KEY CONCEPTS in VCE

LEGAL STUDIES

UNITS 3 & 4

SECOND EDITION

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This textbook contains images of Indigenous people who are, or may be, deceased. The publisher appreciates that this inclusion may distress some Indigenous communities. These images have been included so that the young multicultural audience for this book can better appreciate specific aspects of Indigenous history and experience.

In this book, the word 'Aborigine' rather than 'Koori' is used when referring to Indigenous Australians. The issues raised are not unique to the Indigenous people of New South Wales and so the Australia-wide reference has been maintained.

It is recommended that teachers should first preview resources on Aboriginal topics in relation to their suitability for the class level or situation. It is also suggested that Aboriginal parents or community members be invited to help assess the resources to be shown to Aboriginal children. At all times the guidelines laid down by the Department of Education should be followed.

CONTENTS

HOW TO USE THIS BOOK

The following examples highlight the main features of *Key Concepts in VCE Legal Studies Units 3 & 4 Second Edition*. An electronic version of the textbook and a complementary set of targeted digital resources — the eBookPLUS — are also available online at the JacarandaPLUS website (www.jacplus.com.au).

Criminal procedure

Your eBookPLUS resources include:

- eLessons featuring video clips and audio programs about real-life cases and legal issues. Student worksheets accompany each eLesson.
- projectsPLUS featuring a targeted ICT assessment task on the jury system (pages 366–7)
- weblinks to various legal websites as well as case weblinks enabling the student to read more about cases in this text
- a crossword for each chapter in the book to aid revision.

Each chapter commences with an arresting image accompanied by a short description of why it is important to learn about this area of law. **Key knowledge and key skills** from the VCAA VCE Legal Studies study design are stated and a case study quickly introduces students to how the law operates in practice.


CHAPTER 1

Parliament and the citizen

WHY IT IS IMPORTANT

Parliament is the primary law-making body of the land. In a democratic society, parliament is elected to create laws that reflect the values and expectations of the people. It must also be able to respond effectively to changing circumstances, both global and local, and to change laws as the need arises. As citizens in this society, we have the ultimate power to influence the work of parliament, and a strong understanding of its structure and operation will improve our ability to perform this role.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE

Principles of the Australian parliamentary system: representative government, responsible government and the separation of powers
The structure of the Victorian Parliament and the Commonwealth Parliament and the roles played by the Crown and the houses of Parliament in law-making
Strengths and weaknesses of parliament as a law-making body
Parliament and the citizen
The legislative process for the progress of a Bill through parliament
The reasons laws may need to change
The means by which individuals and groups influence legislative change, including petitions, demonstrations and use of the media
The role of the Victorian Law Reform Commission

KEY SKILLS

These are the skills you need to demonstrate:

- define legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- explain the principles and structures of the Australian parliamentary system
- use contemporary examples to explain the influences on legislative change
- evaluate the effectiveness of methods used by individuals and groups to influence change in the law
- critically evaluate the law-making processes of parliament.

Can you demonstrate these skills?

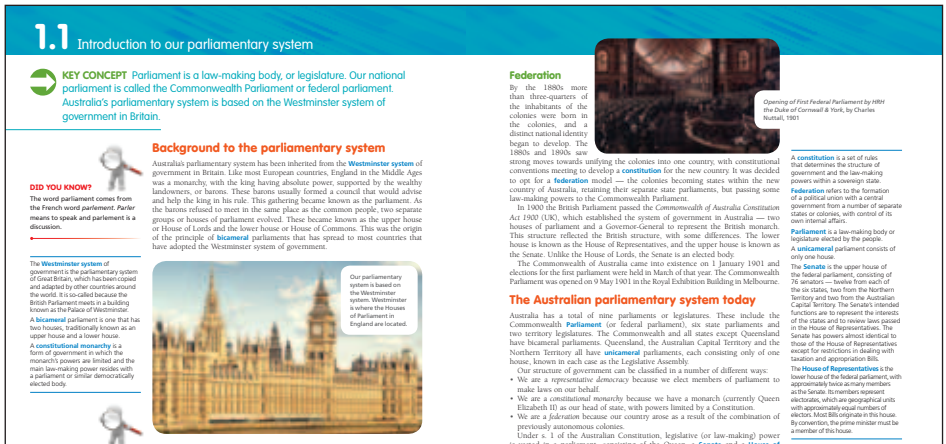
Occupy Melbourne

On 15 October 2011, a group of protesters moved into Melbourne's City Square in Swanston Street. This action was part of a worldwide movement, which began in New York City in September 2011, to occupy important areas of major cities. Participants in the Occupy movement have been protesting about inequality in society. Their belief is that our democratic institutions increasingly represent the interests of the wealthy while ignoring the needs of the majority.

Throughout our history, protest movements have been an important means by which ordinary people can highlight issues and concerns, raise public awareness and ultimately hope to influence decisions made in parliament. While protest movements have had varying levels of success, participation in such activities is recognised as an essential way in which the ordinary citizen can influence the laws that govern us.

2 UNIT 3 Law-making

Parliament and the citizen CHAPTER 1 3


1.1 Introduction to our parliamentary system

KEY CONCEPT Parliament is a law-making body, or legislature. Our national parliament is called the Commonwealth Parliament or federal parliament. Australia's parliamentary system is based on the Westminster system of government in Britain.

Background to the parliamentary system

DID YOU KNOW?

The word parliament comes from the French word *parlement*. *Parler* means to speak and parliament is a discussion.

The **Westminster system** of government is the parliamentary system of Great Britain, which has been copied and adapted by other countries around the world. It is so-called because the British Parliament meets in a building known as the Palace of Westminster.

A **bicameral** parliament is one that has two houses, traditionally known as an upper house and a lower house.

A **constitutional monarchy** is a form of government in which the monarch's powers are limited and the main law-making power resides with a parliament or similar democratically elected body.

Australia's parliamentary system has been inherited from the **Westminster system** of government in Britain. Like most European countries, England in the Middle Ages was a monarchy, with the king having absolute power, supported by the wealthy landowners, or barons. These barons usually formed a council that would advise and help the king in his rule. This gathering became known as the parliament. As the barons refused to meet in the same place as the common people, two separate groups or houses of parliament evolved. These became known as the upper house or House of Lords and the lower house or House of Commons. This was the origin of the principle of **bicameral** parliaments that has spread to most countries that have adopted the Westminster system of government.

Our parliamentary system is based on the Westminster system. Westminster is where the Houses of Parliament in England are located.

DID YOU KNOW?

When the early parliaments met, the barons would meet in the royal Council Chamber, which was decorated in the royal colour of red. The commoners would meet out in the fields, under the trees, as no chamber was provided for them. The tradition remains, with the upper houses of our state and Commonwealth parliaments decorated in red, and lower houses decorated in green.

Throughout the centuries, monarchs relied increasingly on parliament, particularly in raising taxes for them. In the seventeenth century, conflict between the king and parliament over their respective powers led to Britain becoming a **constitutional monarchy**, with parliament having supreme law-making power and the monarch having a relatively minor role in the law-making process.

Colonial Australia

When the British established the colony of New South Wales, all laws made by the British parliament automatically applied in the colony, although early governors had very wide powers and could exercise discretion when applying those laws. As more convicts gained their freedom there was pressure for some form of representative government. In the 1850s the British parliament passed laws to divide New South Wales, leading to the creation of separate governments in Victoria, Tasmania and South Australia. Each colony had its own governor and two houses of parliament.

Federation

By the 1880s more than three-quarters of the inhabitants of the colonies were born in the colonies, and a distinct national identity began to develop. The 1880s and 1890s saw strong moves towards unifying the colonies into one country, with constitutional conventions meeting to develop a **constitution** for the new country. It was decided to opt for a **federation** model — the colonies becoming states within the new country of Australia, retaining their separate state parliaments, but passing some law-making powers to the Commonwealth Parliament.

Opening of First Federal Parliament by HRH the Duke of Cornwall & York, by Charles Nuttall, 1901

In 1900 the British Parliament passed the *Commonwealth of Australia Constitution Act 1900* (UK), which established the system of government in Australia — two houses of parliament and a Governor-General to represent the British monarch. This structure reflected the British structure, with some differences. The lower house is known as the House of Representatives, and the upper house is known as the Senate. Unlike the House of Lords, the Senate is an elected body.

The Commonwealth of Australia came into existence on 1 January 1901 and elections for the first parliament were held in March of that year. The Commonwealth Parliament was opened on 9 May 1901 in the Royal Exhibition Building in Melbourne.

The Australian parliamentary system today

Australia has a total of nine parliaments or legislatures. These include the Commonwealth **Parliament** (or federal parliament), six state parliaments and two territory legislatures. The Commonwealth and all states except Queensland have bicameral parliaments. Queensland, the Australian Capital Territory and the Northern Territory all have **unicameral** parliaments, each consisting only of one house, known in each case as the Legislative Assembly.

Our structure of government can be classified in a number of different ways:

- We are a *representative democracy* because we elect members of parliament to make laws on our behalf.
- We are a *constitutional monarchy* because we have a monarch (currently Queen Elizabeth II) as our head of state, with powers limited by a Constitution.
- We are a *federation* because our country arose as a result of the combination of previously autonomous colonies.

Under s. 1 of the Australian Constitution, legislative (or law-making) power is vested in a parliament, consisting of the Queen, a **Senate** and a **House of Representatives**.

A **constitution** is a set of rules that determines the structure of government and the law-making powers within a sovereign state.

Federation refers to the formation of a political union with a central government from a number of separate states or colonies, with control of its own internal affairs.

Parliament is a law-making body or legislature elected by the people.

A **unicameral** parliament consists of only one house.

The **Senate** is the upper house of the federal parliament, consisting of 76 senators — twelve from each of the six states, two from the Northern Territory and two from the Australian Capital Territory. The Senate's intended functions are to represent the interests of the states and to review laws passed in the House of Representatives. The Senate has powers almost identical to those of the House of Representatives except for restrictions in dealing with taxation and appropriation Bills.

The **House of Representatives** is the lower house of the federal parliament, with approximately twice as many members as the Senate. Its members represent electorates, which are geographical units with approximately equal numbers of electors. Most Bills originate in this house. By convention, the prime minister must be a member of this house.

TEST your understanding

1 On what system is our system of government in Australia based?
2 Another name for a parliament is a _____ because parliament is the primary law-making body.
3 Parliaments that have two houses are said to be _____. The Commonwealth Parliament has the _____ which is the upper house, and the _____ which is the lower house.
4 Explain what is meant by the term constitutional monarchy.

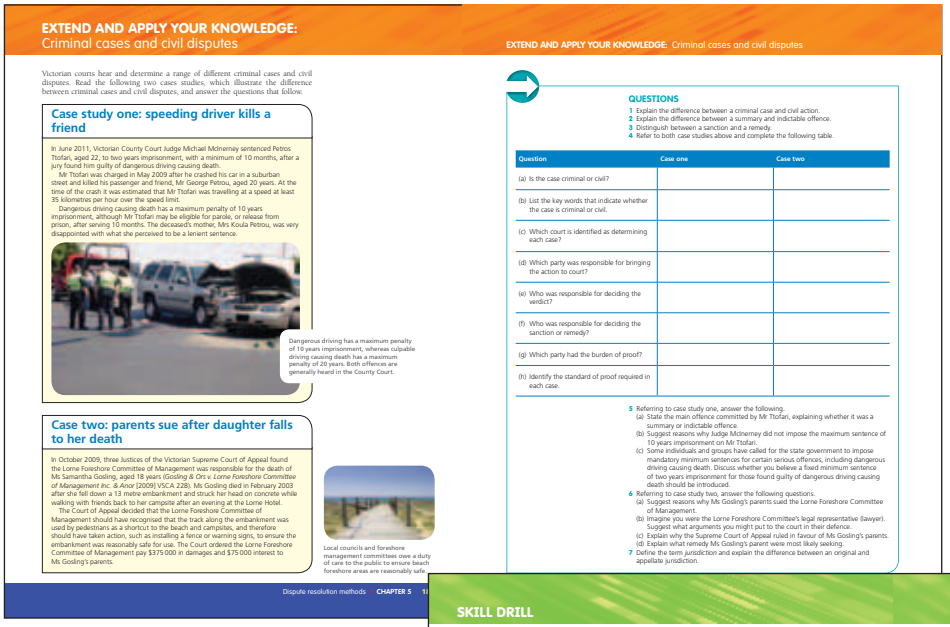
APPLY your understanding

5 Australia adopted a federal parliamentary model. What does this mean?
6 Why do we have representative democracy in Australia?

4 UNIT 3 Law-making

Parliament and the citizen CHAPTER 1 5

All key knowledge points from the VCAA VCE Legal Studies study design are broken down into **key concepts** — highly visual, digestible, lesson-based sections. Two levels of questions, *Test your understanding* and *Apply your understanding*, encourage students to practise and apply the concepts they are studying.



EXTEND AND APPLY YOUR KNOWLEDGE: Criminal cases and civil disputes

Victorian courts hear and determine a range of different criminal cases and civil disputes. Read the following two cases studies, which illustrate the difference between criminal cases and civil disputes, and answer the questions that follow.

Case study one: speeding driver kills a friend

In June 2011, Victorian County Court Judge Michael McInerney sentenced Petros Tfofari, aged 22, to two years imprisonment, with a minimum of 10 months, after a jury found him guilty of dangerous driving causing death.

Mr Tfofari was charged in May 2009 after he crashed his car in a suburban street and killed his passenger and friend, Mr George Petrou, aged 20 years. At the time of the crash it was estimated that Mr Tfofari was travelling at a speed at least 35 kilometres per hour over the speed limit.

Dangerous driving causing death has a maximum penalty of 10 years imprisonment, although Mr Tfofari may be eligible for parole, or release from prison, after serving 10 months. The deceased's mother, Mrs Koula Petrou, was very disappointed with what she perceived to be a lenient sentence.

Dangerous driving has a maximum penalty of 10 years imprisonment, whereas culpable driving causing death has a maximum penalty of 20 years. Both offences are generally heard in the County Court.

Case two: parents sue after daughter falls to her death

In October 2009, three Justices of the Victorian Supreme Court of Appeal found the Lorne Foreshore Committee of Management was responsible for the death of Ms Samantha Gosling, aged 18 years (*Gosling & Ors v. Lorne Foreshore Committee of Management Inc. & Anor* [2009] VSCA 228). Ms Gosling died in February 2009 after she fell down a 13 metre embankment and struck her head on concrete while walking with friends back to her campsite after an evening at the Lorne Hotel.

The Court of Appeal decided that the Lorne Foreshore Committee of Management should have recognised that the track along the embankment was used by pedestrians as a shortcut to the beach and campsites, and therefore should have taken action, such as installing a fence or warning signs, to ensure the embankment was reasonably safe for use. The Court ordered the Lorne Foreshore Committee of Management pay $375 000 in damages and $75 000 interest to Ms Gosling's parents.

Local councils and foreshore management committees owe a duty of care to the public to ensure beach foreshore areas are reasonably safe.

QUESTIONS

1 Explain the difference between a criminal case and civil action.
2 Explain the difference between a summary and indictable offence.
3 Distinguish between a sanction and a remedy.
4 Refer to both case studies above and complete the following table.

Question	Case one	Case two
(a) Is the case criminal or civil?		
(b) List the key words that indicate whether the case is criminal or civil.		
(c) Which court is identified as determining each case?		
(d) Which party was responsible for bringing the action to court?		
(e) Who was responsible for deciding the verdict?		
(f) Who was responsible for deciding the sanction or remedy?		
(g) Which party had the burden of proof?		
(h) Identify the standard of proof required in each case.		

5 Referring to case study one, answer the following.
(a) State the main offence committed by Mr Tfofari, explaining whether it was a summary or indictable offence.
(b) Suggest reasons why Judge McInerney did not impose the maximum sentence of 10 years imprisonment on Mr Tfofari.
(c) Some individuals and groups have called for the state government to impose mandatory minimum sentences for certain serious offences, including dangerous driving causing death. Discuss whether you believe a fixed minimum sentence of two years imprisonment for those found guilty of dangerous driving causing death should be introduced.

6 Referring to case study two, answer the following questions.
(a) Suggest reasons why Ms Gosling's parents sued the Lorne Foreshore Committee of Management.
(b) Imagine you were the Lorne Foreshore Committee's legal representative (lawyer). Suggest what arguments you might put to the court in their defence.
(c) Explain why the Supreme Court of Appeal ruled in favour of Ms Gosling's parents.
(d) Explain what remedy Ms Gosling's parent were most likely seeking.

7 Define the term *jurisdiction* and explain the difference between an original and appellate jurisdiction.

Extend and apply your knowledge sections challenge and extend understanding using real-life case studies depicting current trends in the law.

SKILL DRILL

KEY SKILL TO ACQUIRE:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

SKILL DEFINITION

Define means to provide a precise meaning.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

Apply means to make a connection or association between information or knowledge and a specific circumstance. For example, you must be able to explain the connection or relationship between existing legal principles and particular legal cases or issues.

Evaluate means to explain the strengths and weaknesses.

In 2011, the Victorian Government passed the *Criminal Procedure Amendment (Double Jeopardy and other matters) Bill* to change the criminal law by modifying the double jeopardy law and also announced a proposal to introduce mandatory minimum sentencing for young people. These changes and recommendations created much discussion within the legal system and wider community. Read the case studies below and answer the questions to practice your key skills. Remember that illustrating your answers with recent or proposed changes to the law can enhance your response.

Case study one: modifying the double jeopardy law

The principle of double jeopardy, which has existed in the Victorian criminal justice system for decades, guarantees that a person who has been acquitted of a criminal offence cannot be retried for that same offence (or for a similar offence relating to the same action), even if new evidence is later found that establishes their guilt.

The double jeopardy principle protects the rights of the accused by assuring finality to a case, because once a person has been acquitted the prosecution cannot pursue a retrial in the hope that a different jury might convict. However, double jeopardy is controversial because it has the potential to protect wrongly acquitted persons by not allowing a retrial in cases where vital new and compelling evidence is discovered that can prove their guilt. Similarly, acquitted persons cannot be retried even if it can be established that evidence presented during the trial was false (including witnesses giving false testimony). It can be argued that by not allowing retrials in cases where these circumstances may have existed, the legal system fails the victims of crime, their families and the community.

In 2011, the Victorian Government modified the laws relating to double jeopardy to allow the prosecution to pursue a retrial against a previously acquitted person in most serious cases where new and compelling evidence can establish the guilt of the accused, or in cases where it can be shown that false evidence was presented or there was interference with the jury. To protect the rights of the accused, the prosecution must submit their case for retrial to the Victorian Court of Appeal so the court can determine whether a retrial is justified.

While modifying the double jeopardy laws may lead to justice being achieved in a small number of cases where a guilty person has been wrongly acquitted, many legal experts suggest it should only be used in very exceptional circumstances because it is important to retain finality after the trial process has concluded. Some commentators have also expressed concern that allowing the prosecution the ability to retry acquitted persons may serve as a disincentive for the prosecution to thoroughly prepare for the original trial.

Case study two: mandatory sentencing for youth

In 2011 the Victorian Attorney-General Robert Clark proposed the introduction of mandatory minimum sentencing for young offenders. Under the proposal, offenders aged 16 and 17 who are guilty of intentionally or recklessly causing serious injury during actions of gross violence would incur a minimum two-year term of imprisonment (with adult offenders incurring a four-year term).

The proposal has caused significant controversy, as many believe mandatory sentencing of young offenders is unfair and counterproductive to rehabilitation, which is a main consideration when sentencing youth. County Court Judge Michael Bourke, chairman of the state's Youth Parole Board and the Law Institute of Victoria, is among many who are concerned the proposal would remove the flexibility of judges to consider individual circumstances from the sentencing process, which would be particularly unfair given the high percentage of young offenders who come from disadvantaged groups, including being affected by mental illness, intellectual disability or child abuse. Minimum mandatory sentencing may also detract from a timely resolution of disputes by discouraging offenders from entering an early guilty plea.

Questions

Read the case study 'Modifying the double jeopardy law' and answer the following questions. The first answer has been done for you.

1 Explain the principle of double jeopardy and discuss how it can assist and detract from the achievement of a fair hearing.

Sample answer

Answer defines key term

The principle of double jeopardy states that a person who has been acquitted of a criminal offence cannot be retried for that same offence or a similar offence (relating to the same action) despite new evidence that later comes to light establishing their guilt.

Student starts to evaluate the proposed change to the law in light of one of the elements of an effective legal system — *entitlement to a fair hearing*. It is clear to the examiner that the second part of the question is being answered.

The principle of double jeopardy protects innocent citizens from repeated prosecutions. For some, it is the cornerstone of what our legal system endeavours to achieve — an entitlement to a fair hearing. Fairness is achieved by offering finality in a case where the accused has been found not guilty, allowing them to have the freedom to live life with the knowledge that the case is closed. Others, however, would argue that if new evidence comes to light a fair hearing had not taken place in the first instance because all the facts were not known. Many say that the double jeopardy rule can protect a guilty person who has been acquitted in cases where new evidence of their guilt arises.

