

Considering the *Ingram* case, explain two ways (from those listed above) that Member Dea tried to ensure a fair hearing.

Personnel, structure, jurisdiction and costs within VCAT

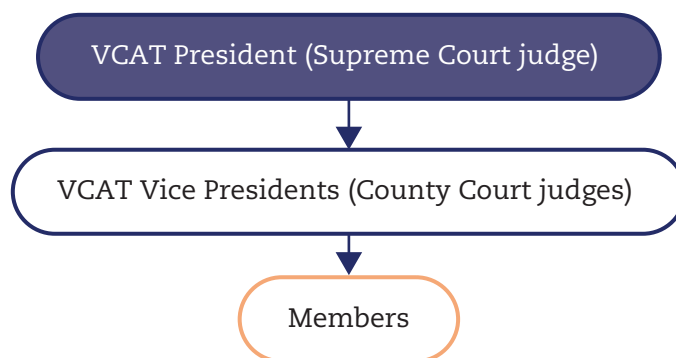


Figure 12.1 VCAT structure

VCAT's structure involves the President (a Supreme Court judge) and 13 Vice Presidents (County Court judges). They are responsible for the administration of VCAT, its four divisions and its lists. Each of the approximately 200 members who preside over hearings within a List has specialist knowledge, qualifications and a legal background. This ensures that members have the skills, ability and capacity to conduct hearings within a particular division and make fair decisions quickly.

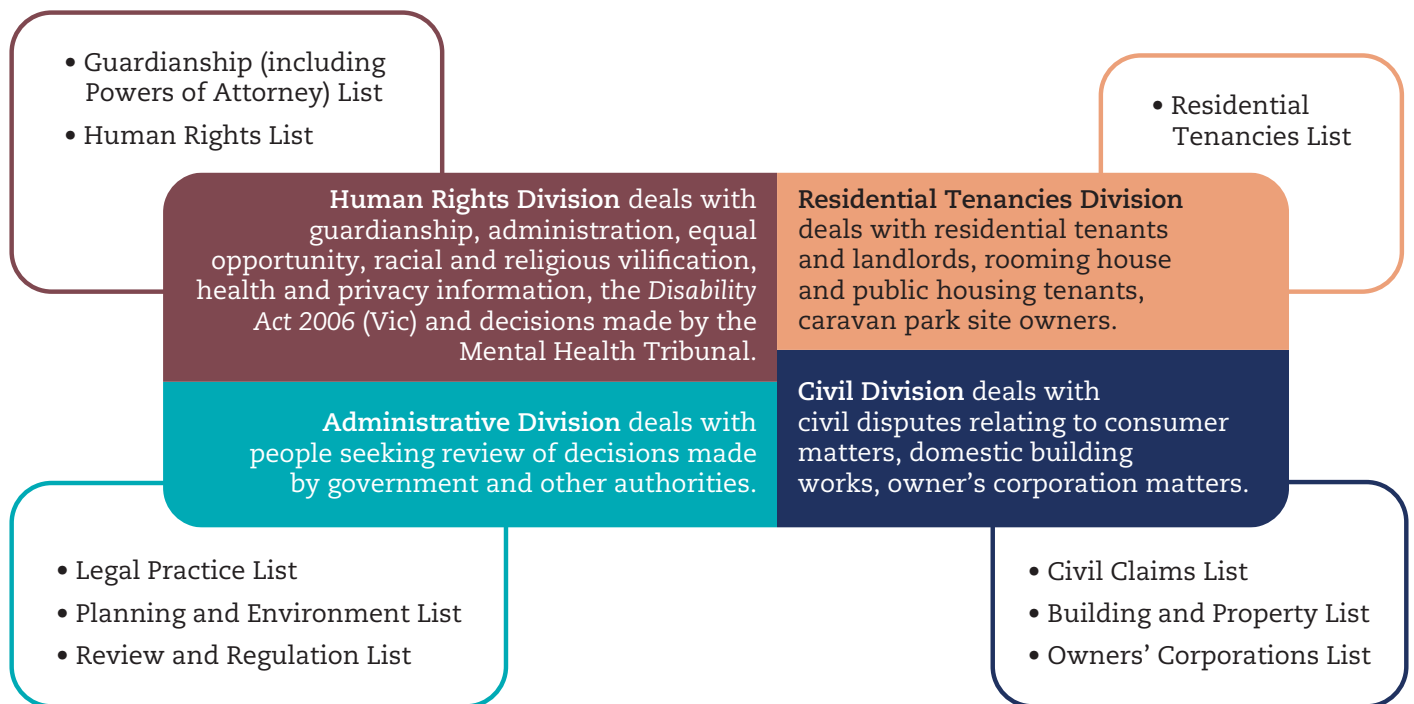


Figure 12.2 Divisions of VCAT

The *Ingram v QBE* case was heard within the Human Rights Division, specifically the Human Rights List, a dispute resolution body within VCAT. VCAT's website outlines its jurisdiction as hearing cases under the *Equal Opportunity Act 2010 (Vic)*, *Health Records Act 2001 (Vic)*, *Privacy and Data Protection Act 2014 (Vic)* and *Mental Health Act 2014 (Vic)*, as well as other legislation.

Applications under the *Equal Opportunity Act 2010 (Vic)* can focus on unfavourable treatment based on personal characteristics or attributes such as age, sex, disability or racial background.

The *Equal Opportunity Act 2010 (Vic)* prohibits discrimination on the basis of listed 'attributes' in certain areas of public life, such as employment, education, services or clubs. The Human Rights List also hears applications for exemptions; that is, allowing certain organisations to legally discriminate. For example, a school that has changed from a single sex to co-education environment, may wish to preferentially admit students of one gender to balance gender ratios.

According to VCAT's annual report from 2018–19, VCAT had over 85 000 cases lodged, and over 83 000 cases were finalised. The Residential Tenancies List and Civil Claims List account for two-thirds of all of VCAT's cases.

There has also been an increased use with the introduction 2017 of Fast Track Mediation Hearings (FTMH) and compulsory conferences used as a means for parties to negotiate an agreement. This was in response to recommendations from the Access to Justice Review. This shift reflects VCAT's focus on alternative methods of dispute resolution that are less adversarial and attempt to 'preserve an amicable ongoing relationship between the parties'.

This was apparent in the Human Rights List, where 75% of cases lodged were settled at this stage, and only 25% requiring a final hearing, where the Member could make a binding determination or decision called an order. Crucially, access and equality were enhanced, as there are no additional hearing fees.

The Human Rights Division has seen an increase from 271 cases when the *Ingram v QBE* case in 2015 was heard, to over 450 cases that were initiated and finalised in 2019. The median time it took for VCAT's Human Rights List to finalise its cases remains at 15 weeks. Crucially, the administrative convenience or effectiveness of this List is evident, as the time taken to hear and finalise cases has remained the same, while there has been a doubling of cases heard.

Despite the complex nature of cases heard by VCAT, and especially by the Human Rights List, the use of a case manager to each case has substantially improved the efficiency of the List as they manage and monitor the case from the lodgement to its finalisation. Crucially, the increased number of self-represented applicants, who lack the expertise of a legal representative that *Ingram* was fortunate to have prepare and present her case, has increased.

Despite the challenges, the Human Rights Division has maintained a clearance rate of 96%, reflecting its importance as part of the Victorian Legal Justice System.

VCAT is an effective dispute resolution body suitable for resolving a substantially growing number of a certain type of civil disputes, but not all types of civil disputes. The *Zwiarsen v Field & Hall Pty Ltd & Ors* case in Chapter 13 demonstrates that when VCAT is unsuitable or a more formal determination process is required the courts will be utilised.

12.3 Methods of dispute resolution and their appropriateness

When parties make an application to VCAT, a review will take place to ensure that the hearing falls into VCAT's jurisdiction, the application fee is paid (if required) and a reference number is assigned for administrative purposes. A direction or order is made regarding how the hearing will proceed. VCAT may refer parties directly to mediation, directions hearings or small claims hearings.

The first method of dispute resolution is usually encouraging the parties to reach an agreement of consensus. This is when the parties resolve their dispute by negotiating with the other party and the dispute is resolved. Once a settlement has been confirmed by parties that come to an agreement, VCAT can confirm the arrangement with a legally binding document called a consent order.

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Minor disputes are settled quickly and inexpensively by the parties involved. Parties may also feel a certain sense of satisfaction that they were proactive and had the skills to resolve the dispute without it escalating into expensive litigation. Crucially, the agreement can become legally binding if the parties agree.

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Even so, reaching an agreement depends on the parties' willingness to find a solution. In addition, even if a solution is agreed to, the decision may be difficult to enforce as it is not legally binding on the parties. This may result in further escalation of the problems and tensions between the parties.

Figure 12.3 Dispute resolution

Alternative Dispute Resolution services at VCAT

Since VCAT is used to resolve approximately 90 000 disputes every year, it has been increasing its use of alternative dispute resolution (ADR) methods. These ADR methods may include private meetings for parties to consider the possibility of helping them resolve their case with the help of a mediator or VCAT member. VCAT offers three types of ADR services:

- 1 mediation, including the use of Fast Track Mediation Hearings since 2017
- 2 compulsory conference
- 3 final hearings.

Generally, resolving disputes using ADR methods within VCAT can be faster and less costly, and gives parties greater control of the outcome than going to a full hearing. Even when the parties still cannot agree, they often have narrowed the issues in dispute. According to VCAT's annual report from 2018–2019, 2516 cases were listed for compulsory conferences and mediations – nearly 800 more cases than in 2015 when the *Ingram v QBE* case took place.

Table 12.1 VCAT compulsory conferences and mediations 2018–2019

List	Compulsory conferences	Mediations	Total
Building and Property	386	300	686
Civil Claims	354	5	359
Human Rights	119	50	169
Guardianship	6	1	7
Legal Practice	33	0	33
Owners' Corporations	165	6	171
Planning and Environment	714	0	714
Residential Tenancies	107	0	107
Review and Regulation	270	0	270
Total	2154	362	2516

Source: VCAT Annual Report 2018–2019

Short mediation and hearing

Short mediation and hearing is used as an ADR method to assist parties with civil claims of less than \$3000, conducted by qualified VCAT staff mediators. If a dispute is not settled at the mediation, it goes to a final hearing on the same day.

Compulsory conferences and mediation

Consider the following testimonial in VCAT's Annual Report.

An experience of alternative dispute resolution

'This dispute was going nowhere since commencing over two years ago, and I approached yesterday's hearing with negative thoughts.

But from the outset of the compulsory conference yesterday it became clear the member had studied the history of this dispute thoroughly and wanted nothing less than for all of us to walk away with an outcome which represented a satisfactory resolution for everyone.

As the day progressed and various aspects were heard, debated and explained, the member was able to bring 'reality', common sense, and compromise to each item culminating in agreement.

It was a learning experience for everyone attending in planning, exploring options, fulfilling regulation requirements, finding solutions, setting timelines, and then all agreeing to move forward. The member displayed continued energy and attention to detail throughout the day maintaining involvement and spirit of a 'win-win' outcome which was very impressive.'

[customer's name withheld]

Of the 2516 cases listed for compulsory conferences and mediations in 2018–19, 1451 cases were successfully resolved by a compulsory conference or mediation conducted by a VCAT member.

The highest resolution rates were found in the following VCAT lists:

- Building and Property List: 52%
- Civil Claims List: 68%
- Planning and Environment List: 44%
- Owners' Corporations List: 58%
- Residential Tenancies List: 73%
- Legal Practice List: 64%
- Human Rights List: 75%.

Mediation does not rely on the expert mediator imposing a binding decision that the parties must follow. A mediator will only facilitate discussion between the parties with the aim that they reach a solution they are willing to follow.

Mediation is a cooperative method of resolving disputes and is widely used by courts, tribunals and other dispute resolution bodies. They are confidential meetings designed for parties to resolve their dispute by sitting down with a mediator, who is a VCAT member or accredited mediator, to discuss issues that are in dispute. The neutral and impartial mediators help by NOT interfering or making suggestions for the resolution. Rather, the mediator is the catalyst. They will facilitate discussion as the parties agree on a fair resolution, instead of VCAT imposing a binding decision at a hearing. Decisions are not binding unless parties enter into terms of settlement that can be legally enforceable.

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Mediation is more cost-effective and a preferred method in resolving a broad range of civil disputes. Its key strength is that parties, with the assistance of expert and trained mediators who facilitate discussion, allow parties greater control in determining solutions they are likely to agree on. Parties are usually prepared to explain the details of the dispute, what they're claiming or saying in response and how the dispute could be resolved. Parties are less adversarial and are encouraged to come to mediation with an open mind. These factors are all reasons for the success of mediations as a dispute resolution method.

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If the parties cannot agree to mediation or determine a solution, then the failure of mediation will result in the case being listed for a hearing that will be determined by a different VCAT member who is unaware of what was discussed in private mediations.

Figure 12.4 Mediation

Compulsory conferences have also been introduced into VCAT as an alternative dispute resolution method. Each party or their representative gives a summary of how they see the dispute and identify key issues. There is an attempt to clarify issues and discuss settlement options confidentially. Unlike mediation, the member in a compulsory conference may suggest forms of settlement and discuss the likely outcomes of the case if it goes to a hearing. Parties are not bound by the member's views, which are not orders. If a settlement is reached that the parties agree to, the member will review the decision and make a consent order to confirm it. If a settlement is not reached, the member will set a date for a directions hearing or final hearing that a different member will preside over.

+

A positive is that most parties choose to represent themselves at VCAT. The member usually decides who is present in the compulsory conference room and the extent to which they participate. Parties are encouraged to participate directly in the compulsory conference, even if they are represented, because of their personal knowledge of the issues. Furthermore, parties can meet the member for a confidential meeting as a means to finding an acceptable solution to the dispute. In addition, parties benefit from the guidance and experience of the member, who may make suggestions for settlement that the parties can freely agree to support. Crucially, successful compulsory conferences resolve the dispute, and stop it from escalating into a potentially expensive and time-consuming process.

-

The key weakness of a compulsory conference is that if the parties cannot reach agreement, the case is usually listed for a directions or final hearing on a later date. The member can then make an order that imposes a binding outcome on the parties that they must follow even if they don't agree. The order is enforceable.

Figure 12.5 Compulsory conferences

Activity 12.3 Structured questions

Benefits of compulsory conferences and mediation

- 1 List four benefits attributed to the member in the testimonial from the compulsory VCAT conference on page 267.
- 2 Why is a compulsory conference more likely to be seen as a 'win-win situation' for the parties than the 'win-at-all-costs' mentality of our adversarial trial system?
- 3 Compare the similarities and differences and strengths and weaknesses of mediation and compulsory conferences as methods used by VCAT.

Final hearing: legally binding decision by a VCAT member

What happens to disputes that are not settled by this stage? Parties would have to prepare for a final hearing. Ella Ingram and QBE's final hearing took place in October 2015. This provided the parties with an opportunity to make submissions such as providing relevant documentation; offer, listen to and respond to evidence in the form of witnesses; and ask questions. A VCAT member who listened to the submissions and evidence would then reach a legally binding decision, either at the end of the hearing or in writing, as Member Dea did two months later in the *Ingram v QBE* case.

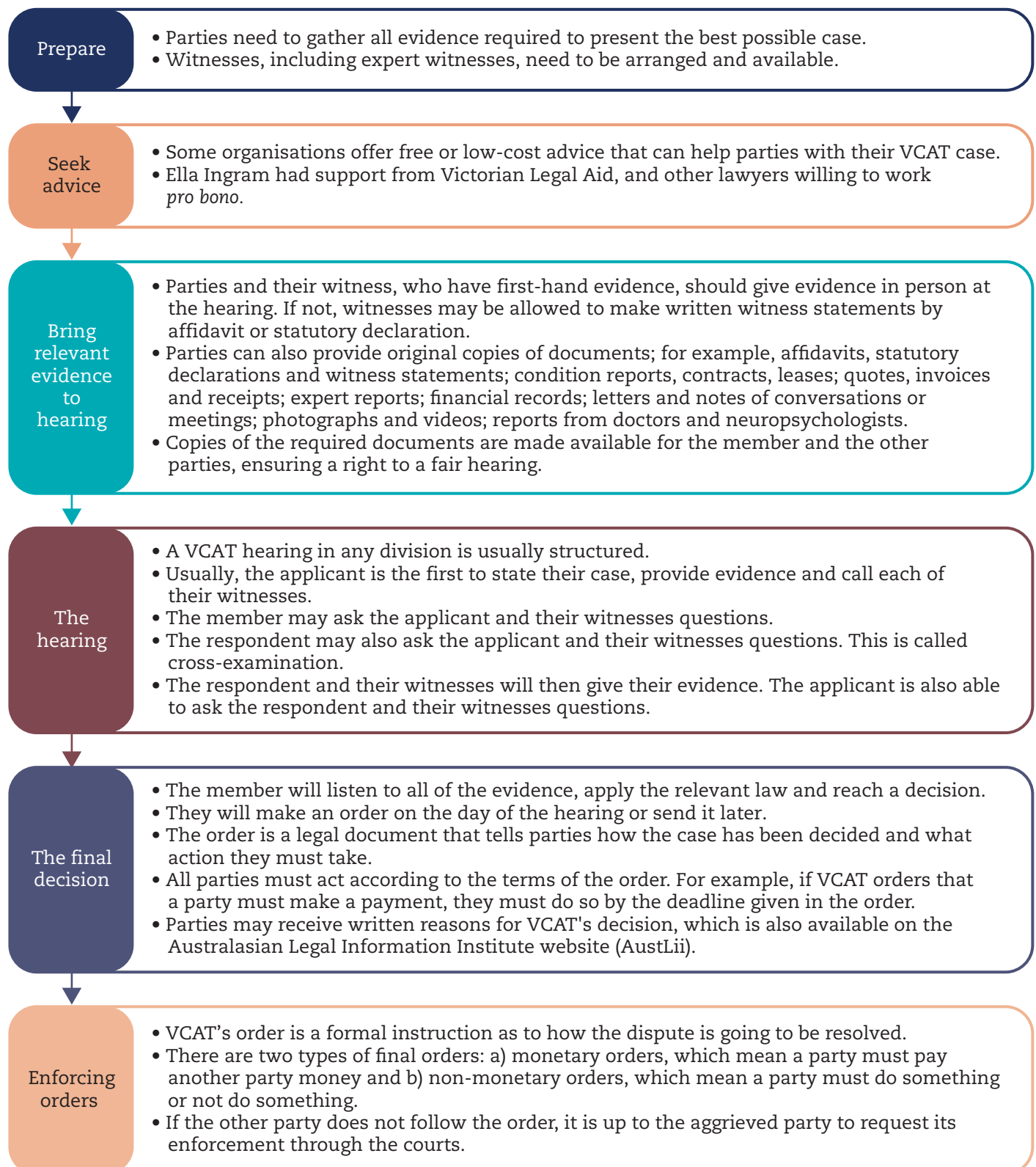


Figure 12.6 Process of a VCAT hearing

Table 12.2 Comparison – VCAT and the courts

Similarities	Differences
<p>1 Expert third parties Both the courts and VCAT are presided over by expert, independent third parties. For example, in our courts, such as the Supreme Court, judges will ensure that the formal rules of evidence and procedure are followed by the parties. Similarly, in VCAT, the President and Vice Presidents, and Supreme and County Court judges, work with expert members in overseeing the three divisions and lists within VCAT.</p>	<p>1 Formal and informal process A key difference between the courts and VCAT is the nature of the process used to resolve the legal dispute. The courts use a formal process where juries may be empanelled; and a judge ensures that the rules of evidence about how witnesses are questioned will be applied to both parties. These formal processes are used due to the complex nature of the disputes. In contrast, the informal process of VCAT offer the opportunity for parties to present their evidence without interruption and without the need for legal representation or a jury.</p>
<p>2 Appeals process Both courts and VCAT have an appeals process that allows parties to access the formal judicial determination method. A judge will decide whether the grounds for appeal have been successful.</p>	<p>2 Legal costs (due to the fees and the need for legal representation) A key difference is that the formal court process relies on the expertise of legal representation to help parties prepare and present their case. However, the cost of legal representation and court fees can be substantial. In contrast, access to VCAT is easier as fees are nominal. For example, Civil Claims List access is only \$55.60. Costly legal representation is rarely allowed; VCAT relies on parties to present the evidence.</p>

Activity 12.4 Report

Comparison between VCAT and the courts

In the form of a short report, complete the following tasks:

- Using Figure 12.6, describe two benefits and two concerns that you have identified for the parties involved in a formal VCAT hearing.
- Identify two similarities and two differences in the (formal and informal) process and (expert and independent) personnel used by VCAT and the courts.



Activity 12.5 Folio exercise

VCAT and the courts

Read the following extended response comparing VCAT with the courts. Identify the contention or key point of view using three topic sentences, evidence used to support each argument and a conclusion.

Extended response

In 2009, former Attorney-General Robert Hulls stated that as 'disputes continue to arise' the public demands 'more accessible and affordable justice' through innovative avenues of dispute resolution like VCAT. As a consequence, courts should be seen as 'the last port of call' in resolving disputes. While VCAT offers a timelier and more affordable means of resolving disputes, both courts and VCAT are effective avenues for dispute resolution as they use a range of methods: mediation, arbitration, conferences and judicial determinations.

VCAT and the courts are effective to varying degrees in providing *fair and unbiased hearings*. Crucially, both utilise the expertise of an impartial judicial officer to ensure a just hearing. This is the case whether it is a justice in the High Court resolving constitutional disputes or a VCAT member in one of the many lists. The benefit is that these judicial officers allow parties to have their fair say in formal or informal procedures where the same rules apply equally to all parties. Additionally, personnel specialise in specific areas of the law to deal with particular types of disputes in a consistent and fair manner. Furthermore, the fairness of both avenues is that parties have access to an appeals process, which may rectify perceived legal injustices. However, the fairness of an appeals process is undermined if parties do not have the legal funds to appeal.

When compared to judicial determination by the courts, VCAT is a *more accessible and affordable* means of dispute resolution. This is because VCAT encourages parties to reach an accepted solution, through alternative dispute resolution methods such as mediation, without the need for expensive legal representation. In contrast, a formal court hearing requires parties to have expert legal guidance, as to how their case should be prepared and presented, due to the complex matters in litigation. Without legal representation in court, parties may suffer a 'miscarriage of justice'. However, in comparison to VCAT, where most lists are free or only charge a nominal \$55.60 filing fee, legal aid can be a financial burden for the state in helping unrepresented defendants receive necessary legal representation for serious criminal disputes heard by the courts. Therefore, VCAT provides an avenue that resolved in 2014 nearly 90 000 civil disputes that may otherwise have been abandoned due to high court expenses. The substantial financial outlay required for civil trials makes the courts a less accessible option for resolving disputes. Even so, a formal court hearing may be more suitable than VCAT for dealing with complex cases (including all criminal cases) that necessitate expensive legal representation.

Finally, both VCAT and the courts are effective to varying degrees in resolving disputes in a timely manner. Alternative dispute resolution methods to judicial determination are implemented by both avenues, and have been successful in saving the courts' time. For example, mediation provides timely administration of justice, as highlighted by Chief Justice Warren of the Supreme Court, as this method has been successful in nearly 60% of Supreme Court civil disputes and saved over 1000 court sitting days in 2010. However, despite benefits, the non-binding nature of some outcomes may lead to disputes escalating to expensive and time-consuming judicial determination by courts. Furthermore, court hearings can take in excess of three years from pre-trial proceedings; delays may magnify problems faced by plaintiffs and can be used by unscrupulous defendants, who may pressure them to settle for less than they are legally entitled to.

Today, courts are considered the 'last port of call', according to former Attorney-General Robert Hulls. VCAT is fast becoming the preferred avenue for dispute resolution, given it provides 'more accessible and affordable justice' for the public.

12.4 Remedies awarded and their appropriateness

A **remedy** is a means by which a plaintiff or claimant's civil rights are protected or corrected for injury caused by a defendant.

The purpose of civil remedies is to restore an injured party to the position they were in before the infringement; that is, before the harm was caused. This may be in terms of financial remedies in the form of damages and/or non-financial remedies in the form of injunctions.

Remedies in action

In the *Ingram v QBE* case, Ella Ingram sought a declaration; that is, a clear public statement that QBE discriminated against her, because the mental illness exclusion clause remains in QBE's policies and affects many consumers. However, VCAT did not make that declaration, as it did not want to express publicly that its decision automatically extends beyond the dispute between the parties and, in particular, it wanted to avoid an impression that the decision applies to all insurers.

However, Member Dea imposed orders that confirmed the remedy of damages.

The Tribunal awarded Ms Ingram specific economic damages of \$4292.48. This amount could be measured as it was the full amount associated with her cancelled trip after taking account of a refund from the credit provider.

In addition, VCAT awarded Ms Ingram \$15 000. These general and exemplary damages were for non-economic loss in accordance with section 125 of the *Equal Opportunity Act 2010* (Vic). This Act provides that compensation can be awarded for psychological injury, humiliation and hurt feelings provided there is a causal link between the breach and the claimed loss, damage or injury.

How appropriate were the remedies awarded in the *Ingram v QBE* case?

Remedies can be effective in achieving their key purpose; that is, returning an injured party to their original position prior to their civil rights being infringed. Was this evident in the specific damages ordered by Member Dea? How could these damages be measured?

With most civil actions, where the loss is other than purely financial, damages cannot restore a complainant to the position they were previously in; Ms Ingram cannot be restored to the position she was in had QBE's wrong not occurred. Damages cannot undo personal or psychiatric injury. They can, however, compensate for the financial losses flowing from the injury and provide a measure of solace for the wrong that has occurred. This was evident with Member Dea's order for special damages that referred to loss that Ms Ingram had suffered prior to the date of hearing and are capable of precise arithmetical calculation, such as airline tickets and accommodation.

However, other injuries, such as loss of enjoyment, may be difficult to measure. Was the award of \$15 000 adequate? In the area of torts, where a civil wrong has occurred and has infringed a person's rights, the award of general damages for emotional suffering is seen to promote a key value; that is, to protect the psychological development and dignity of individuals and their autonomy in how they wish to be treated and seen by others.

Would this amount make an example of, and deter, a company that had assets of \$18.5 billion? The award would possibly not deter a multinational such as QBE. Member Dea had the opportunity to order exemplary damages, which are made only in exceptional circumstances. VCAT or a court can consider that the damages awarded would not provide a sufficient deterrent against similar conduct in the future. The fact is, Ms Ingram sought a clear public statement that QBE discriminated against her. However, VCAT did not make that declaration. Therefore, this decision may not deter QBE or other insurers whose policies may still exclude parties on a range of grounds, including disabilities such as mental illness.

12.5 Avenues of appeal

Parties may seek leave to appeal a VCAT decision to the Supreme Court (Trial Division) on a question of law; that is, whether the member ‘erred on a point of law’– in other words, made a legal error. If the VCAT decision was made by the President (Supreme Court Justice overseeing VCAT), or a Vice President (County Court Justice overseeing a VCAT Division), then an appeal can be heard by the Supreme Court (Court of Appeal) on a question of law.

Limited appeals are designed to provide parties with certainty when they seek dispute resolution.

Table 12.3 VCAT appeals to Supreme Court 2018–2019

Leave to appeal not granted	31
Leave to appeal granted and appeal dismissed	3
Leave to appeal granted and appeal upheld	6
Administrative disposal/discontinued/finalised by consent	16
Awaiting decision	53
Total number of appeals lodged	109

Source: VCAT Annual Report 2018–2019

If parties want to appeal, they must seek leave or permission from the Supreme Court of Victoria (Trial Division), which would hear the appeal if the order was made by a VCAT member or Deputy President. There is also an opportunity for the Court of Appeal to hear an appeal against an order made by the VCAT President or a Vice President. This is very rare. Crucially, the possibility of appeals is limited if parties are unable to afford the expensive legal representation required to prepare and present in the Supreme Court. Therefore, access to appeals is limited, even if parties feel they have been treated unjustly.

Even so, the VCAT’s 2018–19 annual report has identified that out of the 90 000 disputes brought to their attention and resolved, less than 0.01% of cases resulted in an appeal being lodged. Of the eight cases where leave to appeal was granted in 2018, only six were upheld. This reinforces that VCAT and its range of dispute resolution methods are highly effective in providing affordable justice to those who feel their rights have been infringed.

Activity 12.6 Structured questions

VCAT and the Supreme Court

- 1 On what grounds can parties seek leave to appeal from VCAT to the Supreme Court?
- 2 Describe the benefits of appeals.
- 3 Why limit access of appeals from VCAT to the Supreme Court?
- 4 Do the statistics on appeals from VCAT reflect its effectiveness as a dispute resolution body?

12.6 Principles of justice achieved

We will now explore the extent to which the principles of justice were achieved in this case.

Fairness

In the *Ingram v QBE* case, the aim of fairness was maintained:

- Fairness was achieved as both parties disclosed full details of their claim. This ensured that both parties could test the relevance and validity of the evidence presented. Consequently, the member presiding over the case in VCAT’s Human Rights List was able to make a fully informed decision.

- Both Ingram and QBE had the *opportunity to be represented* and advised in their civil action. As parties, they were able to engage legal representatives, whether they were solicitors or barristers, to prepare (for example, legal documents) and present (for example, questioning of witnesses). Crucially, legal representatives have the skills to effectively research complex areas of law and question witnesses. In assisting the parties to effectively prepare and present their client's case, they therefore provided the best opportunity for each party to put forward their case. But legal representation, which is seen as a pillar of our justice system, is expensive. The cost may not have been prohibitive for QBE, but Ingram's reduced access to effective legal representation, due to her being a secondary school student, would have diminished her ability to access a fair hearing.
- Methods such as mediation and compulsory conferences are encouraged, as they assist parties to resolve the dispute themselves, as opposed to having a decision made for them.
- Tribunals such as VCAT have been created as forums for resolving disputes between parties, usually without the level of costs associated with courts.

The Victorian Legal Aid (VLA) service provides legal practitioners or pays a private legal practitioner to represent a person, but this assistance is not free and eligibility is means and merit tested.

News report 12.1

Ella Ingram wins discrimination case against insurance giant

Twenty-one-year-old Ella Ingram has won a landmark discrimination case against insurance giant QBE, in what is a strong wake-up call for the industry to comply with the law and keep up with community expectations about how people with a mental illness should be treated.

The Victorian Civil and Administrative Tribunal found that QBE (Australia) Ltd directly discriminated against Ella by providing her with a travel insurance policy that had a blanket exclusion for claims relating to all mental illnesses, and relying on this clause to reject her claim to reimburse travel expenses of \$4292.48.

Ella's case, run by Victoria Legal Aid (VLA), is an Australian-first test of discrimination by insurers on the basis of a mental illness. Ella had no pre-existing illness when she was diagnosed with major depression in February 2012. On medical advice she had to cancel an overseas school trip she had booked in late 2011.

Equality Law Program Manager Melanie Schleiger said the case showed that QBE had breached the law and that its attitudes and practices had not kept up with community values and expectations about how people with a mental illness should be treated.

'We know so much more about mental illnesses today, so insurers shouldn't be relying on outdated and stereotyped attitudes and misconceptions. If some insurers can provide this cover, it's time for QBE and others to eliminate discriminatory practices, as they have with other medical conditions.'

Melanie Schleiger added: 'QBE clearly failed to meet its obligations under discrimination laws. There was no evidence that it considered any statistics, actuarial data or expert medical information about the risks presented by different types of mental illnesses when it created this travel insurance policy and decided to exclude all claims made because of a mental illness.'

Ms Schleiger said the decision sends a strong message to the insurance industry.

'Ella's win confirms that compliance with discrimination laws is not optional and that insurers need to base their decisions on evidence, not stereotypes and assumptions, when they reject a claim or cover because of a mental illness.'

The tribunal found that QBE's exclusion of all claims made because of a mental illness, regardless of the type, severity or circumstances of the illness, was not reasonable. It also rejected QBE's claim that it would suffer unjustifiable hardship if it removed the general exclusion clause from the travel insurance policy.

Ella spoke of a feeling of hope: 'I really want this to pave the way for others living with a mental illness to stand up for their rights, and insurers to not treat us like second-class citizens. I thought their treatment of me might be what I would experience for the rest of my life.'