Student looks at both sides of the issue and that's crucial in evaluation.

2 Explain the changes to the double jeopardy laws introduced in 2012 and discuss the extent to which you believe these changes will improve the effectiveness of the criminal justice system.
Read the case study 'Mandatory sentencing for youth' and answer the following questions.
3 Explain the Victorian Government's 'mandatory minimum sentencing for young offenders' proposal.
4 Discuss the strengths and weaknesses associated with mandatory minimum sentencing.

Skill drills provide an approach to mastering skills in Legal Studies. Each skill is defined and demonstrated, then students practise their skills.

CHAPTER 3 REVIEW

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

Please note: Outcome 2 contributes 70 marks out of the 100 marks allocated to School-assessed Coursework for Unit 3. Outcome 2 may be assessed by one or more assessment tasks. This assessment task is designed to contribute to 20 marks out of the total of 70 marks for Outcome 2.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- apply legal principles to relevant cases and issues
- evaluate the means by which rights of Australians are protected by the Commonwealth Constitution, and the extent of this protection
- compare the approach used to protect rights in a selected country with the approach used in Australia.

Essay

The United States of America, Canada, New Zealand and South Africa have adopted different approaches than that used by Australia for the constitutional protection of democratic and human rights.

Explain how the Commonwealth Constitution protects democratic and human rights. In your answer, identify and explain **three similarities** and **three differences** between the approach adopted by Australia and the approach adopted by any **one** of the countries listed in the above statement. Indicate clearly which country you have chosen.

Tips for writing your essay

Use this checklist to make sure you write the best essay you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
• Defines implied and express rights • Defines what our Constitution is. Mentions that some rights are constitutionally entrenched and explains what this means.		
Introduces the topic to the reader		
• Explains that the way our political system is structured seeks to protect us • Mentions that Australia's approach to the protection of rights is unique and will be discussed in relation to another country's approach		
Uses a logical sequence that focuses on the topic		
• Rights are protected under a representative and responsible government. • The Tea express rights in the Constitution are covered. • The implied right to freedom of communication is mentioned. *Tip: the main focus though is answering the question. The essay should not focus on whether Australia needs a bill of rights.*		

(continued)

studyON
Summary
Unit 3: Law-making
Area of study 2: Constitution and the protection of rights
Topic 5: An integrated comparison of rights protection

studyON
Unit: 3
AOS: 2
Topic: 5
Concept: 2
Do more Interactivity on the rights that are protected

studyON
Unit: 3
AOS: 2
Topic: 5
Concept: 2
See more PowerPoint on a comparison of foreign rights protection methods

Performance area	Yes	No
Apply legal principles to relevant cases and issues.		
When discussing how the Constitution seeks to protect our rights include some cases to help you illustrate the point. For example, when talking about the right that interstate trade and commerce be 'absolutely free' you might mention the *Bettar Case* on page 99. To use another example, when talking about the implied right to freedom of political speech you could mention one of the relevant cases dealing with this issue.		
Evaluate the means by which rights are protected under the Constitution.		
A balanced discussion will mention that some rights are protected but in fact it was never intended that the Constitution would comprehensively state all rights to be protected. It was thought that parliament and the courts would uphold our rights. It should be mentioned that the Constitution provided a political structure to ensure representative and responsible government. Opinions may differ as to whether our rights are sufficiently protected.		
Compare the approach used to protect rights in a selected country and compare it with the approach used in Australia.		
A comparison should include: whether rights are entrenched types of rights protected enforcement of rights courts' role in the protection of rights		
Your response is easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your* **POINT**, *then* **EXPLAIN**, *then give an* **EXAMPLE** *if appropriate.*		

Chapter summary

- The means by which the Commonwealth Constitution protects rights, including structural protection, express rights and implied rights
- Evaluate the means by which rights of Australians are protected by the Commonwealth Constitution and the extent of this protection.

- **Our Constitution concentrates on the actual structure of parliament and the division of power** between the Commonwealth and state governments, rather than expressly stating all rights that should be protected.
- **The Constitution says very little about rights.**
  - It was assumed parliament and common law principles would protect our democratic rights.
- **Our Constitution guards against the possibility of the government becoming too powerful.**
  - The federal system itself, the separation of powers, and systems of checks and balances restrict the possibility of the government becoming oppressive.
- **The political structure created by the Constitution protects our rights by:**
  - establishing a federal system of government
  - bicameral legislature that reviews legislation
  - governments subject to the rule of law
  - the separation of powers
  - representative and responsible government
  - a democratic way of amending the Constitution.

Students using **studyON VCE Legal Studies** are directed to summaries, exam practice questions, interactivities and videos/PowerPoints for each section of the study design.

Chapter review sections help students complete an assessment task and prepare for their examination.

About eBookPLUS

jacaranda plus

Next generation teaching and learning

This book features eBookPLUS: an electronic version of the entire textbook and supporting multimedia resources. It is available for you online at the JacarandaPLUS website (www.jacplus.com.au).

Using the JacarandaPLUS website

To access your eBookPLUS resources, simply log on to www.jacplus.com.au using your existing JacarandaPLUS login and enter the registration code. If you are new to JacarandaPLUS, follow the three easy steps below.

Step 1. Create a user account

The first time you use the JacarandaPLUS system, you will need to create a user account. Go to the JacarandaPLUS home page (www.jacplus.com.au), click on the button to create a new account and follow the instructions on screen. You can then use your nominated email address and password to log in to the JacarandaPLUS system.

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Searchlight

Minimum requirements

JacarandaPLUS requires you to use a supported internet browser and version, otherwise you will not be able to access your resources or view all features and upgrades. Please view the complete list of JacPLUS minimum system requirements at http://jacplus.desk.com/customer/portal/articles/463717.

Troubleshooting

- Go to the JacarandaPLUS help page at www.jacplus.com.au/jsp/help.jsp.
- Contact John Wiley & Sons Australia, Ltd.
  Email: support@jacplus.com.au
  Phone: 1800 JAC PLUS (1800 522 7587)

ICT ACTIVITIES

eBookPLUS gives instant access to the online text along with a wealth of digital resources to engage VCE Legal Studies students. Digital resources in this book include video eLessons, audio podcasts and projectsPLUS, as well as weblinks to useful support material on the internet.

Your ICT activities are available through the student resources tab inside your *Key Concepts in VCE Legal Studies Units 3 & 4 Second Edition* eBookPLUS. Visit www.jacplus.com.au to locate your digital resources.

eLessons

Video clips with worksheets

Video and audio case studies have been carefully selected from programs such as *The 7:30 Report* and *Stateline*.

ProjectsPLUS

A targeted ICT assessment task on the jury system

ProjectsPLUS includes a report writing template, an assessment rubric, four additional case studies with worksheets and guidance for students to complete their own research on the jury system.

Tasmanian Dam Case

Explore the impact of the *Tasmanian Dam Case* — a victory that changed the national political landscape.

Judges

Judges: who are they, how do they get there, what's the job like and what happens when they falter or fail?

Criminal procedure

The conduct of two jurors in the *Bilal Skaf Case* led to a retrial. The rape victim who had already given evidence was unable to go through the ordeal again.

ABOUT THE AUTHORS

Annie Wilson, currently a teacher at Presbyterian Ladies College in Melbourne, has taught for 25 years in the field of Commerce, primarily teaching Legal Studies and Accounting. Annie is also an experienced author of three Commerce texts and has written material for the Association of Independent Schools Victoria (ASIV) and the Victorian Commercial Teachers Association (VCTA). Annie has experience as a VCE Assessor in Economics and Legal Studies, and has been an active reviewer of various curriculum materials.

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Text

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KEY CONCEPT Rules tell people what they can and cannot do. In our society we have both legal rules (law) and non-legal rules. Parliament makes law. Courts also have a role to play in law making as well as settling disputes. Two distinct branches of law are criminal and civil law.

Have you studied Legal Studies before? Even if you have studied Legal Studies, this section may refresh your memory on some of the basic points you need to know before embarking on units 3&4.

Legal and non-legal rules

There's a big difference between 'stealing' a biscuit from a jar at home and stealing a packet of biscuits from the supermarket. We are all governed by rules that set boundaries for what is acceptable behaviour. **Non-legal rules** provide guidelines for acceptable behaviour within a particular group, such as a family or sporting club. **Legal rules** are laws that each member of the community must follow and are enforceable by the police. Laws are made by law-making bodies. A person who breaks the law may go to court.

Non-legal rules are rules that are not enforceable through the courts.

Legal rules are made by parliament, subordinate bodies (such as your local council) and the courts. If a legal rule is broken the offender may go to court.

Has the girl 'stealing' a biscuit from the jar at home broken a legal or non-legal rule? How is the young girl's behaviour different to the behaviour of the woman who has just attempted to steal while shopping?

The legal system

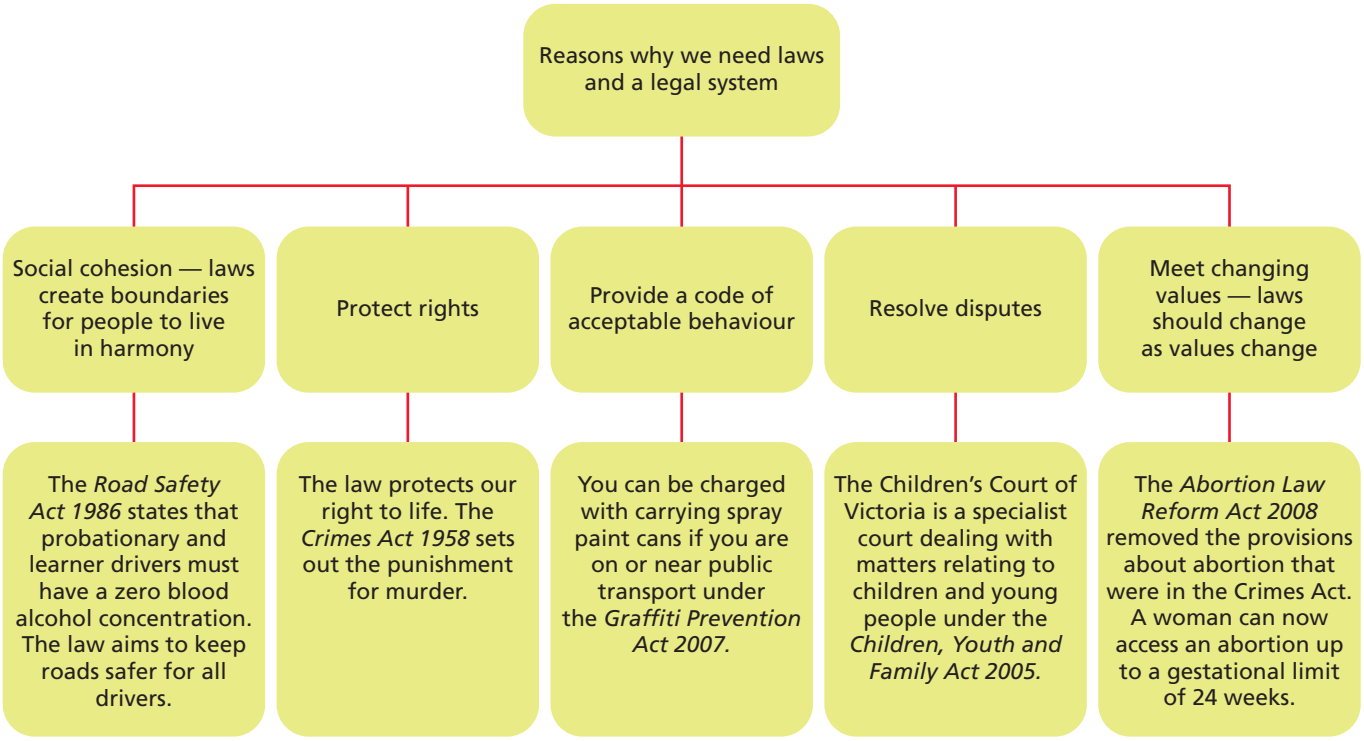
A **legal system** is a system that ensures laws are made and abided by. The reasons we need a legal system are outlined in the diagram on the next page.

Law making in our legal system is primarily the responsibility of the Commowealth **Parliament** in Canberra (our national parliament) and state parliaments (for example, the Victorian Parliament). Parliamentarians are our elected representatives and it is hoped that they will reflect the views of those who voted for them at an election (see page 13). Parliament makes law and these laws are referred to as statutes, legislation or Acts of parliament. Courts are reponsible for interpreting the laws that parliament makes.

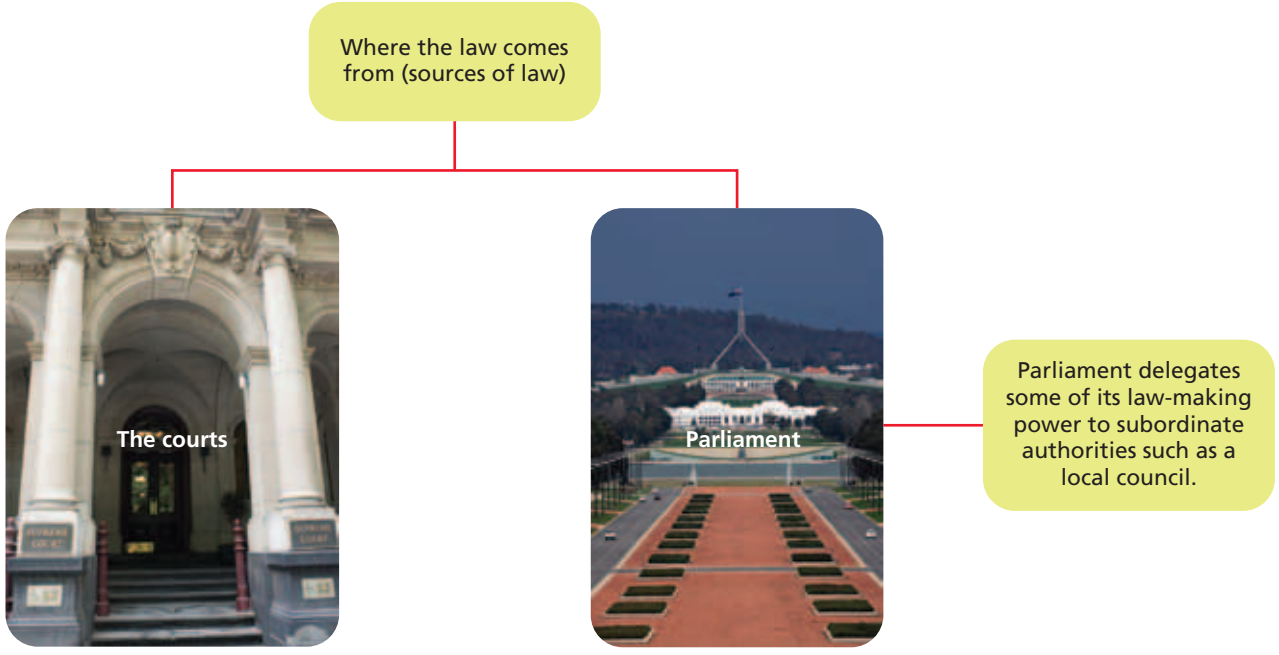
When a law is broken, the courts (presided over by a magistrate or a judge) will apply the law parliament has made to an individual case. In this way the courts are resolving a dispute and in fact making law themselves through interpreting legislation. If a case comes before the court and no legislation exitsts, the courts will have to decide the outcome of the case. The courts will refer to decisions in previous cases from superior courts where the facts were similar (see page 145). Law made by the courts is known as common law, case law or judge-made law.

A **legal system** is a structure or system that sets boundaries for behaviour. The system requires institutions to make, administer and enforce laws, and to adjudicate when laws are broken.

Parliament is the supreme law-making body. The Commonwealth Parliament consists of the Governor-General (Queen's representative), the Senate and the House of Representatives. The Victorian Parliament consists of the Governor (Queen's representative), the Legislative Council and the Legislative Assembly.



Can you imagine a society without law? Do you think there would be social cohesion and would rights be protected?



Parliament, subordinate authorities and the courts make law.

Criminal and civil law

Criminal law is the area of law concerned with criminal behaviour, which is against the law and is harmful to society and, therefore, requires the imposition of a penalty.

Civil and criminal law are two distinct branches of law.

Criminal law establishes what behaviour is acceptable by prohibiting certain actions. If the law is broken the consequence is punishment of some kind. Examples of behaviour prohibited under criminal law include murder, theft, rape and fraud.

Laws that are concerned with the infringement of a person's rights are called **civil laws**. For example, if someone does not fulfil the terms of a contract, does something that damages your reputation, or acts, or fails to act, in a manner that causes an injury to you or your property, then you can take legal action against that person. In civil law, the aim is not to punish the other party but, rather, to restore the affected person to his or her original position (as far as possible), or compensate that person for his or her loss. This area of law includes contracts, negligence, defamation and trespass (see page 330). The differences between criminal and civil law are outlined in the table below and further explained on page 186–8.

Civil law is an area of law covering the infringement of a person's rights.

Feature	Criminal law	Civil law
Purpose	Protection of the community as a whole	Protection of individual rights
Parties involved	The state, acting on behalf of the community, prosecutes the accused.	The injured party, the plaintiff, sues the wrongdoer, the defendant.
Burden of proof (the party who has the task of proving the allegation)	The prosecution has the task of proving the accused is guilty of the criminal charge.	The plaintiff has the task of proving the defendant breached his or her civil rights.
Standard of proof (the degree of proof required)	The prosecution must prove beyond reasonable doubt that the accused is guilty.	The plaintiff must prove on the balance of probabilities that the defendant is liable.
Use of a jury	A jury of 12 is used in criminal trials before the county and supreme courts.	Either party may request that a jury of six be used in the county or supreme courts.
Possible court finding	Guilty, not guilty, or no decision (hung jury)	Defendant liable for the injuries suffered by the plaintiff, or defendant not liable
Possible outcomes	A penalty such as a fine or imprisonment in order to punish the offender	A civil remedy such as compensation, in order to return the plaintiff to their original position as far as possible

TEST your understanding

1. What is the difference between a legal and non-legal rule?
2. Give two reasons why non-legal rules are important.
3. Name three law-making bodies.
4. What is another name for legislation?
5. We have a Commonwealth Parliament and a state parliament. The Commonwealth Parliament makes laws for the _____ and the state parliament makes laws applicable to _____.
6. What is the name of the injured party taking civil action?
7. How does the purpose of civil law differ from the purpose of criminal law?

APPLY your understanding

8. Explain whether a legal or non-legal rule has been broken in the following scenarios.
   (a) John picks his nose in a public place.
   (b) Lee sneaks out of a shop with a T-shirt she hasn't paid for.
   (c) Jo 'borrows' her sister's T-shirt without asking her.
   (d) Tan punches one of his classmates, causing serious injury.
9. In each of the following fictitious cases, state whether the case is criminal, civil or both.
   (a) Jan slipped on a wet floor at the supermarket and received minor injuries.
   (b) Troy was speeding when he crashed into another car.
   (c) Donna was caught spraying offensive words on a fence near her home.
   (d) Sam kept receiving an unemployment benefit even though he had commenced working for his uncle.

UNIT 3

LAW-MAKING

There is growing pressure on the Commonwealth Government to change the *Marriage Act 1961* (Cwlth) to give lawful recognition to same-sex marriage. Those who favour a change to the law argue that the law should not discriminate on the ground of sexual orientation. Same-sex marriage is a big issue for law-makers. Protesters try to influence the law by making their message known to the law-makers — the parliamentarians we voted for to represent our views. Chapters 1 to 4 focus on parliament as the major law-maker and the role the courts play in the law-making process. At the end of this unit it is hoped that you will be able to evaluate the effectiveness of these law-making bodies and how they make law to reflect a changing society.

CHAPTER 1

Parliament and the citizen

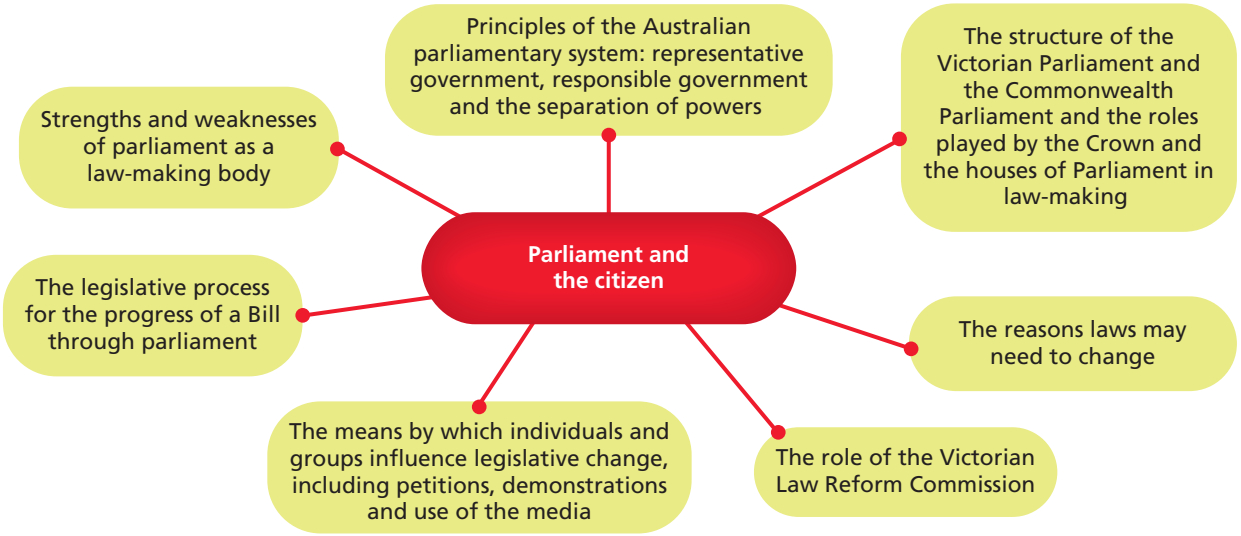
WHY IT IS IMPORTANT

Parliament is the primary law-making body of the land. In a democratic society, parliament is elected to create laws that reflect the values and expectations of the people. It must also be able to respond effectively to changing circumstances, both global and local, and to change laws as the need arises. As citizens in this society, we have the ultimate power to influence the work of parliament, and a strong understanding of its structure and operation will improve our ability to perform this role.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- explain the principles and structures of the Australian parliamentary system
- use contemporary examples to explain the influences on legislative change
- evaluate the effectiveness of methods used by individuals and groups to influence change in the law
- critically evaluate the law-making processes of parliament.

Can you demonstrate these skills?

Occupy Melbourne

On 15 October 2011, a group of protesters moved into Melbourne's City Square in Swanston Street. This action was part of a worldwide movement, which began in New York City in September 2011, to occupy important areas of major cities. Participants in the Occupy movement have been protesting about inequality in society. Their belief is that our democratic institutions increasingly represent the interests of the wealthy while ignoring the needs of the majority.

Throughout our history, protest movements have been an important means by which ordinary people can highlight issues and concerns, raise public awareness and ultimately hope to influence decisions made in parliament. While protest movements have had varying levels of success, participation in such activities is recognised as an essential way in which the ordinary citizen can influence the laws that govern us.

1.1 Introduction to our parliamentary system

KEY CONCEPT Parliament is a law-making body, or legislature. Our national parliament is called the Commonwealth Parliament or federal parliament. Australia's parliamentary system is based on the Westminster system of government in Britain.

Background to the parliamentary system

Australia's parliamentary system has been inherited from the **Westminster system** of government in Britain. Like most European countries, England in the Middle Ages was a monarchy, with the king having absolute power, supported by the wealthy landowners, or barons. These barons usually formed a council that would advise and help the king in his rule. This gathering became known as the parliament. As the barons refused to meet in the same place as the common people, two separate groups or houses of parliament evolved. These became known as the upper house or House of Lords and the lower house or House of Commons. This was the origin of the principle of **bicameral** parliaments that has spread to most countries that have adopted the Westminster system of government.

Our parliamentary system is based on the Westminster system. Westminster is where the Houses of Parliament in England are located.

Throughout the centuries, monarchs relied increasingly on parliament, particularly in raising taxes for them. In the seventeenth century, conflict between the king and parliament over their respective powers led to Britain becoming a **constitutional monarchy**, with parliament having supreme law-making power and the monarch having a relatively minor role in the law-making process.

Colonial Australia

When the British established the colony of New South Wales, all laws made by the British parliament automatically applied in the colony, although early governors had very wide powers and could exercise discretion when applying those laws. As more convicts gained their freedom there was pressure for some form of representative government. In the 1850s the British parliament passed laws to divide New South Wales, leading to the creation of separate governments in Victoria, Tasmania and South Australia. Each colony had its own governor and two houses of parliament.

DID YOU KNOW?

The word parliament comes from the French word *parlement*. *Parler* means to speak and parlement is a discussion.

The **Westminster system** of government is the parliamentary system of Great Britain, which has been copied and adapted by other countries around the world. It is so-called because the British Parliament meets in a building known as the Palace of Westminster.

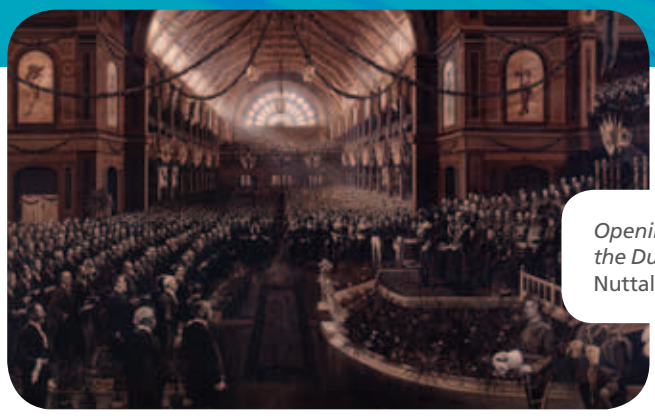
A **bicameral** parliament is one that has two houses, traditionally known as an upper house and a lower house.

A **constitutional monarchy** is a form of government in which the monarch's powers are limited and the main law-making power resides with a parliament or similar democratically elected body.

DID YOU KNOW?

When the early parliaments met, the barons would meet in the royal Council Chamber, which was decorated in the royal colour of red. The commoners would meet out in the fields, under the trees, as no chamber was provided for them. The tradition remains, with the upper houses of our state and Commonwealth parliaments decorated in red, and lower houses decorated in green.

Federation



Opening of First Federal Parliament by HRH the Duke of Cornwall & York, by Charles Nuttall, 1901

By the 1880s more than three-quarters of the inhabitants of the colonies were born in the colonies, and a distinct national identity began to develop. The 1880s and 1890s saw strong moves towards unifying the colonies into one country, with constitutional conventions meeting to develop a **constitution** for the new country. It was decided to opt for a **federation** model — the colonies becoming states within the new country of Australia, retaining their separate state parliaments, but passing some law-making powers to the Commonwealth Parliament.

In 1900 the British Parliament passed the *Commonwealth of Australia Constitution Act 1900* (UK), which established the system of government in Australia — two houses of parliament and a Governor-General to represent the British monarch. This structure reflected the British structure, with some differences. The lower house is known as the House of Representatives, and the upper house is known as the Senate. Unlike the House of Lords, the Senate is an elected body.

The Commonwealth of Australia came into existence on 1 January 1901 and elections for the first parliament were held in March of that year. The Commonwealth Parliament was opened on 9 May 1901 in the Royal Exhibition Building in Melbourne.

The Australian parliamentary system today

Australia has a total of nine parliaments or legislatures. These include the Commonwealth **Parliament** (or federal parliament), six state parliaments and two territory legislatures. The Commonwealth and all states except Queensland have bicameral parliaments. Queensland, the Australian Capital Territory and the Northern Territory all have **unicameral** parliaments, each consisting only of one house, known in each case as the Legislative Assembly.

Our structure of government can be classified in a number of different ways:

- We are a *representative democracy* because we elect members of parliament to make laws on our behalf.
- We are a *constitutional monarchy* because we have a monarch (currently Queen Elizabeth II) as our head of state, with powers limited by a Constitution.
- We are a *federation* because our country arose as a result of the combination of previously autonomous colonies.

Under s. 1 of the Australian Constitution, legislative (or law-making) power is vested in a parliament, consisting of the Queen, a **Senate** and a **House of Representatives**.

A **constitution** is a set of rules that determines the structure of government and the law-making powers within a sovereign state.

Federation refers to the formation of a political union with a central government from a number of separate states or colonies, with control of its own internal affairs.

Parliament is a law-making body or legislature elected by the people.

A **unicameral** parliament consists of only one house.

The **Senate** is the upper house of the federal parliament, consisting of 76 senators — twelve from each of the six states, two from the Northern Territory and two from the Australian Capital Territory. The Senate's intended functions are to represent the interests of the states and to review laws passed in the House of Representatives. The Senate has powers almost identical to those of the House of Representatives except for restrictions in dealing with taxation and appropriation Bills.

The **House of Representatives** is the lower house of the federal parliament, with approximately twice as many members as the Senate. Its members represent electorates, which are geographical units with approximately equal numbers of electors. Most Bills originate in this house. By convention, the prime minister must be a member of this house.

TEST your understanding

1. On what system is our system of government in Australia based?
2. Another name for a parliament is a _____ because parliament is the primary law-making body.
3. Parliaments that have two houses are said to be _____. The Commonwealth Parliament has the _____, which is the upper house, and the _____ _____ _____, which is the lower house.
4. Explain what is meant by the term *constitutional monarchy*.

APPLY your understanding

5. Australia adopted a federal parliamentary model. What does this mean?
6. Why do we have representative democracy in Australia?

1.2 The structure and role of the Commonwealth Parliament

KEY CONCEPT The major role of parliament is to make laws. The commonwealth and state parliaments (with the exception of Queensland) have two houses of parliament, known as an upper house and a lower house. The Governor-General and the states' governors, as representatives of the Queen, are also part of the structure of parliament.

study on

Summary

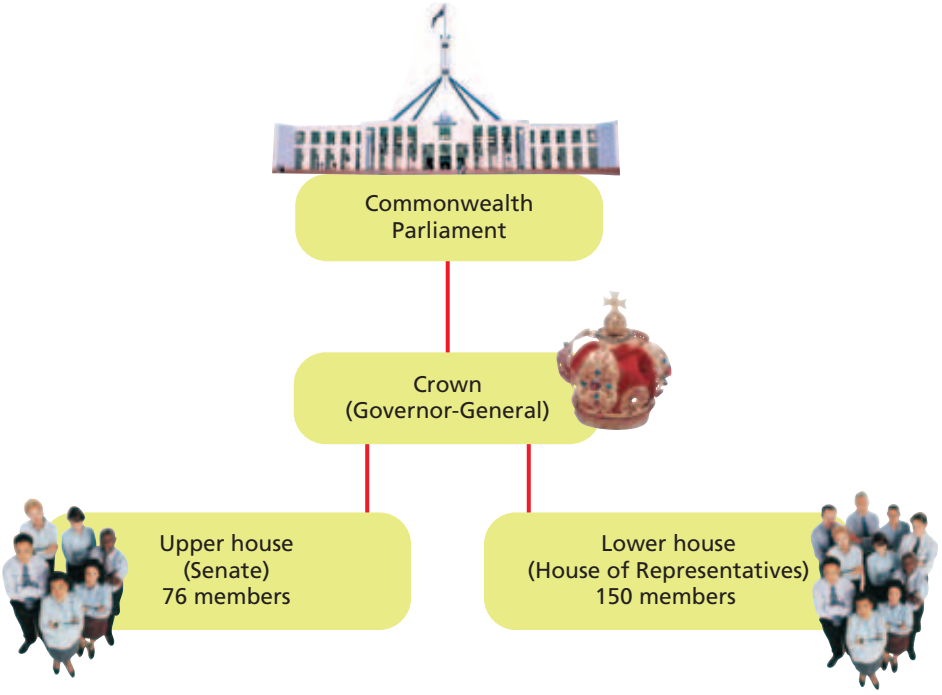
Unit 3:
Law-making

Area of study 1:
Parliament and the citizen

Topic 2:
The structure of parliament in Australia

Think of Commonwealth Parliament as being made up of three elements — the upper and lower houses of parliament, and the Crown. Australia is both a constitutional monarchy and parliamentary democracy, as both houses of parliament are elected by the people of Australia.

The Commonwealth Parliament consists of the Queen (represented by the Governor-General), the Senate and the House of Representatives.



This section examines the structure and role of the Commonwealth Parliament. Having this foundation knowledge makes it easier for you to understand the principles of the Australian parliamentary system discussed on pages 13–16. Let us first examine the role and structure of the House of Representatives in more detail.

The House of Representatives

The House of Representatives is the lower house in the Commonwealth Parliament and is sometimes referred to as the *people's house*. It has the following structure and roles:

- It has 150 members, each elected for three years. Each member represents an electorate (or *seat*) that covers a specific geographic area. All electorates have roughly the same number of electors. This means that electorates with a high population density are smaller in area, while those with a low population density are larger in area. The more populous states such as New South Wales and Victoria elect the largest number of members, while states with smaller populations such as Tasmania and South Australia elect much smaller numbers. The Northern Territory and the Australian Capital Territory each elect two members to the House of Representatives.

- Members of the House of Representatives are elected by a system of preferential voting. Under this system voters are required to number all candidates on the ballot paper in order of preference. If no candidate wins more than 50 per cent of the vote, the preferences expressed on the ballot papers of the lower polling candidates are distributed until one candidate has a majority of votes.
- Government is formed by the political party or **coalition** of parties that wins a majority of seats in the House of Representatives. In practice this means winning 76 or more seats at an election. The largest political party not in government forms the Opposition. The Opposition is effectively the alternative government, so it will usually attempt to hold the government accountable for its decisions.
- The parliamentary leader of the party that wins government becomes the prime minister. The office of prime minister is not mentioned in the Constitution, but is a convention inherited from the British parliamentary system. The prime minister is the head of the Commonwealth Government, and will always be a member of the House of Representatives.
- While members of the House of Representatives are elected for a maximum of three years, the government has the power to advise the **Governor-General** to call an election at any time before the three years has elapsed. In recent years governments have used this power to try to gain political advantage over the Opposition.
- Other leading members of the **Commonwealth Government** become ministers. Each minister is responsible for a specific government department (such as the Department of Defence or the Department of Foreign Affairs and Trade). Ministers can come from either the House of Representatives or the Senate. Ministers are responsible for introducing legislation that is relevant to their area of responsibility.
- Government ministers acting together form a **cabinet**, which is the body charged with ensuring the implementation of the government's program.
- Most legislation originates in the House of Representatives, although if the relevant minister is a Senator, he or she will introduce legislation in the Senate.
- Legislation that requires the government to appropriate money can only be introduced in the House of Representatives. This includes legislation introducing or changing taxes.
- Although members of the House of Representatives (MHRs) are supposed to represent the views of those in their electorate, in reality most members vote according to what their party decides. This is described as *voting along party lines*. If a member decides to vote against his or her party's position on a piece of legislation, this is known as *crossing the floor*.
- Meetings of the House of Representatives are chaired by the Speaker of the House. The Speaker is usually elected by the all members of the House, although there is usually only one candidate — the nominee of the majority party that forms government. The Speaker has an important role in chairing the House, maintaining order in debates and ensuring all members observe the rules of the House, known as the *standing orders*. The Speaker is also officially in charge of Parliament House, in consultation with the President of the Senate.

A **coalition** is a group of two or more political parties.

The **Governor-General** is the Queen's representative at the federal level.

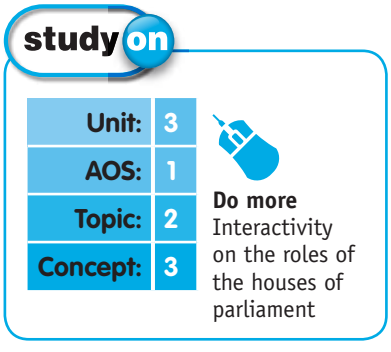
The **Commonwealth Government** is the political party or coalition of parties that has won a majority of the seats in the House of Representatives.

The **cabinet** is the body of people with responsibility for the implementation of government policies, and includes the prime minister and senior ministers.

The Senate

The Senate is the upper house of the Commonwealth Parliament. Its structure and roles are as follows:

- The Senate has 76 members, elected on a state basis. The Constitution requires that there be, as close as is practicable, twice as many MHRs (Members of the



House of Representatives) as there are Senators. Each of the six states returns twelve senators, irrespective of size or population. The Northern Territory and ACT each elect two senators. For the purpose of electing senators, each state or territory operates as one electorate. Senators from the states are each elected for six years, although Senate elections occur every three years, usually at the same time as House of Representatives elections. At each election, only one half of the senators from each state will have to stand for re-election; the other half will stand for re-election at the following election. The four senators from the territories are elected for a maximum of three years, and so stand for re-election at the same time as the MHRs do.

- Senators are elected by a system of proportional representation. Under this system, voters are required to indicate their preferences for all candidates. Senators are effectively elected according to the proportion of the vote achieved by their party, with each candidate required to achieve a quota of votes to be elected. Because of the proportional nature of the distribution of votes, it has been possible for minor political parties such as the Democratic Labor Party, The Australian Democrats and the Australian Greens to gain representation in the Senate during the last 60 years.
- The Senate was originally established to safeguard the interests of the smaller states in the establishment of the Australian federation. The members of the lower house are elected on the basis of population, and because there are so many representatives from New South Wales and Victoria, they could out-vote all other members combined. The Senate was created with equal numbers from each state to act as a safeguard against this happening. Although most senators vote along party lines, there have been occasions in recent years when independent senators have been able to negotiate benefits for their state in return for promising to support government legislation.
- The Senate also has a role as a house of review. This is a traditional role inherited from the House of Lords in Britain. It comes from a time in the past when there was concern that the popularly elected people's house might wish to introduce legislation that was too radical, or may upset the existing social order. A house of review could reject or amend such legislation to ensure this did not occur. Part of the reason for having only half the senators facing election each three years was to ensure that the Senate always contained experienced legislators who could carry out this review process most effectively. In practice, most senators usually vote along party lines so their role as reviewers of legislation is limited. However, apart from the period from 2005 to 2008, no government has had a majority in the Senate since 1981, so the passage of legislation through the Senate has generally not been guaranteed. This has enabled the Senate to more effectively act as a house of review.
- If the Senate twice refuses to pass legislation that has come from the House of Representatives, there is said to be a deadlock between the two houses of parliament. In this situation, s. 57 of the Constitution allows the Governor-General to dissolve both houses of parliament, and call an election. This is known as a **double dissolution**, and is the only time when all senators must face the electors at one time. After a double dissolution, if the government is successful in winning the election, it can present the previously failed legislation once more. If the Senate still refuses to pass it, the Governor-General may convene a joint sitting of both houses in an attempt to have the legislation passed. A joint sitting has occurred only once in Australian parliamentary history, in 1974.
- Meetings of the Senate are chaired by the President of the Senate. He or she has a similar role in relation to the Senate as the Speaker has in relation to the House of Representatives.

DID YOU KNOW?

For most of the last 30 years governments have had to rely on the support of minor parties such as the Australian Democrats or the Greens to have legislation passed. These parties are said to have held the *balance of power* because if they choose to vote with the government, legislation will be passed, but if they vote with the Opposition, it will be defeated.

A **double dissolution** occurs when both houses of the Commonwealth Parliament are dissolved and all members are required to face an election, unlike a scheduled election when only half the senators are up for re-election.

The Crown

The twenty-fifth Governor-General of Australia, Ms Quentin Bryce, meets with the Queen. The Governor-General is the Queen's representative in Australia.

The monarch is represented as the third element in the Commonwealth Parliament by the Governor-General (also referred to as the Crown). The Crown performs the following roles and functions in relation to law-making within the parliamentary system:

- The Governor-General gives the **royal assent** to legislation that has been passed by both houses of parliament. This is the final stage that must occur before the law is proclaimed and comes into force (see page 37). Under s. 58 of the Constitution, the Governor-General also has the power to withhold the royal assent, and return a Bill to parliament with recommended amendments. Because there is an expectation that the Governor-General will act on the advice of ministers, this has rarely occurred.
- The Governor-General also has a number of reserve powers. These include the power to summon, open and dissolve parliament, as well as to **prorogue** a current session of parliament. These powers are usually exercised on the advice of ministers, particularly that of the prime minister, although the exact limits of the reserve powers remain undefined by the Constitution. (See page 12 for the role of the Crown as an element of the executive arm of government.)

The **royal assent** is the formal signing of a Bill by the monarch's representative to indicate approval of the Bill, and is the final step necessary before a Bill becomes law.

To **prorogue** the parliament is to bring a parliamentary session to an end, without dissolving parliament or calling an election. It terminates all business currently before both houses until the next scheduled session.

TEST your understanding

1. Explain the difference between parliament, government and cabinet.
2. List and explain the respective roles of the House of Representatives and the Senate.
3. Explain the terms 'house of review' and 'states' house'.
4. What type of Bills cannot be introduced in the Senate?
5. What is the royal assent? Why is it important?

APPLY your understanding

6. To what extent does the Senate actually operate as a states' house and/or a house of review?
7. Use the **Parliament of Australia** weblink in your eBookPLUS to research the composition of our current Commonwealth Parliament.
   (a) Who is our Governor-General?
   (b) Which political party has formed the government?
   (c) What is the current breakdown of parties in the Senate?
   (d) Use your answers to the above questions to explain which parties control the Commonwealth Parliament.

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1.3 Structure and role of the Victorian Parliament

KEY CONCEPT The Victorian Parliament is empowered to make laws that are enforceable within the boundaries of the state. It has a bicameral structure, with the role of the Crown exercised by the state governor. It is subject to the rules contained within the Victorian Constitution, and operates with a system of fixed terms between elections.