Source (adapted): Victoria Legal Aid, 18 December 2015

Activity 12.7 Folio exercise

Ella and the giant

Consider News report 12.1 to assess whether the Ingram case was fair, and complete the following tasks:

- 1 Identify three reasons why this case was important.
- 2 How did Ella Ingram having access to legal representatives from the VLA ensure justice?
- 3 Why would the VLA and other lawyers work *pro bono* for Ms Ingram?
- 4 Reflect on whether the law reflects community values. Should the law reflect community values?
- 5 Considering this case, how is the legal system attempting to eliminate discriminatory practices?
- 6 According to the VLA's Melanie Schleiger, how was QBE behaving unfairly towards members of our society who suffer from mental illness?
- 7 Explain why you think Ella Ingram was judged as one of the 100 most inspirational women in the world in 2015 by the BBC.

Activity 12.8 Report

Reforms and achieving justice

After Ingram's win, Victoria Legal Aid, Beyond Blue, Mental Health Australia and the Public Interest Advocacy Centre called on the Victorian Government to change discrimination laws. Choose one suggestion to research and report on the extent to which these reforms could improve fairness, and therefore achieve justice:

- stronger protection for consumers
- data and information insurers rely on when excluding or rejecting claims based on a mental illness should be made available to consumers
- detailed reasons for any denial of cover are provided
- insurers must report annually on how often and on what basis they discriminate because of a mental illness
- insurers comply with updated Insurance Industry Anti-Discrimination Guidelines, which could be developed by the Australian Human Rights Commission
- the 'other relevant factors' insurers can consider in declining insurance are specified.

Equality

Equality is an important principle within our legal system and our pursuit of justice. Cases like *Ingram v QBE* highlight its importance in the area of civil law. Crucially, this principle relies on all citizens, regardless of race, gender, religion and mental illness, being treated the same as others and without discrimination.

As seen in the *Ingram v QBE* case, Commonwealth and state legislation is a measure of the protection Australians have from discrimination. Yet, have our laws evolved to eliminate stigma, bias, discrimination and prejudice directed at Australians who suffer from mental illness?

Activity 12.9 Case study

Did the Ingram case lead to equality or inequality before the law?

QBE has retained mental illness cover as a 'necessary exclusion' despite VCAT's landmark ruling in *Ingram v QBE*. The legal case was to test whether the data QBE used was reasonable to be included and whether mental illness should be treated on a case-by-case basis. Even though economic and non-economic damages were awarded and QBE was found to have breached the *Equal Opportunity Act 2010* (Vic), VCAT's ruling has not affected its policy wordings.

QBE states that providing travel insurance cover for mental health illness would increase the cost of premiums for the whole community significantly.

QBE has argued that they would welcome further engagement on the topic with the medical profession, government and non-government agencies, as well as the Insurance Council of Australia.

Consider whether the determination in the *Ingram v QBE* case has led to equality in the law for citizens suffering from mental illness by completing the following tasks:

- 1 Why has QBE maintained its 'necessary exclusion' clause?
- 2 Suggest reasons why QBE has not changed the wording to its policy after the Ingram case.
- 3 Explain whether you agree with QBE's assessment that insuring citizens with mental illness would substantially increase its costs and risk.
- 4 To what extent is the law able to force powerful multinationals like QBE to create policies that are equal for all?

Activity 12.10 Structured questions

Charter of Human Rights and Responsibilities Act 2006 (Vic) ('the Charter') as a means to equality

VCAT considered that an interpretation of 'disability' in the *Equal Opportunity Act 2010* (Vic) was compatible with the right to equality in Section 8 of the Charter, which includes 'a disability that may exist in the future'. This was in keeping with the purpose of the *Equal Opportunity Act 2010* (Vic) to eliminate discrimination to the greatest possible extent by ensuring that all persons with disabilities, past, current or future, may rely on its protections.

Consider how the right to equality in section 8 of the Charter influenced VCAT's interpretation of the *Equal Opportunity Act 2010* (Vic) in *Ingram v QBE* by completing the following tasks:

- 1 Describe why it is important for Victorians to have the Charter.
- 2 Explain whether our legal system provides for all people to be treated equally.

Activity 12.11 Structured questions

Relevance of the Ingram case to all of us

An estimated 45% of the community will suffer from a mental illness at some point in their life. QBE claimed that their discrimination was 'lawful' and that removing its capacity to discriminate in this way it 'would have imposed an unjustifiable hardship on QBE'. More than 200 Australians have contacted Beyond Blue with claims of discrimination by insurance companies.

- 1 Should there be a change in the approach taken by insurers if equality in the law is to be achieved?
- 2 To what extent do you agree with QBE, since its mental illness exclusion policy is 'standard industry practice'?
- 3 Evaluate whether citizens with mental illness should have to pay higher premiums, have more exclusions on their insurance policies or be refused cover.

News report 12.2

‘Landmark’ ruling against QBE insurer that denied depression claim

Beyond Blue CEO, Georgie Harman, told The Huffington Post Australia it was ‘a great day’ for the wider recognition of mental illness. ‘It means so much, not just for Ella but for the hundreds of thousands of people we know face discrimination every day for mental health problems. This is a real wake-up call for the insurance industry to really look at their practices, to make sure they’re relying on modern data and modern community expectations about mental health.’

Melanie Schleiger of Victorian Legal Aid, which provided Ingram with representation, claimed QBE’s blanket policy excluding mental health claims was

not based on evidence. ‘There was no evidence that it considered any statistics, actuarial data or expert medical information about the risks presented by different types of mental illnesses when it created this travel insurance policy and decided to exclude all claims made because of a mental illness.

‘We see examples of discrimination happening in workplaces still. This is not the only industry or circumstance, but this is a case which has exposed the lack of reliable data on which QBE assessed this claim. This is a landmark day. This gives us some case law that says there are consequences for this sort of behaviour.’

Activity 12.12 Folio exercise**Ingram as a landmark ruling**

Read News report 12.2 and complete the following tasks:

- 1 Describe how the insurance industry incorporating mental health considerations into their policies would lead to equality.
- 2 Explain how the insurance industry’s use of statistics could lead to inequality for sufferers of mental illness.
- 3 Even if laws exist that are anti-discriminatory, why do cases like Ella Ingram’s occur?
- 4 Evaluate why this is an important or landmark case in the pursuit of justice.

Access

A third guiding principle underpinning our legal system’s pursuit of justice is access. In any case, particularly civil disputes, where individuals have had their rights infringed, parties need access to information, support and assistance. Ingram, who was only 17 when she started her pursuit for justice, needed the support of others to obtain legal information and advice. As a 17-year-old, who later pursued tertiary studies as a nurse, Ingram needed support to help represent her against a multinational that was worth over \$18 billion at the time of the hearing in VCAT.

The legal system can improve a person’s access through:

- methods of dispute resolution such as mediations and compulsory conferences that allow views to be heard and parties to determine their own solutions that they will follow
- VCAT’s success as a complaints body and the information provided on its website, which provides guidance about rights, and access to affordable, accessible and timely resolution.

Despite government funding for the VLA being cut, it provides a crucial service for Victorians who would otherwise be denied the means to access justice. The value of the VLA is evident: Gregory Buchhorn and Melanie Schleiger, lawyers at VLA, represented Ms Ingram with the generous assistance of Ms Claire Harris as counsel.

However, why was access to timely resolution denied, with the dispute being hard-fought and protracted, taking almost four years?

Timely resolution may have been impossible to achieve as the parties may have attempted a range of other dispute resolution methods that proved unsuccessful. On page 267, statistics reveal that approximately 75% of disputes in VCAT's Human Rights List that heard the Ingram case are now resolved using mediation. In this case and in many others that require a more formal process, additional time is needed to initiate legal proceedings, appoint legal representatives, possibly including members of the VLA, to adequately prepare for the hearing and to present the dispute in a manner that leads to a just outcome.



Why is the case still relevant today?

Go to the Victorian Equal Opportunity and Human Rights Commission website at www.humanrightscommission.vic.gov.au to view the *Fair-minded cover* report.

In June 2019, the Victorian Equal Opportunity and Human Rights Commission authored the 'Fair-minded cover: Investigation into mental health discrimination in travel insurance' report, under the guidance of its Commissioner Ms Kristen Hilton. The Commissioner commented on the importance of the *Ingram v QBE* case as a 'test case' that has the capacity to affect Australians who take over ten million trips overseas and eight million trips interstate.

Even though Member Dea, who presided over the case in VCAT's Human Rights List in December 2015, established that her findings were limited to the circumstances of Ingram's case, the case continues to have broader implications. The Ingram case was the first test case heard by a court or tribunal concerning insurance discrimination on the basis of mental illness in Australia. It took almost four years for Ingram to find out whether QBE's discrimination against her was unlawful. As Commissioner Hilton determined, 'in the time that it takes to pursue a complaint, an individual may be uninsured and unprotected, or suffer financially'. Despite the delays, the public is starting to benefit from her courage in pursuing legal action.

The Ingram case highlighted critical and ongoing issues regarding blanket mental health exclusions, and the terms of the policy affected by questionable statistical data. The impact has affected the right for all Victorians to fair access to travel insurance. This is because policies with such exclusion clauses have the potential to discriminate against one-fifth of Australians, or an estimated 1.2 million Victorians, who have and or continue to experience, mental health conditions like anxiety and depression.

Even if Australians feel that they have been discriminated against, the process of initiating a complaint and having it enforced, remains according to the Victorian Equal Opportunity Human Rights Commission, 'complicated, costly and time-consuming'. Consider how this assessment undermines the principles of justice: fairness, equality and access.

Is there access for complainants to pursue legal action like Ella Ingram?

Access exists to multiple bodies that have jurisdiction to hear complaints regarding discriminatory insurance practices. These bodies include:

- the Australian Human Rights Commission
- Financial Ombudsman Service
- Superannuation Complaints Tribunal
- and State and Territory human rights, anti-discrimination or equal opportunity bodies like Victoria's VCAT Human Rights List that presided over the *Ingram v QBE* case.

However, many consumers would be deterred from taking action, while others would seek resolution through the process of conciliation. To what extent would conciliation be effective? There are two issues with conciliation.

First, despite the expertise of the conciliator, their suggestions to resolve the dispute are not binding, and therefore, don't have to be followed.

Second, insurance companies may be willing to settle, but require the claimant to sign a confidential agreement, where they are unwilling to admit legal liability. Therefore the opportunity to establish a legal precedent that may have resulted in broader legal and social change is lost. Consequently, individuals like Ella Ingram are burdened by the time, stress, uncertainty and money required to pursue a legal claim through more formal means because the possibility of resolving the dispute through conciliation or mediation is highly unlikely.

Has access to dispute resolution been improved since the case?

Yes and no: the Ingram case did not result in an appeal. However, legal discussion arose with the Victorian Equal Opportunity Human Rights Commission launching reviews of the insurance industry and the issues of discrimination as a result of the Ingram case, because issues relating to discrimination was widespread.

The Equal Opportunity Human Rights Commission reflected the power individuals like Ella Ingram can have in influencing legal change. The report stated, 'the decision in *Ingram v QBE* was an important catalyst for the Commission's Investigation. Despite VCAT's decision, the longstanding efforts of consumer advocates and existing guidance to insurers on complying with the law, the practice of travel insurers offering policies with blanket mental health exclusions remained widespread. In recognition of the potentially far-reaching impacts of discrimination in the travel insurance industry more broadly, the Commission drew inspiration from Ella Ingram's story and the many years of consumer advocacy to investigate and shine a light on discriminatory policies and practices by travel insurers.'

Even so, individual complaints are not always sufficient to lead to a broader change in policy or practice. Despite finding that QBE had unlawfully discriminated against Ingram, QBE initially refused to change its policies, arguing that 'mental health exclusions were necessary to keep travel insurance affordable'. QBE argued that VCAT's findings related 'only to a specific set of circumstances'. However, legal discussion, coupled with strong advocacy from the VLA, consumer groups and advisory groups on mental health issues, like Beyond Blue and SANE, resulted in QBE changing its travel insurance policies in 2017.

What impact could these policies have?

In July 2019, the Commission made a submission to the Royal Commission into Victoria's mental health system, stating that 'routinely failing to provide cover or indemnity for people with a mental health condition perpetuates the stigma surrounding mental health and can lead to people choosing not to seek treatment and support'.

Travel insurers refusing to cover mental illness ‘widespread’, investigation finds

Hundreds of thousands of Australians are still being sold travel insurance policies that will not cover them for mental illness, years after a landmark case against QBE was meant to turn things around.

Key points

- Hundreds of people were denied mental health-related claims by three companies
- Ella Ingram still struggles to get affordable travel insurance, despite winning her case against QBE
- Almost half of all Australians will experience a mental health condition at some point in their lives

Four years ago, Ella Ingram was awarded compensation because her insurer, QBE, decided not to cover her for a bout of depression that forced her to cancel an overseas school trip.

She took them on and won, and the case got the attention of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), which launched an investigation into travel insurance companies.

‘It should’ve been and it could’ve been a watershed moment for other insurers to look at their policies to try to determine whether they did have the basis to discriminate against people on mental health conditions,’ Commissioner Kristen Hilton said. ‘But it wasn’t.’

The Commission investigated three travel insurance companies – Allianz, Suncorp and World Nomads (now nib Travel) – and the data the companies relied on to support blanket exclusions for mental health conditions. Mental health exclusions mean the policy holder cannot make a claim if their trip is affected by mental illness of any kind, pre-existing or new. The exclusion treats everything from mild anxiety to a psychotic episode exactly the same.

The investigation found in a period of eight months, between July 2017 and April 2018, the three companies sold 365 000 policies containing exclusions, and denied hundreds of people’s claims on the basis on mental illness. ‘In terms of unlawful discrimination, we found that it was widespread and far-reaching,’ Ms Hilton said.

‘We have recommended that insurers contact all of the claimants that might have been affected by these discriminatory policies.’

‘Such blanket exclusions are only lawful if the insurers can justify them with statistical data, which shows the group is too high-risk. In all the insurance that we looked at, we found that the data was either inadequate to justify the policy, it was out of date, or in some cases the data simply didn’t exist,’ Ms Hilton said.

Cheaper to fly home

After Ms Ingram won her case against QBE, she booked a flight to Europe and started to look for travel insurance that would cover her. But, despite

some insurers removing blanket exclusions, she still could not find an affordable option.

‘We came up with this plan that if I was overseas and I started to slip and become unwell again mentally, I could make an assessment right then and there and think I should probably go home now. The cost of the flight home was going to be less than the premium to pay for an existing mental health condition.’

She said she found the lack of progress that pushed the commission to look into the issue disappointing.

‘I don’t want to sound pessimistic, but I don’t think there has been too much change and ... that’s been disappointing. In my position where I’ve gone through this court case, I’ve gone through the whole debacle of it all, it’s disconcerting to see that it’s still happening, it’s still an issue and there’s still policies out there that are discriminating against people.’

But there is some room for hope.

The three companies that participated in the investigation, which represent more than a third of industry, all agreed to change their policies and scrap blanket exclusions.

‘The insurers that we worked with, were good to work with ... there was a recognition that perhaps the industry had not moved in the way that community understanding and medical understanding of mental health conditions had,’ Ms Hilton said.

Insurers ‘stuck in the stone age’

But consumers essentially rely on the companies’ goodwill because the commissioner is powerless to hold them to their legal obligations not to discriminate.

‘That’s probably one of the issues; as a regulator in this space, we would like to have stronger powers, we would like to take more robust action,’ Ms Hilton said.

‘We’ve certainly submitted the report to the insurance regulators in the insurance industry and pointed out what the deficiencies in the current system are and we’ve encouraged better regulations.’

But she is taking heart that insurers are recognising they have fallen behind community standards when it comes to mental health.

And the commission is not completely taking the companies at their word that the eight recommendations resulting from the investigation will be taken up, and things will improve for consumers.

‘All insurers that were party to the investigation have agreed to change their policies, or have already changed their policies in relation to blanket exclusions,’ Ms Hilton said.

‘A number of them have also agreed to implement all of our recommendations. We’ve also said that we’ll go back in six months’ time and look at what development and progress have been made and report on that.’



The VEOHRC's commissioner Kristen Hilton does not have enforcement powers to crack down on insurers doing the wrong thing. (ABC News: Patrick Stone)

For Ms Ingram, that change is long overdue.

'People in Australia are going to get diagnosed with mental health conditions. I just feel like the general population of Australia is starting to move forward in talking about mental health conditions and I feel like insurers are stuck in the stone age,' she said.

The Insurance Council of Australia (ICA) said it had been working alongside its members to improve mental health-related coverage and outcomes for customers. 'The ICA and members cooperated openly with VEOHRC during its inquiry, but have not seen the final report,' the ICA's Campbell Fuller said.

'Travel insurers responsible for most of the market had either removed exemptions or were intending to do so before this inquiry was instigated in 2017. This trend has continued and soon insurers with more than 80% share of the travel insurance market will have removed blanket exclusions for mental health conditions, with cover also widely available for first-instance episodes of mental health conditions. Many insurers cover pre-existing mental health conditions on an individually underwritten basis similar to coverage available for pre-existing medical conditions.'

The ABC contacted Allianz, Suncorp and nib Travel for comment.

In a statement, nib Travel said it was working with its underwriter to adopt the changes, and travellers with mental health conditions, new and pre-existing 'may be covered for policy benefits' in the following months.

Suncorp said it had already removed mental health exclusions from its policies.

'We accept that, at the time, our policies did not comply with the Victorian legislation and community expectations,' Suncorp said in a statement.

Allianz said it believed 'the terms and conditions of the relevant policies were reasonable', but it had widened its coverage to support people with mental illness in late 2017.

QBE, which had removed mental health exclusions by the time of the investigation, was asked to take part but declined and sold out of the travel insurance business in the second half of 2018.

Source: Amy Bainbridge and Loretta Florance, ABC News, 12 June 2019

Activity 12.13 Letter/speech

Making discriminatory practices unlawful

Read News report 12.3 and complete the following task:

Write a letter to the Royal Commission. Outline reasons for change that are necessary in making discriminatory practices unlawful.

OR

Write a speech to your class that addresses how legal change that removes discriminatory practices is critical in achieving mental health reform.

Key point summary

Do your notes cover all the following points?

- ❑ An overview of the claims made by the applicant, Ms Ingram
 - Denial of insurance coverage
 - Direct discrimination, leading to exclusion based on attribute, in the form of mental illness
- ❑ An overview of the central facts of the case
 - Claim for travel insurance made by applicant
 - Refusal to provide cover according to terms of insurance, by respondent, based on 'lawful discrimination'
- ❑ Dispute resolution body involved
 - VCAT
 - Human Rights Division – Human Rights List
- ❑ Member's findings
 - Applicant (Ms Ingram) 'directly discriminated' against by respondent (QBE) due to:
 - mental exclusion clause in policy
 - denial of insurance covered by policy
 - Defences allowing 'lawful discrimination' were unsuccessful
- ❑ Remedy imposed by member and its appropriateness
 - Damages for economic and non-economic loss
- ❑ Possible avenues of appeal
 - To the Supreme Court (not exercised)
- ❑ Extent to which principles of justice were achieved
 - Fairness
 - Equality
 - Access

End-of-chapter questions

Revision questions

- 1 Outline the grounds the applicant Ms Ella Ingram used to commence her claims against the respondent QBE.
- 2 Outline the grounds the respondent QBE used to deny Ms Ingram's claim for reimbursement.
- 3 Describe Member Dea's reasons in finding that QBE's 'blanket mental exclusion clause' amounted to 'unlawful discrimination'.
- 4 Describe one reason why the award of damages to Ms Ingram may be seen as just. Distinguish (show the difference) the purposes of awarding damages for economic and non-economic loss.
- 5 Currently insurers are able to exercise an exemption that allows them to 'lawfully discriminate' based on the risks faced by their business. Analyse whether or not this contract term should be allowed to exist.
- 6 Explain two benefits to Victorians in being able to have certain civil disputes resolved by lists within VCAT, rather than going to our courts.
- 7 Even though an appeal from VCAT was not exercised by the parties, where would the appeal be heard and on what grounds?
- 8 Ms Ingram was also supported by her legal team which included members from the VLA (Victorian Legal Aid). In what ways would her legal representation have asserted or protected her basic human rights?

- 9 Complete the table below in your exercise books. Define and discuss ‘consensus’, ‘mediation’ and ‘conferences’ as dispute resolution methods used by the courts and VCAT.

Definition of method	Strength	Weakness
Consensus		
Mediation		
Conferences		

- 10 VCAT’s Human Rights Division saw 455 cases initiated, of which 439 were finalised. The median time it took to finalise cases has remained at roughly 15 weeks in 2018–19, however, the number of cases heard by the List has doubled since 2015. Fees for the Human Rights Division, which were set in July 2016, confirm that a standard hearing may still involve no fee, although the cost of legal representation, if required, will be the responsibility of the parties.

Using this data from VCAT’s 2018–19 report, assess whether VCAT’s Human Rights Division has been effective in fulfilling the principles of justice.

- 11 Complete the table below. Allocate one page per principle of justice. Identify a minimum of two aspects of each principle and explore how they led to or hindered the achievement of justice in *Ingram v QBE*.

Principle of justice	Achieved in <i>Ingram v QBE</i>	Hindered in <i>Ingram v QBE</i>
Fairness		
Equality		
Access		

Practice exam questions

- Using the *Ingram* case to illustrate, explain the roles of the member in VCAT when presiding over a civil hearing. [3 marks]
- In the *Ingram* case, the applicant claimed monetary compensation in the form of damages. Explain: [2 + 2 = 4 marks]
 - the purpose of damages
 - two types of damages that can be sought.
- Angela has read media reports concerning the *Ingram* case and is confused as to why this case would be heard in VCAT rather than our formal courts. Explain two reasons or benefits of the *Ingram v QBE* case being heard at VCAT. [4 marks]
- Use the *Ingram* case to answer the following questions: [2 + 2 + 2 = 6 marks]
 - Outline why parties in a civil dispute may want to reach an agreement or consensus.
 - Describe two differences between mediation and compulsory conferences. Consider the role of the independent third party, the process or the outcome.
 - Why are processes such as mediation and conferences preferred as methods of dispute resolution used by courts and VCAT?
- Explain and evaluate two similarities and two differences in the processes, outcomes and/or personnel used by VCAT and the courts to resolve civil disputes. [8 marks]
- ‘VCAT and the courts have the same possible avenues for appeals.’ To what extent is this statement correct? [10 marks]
- Essay: To what extent were or could the principles of justice (fairness, equality and access) be achieved in *Ingram v QBE*? [20 marks]

Chapter 13

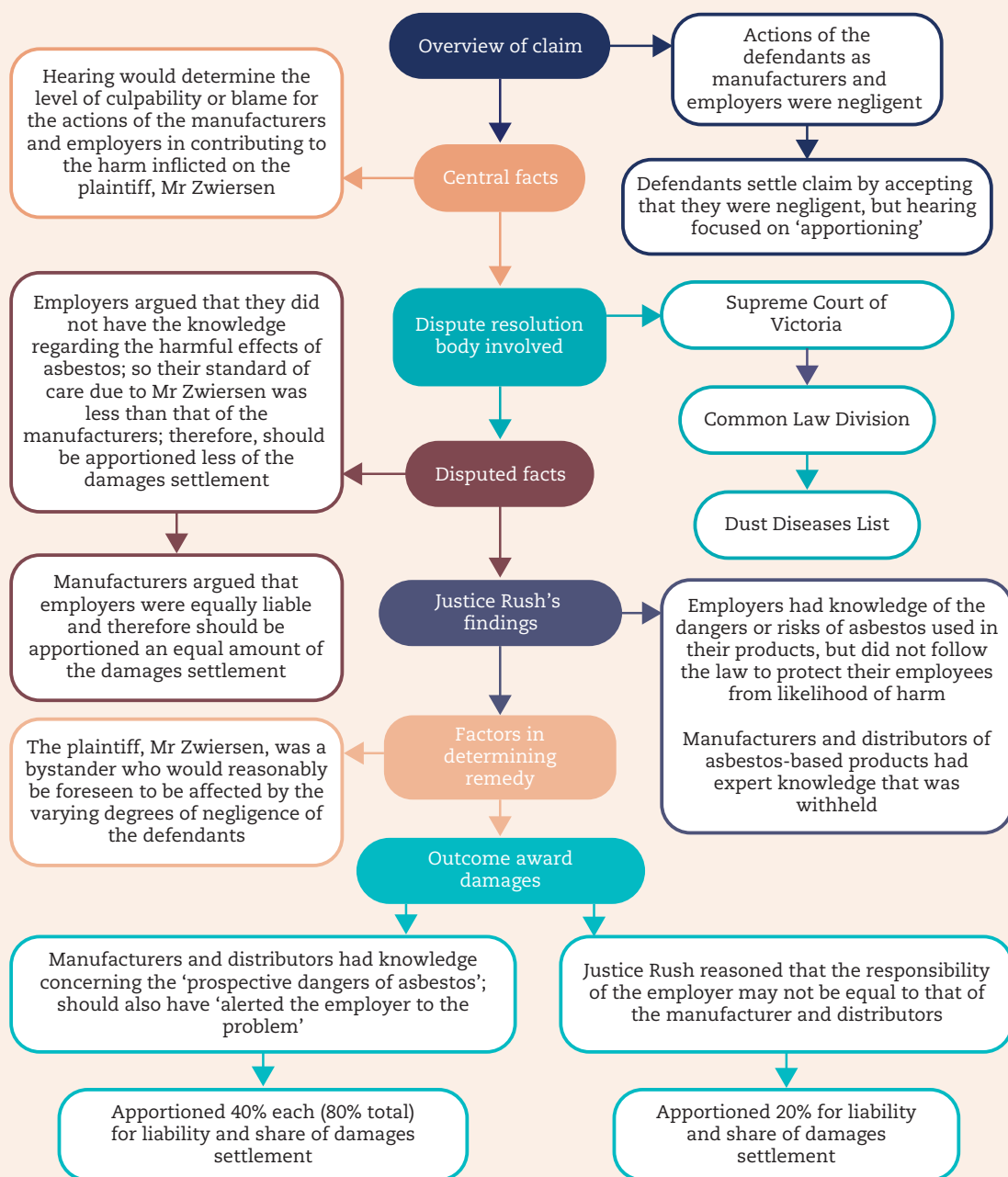
Unit 2 – Area of Study 2

A civil case: exposure to asbestos during employment caused cancer – *Zwiersen v Field & Hall Pty Ltd & Ors* [2016] VSC 16 (29 January 2016)

This chapter provides an examination of one civil case. The case, heard in the Supreme Court of Victoria, is *Zwiersen v Field & Hall Pty Ltd & Ors* [2016] VSC 16 (29 January 2016). This chapter will commence with an overview of the claim and the facts of the case, followed by a review of the Supreme Court, and the methods of dispute resolution considered and their appropriateness. Remedies that were awarded and their appropriateness will then be considered, as will possible avenues of appeal. It will then conclude with an overview of the extent to which the principles of justice were achieved in this case.



Exposure to asbestos during employment caused cancer



Key terms

apportionment of liability to determine the portion of blame or legal liability

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

binding precedent formed from the legal reasoning (or *ratio decidendi*): a precedent that must be followed by lower courts in the same hierarchy in matters of similar fact; for instance, a decision of the High

Court is a precedent that must be followed

causation the need to determine whether there is a link between the action of the person or persons and the harm suffered by the person

culpability level of blame or responsibility for a wrongful act or omission

damages a monetary award; this is the most common outcome of a civil case

duty of care a legal obligation to avoid causing harm; can arise when

the harm is 'reasonably foreseeable' if care is not taken

persuasive precedent the legal reasoning of a court: a court does not have to follow this reasoning, but it can be influential; applies to decisions of a lower court or a court at the same level

precedent law made by courts: a reported judgment of a court that establishes a point of law

ratio decidendi the legal reasoning, or rule, upon which a decision is based; forms a binding precedent

13.1 Claim and facts of the case

Mr Zwiarsen had contracted mesothelioma, a form of cancer, after working as an electrician for Field & Hall between 1964 and 1971 and between 1976 and 1981. Mesothelioma occurs when a person has been exposed to asbestos. Between 1972 and 1976, he worked for AEC Constructing, but they were no longer registered as a company at the time of the hearing. As an electrician, Mr Zwiarsen undertook lagging work in boiler rooms and service tunnels with insulation products that contained asbestos dust and fibre. Mr Zwiarsen said the dust 'was everywhere, floating around like snow ... all the dust and stuff would fall to the ground'.

In December 2015, Justice Jack Rush of the Victorian Supreme Court presided over the case *Zwiarsen v Field & Hall & Ors* [2016] VSC 16. A jury of six was also empanelled, but on the second day of the trial, the parties agreed to settle.

What followed was a three-day hearing presided over by Justice Rush, who had to apportion (determine what portion of) the blame or legal liability the employers and manufacturers/distributors had for failing in their duties. Mr Zwiarsen passed away in June 2016, at the age of 70.

Juries of six are optional in County and Supreme Court civil disputes and, if empanelled, will determine which party's case is more probable and assess damages.

Why does the Zwiarsen case matter?

According to research in Occupational and Environmental Medicine, Australia is known to have had one of the highest per-capita asbestos consumption rates. Between 1982 and 2009, 10 930 people with malignant pleural mesothelioma and 640 people with malignant peritoneal mesothelioma were diagnosed in Australia. Asbestos was not banned until 2003.

It has been scientifically determined that mesothelioma can develop substantially later than when asbestos fibres and dust are first inhaled. Approximately 400 cases per year, like the Zwiarsen case, are being resolved in settlements by our courts.

The Zwiarsen case has seen a spate of important cases involving individuals suing manufacturers of asbestos. Prior to the Zwiarsen case, High Court cases such as *Amaca v Ellis* (2010) 240 CLR 111 and *Amaca v Booth* (2011) 246 CLR 26 dealt with the complexity of determining who was liable and the extent of liability for cases of mesothelioma with multiple defendants. Since the Zwiarsen case, it has become easier for plaintiffs to be awarded damages or seek settlements if they have a history of being exposed to asbestos.

Mesothelioma

An aggressive and deadly form of cancer, mesothelioma occurs in the thin layer of tissue – called the mesothelium – that covers most internal organs. It is most commonly associated with high exposure to asbestos and represents less than 1% of all cancers.

Pleural Malignant Mesothelioma the most common type, most often affects the tissue that surrounds the lungs (pleura).

1 Asbestos fibres

Enter through the nose and mouth.

2 Pleural lining

Fibres accumulate in the lungs or migrate to the pleural lining, causing inflammation, scarring and genetic changes within cells. The cells grow and multiply out of control. The growth builds up and restricts breathing.

Other types

- **Peritoneal mesothelioma** occurs in the tissue lining of the walls of the abdominal cavity.

- **Pericardial mesothelioma** affects tissue that surrounds the heart.

- **Mesothelioma of tunica vaginalis** affects tissue surrounding the testicles; may be first detected as a mass on a testicle.

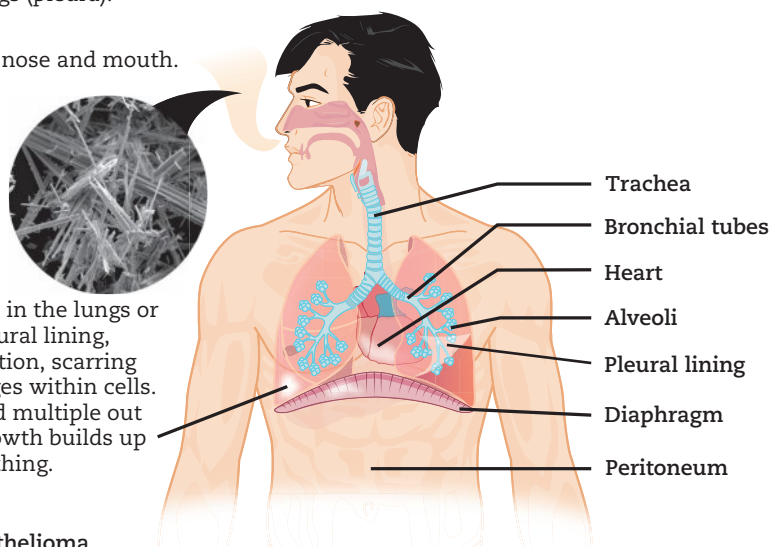


Figure 13.1 The medical impact of mesothelioma, as caused by exposure to asbestos

Plaintiff's claim accepted: hearing set to apportion liability

In his statement of claim, Mr Zwiersen claimed **damages** from his employer and the two asbestos manufacturers/distributors. On 11 December 2015, the parties decided to settle their claim before Justice Rush and a jury of six. The defendants accepted that they had breached their **duty of care**.

The case continued in order to determine what **apportionment of liability** the parties had and therefore the percentage of the damages payout or settlement they were responsible for.