The Victorian Parliament House

Historical background

In 1850 the British Parliament passed the *Australian Constitutions Act 1850* which allowed for the formation of a separate colony of Victoria on 1 July 1851. Initially Victoria had its own Lieutenant-Governor and a partly appointed, partly elected Legislative Council. This Council had the task of developing a constitution for the colony, and of organising the construction of Parliament House in Spring Street in Melbourne. The proposed Constitution was approved by the British Parliament in 1855, and came into force with the election of the first bicameral Victorian Parliament in 1856.

Changing the Victorian Constitution

From 1855 until 1975, the Victorian Constitution was an Act of the British Parliament, but in 1975, the Victorian Parliament adopted the Constitution as an Act of the Victorian Parliament. In 2003, the *Constitution (Parliamentary Reform) Act 2003* changed the structure of the state parliament, as well as the means by which the Constitution can be changed.

While it is possible for the parliament to amend many parts of the Constitution by a simple majority vote in both houses of the state parliament, some sections of the constitution were entrenched after the changes of 2003. This means those sections can only be changed by very specific actions. Following are examples:

- The 2003 constitutional amendments established a set number of members in each house, with 40 members in the upper house, and 88 in the lower house. These numbers can only be changed by a **referendum** of all eligible voters.
- The same changes removed the power of the upper house to block supply; that is, to refuse to pass Bills allowing government access to money raised through taxation. This power could only be restored to the upper house through a referendum.
- Eligibility of citizens to vote in state elections can be changed only through a *special majority*, which is a majority of three-fifths of members in each house. This means that 24 out of 40 members must vote in favour in the upper house, and 53 out of 88 in the lower house.

A **referendum** is the process through which changes can be made to the Commonwealth Constitution. Electors vote for or against a particular change. For the change to take effect, it must be supported by a majority of voters and a majority of states.

In Victoria, government is formed in the lower house of parliament, known as the Legislative Assembly.

The Victorian Parliament

The Victorian Parliament has legislative power vested in the Crown, an upper house known as the Legislative Council, and a lower house known as the Legislative Assembly. Elections for the two houses of the Victorian Parliament are held every four years, on the last Saturday in November. Unlike the Commonwealth Parliament, the state parliament has fixed terms, so the government cannot call an early election as a means of gaining political advantage. An early election can occur only if:

(a) a vote of no confidence in the government is passed in the Legislative Assembly; or

(b) there is a deadlock between the two houses over the passage of a Bill.

The Legislative Assembly

As is the case with the House of Representatives in the Commonwealth Parliament, the Legislative Assembly in Victoria is the people's house. It has the following structure and roles.

- The 88 members of the Legislative Assembly are elected from 88 electoral divisions by preferential voting. These electoral divisions each have roughly the same number of electors.
- The party or coalition of parties that wins a majority in the Legislative Assembly forms the government. In practice this means winning 45 out of the 88 seats.
- The parliamentary leader of the party that wins government becomes premier, with other leading members of the government becoming ministers, each responsible for an area of government activity. Ministers can come from either the Legislative Assembly or the Legislative Council.
- Government ministers acting together form the state cabinet.
- Most legislation originates in the Legislative Assembly, as most senior ministers are members of the lower house.
- The presiding officer in the Legislative Assembly is the Speaker, as is the case in the Commonwealth lower house.

The Legislative Council

The Victorian upper house is a house of review, and has the following structure and roles:

- The Legislative Council has 40 members. These are elected through a process of proportional representation, with five members elected from each of eight electoral regions. Five of these regions are in metropolitan Melbourne, with the other three representing country areas.
- As is the case in the Commonwealth Senate, proportional representation means minor parties have been able to gain representation in the Legislative Council.
- The Legislative Council cannot refuse to pass money or budget Bills that have been successfully passed in the Legislative Assembly. This contrasts with the upper house in the Commonwealth Parliament, which retains that power.
- The Legislative Council has the ability to reject other Bills that come before it, as well as to delay the passage of a Bill, or return it to the lower house with suggested amendments.
- The capacity of the Legislative Council to operate as a genuine house of review is largely dependent on whether or not the government holds a majority in that house. There is likely to be greater scrutiny of government legislation when the government does not hold a majority in the upper house.
- The presiding officer in the upper house is known as the President of the Legislative Council.

study on

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Practice VCE exam questions

The Crown

In Victoria the Crown is represented by the state governor. The governor performs the following roles and functions in relation to law-making within the parliamentary system:

- The governor gives the royal assent to legislation that has been passed by both houses of parliament. State governors do not have the power to withhold the royal assent, as this power was removed under s. 9 of the *Australia Act 1986* (Cth).
- The governor has the power to dissolve parliament and call an election before the required four year period has expired if a successful vote of no-confidence in the government is passed in the Legislative Assembly. If the two houses are deadlocked over legislation, the governor may also call an early election. In all circumstances, the governor is expected to rely on the advice of ministers, in particular that of the Premier.

TABLE 1.1 Comparison of state and Commonwealth parliaments

	Federal Parliament	State Parliament
Name of the upper house	Senate	Legislative Council
Term of office for upper house members	Six years	Four years
Number of upper house members	76	40
Method of election of upper house members	Proportional representation	Proportional representation
Name of lower house	House of Representatives	Legislative Assembly
Term of office for lower house members	Three years	Four years
Number of lower house members	150	88
Method of election of lower house members	Preferential voting	Preferential voting
Government formed in	House of Representatives	Legislative Assembly
Queen's representative	Governor-General	Governor
Frequency of elections	Maximum three years between elections	Fixed terms of four years
Title of leader of the government	Prime Minister	Premier

TEST your understanding

1. What is the name of the upper house in the Victorian Parliament, how many members does it have, and what is the process for their election?
2. What is the name of the lower house in the Victorian Parliament, how many members does it have, and what is the process for their election?
3. List and explain the respective roles of the two houses of the Victorian Parliament.
4. What is an important limitation on the powers of the Victorian upper house that does not apply in the Commonwealth upper house?
5. Explain the significance of the length of parliamentary terms in Victoria, when compared with the Commonwealth Parliament.
6. Why can the governor of Victoria no longer withhold royal assent to a Bill?

APPLY your understanding

7. Identify and explain three similarities and three differences between the operation and role of the Commonwealth Parliament and that of the Victorian Parliament.
8. Use the **Parliament of Victoria** weblink in your eBookPLUS to research the composition of our current state parliament:
   (a) Who is the current state governor?
   (b) Which political party has formed the government?
   (c) What is the current breakdown of parties in the Legislative Council?
   (d) Use your answers to the above questions to explain which parties control the Victorian Parliament.

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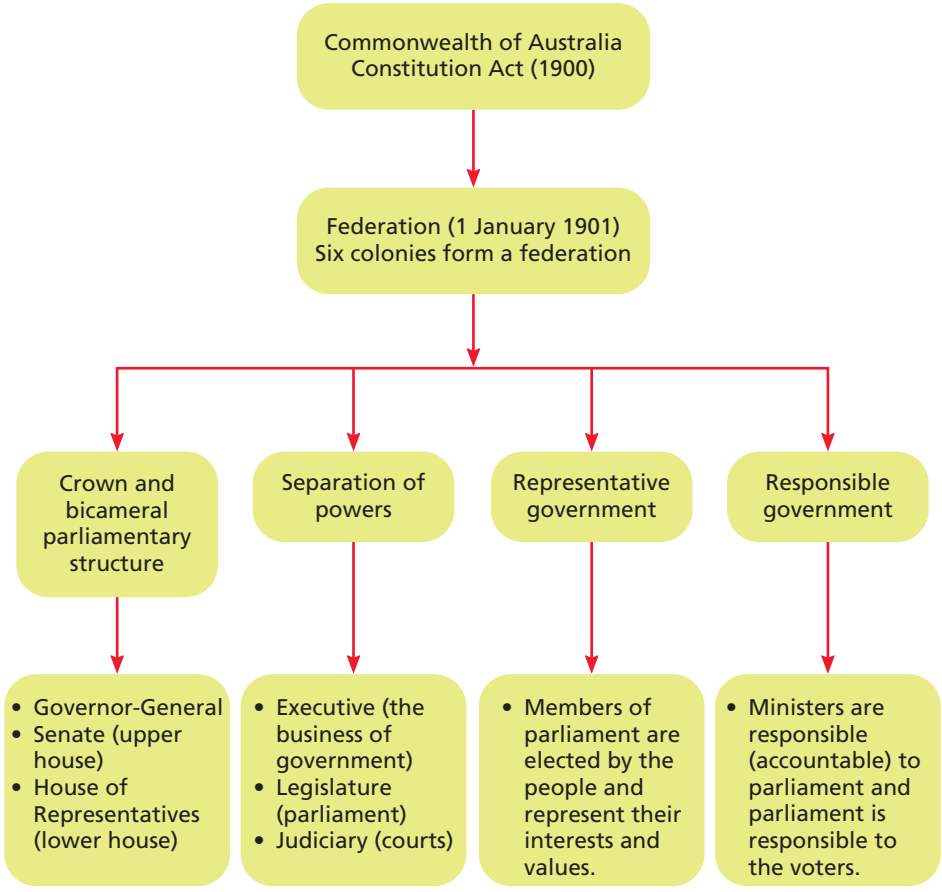
1.4 Principles of the Australian parliamentary system

KEY CONCEPT Australia is a parliamentary democracy. This means that we elect members of parliament to represent our interests, and to reflect our views in the laws they make. We expect members of parliament to be accountable to us, and that their re-election will depend on how well they perform. The separation of powers within our system also ensures that no arm of government can be too powerful or abuse the powers granted to it.

All Australian parliaments inherited a number of basic principles of parliamentary democracy, including representative government, responsible government and the separation of powers.



Representative government

As a parliamentary democracy, a fundamental basis for our system is that of representative government. This is based on the following principles:

- Members of parliament are elected to represent the interests of the voters and should only expect to retain their seat in Parliament while they continue to demonstrate that they are representing the interests of voters.
- Most members belong to a political party, and stand for election based on a platform of policies developed by that party.
- In addition to voting for individuals who stand for election, voters will also be influenced by the policies of the party to which that person belongs.

study on

Summary

Unit 3: Law-making

Area of study 1: Parliament and the citizen

Topic 1: Principles of the parliamentary system

This figure summarises the principles behind the Australian parliamentary system.

study on

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See more PowerPoint on representative government

- The political party that wins the majority of seats in the lower house forms a government, which is then empowered to enact the platform it placed before the electors.
- Leading members of the government become **ministers**, each taking responsibility for a particular area of government activity, such as health, education or defence.
- A government must ultimately represent the interests of the majority of the voters, or it will soon be voted out of office.

A **minister** is a member of parliament who has responsibility for a particular area of government activity, known as a portfolio.

Responsible government

Another fundamental basis for our parliamentary system of government is that of responsible government. In this context, the term responsible means accountable and refers to the fact that in whatever role a member of parliament might find themselves, they have to be able to openly and publicly account for their actions. The concept of responsible government is based on the following principles:

- All members of parliament are directly responsible to those who elected them. They are expected to be able to report back to voters, and to keep them informed openly and honestly.
- Ministers are members of parliament and so are responsible to the parliament as a whole. They can be questioned by other members (the daily *question time*) and are expected to keep the rest of parliament informed of government activity in their portfolio.
- A minister who is found to have deliberately misled parliament, or not upheld the highest possible standards as a minister, is expected to resign from that ministerial position.
- Ministers are also responsible for the actions of their departments. This means that they are expected to take responsibility for the actions of public servants and others working within those departments, and are accountable for errors that may occur within their department.
- Because they are responsible to parliament, and the parliament is responsible to the voters, ministers are ultimately responsible to those same voters for their actions, and the actions of the government departments under their control.

study on

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See more PowerPoint on responsible government

The separation of powers

Another of the basic principles underpinning our system is the doctrine of separation of powers. Under this doctrine, government operates through three arms, as follows:

1. The *legislative arm*, which is the parliament that makes the laws
2. The *executive arm*, which includes the representative of the monarch and the government ministers with responsibility for implementing and administering the laws passed by parliament. Administration of legislation occurs through the work of people such as public servants and the police, both of which are an extension of the executive arm of government.
3. The *judicial arm*, which includes the courts and judiciary, which have responsibility for enforcing the law and settling disputes that might arise under the law.

Under the **doctrine of separation of powers**, each of these arms of government should be kept separate and the powers of each arm exercised by a different group of people. This separation is considered necessary for the following reasons:

(a) It provides a system of checks and balances on the power of government. No one arm of government can control all three functions, so abuses of power are less likely.

(b) Individual freedoms are protected by ensuring that an independent judiciary has the power to ensure that parliament and the executive are acting within the limits of the Constitution.

study on

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See more PowerPoint on the separation of powers

The **doctrine of separation of powers** refers to the separation of the executive, legislature and judiciary.

When thinking of the doctrine of the separation of powers, a useful analogy is to think of a tree with three branches. If one branch was to grow out of control, the tree may fall over. The separation of powers operates in the following ways:

- Under s. 61 of the Constitution, executive power is vested in the Queen, and exercised by the Governor-General. Section 62 of the Constitution provides for an Executive Council, theoretically consisting of all ministers of the government, to advise the Governor-General. In practice, the operation of the Executive Council is only a formality, and it exists only to provide official approval for cabinet decisions, as the Governor-General is required to accept the advice of ministers. A meeting of the Executive Council can consist of as few as three members, the Governor-General and two ministers, and the place of the Governor-General at such meetings can be taken by the Vice-President of the Executive Council, who is usually a senior minister. Decisions made by the Executive Council, such as the making of regulations and appointments of judges to the High Court, are known as the decisions of the Governor-General in Council.
- Each state also has an Executive Council that operates in a similar manner to the federal body. In reality executive councils are little more than a rubber stamp for the decisions of the cabinet in each state.
- While executive power is exercised by the cabinet as the leading group in the government of the day, responsibility to parliament can limit the powers of the executive. The government has to gain parliamentary approval for any new laws it wishes to have passed. Unless it can command a majority of votes by members of both houses, it cannot have any law enacted.
- Ministers are individually responsible to parliament, and are required to answer questions about actions they take as part of their executive role.
- The representative of the monarch, as part of the executive arm, is required to give royal assent to legislation before it becomes law. Under s. 58 of the Constitution, the Governor-General has the power to withhold assent and return a proposed law to the parliament with suggested amendments. While the power to withhold the royal assent is no longer held by state governors, no legislation can come into effect until this formality has been completed.
- Under s. 5 of the Constitution, the Governor-General technically has the power to determine when parliament sits, dissolve parliament and call an election, and prorogue parliament. These powers are known as the reserve powers and although they will normally be exercised on the advice of ministers, particularly the advice of the prime minister, the Governor-General can exercise these powers against such advice. This occurred in 1975 when Governor-General John Kerr dismissed the elected government led by Gough Whitlam. He then appointed Opposition leader Malcolm Fraser as caretaker prime minister, and accepted Fraser's advice that a double dissolution election be called.
- In the case of a parliamentary deadlock following an election, the Governor-General or a state governor can have a decisive role in resolving the issue, as the following case study demonstrates.

Josef Stalin wielded absolute power without checks from a legislature, executive or judiciary. This led to the deaths of millions of people as a direct result of this absence of legal and social structures. Even in the twenty-first century, people such as Robert Mugabe (Zimbabwe) and Kim Jung-Il (North Korea) have exercised similar control over people in their country.

Tasmanian governor resolves deadlock

A deadlocked lower house was the result in the Tasmanian state election of March 2010, with the Liberal Party holding ten seats, the outgoing Labor government holding ten seats, and the Greens holding five seats in the 25-seat House of Assembly. Although the Liberals and Labor had the same number of seats, the Liberal Party had won 39 per cent of the popular vote, while the Labor Party had won 37 per cent of the popular vote. Labor Premier David Bartlett had promised before the election that in the event of a tie in the number of seats he would advise the

DID YOU KNOW?

In the federal election of August 2010, each major political party gained 72 seats in the 150-member lower house, leaving six seats in the hands of independent members and representatives of minor parties. It took over two weeks of negotiations before Julia Gillard, as leader of the Labor Party, was able to approach the Governor-General with an undertaking that she could command a majority of votes in parliament, and thus form a government.

governor to commission a government of the party with the highest popular vote. Consequently Bartlett advised the governor, Peter Underwood, that his government would resign and that the governor should summon Liberal leader Will Hodgman to form a new government. After speaking to both Bartlett and Hodgman, the governor decided to commission Bartlett to form a government, despite the advice he had received from both political leaders. In his reasons for this decision, Underwood indicated that Bartlett had no constitutional right to promise to hand power over to Hodgman and the Liberal Party, and that he, the governor, was acting in the interests of stable government. Until this time neither party had been prepared to negotiate with the Greens for their support, but after being commissioned to form a government, Bartlett entered into such an agreement, providing for an effective majority on the floor of the lower house.

- The courts can act as a check on parliament, and can declare legislation invalid if it is contrary to the Constitution, or if correct parliamentary procedures have not been followed.
- The courts can also operate as a check on the executive functions of government, as expressed through the operation of the police and other employees of the state. In October 2011 a judge disallowed evidence in a criminal trial because search warrants used to gain that evidence had not been sworn by police officers (for further detail see the case study in chapter 8 on page 293).

In reality, while the judiciary maintains a high level of independence from both of the other two arms of government, in Australia the legislative and executive arms are closely intertwined.

- While the Governor-General holds an important role as part of the executive, he or she is also a key part of the legislative process, as the royal assent is the final step in the process by which a law comes into force.
- Under s. 64 of the Constitution, ministers must be members of parliament, so they will have both a legislative role as a parliamentarian, as well as an executive role as a minister.
- Many laws passed by parliament give ministers the power to make regulations in relation to the administration of those laws. The formulation of these regulations is part of the executive function of government; however, all regulations must be tabled in parliament, which holds the ultimate power to accept or reject these regulations.

study on

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Practice VCE exam questions

TEST your understanding

1. In your own words explain the key principles of representative government.
2. How do the principles of responsible government serve to ensure that government is accountable to the electors for its actions?
3. Explain the government structure that supports the doctrine of the separation of powers.
4. What are the key advantages of the separation of powers?

APPLY your understanding

5. Identify and explain **four** examples of the operation of the separation of powers that illustrate the checks and balances that ensure that abuses of power are less likely to occur.
6. With reference to information contained in this chapter, explain why the following actions may be illegal.
   (a) The Premier of Victoria seeks the assistance of the Chief Justice of the Supreme Court in having a particular judge hear a criminal trial over anti-terrorism laws.
   (b) A High Court judge asks the Governor-General for an opinion on evidence being given in a case involving the Constitution.
   (c) The Governor-General suggests to the Prime Minister that a judge of the High Court should be removed for making decisions that are unfavourable to a particular interest group.
7. The Australian system of government does not completely demonstrate the principles of the separation of powers. Explain why this is the case.

1.5 The reasons laws may need to change

KEY CONCEPT If laws are working well, then we do not tend to notice them. We usually take good law-making for granted. However, when laws fail, the consequences can be disastrous and the law needs to change.

There are many reasons why laws need to change. Let us first look at how changing society values necessitate a need for the law to change.

Values change

Changing attitudes to morality have been responsible for many changes to laws regulating society.

Following are some examples.

In the latter part of the nineteenth century, legislation banned bathing in public between the hours of 6 am and 8 pm. State governments and local councils lifted the bans by the early twentieth century, but bathers had to wear neck-to-knee costumes in the water. The arrival of the bikini after World War II ignited a series of local council bans on beaches all around Australia. Of course, today, the wearing of skimpy bathing costumes barely raises a comment.

This scene of an Australian beach in 1912 is radically different to the scene at beaches today. The law has had to keep pace with changing moral and social attitudes in the community.

Until the 1960s, a couple living together in a sexual relationship while not married was considered to be 'living in sin' and socially unacceptable. A single woman who became pregnant was usually encouraged to offer her child for adoption, as there was a stigma attached to the children of single mothers. Since the passing of the *Family Law Act 1975* (Cth), successive amendments to this Act have meant that today, in most situations, couples living in de facto relationships, and their children, have been treated by the law in the same way as married couples. In Victoria, the *Relationships Act 2008* has given de facto couples the opportunity to register their relationship with the Registrar of Births, Deaths and Marriages, which effectively gives their relationship the same status as a legal marriage for most practical purposes. Both heterosexual and same-sex couples can register their relationship.

The law relating to abortion is another example of the need to change laws because of changing values. Procuring or performing an abortion was a criminal offence in all Australian states, and doctors performing abortions were routinely prosecuted. In 1969, in the case of *R. v. Davidson* [1969] VR 667, Justice Menhennit of the Victorian Supreme Court held that an abortion could be lawful if there were reasonable grounds to believe that the woman's mental or physical health was endangered by the pregnancy. This meant there was now a legal basis for abortions to be performed lawfully within Victoria, even though the relevant legislation had not changed. Pressure for legislative change to clarify the situation eventually led to the enactment of the *Abortion Law Reform Act 2008* (Vic.). This Act now allows for abortions up to 24 weeks into pregnancy, without the express permission of doctors.

study on

Summary

Unit 3: Law-making

Area of study 1: Parliament and the citizen

Topic 3: Initiating change in the law

Economic circumstances

Governments have regularly had to respond to changes in economic circumstances to ensure continuing economic growth and prosperity. Workplace laws have had to respond to changes in the nature of work, the relationship between employers and employees, and the need for businesses to become more competitive internationally. For most of the twentieth century, wages and working conditions were decided by

DID YOU KNOW?