Legal arguments to determine apportionment

For a defendant to be liable for causing a plaintiff's injury, it must be proved that the defendant's negligent conduct (in this case as employers and manufacturers) caused or made a contribution to the injury. **Causation** must be proved on the **balance of probabilities**.

In determining who was going to pay what portion of Mr Zwiersen's settlement, Justice Rush was directed to the High Court's **precedent** in *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 and the Victorian Supreme Court's case *Jones v Southern Grampians Shire Council & Anor* [2012] VSC 485.

The High Court case looked at **culpability**; in other words, how responsible each party was for the damage caused. Justice Rush had to apply that case's **binding precedent**, as it was from the High Court and relevant to this case.

In doing so, Justice Rush had to determine the link between the employers' and manufacturers' negligent actions and the damage caused to Mr Zwiersen.

A claim for damages due to negligence relies on the plaintiff suing and establishing the defendant's liability; that is, they owed a duty of care to a reasonable standard that was breached and harm occurred.

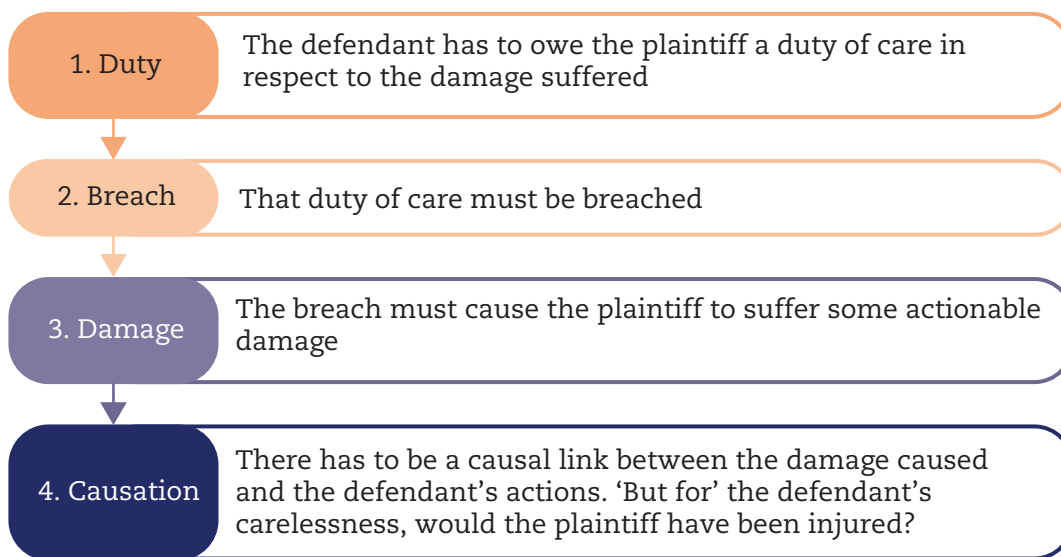


Figure 13.2 Proving negligence

Justice Rush had to:

- compare the culpability of Field & Hall as employers and Amaca and CSR as manufacturers
- determine the portion of blame for each party
- determine what portion or percentage of the settlement each party had to pay Mr Zwiersen.

The defendants

The defendants were the employer (Field & Hall) and the manufacturers/distributors (Amaca and CSR).

Employer (Field & Hall)

For Mr Zwiarsen's employer, the duty or obligations focused on the fact that they had not taken steps to determine whether they had complied or followed statutory regulations to ensure that their employee's workplace was safe. Appropriate respiratory protection was not provided. They argued three points: less knowledge, lower duty, less blame (and less damages):

- 1 they did not have the knowledge regarding the harmful effects of the insulation products they used
- 2 their standard or level of care due to Mr Zwiarsen was less than that of the manufacturers
- 3 therefore they should be apportioned, and be responsible in paying, less of the damages payout.

Findings

Justice Rush highlighted that as Mr Zwiarsen's employers between 1964 and 1972, Field & Hall failed in their responsibility to make enquiries or assess the risk. Expert evidence from Dr James Leigh had highlighted that Field & Hall would have access to 'knowledge concerning the dangers of exposure to asbestos [that] was rapidly increasing' and that the 'dangers of asbestos causing mesothelioma [were] well known in Australia'.

In addition, Field & Hall failed to provide protection for their employees by fulfilling their statutory obligations.

The *Harmful Gases Regulations 1945* and *Regulations Relating to the Precautions to be Taken in Entering into Confined Spaces 1954* meant employers had a duty to supply their employees with appropriate respiratory equipment, especially in confined spaces where products with asbestos would have been used.

Even under the *Health Act 1928 (Vic)*, 'asbestos lagging or spraying, asbestos works or factories in which asbestos is used, manipulated, crushed or pulverised' was seen as dangerous work.

Therefore, employers like Field & Hall had a duty or responsibility to their employees.



Asbestos in its natural mineral form

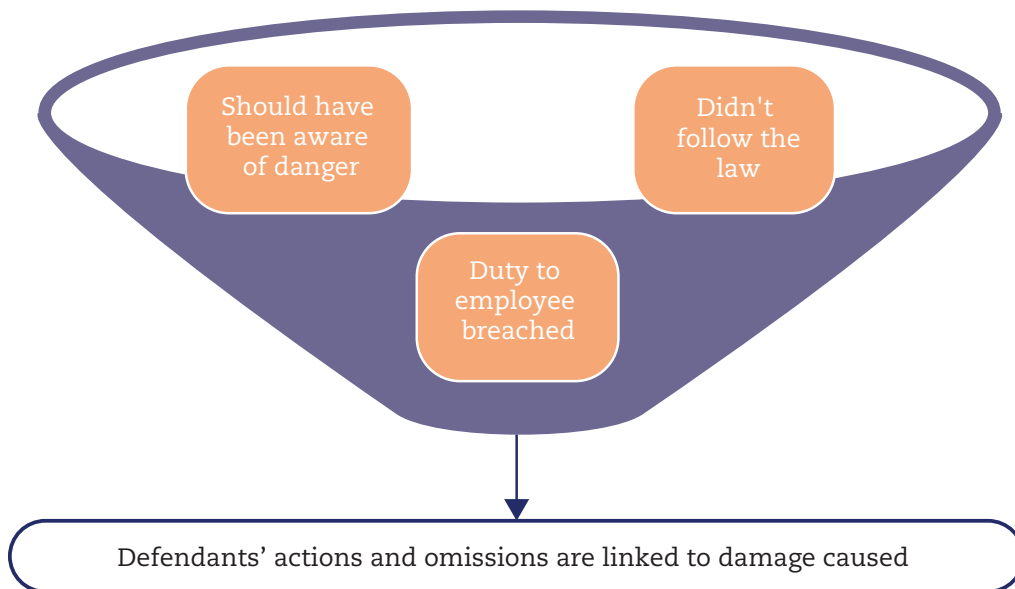


Figure 13.3 Actions leading to negligence



Manufacturers/distributors (Amaca, formerly James Hardie, and CSR)

Justice Rush determined that the manufacturers were unsuccessful in their claim that the employer had a greater duty of care.

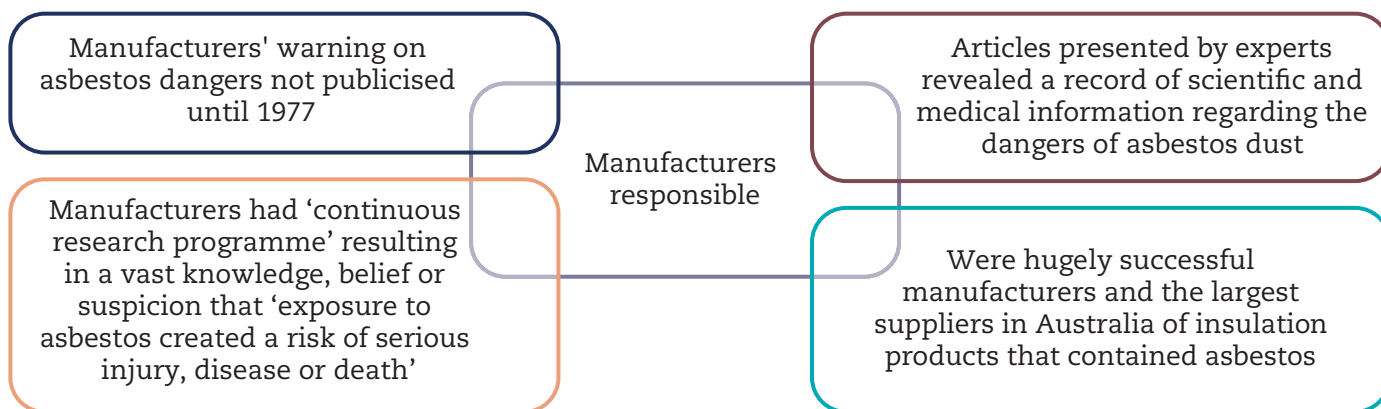


Figure 13.4 Manufacturers responsible

The discovery phase, used to uncover relevant documents, was seen as a strategic way to create a long process and so significantly increase costs for parties and delay dispute resolution.

Justice Rush accessed documents and interrogatories; that is, questions and answers exchanged by the parties during the discovery phase of the civil pre-trial phase. Justice Rush determined that as manufacturers and suppliers of asbestos-laden products, Amaca and CSR had a 'repository of knowledge concerning the dangers of asbestos dust' and therefore were aware of the dangers of their products and should have informed potential users of their products, including employers such as Field & Hall.

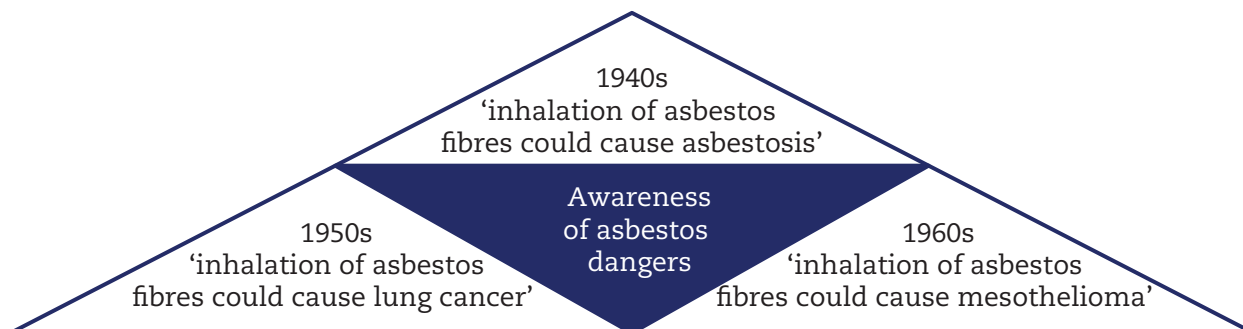


Figure 13.5 Awareness of asbestos dangers

Today, the courts have the power to require litigants to narrow the issues in dispute. Parties need to seek discovery of documents only if there is a legitimate basis for doing so.

Justice Rush stood by and applied the **persuasive precedent** in the 2012 Jones case. Manufacturers and distributors that had knowledge concerning the prospective dangers of asbestos should also have alerted the employer to the problem. Justice Rush reasoned that the responsibility of the employer may not be equal to that of the manufacturer and distributors.

Findings

In assessing the apportionment, or portion of the damages settlement, Justice Rush would have considered a number of factors. He would have weighed each party's actions and omissions that contributed to Mr Zwiersen's illness.

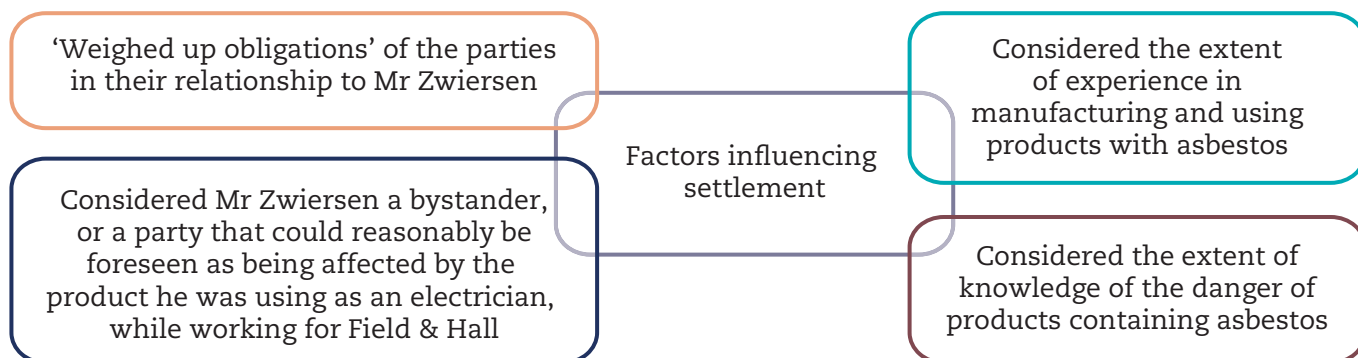


Figure 13.6 Factors influencing settlement

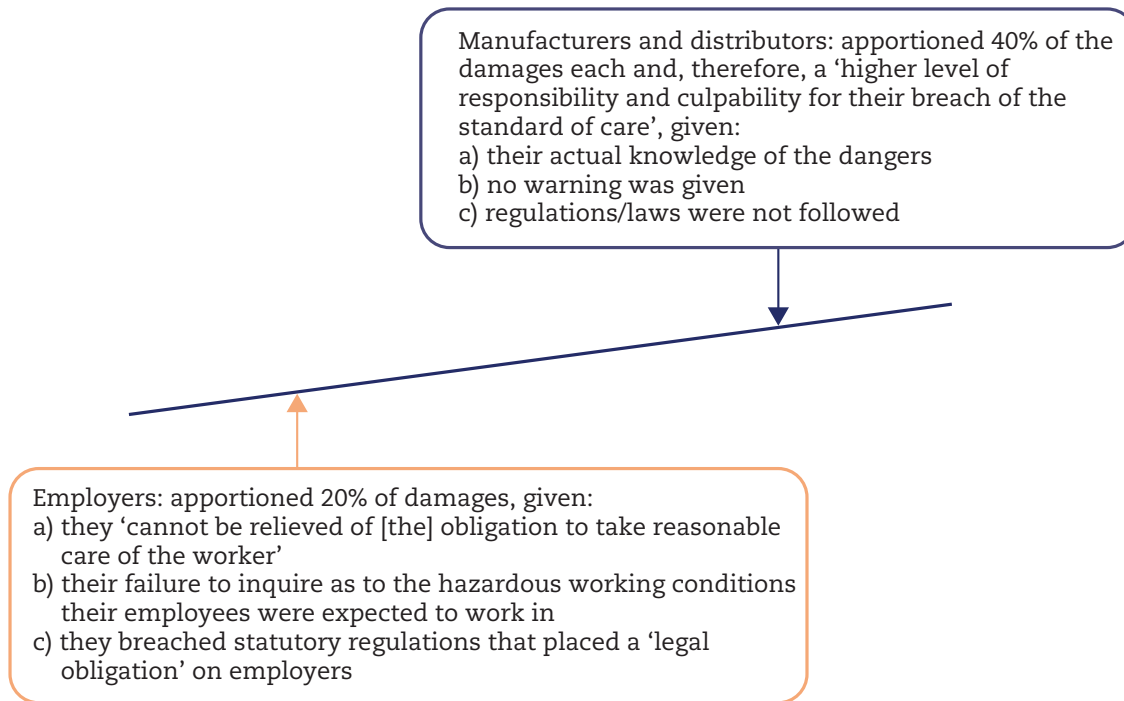


Figure 13.7 Weighing up the level of responsibilities of the parties involved

For the defendant: employer Field & Hall

Justice Rush determined that employers 'cannot be relieved of [their] obligation to take reasonable care of the [worker] even though the [worker's] work was being undertaken in workplaces it did not control'.

He found Field & Hall's failure to inquire as to the hazardous working conditions their employees were expected to work in meant that 20% of the liability was apportioned to the employer. As the employer they were liable as they:

- 'directed the plaintiff to his place of work and [where he was subject to] the dusty conditions' we now know was asbestos dust and fibres
- breached statutory regulations that placed a 'legal obligation' on them to provide a safe working environment designed to protect their employees.

For the defendants: manufacturers and distributors

Justice Rush found that Amaca and CSR as manufacturers and distributors had a higher level of responsibility and culpability for their breach of the standard of care than Field & Hall and therefore were each apportioned to pay 40% of Mr Zwiarsen's settlement payout.

For Justice Rush, Amaca and CSR had 'actual knowledge concerning the dangers of asbestos ... the ability to research and warn of the dangers of asbestos ... failed to place a warning', unlike US asbestos product manufacturer Johns Manville, who did so in 1964 '... not followed the regulatory regime'; for example, the *Harmful Gases Regulations*.

Activity 13.1 Structured questions

The claim and the central facts of the case

- 1 Describe one reason for the defendants accepting that they breached their duty of care.
- 2 Why would Justice Rush refer to and follow a binding precedent from the High Court? How could this precedent improve the possibility of justice being achieved for the parties involved?
- 3 Consider the value of civil pre-trial mechanisms procedures such as the discovery phase. Identify and describe the two types of evidence exchanged by the parties in this phase.
- 4 Outline the factor that altered the level of responsibility and, therefore, the percentage of the settlement for the manufacturers and employers. To what extent do you agree with this legal reasoning?

Activity 13.2 Role play

You be the lawyer

A client, like Mr Zwiarsen, comes to you advising that they are suffering from mesothelioma. They state that while working for their employer, they were exposed to asbestos. Using Figure 13.2, outline how these elements may apply to their case.



Why is the case still relevant today?

1 The extent of the ongoing legal and health problem

Even though the Zwiarsen case was finalised in early 2016, and Mr Zwiarsen passed away in June 2016, Australia has one of the highest incidences of mesothelioma in the world. According to the Australian government's advisory body ASEA (Asbestos Safety and Eradication Agency) it is 'estimated that Australia will reach 18,000 cases of mesothelioma by 2020, with another 30,000 to 40,000 cases other asbestos-related diseases predicted'.

These have predominantly been cases associated with occupational asbestos exposure, as was the case for Mr Zwiarsen. This comprised the first wave of asbestos miners and manufacturers and the second wave of tradespeople using asbestos products. Despite the decline, the courts are still dealing with occupational cases.

However, the biggest concern is that an estimated one-third of new cases of asbestos sufferers, will be associated with Do-It-Yourself (DIY) renovators undertaking repairs and improvements on homes. Due to the nature of dust diseases, they will not realise that they may be exposing themselves to asbestos in the process.

Even though cases like the Zwiarsen case have occurred recently, the following article on the Werfel case 2019 illustrates that the risks continue and more must be done to raise awareness and educate Australian homeowners and DIY renovators about the likely presence of asbestos in the residential sector.

News report 13.1

Terminally ill man awarded \$3M for asbestos exposure while renovating

James Hardie ordered to compensate Mathew Werfel, 42, who inadvertently sanded asbestos sheets at his home in the mid-2000s.



Father of three, Mathew Werfel (pictured outside court with his wife), was awarded \$3 million after James Hardie, now Amaca, was found to have failed to warn the public about the dangers of asbestos.

A terminally ill South Australian man has been awarded a record \$3m payout after he was exposed to asbestos dust, including while renovating his home.

Matthew Werfel, 42, will receive \$3 077 187 – the largest amount ever awarded to an asbestos victim in Australia – after the building materials company James Hardie was found to have failed to warn the public about risks posed by their cement products.

Lawyers for Mr Werfel lodged a claim against James Hardie – now known as Amaca – in the South Australian employment tribunal seeking damages after he was diagnosed with mesothelioma in 2017.

Mr Werfel had been exposed to asbestos dust while working for a fencing contractor as a teenager and later in the mid-2000s during renovations on his Pooraka home. Over three or four weekends, he sanded and painted the home,

unaware it was constructed from asbestos cement sheets. ‘By the time of Mr Werfel’s exposure there can be no doubt that Amaca knew the risk that was posed to renovators,’ Judge Leonie Farrell said in her judgment on Tuesday.

In addition to awarding compensation for pain and suffering, future economic loss, medical expenses and loss of life expectancy, Judge Farrell imposed exemplary damages on the company, as a deterrent to other firms.

‘Amaca breached its duty of care to a large class of Australians, of which Mr Werfel was a member,’ Farrell said.

‘The magnitude of the risk of members of this class contracting mesothelioma was vast. The consequences of the risk were the deaths of many Australians. The probability of the risk occurring was certain. It had occurred in the past and the numbers were increased to the knowledge of Amaca. Amaca had the resources with which it could and should have taken steps to minimise or obviate the risk of death in this class.’

Werfel welcomed the payout but feared many home renovators were still exposed to the dangerous fibre.

‘On the one hand, this outcome is a great relief, knowing that my family will be taken care of,’ he said in a statement. ‘But it’s heartbreaking to think how many people continue to be exposed, without their knowledge, to asbestos in their homes and workplaces.’

His lawyer, Annie Hoffman, said the case had significant implications for people exposed to asbestos in their homes, workplaces and in the community. She said the case confirmed James Hardie’s duty of care continues even decades later.

Source: Australian Associated Press via The Guardian, 7 August 2019, © AAP

Activity 13.3 Folio exercise

Apply your understanding

Read News report 13.1 and answer the following questions:

- 1 Why was James Hardie (Amaca) liable in Mr Werfel’s case?
- 2 To what extent was James Hardie’s liability similar to that owed to Mr Zwiersen?
- 3 Identify two types of damages awarded by Judge Farrell, and two purposes of the remedy ordered.
- 4 Outline:
 - a why the defendant owed the plaintiff a duty of care
 - b how the defendant failed to fulfil their duty of care to the plaintiff. In your answer consider the ‘reasonable person test’ and the ‘standard of care’ required by the defendant.
 - c why the harm that occurred to Mr Zwiersen and Mr Werfel was foreseeable
 - d why Judge Farrell ordered James Hardie to pay exemplary damages
 - e to what extent does the remedy in this case fulfil its purposes
- 5 Why does James Hardie’s duty of care continue even decades later?

2 How is the Supreme Court (Common Law) Dust Diseases List trying to deal with the number of growing cases?

According to the Supreme Court's (Common Law) Dust Diseases List in 2018, the vast majority of cases in the List currently, and in the future, have and will involve claims of injury relating to asbestos exposure in a variety of industrial and domestic settings.

Many plaintiffs with claims in this List have a shortened life expectancy and their claims are given an expedited timetable. In 2017, the average time from initiation to trial for 274 matters in the List resulted in 249 matters being resolved within 6.6 months.

A recent reform in October 2018 saw the Supreme Court Dust Diseases List issue a Practice Note to clarify procedures to be used, due to the increasing number of cases, as a means to improve access to resolution for plaintiffs.

First, the scope of dust diseases has been substantially increased, since the *Zwiersen* case, to include aluminosis, asbestos related pleural diseases and coal dust pneumoconiosis. Crucially, legislation and the courts have extended the definition and breadth of cases to include those resulting from silicosis, that will be discussed below.

Second, changes in the ability to initiate and the use of civil pre-trial procedures reflect the specialisation of the Supreme Court Dust Diseases List and its attempt to improve the administrative convenience of the civil justice system to resolve these disputes. This is crucial considering most plaintiffs are seriously or terminally ill.

Case management by judges has substantially increased their role in dealing with these new cases. Judges will undertake directions hearings with the parties that are central to encouraging them to finalise all relevant documentation and are also an attempt to encourage out of court settlement. This civil pre-trial phase is also making greater use of expert mediation services to finalise resolution.

As a result of cases like those involving Mr *Zwiersen*, who died in June 2016, interlocutory applications can now be made for *expedited trials*, where the hearing date can be pushed forward. Even the attempt by parties wishing to delay hearings has been minimised, with the applications to reschedule hearings being limited and the use of private mediation continuously encouraged. By the final direction, parties will be expected to have confirmed their readiness for trial, including the list of witnesses, need for interpreters and identification of the main issues in dispute.

The main change has been the need for parties to file, prior to trial, a joint memorandum to provide the trial judge with an overview of the case to be presented at trial by each party. It should not simply recite the pleadings, nor is it a substitute for proper pleadings. Rather, it should concisely set out an overview of:

- the claim and defences
- any relevant procedural history
- the basic facts of the case, noting significant points of agreement and disagreement
- the major issues that remain in dispute
- a short outline of the evidence each party intends to call and the names of the witnesses, whether they are lay or expert and, in the case of experts, the witness's occupation/area of expertise.

3 What is required to deal with this threat in a timely manner?

Legal discussion within the courts and parliament has resulted in the ongoing need to regulate procedures for the safe management, removal and disposal of asbestos. It has become a priority in recent decades as the incidence and awareness of asbestos-related diseases has increased and as asbestos-containing materials come to the end of their useful life. Past practices have resulted in widespread, uncontrolled disposal of asbestos waste throughout urban and rural environments. The issue is that this will result in more litigation and, tragically, more people like Mr *Zwiersen* who will lose their lives due to dust diseases. However, parties must act in a timely manner because of the limitation of action.

Limitation of action

Limitation of action refers to the time period within which a plaintiff must bring their case against a defendant. This means a civil claim must be commenced or initiated within a certain time period under the *Limitation of Actions (Amendment) Act 2002* (Vic). In Australia, different time limitations exist, and therefore delaying the initiation of legal action may compromise a plaintiff's ability to access damages.

A person exposed in New South Wales can lodge a court claim or a workers' compensation claim without any time limits applying. In Queensland, there remains a strict six-month time limit from the date of diagnosis with an asbestos disease for one to lodge a claim.

Western Australia maintains a three-year time limit from diagnosis to lodge a court claim.

Claims for compensation due to a dust or asbestos disease in Victoria are generally made under the *Wrongs Act 1958* (Vic). Unlike other areas of personal injury law in Victoria, a number of caps and limitations on compensation claims do not apply.

Activity 13.4 Structured questions

Apply your understanding

- 1 How will this reform improve the administrative convenience of the Supreme Court to resolve similar civil disputes?
- 2 'Directions hearings are a waste of time.' Comment on the extent to which you agree with this statement.
- 3 Do you agree that there should be limitations of time that are strictly enforced? Should claims that are lodged even a day late, be rejected?

4 How are new dust diseases, like silicosis, being dealt with by parliament and the courts?

In September 2017, the *WorkSafe Legislation Amendment Act 2017* (Vic) was granted Royal assent by the Victorian Governor. In March 2018, the Act was enacted in order to improve the operation of various Acts of Parliament including the *Dangerous Goods Act 1985* and *Workplace Injury Rehabilitation and Compensation Act 2013*. The Acts have broadened the definition of asbestos-related diseases to include those linked with mineral silicates that have seen a skyrocketing of cases linked with silica dust and deadly disease called 'silicosis'. They have also introduced criminal penalties in order for authorities and workplaces to 'exercise due diligence' and protect those who come into contact with their product, such as their workers and consumers.

Why?

WorkSafe, a government authority designed to protect workers from workplace hazards, have commented on the dangers of working with reconstituted stone, which produces highly hazardous crystalline silica dust. Silica dust can be harmful when inhaled and cause incurable lung disease such as silicosis, which can be fatal.

Between July 2017 and March 2019, 44 silicosis claims were lodged with WorkSafe Victoria. Of these, 35 claimants were employed as stonemasons. People working in benchtop fabrication are at higher risk, because they regularly work with reconstituted stone which can contain up to 95% crystalline silica.

As a result, an increasing number of law firms have investigated potential representative proceedings or class actions on behalf of stonemasons who have been diagnosed with acute silicosis and other respiratory illnesses arising from the cutting of engineered stone made from crystalline silica.

These conditions are said to be caused by cutting engineered stone kitchen and bathroom benchtops, which contain a high level of respirable crystalline silica (90% and above). A number of stonemasons in Australia who have been involved in the cutting of engineered stone benchtops manufactured by companies like Caesarstone, Quantumquartz, Smartstone and Silestone have been diagnosed with silicosis.

Under Australian law, manufacturers of products owe duties to consumers and end-users of these products to ensure that they are safe and that any risks they present are accompanied by appropriate warnings. Even so, with the diagnoses of silicosis that have occurred to date, it appears that these obligations may have been breached.

Is there really an ongoing problem? How and why are the courts going to resolve the growing number of civil disputes involving dust diseases?

News report 13.2

'I feel robbed': stonemasons launch class action over silica dust exposure

Authorities are bracing for a health crisis that could be worse than asbestos exposure

longer cuts benchtops and is confined to measuring duties. Even walking around at work can prove difficult, he said.

'If I tried to run I'd be out of breath in 30 seconds,' Mr Goldby said. 'I don't know how long I've got. I feel robbed definitely but by how much I don't know. I'd just love some kind of clarity but I don't think doctors know enough about it.'

People exposed to silica dust can develop chronic bronchitis, lung cancer, emphysema, kidney damage and acute, accelerated or chronic silicosis.

Slater and Gordon spokeswoman Margaret Kent said the largest stone benchtop suppliers – Caesarstone, Quantum Quartz and Smartstone – did not adequately communicate the severe safety risks or convey the necessary safety precautions.

'It is a tragedy that so many people have, or will, become grievously ill just by going to work,' Ms Kent said.

Comment has been sought from Caesarstone and Quantum Quartz. Smartstone declined to comment.

The class action is aimed at supplementing existing workers' compensation entitlements and the law firm wants to hear from other workers who fear they may have been exposed.

The Australian Engineered Stone Advisory Group, an industry group which covers 70% of manufacturers, said it was aware law firms had been advertising for silicosis patients to join a class action.

'It should be pointed out that manufacturers and suppliers are not the employers of the customers who purchase our products or the workers diagnosed with silicosis. Our members have been very active in educating our customers on safe work practices for more than a decade. We are developing an accreditation program and new safety education initiatives to further safeguard our industry.'

WorkSafe Victoria said the health risks of crystalline silica can be eliminated or reduced by using wet methods, and recommends air monitoring. The occupational health and safety manager at the Construction, Forestry, Maritime, Mining and Energy Union, Gerry Ayers, said it was unfortunate the situation had resulted in a class action.



People exposed to silica dust can develop chronic bronchitis, lung cancer, emphysema, kidney damage and acute, accelerated or chronic silicosis.

Despite being more than a year shy of his 30th birthday, Joel Goldby has the lungs of an old man. The Melbourne stonemason, who worked for a small company installing kitchens, has been diagnosed with potentially deadly silicosis following exposure to silica dust from cutting stone kitchen benchtops over the past 13 years.

He is one of scores of stonemasons who have joined Slater and Gordon's national class action against manufacturers, as authorities brace for a health crisis that could be worse than asbestos.

At least 135 stonemasons have been diagnosed with silicosis in Victoria and Queensland alone.

'Each day I'm out of breath, my chest feels tight and heavy,' Mr Goldby told *Guardian Australia*. 'I'm always short of breath.'

'I had never even heard about it. We really didn't know the danger involved. I just want them to be held accountable and the rules to change.'

Mr Goldby's brother Mark, 32, is also a stonemason and was diagnosed first, which prompted Joel's mother to urge him to get a medical check-up. Scans showed Mr Goldby had nodules ranging from 1mm to 5mm across both lungs.

His best mate and a group of his work colleagues are also grappling with the condition. Mr Goldby no

'This issue has taken a long time for people to come to grips with and in that time we've had people dying and suffering immeasurably over a completely preventable disease,' he said.

Since 2001, WorkSafe Victoria has had 60 claims and six people had died so far, Ayers said. He noted there had been 13 claims last year.

In April, the federal government announced it would set up a national dust diseases task force. It has committed \$5 million towards developing

a national approach for the prevention, early identification, control and management of dust diseases. The money will also fund a national dust diseases register and research. The taskforce of medical experts, researchers and industry representatives will begin work in July.

Source: Lisa Martin, *The Guardian*, 30 May 2019

Activity 13.5 Folio exercise


Apply your understanding

Read News report 13.2 and answer the following questions:

- 1 Under the *Supreme Court Act 1986* (Vic) proceedings are commenced by the lead plaintiff on behalf of a group of at least 7 people similarly affected. Why would a class action be initiated by the stonemasons?
- 2 According to the *Civil Procedures Act 2010* (Vic), the aim of class actions or representative proceedings is to facilitate 'the just, efficient, timely and cost-effective resolution of the real issues in dispute' for those whose rights have been infringed.
 - a To what extent would this class action achieve the principles of justice outlined in the Act?
 - b To what extent would a class action be better for the plaintiffs, defendant and the legal system, when compared to Mr Zwiersen's legal action in 2016?
- 3 Write a letter to the Victorian Premier giving two reasons regarding whether enough is being done by the authorities to deal with the threat of silicosis.

13.2 Dispute resolution bodies involved

Courts play a vital role in providing a forum for dispute resolution. In the previous chapter, we observed how the Victorian Civil and Administrative Tribunal (VCAT) provided a low-cost, efficient, expeditious and informal forum for the resolution of a large number of civil disputes, including a complex matter like the *Ingram v QBE* case. However, we also benefit from the creation of courts that are part of a hierarchy and that have the jurisdiction to resolve a broad range of civil disputes. These courts provide parties with expert personnel, processes and procedures designed to make dispute resolution most effective. The Zwiersen case was heard in the Supreme Court of Victoria, which hears among the most complex civil cases in the state.

 Go to the website of the Supreme Court of Victoria at www.supremecourt.vic.gov.au for more information.

Courts and tribunals in Australia

The Magistrates' Court sits between the formality and complexity of the higher courts and the informal and less legalistic VCAT.

The County and Supreme Courts continue to administer justice in accordance with legal and procedural requirements in more complex disputes.

Our formal court system is suitable for resolving a broad and complex range of disputes. However, there has been an increased use of alternative dispute resolution mechanisms designed to improve administrative efficiency, justice and accessibility.

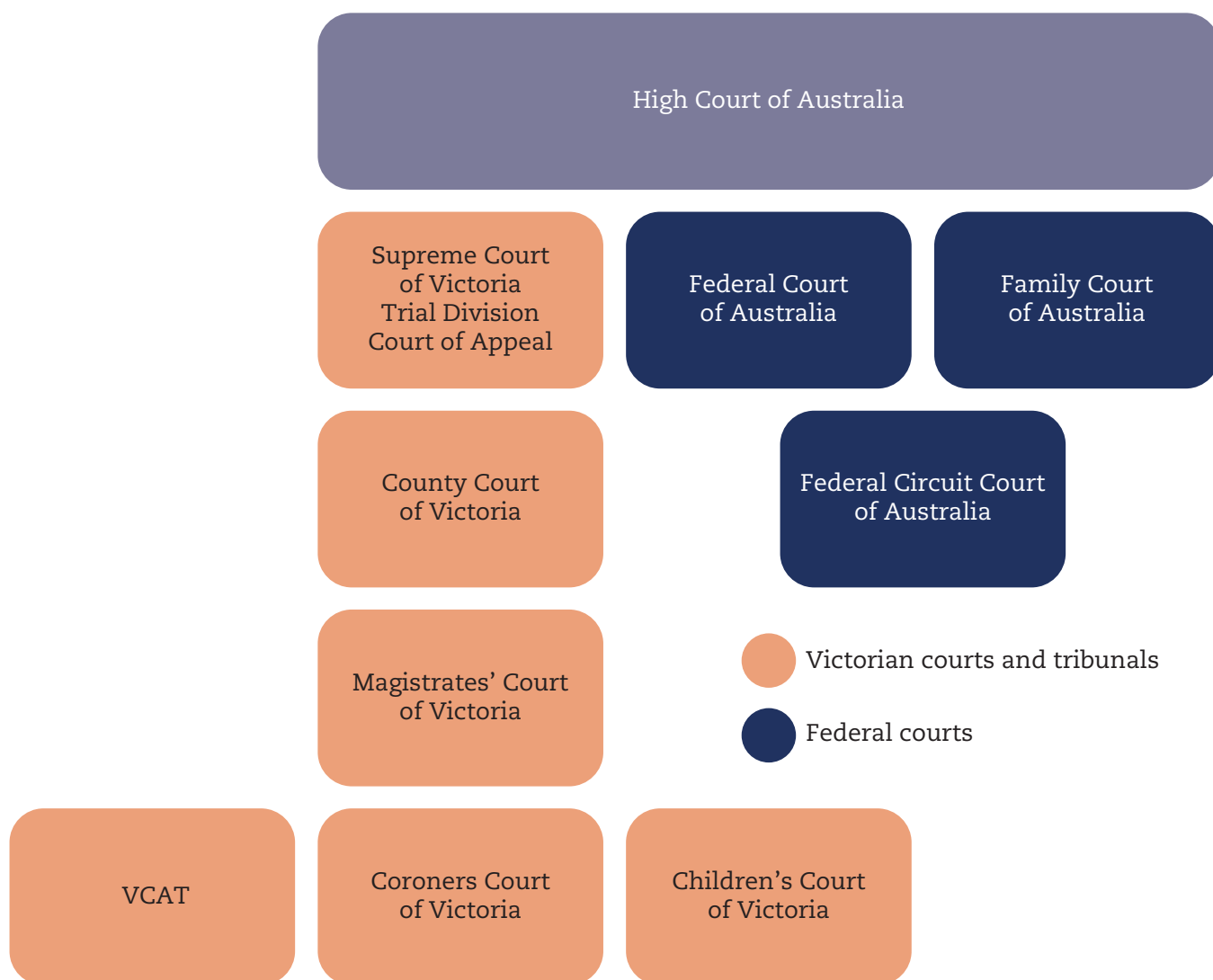


Figure 13.8 Courts and tribunals that operate in Victoria

Table 13.1 Original and appellate civil jurisdiction in the Victorian court hierarchy

	Original civil jurisdiction	Appellate civil jurisdiction
Court of Appeal	No original jurisdiction	From County and Supreme Courts based on point of law, question of fact and damages in the form of monetary compensation
Supreme Court (Trial division)	Unlimited damages in the form of monetary compensation Presided over by judge (jury of 6 optional)	From Magistrates' Court and VCAT on point of law Presided over by one justice
County Court	Civil disputes for unlimited damages in the form of monetary compensation Presided over by judge (jury of 6 optional)	No appellate jurisdiction
Magistrates' Court	Up to \$100 000 By arbitration, up to \$10 000 Presided over by magistrate No jury	No appellate jurisdiction

Activity 13.6 Structured questions

The Victorian court hierarchy

Study Table 13.1 and consider the jurisdiction of courts in the Victorian court hierarchy that preside over civil disputes.

- 1 Discuss why we have a court hierarchy, rather than one court resolving all civil disputes.
- 2 Explain the difference between original and appellate jurisdiction.
- 3 Drawing on what you have learned in previous chapters, explain why the *Zwiersen v Field & Hall Pty Ltd & Ors* [2016] case would have been heard in the Supreme Court rather than the County Court.

Benefits of a court hierarchy as seen in the Zwiersen case

We will now consider the benefits of having a dispute resolution body like our formal court hierarchy in hearing civil cases like the Zwiersen case.

Allows for the operation of the doctrine of precedent to exist

The existence of a court hierarchy allows for the operation of the doctrine of precedent to exist. Superior courts of record (like the High Court) are able to provide legal guidance to lower courts when resolving disputes with similar facts. Therefore, legal guidance, through the legal reasons or the **ratio decidendi** for the decision, is given by independent and learned judges.

Crucially, having a court hierarchy that allows superior courts to guide lower courts provides the important principle of *stare decisis*; that is, standing by the decision. This is beneficial for the legal system and parties, as the reasons for the decisions will provide consistency and guidance from learned judges.

In the Zwiersen case, Justice Rush considered the precedent in the High Court's case *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) to help him determine the defendants' share of the responsibility for the damage caused. Justice Rush also considered the Victorian Supreme Court's case *Jones v Southern Grampians Shire Council & Anor* (2012).

Allows for an appeals process to exist

An appeals process is only possible with the existence of a court hierarchy. Superior courts provide an opportunity for aggrieved parties to seek leave appeal to a higher court. Superior courts (like the High Court) provide parties with an opportunity to review their case and rectify an injustice.

Appeals process

Consider David Miller, a lawyer at Colin Biggers and Paisley who reviewed the *Amaca v Booth* (2011) case. Miller's review (see Legal brief 13.1 on the next page) focuses on an appeal to the High Court that determined that all asbestos exposure may be deemed a cause of mesothelioma. Remember, Amaca were formerly James Hardie and were one of the defendants in Mr Zwiersen's case in 2016. The *Amaca v Booth* case was originally commenced in the NSW Dust Diseases Tribunal (a similar list to the one that is the part of the Victorian Supreme Court that Mr Zwiersen's case was heard and settled in). The case was then appealed to the NSW Court of Appeal, before Amaca sought special leave (permission) to appeal to the High Court.

Legal brief 13.1

Asbestos cases continue to be appealed

Cases involving exposure to asbestos continue to attract appellate court attention. The High Court's *Amaca v Booth* case reviewed expert evidence available to a trial judge in the Dust Diseases Tribunal of New South Wales. The majority of the Court concluded that such evidence supported a conclusion that all material exposure to asbestos may be deemed a cause of mesothelioma. The decision will impact the way such cases

are run at trial and also on the question of insurance cover for mesothelioma claims in general. At trial, various medical experts for Mr Booth expressed a view that all asbestos exposure above the ambient background contributes to the cause of mesothelioma. Based on that evidence, the trial judge (Curtis DCJ) found in favour of Mr Booth and awarded him damages of \$326 640.

New South Wales Court of Appeal dismisses appeal of brake lining manufacturers

Amaca appealed to the New South Wales Court of Appeal. They argued that, properly analysed, the evidence of the relevant experts did no more than express a view that exposure to asbestos added to the risk of contracting mesothelioma – not that all exposures were a legal cause of injury. The New South Wales Court of Appeal dismissed the manufacturers' appeal. They obtained Special Leave to Appeal to the High Court.

High Court agrees with decision of Dust Diseases Tribunal

The High Court found that the expert evidence before the trial judge supported a finding that cumulative exposure to asbestos was the cause of Mr Booth's injury.

Activity 13.7 Structured questions

Is an appeals process beneficial?

Read Legal brief 13.1 and consider David Miller's analysis of appeals involving asbestos cases.

- 1 What does 'seek leave to appeal' mean? Do parties have an automatic right to appeal?
- 2 Discuss one advantage and disadvantage to the parties involved in an appeal.
- 3 What is the benefit of the parties accessing expert witnesses? Why could *Amaca* have a huge advantage over individuals like Mr Booth or Mr Zwiersen, when it comes to expert witnesses?

A court hierarchy allows for specialisation

The court hierarchy allows for specialisation. Court personnel and procedures exist to deal with a broad range of disputes. For example, the Supreme Court that presided over the *Zwiersen* case has undergone substantial reform since 2014 in order to effectively resolve a broad range of disputes, especially in the area of civil law.

The Supreme Court's Trial Division

When hearing the most serious civil cases in Victoria, the Supreme Court Trial Division presides over:

- civil cases unlimited in the amount of money that may be claimed
- civil cases involving complex legal issues
- some appeals and reviews of decisions made in lower courts and tribunals.

Civil proceedings are heard in one of two Divisions.

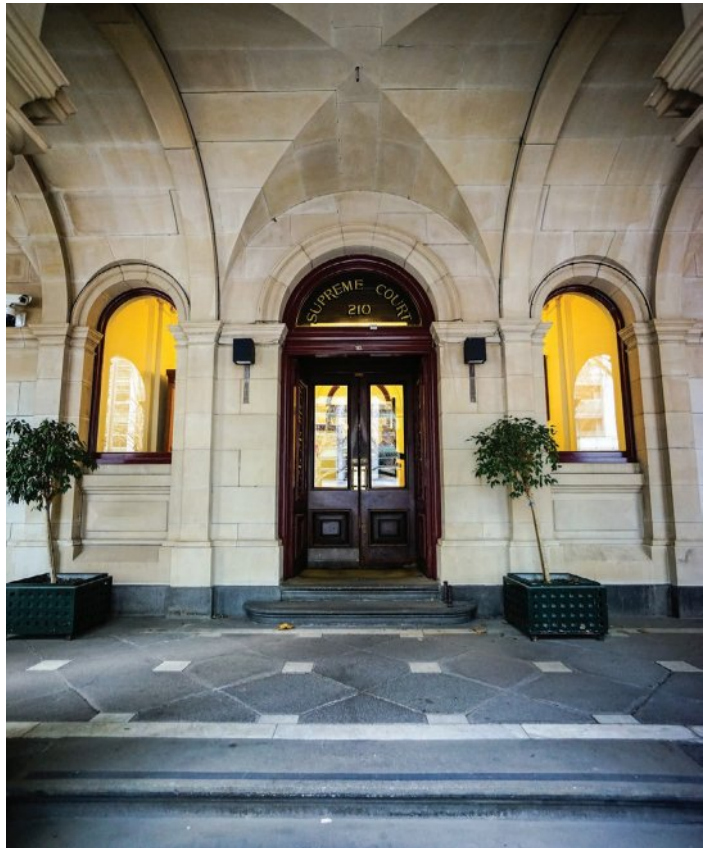
Division 1

The Commercial Court became a division of the Supreme Court in 2014 to resolve commercial disputes in a ‘just, efficient and timely manner’. There are now 11 judge-managed lists that specialise in admiralty, arbitration, corporations, insurance, intellectual property, taxation, as well as technology, engineering and construction (TEC). In the Supreme Court’s annual report of 2017–19, it was reported that 2702 cases were initiated in 2018–19. The Commercial Court encourages judicial mediations to reach settlements that save the parties considerable time and money.

Division 2

In January 2017, the Common Law Division, which manages three broad categories of civil disputes, was divided into 13 judge-led lists. These include: major torts, personal injuries, dust diseases, judicial review and appeals, and trusts, equity and probate. Each list deals with a specific area of law and is managed by judges and associate judges with expertise in the area. According to the Supreme Court’s annual report of 2017–19, 2820 cases were initiated in the Common Law Division in 2018–19.

These claims involve professional negligence, personal injury or defamation. The *Zwiersen* case was heard as part of this category of civil disputes, in the Supreme Court’s Common Law Division: Dust Diseases List.



Specialised list within Supreme Court’s Common Law Division – Dust Diseases List

On 1 January 2015, the Dust Diseases List was created for the management of all proceedings in which the plaintiff claims to suffer from a disease of the lungs or related organs attributable to exposure to dust, including asbestos.

Prior to 2015, these proceedings were managed within the Personal Injuries List. Why establish a dedicated and specialised list?

- increasing number of dust-related proceedings
- the often catastrophic nature of the injuries alleged
- frequent complexity of contribution claims between multiple defendants.

Consider the *Zwiersen* case

How would the parties in the *Zwiersen* case have benefited from a specialised list that is part of the Victorian Supreme Court?

It has been argued that the Dust Diseases List allows the Supreme Court more time to closely monitor the progress of such cases and to react quickly to changing circumstances, particularly where the plaintiff’s health is in rapid decline. Consider that Mr *Zwiersen* passed away 6 months after this case was settled. Between January and June 2015, 182 cases were initiated or transferred into this list and 27 were resolved.

Court hierarchy improves administrative efficiency

Having a court hierarchy allows for the legal system’s resources to be better allocated to resolve an estimated 120 000 cases heard in the courts every year.

Dispute resolution bodies like the Supreme Court's Common Law Division are using procedures such as mediation to improve the efficient use of limited resources needed to effectively resolve a broad range of complex civil disputes. In this way, an effective court hierarchy attempts to reduce delays.

The 20 judge-led and managed lists, including the Dust Diseases List, are part of a more efficient and effective process structure. Civil disputes are managed from commencement, right through to the completion of the hearing.

Activity 13.8 Structured questions

Supreme Court specialisation

- 1 Why would the Supreme Court be divided into divisions and lists?
- 2 Using the internet, research the median time to resolve a dispute in the Dust Disease List.
- 3 You have been asked to write a paragraph in the Supreme Court's annual report examining to what extent has the specialised Dust Disease List been a success.

13.3 Methods of dispute resolution and their appropriateness

Methods of dispute resolution were designed to assist with the progress of a civil dispute towards formal adjudication by the courts. Today, however, in an overwhelming set of cases, disputes are resolved prior to trial.

As seen in *Zwiarsen* case, the imminence or cost of trial and the overwhelming evidence held by one party may lead to increased settlements. The formality of the Supreme Court required methods that were more extensive at pre-trial and trial phases.

We will now look at the methods of dispute resolution used in this case, with particular focus on pre-trial procedures such as pleadings, discovery directions hearings and mediation.

Civil pre-trial phase

The civil pre-trial phase should achieve the following purposes.

- Parties, like Mr *Zwiarsen* and the defendants, would be informed about the details of the legal action through the exchange of relevant documents.
- Attempts would be made through a range of pre-trial processes and procedures to resolve the civil dispute rather than going to trial, therefore encouraging parties to reach an out-of-court settlement.
- Even if the parties proceed to trial, the methods used as part of the civil pre-trial procedures would help identify key issues, where the parties agreed, and therefore time and money will be saved as the trial only focuses on issues the parties dispute.

Civil pre-trial procedures

Civil pre-trial procedures include pleadings, discovery, directions hearings and mediation.

Pleadings

Dispute resolution methods in the civil pre-trial phase commence with an exchange of legal documents between the parties (the plaintiff, who initiates legal action, and the defendant, who responds) called pleadings. These documents are completed by the parties and their legal representatives and filed in the Supreme Court.

Pleadings aim to ensure that:

- parties are informed/aware of the claim
- the Supreme Court and parties have details (written records)
- a resolution is encouraged; that is, an out-of-court settlement.

Stages involved in pleading for plaintiffs like Mr Zwiersen and the defendants

- *Writ*: Sent from plaintiff to defendant to inform them that they are initiating legal action. The writ is also logged in the Supreme Court.
- *Statement of claim*: From the plaintiff to the defendant, usually with the writ, that sets out the specific nature of claims and the remedy sought.
- *Notice of appearance*: Filed by the defendant within 10 days to inform the plaintiff and the court whether or not they will defend the claim.
- *Statement of defence*: Made by the defendant within 30 days to explain their version of the events, to admit and/or deny claims and to offer a defence.
- *Counter claim* (optional): Filed by defendant, alleging that the plaintiff committed a civil wrong, and therefore is being sued.

Discovery

The second method of dispute resolution is the discovery phase. This phase involves a further exchange of relevant documents and the answering of relevant questions through interrogatories.

The discovery of documents allows both parties to inspect and access relevant documentation such as medical reports or contracts. They assist the parties to effectively prepare their case, as the documents may narrow or explain the legal claim or issues in dispute.

Similarly, discovery by written interrogatories allows both parties to exchange questions and answers on matters of fact that must be answered by affidavit. The purpose of interrogatories is to save the court and parties time and money as relevant evidence or claims can be discovered prior to trial, reducing the element of surprise. Both parties should have access to all relevant information to prepare their case and determine whether they will pursue legal action.

Even so, discovery may undermine the effectiveness of our legal system as some parties rely on expensive legal representation to present and prepare their case, while other parties cannot afford to access the same level of expertise.

In the *Zwiersen* case, Justice Rush accessed documents and interrogatories during the discovery phase of the civil pre-trial phase.

Directions hearings

This is a third dispute resolution method that has grown in importance for the Supreme Court. Directions hearings are run by an expert judge or associate judge, 35 days prior to the trial. The judge will determine if the parties, who are also present, are ready for the trial. If parties are to proceed to trial, then important details like witness lists and relevant precedents to be used must be organised. This will reduce the need for their case to be adjourned once it commences.

Furthermore, this method of dispute resolution is seen as appropriate as it is designed to encourage settlements and therefore save the court and the parties time. The expert judge is also able to establish a clear timeline for the parties to complete all relevant documentation and procedures (such as attending compulsory mediation).

However, directions hearings can be stressful since parties are required to attend with their lawyer. If a person is unrepresented, it can be very daunting to appear before a judge or associate judge, particularly if the other party has engaged a solicitor.

Directions hearing reforms for Supreme Court's Dust Disease List

Reform 1

In January 2017, the Supreme Court determined that disputes going to trial in its Common Law Division, specifically the Dust Disease List, will give the parties directions for the management of a proceeding. Parties will be notified of the date and time, and attempt to settle the dispute at a pre-trial conference.

Reform 2

In 2017, the Supreme Court's Common Law Division established that the Dust Diseases List will now have second and final directions hearings. The parties and/ or their legal representatives must appear 'to address questions from the Bench as to the readiness of the proceeding for trial'. Parties will be ordered to file a joint memorandum identifying the factual and legal issues in dispute and to prepare a folder of key documents for the assistance of the trial judge.

Mediation

Mediation as a dispute resolution mechanism has been considered in Chapter 12 in relation to the *Ingram v QBE* case. Mediation has become a valued mechanism used by the courts, particularly for the Supreme Court, where it became a compulsory procedure in 2009. Parties may be directed to mediation by the judge during directions hearings or the pre-trial conference stage.

Benefits of mediation

According to Professor Tania Sourdin, from Monash University's The Australian Centre for Justice Innovation, some positives of mediation include:

- 81% of mediation clients were satisfied with mediation as the process that finalised their dispute
- it led to the settlement of some of the more difficult disputes
- it narrowed issues if the case went to trial, leading to cost savings and time
- the median number of days from when a matter was filed in court to the first mediation was 324 days, while matters that went to a hearing were heard 426 days later
- 95% of defendants considered that they were able to participate in mediation
- those who finalised their dispute as a result of a mediation believed they saved \$30 000 in legal costs.

13.4 Remedies awarded and their appropriateness

The purpose of remedies is to restore injured parties (plaintiffs) to their original position prior to the infringement of their civil rights. However, a remedy in the form of damages cannot adequately compensate an injured party like Mr Zwiarsen, who later died of asbestos-related mesothelioma caused by the defendants' negligent actions.

The main remedy sought through the courts is damages in the form of monetary compensation. The court orders the defendant to pay the plaintiff a sum of money to compensate them for the costs of injuries suffered.

Even though we are unaware of the settlement in the *Zwiersen* case, as it was confidential, an award for damages may have taken different forms.

The jury or judge assessing damages could award specific damages for injuries that can be measured (for example, the exact amount of medical costs) and general damages that estimate other losses such as pain and suffering.

13.5 Avenues of appeal

From November 2014, any party wishing to bring a civil appeal in the Supreme Court will need to seek leave to appeal. This leave to appeal will only be granted if the Court of Appeal believes that there is ‘a real prospect of success on appeal’. Under the *Courts Legislation (Miscellaneous Amendments) Act 2014 (Vic)*, applications for civil appeals have been streamlined to make the process more effective and timely.

The *Zwiersen* case did not result in an appeal from the Supreme Court to the Court of Appeal.

We will now turn to past reports that explore the avenue of appeals for parties involved in dust disease cases.

News report 13.3

Court upholds \$1 million asbestos payout – *Amaca v King* 2011 (Court of Appeal)

A 62-year-old man with mesothelioma who was exposed to asbestos at a James Hardie factory almost 40 years ago had a \$1 million compensation payout upheld by the Court of Appeal. Former machinist and fitter Eric King visited a James Hardie factory at Welshpool, Western Australia, in 1972 on three occasions lasting several hours each.

Mr King told his Victorian Supreme Court trial he was not warned about asbestos or given a mask while he conducted maintenance on a machine in the asbestos sheeting factory. A jury awarded him \$1.15 million, including \$730 000 in damages for pain and suffering, after it found that James Hardie had failed to take reasonable care to prevent Mr King’s exposure to asbestos and that this caused his mesothelioma.

It was the first time in more than a decade that a mesothelioma case

in Victoria had been decided by jury verdict. James Hardie, now known as Amaca Pty Ltd, appealed the decision, arguing that there was no evidence capable of linking the alleged breaches of duty to Mr King’s mesothelioma.

Amaca also argued that the damages were too high. But the Victorian Court of Appeal Justices Geoffrey Nettle, David Ashley and Robert Redlich dismissed the appeal. They said while it was true that \$730 000 had never before been awarded in a mesothelioma case in Victoria, it did accord with amounts awarded after jury verdicts in other cases.

Maurice Blackburn asbestos principal Andrew Dimsey said the decision was a welcome relief for Mr King and his family.

*Source: Daniel Fogarty,
The Courier Mail,
23 December 2011,
© AAP*

News report 13.4

Rio Tinto loses court appeal against asbestos compensation ruling to dying worker Zorko Zabic

In *Rio Tinto v Zabic* (2015), the High Court threw out an appeal by mining giant Rio Tinto against an asbestos compensation claim, setting a precedent for the Northern Territory.

Zorko Zabic, 74, worked at the Gove alumina refinery in the 1970s cleaning asbestos from pipes, and was diagnosed with mesothelioma after suffering chest pains.

The Supreme Court ruled that Mr Zabic developed the malignant mesothelioma as a result of exposure to asbestos dust and negligence by the mine operators, Alcan Gove, which was later bought by mining giant Rio Tinto.

But the Court ruled against the claim because the symptoms emerged after the *Workers Rehabilitation and Compensation Act*, which prevents such compensation claims being made in the courts after 1987.

This was overturned by the NT Court of Appeal. 'The appellant sustained an injury of the kind defined in the Act during and following his inhalation of asbestos fibres,' the Court of Appeal ruling said. 'That damage inevitably and inexorably led to the onset of malignant mesothelioma.' In rejecting Rio Tinto's latest challenge, the High Court has upheld the Court of Appeal decision.

High Court sets precedent

The arguments submitted to the High Court centred on whether the injuries suffered by Mr Zabic occurred before 1987, when the *Workers Rehabilitation and Compensation Act* started.

Rio Tinto argued that the claim for damage should be covered by the statutory workers' compensation scheme, rather than through common law. In submissions, Rio Tinto argued that mesothelioma was not contracted the moment the fibres entered the lungs. 'The decision of the NT Court of Appeal was made in error,' Rio Tinto's submission said. 'As at 1 January 1987 [Mr Zabic] had suffered some cellular changes – but these were dormant and were likely to remain dormant.'

'All that had accrued as at 1 January 1987 was a risk that Mr Zabic would contract mesothelioma.' Mesothelioma symptoms often emerge many years after asbestos fibres enter the lungs. Irrespective of the High Court result, Rio Tinto was required to pay Mr Zabic \$425 000 in compensation.

'Disappointed with the outcome': Rio Tinto

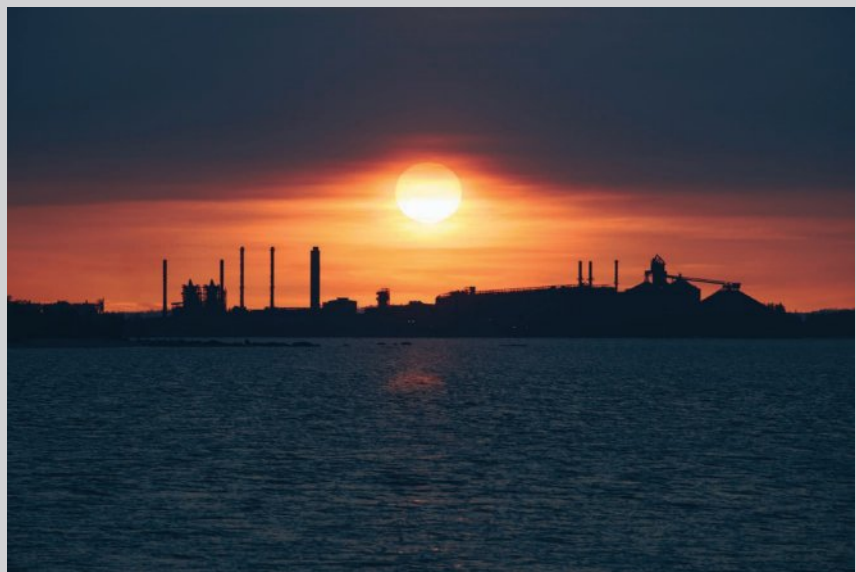
In a statement issued shortly after the court's decision, Rio Tinto said 'our deepest sympathies remain with Mr Zabic and his family. We accept the decision of the High Court, and whilst disappointed with the outcome, are grateful that the matter has now been resolved for all involved. We will wait to review the detailed judgment of the High Court to understand the reasoning behind the decision.'

'This case was not about trying to deny Mr Zabic's ability to access compensation, as he has always been able to seek compensation through the NT workers' compensation scheme. The reason we pursued this matter was simply to confirm what has been widely understood to be the correct application of the relevant NT legislation, that claims such as Mr Zabic's should be made under the statutory workers' compensation scheme rather than the common law.'

A 'victory for humanity'

Roger Singh from Shine Lawyers, who represented Mr Zabic, said the court decision would have widespread implications in the NT. 'This decision will pave the way for the many asbestos victims in the Northern Territory who have previously been denied justice to come forward and seek redress for themselves and their families. Workers in the NT injured prior to January 1987 would now be allowed to use common law to get fair and reasonable entitlements and compensation, without having to rely only on the existing workers' compensation scheme.'

Source (adapted): James Oaten and Elizabeth Byrne, ABC News, 12 August 2015



Activity 13.9 Folio exercises

Avenue of appeals for parties involved in dust disease cases

Read News reports 13.3 and 13.4 and complete the following questions:

- 1 On what grounds did the Supreme Court jury award Mr King the \$1.15 million damages payout?
- 2 On what grounds did Amaca appeal against the Supreme Court's decision? Why was Amaca's appeal dismissed by the Court of Appeal?
- 3 In relation to News report 13.3, on what grounds was there an appeal from the Northern Territory Supreme Court to their Court of Appeal? Why was the Supreme Court's decision overruled? Was this just, in your view?
- 4 On what grounds was there an appeal from the Court of Appeal to the High Court?
- 5 Why did the High Court's decision set a binding precedent? What effect would this decision have on future similar cases?

13.6 Principles of justice achieved

We will now explore the extent to which the principles of justice were achieved in this case.

Fairness and equality

Does our civil justice system achieve justice by fulfilling the principle of fairness and equality? In Victoria, there has been an increasing acceptance of the desirability of different or alternative dispute resolution methods within our civil justice system, whether it is VCAT, as seen in the *Ingram v QBE* case, or the Supreme Court, as seen in the *Zwiersen* case. These alternative methods are seen as contributing to the overall principle of justice as they provide fair means, processes and personnel to achieve this goal.

Consider the role of an independent third party that fulfils their judicial role by managing the case through the pre-trial phase, conducting the hearing or trial and determining a decision. Today, dispute resolution bodies such as VCAT and the courts are being more proactive in how they deal with and try to resolve disputes.

A basic goal of the justice system is that it treats all parties fairly and equally. In theory, all parties should be able to make appropriate and fair use of the law, lawyers and the court system to reach the correct decision once all relevant evidence has been disclosed. Is this a reality? Was there an inequality of wealth, power and resources that gave one party an advantage over the other in the *Zwiersen* case?

The courts may provide safeguards in the form of personnel and procedures to reduce bias, but the costs and time taken to resolve the dispute undermines the pursuit of justice. Well-resourced litigants may be prepared to incur costs that are disproportionate to the amount in dispute. They may seek to deter other parties from pursuing a valid claim. Even though Mr *Zwiersen* was successful, a substantial proportion of the settlement may have been used to cover his legal costs.

Access

In judging whether our civil justice system is accessible we would need to consider whether costs were excessive and whether proceedings were delayed.

Even though Mr *Zwiersen* settled, did the defendants, including Amaca and CSR, deny an injured party who happened to be dying access to appropriate damages in the form of monetary compensation? There is no doubt that parties are able to access the procedures or mechanisms that can help them gain an appropriate remedy.

Access to timely resolution is important in the pursuit of justice. Timeliness may improve with methods like directions hearings, conferences and mediations. Processes and mechanisms such as the discovery phase may assist rather than hinder a just and timely outcome. This could help improve procedural fairness.

A further issue regarding whether justice will be achieved for people suffering from mesothelioma is the age of patients who may pursue legal action. Of the 614 people who died from mesothelioma in 2014, approximately 80% were men, and the age range of those affected was 70 to 79. Settlements given for sufferers have been reduced for those who are elderly, effectively reducing their access to legal representation and their financial entitlements.

Go to the website of the Australian Mesothelioma Registry (AMR) at www.mesothelioma-australia.com/home for more information.

News report 13.5

BHP appeals against \$2.2 million asbestos cancer case

BHP Billiton has begun an appeal against the multi-million dollar payment awarded to a dying mesothelioma victim. In 2014, the multinational miner was ordered to pay \$2.2 million to former employee Steve Dunning after a four-year legal battle. Mr Dunning, 54, worked at the Newcastle steelworks from 1979 to 1981, during which time he was exposed to asbestos dust from the blast furnaces. Diagnosed with mesothelioma in 2010, Mr Dunning is terminally ill and has had one of his lungs removed.

In July 2014, BHP was found negligent by the Dust and Diseases Tribunal, and ordered to pay compensation of \$2.2 million to Mr Dunning, including \$500 000 for pain and suffering. The two-day appeal began on 2 January 2015 in the Court of Appeal. A spokesperson for BHP said the appeal was made on the basis of 'legal principles'.