The outbreak of the H1N1 (Swine Flu) virus in 2009 saw state and Commonwealth parliaments creating laws rapidly to move the Australian public into different control and containment phases in an attempt to contain the virus. More than 170 people died of the virus across Australia in 2009. The parliament, with its ready access to experts, is best placed to make laws quickly. The government also suspended the swine flu vaccination program in 2010 when children became ill after receiving the injection.

central tribunals, which received submissions from representatives of unions and employers before making a decision that would apply to all workplaces in an industry. In recent times this process has been recognised as inefficient, and not in the best interests of either employers or employees. Governments have legislated to establish enterprise bargaining, so that wages and working conditions can be negotiated within individual businesses. *The Fair Work Act 2009* (Cth) is the most recent attempt by government to match workplace laws with changing economic circumstances.

Government inquiries and research have at various times recommended changes in the structure of the taxation system to meet changes in the economy. The need for a broad-based consumption tax in Australia was recognised in the 1980s, but was not enacted until the introduction of the goods and services tax (GST) in 2000. More recently, research undertaken in 2008 by the then Rudd government led to the introduction of the minerals resource rent tax, which is designed to provide government with an increased share of the profits being made during Australia's mining boom.

Governments have had to respond to economic threats such as excessive inflation, or the risk of economic recession, by enacting laws to deal with such threats. In 2009, the Rudd government reacted to the global financial crisis by making changes to banking and finance laws to ensure that institutions are more open and accountable to government agencies and the general public.

Technological advances

New technology is being developed at a rapid rate and has the potential to change our lives in many ways. Our law-makers struggle to keep pace with these significant changes and the impact new technology has on our society. Because we cannot predict the effects of technological change, governments often respond slowly, long after a need has been identified. Recent legislation to restrict the use of mobile phones by the drivers of cars is an example of a government response to changing technology and the increased road toll.

Issues related to technological developments in communications, information technology and medical science challenge law-makers. Many laws relating to privacy have been made as a result of the onset of technology.

The growth in electronic communications has created many issues requiring legislative responses. The use of the internet, the growth in the use of mobile phones, including those with cameras, and the proliferation of online social networking have all required legislative responses in recent years. Laws to combat the transmission of child pornography over the internet, the use of the internet for identity theft, and the use of mobile phone cameras to infringe a person's right to privacy have all led to the enactment of new legislation. The recent phenomenon of sexting — sending sexually explicit images electronically — has resulted in teenagers being prosecuted for child pornography offences, and placed on the Sex Offenders Register. Governments have had to respond by reviewing existing laws to determine whether or not they are appropriate to deal with this issue.

Political circumstances

Since the terrorist attacks in the United States on September 11 2001, the Commonwealth government has passed more than 40 new counter-terrorism laws. This legislative activity has resulted in the creation of many new criminal offences; new powers for police and government security agencies to question and detain people, sometimes without charge; and powers for the government to ban organisations believed to have links with terrorists. While increased security at airports and shipping terminals has been deemed necessary to protect the travelling public, many have argued that the new laws have created restrictions in civil rights and basic freedoms.

Increased community awareness and information

Our community is much more informed and aware today than in previous generations. The impact of the internet and a broader range of media has meant that we have much more information at our fingertips than at any time in human history. We use our knowledge to put more pressure on law-makers, particularly in relation to the protection of our rights.

Equal opportunity and anti-discrimination legislation has been continually enacted and updated since the 1970s. The *Equal Opportunity Act 2010* (Vic.) is the latest update at state level, while Commonwealth legislation covers many similar areas, including:

- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Human Rights and Equal Opportunity Commission Act 1986*
- *Disability Discrimination Act 1992*
- *Equal Opportunity for Women in the Workplace Act 1999*
- *Age Discrimination Act 2004*.

We are more aware today of environmental issues than in the past. For most of the first half of the twentieth century we allowed our industries to pollute rivers, seas and the atmosphere, and accepted this as an inevitable part of progress and economic growth. The *Environment Protection Act 1970* (Vic.) was the second such Act passed by any parliament anywhere in the world. Since 1970 the Act has been amended many times to accommodate community concerns about new environmental issues as they have arisen. At the Commonwealth level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was subject to a government review in 2008–09, with the government announcing a number of reforms to improve the law in August 2011. Global warming and the possible effects of climate change led to the Commonwealth Parliament passing the *Clean Energy Act 2011*, which sets up a carbon pricing mechanism and the basis for emissions trading.

Significant incidents

Sometimes a significant event occurs that gains so much public exposure for an issue that the parliament has to act to try and prevent similar incidents occurring in future. Often this may involve a death that may be seen to have been preventable if the law had been different.

In 2006, Brodie Panlock, a 19-year-old waitress at a Hawthorn café, committed suicide by jumping from a multi-storey car park. An inquest held in late 2007 to early 2008 found that Brodie had been constantly bullied and harassed by three of her fellow employees, and that her employer had known of the bullying, but turned a blind eye to it. In February 2010, the employer and the three men who had bullied Brodie were fined $335 000 under provisions of the *Occupational Health and Safety Act 2004* (Vic.). There was no provision for the perpetrators to be given a custodial sentence, so the state government set out to change the law to increase penalties for bullying in the workplace and other forms of bullying, including cyber-bullying. On 7 June 2011, the *Crimes Amendment (Bullying) Act 2011* (Vic.) came into force, allowing workplace bullies to be prosecuted through the criminal law rather than occupational health and safety laws, and allowing for prison sentences of up to ten years for those found guilty.

In August 2011 a four-year-old girl was mauled to death by a bull terrier cross that had run into her home in St Albans, Victoria. Within two weeks the state parliament had passed the *Domestic Animals Amendment (Restricted Breeds) Act 2011* (Vic.),

Following a fatal attack on a four-year-old girl, laws in Victoria controlling the ownership of dangerous dogs were changed by parliament within two weeks.

which obliged the owners of dangerous breeds of dog to register their dogs with local councils, and gave councils to power to destroy unregistered dogs of those breeds.

Updating the legal system

Governments regularly look for ways to improve the operation of the legal system. Generally these seek to address problems such as excessive costs and delays involved in getting matters heard before the courts, but cultural and social issues can lead to changes to the operation of the legal system. These have included:

- The development of legal aid since the 1960s, and the operation of community legal aid centres throughout Victoria. Both state and Commonwealth governments provide funding for legal aid services.
- The establishment of specialist courts to deal with specific social issues and the recognised needs of particular groups in society. The adult and children's Koori courts in different parts of Victoria, the Drug Court in Dandenong, and the Family Violence Court in Heidelberg and Ballarat are all examples of specialist courts.
- The provision of alternative means of solving disputes to avoid the high costs of court action. The Dispute Settlement Centre of Victoria provides assistance to individuals and organisations to help them resolve disputes without resort to expensive court action, while the Neighbourhood Justice Centre in Collingwood deals with a number of legal issues, including both criminal matters and civil disputes.

(See chapter 11 for more details of recent changes to the legal system.)

TEST your understanding

1 In your own words, identify and explain **four** reasons why laws may need to change.
2 Outline one example of legislative change that has occurred for each of the four reasons discussed in question 1.

APPLY your understanding

3 Explain why the law has changed or is about to change in each of the following situations:
   (a) The Victorian Parliament provides police with the power to stop and search ordinary citizens for weapons in designated problem zones.
   (b) The *Terrorism (Community Protection) (Amendment) Act 2006* (Vic.) provides that a person can be taken into custody and detained for up to 14 days if it is felt that this will prevent an imminent terrorist attack from occurring, or it will preserve evidence relating to a recent terrorist attack.
   (c) There has been a spate of vicious attacks by pitbull terriers across Melbourne.
   (d) In rural areas, salinity problems have affected the landscape due to excessive clearing of native vegetation.
   (e) The Victorian Parliament has considered imposing 2 am curfews on all licensed venues in an attempt to reduce the amount of violence in the Melbourne CBD.
4 Over the period of one week, collect five articles from newspapers that discuss changes to the law or suggested changes to the law. For each article, explain the area of law being addressed and give reasons why you think the change in law is necessary.
5 Why is it so important that the law keeps pace with international events? What might occur if our parliaments were not responsive?
6 'Parliament is well placed to address concerns as they arise. The community relies on our law-makers to act quickly to ensure social cohesion.' Discuss this statement in relation to the following:
   (a) anti-terrorism laws
   (b) environment protection laws relating to the dumping of hazardous waste such as toxic chemicals into rivers and streams
   (c) laws relating to underage purchasing and consumption of alcohol.
7 There has been considerable debate on the issue of **same-sex marriage** in Australia. Use the same sex marriage weblink to find out more about this issue and then answer the following questions.
   (a) What is the actual law that many consider needs to be changed in relation to this issue?
   (b) To what extent do you believe this is an issue of changing social values?
   (c) What are the key arguments presented by each side in this debate?

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1.6 The role of the Victorian Law Reform Commission

KEY CONCEPT The Victorian Parliament relies on formal law reform bodies such as the Victorian Law Reform Commission (VLRC) to recommend changes to legislation. The VLRC is an independent, government-funded organisation that develops, monitors and coordinates law reform in Victoria.

The Victorian Law Reform Commission's (VLRC) major responsibility is to research issues that have been referred to it by the Victorian Attorney-General. The VLRC also has the power to recommend minor changes to the law without receiving a reference from government. It is important to note that the VLRC operates independently of government. This independence is necessary because, on occasion, the VLRC may be required to review the activities of government and, when it prepares its report, may be critical of the way that government has managed its law reform agenda.

DID YOU KNOW?

The VLRC has a charter to consult with the community and to advise the Attorney-General on how to improve and update Victorian laws. One of its most significant reports involved the eventual abolition of provocation as a defence under the criminal law of Victoria. The defence of provocation had once allowed for a reduced sentence in circumstances where a person had killed his or her spouse in a fit of rage.

VLRC personnel

The VLRC has a full-time chairperson and five part-time commissioners, and is able to appoint full-time commissioners to work on particular projects. Part-time commissioners can include Supreme Court Justices, County Court judges, magistrates, legal academics, and other people who have had leadership roles in community organisations with interest or expertise in law reform issues. Full-time commissioners are usually appointed on the basis of their expertise in an area of law under investigation. The VLRC also employs the policy and research officers who work on the various projects undertaken by the Commission.

The powers of the VLRC

The Commission's powers are set out in the *Victorian Law Reform Commission Act 2000* (Vic.) Under this legislation, the role of the VLRC is to:

1. make law reform recommendations on matters referred to it by the Attorney-General
2. make recommendations on minor legal issues of general community concern
3. suggest to the Attorney-General that he or she refer a law reform issue to the Commission
4. educate the community on areas of law relevant to the Commission's work
5. monitor and coordinate law reform activity in Victoria.

The law reform process

The VLRC generally uses the following process, although some changes can occur, depending on the amount of time allowed to complete the project and the nature of the reference.

Let's now consider each stage of the law reform process in more detail.

1. Identifying a problem

The process commences when a problem with a current law is identified. This may occur because:

- of changes in social values
- the existing law is too complex
- a court case has identified an area of law in which there may be confusion
- the current situation leads to unnecessary discrimination
- a particular law is not functioning well in practice.

study on

Unit:	3
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Topic:	3
Concept:	2

Do more
Interactivity on the Victorian Law Reform Commission

The VLRC process for considering law reform issues

The problem will usually have been bought to the attention of government by groups or individuals.

2. Attorney-General's reference

The minister in charge of legal matters in the state cabinet, the Attorney-General, provides the commission with a reference. This is in the form of a letter, outlining the issue and providing terms of reference and a date by which a report is expected.

3. Initial research and consultation

Commission staff undertake research into the current state of the law in the area specified. As well as examining current Victorian law, the Commission can also examine corresponding law in other states and even other countries. It will look at any recent attempts made at reform in other jurisdictions, and study the results of recent cases in the area of law under investigation.

Commission staff will also conduct interviews and consultation with groups and individuals who may be affected by the law. The aim is to get as broad a picture as possible of the current situation to identify all the issues that may need consideration.

4. Committee of experts

Opinions may also be sought from experts with a high level of experience and knowledge in the relevant area of law. These experts may be asked to participate in a committee of experts to provide ongoing advice on the issue. These need not be legal specialists, but may have other expertise. For example, when examining the issue of the law relating to abortion, the Commission gathered together a committee of medical specialists to advise it.

5. Publication of a consultation paper

A paper outlining all the issues that have been identified by researchers is published and circulated widely. This may also include a number of options for reform. Individuals and groups known to have an interest in the particular area of law are invited to make submissions in response to the issues raised in the consultation paper. In addition, the Commission attempts to publicise their work as widely as possible so that any interested group or individual can contribute with a submission.

6. Consideration of submissions

Researchers work through submissions received in response to the consultation paper. This will sometimes result in the need for additional research, as issues can

arise from submissions that may not have previously been considered. Commission members seek to ensure they are familiar with all the issues before engaging in broader community consultation.

7. Community consultation

Commission researchers now conduct extensive consultation with those who may be affected by the law. Relevant organisations, experts in the field, and people who work in the community with a stake in the outcome may all be consulted. The Commission may also convene community forums to hear the views of ordinary citizens or community groups. Any disadvantaged groups who may be affected, and their representatives, will also be consulted. The Commission aims to get as broad a cross-section of views as possible, particularly if a major issue of broad community interest is under consideration.

8. Final report

The results of all the research and consultation are combined into a final report, along with a number of recommendations for change. These recommendations could include changes or amendments to existing legislation, the introduction of new legislation, improved educational and community awareness campaigns, or the establishment of new organisations to facilitate change in the necessary areas. The final report is presented to the Attorney-General to be considered by the government of the day.

9. Tabling of the report

The report is required to be tabled in parliament within 14 parliamentary sitting days of its presentation to the Attorney-General. This is the official release of the report to the public and the media, and frequently leads to news stories and opinion pieces in the press and on television current affairs programs. The government will often listen for supportive or negative commentary and responses before making final decisions about the implementation of the report.

10. Government response

The government must now make decisions in response to the VLRC report. This usually occurs as part of the cabinet process. Cabinet may decide to accept all of the report and act on its recommendations, or act on only some of the recommendations. Some recommendations may require legislation, some may simply require a change in government procedures or operations. Cabinet usually charges the Attorney-General and other relevant ministers with the task of preparing any necessary legislation or administrative procedures.

11. Legislation

New legislation, or amendments to existing legislation, necessary to bring recommendations into force go before parliament. If the government does not have a majority in both houses of parliament it may have to consider amendments from the upper house before legislation can be enacted.

Community law reform projects

The VLRC is able to take on law reform projects in response to direct submissions from the public. These are usually minor reforms that do not require the large-scale deployment of Commission resources to research and produce recommendations. Any individual or group may make a suggestion or submission for a project that could provide community benefit, although the VLRC can usually only tackle one or two such projects at any time. On completion, the Commission usually makes

recommendations to the Attorney-General in relation to the area of law dealt with in the project, and it then becomes a matter for government to consider.

An example of a community law reform project was a report released in June 2011, entitled *Supporting young people in police interviews*.

In 2008, a number of community organisations suggested a community law reform project to review the role of independent persons in police interviews with young people. These organisations believed that the rights of young people in custody are not adequately supported during police interviews. They felt that the role and responsibilities of parents or independent support persons in police interviews with young people should be clarified.

The VLRC's recommendations included:

- the establishment of a statewide pool of trained 'support persons' who can be present at interviews with young people in custody when a parent or carer cannot attend
- clarification of the role of a support person, including the ability to inform young people about their legal rights and supporting them in exercising those rights.

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eLesson:

VLRC's review of family violence laws.

Commissioner Judith Pierce is interviewed about the VLRC review into domestic violence.

Searchlight ID: eles-0635

The VLRC has reviewed the procedures used in applying for child protection orders in the Children's Court.

Dealing with child protection issues

In 2009, the Victorian Attorney-General asked the VLRC to review procedures in the Children's Court in child protection cases. It had been found that these cases were subject to a high level of disputation, and it was felt that a more collaborative approach might better serve the interests of children involved in such cases. The reference to the VLRC asked it to develop options that could reduce the level of disputation.

The Commission had to strike a balance between the need for the state to move quickly to protect children from harm, while ensuring fairness in terms of the need to intervene in a family by removing a child into care. The Children's Court has had to deal with more than 3000 applications for such interventions each year. Most of the Children's Court procedures in protection cases are similar to criminal law procedures, which lead automatically to an adversarial approach, although the Commission found that 97 per cent of child protection applications are actually resolved by agreement. This suggests that maintaining the current Children's Court procedures did not reflect reality.

In carrying out its research, the VLRC held 28 formal consultations with interested groups and individuals, released an information paper in February 2010, and received 51 submissions. It presented its final report in October 2010, providing the Attorney-General with five different options for reform. Each of these options has drawn on an increased use of mediation and other methods of dispute resolution, as well as methods tried elsewhere, such as family group conferences. One specific change proposed was the creation of an independent statutory body to represent the interests of children at all stages of the child protection process.

TEST your understanding

1. Explain the function of the VLRC in promoting changes in the law in Victoria.
2. Describe the main powers of the VLRC.
3. What are the two ways by which the VLRC can commence an investigation into an area of the law?

APPLY your understanding

4. Do you believe that VLRC recommendations for changes in the law are likely to reflect prevailing community attitudes and values? Support your response with examples from the processes used by the Commission.
5. Use the **Law reform** weblink in your eBookPLUS to describe **one** project that the VLRC has undertaken and explain whether or not its recommendations were accepted by the parliament.

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1.7 Means by which individuals and groups influence legislative change

KEY CONCEPT One of the key elements of a democracy is that individuals and groups have the right to have their say. Taking part in demonstrations, signing petitions, approaching members of parliament directly and joining groups and associations that are fighting for change can make an impact and lead to change in the law.

The means of influencing legislative change are usually classified as either formal or informal. Formal methods include the activities of the VLRC, the reports and recommendations of inquiries such as a **royal commission** and the findings of parliamentary committees. Informal methods are usually those in which individuals or groups in the community attempt to influence members of parliament to consider a change in the law. These can include activities such as the presentation of petitions, participation in demonstrations, defiance of the law and lobbying. Let's look at these methods first.

A **royal commission** is a public judicial inquiry into an important issue, with powers to make recommendations to government.

Individuals, either alone or as members of an organised group, have the right to pressure for change. This is one of the key elements of our democratic society. For example, the action of the diggers (miners) at the Eureka Stockade in 1854 is one of Australia's earliest instances of a group of people using civil disobedience to apply pressure on the authorities to change the law.

On 3 December 1854, miners fought a fierce but short battle. They wanted parliamentary representation, increased voting rights for diggers and the abolition of the hated licence fee.

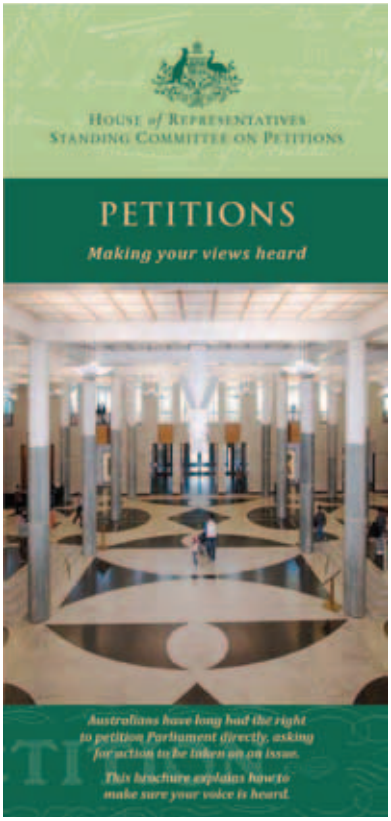
Presentation of petitions

Presenting a petition is the most direct way of bringing an issue to the attention of elected representatives. Petitions can be addressed to either house of parliament, both state and federal. All citizens have the right to petition parliament. The basic requirements of a petition are:

- It must address a matter that is within the legislative jurisdiction of the parliament concerned. Petitioners need to be aware of the different areas of law that come within the powers of federal and state parliaments, to ensure they address a petition to the appropriate parliament.
- In most cases it is expected that the petition be presented to only one house in the appropriate parliament, not to both. Most petitions are presented in the lower house because that is where government is formed.

DID YOU KNOW?

Even in ancient Greece, the right to protest was acknowledged as being essential to a democracy. Playwrights such as Aristophanes mocked political leaders for their vanity, and scholars identified that the future of nations depended upon people being informed and able to mobilise themselves for rebellion.