'After careful consideration of the judgment, the company has concluded that the findings and

application of legal principles made by the trial judge are such that review by the Court of Appeal is warranted. As the matter is now before the Court, it is not appropriate for any party to comment further.'

Slater and Gordon lawyer, Joanne Wade, represented Mr Dunning and said BHP's decision to appeal was unfair to the Dunning family. 'It's really frustrating that BHP filed an appeal in the case of a dying man and one of its ex workers. The company has argued every available legal point for the duration of this case and it continues to do so, but it is not fair for Mr Dunning and his family. BHP was legally entitled to bring the appeal, but the case had been running for a long time. Mr Dunning is and will continue to suffer from mesothelioma and it will take his life. It is a very difficult situation for the family and hopefully it will come to an end very soon.'

Source: Ben Hagermann, Australian Mining, 2 February 2015



Activity 13.10 Folio exercise

BHP appeals

Read News report 13.5. To what extent was Mr Dunning's legal dispute with BHP Billiton just? Consider the following questions:

- 1 Was it resolved in a timely and efficient manner?
- 2 Were both parties provided with access to equal and affordable legal representation?
- 3 Were both parties provided with access to dispute resolution bodies (such as the courts and lists) and an appeal system?
- 4 Did the case result in just damages?

News report 13.6

James Hardie's payment to asbestos fund set to fall even as claims keep rising

James Hardie's contribution to an asbestos victims' fund is expected to fall by a third, even as the company posted a 12% rise in profit.

The building materials company reported a \$US221.4 million (\$AU281 million) profit in the first quarter of 2015. It will pay shareholders a 27 cent final dividend and a 22 cent special dividend.

James Hardie has an obligation to put up to 35% of its operating cash flow into the Asbestos Injuries Compensation Fund (AICF), which provides payouts to Australian victims of asbestos-related diseases. On 1 July 2014, James Hardie made a \$119.9 million payment to the AICF; however, in 2015 the payment was likely to be around \$80 million. That would only be a little more than half of the \$154.3 million the AICF actually paid out during the 2014 financial year. James Hardie said it has so far contributed \$718.1 million to the AICF since its establishment in February 2007.

Asbestos disease claims continue to rise

Under the asbestos compensation deal, each year an independent actuarial report is required to estimate the likely amount of asbestos liabilities for James Hardie, its related entities and former businesses which are covered by the compensation fund. The estimated net present value of asbestos liabilities has risen from \$1.87 billion at 31 March 2014 to \$2.14 billion at the end of March 2015.

James Hardie and the AICF's actuary, KPMG, had already dramatically increased its forecast for asbestos-related compensation last year after acknowledging that a predicted peak in asbestos claims had not been reached, with new cases of illness still on the rise. The AICF received a record 412 mesothelioma claims in 2013–2014, up from the previous record of 370 in 2012–2013 and 309 the year before that. It is currently estimating that mesothelioma claims should remain around a peak level of 400 per year until 2016–2017, before declining thereafter.

Average payouts fall as typical sufferer gets older
However, the rise in the number of claims has been partially offset by lower average claim sizes, legal defence costs and settlements. The average mesothelioma sufferer received a \$301,275 settlement in 2014. Part of the decrease in average claim sizes has been due to a steady increase in the average age of claimants, over 60% of whom are more than 70 years old. The older the claimant when they get sick, the lower their payout tends to be because their death is less premature. They probably are not claiming loss of future earnings and they are less likely to have dependants requiring additional compensation.

Source: Michael Janda, ABC News, 21 May 2015

Activity 13.11 Folio exercise

Questionable tactics

Read News report 13.6 and write a letter outlining your opinion of the tactics used by Amaca. In your letter, refer to:

- Amaca's legal and moral obligations
- whether the principle of fairness has been achieved
- a solution for how governments, regulators and consumers should respond.

Key point summary

Do your notes cover all the following points?

- ❑ An overview of the claim made by the plaintiff, Mr Zwiarsen
 - Defendants' actions as manufacturers and employers were negligent
 - Defendants settle claim by accepting they were negligent, but hearing focused on 'apportioning'
- ❑ An overview of the facts of the case
 - Justice Rush had to apportion liability for each defendant to determine the percentage of damages settlement they were responsible for
 - Justice Rush had to determine the level of liability for employers and manufacturers
 - Justice Rush considered the employer's knowledge of risk and statutory requirements for protecting employees
 - Justice Rush considered the manufacturers' and distributors' expert knowledge of the risks of asbestos that were withheld
 - Justice Rush considered the defendants' specific breach of duty of care that caused damage to plaintiff
- ❑ Dispute resolution body involved
 - Supreme Court
 - Common Law Division – Dust Diseases List
- ❑ Justice Rush's findings
 - Employer had knowledge of the dangers or risks of asbestos used in their products, but did not follow the law to protect their employee from likelihood of harm.
 - Manufacturers and distributors had expert knowledge concerning the 'prospective dangers of asbestos' and should also have 'alerted the employer to the problem'.
 - The plaintiff, Mr Zwiarsen, was a bystander who could reasonably be foreseen to be affected by the varying degrees of the defendants' negligence.
 - Justice Rush reasoned that the responsibility of the employer may not be equal to that of the manufacturer and distributor. Therefore, apportionment of liability and share of damages settlement paid varied between parties.
- ❑ Remedy imposed and its appropriateness
 - Damages – confidential settlement
- ❑ Possible avenues of appeal
 - To the Court of Appeal and the High Court (not exercised)
- ❑ Extent to which principles of justice achieved
 - Fairness
 - Equality
 - Access.

End-of-chapter questions

Revision questions

- 1 Outline the grounds the plaintiff (Mr Zwiarsen) used to commence his claims against the defendants.
- 2 Explain why the defendants in the Zwiarsen case settled their claim on the second day of the civil trial.

- 3 Describe Justice Rush's reasoning in determining the apportionment of liability and the different settlements for the employer and the manufacturers and distributors of the products containing asbestos.
- 4 Even though the settlement was confidential, describe one reason why the award of damages to Mr Zwiersen may be seen as just.
- 5 Identify and describe two documents exchanged by the parties during the pleadings stage of a civil dispute.
- 6 Explain two benefits to Victorians of being able to have complex civil disputes resolved by specialists within the Supreme Court of Victoria.
- 7 Outline two major disadvantages of parties proceeding to trial rather than having their civil dispute resolved during mediation.
- 8 Complete the table below in your exercise books regarding the Victorian court hierarchy's jurisdiction in resolving civil disputes. Include whether a jury is present and who presides.

Name of Victorian Court	Original Civil Jurisdiction	Appellate Civil Jurisdiction
Court of Appeal		
Supreme Court		
County Court		
Magistrates' Court		

- 9 Even though an appeal from the Supreme Court was not exercised by the parties in the Zwiersen case, where would the appeal be heard and on what grounds? Discuss (outlining the strength and weakness) whether appeals are beneficial in achieving justice.
- 10 Complete the table below in your exercise book. Allocate one page per principle of justice. Identify a minimum of two aspects of each principle and explore the strengths and weaknesses that led to or hindered the achievement of justice in the Zwiersen case.

Principle of justice	Achieved in Zwiersen case	Hindered in Zwiersen case
Fairness		
Equality		
Access		



Video

Practice exam questions

- 1 Explain the role of Justice Rush, who presided over the case. [3 marks]
- 2 The plaintiff settled a claim for monetary compensation, in the form of damages. Explain: [2 + 2 = 4 marks]
 - a the purpose of damages
 - b how the percentage of damages was apportioned.
- 3 Luis has read media reports concerning the Zwiersen case and is confused as to why this case would be settled two days into the civil trial. Explain two reasons for/benefits of the parties settling compared to a jury determining the outcome. [4 marks]
- 4 Outline one benefit and one disadvantage of directions hearings for the parties and the civil justice system. [4 marks]
- 5 Describe the purpose of the independent third party involved in mediations. [5 marks]
- 6 Describe one similarity and one difference in the role of the judge during directions hearings compared to formal judicial determination at trial. [4 marks]
- 7 Why are processes such as mediation preferred as methods of dispute resolution used by courts? [3 marks]
- 8 'Courts have effective avenues for appeals in order to achieve justice.' In reference to the case studies explored in this chapter, to what extent do you agree? [10 marks]
- 9 Essay: To what extent were or could the principles of justice (fairness, equality and access) be achieved in the Zwiersen case? [20 marks]

Chapter 14

Unit 2 – Area of Study 3

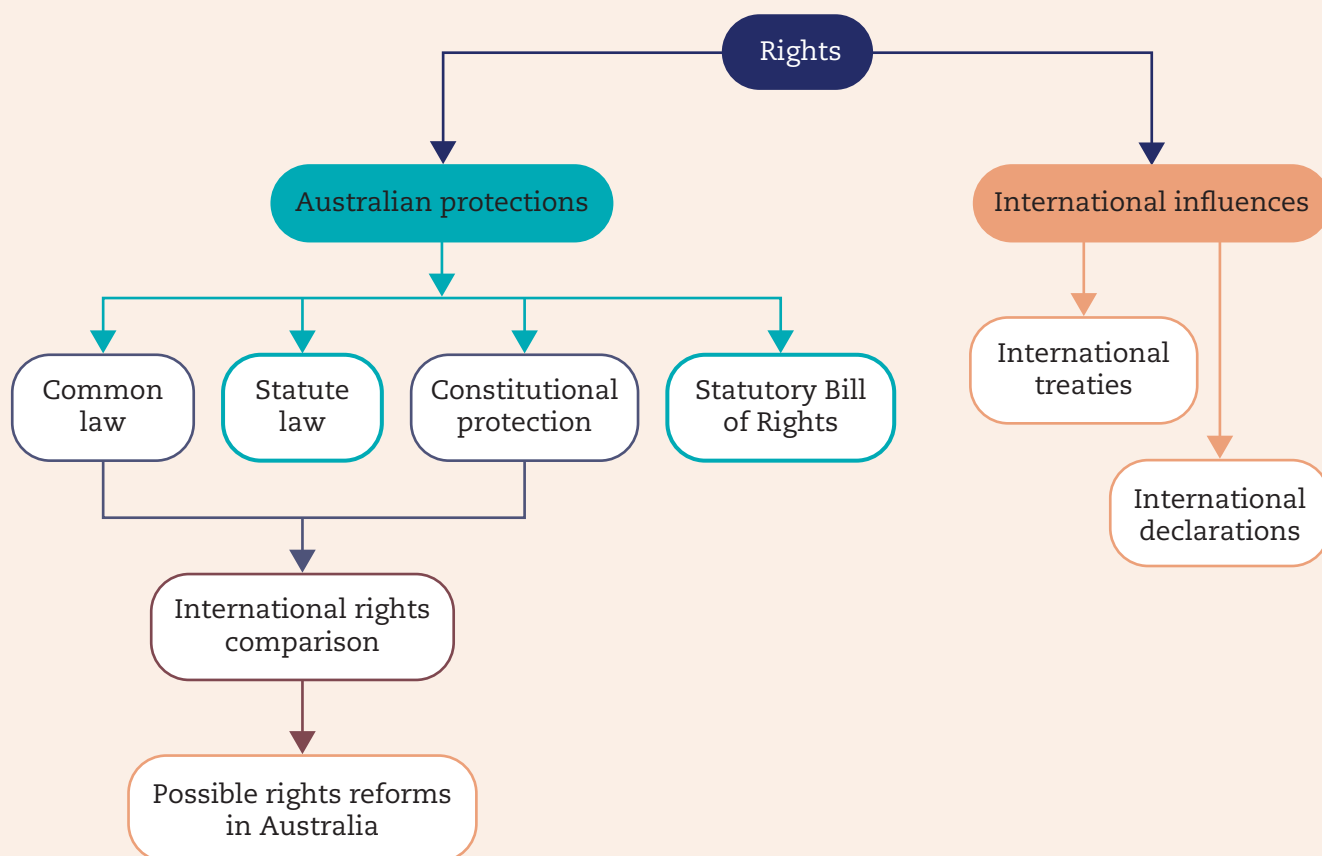
Rights

After reading this chapter, you will have an overview of how rights in Australia are protected at a national level, through the Australian Constitution, common law, and more commonly through statute law, which includes a Victorian Statutory Bill of Rights, and be able to understand how Australian rights are influenced at an international level, through declarations and treaties. In our evaluation of rights in Australia, we will consider the questions:

- How are current methods of rights protecting us?
- Are our individual rights sufficient to protect our day-to-day lives?

In comparing the approach of Australia's protections to those of other countries, we will be able to discuss possible reforms that might better protect rights in Australia.





Key terms

common law rights rights that are developed through judges' statutory interpretation of, or in the absence of, existing Acts

constitution fundamental rules or principles and structures to which a nation is governed

express rights rights that are written into the Australian Constitution; these rights can only be changed by a referendum

implied rights rights not found to be clearly listed in a constitution but that are instead inferred by its interpretation by a relevant judicial body

international declaration a non-binding agreement between countries

reference a request from the Attorney-General to undertake law reform

referendum the process set out in section 128 of the Constitution to allow the Constitution to be formally altered; requires a vote by the Australian public and to achieve a double majority

representative government a government that reflects the needs of its voting public

responsible government a government's accountability to its voting public

statutory Bill of Rights a document where rights are listed, which be altered or abrogated by an Act of Parliament; these rights are not entrenched in a constitution

statutory rights rights enshrined in Acts of Parliament through the legislative process

structural protections rights that indirectly protect from an abuse of power by government through the Constitution's mechanisms and structures

treaty a formal agreement between nations that is binding at international law

14.1 Ways in which rights are protected in Australia

Rights are defined as:

In an abstract sense, justice, ethical correctness, or harmony with the rules of law or the principles of morals. In a concrete legal sense, a power, privilege, demand, or claim possessed by a particular person by virtue of law.

In a modern democracy, whose role is it to establish how morality and justice are afforded in the form of legal rights for its people? Furthermore, whose role is it to decide on the design of such legal entitlements, as well as the necessary processes to ensure that they are protected in everyday situations?

In Australia, legal rights are protected through the Australian **Constitution**, statute law, common law, statutory Bills of Rights (for example, the *Charter of Human Rights and Responsibilities 2006* (Vic)) and international law.

Table 14.1 Means by which rights are protected in Australia

Australian Constitution	Provides express rights, implied rights and structural protections that protect Australians mainly from any abuses of the power of parliament. Other protections include the role of the High Court as guardian of the Constitution and section 128 of the Constitution (the referendum process)
Statute law rights	Rights enshrined in legislation, developed by Commonwealth and state parliaments through the legislative process; for example, the <i>Equal Opportunity Act 2010</i> (Vic)
Common law rights	Rights developed by courts in a judge's ruling of a case by interpreting, or in the absence of, an Act of Parliament. This process is known as statutory interpretation; for example, the right to silence
Statutory Bill of Rights	Rights, freedoms and privileges that have been defined and can be amended by parliament through the legislative process; for example, the <i>Charter of Human Rights and Responsibilities 2006</i> (Vic)
International law	Includes: International declarations, which although not binding, can influence the protection of rights. For example, rights for Indigenous Australians as per the <i>Declaration of Rights of Indigenous Peoples</i> . Treaties that place binding obligations to countries upon signing them. For example, articles of the <i>International Covenant on Civil and Political Rights</i> are enshrined in the <i>Privacy Act 1998</i> (Cth).

The Australian Constitution

The Commonwealth of Australia Constitution Act (UK) 1901 – hereafter referred to as the 'Constitution' – drafted in 1901 during Australia's Federation, is regarded as the rule book by which Australia is governed and protected. Although concerns with the Constitution include its omission of a Bill of Rights, it does afford Australians some rights, albeit minimal (compared to the United States, for example).

Rights within the Constitution are explicitly found, indirect, or must be found through interpretation by the High Court. These common protections include:

- express rights
- implied rights
- structural protections.

Other protections include:

- section 128: the referendum process
- section 76: the role of the High Court.

Constitutional rights can be direct or indirect, and are either entrenched or found through interpretation.

How to Vote 'Yes'

Preamble Referendum

Mauve ballot paper

Write Yes in the box on the ballot paper as shown.





for our Republic and an Australian as our Head of State

You will be given two ballot papers. A buff one for the Republic Referendum and a mauve one for the Preamble Referendum.

Just write **Yes** in the box on each ballot paper.

Do not use ticks or crosses.

If you make a mistake ask for another ballot paper

Republic Referendum

Buff ballot paper

Write Yes in the box on the ballot paper as shown.



How to vote 'yes' card for the 1999 Australian republic referendum

Express rights

Express rights are those rights that are explicitly stated in and are, by definition, clearly expressed or set out in the Constitution. These sections are scattered throughout the Constitution and clearly express the nature and extent of these rights.

Express rights are also referred to as entrenched rights, as they can only be removed or amended by a successful **referendum**, as per section 128 of the Constitution.

The five express rights that are afforded to Australians through the Constitution are as follows:

1 Right to freedom of interstate trade, commerce and intercourse/movement (section 92)

Section 92 stipulates that no government, be it state or Commonwealth, is able to pass legislation that would impose any restriction (customs or duties) on goods, communications and people, which travel over and between state divides, either by sea or other mode of transport. The case of *Cole v Whitfield* (1988) 165 CLR has since found that legislation must also not be protectionist by nature: that is, it cannot protect states from competition from other states.

2 Right to acquisition of property on just terms (section 51(xxxi))

Section 51(xxxi) stipulates that where any property or area is acquired by the Commonwealth, which has the specific law-making power to make such laws, it must be done on the basis that there is a specific purpose for the use of said property; for example, for an airport. Further, the acquisition of the property must be for reparation or payment which is fair and adequate.

3 Right to trial by jury for Commonwealth indictable offences (section 80)

Section 80 stipulates that Australians have rights with respect to a jury when the following criteria are successfully fulfilled:

- The offence must be against a Commonwealth law and not a state law
- The offence must be of an indictable nature and not a summary or simply a 'serious' offence, as held by *Kingswell v the Queen* (1985) 159 CLR 264
- The jury trial must be held in the state where the offence was committed.

In the case of *Cheatle v the Queen* (1993) 177 CLR 541, the High Court extended this right to now include the requirement of a unanimous verdict, and not a majority verdict.

Go to the website for the Parliament of Australia at www.aph.gov.au to view a copy of the Australian Constitution under the 'Senate – Powers, practice and procedures' section.

Rights as expressed in the Constitution are very specifically worded and as such may be limited in certain circumstances; for example, sections 116 and 80 provide limitations on Commonwealth, not state, parliament.

4 Right to freedom of religion (section 116)

Section 116 stipulates that the Commonwealth parliament (note that this is not a restriction on the states) are limited with respect to legislating on certain areas of religion, including:

- establishing or proclaiming a single religion as a national religion
- imposing a religious observance, or practice
- establishing the prohibition of freely exercising religious beliefs
- requiring a religious test to hold employment in Commonwealth office.

5 Right not to be discriminated against based on state of residence (section 117)

Section 117 stipulates that no person shall be discriminated against, nor given immunity or privilege, by way of laws or judicial treatment, nor shall their position be unduly worsened based on the state in which they reside. Exceptions to section 117 include state voting rights.

Legal brief 14.1

Attorney General for Victoria; ex rel Black v The Commonwealth (1981) 146 CLR 559: (the DOGS case)

The question posed to the High Court by the Department of Government Schools (DOGS) was whether Commonwealth funding provided to non-government, religious schools contravened section 116 of the Constitution. The High Court found that the legislation was not unconstitutional

due to the fact that said aid was not for the advancement of religious schools, but was instead for the education of its pupils. This finding was based on the premise that funding given to non-government schools was not differentiated among schools based on religion.



Activity 14.1 Class discussion

Relevance of express rights in modern times

In pairs, consider the following questions in relation to the express rights in the Constitution. Discuss your answers with other members of the class.

- 1 Of the five express rights, which do you believe to be the most important and relevant for your day-to-day living? Explain.
- 2 Of the five express rights, which do you believe to be the most irrelevant for your day-to-day living? Explain.
- 3 In general, how well do you believe express rights protect Australians? Discuss.
- 4 Make a list of five rights that you believe should be included in the Constitution. Justify your responses.
- 5 Research whether any of the five rights you have suggested are protected in Australia through the other methods of protections listed in Table 14.1.

Implied rights

Implied rights are rights that are not clearly listed in the Constitution but are instead inferred by the High Court, whose role is to interpret the Constitution when a case comes before it and from this derive meaning from its text and structure. In Australia, there is only one implied right; the right to freedom of political communication, which was established in *Australian Capital Territory Pty Ltd v The Commonwealth* (1992) 177 CLR 106.



Legal brief 14.2

Australian Capital Television v The Commonwealth (1992) 177 CLR 106

In the *Australian Capital Television v the Commonwealth* case, the High Court held that the *Political Broadcasts and Political Disclosures Act 1991* (Cth), which was aimed at banning political advertising on television or radio prior to an election, was invalid and unconstitutional as it interfered with the people's right to a representative government, a right that held that the Senate and the House of Representatives, through sections 7 and 24 of the Constitution respectively, should be 'directly chosen by the people'.

The reading of this right into these sections of the Constitution by the High Court implied that the Australian people were required to have some free discussion and free

speech on matters of politics and those running for office in order to cast an informed vote, which the Act would have limited. From this, the right to freedom of political communication was established.

The right to freedom of political communication has since had further developments. For example, in *Lange v Australian Broadcasting Corporations* (1997) 189 CLR 520, the High Court ruled that this right was to be protected at all times, not just prior to an election.

Structural protections

As discussed in Chapter 1, **structural protections** are rights that indirectly protect Australians from abuse of power by government, through the Constitution's mechanisms and structures. These protections are considered to provide checks and balances on the power of government and are regarded as more extensive than individual express rights as they provide a greater scope of protection to Australians. Examples of these structures include:

- the separation of powers
- representative government
- responsible government.

Structural protections are mainly concerned with indirectly protecting Australians from abuse of power by government.

Separation of powers

The principle of separation of powers ultimately protects Australians from abuse of power by the Commonwealth parliament by keeping independent those who administer, legislate and enforce laws. This provides checks and balances on Commonwealth parliament, which, in turn, protects the rights of Australians.

These powers are separated in the Constitution in chapters I, II and III, respectively, as follows:

- *Legislative power*: parliament's power to make laws (the Government and the Governor-General)
- *Executive power*: the Governor-General's power to administer laws (practised and carried out by the Prime Minister and Cabinet)
- *Judicial power*: the judiciary's power to enforce laws and resolve disputes (courts and tribunals).

Representative and responsible government

Representative government and **responsible government** refer to a regularly elected government that is reflective and representative of the needs of the voting population through legislative practices. They are also required to be accountable to these voters and answerable to parliament, for example, during parliamentary question time. This fulfils their role as a responsible government.



The significance of sections 7 and 24 of the Constitution

Sections 7 and 24 of the Constitution state that the Senate and the House of Representatives ensures that the government be 'directly chosen by the people', respectively. These sections have been interpreted in various cases by the High Court and, as a result, rights under representative government have been established and upheld.

***Roach v Electoral Commissioner* [2007] HCA 43**

In this case, prisoner Vicki Roach argued that the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), which banned all prisoners from voting), would contradict the structurally protected right to a representative government afforded by sections 7 and 24 of the Constitution.

In their ruling, the High Court found in favour of Roach; that the law was unconstitutional and, therefore, invalid: a directly elected, representative government could not be achieved due to the voting restrictions presented by the law.

Australian Capital Television Pty Ltd v The Commonwealth

In this case, the validity of the *Political Broadcasts and Political Disclosures Act 1991* was challenged in the High Court due to the restrictions it imposed on political advertising prior to an election. The Act prohibited the broadcasting of political material on electronic media (excluding the news and talk back radio) and, as such, was argued to be unconstitutional.

The High Court interpreted sections 7 and 24 of the Constitution and found that the sections, by establishing a representative government, also implied that the public were required to have knowledge of its political representatives; the Act precluded this from occurring. As a result, the High Court established Australia's implied right to freedom of political communication. The Act was deemed invalid.

Failure to hold the confidence of the lower house

A vote of no confidence – or a leadership spill – refers to a vote taken by government members who hold a seat in the lower house of parliament. This is commonly considered when the government are concerned with their ability to continue to act responsibly.

This occurred in September 2015 when Malcom Turnbull defeated the then Prime Minister Tony Abbott 54 votes to 44. Tony Abbott subsequently resigned from his position as Prime Minister, as is the requirement of responsible government. A second spill for the Liberal Party occurred again in 2018, which eventually resulted in Scott Morrison taking over from Malcolm Turnbull as leader of the Liberal party and leading the nation as the new Prime Minister.



Australia's Governor General Peter Cosgrove (right) congratulates new Australian Prime Minister Scott Morrison (left) after the latter was sworn into office at Government House in Canberra on 24 August 2018.

Other constitutional protections

Further indirect protections offered by the Constitution include the referendum process and High Court interpretation, both protecting Australians by limiting the ability of parliament to pass laws that would infringe on people's rights. In both instances, the people are able to be proactive in protecting their rights.

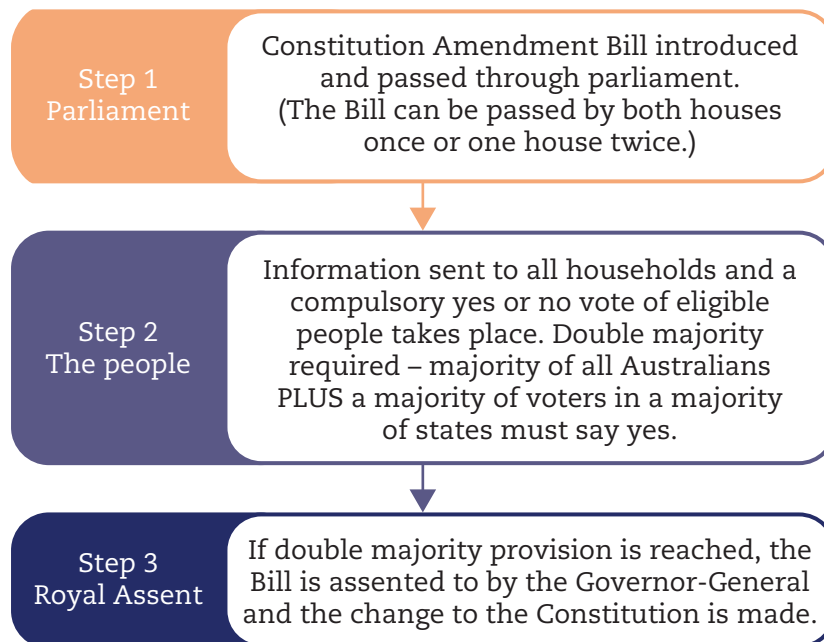


Figure 14.1 The referendum process

The referendum process

The compulsory public vote and the double majority provision are considered to offer great protections to the Australian people, as parliament alone is unable to pass any legislation that alters or amends the Constitution. Further, it protects individual states by ensuring that their specific needs are not overlooked, and their autonomy is protected. If individuals from each state do not agree with the suggested change to the Constitution, a double majority will not be achieved and hence, the referendum will not pass. For example, the 1977 referendum that called for simultaneous elections achieved 62.22% of votes Australia wide, but was unsuccessful due to only achieving a 'yes' vote from three states: New South Wales, South Australia and Victoria. Here, Tasmania, Western Australia and Queensland did not vote in favour and therefore the referendum did not carry.

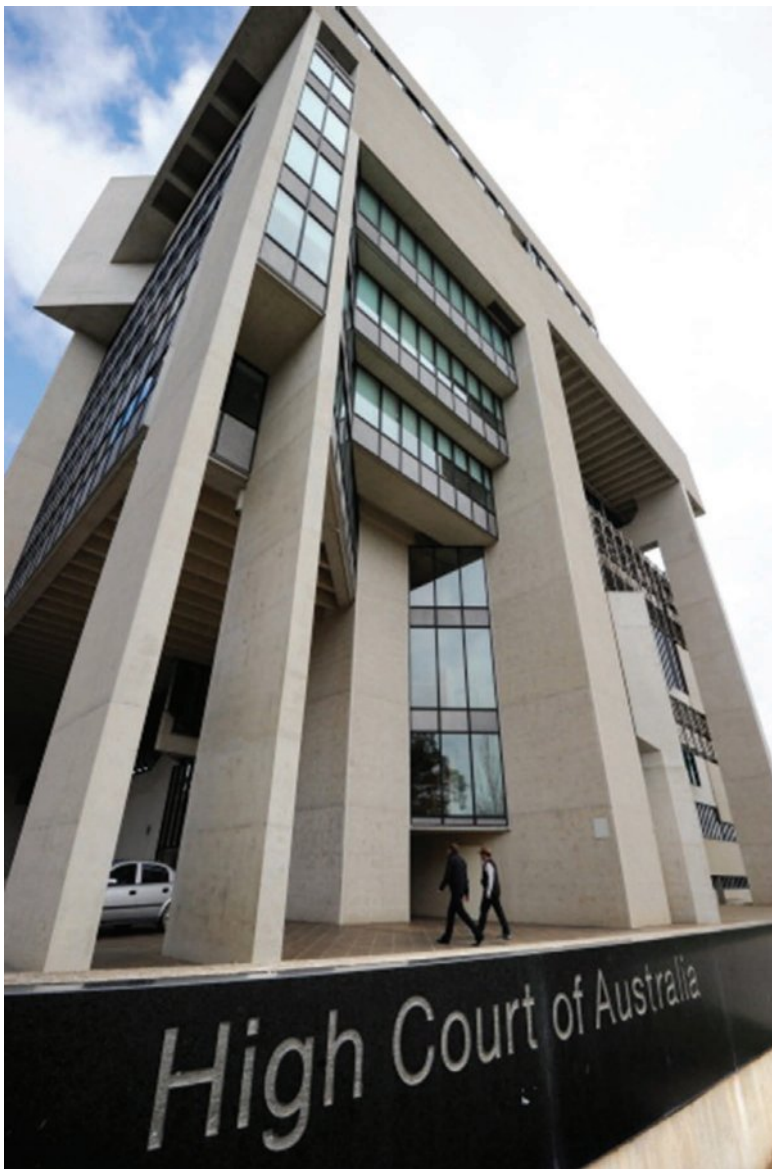
The role and significance of the High Court

Section 76 of the Constitution sets out the jurisdictional power of the High Court arising under the Constitution and for disputes arising from any laws made by the parliament. This is referred to as a complaints-based approach to the enforcement of rights. Any person who has standing (can prove to be personally affected by the injustice) can apply to have a matter heard in the High Court.

In hearing such disputes, the High Court has supremacy over parliament and has the power to deem legislation *ultra vires*, meaning beyond the law-making powers of parliament, and therefore invalid. This process of statutory interpretation can also protect Australians by extending or broadening the meaning of words in the Constitution or can establish new rights in order to keep it up to date with societal changes.

Limitations do arise, however, in that the High Court must wait for a case. The costly nature of a case may leave the Constitution unprotected.

The High Court and the process of referendum are both considered indirect protections, which further protect Australians from the abuse of power by government.



The High Court of Australia

Activity 14.2 Structured questions

Indirect protection of rights

- 1 Explain how structural protections and implied rights protect Australians.
- 2 Explain what it means for a right to be 'indirect'.
- 3 Using the *Roach v Electoral Commissioner* (2007) case, explain the significance of section 7 and 24 of the Constitution.
- 4 Explain how the High Court is able to protect Australians.
- 5 Distinguish between responsible and representative government.
- 6 The High Court has a significant role in protecting rights and developing rights in Australia. Explain this protection and in your response, refer to the decision made in *Australian Capital Television v The Commonwealth* (1992).
- 7 Define the terms 'representative government' and 'responsible government'.
- 8 Explain what a 'vote of no confidence' is and how it relates to responsible government.
- 9 Outline the referendum process as stipulated in section 128 of the Constitution and explain its relevance to the protection of rights in Australia.

Legal brief 14.3

Comcare v Banerji [2019] HCA 23: A question on implied right to freedom of political communication

Comcare v Banerji is an example of the High Court in action: where the Constitution was in question and, more specifically, the implied right to freedom of political communication was required to be interpreted for a decision to be made.

Issue

- Does the *Public Service Act 1999* and the Australian Public Service Code of Conduct ('the Code') violate the constitutional implied right to freedom of political communication?