A petition can be presented to parliament calling for legislative action. Both houses of the Commonwealth Parliament have specific processes that must be followed.

DID YOU KNOW?

Two of the most famous petitions presented to parliament were prepared in 1963 by the Yolngu people of Yirrkala in the Northern Territory, raising issues relating to their dispossession from their traditional lands. These petitions were on pieces of bark, with traditional designs painted around the outside, and typed petitions glued in the centre. These are now on display at Parliament House in Canberra.

- The petition must have a principal petitioner; that is, the main person organising the petition and taking responsibility for ensuring it actually gets to parliament. This person's name and contact details appear at the beginning of the petition.
- The petition must contain a formal address. This is usually in the form of 'The Speaker and the Members of the House of Representatives', or similar for other houses or state parliaments.
- It should indicate who the petition is from. This is usually a group of 'concerned citizens' and may include their location if that is relevant. The location may be the electorate in which they live, or suburb, or state, depending on where signatures have been collected.
- The petition must state the reasons the petition has been prepared. These are the issues or problems that have been identified by the petitioners.
- It must also contain the request for action desired by the petitioners. This is the action the petitioners want parliament to take to solve the problems or issues.
- The petition must be written in moderate language that is not abusive or offensive.
- The main body of the petition is divided into three columns, to include the name, address and signature of each petitioner. Each petitioner should be numbered.
- The request for action should be repeated at the top of every page, and every name and address should be handwritten by each petitioner. Photocopied names and signatures are not accepted.
- Letters or other documents should not be attached.
- If the petition is to be presented to the Victorian state parliament, it must be presented by a member of that parliament, so the petitioners should send it to the member they wish to present it. This will usually be their local member.

What happens to petitions?

The Commonwealth House of Representatives has a Petitions Committee that deals with all petitions to be presented to the House. Petitions are usually sent to that committee, which adheres to the following procedure:

- The chairperson of the Petitions Committee usually presents petitions to parliament on the Monday of each sitting week.
- The details of the petition, including the reasons for the petition, the request for action and the number of signatures, are officially recorded in parliamentary records.
- Details of petitions are published on the Petitions Committee's website.
- The issues raised will usually be brought to the attention of the relevant minister, who is expected to arrange a response from his department.
- After the minister has responded, the committee considers the response, arranges for the response to be tabled in the House and forwards the response to the principal petitioner.
- Details of all petitions and ministerial responses are published on the Committee's website.

Petitions seem to be effective in promoting community support for an issue, but whether or not the views of the people are heard in parliament is another matter. One of the main criticisms of petitions is that once they are lodged, nothing is heard back from parliament.

Lobbying

Lobbying is a process of approaching a member of parliament to argue a case for change. Many organisations seek meetings with their local member or with a minister to present a case for changes in the law. In recent years, lobbying has become a professional activity, with businesses set up to carry out lobbying for a fee. In order to regulate the lobbying industry, the Commonwealth Government has established a code of conduct for lobbyists, and a register of lobbying businesses

and their clients. Close to 300 lobbying businesses are registered, employing over 600 lobbyists. Many of these are former politicians, or former government officials, who know the workings of government, and have personal contact with many current members of parliament. Close to 2000 organisations are registered as clients of these lobbyists, including businesses such as the major banks, and major manufacturing and mining companies; sporting bodies such as the Australian Football League; educational organisations such as universities; and community organisations as diverse as the Salvation Army and the Wilderness Society. All are prepared to pay a fee to have a lobbyist present their views to parliamentarians.

Pressure groups

Pressure groups represent people in society with particular points of view to promote. They provide a ready-made forum for the assembling of opinion and are, perhaps, the most influential means of changing the law. Since the 1990s, it has been widely accepted by political parties that the Green movement has a significant influence in determining the outcome of elections. Beginning with the Franklin Dam blockade in 1982, groups such as the Wilderness Society and the Australian Conservation Foundation have established a firm financial base from upon which they can influence governments in terms of protecting the environment. The construction of the South Gippsland desalination plant by the Brumby Government in 2009 also caused great controversy. The media regularly covered protests by conservation groups on Kilcunda Beach, where locals sought to highlight the potential damage to the environment of this desalination project.

Demonstrations

A demonstration is a public protest, in which people take to the streets to protest against the actions of government, or to raise awareness of an issue of concern. The success of a demonstration depends on the number of participants and the degree to which they capture public support. Most demonstrations in Melbourne involve a march through the city streets, often finishing outside Parliament House in Spring Street, although demonstrators often use a variety of methods to get their message across.

Over the years, many causes have led to a variety of different types of demonstration, not always involving street marches.

A demonstration is a regular way of different groups making their views known to government and urging a change in the law.

- In the late 1960s, demonstrations against Australia's involvement in the Vietnam War were relatively small, often with only a few hundred protesters. They were largely dismissed by government as the views of a small minority. As more people became aware of the issues, the size of the demonstrations grew, culminating in the first moratorium march in May 1970, when over 100 000 demonstrators marched through Melbourne. Within 18 months, Australian troops had been withdrawn from Vietnam.
- In late 1982, protests were growing against the construction of a dam in south-west Tasmania that would have flooded the Franklin River. At that time a federal by-election was held for the federal electorate of Flinders in Victoria. Voters were encouraged to write the words 'No Dams' on their ballot papers and around 42 per cent of voters did so. This action is credited with encouraging both major parties to promise to intervene in the Franklin Dam issue during the federal election that was held in March 1983.
- In 2007, the Victorian state government introduced new liquor licensing laws, which required all live music venues to have increased security. For many smaller

venues, the additional cost made the provision of live music too expensive and they began closing down their live music activities. When one of the most popular venues, the Tote Hotel in Collingwood, was facing closure in early 2010, between 20 000 and 50 000 demonstrators protested in the streets of Melbourne. This led to a relaxation of some of these laws, with small music venues having greater flexibility to organise their own security.

Defiance of the law

Another quite public means of promoting change is by deliberately breaking the law, with the result that police may arrest the individuals concerned. These individuals then use the criminal law processes as a means of drawing attention to their demands for reform.

- In a celebrated example from the 1980s, Frank Penhalluriack, the proprietor of Penhalluriack's Building & Garden Supplies, consistently broke laws that prohibited Sunday trading in Melbourne with the exception of designated tourist areas. His hardware store in Hawthorn Road, Caulfield, became a frequent centre of media and police activity on Sundays as Penhalluriack was charged for selling goods illegally. His chief complaint was that if his shop was located on the opposite side of the road, which was designated as a tourist precinct, he could operate on Sundays quite legally. After a decade of prosecutions and penalties, the Victorian Parliament eventually changed the law in 1987.
- In the late 1960s, one of the main grievances in relation to Australia's participation in the Vietnam War was the use of conscription to increase the number of troops that could be sent overseas. Many of those conscripted chose to defy the law by burning their conscription documents and refusing to be inducted into the army. The court cases and imprisonment of many of these young men helped to turn public opinion against the war.
- In 1982, as protests grew against the Franklin Dam, the Tasmanian Government passed laws making much of the area around the construction site private property and enforcing special bail conditions for anyone caught trespassing. Protesters attempted to set up a blockade to prevent earth-moving equipment from being used in the dam site. Over 1200 people were arrested for trespassing, and more than 500 were imprisoned for refusing to abide by bail conditions and returning to the site. The construction of the dam was eventually stopped with the passing of the *World Heritage Properties Conservation Act 1983* (Cth).

TEST your understanding

1. Distinguish between formal and informal methods of changing the law.
2. What changes to the law did the diggers of the Eureka Stockade seek?
3. Explain the process for presenting a petition to parliament.
4. In what ways does the parliament provide feedback to petitioners?
5. Give examples to explain how the lobbying of parliamentarians has become a highly professional activity.

APPLY your understanding

6. Collect a portfolio of five newspaper articles dealing with changes to the law. You may search the newspapers or undertake an internet search (try typing in the words, 'Pressure to change law in Victoria').
   (a) Provide a summary of one of the articles.
   (b) How does this article demonstrate the role played by an individual or group in bringing about change to the law?
7. Find an example of pressure-group advertising. Explain how pressure groups attempt to change the law.
8. 'Although formal processes for law change are effective, it can be years before change occurs. In contrast, informal means of calling for law reform are more immediate and ultimately more efficient.' Comment on this statement, referring to cases in the media that have arisen during the past 12 months.

1.8 Use of the media and legislative change

KEY CONCEPT In today's connected world, access to the media provides one of the strongest means of building up an impetus for legislative change. Groups or individuals who are able to make use of the media can improve their chances of success, and when a media organisation decides to support a particular campaign, it can have a huge impact on the momentum for change.

The media are very influential and play a crucial role in forming and reflecting public opinion. Most demonstrations and instances of civil disobedience are carried out in the hope of achieving media coverage for an issue or campaign. Media campaigns have traditionally used newspapers, radio and television, but the internet and social media are increasingly significant as means of promoting ideas for changes in the law.

Newspapers

Every day newspapers publish letters to the editor in which individuals express their opinions on a wide range of issues. In many cases, the issues of concern to readers require changes to the law and large numbers of such letters can reflect significant public opinion. Daily editorials are also used to raise matters requiring legislative change. Newspapers often conduct campaigns on issues they believe require more attention from government. Newspapers also operate online editions and provide the means by which their readers can comment on stories and issues of the day. Daily online opinion polls are also a feature of newspapers and allow them to gain speedy feedback from readers on a variety of issues. The state government has controversially made use of this facility in relation to sentencing of criminals in the courts.

State government surveys *Herald Sun* readers on sentencing

In July and August 2011, the Baillieu government conducted a survey through the *Herald Sun* newspaper, asking readers for their views on sentencing for a variety of criminal offences. Readers were given 17 hypothetical cases of offences and asked to give their opinion on what the sentence should be for each offence. Offences included that of a man killing a close friend in a minor disagreement, a drug addict using a steak knife to rob someone to buy drugs and a drink driver killing someone after speeding through a stop sign. Over 18 500 people completed the survey and the government released the results in December 2011. Attorney-General Robert Clark said the results would be used to assist the government in changing the law to increase minimum sentences that could be imposed by judges. Legal experts criticised the survey and the government response, expressing concern that the public did not always know the details of cases before the courts, and could too easily believe sentences were too lenient.

Radio

Talkback radio programs provide an opportunity for members of the public to air their views about possible changes in the law. Some talkback hosts have large audiences, allowing them to exert a great deal of influence over public opinion. A number of these radio hosts have been described as 'shock jocks' and have variously been accused of holding extreme views, cutting off callers who disagree with them and accepting cash to provide favourable comments about particular businesses, without disclosing this as paid advertising. Nevertheless, radio remains an influential medium and can provide opportunities for the public to raise important issues.

Television

Television current affairs programs can also be very influential in leading to changes in the law. Many people with serious complaints about the activities of rogue businesses have used an interview on *A Current Affair* or *Today Tonight* to bring these activities to the attention of government authorities. The ABC's *Four Corners* program has been very influential in raising important legal issues over many years. A report on corruption in the Queensland police force aired in 1987 led to the establishment of a major inquiry that set up a permanent Criminal Justice Commission. A number of senior police and government ministers were prosecuted as a result of the inquiry. More recently, another *Four Corners* report has led to changes in animal welfare laws.

Cruelty in live animal exports

Cruelty in the live animal export trade was revealed by the *Four Corners* program, leading to changes in the regulation of the trade.

In May 2011, the ABC's *Four Corners* program showed footage of cattle exported from Australia being subjected to cruel treatment in Indonesian abattoirs. Much of the footage shown on the program was filmed by Animals Australia members, with a view to bringing the treatment of these animals to the attention of the television audience. A public outcry led to government action to suspend live cattle exports to Indonesia. Two private members' Bills were introduced into the House of Representatives with the aim of ending the live animal export trade. Both were defeated in the House. In October 2011, the Commonwealth Government introduced a new regulatory framework designed to improve the treatment of animals exported to other countries for slaughter and the trade with Indonesia resumed. Despite this, many animal welfare organisations do not believe the new regulations go far enough and continue to campaign for an end to live animal exports.

DID YOU KNOW?

When Barack Obama was running for President of the United States in 2008, his campaign team created election advertising to be shown on YouTube. The material was watched for 14.5 million hours, all for free, the equivalent of $47 million worth of paid television advertising. President Obama launched his re-election campaign for 2012 on Facebook in April 2011. Voters in the US can post comments, suggestions and ideas for the future on the President's Facebook page.

The internet and social networking

In many ways, the internet and the development of portable devices such as smartphones have revolutionised communications in the twenty-first century. New platforms provide the means for community and other groups to communicate their ideas and proposals for change.

- Online organisations such as GetUp have campaigned on issues such as migration laws, Australia's involvement in the Iraq war, the Murray Darling Basin environment and coal seam gas mining. GetUp uses its website as a means by which its members and followers can express their opinions and call for changes in the law.
- Social networking media such as Facebook and Twitter have been used by political activists to conduct campaigns for change. The Occupy Melbourne movement set up a Facebook page in 2011 to allow its members and supporters to promote their views on the need for change in society. Movements for social and political change in various parts of the world have used Twitter as a means of keeping followers updated, enabling them to bring large numbers of people to demonstrations and other protest activities.
- The Wikileaks website has been used to release previously secret government files, raising people's awareness of government activities, and highlighting areas that could become a focus for calls for changes in the law.

The effectiveness of methods used to influence change in the law

Many individuals and groups use a variety of methods to influence change. You would be sadly disappointed if the only method used to affect change was a petition. If, however, you sought media attention through talking on radio or television, taking out a full page advertisement in a newspaper and holding a protest rally, you might be more successful in galvanising opinion and, perhaps, support from politicians. Table 1.2 analyses the likely effectiveness of the methods used to influence legislative change.

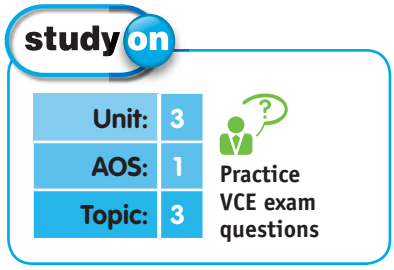


TABLE 1.2 Effectiveness of methods use to influence change to the law

Method	Effectiveness of methods used to influence change to the law
Petition	Petitions alone are unlikely to influence legislative change, but they can be successful in drawing parliament's attention to an issue. Petitions can gain support as they are a peaceful means of effecting change and any citizen can organise a petition. Petitions that gain more signatures are more likely to effect change.
Demonstrations	Demonstrations can be effective if they attract media attention, thus highlighting the issue and increasing the chances of parliamentarians listening to the views of their constituents, particularly if the cause gains public support. In early 2012 Victorian nurses staged a number of rallies and many patients publicly joined in. If demonstrations become violent, however, they may be less effective in impacting legislative change because they are less likely to involve community support.
Lobbying	Employing the services of an expert to lobby for a cause may be effective given that many lobbyists are former politicians, or former government officials, who know the workings of government and have personal contact with many current members of parliament. The downside of using an organisation to lobby for your cause is that a fee may be charged for this service.
Defiance of the law	Disobeying the law can be effective if it raises media awareness of the issue, particularly if civil disobedience highlights that the law is in fact out of date and needs to be changed. Frank Penhalluriack gained support and had an impact on changing trading hours in Melbourne. Breaking the law to highlight a cause, however, can lead to prosecution and may only result in turning public opinion against a cause.
Use of the media	Using the media is a powerful method of effecting change because it increases public awareness of an issue. If politicians see there is public support for an issue they will begin to listen. The issue of same sex marriages is a good example where politicians are beginning to listen to the views of constituents. Use of the media may, however, hinder a cause if media coverage fails to highlight the real broader issues of change being sought.

TEST your understanding

1. Describe three ways in which individuals and groups can make use of media such as newspapers, radio and television to influence legislative change.
2. What advantages do the internet and social networking have over traditional media in promoting ideas for changes in the law?

APPLY your understanding

3. Investigate changes that have been made to the sentencing laws since the *Herald Sun* survey of 2011. Compare these changes with the results of the survey (available online) and comment on how influential the survey was in determining the changes that were made to the legislation.
4. Identify a recent issue raised in a television current affairs program. Did the airing of the issue lead to changes in the law? How influential was the program in bringing about that change?
5. Use the **GetUp** weblink in your eBookPLUS to investigate campaigns recently conducted by this organisation.
   (a) Identify **three** issues that are currently the focus of GetUp campaigns.
   (b) Outline an issue GetUp has recently promoted that has led to some change in the law.

SKILL DRILL

KEY SKILL TO ACQUIRE:

- evaluate the effectiveness of methods used by individuals and groups to influence change in the law.

SKILL DEFINITION

Evaluate means to make a judgement based on criteria, and supported by evidence and examples.

In evaluating the effectiveness of methods used to influence change in the law, it is important to be able to call on examples of the different methods, both successful and unsuccessful. Consider the following case studies.

Mining tax proceeds

The mining industry conducted a strong campaign against the original resources super profits tax in 2010.

In April 2008, the newly elected Rudd government conducted the Australia 2020 Summit, a meeting of 1000 people called together to propose ideas for the future of the country. One significant issue discussed was that of the structure of the taxation system. As a result of the discussions, a comprehensive review of the tax system was set up, under the leadership the Secretary of the Treasury, Dr Ken Henry. In December 2009 the review panel presented its report to the government, which examined its contents before publicly responding in early 2010. At this time the government decided to adopt one of the review's recommendations, a resources super profits tax. This tax was to be levied on mining companies and used to reduce the company tax rate, and pay for a number of other government programs. The tax was strongly opposed by large mining companies, which conducted a strong advertising campaign in all the media, claiming the tax would destroy the mining industry and slow Australia's economic growth. For a while, public opinion was strongly against the tax and this unpopularity may have contributed to the replacement of Kevin Rudd with Julia Gillard as prime minister in June 2010. The new prime minister negotiated a new version of the tax with some of the larger mining companies, resulting in its change to the minerals resource rent tax. The tax passed through the House of Representatives in late 2011 and through the Senate in 2012. This tax had the support of some larger mining companies, although some have continued to oppose the tax. Opposition Leader Tony Abbott maintained that if his party won government at the next election, they would repeal the tax.

eBookplus

Use the **anti-mining tax campaign** weblink in your eBookplus to see the campaign played out in the media against the mining tax.

QUESTIONS

1. Was the original recommendation for a resources super profits tax a result of formal or informal means of achieving legislative change?
2. How effective was the original recommendation as a means of changing the law? Give reasons for your answer.
3. What methods did opponents of the tax use to present their opposition to its introduction?
4. How effective was their campaign? Explain your answer.
5. Consider all the parties in this process, and evaluate the effectiveness of the methods used by each of the following groups and individuals in achieving legislative change:
   (a) The Henry tax review
   (b) The large mining companies that negotiated changes with the Gillard government
   (c) The government, as led by both Kevin Rudd and Julia Gillard
   (d) Those mining companies that continued to oppose the tax
   (e) The federal opposition.

Carbon tax enacted

Since the 1980s there has been growing concern in response to the scientific evidence of global warming occurring as a result of human activities, such as the burning of fossil fuels. At an international conference in Rio de Janeiro, Brazil in 1992, governments around the world committed to taking action to reduce carbon emissions over time. During the early years of this century, public opinion in Australia became increasingly more supportive of government taking action to address the issue of climate change. At the 2007 federal election, both sides of politics promised to introduce an emissions trading scheme as a means of ultimately reducing Australia's carbon emissions.

The newly elected Rudd government set about developing such a scheme and introduced legislation in 2009. Because the government did not have a majority in the Senate, it had to negotiate some changes to the legislation with then opposition leader Malcolm Turnbull, and a compromise bill was introduced in November 2009. Soon after, Malcolm Turnbull was replaced as Opposition leader by Tony Abbott, who refused to agree to the passage of the Bill through the upper house. The legislation was put on hold.

No action had been taken by the time of the August 2010 federal election, when a hung parliament resulted. As part of the negotiations that occurred in the formation of a minority government, Prime Minister Julia Gillard agreed to a request from some of the cross-bench members of parliament that a carbon tax be introduced during the coming parliament, as a means of dealing with the climate change issue. Prior to the election the Prime Minister had promised that her government would not introduce a carbon tax, so she was attacked as having broken an election promise. Legislation was negotiated with the cross-bench members of the House of Representatives, and with the Greens, who now held the balance of power in the Senate. The *Clean Energy Act 2011* became law after passing the Senate in November 2011, with the tax taking effect in July 2012.

Many people came out to support a carbon tax. This rally was held in Brisbane on World Environment Day.

QUESTIONS

1. Did the initial impetus for government action in Australia on climate change come from formal or informal means?
2. How effective was this pressure for legislative change by 2007? Give reasons for your answer.
3. Why was the Opposition an effective influence on the legislative changes proposed in 2009?
4. What methods were used by the cross-bench MPs (members of parliament) and the Greens to bring about legislative change in relation to the issue of climate change in 2010 and 2011?
5. Consider all the parties in this process, and evaluate the effectiveness of the methods used by each of the following groups and individuals in achieving legislative change:
   (a) Public opinion on the issue of climate change prior to the 2007 election
   (b) The federal Opposition, as led by both Malcolm Turnbull and Tony Abbott
   (c) The government, as led by both Kevin Rudd and Julia Gillard
   (d) The cross-bench MPs in the House of Representatives
   (e) The Greens and other groups campaigning on environmental issues.