Facts

- Michaela Banjeri worked for the Department of Immigration and Citizenship. In 2013, she was fired from her role following Tweets she had posted anonymously.
- The Tweets were said to have been critical of the Government's policies which was a breach of Part 3, section 13(11) of the *Public Service Act 1999*, the Australian Public Service Code of Conduct, which requires Australian Public Service ('APS') employees to 'behave in a way that upholds the APS Values and the integrity and good reputation of the APS'.
- Following this, Ms Banjeri took action stating that the termination of her employment caused her to suffer PTSD and she was suing for damages.
- Her claim for damages was rejected, but then later set aside by the Administrative Appeals Tribunal on the basis that the Code infringed the right to freedom of political communication.

Decision

The judge's comments during the proceedings and subsequent ruling were as follows:

[205] ... it is also fundamentally important, and indeed essential, that in a system of modern representative government a parliament has freedom to make laws that implement the policy decisions it makes for the welfare of the governed. Where a law impairs freedom of political communication in a reasonably necessary manner in pursuit of another legitimate object, the law should only be held unconstitutional if there is such a gross imbalance between, on the one hand, the importance of that legitimate object to the parliament, and, on the other hand, the magnitude of the burden that the law places on the implied freedom of political communication, so as to pose a threat to the integrity of the constitutionally prescribed system of representative and responsible government.

[206] Section 13(11), in light of the APS Values, including s 10(1)(a), and the sanctions in s 15(1), is far from exhibiting this lack of balance. Although the burden on the implied freedom of political communication is deep and vast, that burden is imposed in the pursuit, by reasonably necessary means, of a purpose of embedded and long-standing constitutional significance, an apolitical public service. The law is not inadequate in its balance.

It was therefore found that the sacking of Ms Banjeri was in line with the Code, under the *Public Service Act 1999* and was not an infringement of the constitutionally protected implied right to freedom of political communication.

Activity 14.3 Structured questions

Rights and the High Court

Read Legal brief 14.3 and complete the following questions:

- 1 Describe the issue that needed to be decided by the High Court in this case.
- 2 Explain the facts of the case, presented by both sides.
- 3 Explain how the *Public Service Act* and APS Code of Conduct was relevant to the case.
- 4 Identify the decision given by the judge in the case. Explain the reasons that followed.
- 5 In your opinion, what negative concerns may this decision have on the public and, in particular, employees of the public service?

Common law rights

Common law rights are established when the courts are required to make laws in their ruling in a relevant case, and as such can make laws that protect the rights of Australians. Within this process, known as statutory interpretation, the court must interpret the words of, or the absence of words of, an Act. In the ruling the judge will give reasons – the *ratio decideni* – which become binding in similar fact situations by a court lower in the same hierarchy.

Rights can also be extended by the courts to include new situations, giving more relevance and scope to particular rights. An example is the extension of the common law right to a fair trial in *Dietrich v The Queen* (1992) 177 CLR 292 to include legal counsel as a component of a fair trial. In this case, the Court decided:

it should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that ... lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial.

Common law rights are, however, subject to abrogation by parliament which, as the supreme lawmaker, has supremacy over laws (save for decisions made by the High Court on constitutional matters).

The right to silence and against self-incrimination

The right to silence and against self-incrimination refers to the common law principle of England that a person suspected of a crime, or in a criminal or civil proceeding, is not bound to answer any questions or produce any documents that might render that person guilty. This upholds the adversarial system's presumption of innocence – innocent until proven guilty – and maintains the requirement that the burden of proof, proving the guilt of the offender, rests on the prosecution. This ensures fairness in the justice system. In the case of *Pyneboard Pty Ltd v Trade Practices Commission*, the judge found the right to silence to be:

... part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination.

Limitations to this right exist in the *Crimes Act 1958* (Vic), which stipulates that a person must give the police their name and address if they are a suspect in certain circumstances.

Recent amendments have been made to the *Evidence Act 1995* (NSW) whereby the police caution now includes the phrase: 'It may harm your defence if you fail to mention now something that you later rely on at trial.' Previously, suspects were told that they 'were not obliged to say or do anything'.



Statutory rights

Statute and common law rights are not entrenched in the Constitution. They are made by parliament and courts, respectively.

A plebiscite is a national vote of the people on matters of interest and on proposed amendments to laws in Australia.

Statutory rights are rights that are made and can be amended through the legislative process by members of parliament. These rights are also subject to interpretation by the courts and as such can be kept up to date. Statutory rights are regarded as more extensive than those provided by the Constitution and provide more specific, individual rights and ensure that citizens are treated with equality and fairness where the law is concerned. They are commonly enforced through the courts and in Victoria through the Victorian Civil and Administrative Tribunal (VCAT), which has a specific Human Rights List. Most cases heard in this list are related to infringement of rights and are free, thus allowing for greater access to rights.

One of the most significant changes to statute law recently have been amendments made to marriage laws in Australia under the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Due to this Act, marriage in Australia under the *Marriage Act 1961* (Cth) has been redefined to now include 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'. Previously, the *Marriage Act 1961* (Cth) referred to the union of marriage being between a man and woman. Of significance to this change was the 2017 plebiscite, where a majority of Australia showed their approval for the change. The government was said to have acted on behalf of the people by making the changes following the plebiscite. These changes can be considered to give more rights regarding marriage and family to same-sex couples.

Table 14.2 Examples of Commonwealth Acts that protect rights in Australia

Name of Act	Explanation of the Act
<i>Racial Discrimination Act 1975</i> (Cth)	The <i>Racial Discrimination Act</i> sets out rights to equality before the law with respect to goods and services, employment and access to places and facilities. Section 18C recognises offensive behaviour, such as insulting, offending, humiliating or intimidating another person because of race, colour, or national or ethnic group as unlawful.
<i>Equal Opportunity Act 2010</i> (Cth)	The <i>Equal Opportunity Act</i> affords the right not to be discriminated against on the basis of various traits and characteristics. These include, but are not limited to, age, breastfeeding, disability, lawful sexual activity, race, or religious and political beliefs. The Act covers discrimination in employment, education, accommodation, sport and services.
<i>Sex Discrimination Act 1984</i> (Cth)	The <i>Sex Discrimination Act</i> gives effect to Australia's obligations under the <i>International Convention on the Elimination of all Forms of Discrimination against Women</i> to promote equality between men and women and end sexual harassment in the workplace and educational institutions. It aims to eliminate discrimination on the basis of sex, marital status or pregnancy, and with respect to dismissals and family responsibilities.



News report 14.1

Andrew Bolt loses racial vilification court case

Herald Sun columnist Andrew Bolt has lost an action brought in the Federal Court in which the columnist was accused of breaching the Racial Discrimination Act.

Mr Bolt was found to have contravened section 18C of the *Racial Discrimination Act*.

Nine Aboriginal applicants brought a class action against Mr Bolt and the *Herald & Weekly Times* claiming that Mr Bolt wrote that they sought professional advantage from the colour of their skin.

He [the judge] found that 'fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed in the newspaper articles' published in the *Herald Sun*.

In a brief statement outside the Melbourne court after the judgment, Mr Bolt said, 'This is a terrible day for freedom of speech in this country.'

'It is particularly a restriction on the freedom of all Australians to discuss multiculturalism and how people identify themselves,' he said.

The judge ruled that Mr Bolt could not use fair comment or public interest to defend those particular articles.

The publisher of the *Herald Sun*, the *Herald & Weekly Times* has issued a statement saying it is 'disappointed' with the Federal Court decision against its columnist Andrew Bolt.

'We maintain that the articles were published as part of an important discussion on a matter of public interest,' the statement says.

'We defended the action because we believe that all Australians ought to have the right to express their opinions freely, even where their opinions are controversial or unpopular...'



Andrew Bolt.



Video

Activity 14.4 Structured questions

Common law and statute law rights

- 1 Define 'common law rights' and 'statute law rights'.
- 2 Explain the process of establishing common law rights.
- 3 Describe how the common law right to silence and against self-incrimination upholds the presumption of innocence.
- 4 Explain how parliament can act as a hindrance to common law rights. Refer to the amendments to the *Evidence Act 1995* (NSW) to support your answer.
- 5 Identify and explain three Acts of parliament that are significant in the protection of rights in Australia. Choose two of these Acts and find a relevant court case that has interpreted each Act. Explain the facts and the outcome of the case and how it protected rights in Australia.
- 6 Read News report 14.1 and complete the following tasks:
 - a Explain the facts of the case, including the arguments presented by both parties.
 - b Explain the law being questioned in this case.
 - c Outline the reasons for and the final decision of the judge.
 - d Locate the relevant Act and identify and explain the defences stipulated in the Act.

Statutory Bill of Rights

A **statutory Bill of Rights** includes rights, freedoms and privileges that have been listed in a charter and defined by parliament. A statutory Bill of Rights is different from an entrenched Bill of Rights in that the latter is part of a country's constitution and can only be amended by way of a constitutional referendum or similar process. A statutory Bill of Rights, instead, is able to be amended by parliament through the legislative process. Australia does not have an entrenched Bill of Rights; it has only the five express rights already covered.

New Zealand has a statutory Bill of Rights that protects and promotes human rights for its citizens. In Australia, Victoria and the Australian Capital Territory both have a *Charter of Human Rights and Responsibilities*.

The Victorian Charter of Human Rights and Responsibilities

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') sets out 20 basic and fundamental human rights, freedoms and responsibilities that are afforded to Victorians. It recognises the need for government, local councils and Victoria Police to act – by way of laws, policy development and in their delivery of services to Victorians in conformity with these rights.

The rights listed in the *Charter* are:

- 1 Recognition and equality before the law
- 2 Right to life
- 3 Protection from torture and cruel, inhuman or degrading treatment
- 4 Freedom from forced work
- 5 Freedom of movement
- 6 Privacy and reputation
- 7 Freedom of thought, conscience, religion and belief
- 8 Freedom of expression
- 9 Peaceful assembly and freedom of association
- 10 Protection of families and children
- 11 Taking part in public life
- 12 Cultural rights
- 13 Property rights


The Charter is only relevant to Victoria and laws passed by the Victorian parliament. Victoria and the ACT are the only two states/territories in Australia to have a statutory Bill of Rights.

- 14 Liberty and security of person
- 15 Humane treatment when deprived of liberty
- 16 Children in the criminal process
- 17 Fair hearing
- 18 Rights in criminal proceedings
- 19 Right not to be tried or punished more than once
- 20 Retrospective criminal laws.

Most importantly, section 28 of the Charter sets the requirements for scrutiny of new legislation, ensuring that all new Bills (proposed laws) are coupled with a Statement of Compatibility that outlines how the new law is compatible or incompatible with the Charter and the extent of any incompatibility. Section 30 of the Charter stipulates that this is the role of the Scrutiny of Acts and Regulations Committee. In only exceptional circumstances can parliament pass a law that is incompatible with human rights: through issuing an override declaration, which must be stated in the relevant Act.

Section 40 establishes the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) who, as per the Charter, may be a part of any proceeding in which a question of law arises with respect to the Charter or its interpretation.

Section 36 of the Charter gives the Supreme Court of Victoria some power in dealing with inconsistencies arising within new Bills through the ability to issue a 'declaration of inconsistent interpretation'. This declaration may require a minister to re-examine the Bill but does not make the law invalid. Victorian parliament has the final say and ultimate supremacy with respect to the Charter.

 View a copy of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) at the Victorian Legislation website (www.legislation.vic.gov.au) under the 'Acts in Force' section.

 View the website of Victorian Equal Opportunity and Human Rights Commission (VEOHRC) at www.humanrightscommission.vic.gov.au for more information about the Charter and the commission's role.

Table 14.3 Recent examples of the Charter in action

Issue	Reform
Some laws incompatible with the Charter	Making amendments to existing incompatible legislation. For example, provisions that prohibited any actions disrupting sporting events were revised so as to not prohibit freedom of expression. Prohibition of disruption now only relates to those who pose a safety risk.
The need for further protection of Indigenous cultural rights	In establishing the Koori male diversion program – the Wulgunggo Ngalu Learning Place – protection of cultural rights under the Charter were regarded, which included a community elders program and community engagement.
Broad human rights approach needed to protect women and families from violence	Prevention of violence against women 2010–2020: <i>A plan</i> . The Victorian Government initiated plans titled 'A right to respect' to address violence against women by deeming it a human rights issue under the Charter.

Activity 14.5 Classroom presentation

The role of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

In groups, go to the VEOHRC website and create a multimedia presentation on the specific areas of discrimination rights the Commission has a role in promoting, such as Aboriginal and Torres Strait Islander rights, LGBTI rights and disability rights. Your presentation should comment on the following:

- What is of concern for the protection of rights of this group?
- What initiatives are being considered to raise awareness for the protection of rights of this group?
- Which Acts of parliament have been recognised as of importance to this group? Explain.
- What is the role of the VEOHRC in providing support for this group?

Legal brief 14.4

Matsoukatidou v Yarra Ranges Council [2017] VSC 61

Maria and Betty ('the applicants') were self-represented in the Magistrates' Court after being charged with offences under the *Building Act 1993* (Vic), both receiving fines. Appeals following these charges in the County Court under the *Civil Procedure Act 2009* (Vic) were struck out due to their non-attendance at the appeal.

The applicants were again unrepresented in their submission to reinstate the appeal. The applicants struggled to explain themselves during the subsequent hearing, and further, during the hearing, the judge did not explain the procedure that would be followed nor the applicable legal test for their appeal. The judge did not seek clarification of the applicants' legal position or understanding of their rights. The decision of the Court was to dismiss their appeal.

A judicial review of the judge's orders was sought, stating that the dismissal and conduct of the hearing constituted a breach of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter'), in that it, and the judge, failed to ensure their human rights to equality under s 8(3) of the Charter and to a fair hearing under s 24(1).

The judicial review found the following, with regards to the conduct of the appeal judge:

- The judge did not seek to clarify or gain knowledge of the applicants' capabilities at the beginning of the hearing
- Having failed to complete this check, the judge consequently failed to recognise them as self-represented litigants
- The failure to check also meant that the judge failed to establish that one of the applicants, Maria, suffered an intellectual disability
- Should the check have been completed by the judge, it would have demonstrated equal respect for them, and most importantly would have allowed them to request an adjournment, which would have enabled them to seek legal representation.

The decision of the judicial review was as follows:

- Because of the way in which the hearing was conducted, the applicants' rights to a fair hearing under s 24(1) of the Charter were breached
- Maria, who suffered a disability, was further discriminated against due to the obligation of a judge under s 8(3) of the Charter to make reasonable adjustments and accommodations to compensate for disability and ensure parties' effective participation in proceedings.

Activity 14.6 Case study

The Charter in action

Read Legal brief 14.4 and complete the following tasks:

- 1 Explain the concerns presented by the applicants in the matter.
- 2 Identify the decision made by the judicial review and explain the reasons the Court gave in their ruling.
- 3 Research the relevant sections of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) that were applied in this case. In your own words, explain how they were applied and give your opinion as to whether the judicial review made the right decision in the case.

Evaluation of rights

Australian Constitution

Advantages

Express rights are listed in the Constitution. These are clearly written in the Constitution, meaning protections are visible and their terms are specifically set out for the Australian people to be aware of. Further, they can only be changed by a successful referendum, not parliament alone.

Indirect protections exist. Rights are protected by way of the High Court and the referendum process. Both of these processes involve individuals being able to challenge parliament, by way of taking a matter to court or voting, respectively, if they feel their rights are in danger.

Importance of existing political rights. Structural protections and implied rights protect Australians from abuses of power by those who administer, legislate and enforce laws. The right to free speech on political matters is important as it upholds the right to a directly elected government.

Disadvantages

Rights are not easily located. Express rights are not listed in a Bill of Rights or somewhere easily accessible to the people. Further, implied rights are not written in the Constitution. In both cases, people may not be aware of the rights that they have and not know when they are being infringed.

Rights are limited. Rights are limited in scope and nature with many having limitations. For example, section 117 provides that a person has a right to a jury only for Commonwealth indictable matters and not for state-related matters. Further, there is only one implied right that provides a right to freedom of speech – on political matters, not on general free speech.

Difficult process to add or amend rights. The double majority, while also an advantage, could mean that adding or amending rights can be difficult and could mean that rights may not be upheld for minority groups, for example.

Complaints-based approach has limitations. The High Court is reactive, and as such must wait for an affected person with standing to deal with any possible rights infringements. Due to the high costs and time associated with court proceedings, this may not occur often. It is also only able to rule on the facts that are presented to it and cannot therefore extend its rulings to other circumstances.

Statute law rights and statutory Bill of Rights

Advantages

Parliament can legislate rights. Rights are able to be enshrined in legislation through Acts or, in the case of Victoria, a statutory charter of rights. This means that rights are able to be updated as the need arises and through a simpler process than a referendum. Parliament is also obligated to ensure that new legislation is accompanied by a statement of compatibility, highlighting the law's compatibility with international and state human rights charters.

More extensive than the Constitution. Rights that have been enshrined in legislation by parliament are said to be much more extensive than what is offered by Australia's Constitution. The right of no discrimination in the Constitution is based on a person's state of residence, whereas the *Racial Discrimination Act 1975 (Cth)* extends to personal attributes and beliefs.

Questioning of rights in the judicial system. Parties who believe their rights have been infringed are able to challenge the application of the law to their case and have a decision made by a judge in a relevant court.

Disadvantages

Party politics. Unlike a referendum process, the people are not part of the process of amending rights where statute law is concerned. Political parties may therefore be concerned with their party politics and their re-election, which may result in some rights being ignored or amended to suit their party politics. Minority groups may not have their views heard.

Incompatible laws. In the case of a statutory Bill of Rights, a new piece of legislation may still be incompatible with the Charter and may be allowed to pass.

Knowledge of rights. Parties must have knowledge of their rights for them to be presented to courts. Challenges can only be made by an affected party.

Common law

Advantages

Quick process. Judges can interpret Acts of parliament and, through their rulings, create rights. This process is quicker than the legislative process, which means that rights can be updated as the need arises and without the lengthy process of investigation and debate that parliament is subject to.

Right to silence. Specifically, the right to silence and from self-incrimination is important for Australians as it upholds the presumption of innocence that is key to the adversary system. The right provides mechanisms that stop authorities from abusing power.

Disadvantages

Judges are not representative. Judges have not been voted in by the people and, as such, may make common law and subsequently rights which are going to affect the entire population. They do not have the resources to consider this when making a decision and, as such, may make rights which adversely affect unintended parties.

Parliament supremacy. Parliament is the supreme lawmaker and, as such, is able to override common law (save for decisions made by the High Court with reference to the Constitution). This means that parliament is able to place some restrictions on people's rights and amend rights.

14.2 Influence of international declarations and treaties

In many cases, international instruments such as **international declarations** and **treaties** (also known as covenants and conventions) have had a significant influence on rights in Australia. However, Australia has only agreed to be bound by some declarations and treaties, specifically those that its domestic laws comply with. For this purpose, the Joint Standing Committee on Treaties was appointed in 1996 to review and report on any government-proposed treaty actions where Australia's national interest was concerned.

The major difference between declarations and treaties is that a treaty is a legally binding obligation by countries who are its signatories. Declarations, on the other hand, merely act as guidelines for how countries should act.



Australia is a signatory to the *International Convention for the Regulation of Whaling*.

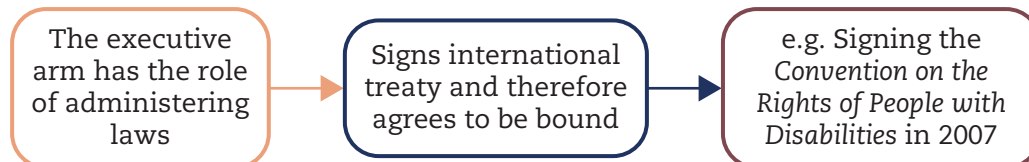
Treaties: the relationship between the Australian Constitution and international law

Treaties, although binding obligations, are not automatically embedded in Australian law upon being signed. Relevant articles within the treaties must be referenced in a Bill that must follow the legislative process to become a law.

This requirement is set out in the Constitution by way of the separation of powers, specifically the differing roles of the executive and legislative arms of government.

Treaties can create obligatory actions to signatories, to enshrine articles within the relevant treaty into domestic law through the legislative process for the protection of Australians.

Step 1 – The role of the executive arm



Step 2 – The role of the legislative arm

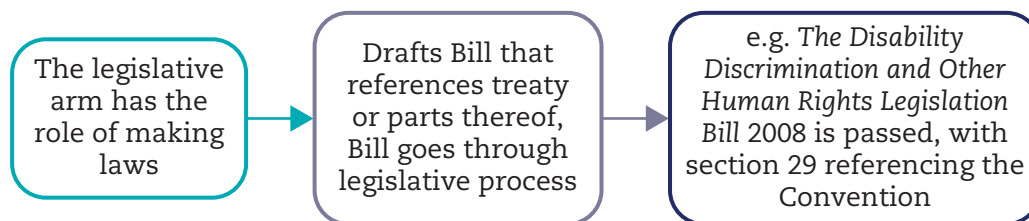


Figure 14.2 The process of embedding a treaty into Australian legislation

However, the term ‘treaties’ itself is not specifically written in the Constitution. Instead, section 51(xxix) of the Constitution provides that: ‘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: (xxix) External Affairs’. External affairs, being matters outside or ‘external’ to Australia, has since been broadened to include treaties, through statutory interpretation of section 51(xxix) in the case of *The Commonwealth v Tasmania* (1983) 158 CLR 1. Here, the High Court found that Commonwealth law, which banned the state of Tasmania from destroying the Franklin Dam, a World Heritage site, took supremacy over Tasmania’s Criminal Code. The High Court found that ‘external affairs’ included international treaties and as such the Commonwealth was obligated to uphold the World Heritage Convention, which Australia is a signatory.

Legal brief 14.5

Croome v Tasmania (1997) 191 CLR 119

Rodney Croome was concerned with the *Criminal Code* (Tas), which stipulated that homosexual sexual activity was illegal. He argued that this was against his right to privacy. The Commonwealth parliament consulted the Human Rights Committee and, from this, drafted the *Human Rights (Sexual Conduct) Act 1994* (Cth), which made legal homosexual intercourse between consenting adults. This was in line with Article 14 of the *International Covenant on Civil and Political Rights*, which Australia is a signatory of and, as such, has an obligation to uphold.

Ultimately, the High Court ruled that treaties such as the *International Covenant on Civil and Political Rights* are to be included in the meaning of ‘external affairs’ within the Australian Constitution. The Court’s interpretation of ‘external affairs’ gave supremacy to the Commonwealth and its Act. The relevant section of the Tasmanian Criminal Code was therefore repealed due to its inconsistency with Commonwealth and, in turn, international law.

Influences of treaties in protecting rights in Australia

We will now look at the influences of the following treaties in protecting rights in Australia:

- *International Covenant on Civil and Political Rights* (ICCPR)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (ICCPR) came into effect in 1976 and provides individuals of those countries who are signatories to it with the right to such freedoms as speech, assembly, religion and life. It also recognises rights within criminal and civil proceedings, such as the right to a fair trial and the right to silence and against self-incrimination.

As Australia is a signatory to the ICCPR, it has had a major influence in protecting the rights of Australians to ensure that fairness, equality and access are all achieved for its citizens. The following list highlights various Acts and processes of parliament that have embedded various articles of the ICCPR:

- Article 17 of the ICCPR is entrenched in the *Privacy Act 1998* (Vic), which stipulates that it must take account of 'developing general international guidelines relevant to the better protection of individual privacy'.
- The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) lists the covenant as a source of human rights and stipulates that new legislation be tabled in Commonwealth parliament with a statement outlining the proposed law's compatibility with the listed human rights.
- This parliamentary scrutiny is also the case within Victoria, where Bills introduced to Victorian parliament must be coupled with a statement of compatibility as per the *Victorian Charter of Human Rights and Responsibilities Act's* compliance with the ICCPR.

Go to the website of the United Nations Human Rights Office of the High Commission at www.ohchr.org to see a copy of the *International Covenant on Civil and Political Rights* (ICCPR).

News report 14.2

Discrimination tax: foreign citizens' rights challenged in Federal Court.

In a recent ruling, the Federal Court have found that changes to taxation legislation, which were expected to raise \$500 million for the federal budget introduced by the government in 2016 cannot be applied to citizens of countries including the US, Japan, Norway, Turkey, UK, Germany, Finland, and Chile.

The 2016 changes to Australian taxation legislation mean that residents from these countries were required to pay tax from the first dollar they earned, and not the \$18 200 threshold given to Australian residents for tax purposes. It was found by the Federal

Court that these changes contravened non-discrimination clauses contained in tax treaties Australia has signed, which make it illegal for workers travelling between signatory countries to be held under unequal tax treatments.

In his ruling, Justice Logan wrote, 'That is a disguised form of discrimination based on nationality.' It is not yet known how this legislation will relate to other European nations such as Ireland.

The test case is said to be important in protecting the rights of foreign citizens working in Australia.

International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) came into effect in 1976 and provides individuals of those countries who are signatories to it the right to health, education, an adequate standard of living and freedom of political status.

As Australia is a signatory to the ICESCR, it has had a major influence in protecting the rights of Australians. The following list highlights various instances where parliament has embedded various articles of the ICESCR:

- Part 5 of the Victorian *Charter of Rights and Responsibilities Act 2006* stipulates that a review of the Charter after four years of operation must include consideration as to whether additional human rights should be included as human rights under this Charter, including rights under the ICESCR.
- The introduction of the *Fair Work Amendment (Gender Pay Gap) Bill 2015*, which recognises gaps in pay between men and women that are non-compliant with Articles 3 and 7 of the ICESCR, which respectively stipulate economic equality and fair wages and equal remuneration for work of equal value between men and women.

Go to the website of the United Nations Human Rights Office of the High Commission at www.ohchr.org and read the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Other treaties recognised in Australian legislation

The *Racial Discrimination Act 1975* (Cth) references obligations within the *International Convention on the Elimination of all Forms of Racial Discrimination*.

The *Sex Discrimination Act 1974* (Cth) references obligations within the *International Convention on the Elimination of All Forms of Discrimination Against Women*.

The *Family Law (Child Protection Convention) Regulations 2003* references obligations within the *Hague Convention on the Civil Aspects of International Child Abduction*.

Activity 14.7 Folio exercise

Influence of treaties on rights in Australia

- 1 Define the terms 'international declaration' and 'treaty'.
- 2 Explain how a treaty can influence rights in Australia. Provide an example.
- 3 Read News report 14.2 and answer the following questions:
 - a What are the facts of the case?
 - b What was the final ruling of the court on the matter?
 - c What influence did international law have on the case and on the protection of rights in Australia?
- 4 Research relevant Acts, and the information provided in this chapter, and complete the following table.

International treaty	Found in (name relevant Australian Act)	Explanation of the influence of the treaty
<i>International Convention on the Elimination of all Forms of Racial Discrimination</i>		
<i>International Convention on the Elimination of All Forms of Discrimination Against Women</i>		
<i>The Hague Convention on the Civil Aspects of International Child Abduction</i>		

Influences of declarations in protecting rights in Australia

We will now look at the influences of the following declarations in protecting rights in Australia:

- The *Universal Declaration of Human Rights*
- The *Declaration of the Rights of Indigenous Peoples*.

The Universal Declaration of Human Rights

The *Universal Declaration of Human Rights* (UDHR) was drafted on 10 December 1948 by the United Nations at the conclusion of World War II, with Australia being one of eight countries who took part in its development. Its intention was to ensure that the atrocities of World War II would not be repeated.

The 30 inalienable rights listed within the UDHR include:

- the right to life, liberty and the security of person
- the right that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment
- the right to freedom of movement.

Unlike treaties, however, an international declaration does not directly create legal obligations; instead it is regarded as a guideline for how rights should be protected. However, the ICCPR and the ICESCR have been given legal force.

Declarations have had a significant influence on rights in Australia, including the *Declaration of the Rights of Indigenous Peoples*, in its protection of First Nations Australians.

News report 14.3

Proposed changes to rough sleeping laws in Melbourne under international scrutiny

In March 2017, proposed changes by Melbourne Council which would see local law broaden its definition of camping to effectively ban any type of camping have recently come under scrutiny from international human rights organisations.

The proposed changes were said to have had a significant impact on rough sleepers within the CBD who are likely to be the most likely targets of this ban. If approved, rough sleepers would be fined \$250 for leaving items unattended and those found 'illegally camping' could face fines ranging from \$250 to \$2000.

The United Nations Special Rapporteur on the Right to Housing, Leilani Farha, has come out in condemnation of the proposed ban, stating that banning camping and fining those who leave personal items unattended raises serious concerns for human rights internationally. 'The proposed law goes further and is discriminatory – stopping people from

engaging in life-sustaining activities, and penalising them because they are poor and have no place to live ... The criminalisation of homelessness is deeply concerning and violates international human rights law,' Ms Farha stated.

Ms Farha said under human rights law the social exclusion of people that were homeless was strictly prohibited. She also encouraged Melbourne Council to focus on its human rights obligations, which leave no room for discrimination.

In September 2017, the then Mayor Robert Doyle announced that proposed changes to rough sleeping laws would be scrapped, upon advice from law firm, Maddocks, that found outlawing camping could restrict people's right to move freely in Victoria and also 'conceivably' result in cruel or degrading treatment or punishment.

Sources (adapted): Aisha Dow, The Age, 14 March 2017; Tammy Mill and Aisha Dow, The Age, 26 September 2017

The Declaration of the Rights of Indigenous Peoples

The *Declaration of the Rights of Indigenous Peoples* provides a framework for how countries are to treat their Indigenous peoples with respect to existing human rights principles. It recognises the differences of Indigenous peoples and affirms a standard of protection against discrimination and disadvantage for those affected. It further provides them with security and dignity, by ensuring specific access to services, policies and initiatives. In 2009, Australia agreed to be a signatory to the declaration after it voted against it in 2007 alongside the United States, New Zealand and Canada.

The Declaration has influenced the protection of rights for Aboriginal and Torres Strait Islander peoples in Australia including, but not limited to the following:

- Creation of a national Indigenous representative body: The National Congress of Australia's First Peoples. This body gave Aboriginal and Torres Strait Islander people representation within policy development and national affairs. This is pursuant to Article 18 of the Declaration, which states, 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves.'
- Initiation of the 'closing the gap' initiative, which provides targets that aim to achieve better access to services to improve health quality and reduce inequality between Indigenous and non-Indigenous Australians in areas of life expectancy rates, birth and death rates and school achievements. Many of these targets are pursuant to Articles 21, 23 and 24 of the Declaration.

Activity 14.8 Folio exercise

The influence of international declarations on rights in Australia

- 1 Explain how an international declaration can influence rights in Australia. Provide an example.
- 2 Using the information on Indigenous rights from the websites of the Department of the Prime Minister and the Cabinet and the Australian Human Rights Commission, complete the table below.

Indigenous affairs initiatives	Explain the initiatives	Relevant articles of the Declaration that have influenced these initiatives
Closing the gap		
Constitutional recognition		
Education		
Employment		
Housing		
Land		
Prime Minister's Indigenous Advisory Council		

- 3 Read News report 14.3 and complete the following tasks:
 - a Explain what changes were being proposed to rough sleeping and camping laws in Melbourne.
 - b Explain the concerns that international political pressures has with these laws.
 - c What rights are being obstructed by these laws?
 - d Provide a list of advantages and disadvantages of the proposed rough sleeping and camping laws. Do you believe it to be justified? Explain.

Go to the website of the Department of the Prime Minister and Cabinet at www.pmc.gov.au for more information about Indigenous Affairs initiatives.

Go to the website of the Australian Human Rights Commission at www.humanrights.gov.au and read the *Declaration of the Rights of Indigenous Peoples*.

14.3 Approach adopted in other countries

We will now look at the approach adopted by other countries – Ireland and the US – in protecting rights.

The Irish Constitution: Bunreacht na hÉireann: Ireland's Rights



Buildings of the Irish parliament at Leinster House, Dublin

Ireland's Constitution, containing 50 articles, was ratified by the Irish people in 1937 and is said to be the fundamental law of the State. Like Australia's Constitution, it sets out the branches of government and established the court system as well as rules on how these institutions should be run. Articles 1–39 define the functions of the state and its agencies and from this, set up a separation of powers: the legislative, executive and judicial power. The legislative power resides with the Parliament, with the Dáil Éireann being likened to the lower house, the Seanad Éireann, known as the Senate, and finally a President as the head of State.

What rights are protected?

Most importantly, Ireland's Constitution sets out the fundamental rights of every citizen. These rights include:

- Article 40: personal rights
- Article 41: the family
- Article 42: education and children
- Article 43: private property
- Article 44: religion
- Article 45: directive principles of social policy
- Article 46: amendment of the Constitution

- Article 47: the referendum
- Article 48: repeal of the Constitution of Saorstát Éireann and the continuance of laws.

How are rights enforced?

Much like Australia, Ireland's Constitution is superior to all other law and, as such, provides for express, or in this case fundamental rights, which must be upheld by parliament. Section 15.4 of Ireland's Constitution states that the Oireachtas (Parliament) must not enact a law which is 'repugnant (in conflict with) to the constitution'. Further, article 26 provides that the President may refer a Bill to the Supreme Court to decide whether or not the Bill is repugnant to the Constitution. Should the Supreme Court find that it does, the President will not sign the Bill.

For individuals, the process of taking a matter to court if they believe a law has infringed on their constitutional rights is possible. In this instance, a person must show they have 'sufficient interest' in the proceedings; for example, show how the legislation affects them in some real way and, further, that there is an arguable case that has grounds. The High Court has the power to annul or cancel the law if it is deemed unconstitutional. This decision may be appealed to the Supreme Court.

How are rights amended?

Ireland's Constitution can be amended by a referendum. The process of a referendum is stated in Articles 46 and 47 of the list of Fundamental Rights as follows:

[46(2)] Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas (Parliament), be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

[47(2 1°)] Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall be held to have been vetoed by the people if a majority of the votes cast at such Referendum shall have been cast against its enactment into law and if the votes so cast against its enactment into law shall have amounted to not less than thirty-three and one-third percent of the voters on the register.

This process, unlike Australia, has a final stage: challenging the result through presenting a petition to the High Court. This must occur within seven days of the publication of the result of the referendum. If no petition is presented to the High Court, the referendum result becomes final.

Two recent referendums have been held in Ireland which have had significant impact on personal rights. These relate to abortion and same-sex marriage.

Abortion in Ireland: the *Thirty-sixth Amendment to the Constitution of Ireland*

The effective legalisation of abortion under Ireland's Constitution was passed by the *Thirty-sixth Amendment of the Constitution of Ireland* (2018). The Bill was introduced to the Oireachtas on 9 March 2018. On 25 May 2018, it was subsequently put to the people and approved by 66.4% of voters. The change to Ireland's Constitution took effect once signed into law by the President on 18 September 2018.

As a result, under article 40 (3°) 'Provision may be made by law for the regulation of termination of pregnancy'. This, in action, means that the Irish Parliament now has the ability to pass law to legislate for abortion, which was previously restricted.

Statutory rights

In Ireland, Acts known as *The Equal Status Acts 2000–2015* prohibit discrimination in access to and the use of goods and services, accommodation and education. Here, various grounds are set out under which people must not be discriminated against. These include the grounds of gender, marital status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. It also includes indirect discrimination and discrimination by association, sexual harassment and harassment, and victimisation.

Statute law also covers areas where discriminatory advertising is also prohibited. It is prohibited to 'publish, display or cause to be published or displayed, an advertisement which indicates an intention to discriminate, harass or sexually harass or might reasonably be understood as indicating such an intention'.

Common law rights

Through its interpretation of Ireland's Constitution, the High Court has developed the common law right to silence in Article 38 of Ireland's Constitution contains a list of rules concerning how trials should take place (referred to as Trial of Offences), with no stated right to silence listed. However, the case of *Heaney v Ireland* [1994] 3 IR 593, the High Court found that events leading up to a trial could adversely affect the achievement of a fair outcome. This included interviews before being charged by the Gardai (the Irish police force). Following an appeal, the Supreme Court upheld the decision in *Heaney v Ireland*, which now affords an accused in police custody the Constitutional right to silence.

The Constitution of the United States: The Bill of Rights

As the supreme law of the United States, the Constitution of the United States provides the overriding protection of rights for its citizens. Within the Constitution, which came into effect in 1789, is an entrenched Bill of Rights. These first ten amendments set out the restrictions on the power of government in favour of, and for, 'the people'.

What rights are protected?

The United States protects rights through express rights. Unlike Australia, this much more extensive list of entrenched rights is in the Bill of Rights. These rights are concerned with individual and civil political rights and include:

- 1 Freedom of speech, press, religion and petition
- 2 Right to keep and bear arms
- 3 Protection from quartering of troops
- 4 Protection from arbitrary search and seizure
- 5 Right to due process, a grand jury, self-incrimination and compensation for private property acquired for public use
- 6 Right to speedy and public trial
- 7 Right to jury in civil cases
- 8 Right against excessive bail and cruel punishment
- 9 Protection of other rights listed in the Constitution
- 10 The delegation of powers not listed in the Constitution be left to the states.

Further, the Supreme Court of the United States (see *Griswold v Connecticut* (1965) 381 US 479) found the right of privacy to be an implied right through a similar approach to that of Australia – via its judicial system.

The United States Constitution also provides for a similar approach to Australia in terms of its structural protection of rights: it too keeps the legislative, executive and judicial arms of government separate, which keeps a check on the abuse of power by government. Unlike Australia, however, the United States Constitution does not provide for a responsible government, with the US President being elected separately to the Congress.



How are rights enforced?

The judiciary, by way of the Supreme Court of the United States, is able to deem a law invalid if it is found through interpretation to be against the law-making powers of parliament that are set out in the Constitution. For a party to take the matter to Supreme court they must have standing; the Court takes a complaints-based approach much like that of Australia. For example, in 2014, judges in

a case found that a 10-day waiting period for gun purchase was ‘reasonable and precautionary’ and did not violate the Second Amendment Right (the right to bear arms). In their ruling, the judges referenced the lengthy delays that would have occurred during 18th and 19th century business transactions, where the rate of delivery was much slower and routinely accepted.

How are rights amended?

Amendment of rights is set out within the US Constitution with a much more complex procedure than that of Australia. For an amendment to be accepted, it must pass by a two-thirds majority of both houses of Congress, followed by a vote and approval by three-quarters in the states. States do not have to complete this vote at the same time.

Statutory rights

Employment discrimination law has been established in the *Civil Rights Act 1964* – the Act that historically ended segregation. Under federal law, employers generally cannot discriminate against employees on the basis of race, disability, pregnancy, citizenship status, genetic information and age. Further, the *Equal Pay Act 1963* prohibits the payment of wages on the basis of a person’s sex by employers and unions. It provides that where workers perform equal work in jobs requiring ‘equal skill, effort, and responsibility and performed under similar working conditions’, they should be provided equal pay.

Common law rights

Similar to Australia, the right to silence has been developed through common law in the United States. Known as ‘Miranda rights’, the right to silence is given by way of a police warning to suspects in a criminal case while in custody. The aim is to preserve the admissibility of the evidence suspects may give during police questioning. The right was established in *Miranda v Arizona* (1966) 384 US 436, where the Supreme Court interpreted the fifth and sixth Amendments of the Constitution (namely, the right to legal counsel). The Court held that should a suspect in a criminal case not be informed of their right to counsel it would directly violate these constitutional amendments and therefore the statement could not be used as evidence in their trial.

Table 14.4 Summary of protection of rights in Australia, Ireland and the US

	Australia	Ireland	USA
What rights are protected	<ul style="list-style-type: none"> Express rights Implied rights (to political communication) Structural protection of rights 	<ul style="list-style-type: none"> Fundamental rights of Ireland, which includes personal rights, education rights and property rights Structural protection of rights 	<ul style="list-style-type: none"> Bill of Rights Based mainly on civil and political rights – freedom from governmental power Structural protections, no responsible government Implied right (to privacy)
How are rights enforced	<ul style="list-style-type: none"> Statutory interpretation by judiciary High Court to declare laws invalid Standing required 	<ul style="list-style-type: none"> Statutory interpretation by the judiciary High Court and Supreme Court to declare laws invalid Parties to have ‘sufficient interest’ and grounds for taking Constitutional matters to High Court, where decisions can be appealed to the Supreme Court 	<ul style="list-style-type: none"> Statutory interpretation by the judiciary Supreme Court to declare laws invalid Standing required
How are rights amended	<ul style="list-style-type: none"> Referendum – double majority (majority of nation plus majority of voters in majority of states) 	<ul style="list-style-type: none"> Referendum – shall have amounted to not less than thirty-three and one-third percent of the voters on the register 	<ul style="list-style-type: none"> Two-thirds majority of Congress plus two-thirds majority of states
Statutory rights	<ul style="list-style-type: none"> <i>Sex Discrimination Act 1984</i> <i>Equal Opportunity Act 2010</i> <i>Racial Discrimination Act 1975</i> 	<ul style="list-style-type: none"> <i>The Equal Status Acts (2000–2015)</i> 	<ul style="list-style-type: none"> <i>Civil Rights Act 1964</i> Employment discrimination law
Common law rights	Right to silence	Right to silence	Miranda rights

Activity 14.9 Folio exercise

Comparing the protection of rights in Australia with other countries

- 1 Using the information provided in this chapter, complete the following table for a comparison of rights in Australia and Ireland.

	Similarities	Differences
What rights are protected?		
How are rights enforced?		
How are rights amended?		
Statutory rights		
Common law rights		

- 2 Using the information provided in this chapter, complete the following table for a comparison of rights in Australia and the United States.

	Similarities	Differences
What rights are protected?		
How are rights enforced?		
How are rights amended?		
Statutory rights		
Common law rights		

- 3 In groups, complete the following table for a comparison of rights in Australia with those of one of the following countries: Russia, China, New Zealand or South Africa.

	Similarities	Differences
What rights are protected?		
How are rights enforced?		
How are rights amended?		
Statutory rights		
Common law rights		

A crowd celebrates the result of the marriage equality postal vote on the streets of Melbourne, November 2017



14.4 Reforms

For rights to remain in line with social norms, it is important that laws are continuously reviewed and reforms are suggested. Law reform ensures that marginalised groups are treated fairly and with equality and are provided with improved access to justice. For example, could you imagine a time when women could not vote? When Aboriginal and Torres Strait Islander peoples were not recognised within a census of Australia?

The law reform process

Law reform includes the Attorney-General making a **reference** for inquiry. From here, submissions from the public, affected people and professionals will be obtained. A final report with recommendations for reform will be submitted to the relevant parliament for debate and possible implementation.


 Go to the website of the Attorney-General's Department of Australia at www.ag.gov.au for more information.

Table 14.5 Law reform bodies in Australia

Law reform body	Recent projects
The Australian Human Rights Commission (AHRC)	<ul style="list-style-type: none"> Elder Abuse (2019) Indigenous Defence Project (2019)
Australian Law Reform Commission (ALRC)	<ul style="list-style-type: none"> Review into the Framework of Religious Exemptions in Australian Discrimination Legislation (2019) Incarceration rates of Aboriginal and Torres Strait Islander Peoples (2016)
Victorian Law Reform Commission (VLRC)	<ul style="list-style-type: none"> Victims of Crime in the Criminal Trial Process (2018) <i>Adoption Act</i> (2017)
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	<ul style="list-style-type: none"> Independent Review into Sex Discrimination in Victoria Police (2016) Racism is Against the Rules (2017)
The Parliamentary Joint Committee on Human Rights	<ul style="list-style-type: none"> Enquiry into the removal of section 18C from the <i>Racial Discrimination Act 1975</i>

Activity 14.10 Folio exercise

Law reform bodies

In groups, research two law reform bodies from Table 14.5 and, for each, comment on the following:

- What is their role with respect to law reform in Australia?
- What is their process of law reform?
- Choosing one recent project referenced in Table 14.5, explain its relevance to the protection of rights in Australia. In your response, you must refer to any relevant law.

News report 14.4

‘Momentous night’: Victorian birth certificate reform passed

Transgender and gender-diverse people in Victoria will be able to change the sex on their birth certificate without having to undergo gender reassignment surgery, after reforms were passed in parliament overnight.

The Births, Deaths and Marriages Registration Amendment Bill introduced by the state government passed 26:14 in the Victorian upper house on Tuesday night and will now go to the Governor for Royal assent.

The Bill will remove the current requirement for transgender people to undergo sex reassignment surgery before updating their birth certificate. They will also be free to self-nominate their sex as male, female or many other non-binary descriptors of their choice. Children will also be able to alter the gender on their birth certificate, provided they have parental support and a statement from a doctor or registered psychologist stating that the decision is in the child’s best interests.

Victoria became the fifth state in Australia to adopt the reform, bringing it in line with Tasmania, Northern Territory, South Australia and the ACT.

The Government has argued that the law that requires a trans person to have sex affirmation surgery before changing their birth certificate should be scrapped because some people cannot, or do not want to, go through an expensive and invasive medical procedure.

The Bill was introduced a second time by Attorney-General Jill Hennessy, who celebrated its passing on Tuesday night.

‘These important new laws are about ensuring everyone can live their life as they choose, and that includes having a birth certificate that reflects their true identity,’ she said. ‘The current surgery requirement sends a painful and false message that there is something wrong with being trans or gender diverse that needs to be ‘fixed’ – that’s why we’re removing this cruel and unfair barrier.’

Greens leader Samantha Ratnam also welcomed the reform.

‘A momentous night as birth certificate reforms pass the upper house of Vic Parliament,’ she wrote on Twitter.

Advocacy groups including Equality Australia, Transgender Victoria and Ygender, which have been campaigning for the bill to be passed, also celebrated on social media using the hashtag #MyIDMyIdentity.

‘Trans rights are human rights and we welcome the passing of this bill. It is important that we can all have documents which reflect who we are and enable us to get on with our lives with pride rather than hiding in the closet,’ she said.

Source: Simone Fox Koob, The Age, 28 August 2019

Activity 14.11 Structured questions

Law reform in Australia

- 1 Why is it important that a law reform process exists?
- 2 Explain why it is important to consider public submissions during the law reform process.
- 3 What reforms have been made to existing Victorian law, as stated in News report 14.4?
- 4 Using your knowledge of statutory rights, explain how this reform has come about.
- 5 Using your knowledge of a statutory Bill of Rights, explain how this reform might further uphold the rights in the Victorian *Charter of Human Rights and Responsibilities 2006*.
- 6 Explain why these changes are important, and for whom.
- 7 In pairs, develop a list of possible arguments in favour of, and against the recent changes.

Possible reforms for the better protection of Australians

We will now explore possible reforms for the better protection of Australians in terms of the following:

- the introduction of an entrenched Bill of Rights
- constitutional recognition for Indigenous Australians.

Should Australia have a Bill of Rights?

There is a ‘civil liberties black hole’ at the heart of this issue. All systems need harmony to produce optimal outcomes and harmony requires checks and balances. It is evident that in contemporary Australia, the capacity for individuals to protect their rights is severely depleted.

Source: Quote from Sev Ozdowski, 2002 Bill of Rights Conference

One possible reform to further ensure protection of the rights of Australians is the introduction of an entrenched Bill of Rights, much like that of Ireland and the United States. Australia is one of the few Western nations that does not have a Bill of Rights, with past attempts to create a Bill of Rights in 1973 and 1983 being unsuccessful. There are many arguments for and against the introduction of a Bill of Rights in Australia.

Criticisms of a Bill of Rights include:

- rights are already protected sufficiently through other means, such as statute and common law; Victoria also has a statutory Bill of Rights
- the ever-changing nature of society would mean that a Bill of Rights might become out of date quickly
- the process of change is difficult.

Arguments that promote a Bill of Rights include:

- through current statutory protections, parliament has the ability to change or omit some rights that society might deem necessary, due to party politics
- judicial limitations that necessitate a person having standing to take a matter to court mean that courts are unable to be proactive in protecting rights
- a Bill of Rights will provide a clear list of rights, known to the people.

Activity 14.12 Class discussion

Should Australia implement a Bill of Rights?

Consider the following questions and tasks in relation to the possibility of implementing a Bill of Rights in Australia. Discuss your answers with other members of the class.

- 1 Identify one country other than Australia that has an entrenched Bill of Rights and explain how this protects its people.
- 2 How would a Bill of Rights differ from the way Australians are currently protected through the Constitution?
- 3 How would an entrenched Bill of Rights differ from the existing statutory Bill of Rights that Victoria has implemented?
- 4 Brainstorm more arguments in favour of and against a Bill of Rights. You can use the internet to complete more thorough research.
- 5 Argue your case for whether or not you believe an entrenched Bill of Rights should be implemented in Australia.

Recognise campaign for Indigenous Australians



The Constitution was drafted at the time of European settlement, when society and lawmakers did not recognise Aboriginal and Torres Strait Islander people as citizens; nor were their laws, customs and traditions regarded when legislation were being drafted. Of significance is the omission from the Constitution of Indigenous rights, including recognition of their existence on, and their ownership of, the land.

There is currently bipartisan support for reforms to the Constitution to extend rights, particularly for Indigenous Australians.

Suggested reforms include:

- recognising Indigenous Australians as First Australians and traditional owners of Australia in the Constitution's introduction
- the addition of a new section prohibiting discrimination on the basis of race, ethnicity, colour or national origin.

Arguments for and against constitutional recognition for Indigenous Australians include the following:

Arguments for

- Although some constitutional rights were given in the 1967 referendum, specifically the right to be counted in a National Census, more needs to be done to recognise Indigenous Australians as First Australians.
- It would further entrench Article 26 of the *Declaration of the Rights of Indigenous Peoples* into law.
- A legally binding treaty, much like those signed by Canada and New Zealand have with their First Nations populations, would provide a more targeted end to discrimination against Indigenous Australians.

Arguments against

- Constitutional recognition will not remove the day-to-day disadvantage suffered by Indigenous Australians.
- It may be a possible threat to the sovereignty of Indigenous Australians and another form of assimilation.
- It would remove racial discrimination from the Australian Constitution.

Activity 14.13 Structured questions

Reforms to better protect rights in Australia

- 1 Explain the suggested reforms for the better protection for Indigenous Australians.
- 2 Explain how constitutional recognition would better protect Indigenous Australians.
- 3 Highlighting arguments for and against, discuss the suggested constitutional reforms for Indigenous Australians. Do you believe the reforms to be justified? Explain.
- 4 In groups, suggest a list of possible reforms to rights in Australia. This can include better protection under the Constitution, statutory rights and common law rights. Give reasons for the suggestions you have made.

Key point summary

Do your notes cover all the following points?

- ❑ Protection of rights in Australia
 - The Constitution
 - Express rights are written and entrenched in the Constitution
 - Freedom of interstate trade, commerce and intercourse/movement
 - Acquisition of property on just terms
 - Trial by jury for Commonwealth indictable offences
 - Freedom of religion
 - Not to be discriminated against based on the state in which you reside
 - Implied rights are not written in the Constitution but, instead, are found through its interpretation by the High Court
 - Right to freedom of political communication established in the *Australian Capital Television* case
 - Structural protection provides an indirect protection from abuse of power by parliament through the Constitution's structure and various mechanisms
 - Separation of powers
 - Responsible government
 - Representative government
 - Other
 - High Court to keep checks and balances on Acts of parliament and can deem laws invalid
 - Section 128 – referendum process with significance placed on population majority vote to pass legislation altering the Constitution
 - Common law rights – established through courts in the ruling of cases through interpreting, or in the absence of, Acts of parliament
 - Right to silence and against self-incrimination
 - Statutory rights – established by parliament through the legislative process
 - *Equal Opportunity Act 2010* (Cth)
 - *Racial Discrimination Act 1975* (Cth)
 - *Sex Discrimination Act 1984* (Cth)
- ❑ International instruments that influence rights in Australia
 - Declarations that are not binding on Australia but can be used to influence rights in Australia
 - *United Nations Declaration of Human Rights*
 - *Declaration of the Rights of Indigenous Peoples*
- ❑ Treaties that are binding on signatories
 - *International Convention on Civil and Political Rights*
 - *International Convention on Economic, Social and Cultural Rights*
- ❑ Protection of rights of a country other than Australia
 - Ireland
 - United States
 - Highlight the similarities and differences between rights in each country and rights in Australia
- ❑ Possible reforms to rights in Australia
 - The role of various law reform bodies
 - Possible reforms to the protection of rights in Australia
 - Bill of Rights
 - Constitutional recognition for Indigenous Australians

End-of-chapter questions

Revision questions

- 1 Identify and explain the main way that rights are protected in Australia.
- 2 Differentiate between a statutory bill of rights and statute law rights. In your response provide an example of each.
- 3 Provide one strength and one weakness of common law rights.
- 4 Explain the significance of the Victorian *Charter of Human Rights and Responsibilities 2006*.
- 5 With reference to one case, explain how the High Court can protect the rights of Australians.
- 6 Evaluate statutory rights as a means of protecting rights in Australia.
- 7 Explain how international laws can influence rights in Australia. Use examples in your response.
- 8 Discuss the extent to which a Bill of Rights might better protect Australia.
- 9 Compare the approach of one other country in protecting rights with that of Australia.
- 10 Suggest one other possible reform that Australia should adopt to better protect its citizens.

Practice exam questions

- 1 With reference to, and an explanation of, at least two statutes, explain how statute law can protect rights in Australia. [4 marks]
- 2 Briefly outline how the Constitution protects Australians. [5 marks]
- 3 Explain the process of ratifying a treaty in Australia. [3 marks]
- 4 Distinguish between a statutory Bill of Rights and an entrenched Bill of Rights. [3 marks]
- 5 Describe how common law rights are developed. In your response, reference at least one common law right. [3 marks]
- 6 A legal critic has claimed that 'In Australia, our rights are not sufficiently protected. A Bill of Rights would combat this issue'. To what extent do you agree with this statement? In your response, highlight one country that has a Bill of Rights. [8 marks]
- 7 Compare the approach taken by Australia to protecting rights with that of another country. [6 marks]
- 8 'Judges should not be able to make rights which are going to affect all of Australians. This should be left to Parliament'. Do you agree with this statement? Justify your response. [5 marks]
- 9 'Australia has obligations under international law to protect the rights of Australians.' Explain this statement with reference to at least one treaty. [5 marks]
- 10 'Statute rights are much more comprehensive than those provided in the Constitution and, therefore, are much better.' Discuss. [7 marks]

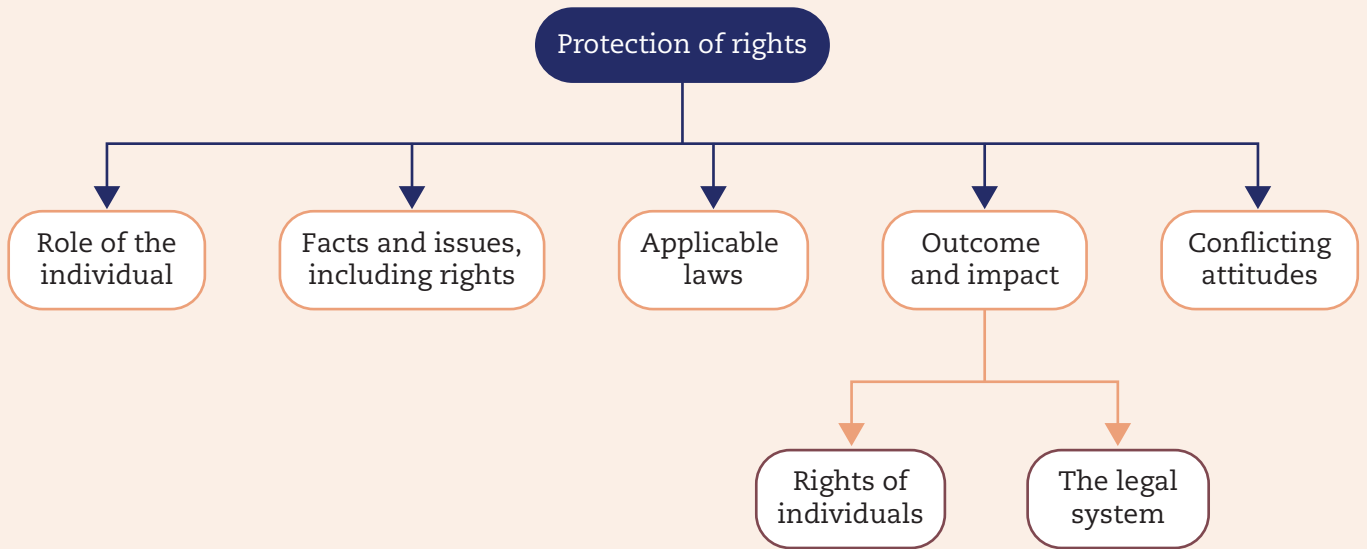
Chapter 15

Unit 2 – Area of Study 3

Impact on the protection of rights in Australia

With rapid changes occurring within society, it is important that Australians have a voice with respect to their rights and that a process of redress is available within the court system when rights abuses, often stemming from out-of-date legislation or unfair processes within the legal system, have gone unnoticed by the authorities. When a question of rights is presented to a court, the decision will usually have far-reaching effects on a wide group of individuals, not just the individual who presented the case in court. This chapter will look in depth at significant cases that have aided in the protection of rights in Australia. By the end of this chapter, you will also have developed an understanding of the role of the individual in taking a matter to court and analysed the facts and laws that apply to the case and balance conflicting views. Finally, you will be able to understand how the judicial system in Australia can have an impact on upholding rights in Australia through its decisions and how these decisions can have an impact on both individuals and the legal system.





Key terms

judicial conservatism when a judge declares there is no course of action under common law and dismisses a case, or adopts a narrow interpretation of legislation when deciding cases and thus avoids controversy

justiciable the requirement that a matter presented to court for resolution has actual and substantial rights infringements

rights a moral or legal entitlement by government to have or do something

stare decisis 'to stand by what has been decided'; the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

test case a case that seeks to create or clarify a legal right or principle, including challenging pre-existing rights interpretation

ultra vires outside of parliament's law-making power



15.1 Role of the individual and the court

For a court to have the power to hear a dispute where there is a question of rights, the matter must be **justiciable**, which includes the need for a person to have standing.

In Australia, it is the primary role of the judicial system to act to enforce **rights**, with people being able to take a matter to court if they feel their rights have been infringed. This process, known as a complaints-based approach to enforcing rights, assists with ensuring that fairness and equality are achieved within the community, particularly for those who are disadvantaged. For example, one of the significant roles of the High Court as a guardian of the Australian Constitution is to hear disputes arising under its jurisdiction, which includes questions relating to rights under the Constitution that it has the power to interpret. From here, the High Court is able to decide if laws have been made **ultra vires**, beyond the law-making power of parliament. Should the High Court find that said legislation contravenes rights that are either explicitly stated in the Constitution or are found through this process of interpretation, these laws will be deemed invalid. The High Court also has the jurisdiction to hear matters on appeal from lower courts through applications to enforce rights. A matter that is presented to the court where legal rights or principles are to be clarified or created, or where pre-existing rights are to be interpreted, is known as a **test case**.

However, taking a matter to court is not accessible to everyone as there are limits to the court's jurisdiction to hear disputes. For a matter to be taken to court, there is a requirement for the matter to have actual and substantial rights infringements or concerns.

Further, a person bringing the case must have standing; that is, show that their position is worsened by the rights infringement and have something to gain by having the matter rectified. However, this process can be expensive and time consuming and can be a significant barrier for individuals wishing to access justice by having their matters heard and rights infringements rectified.

'Judicial conservatism' is a term used to describe a judge who does not see it as their role to affect law and, as such, will avoid making a decision in a case which will affect the law and, subsequently, rights.

The courts themselves also have limitations in their ability to protect rights, which often requires reforms to laws such as existing common law and statute. **Judicial conservatism** is a term often used to describe a judge who does not see it as their role to affect laws and, as such, will make decisions that do not make any significant changes to the law. A further limitation of the court and, consequently, the individual, is if a matter is taken to a court that must follow precedent of high courts. This is known as the legal principle **stare decisis**, meaning 'to stand by what has been decided'. In these cases, the lower court must apply existing law from higher courts. Both instances discussed here may limit the impact the judicial system can have in the protection of rights in Australia.



News report 15.1

Can a sperm donor be considered a legal parent? In a landmark decision, the High Court says yes

On Wednesday, the High Court handed down a landmark decision that confirmed parentage rights to a man who donated his sperm to a woman who wanted to have a child.

The ruling could impact thousands of couples and single women whose children were conceived with known sperm donors.

It could also significantly impact the relationship between Commonwealth and state laws on parental matters in situations where children are born via artificial conception.

The facts of the case

Robert Masson and Susan Parsons (their court pseudonyms) had been friends for decades before deciding to 'privately and informally' conceive a child in December 2006.

According to court documents, Mr Masson was involved in the girl's life from birth and developed a close relationship with her, including overnight visits and attending school performances. Masson was listed as the father on the girl's birth certificate, and she refers to him as 'Daddy'.

After the girl was born, Parsons had a second child with her partner, who is not biologically related to Masson. In 2015, Parsons married her partner in New Zealand and wanted to relocate there permanently with the two children.

Masson took legal action to prevent the women from moving, a move that would have effectively separated him from his biological daughter.

Legal parentage considered in family court

In 2017, Justice Margaret Cleary of the family court prevented the mothers from relocating to New Zealand, finding that the two women were not in a de facto relationship at the time the girl was conceived. Masson was recognised as the child's legal parent based on a section of the Commonwealth *Family Law Act 1975* that deals with the parentage of children born via artificial conception procedures.

In her ruling, Cleary gave weight to Masson's intentions when the girl was conceived and his subsequent involvement in her life.

On appeal, the mothers argued that Cleary failed to consider a section of the NSW *Status of Children Act 1996* which states:

If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

This section goes on to state that this presumption is irrebuttable.

The full family court agreed with this argument and found that this section of the state act must

be applied when questions of parentage arise in a federal court.

As a consequence, Masson was presumed not to be the legal parent. The court also rejected the notion that a child can have more than two parents.

Masson filed an appeal to the High Court earlier this year. In an unusual step, both the Commonwealth and Victorian attorneys-general filed notices of intervention to argue which laws they believed should apply when determining parentage rights in sperm donor cases. (Victoria intervened because it had an interest in making sure state law was applied, even though the case originated in NSW).

Can a sperm donor be a legal parent?

In this week's ruling, a majority of the High Court found there was no reason to doubt Cleary's conclusion that Masson was, in fact, a parent of the child.

The court concluded that the federal act's definition of a parent was not exhaustive, and the question of whether a person is a parent of a child born of an artificial conception procedure depends on whether the person is a parent of the child according to the ordinary, accepted English meaning of 'parent'.

Interestingly, the court was silent on whether a child could have more than two legal parents, but did suggest that the federal act might support this assumption.

The majority pointed out that it was unnecessary to decide whether a man who relevantly does no more than provide his semen to facilitate an artificial conception procedure that results in the birth of a child falls within the ordinary accepted meaning of the word 'parent'.

In this case, Masson had clearly demonstrated, in addition to being a sperm donor, that he had an ongoing involvement and relationship with the child, meeting the definition of 'parent' under the federal act.

What is the impact of this decision?

This means that the federal act, which recognises a broad range of people who may qualify as parents, will apply in future cases seeking to determine parentage rights. This can now include sperm donors who demonstrate they ordinary, accepted English definition of the word 'parent' under the act in cases where the biological mother did not have a spouse at the time of conception.

While the extension of the definition of 'legal parent' to a sperm donor may initially appear to be far-reaching, the implications of this decision are limited.

A fundamental principle in family law is that the best interests of the child be a paramount consideration. As a consequence, there is a presumption that shared parental responsibility is also in a child's best interests.

It is these underlying principles that have been applied in this case.

The High Court has arguably taken a common sense approach by recognising that any person – including a sperm donor – who is found to be taking on a parental role should share in the responsibilities of raising a child, under certain circumstances.

This decision does not open the door to custody battles from anonymous sperm donors who have never seen or had a relationship with their biological child. However, the ruling does point out that sperm donors who develop a relationship with their biological children may find themselves taking on the role of a 'legal parent', whether they intend to or not.

This could also serve as a deterrent for sperm donors who may have been open to some level of contact or connection with a child in the past. Now, many may refuse such contact in fear they could be found to have legal responsibilities – including possibly financial obligations – to their biological children.

The threshold at which a person transitions from 'sperm donor' to 'legal parent' remains somewhat unclear.

Ultimately, prospective parents, including those involved in arrangements that deal with artificial conception, have been put on notice that a child's right to both parents is paramount – even where this might infringe on a parent's individual rights.

Source: Cassandra Seery, The Conversation, 19 June 2019



Video

Activity 15.1 Report

A question of rights: can sperm donors be considered a legal parent?

Using the internet and News report 15.1, complete a report that comments on the following:

- the role of the individual in taking a case to court
- the facts and issues central to the case, including the rights in question
- the laws that applied to the case
- the outcome of the case and its impact on the rights of individuals and the legal system
- possible conflicting attitudes in relation to the case.