1.9 The legislative process for the progress of a Bill through parliament

KEY CONCEPT The passage of a Bill through parliament is often fiery, with politicians' tempers running hot and interested parties in the public gallery also having their say. When the Abortion Law Reform Bill eventually passed the Legislative Council in 2009, shouts erupted from the public gallery, and people were evicted from the chamber by security guards.

DID YOU KNOW?

The Senate conducted one of the longest debates in history over the wording of one section of the *Family Law Act 1975* (Cwlth). The words 'irretrievable breakdown of marriage', which describe the grounds for a divorce, were debated by senators for over 40 hours.

A **Bill** is a proposed law or change to an existing law to be debated by parliament.

The law-making process commences with an idea for a piece of legislation that is deemed necessary. This idea often comes from government, usually from its Cabinet, but it can also come from outside sources such as pressure groups and lobbyists. It is estimated that about half of the total sitting time of the house is taken up considering Bills. Bills range from matters of an administrative nature to those that have significant social, economic and industrial impact. From 2009 to 2011, an average of 159 Bills were passed in Federal Parliament and became Acts.

Types of Bills

A **Bill** is a proposal for a new law or a change to an existing law. Parliament relies on set procedures to make or change laws. Before any Bills can become Acts of parliament, they have to be debated and passed by both houses, and then approved by the Crown. This is known as the legislative process. The main types of Bill are:

- government Bills, which are proposed by the ministers. These Bills are guaranteed passage through the lower house where the government has a majority of members.
- private members' Bills, which do not have the support of the government and are usually introduced by Opposition members or government backbenchers. These Bills often fail because they do not reflect the policies of the government and will be voted down in the lower house.
- money or appropriation Bills, which involve government spending or raising taxes. These Bills cannot originate in the Senate. The Senate may not amend Bills that impose taxation and other kinds of appropriation Bills that will increase 'proposed change or burden on the people', but it can ask the House of Representatives to make amendments to these types of Bills.

Before the Bill comes to parliament

Having made the decision to bring new legislation before parliament, the minister responsible or private member has to have the Bill drafted. This task is carried out by the Office of the Parliamentary Counsel, a parliamentary office which includes a staff of around 35 professional drafters.

- One or more of these drafters will be briefed by the relevant government department, or by the private member and his or her staff, and given details of the requirements to be included in the Bill.
- Drafters are usually experts at transforming broad policy directions into appropriate language, ensuring all necessary legal and constitutional requirements are adhered to.
- A draft Bill is sent to the minister's or private member's office for consideration. If it needs changes, it will be returned with comments, or a further briefing may occur.
- Once a satisfactory Bill has been produced, if it is a government Bill it will be printed and presented to cabinet, where it may be referred to the cabinet's Legislation Committee.
- If there is a Labor Party government, the Bill may also be presented to **caucus** for discussion.

The **caucus** is the total membership of all Labor members in the parliament, both senators and members of the House of Representatives.

Where do ideas come from?

- Political parties
- Parliamentary committees
- Government departments
- Organisations
- Media
- Pressure groups
- Public opinion
- Court decisions
- Formal law reform bodies

The development of policy

- Government policy developed by the responsible minister
- Cabinet develops the general details of the Bill and refers expert reports to the parliamentary counsel for drafting
- Opposition member may prepare a private member's Bill

What problems exist in drafting legislation?

- Difficult to foresee future events
- Meaning of words might change over time
- The Bill might relate to complex areas with technical language
- New law might be in conflict with existing statutes
- Difficult to accommodate the opinions of all people in controversial areas

The Bill enters the house of origin (usually the lower house)

- Notice of intention
- First reading
- Second reading: debate commences after the minister's speech
- Consideration in detail: the Bill is debated, clause by clause
- Adoption of the report by the committee
- Third reading

House of review

- The Bill now proceeds to the other house where it is examined. If changes are made the Bill returns to the house of origin.
- Bills may be examined by a designated committee

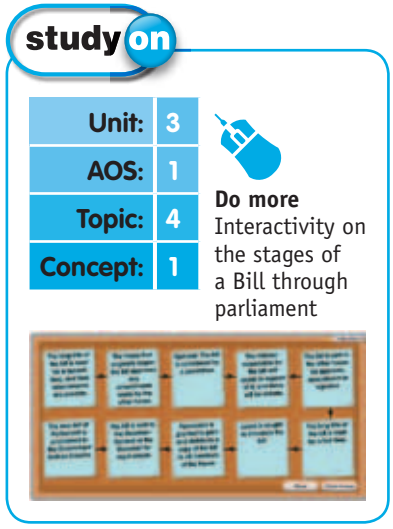
Royal assent

When both houses have read the Bill three times and agree on its contents, royal assent is given by the Queen's representative at a meeting of the Executive Council.

Proclamation

- The Bill becomes an Act of parliament and is effective on the date specified in the *Government Gazette.*
- The government undertakes programs to educate the public on the new law.

The process by which a Bill passess through parliament



Progress through parliament

Once the Bill has been drafted to the satisfaction of the minister and cabinet, it commences on its path towards becoming law.

Notice of intention and first reading

Scheduling of the introduction of legislation is carried out in consultation with the manager of government business in the house, who is a minister with responsibility for scheduling government legislation during a parliamentary session. He or she will usually work closely with the Speaker and the Clerk of the House, and will allocate time for private Bills as requested. Once scheduled the following steps occur.

- The minister or private member gives notice of intention to introduce the Bill.
- The first reading occurs, in which the title of the Bill is read out and copies of the Bill are circulated to members, along with an explanatory memorandum, summarising the Bill's content and purpose.
- No discussion of the Bill takes place at this time. The minister may move immediately to the second reading, or this may be adjourned to a later date.

Second reading

This is the first occasion when the Bill is debated.

- The minister moves that the Bill be read a second time and proceeds to present the second reading speech. This speech allows the minister to outline details of the Bill, its purpose and what the government hopes to achieve with its passing.
- On completion of the minister's second reading speech, debate may continue, or may be adjourned to a later date.
- When debate resumes, the **shadow minister** will present the Opposition's response to the Bill. If the Opposition has decided to oppose the Bill, the shadow minister will outline the reasons for this. Not all Bills are opposed, and sometimes the Opposition may only want minor changes to the Bill. These may be outlined at this stage.
- Second reading debate continues, with speakers for and against the Bill taking turns in presenting their views to the house. The content of these speeches is reproduced in Hansard, which is a record of the debates and proceedings in parliament.
- At the conclusion of the debate, the motion will be put and, if carried, the Bill moves to the next stage.

A **shadow minister** is a member of the Opposition's leadership group who has responsibility for the policy area of a particular minister. He or she would be likely to become minister if the Opposition won government.

Consideration in detail

The Speaker vacates the chair and leaves the chamber for this stage, with the chair taken by the Deputy Speaker, who is also Chair of Committees.

- The Bill is debated clause by clause. This stage is known as *consideration in detail*. The corresponding stage in the upper house is known as *committee of the whole*.
- Amendments can be moved and debated at this stage, and voted on. Successful amendments will be incorporated into the Bill, often replacing some of the original wording.
- During this stage, the Bill may be referred to a smaller committee. The House will have a number of standing committees, many of which have a specific role in relation to an area of government policy. Sometimes it is deemed appropriate for such a committee to examine the Bill before proceeding further.
- At the conclusion of consideration in detail, the Speaker resumes the chair and the Chair of Committees reports on the progress made. The House then votes to accept this report before moving to the next stage.

Third reading

The minister moves that the Bill (as amended) be read a third time.

- Usually there is no debate during the third reading, unless the Bill has been substantially amended, in which case the minister may wish to make additional comments related to the purpose of the Bill.
- A vote at the completion of the third reading signals that the Bill has completed its passage of the lower house.

The upper house

The Bill follows the same stages in the upper house as it has in the lower house.

- The federal government has rarely held a majority in the Senate over the last 3 years, so amendments are most likely to occur in the Senate.
- Bills that require detailed analysis are referred to the Selection of Bills Committee of the Senate, which reports back with any recommendations for action on the Bill.
- If the Bill is successfully amended in the upper house, it must be returned to the lower house for those amendments to be approved.
- If the lower house does not agree with amendments made in the upper house, the Bill may be returned with a request that the Bill be passed without those amendments.
- If the upper house does not agree to this request, the Bill may be laid aside.
- Once the Bill as agreed to by both houses has been passed it moves to the next stage.

study on

Unit:	3
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Practice VCE exam questions

Royal assent and proclamation

Having passed both houses successfully, the final stages allow the Bill to become law.

- The Governor-General (or governor at state level) provides the royal assent. This is the final stage at which the Bill becomes an Act.
- Once it has become law, the Act is proclaimed in the *Government Gazette*. This usually in the form of a statement by the Governor-General indicating that the Bill has been signed into law. It also announces a commencement date for the Act, or if the Act comes into force immediately.

TEST your understanding

1 Define the following terms:
(a) Bill
(b) second reading speech
(c) consideration in detail stage
(d) royal assent
(e) proclamation.

2 Prepare an overview or summary of this section, referring to the stages as listed below. Write a brief statement under each heading.
- The progress of a Bill through parliament
- Parliament has to follow certain steps before a Bill becomes an Act.
- The following procedures ensure that proposed laws can be debated and amended if necessary:
(a) second reading
(b) consideration in detail stage
(c) adoption of the report by the committee
(d) royal assent
(e) proclamation.

3 Use the following terms in a sentence to explain their meaning:
(a) motion
(b) amendment
(c) Act
(d) Hansard.

APPLY your understanding

4 Why do you think it is important for a Bill to be debated so often?

5 Would you say the process by which laws are made in Australia reflects the principles of representative government and responsible government? Explain, with references to examples in the recent media.

1.10 Strengths and weaknesses of parliament as a law-making body

KEY CONCEPT Although the parliament has some significant strengths in law-making it does not always get it right.

study on

Summary

Unit 3:
Law-making

Area of study 1:
Parliament and the citizen

Topic 5:
Effectiveness of parliament as a law-maker

Strengths of parliament as a law-maker

Parliament is the supreme law-maker and has, at its disposal, a variety of mechanisms that allow it to represent the interests of the people. Let us look at the strengths of parliament as a law-maker.

Access to expert opinion

Parliament conducts investigations into matters of concern. Gathering data from a wide variety of sources allows parliament to make informed decisions on policy issues when drafting Bills. For example, the Road Safety Committee of the Victorian Parliament undertook a major study of random drug testing of motorists. After much debate and community consultation, the legislation enabling Victoria Police to test drivers for the recent consumption of THC (the active component in cannabis) and methamphetamines (speed) was passed in December 2003.

Consultation with the public

Through the establishment of committees and public inquiries, parliament allows the community to be actively involved with regard to proposals for law reform. In this way, it provides a forum for debate. Formal law reform bodies, such as the Victorian Law Reform Commission, issue discussion papers that outline possible avenues for change. The public is given the opportunity to submit written and oral statements in an attempt to influence law reform. This is one of the key elements of our democratic system of government.

Legislating on an entire topic

Parliament has the power to legislate on an entire topic. This provides certainty in the law with a comprehensive declaration of rights and responsibilities on a particular issue. For example, the Commonwealth Parliament introduced a far-reaching piece of legislation on 1 January 1976 to regulate issues of marriage, dissolution of marriage, custody, property, maintenance and access to children. Known as the *Family Law Act 1975* (Cwlth), this statute has had a profound impact on Australian society.

In late 2009, the Australian Crime Commission revealed that organised crime syndicates had infiltrated the nation's wharves and airports and were exploiting security weaknesses. The Commonwealth moved quickly to review the security card system in an attempt to address growing concerns over terrorism and organised crime.

Law made by parliament is responsive and flexible

Society is experiencing rapid change in many areas. Parliament can act quickly when necessary to introduce laws in response to these changes. For example, when H1N1 (swine flu) spread across the world in 2009, the Commonwealth reacted swiftly by tightening Australia's quarantine laws and reporting procedures.

Looking to the future

Parliament has the power to make law *in futuro* (to cover future circumstances). This reinforces confidence in the legal system in that the community can be informed of forthcoming legislation. Parliament also may undertake public education programs before the law comes into effect, especially in regard to areas involving police powers and road laws. When parliament introduces new laws affecting motorists, bodies such as the Transport Accident Commission conduct detailed public awareness campaigns.

Climate change has produced significant issues for governments around the world. As an essential part of election campaign promises, political leaders make campaign promises about environmental protection.

Weaknesses of parliament as a law-maker

Although parliament is a powerful law-maker, it is inhibited by some weaknesses which we now explore.

Although the Victorian Government's own expert committee recommended in favour of the decriminalisation of street prostitution in 2004, the Premier dropped the plans when local residents in St Kilda pledged to campaign against the local member at the forthcoming state election. The local member at risk was then Deputy Premier, John Thwaites. The law was never introduced.

study on

Unit:	3
AOS:	1
Topic:	5
Concept:	4

See more PowerPoint on parliament as a representative body

studyon
Unit: 3
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Practice VCE exam questions

Fear of voter backlash

Politicians are conscious of public opinion. Therefore, controversial issues are sometimes not handled by parliament because political parties fear losing voter support.

Bicameral structure of parliament

Where the government does not control the upper house, Opposition parties can frustrate the legislative program purely for political purposes. Changing statute law can be very time-consuming, and much needed law reform can be delayed because opponents of the government wish to indulge in 'point scoring' rather than an objective analysis of the issues. On the other hand, if the government controls the upper house, it might act only as a 'rubber stamp' and not vigorously review government Bills.

Parliament is not always sitting

The number of sitting days for parliaments is relatively few and, therefore, law reform may be delayed. This problem is partly addressed because the parliament has created subordinate authorities that have the authority to create law in narrowly defined areas. These bodies, which include government department, local councils and statutory authorities, create law on an ongoing basis on behalf of the parliament.

DID YOU KNOW?

The total number of sitting days for the House of Representatives in 2008 was 69 days and the Senate sat for 52 days. Australian politicians sit fewer days than UK or US politicians. In the United Kingdom, the House of Commons sat 149 days and the House of Lords sat for 148 days in 2008. In the United States of America, the House of Representatives sat for 118 days and the Senate sat for 184 days in 2008.

Difficulties in drafting legislation

When parliament is drafting and debating legislation relating to a highly technical area, the words contained in the Bill may not be fully defined. This may lead to confusion in the community and lengthy court cases where the exact intention of parliament must be later determined by a judge or magistrate.

Inconsistencies in statute laws between states

State parliaments in Australia each have control over key areas such as criminal law and road rules. In some instances, state parliaments create laws that are inconsistent across the nation, and this means that the rights of people vary depending on the state in which the person lives. For example, the age at which a person can obtain a driver's licence varies from state to state. Also, peer passenger restrictions for P-plate drivers vary across Australia. For people conducting business on a nationwide basis, these state-by-state differences can present major problems.

TEST your understanding

1. Define the term *in futuro*. In what ways could the requirement that parliament make laws *in futuro* create problems in the law-making process?
2. Give **three** examples of law-making where you believe that the parliament has acted appropriately to enhance representative democracy.
3. Suggest **two** reasons why inconsistencies could arise between acts of parliament.

APPLY your understanding

4. 'Parliament has an important role to play in creating laws that provide social harmony. However, even though parliament can access detailed research, it sometimes fails to act where there is a need for law reform.' Discuss this statement with reference to the strengths and weaknesses of parliament as a law-maker. Refer to case studies drawn from current media reports concerning debates over public policy and the passage of Bills through the parliament.

Northern Territory National Emergency Response Act 2007 (Cwlth)

The Northern Territory National Emergency Response Act, introduced by the Howard Government and supported largely by the Rudd and Gillard Governments involved major changes to welfare provision, law enforcement and land tenure of Aboriginal Australians in the Northern Territory. This law was made by the Commonwealth according to its constitutional powers to make law for the territories.

Aboriginal Australians have occupied the land for over 40 000 years. While many gains have been made in health and education and in the sporting arena over the past 30 years, more work needs to be done to ensure that young Aboriginal Australians share the same rights and opportunities as non-indigenous people.

DID YOU KNOW?

The Commonwealth Parliament has the power to make any law for the territories. This power exists under s. 122 of the Constitution.

The reason the law had to change

In August 2006, the Northern Territory Government commissioned a Board of Inquiry into the issue of sexual abuse of Aboriginal children. In June 2007, the Board of Inquiry released its report, *Little Children are Sacred*, concluding that sexual abuse of children in Aboriginal communities had reached crisis levels, and that urgent changes to the law were needed to deal with the problem. The *Northern Territory National Emergency Response Act 2007* was the legislative response of the Commonwealth government. It became known as the Northern Territory intervention.

Purpose of the legislation

The main purposes of the legislation include the following:

- additional police deployed to affected communities
- new restrictions on alcohol and kava
- pornography filters on publicly funded computers
- Commonwealth funding for provision of community services
- removal of customary law and cultural practice considerations from bail applications and sentencing within criminal proceedings
- quarantining of a proportion of welfare benefits to all recipients in some communities
- quarantining of all benefits of those who neglect their children
- create leases to the Commonwealth for a period of five years to enable it to acquire rights, titles and interests in town camps
- provide for closer management by the Commonwealth of community stores
- to modify or suspend the operation of the Racial Discrimination Act in some areas.

Attitudes of individuals and groups

At the time, the intervention was criticised, with some believing it was simply a publicity seeking stunt by the government in the lead up to the 2007 election. It was also criticised by the Northern Territory government and the Human Rights and Equal Opportunity Commission, particularly in relation to the suspension of the Racial Discrimination Act.

The response in Aboriginal communities was mixed, with some community leaders welcoming changes that reduced violence in communities and provided incentives for children to attend school. Others were critical of the fact that there had been no consultation with Aboriginal people, particularly with leaders and elders in communities. Some claimed that it reminded them of the days many had spent on missions, when all decisions were made for them by white bureaucrats.

Recent developments

The intervention remained in place after the change of government at the 2007 election, but has been the subject of further reports and legislation:

- In 2009, a United Nations report criticised the intervention, particularly the suspension of the Racial Discrimination Act. The report found a need to develop new initiatives to conform to international standards requiring respect for cultural integrity.
- In 2010, Indigenous Affairs Minister, Jenny Macklin, ended the suspension of the Racial Discrimination Act, restoring rights under that Act.
- In February 2011, a group of respected Aboriginal elders produced a document protesting against the continuation of the intervention. The document stated, 'As people in our own land we are shocked by the failure of democratic processes, of the failure to consult with us and of the total disregard for us as human beings.' The statement was endorsed by former Prime Minister Malcolm Fraser, rights advocate Patrick Dodson, lawyer Larissa Behrendt and former Family Court Chief Justice Alastair Nicholson.
- As part of the intervention, many Aboriginal people were issued with a basics card, with half of their income available only through the card and only to be spent on food. A report on the use of the card in 2011 found that 85 per cent of women said they had not changed their shopping habits because of the card, and 74 per cent said it did not make it any easier to look after their family.
- *Intervention creep* is a term used to describe Aboriginal people fleeing from communities covered by the intervention into larger cities like Alice Springs and Darwin, increasing the number of homeless people sleeping rough in those cities.

QUESTIONS

1. Give **two** reasons why the Commonwealth Parliament introduced the Northern Territory National Emergency Response Act.
2. Under what authority did the Commonwealth Parliament create this law?
3. Outline the controversy arising from this law regarding the Racial Discrimination Act.
4. Explain **two** methods that have been used to influence the development of law in this area.
5. Do you agree that sometimes it is useful for Australia to have a body such as the United Nations criticise our laws and policies?
6. To what extent does this case highlight the strengths of the Commonwealth Parliament as a law-maker?

CHAPTER 1 REVIEW

Assessment task — Outcome 1

On completion of this unit the student should be able to explain the structure and role of parliament, including its processes and effectiveness as a law-making body, describe why legal change is needed, and the means by which such change can be influenced.

Please note: Outcome 1 contributes 25 marks out of the 100 marks allocated to school-assessed coursework for Unit 3.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- explain the principles and structures of the Australian parliamentary system
- use contemporary examples to explain the influences on legislative change
- evaluate the effectivess of methods used by individuals and groups to influence change in the law
- critically evaluate the law-making processes of parliament.

Structured questions

Question 1

Individuals, either alone or as the member of an organised group, have the right to pressure for changes. This is one of the key elements of our democratic society.

Describe **one** method that individuals or groups have used to bring about changes to the law and explain whether they were successful. **(4 marks)**

Question 2

In what ways is parliament both representative and responsible? **(4 marks)**

Question 3

One of the key reasons for changing the law is to keep pace with scientific research. Although parliament can act quickly to change the law, it relies on formal law reform bodies such as the Victorian Law Reform Commission to make recommendations about the precise content of draft Bills.

a. Describe the role of the Victorian Law Reform Commission.

b. Analyse whether formal law reform bodies such as the VLRC are an effective means of influencing reform. **(2 + 3 = 5 marks)**

Question 4

The law is a set of dynamic legal rules. This means that new laws develop and old ones are scrapped as society changes or its values change.