15.2 Case study 1: IVF and the inconsistency of laws between state and Commonwealth parliament – *McBain v State of Victoria* (2000) 99 FCR 116

We will now look at one Australian case that has had an impact on the protection of rights in Australia: *McBain v State of Victoria* (2000) 99 FCR 116. This case shows the inconsistency of laws between state and Commonwealth parliament.



Leesa Meldrum

Issues in the case

Leesa Meldrum was a single woman who wanted to access in-vitro fertilisation (IVF) services in Victoria in order to conceive a child. Her doctor, a reproductive specialist, Dr John McBain, was unable to give her access to IVF services due to restrictions placed on him as a doctor under the *Infertility Act 1995* (Vic), which restricted access to IVF services in Victoria to women who were unmarried and not in a de facto relationship with a man. This, however, was believed to be in conflict with section 22 of the *Sex Discrimination Act 1984* (Cth) which made it unlawful for a person to be denied services based on their marital status.

In this case, both Leesa and Dr McBain were affected by the law; Leesa by not having access to IVF under the *Infertility Treatment Act (1995)* and Dr McBain who could be sanctioned under both conflicting laws.

The case was presented to the High Court by Dr McBain, questioning the validity of the Victorian law. Central to the case was the conflict between state and Commonwealth law, and the ability of section 109 of the Constitution to be factored in to this inconsistency.

Facts and laws central to the case

The laws that were applicable to this case and which will be discussed throughout this analysis are as follows:

- Section 8(1) *Infertility Treatment Act 1995* (Vic)
- Section 22 *Sex Discrimination Act 1984* (Cth)
- Section 109 *Commonwealth of Australia Constitution Act 1901* (UK).

Leesa Meldrum was a single woman in Victoria, meaning she was unmarried and not in a de facto relationship with a man. She wished to access IVF services in order to conceive a child on her own.

The facts relating to her doctor, John McBain, were two-fold:

- 1 He was unable to give her access to IVF under the provisions stipulated in section 8(1) of the *Infertility Treatment Act 1995* (Vic) and, if he did, would be sanctioned for this.
- 2 He was unable to deny Ms Meldrum access to IVF treatment and services under the provisions stipulated in section 22 of the *Sex Discrimination Act 1984* (Cth).

Conflict between state and Commonwealth parliament laws

State and Commonwealth parliament are able to make laws with regard to their own states and Australia wide, respectively. These laws can exist together and will only be questioned when a matter is presented to the High court where there is believed to be a conflict. This conflict will then be applied to section 109 of the Constitution which states: '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'. A decision will be made by the judge in this matter and where a conflict exists, the State law shall be deemed invalid, to the extent of the inconsistency.

Section 109 of the Constitution states that the Commonwealth holds supremacy in matters where a law between the state and Commonwealth are inconsistent in areas of shared, concurrent power.

Dr McBain argued that IVF treatment was regarded as a 'service' and as such the Victorian law was inconsistent with the Commonwealth law. This subsequently meant that a decision be made under section 109 of the Constitution.

Arguments made by the Victorian Government in defence of Victorian IVF laws included that under section 22 of the *Sex Discrimination Act 1984* (Vic), fertility treatment services were exempt given that 'the prohibition on discrimination does not apply to the provision of services which can, of their very nature, only be provided to members of one sex'.

In the case, the judge was required to decide the following:

- Was IVF regarded as a 'service' and if so, did the Victorian law pose a conflict with the Commonwealth law?
- Did section 22 of the *Sex Discrimination Act 1984* (Cth) mean that infertility treatment was exempt from discrimination of services? And if not:
- To what extent was there an inconsistency between the state and Commonwealth laws?

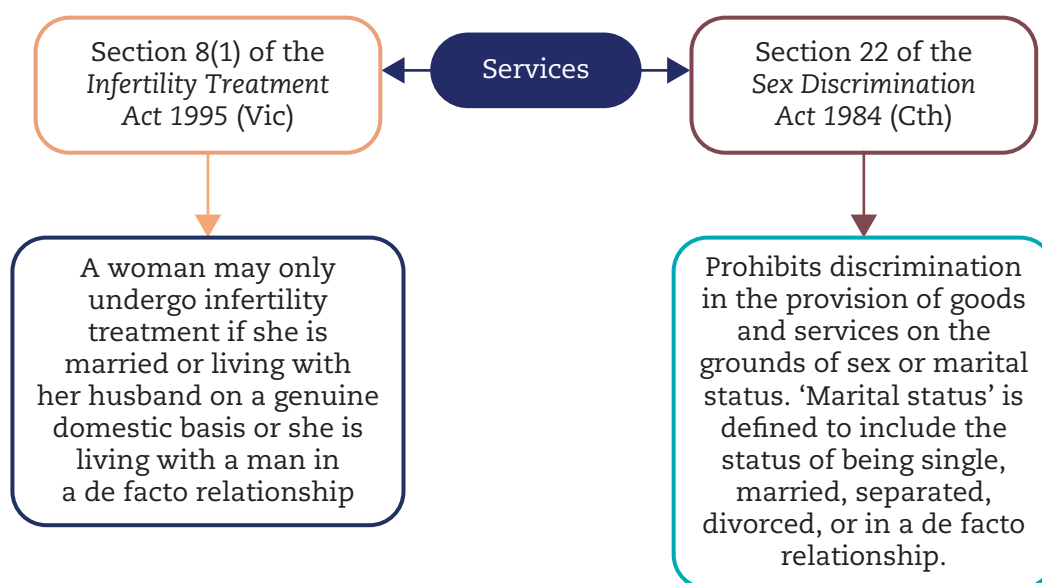


Figure 15.1 State and Commonwealth laws that were in contradiction in *McBain v Victoria* (2000).

Outcome of the case

The High Court found in favour of McBain, in validating the *Sex Discrimination Act 1984* (Cth), which led to a repeal of the parts of the *Infertility Treatment Act 1995* (Vic).

The High Court found that the state law was in fact in conflict with the Commonwealth law, given that the state *Infertility Treatment Act 1995* (Vic) did limit 'services' to women on the basis of their marital status. In their ruling, the High Court did not agree that section 22 of the *Sex Discrimination Act 1984* (Cth) allowed for discrimination on the basis of which the Victorian Government presented in their defending arguments.

Due to the recognised conflict, section 8(1) of the Victorian law on infertility was deemed invalid and, as such, was inoperable. This ruling was made in accordance with section 109 of the Constitution and on the basis that single women in Victoria should not be discriminated against, as referred to in section 22 of the *Sex Discrimination Act 1984* (Cth).



The impact of the case on individuals was significant, extending the right to IVF services to single women in Victoria. This meant that the High Court was able to amend discrimination of women on the basis of their marital status, as the Victorian law had done for some time.

The case highlights the ability of individuals to affect rights when they are aware of them and have the resources, including cost and time, to do so.

A limitation here, however, is that the case was unable to address the reference to 'need' within the *Infertility Treatment Act 1995* (Vic) and, consequently, single women may still need to show there is a medical need for the treatment. The *Sex Discrimination Act 1984* (Cth) does not list 'medical need' as an area in which a person can be discriminated against.

With respect to the impact on the legal system, the case now means that doctors will no longer be able to be sanctioned under Victorian law for refusing IVF treatment services to women on the basis of their marital status. Cases proceeding *McBain* were also brought to court, and on three separate occasions women were compensated for being refused IVF service treatment on the basis of their marital status.

Conflicting attitudes

During the case, and in much of the sentiment that surrounded the discrimination of women, were the following arguments.

In favour of the amendments to the *Infertility Treatment Act 1995* (Vic) were the following arguments:

- The Victorian law blatantly discriminated against woman and, for this reason, needed to be amended to ensure equality among all women.
- The rights of women to have a family were significantly hindered due to the Victorian law. This right is one listed in the Victorian *Charter of Human Rights and Responsibilities 2006*.
- Commonwealth law regarding sex discrimination should be able to take precedence where individual states are discriminating against its residents.

Against the amendments to the *Infertility Treatment Act 1995* (Vic) were the following arguments:

- By allowing single women access to IVF treatment, the community would start to see a break down in moral values associated with families.
- The *Infertility Treatment Act 1995* (Vic) should not have been deemed in conflict with the *Sex Discrimination Act 1984* (Cth) due to provisions set out in section 22 of the Commonwealth Act (this argument was not accepted by the judge in this case).

Activity 15.2 Structured questions

McBain v Victoria

- 1 With reference to the McBain case, explain the principle of 'standing'.
- 2 Outline the actions taken by Leesa Meldrum and John McBain in the case.
- 3 Describe the two laws that were 'in conflict' and explain how section 109 of the Constitution impacted the case.
- 4 What was the final decision of the High Court?
- 5 What impact did the outcome have on:
 - a individuals?
 - b the legal system?
- 6 Complete the following summary of the McBain case.

Issue	
Facts	
Law/rights	
Outcome	
Impact: Individual Legal system	
Conflicting views	

15.3 Case study 2: a question of legal representation and the right to a fair trial – *Dietrich v R* (1992) 177 CLR 292

We will now look at another Australian case that has had an impact on the protection of rights in Australia – *Dietrich v R* (1992) 177 CLR 292. This case addresses the question of legal representation and the right to a fair trial.

Issues in the case

The right to a fair trial is an ideal that is often viewed as significant to upholding the justice system in Australia. Synonymous with a fair trial is access to an objective jury, an impartial judge and appropriate legal representation so that those who are accused are able to defend allegations against them. This notion of legal representation was the central argument of Olaf Dietrich in the case *Dietrich v R* (1992) 177 CLR 292.

Mr Dietrich was unrepresented, or lacked proper access to legal representation, during his County Court case and based his subsequent appeals on this fact. The High Court was required to consider whether a right to a fair trial exists in Australia and, further, whether an accused person has a right to free legal representation, funded by public money.

Facts and laws central to the case

In a trial that lasted 40 days, the accused, Olaf Dietrich, was found guilty of importation of drugs after his arrest at Melbourne airport after he arrived from Thailand, where he was found to have swallowed 70 grams of heroin, concealed in a condom. During the trial, Mr Dietrich was unrepresented and made several objections to this point. In what was common practice, the County Court judge continued the trial, following a failed last attempt to apply for free legal aid through the Legal Aid Commission of Victoria, whose response was that legal aid would only be provided should Dietrich change his plea from not guilty to guilty. Not prepared to do so, Mr Dietrich continued his case unrepresented.

Following his conviction, Mr Dietrich applied to the Supreme Court for an appeal; he was forced to proceed to the High Court after his appeal was denied. In their acceptance of the appeal, the High Court cited the following:

This application for special leave to appeal seeks to raise the question whether the applicant's trial in the County Court at Melbourne miscarried by virtue of the fact that he was unrepresented by counsel ...

The trial judges recognised that while there is a common law right to a fair trial, there has been no judicial attempt to list the attributes of a fair trial. However, the Court did observe that the common law right was afforded in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), which includes the right to counsel and due process. This was regarded as significant due to Australia's being a signatory to the ICCPR.

Mr Dietrich's main arguments in the appeal case were as follows:

- That, with respect to an indictable offence that will be heard before a judge and jury, and in the interests of justice, an indigent (disadvantaged) accused should be provided with and have access to legal representation should they wish to be represented.
- That such representation should be afforded to the applicant at public expense.
- That the judge, in ensuring the fairness of a trial, should use discretion to 'stay' or adjourn a case so that legal representation may be sought by the accused.

As there was no clear judicial attempt to list the attributes of a fair trial, the High Court looked towards the ICCPR to assist with its ruling.



A shipment of heroin seized by the Australian Federal Police

Legal brief 15.1

Dietrich v R (1992) 177 CLR 292: Excerpt from transcript of the case

MASON C.J. AND McHUGH J. In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.

A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound

to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained.

Outcome of the case

The decision of the High Court recognised the right to a fair trial and extended this right to include legal representation; however, it fell short of declaring that this be afforded at public expense.

It was recognised by a majority of the High Court that a fundamental element of the Australian justice system was that a person not be treated unfairly; thus, a common law right to a fair trial exists. It was further acknowledged that forcing an indigent person to proceed to trial without proper access to legal representation contravened such a right. However, the decision did fall short in that although legal representation is significant in such a right, it did not require that this should be provided to an accused at public expense. Instead, courts should 'stay' or adjourn a case, which would otherwise result in an unfair trial to allow for an indigent person time to seek legal counsel should they wish. With respect to Mr Dietrich specifically, it was decided that his case should be retried due to the fact that he was not provided with a fair trial due to his case continuing without legal representation.

With respect to the legal system, the outcome was significant. First, it extended the existing common law right to a fair trial to include elements of necessary legal representation, and further highlighted the relevance of international law within the broader context of Australian law. Second, what is now known as 'The Dietrich principle' has since been applied to all Australian Supreme and District Courts. The Victorian parliament went further, codifying the decision of the High Court within legislation, with relevant sections of the *Crimes Act 1958* (Vic) to include the requirement of legal aid. Other sections also reference the need for a 'stay' or adjournment for unrepresented persons, so that they are able to obtain legal representation. The case highlights the significance of fairness, equality and access to justice for those being accused and tried under the law.

Conflicting attitudes

Some positive arguments with respect to the Dietrich case are that it has allowed for a higher level of fairness within the justice system and thus created a greater sense of equality, particularly for those who are disadvantaged due to their financial status. It also demonstrated the significance and the responsibility of Australia with respect to human rights and international law.

Arguments that arose against the result of the Dietrich case are concerned with the additional time that many of the new provisions would add to cases overall, causing concern for the legal system, the community and victims. For example, there could be lengthy stays or adjournments as well as more people pleading not guilty, where, under the previous provision, they would have pleaded guilty in order to receive legal aid, the overall result of which is more trials. It has also been argued that as a result of the specific nature of this right, being extended only to those charged with an indictable offence, it may result in those being charged with summary offences electing to have their cases heard on indictment, resulting in virtually guaranteed legal aid and, again, lengthier trials.

Activity 15.3 Case study

Dietrich v R (1992) 177 CLR 292

- 1 Explain the circumstances that would have seen Mr Dietrich be provided with legal aid. In your opinion, was this fair? Justify your opinion.
- 2 Highlight the main arguments of Mr Dietrich's appeal.
- 3 Explain the significance of common law rights in protecting Australians.
- 4 Using your knowledge of the influence of international law in Australia, explain how it influenced this case.
- 5 Summarise the reasons for the decision given by the High Court as stated in Legal brief 15.1.
- 6 What was the final decision of the High Court?
- 7 With reference to the *Crimes Act 1958* (Vic), explain how the decision of the High Court influenced legislation.
- 8 What impact did the outcome have on:
 - a individuals?
 - b the legal system?
- 9 Discuss the conflicting attitudes to the outcome of the Dietrich case.
- 10 Complete the following summary of the Dietrich case.

Issue	
Facts	
Law/rights	
Outcome	
Impact: Individual Legal system	
Conflicting views	

15.4 Case study 3: the right to vote – *Roach v Electoral Commissioner* [2007] HCA 43

We will now look at a final Australian case that has had an impact on the protection of rights in Australia – *Roach v Electoral Commissioner* [2007] HCA 43. This case examines the right to vote.

Issues in the case

The ability of a government to be elected by the people for the people is said to be the cornerstone of any democracy. However, the question that exists in Australia is do these voting rights exist, limited or wholly, and if so in what form?

The question central to *Roach v The Electoral Commissioner* (2007) was the validity of the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth), which saw the removal of voting rights for all prisoners, regardless of the length of their prison sentence. Before this, only those prisoners sentenced to three years or more were banned from voting.

Prior to the passing of the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth), voting was limited to those not of sound mind and to those serving a minimum three-year prison sentence.

Vickie Lee Roach, Victorian woman of Aboriginal descent from the Yuin people, was serving a six-year prison sentence at the time of the High Court challenge, a challenge that rested on the following questions:

- Did the Australian Constitution grant, in some form, the right to vote in Australian federal elections?
- How significant were sections 7 and 24 of the Constitution with respect to such a question?
- If these rights did exist, did the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006 (Cth)* go beyond the law-making power of Commonwealth parliament to limit this right?

Go to the website of the Australian Electoral Commission at www.aec.gov.au for more information about voting rights.

Facts and laws central to the case

Prior to the passing of the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006 (Cth)*, the banning of prisoners serving less than a three-year sentence from voting existed within legislation only between 1995 and 2004. In this case, the High Court reiterated that the current ban, which also specifically referenced those who had committed acts of treason, existed due to:

the capacity to exercise choice. It will be necessary to return to the rationale for excluding prisoners ... Since what is involved is not an additional form of punishment, and since deprivation of the franchise takes away a right associated with citizenship, that is, with full membership of the community, the rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right.

The High Court also noted that there was merit to excluding those not of sound mind and referenced the various changes to prisoner voting bans, where from 1902 until 1983, a one-year prison sentence warranted a ban from voting. Ms Roach was challenging the validity of the 2006 amendments, as well as the previous legislation.

During the case, the High Court sought clarification in the Australian Constitution and recognised that while there was no individual express right to vote specifically written within, various strictures and mechanisms provided Australians with some voting protections. Namely, sections 7 and 24 were referred to which acknowledged that, respectively, the Senate and the House of Representatives were to be 'directly chosen by the people' – a fact that proved to be significant in their final decision.



Outcome of the case

A majority of the High Court partially ruled in favour of Ms Roach, agreeing that the 2006 amendments were invalid; however, the Court found that the existing legislation, which placed a voting ban on prisoners serving three or more years, was not unconstitutional.

Their reasons for finding the 2006 amendments invalid were as follows:

- Sections 7 and 24 of the Constitution respectively acknowledge that Australians have a structurally protected right to a representative government.
- The Act would preclude some 20 000 people from voting, which would effectively see a 'directly elected' government not be achieved.
- Voting bans should only be imposed for exceptional circumstances, including serious criminal offences, and not merely because of the fact that a person has been imprisoned.

It is with respect to this last point that the original Act was found not to be invalid. The High Court found that:

- a ban on voting was warranted for a three or more-year prison sentence, as it was within the constitutional power of the Commonwealth parliament to limit some voting rights
- the reasons provided in the existing legislation were not arbitrary and took into consideration the seriousness of an offence, which can remove a person from society physically and figuratively, by way of their civic and political rights.

The High Court found that the Act was unconstitutional and invalid as it would infringe the structurally protected right to a representative government, afforded by sections 7 and 24 of the Constitution.



The impact of the case for Vickie Roach was not as significant as it was for others and the legal system. Due to the previous Act being found valid, Roach was still unable to vote, as her sentence exceeded the three-year period stated in the Act, and it further confirmed that there are circumstances where voting rights should be removed. However, it did ensure the voting rights of some 8000 prisoners and uphold the rights of Australians to a representative democracy.

The decision was more significant for the legal system, as it highlighted the importance of the High Court in protecting the rights of Australians, and further demonstrated the extent of the High Court's power in constitutional matters. The significance of sections 7 and 24 in protecting Australia's civil and political rights against a governmental abuse of power was also reaffirmed in the case.

Conflicting attitudes

Arguments in favour of Ms Roach's case included that the 2006 amendments created an intrinsic discrimination towards prisoners in that as well as receiving a prison sentence as a sanction for their crime they would be receiving extra-judicial punishment, one that a judge has not ordered in their ruling. Many were also concerned with how this would

affect Aboriginal and Torres Strait Islander communities, which are hugely overrepresented in prisons; the amendments would remove them further from the community and from significant decisions that affected the country.

Arguments against Roach's case included the opinion that criminal offenders serving jail time, a sanction of last resort and the most severe punishment in Australia, should not have a say in how society should be governed and that there is merit to a suspension of a fundamental part of citizenship: electing representatives to government.

Activity 15.4 Case study

Roach v Electoral Commissioner [2007] HCA 43

- 1 Explain the changes the Act would have made to existing voting laws in Australia. Do you believe these changes to be justified? Why? Why not?
- 2 Highlight the main arguments of the Roach case.
- 3 Using your knowledge of the High Court, explain its significance in this case.
- 4 What was the final decision on the High Court? Do you believe their reasons to be justified? Why? Why not?
- 5 Highlight the relevant sections of the Constitution that were referenced in this case and explain how these sections provide protections to Australians.
- 6 What impact did the outcome have on:
 - a individuals?
 - b the legal system?
- 7 Analyse the impact of the outcome of the Roach case. Was it significant overall? Justify your opinion.
- 8 Complete the following summary of the Roach case.

Issue	
Facts	
Law/rights	
Outcome	
Impact: Individuals Legal system	
Conflicting views	

Activity 15.5 Classroom presentation

Researching significant human rights cases

In groups, research one of the following cases:

- *Mabo v Queensland* (1992) 175 CLR 1
- *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96
- *Croome v Tasmania* (1997) 191 CLR 119
- *Tuckiar v R* (1934) 52 CLR 335

During your research, create a presentation that comments on the following points:

- the role of the individual in taking a case to court
- the facts and issues central to the case, including the rights in question
- the laws that applied to the case
- the outcome of the case and its impact on the rights of individuals and the legal system
- possible conflicting attitudes to the case.

Key point summary

Do your notes cover all the following points?

For each case in relation to the protection of rights in Australia:

- ❑ Role of the individual in taking a case to court
 - The requirement for a case to have actual and substantive rights concerns
 - Standing: to be personally affected by the rights abuse
 - The role and ability of the High Court in hearing disputes
- ❑ Facts and issues central to the case, including the rights in question
- ❑ Laws that applied to the case
 - common law (*Dietrich* case)
 - statute law (*Roach* case)
- ❑ Outcome of the case
- ❑ Impact of the case
 - on the rights of individuals
 - on the legal system
- ❑ An analysis of the impact
- ❑ Possible conflicting attitudes to the case.

End-of-chapter questions

Revision questions

- 1 Define the term 'standing'.
- 2 Explain how rights can be protected by the High Court. In your answer, explain the term *ultra vires*.
- 3 With reference to at least one case you have studied, explain how matters taken to court can impact on individuals and the legal system in Australia.
- 4 Outline the facts of the *McBain* case, including the relevant law and rights in question.
- 5 The arguments presented by *Roach* in *Roach v Electoral Commissioner* (2007) raised many concerns. Discuss the conflicting views with respect to the *Roach* case.

Practice exam questions

- 1 Describe the role of individuals in bringing about changes in the law through cases. [4 marks]
- 2 Describe how judicial conservatism relates to the ability of courts to impact on the protection of rights in Australia. [3 marks]
- 3 'The High Court has significant power regarding rights in Australia.' Using one case you have studied, explain this statement. [5 marks]
- 4 Analyse the impact of a case on the rights of individuals and the legal system. [6 marks]
- 5 Discuss the arguments presented by both parties in the *Dietrich* case and explain whether or not you believe the final decision is justified. [6 marks]

Glossary

accessory a person who did not commit the crime themselves, but impedes the apprehension or prosecution of a principal offender

actus reus Latin for 'guilty act'; the action someone has taken to commit a crime

aggravating factors evidence presented that increases the seriousness of the offence and so contributes to a harsher sentence; for example, use of a weapon, prior convictions

applicant the party to a VCAT hearing that applies to commence legal proceedings

apportionment of liability to determine the portion of blame or legal liability

arbitration a method of dispute resolution whereby an independent third party (known as an arbitrator) is appointed to listen to the evidence of both parties and make a binding decision

armed robbery the use of a firearm or offensive weapon when carrying out a robbery

bail the release of an accused back into society while awaiting his or her next hearing or trial; conditions may be 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

Bill a proposed law to be considered by parliament

binding precedent formed from the legal reasoning (or *ratio decidendi*): a precedent that must be followed by lower courts in the same hierarchy in matters of similar fact; for instance, a decision of the High Court is a precedent that must be followed

breach of civil law an action committed by a person, group or organisation that has impacted on someone in a way that has caused them some type of harm or loss

breach of duty occurs when a person has a duty of care to another and that other person is injured or harmed due to this person's actions

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

burglary unapproved entry into a building, or part of a building, that involves stolen property, damage or assault

Cabinet the policy-making body of parliament comprising of the leader of the government and senior ministers

causation the need to determine whether there is a link between the action of the person or persons and the harm suffered by the person

child homicide where a person kills someone who is under the age of six in circumstances that would usually constitute manslaughter

civil law laws regulating the behaviour of private individuals

codified where common law developments are formally adopted into a statute

committal hearing pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to establish a *prima facie* case and support a conviction

common law law developed in the courts; also known as case law or judge-made law

common law rights rights that are developed through judges' statutory interpretation of, or in the absence of, existing Acts

community correction order (CCO) a sentencing order requiring an offender to comply with conditions while in the community; can include unpaid community work, drug/alcohol treatment or curfews

conciliation a method of dispute resolution whereby a third party assists the disputing parties to reach their own decision; the conciliator can offer advice and make suggestions to assist parties

concurrent powers specific law-making powers in the Constitution that may be exercised by both the Commonwealth and State parliaments; namely, shared law-making powers

concurrent sentence where the defendant is sentenced to serve two terms but the lesser is to be served at the same time as the larger term rather than the terms being added together

constitution fundamental rules or principles and structures to which a nation is governed

contributory negligence where the defendant is at fault, but the behaviour and conduct of the plaintiff has contributed to their loss or suffering

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

Crown the authority of the monarch, represented in Australia by governors in each state and the Governor-General at the federal level

culpability the level of blame or responsibility for a wrongful act or omission

culpable deserving of blame

cumulative sentence where the defendant is sentenced to serve two terms and these are added together to create one total term

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

declaration a document outlining that material provided to the court or VCAT by the parties is true and correct; parties are aware that if they make a false declaration, they are liable to penalties for perjury

defamation the publication of a statement that damages a person's reputation

denunciation the expression by the sentencing judge or magistrate, through comments or the sanction set, that the offence is condemned by society

deterrence discouraging a person from making a certain decision or following a certain course of action

Director of Public Prosecutions (DPP) department in Victoria responsible for overseeing and prosecuting criminal charges on behalf of the state

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)

drug treatment order (DTO) a sentencing option available to the Drug Court to assist in rehabilitating offenders with drug issues

duty of care a legal obligation to avoid causing harm; can arise when the harm is 'reasonably foreseeable' if care is not taken

exclusive powers law-making powers set out in the Constitution that may only be exercised by the Commonwealth parliament

express rights rights that are written into the Australian Constitution; these rights can only be changed by a referendum

factual causation causation that passes the 'but for' test of necessity: if not for the action, there would have been no harm

fine an order to pay a sum of money as a punishment under the law

government the ruling political party (or parties in coalition) that holds a majority of seats in the lower house

homicide the unlawful killing of another person

House of Representatives the lower house of the Commonwealth parliament

hung jury a jury that cannot agree upon a verdict after an extended deliberation time and is unable to reach the necessary majority or unanimity required under the law

implied rights rights not found to be clearly listed in a constitution but that are instead inferred by its interpretation by a relevant judicial body

imprisonment the holding of a convicted person in custody (i.e. a prison) for a certain term

imputation an implied meaning: a defamatory imputation is an interpretation of the words of a publication that gives it a defamatory meaning

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court (Trial Division)

indictable offence heard summarily an indictable offence that can be tried before a magistrate without a jury if the accused and the court agree

infanticide where a woman kills her own child (under the age of two) in circumstances that would usually be considered murder, and, at the time, the balance of her mind was disturbed as a result of the birth of the child

injunction a remedy in civil law that is 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

international declaration a non-binding agreement between countries

judicial conservatism when a judge declares there is no course of action under common law and dismisses a case, or adopts a narrow interpretation of legislation when deciding cases and thus avoids controversy

justiciable the requirement that a matter presented to court for resolution has actual and substantial rights infringements

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

legislation an Act of Parliament, a statute or piece of delegated legislation

Legislative Assembly the lower house of the Victorian parliament

Legislative Council the upper house of the Victorian parliament

limitation of actions legislation limiting the time allowed for a civil case to be initiated after the action causing harm or loss

loss monetary, psychological, physical or reputational damage as the result of another person's actions

majority verdict where one fewer than the total of the jury members need to agree

malice aforethought the intention to kill or harm, which distinguishes murder from other forms of unlawful killing

manslaughter a form of homicide where the accused's actions are deemed to have been negligent and/or dangerous

mediation a method of dispute resolution with a structured negotiation process, comprising an independent person (mediator) assisting parties to identify and assess options and negotiate an agreement to resolve their dispute

member a qualified, expert, experienced and independent third party that oversees the hearing in a VCAT List

mens rea Latin for 'guilty mind'; the intention to commit a crime

mitigating factors evidence presented that reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

murder the killing of another human being with malice aforethought, whether intentional or reckless

negligence where the act or omission of one party affects the rights of another

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

non-parole period the portion of a custodial sentence to be served in prison

novus actus interveniens literally means 'new act intervening'; involves a new intervening act that breaks the chain of action between the defendant's conduct and the eventual result, thus diminishing the defendant's culpability

obiter dictum 'matters by the way'; a judge's statement of opinion or observation made during a judgment but not part of the

reason for a decision; may be persuasive in future cases

order a legal decision or instruction by the member to the parties designed to resolve the case; for example, pay damages

parliament the supreme law-making body, consisting of elected representatives and the Crown

parliamentary privilege legal immunity that ensures any statements made during the course of parliamentary proceedings are protected from liability for defamation

parole the conditional and supervised release of a prisoner before the end of their sentence; it allows a prisoner to serve part of their sentence of imprisonment in the community

persuasive precedent the legal reasoning of a court: a court does not have to follow this reasoning, but it can be influential; applies to decisions of a lower court or a court at the same level

plaintiff the party who initiates a civil action

possession occupation or control of a piece of property

precedent law made by courts: a reported judgment of a court that establishes a point of law

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

principal offender the person who committed the *actus reus* of a crime, or assists in the commission of a crime

property a thing or things possessed by a person; it is divided into two categories: 'real property', which is the ownership of land, and 'personal property', which is the ownership of tangible things

proprietary owned by a private individual or business under a trademark or patent

ratio decidendi the legal reasoning, or rule, upon which a decision is based; forms a binding precedent

reckless behaviour that is undertaken despite knowing the possible consequences

reference a request from the Attorney-General to undertake law reform

referendum the process set out in section 128 of the Constitution to allow the Constitution to be formally altered; requires a vote by the Australian public and to achieve a double majority

remand the holding of an accused in custody while awaiting his or her next hearing or trial as bail has not been granted

remedy any means by which a civil wrong is redressed

representative government a government that reflects the needs of its voting public

residual powers law-making powers that remained with the state parliaments after Federation

respondent the party in a VCAT hearing against whom legal proceedings have been commenced; they will respond to the claims

responsible government the government's accountability to its voting public

retention the act of retaining

rights a moral or legal entitlement by government to have or do something

robbery the taking of another person's property via the use of force or threat of force

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

sanction a penalty handed down by a court for someone found guilty of breaching a criminal law (for example, a fine or imprisonment); sometimes interchanged with 'sentence'

Senate the upper house of the Commonwealth parliament

separation of powers a principle established by the Australian Constitution that entails the division of powers of government among legislative, administrative and judicial bodies, to provide a system of checks and balances

standard of care the degree of care expected from a reasonable person in the same circumstances

standard of proof the level of proof that must be reached to prove a case in court: in a criminal case, the standard of proof is 'beyond reasonable doubt'; in a civil case, the standard is 'on the balance of probabilities'

standing where a party has been directly affected by matters and so has the right to take legal action; also known as *locus standi*

stare decisis 'to stand by what has been decided'; the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

statute a law passed by parliament; legislation

statute law Acts of Parliament

statutory Bill of Rights a document where rights are listed, which can be altered or abrogated by an Act of Parliament; these rights are not entrenched in a constitution

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

statutory rights rights enshrined in Acts of Parliament through the legislative process

strict liability offence an offence for which the prosecution only has to prove that the accused carried out a criminal act, and does not have to prove they intended to commit that act

structural protections rights that indirectly protect from an abuse of power by government through the Constitution's mechanisms and structures

subordinate distributor a person who is not the author, did not have any editorial control, and is not the primary distributor of a publication; a secondary publisher

summary offence a less serious crime, heard and determined in the Magistrates' Court

test case a case that seeks to create or clarify a legal right or principle, including challenging pre-existing rights interpretation

theft dishonestly appropriating property belonging to another person with the intention of permanently depriving the person of the property

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

treaty a formal agreement between nations that is binding at international law

tribunal a body whose function is to settle disputes or grant rights under the law as an alternative to the courts; generally specialised in a defined area of the law

ultra vires outside of parliament's law-making power

unanimous verdict where all jurors on the jury panel agree on the verdict

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