Outline **three** reasons why laws need to change and support each reason with a contemporary example. **(6 marks)**

Question 5

Discuss the strengths and weaknesses of law-making by the parliament. **(6 marks)**

(Total 25 marks)

Tips for responding to structured questions

Use the following checklist to make sure you write the best responses to the questions that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You should at least define the following terms in your short-answer responses: Representative and responsible government and parliament.		
Discuss, interpret and analyse legal information and data.		
Question 3 asks you to analyse whether or not law reform bodies such as the VLRC are effective in influencing reform. In your answer you should at least mention that the VLRC plays a role in drawing together opinions of interested parties so that parliament has access to all points of view when considering prospective legislation. Do a bit of extra research for this question and have a look at the VLRC's latest annual report. The annual report provides a summary of achievements that you could use to help support your answer. Use the **VLRC annual report** weblink in your eBookPLUS to access the latest VLRC annual report.		
Explain the principles and structures of the Australian parliamentary system.		
Question 2 specifically asks you to explain how parliament is representative and responsible. When talking about how parliament is representative, you must explain how each house is elected to represent the people and state view. When talking about responsible government you should explain the notion of accountability and give some examples of how checks are placed on the government of the day to avoid abuse of power.		
Use contemporary examples to explain the influences on legislative change.		
Question 4 is asking you to provide some real life examples of why laws have changed. To find some contemporary examples, consider doing an internet search on the following terms: change in Victorian law, law reform, technology and the law.		
Evaluate the capacity of individuals and groups to influence change in the law.		
Question 1 asks you to pick one method individuals or groups have used to bring about change in the law and whether or not they were successful. You can use some examples from this text or you might use more contemporary examples by doing an internet search. Consider entering the following search terms into a search engine such as Google: protest, demonstration, pressure group, lobbyist. When you read the search results you may be able to find a current example of action that has been taken to influence change in the law. It may not be possible for you to accurately assess whether or not the individual or group was successful in achieving change but you will at least be able to say whether or not they were successful in raising awareness of an issue.		
Critically evaluate the law-making processes of parliament.		
Question 5 asks you to provide a discussion of the strengths and weaknesses of parliament as a law-maker. A discussion is an exchange of views so you will need to provide both strengths and weaknesses of parliament as a law-maker.		
Your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used instead of point form. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

The Australian commonwealth and state parliaments are based on a model inherited from Britain.

- **Parliament's primary role**
  - Parliament is a legislature or law-making body.

The structure and role of the Commonwealth Parliament

- **Structure of parliament**
  - Our parliamentary system is bicameral, meaning that it has two houses.
  - Australia has adopted a federal system where the power to govern is divided between the state and federal parliaments.
  - Australia's political system is called a constitutional monarchy because the monarch (the Governor-General being the Queen's representative) is the head of state.
- **The House of Representatives**
  - The House of Representatives is the lower house of the Commonwealth Parliament and is designed to represent the interests of the people. There are 150 members in this house who are elected for three years.
- **The Senate**
  - The Senate is the upper house of the Commonwealth Parliament. It comprises 76 members — 12 from each state and two from each territory. Senators are elected for a term of six years.
  - The Senate is a house of review because legislation is initiated mostly in the House of Representatives and then sent to the Senate for reviewing. The Senate is also known as the states' house because there must be an equal number of senators from each state.
- **The Victorian Parliament**
  - The Legislative Assembly is the lower house of the Victorian Parliament and comprises 88 members, who are elected for four-year terms.
  - The Legislative Council is the upper house of the Victorian Parliament. It comprises 40 members who are each elected for a four-year term. It is known as a house of review as it reviews proposed laws from the lower house of parliament.
  - Legislation passed by both houses of the Victorian Parliament will then be given to the governor of Victoria to formally approve (give royal assent).

Structure and role of the Victorian Parliament

- **Representative government**
  - Representative government is based on a democratic system where those elected to parliament are expected to create laws that reflect the values and expectations of the people.
- **Responsible government**
  - Responsible government means that the Crown and its ministers are both responsible and accountable to the parliament and, ultimately, the voters.
- **The separation of powers**
  - The powers of government in a parliamentary democracy are separated between the legislature (parliament), the executive (the government) and the judiciary (the courts). This is called the separation of powers.

Principles of the Australian parliamentary system: representative government, responsible government and the separation of powers

- **Reasons why laws change**
  - Laws need to be changed for the following reasons: a shift in values, changes in economic policy, technological advances, changing political circumstance, a more informed community and enhancing the legal system.

The reasons why laws may need to change

The role of the Victorian Law Reform Commission

- **The role of the VLRC**
  - The role of the VLRC is to make law reform recommendations on matters referred to it by the Attorney-General; make recommendations on minor legal issues of general community concern; suggest to the Attorney-General that he or she refer a law reform issue to the commission; educate the community on areas of law relevant to the commission's work; and monitor and coordinate law reform activity in Victoria.

The means by which individuals and groups influence legislative change, including petitions, demonstrations and use of the media

Use contemporary examples to explain the influences on legislative change.

- **Means by which individuals and groups can influence change**
  - Individuals and groups can influence change in the law by signing petitions to parliament, lobbying for change, joining pressure groups, demonstrating, or defying the law.
  - Individuals and groups can influence change in the law by making use of the media, including newspapers, radio, television, the internet, and social media such as Facebook and Twitter.
  - Use of the media is a powerful means of effecting legislative change. The exposure of cruelty to animals exported live from Australia has led to changes in animal welfare laws.
  - Demonstrations can be effective in bringing about legislative change. The Vietnam demonstrations were instrumental in withdrawing troops from Vietnam. More recently and at a local level, demonstrations against new liquor licensing laws were changed to ensure small music vendors continued to operate (some music venues were at risk of closure due to having to conform to strict security requirements that imposed additional costs).
  - The method used to influence change in the law will most likely be effective if it gains media attention. This is because the cause of the individual or group can be quickly communicated to millions of people. Public opinion is what many politicians should listen to, particularly if they wish to be re-elected (see table 1.1 for further summary).

Evaluate the effectiveness of methods used by individuals and groups to influence change in the law.

The legislative process for the progress of a Bill through parliament

- **The legislative process of a Bill through parliament**
  - Before any proposed laws (Bills) can become Acts of parliament, they have to go through the legislative process — that is, they have to be debated and passed by parliament, and then approved by the Crown.
  - A Bill passes through three readings in the lower house before being sent to the upper house.

Strengths and weaknesses of parliament as a law-making body
- **Critically evaluate the law-making processes of parliament.**

- **Parliament's strengths**
  - The strengths of parliamentary law-making include access to expert opinion, consultation with the public, ability to legislate on an entire topic, responsiveness and flexibility, and power to make law *in futuro*.
- **Parliament's weaknesses**
  - The weaknesses of parliamentary law-making include fear of voter backlash, bicameral structure of parliament, parliament is not always sitting, difficulties in drafting legislation, and inconsistencies in statute laws.

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

Joe is on holiday and visits Parliament House in Canberra. He has a number of questions about our law-making processes.

a What role does the Governor-General play in the law-making process of Commonwealth Parliament?

b Joe heard a debate about a proposed law. Provide one reason why a law may need to change. Give an example to help illustrate your answer.

c Where Joe comes from, no one is allowed to 'have their say'. Explain to Joe one way in which individuals or groups can influence change in the law. **(1 + 2 + 2 = 5 marks)**

Question 2

Parliament can make laws that reflect community views and change law whenever the need arises. Critically examine these two law-making strengths. **(1 mark)**

Question 3

Outline **one** role of the upper house of Commonwealth Parliament. **(1 mark)**

Question 4

One democratic principle is the notion of responsible government. Explain what is meant by responsible government. **(2 marks)**

Question 5

Explain what is meant by the separation of powers principle. **(2 marks)**

Question 6

Laws sometimes change. Discuss one reason why laws may need to change. **(1 mark)**

Question 7

Identify and critically evaluate one strength and one weakness of parliament as a law-making body. **(6 marks)**

(Total 18 marks)

Examination technique tip

Test yourself before the exams! Use past examination questions and do not refer to your notes when providing answers. This will reveal what you do not know so you can fill in any gaps in your knowledge before the real examination.

eBookplus

Digital doc:

Access a list of key terms for this chapter.

Searchlight ID: doc-10201

eBookplus

Digital doc:

Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10202

CHAPTER 2

The Commonwealth Constitution

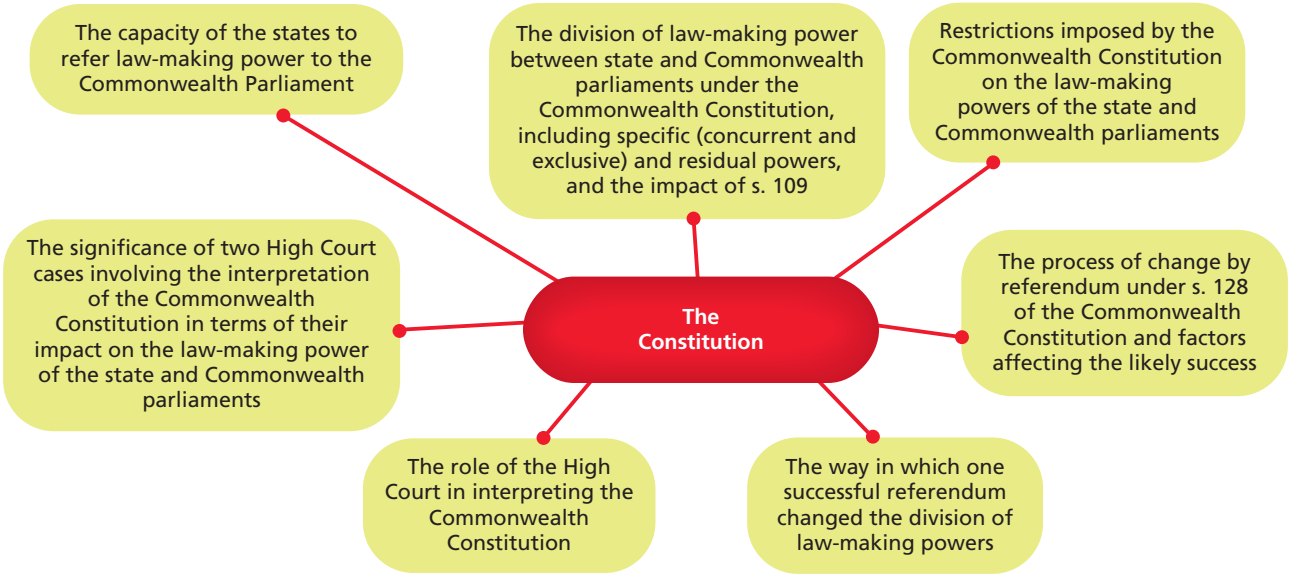
WHY IT IS IMPORTANT

The Commonwealth of Australia Constitution was written well over 100 years ago and is a set of instructions for how law-making power is divided between the Commonwealth and state parliaments. The High Court is the final arbiter on disputes that arise under the Constitution. In recent years it has made important decisions such as the right of some indigenous people to use their land according to traditional laws and customs, and the landmark decision that protected the Franklin River in Tasmania.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE

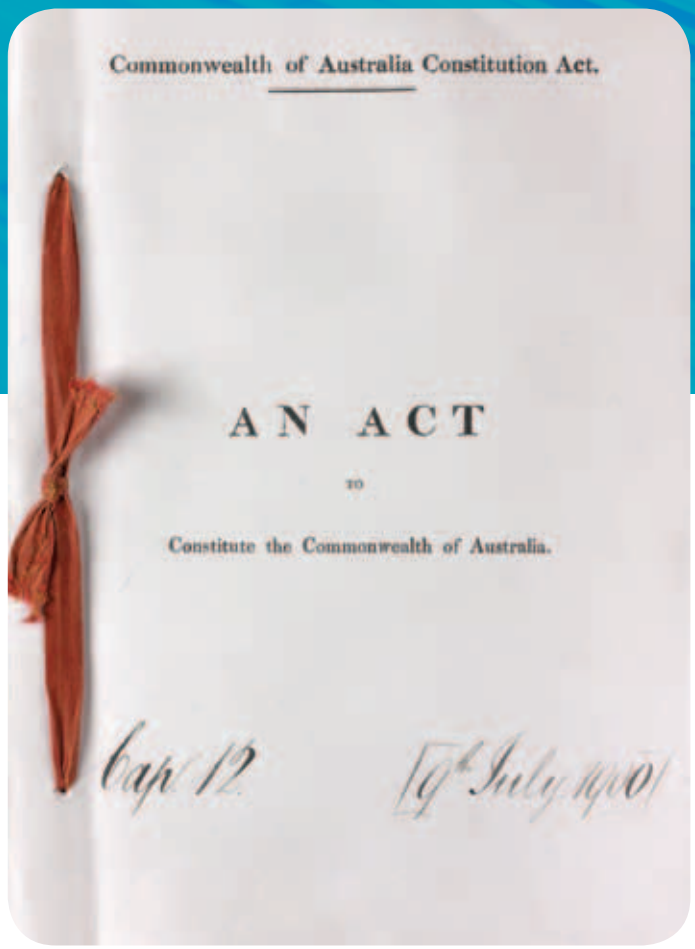


KEY SKILLS

These are the skills you need to demonstrate:

- explain the role of the Commonwealth Constitution with respect to law-making powers
- identify the types of law-making powers
- explain the methods and processes of changing constitutional power
- analyse the impact of referendums, High Court interpretation of the Constitution, and the referral of powers on the division of law-making powers.

Can you demonstrate these skills?


Commonwealth of Australia Constitution Act.

AN ACT

TO

Constitute the Commonwealth of Australia.

Cap 12

9th July 1900

Step back in time

When we think of the time in which the Australian Constitution was written, we think of the steam engine and mail being delivered on horseback. Back then, over 110 years ago, there was political and social unrest in the Asia-Pacific region and heated debate over whether Australia should accept more immigrants, especially from countries such as China.

The colonies back then (now known as states) did not have the guidance of a national Commonwealth Parliament. The colonies were very protective of their powers and on many issues they refused to cooperate with each other. This led to a sense of disunity across the nation. You might reflect that not much has changed.

More than 120 years ago, when the idea of having a Commonwealth was being seriously discussed, the colonies expressed concern about how they would fare economically under this new model of power. Population numbers were on the rise and governments were concerned about how to pay for new expansions in roads, health care and education. Eventually, concerns over defence and the development of a national identity moved Australia towards adopting the model of federation we have today.

The closing decade of the nineteenth century saw the framework laid for the Australia that we enjoy today. It is interesting to reflect on those times and to consider that the issues that we debate today — immigration, defence, taxation and trade — were just as much on the agenda then as they are now.

Swanston Street from the Bridge, 1861
Henry Burn
Born England c.1807, arrived Australia 1853, died 1884
Oil on canvas
71.8 × 92.2 cm
National Gallery of Victoria, Melbourne
Gift of John H. Connell, 1914

2.1 Federation and the role of the Constitution

KEY CONCEPT In the 1890s, it was decided by the colonies that Australia should mark the arrival of the twentieth century by becoming a Federation, comprising one Commonwealth Parliament and six state parliaments. Federation was a complex process that established a rule book for how these new parliaments were to operate in relation to each other.

A **colony** is a group of people who leave their homeland to form a new country or region ruled by a parent state.

Federation refers to the formation of a political union with a central government from a number of separate states or colonies, with control of its own internal affairs.

After the arrival of the British in 1788, Australia was organised as separate **colonies** (now referred to as states), which eventually numbered six in total. By the middle of the next century, these colonies enjoyed significant freedom in terms of self-government, each having their own parliament, with the British maintaining control of defence. Interference from Britain in the work of the colonial parliaments was rare.

The *Colonial Laws Validity Act 1865* (UK) affirmed that the colonies each had their own laws, which did not need to be consistent across the nation. According to democratic models, these laws reflected the views and values of the people who the colonial parliaments served.

As the nineteenth century progressed, a belief emerged in the need for Australia to become a **Federation**, where the six colonies should join together as one. In the 1890s, two constitutional conventions were formed to consider these proposals. These conventions were meetings of people from legal and political circles who discussed models of government from overseas countries, most notably the United Kingdom and the USA.

Arguments for forming a federation

The people arguing for this new Federation did so on three major grounds, which we will now examine.

Economic development

The colonies applied conflicting laws with regard to freedom of interstate trade and special taxes that were imposed on imported goods. This was considered to be a factor in preventing growth, especially as Australia was just emerging from a severe economic depression that crippled the nation. It was also argued that industrial disputes and the rise of trade unionism in the 1890s required a national approach. Having one central parliamentary body to manage economic affairs was considered important.

Different gauges (widths) were used for train tracks in Victoria and New South Wales, so that trains could not run across borders. Passengers would have to pass through customs and immigration checks at the border, but this had to change after Federation.

National security

With many European powers such as Germany controlling countries in the Asia-Pacific region, it was considered important that a Commonwealth Parliament be able to make decisions with regard to perceived threats of attack. Leaving such defence responsibilities with the distant British Parliament and individual colonies seemed unwise.

There was a growing concern around the turn of the century that Australia should adopt a national approach when it came to security matters.

DID YOU KNOW?

In the early 1890s, it was suggested that New Zealand might also join the new Federation of Australia. The idea was rejected after the 1891 convention when both the colonies and New Zealand decided to pursue their own unique national identities.

Immigration

Since the 1850s, an increasing number of people had arrived in Australia as immigrants. It was felt that Australia was at risk of losing control of managing those who entered the country if there was no central parliament to regulate the laws and processes of immigration.

DID YOU KNOW?

Our founding fathers are those people credited with establishing their nation. Typically, they are those who played a role in setting up the system of government. Edmund Barton is one of our founding fathers who helped write the Australian Constitution.

The Australian Constitution comes into effect

The Constitution was passed as an Act of the British Parliament, the Commonwealth of Australia Constitution Act 1900, which came into force on 1 January 1901. The role of the Constitution is to determine the powers of the government and its duties (see discussion later in this chapter). The ties to Britain were not completely severed, however. The British Parliament retained the power to engage in foreign affairs on behalf of Australia and to make laws that would override the new Commonwealth Parliament. The Constitution also provided that the British monarch be represented in Australia by a Governor-General. At that time, the Constitution provided that any law of the Commonwealth Parliament could be disallowed within a year by the British monarch, though this power was never actually exercised.

Australia Act 1986

The power to request the British Parliament to make laws for Australia was used on several occasions, most notably to enable Australia to acquire new territories. Eventually, the Australia Act 1986, which was passed as identical legislation simultaneously by the British and Australian parliaments, terminated the ability of the British to make laws for Australia or its states. It also provided that any law

Queen Elizabeth ascended to the British throne in 1952 and is one of the most popular monarchs in history. She has made many visits to Australia and is popular, even with those who would prefer that Australia was not a constitutional monarchy.

previously required to be passed by the British on behalf of Australia could now be passed by Australia and its states. Since the Australia Act, the only remaining constitutional link with the United Kingdom is the monarch.

The role of the Constitution

The Constitution performs key roles that helps ensure smooth government in Australia.

- The Commonwealth Parliament was established with specific powers to make laws in certain areas.
- Clear guidelines about which powers could be exercised by the newly formed state parliaments were created.
- The office of the Governor-General was established to act as head of state for the new Commonwealth of Australia.
- The High Court was created to hear and decide disputes involving the law-making powers of the new Commonwealth Parliament.
- Key democratic principles form the basis of our Constitution, such as the principle of representative government. The Constitution provides for direct election of members of the House of Representatives and the Senate, providing a government that is representative of its constituents' views.
- The principle of responsible government is also embedded within our Constitution. This means the government must be accountable for its actions. Direct elections ensure some sort of accountability because an unpopular government will be voted out at the next election. The notion of responsible, accountable government is also a principle reflected in the fact that powers of the legislature, the executive and the judiciary are separate (see pages 13–16).

TEST your understanding

1 Define the following terms and write each term into a full sentence that shows its meaning:
(a) colony
(b) federation.
2 What was the purpose of the constitutional conventions?
3 Outline the purpose of the Australia Act. Give two reasons why you believe it was considered necessary at Federation to allow the British to make law for Australia.

APPLY your understanding

4 Outline the reasons put forward in the 1890s about why Federation was considered important for national security and to control immigration.
5 'We need a federal system because right now in 1895, my business has no protection and my rivals in Victoria have a government that protects them from competition. It isn't fair.'
Imagine that you are a person managing a business in the 1890s. Write a statement outlining the ways in which Federation would assist your business and national economic prosperity.

2.2 Constitutional division of powers between state and Commonwealth parliaments

KEY CONCEPT When our founding fathers developed Australia's Constitution, they realised that if Australia was to function effectively under a federal system, then the exact powers of the parliaments would have to be made clear. They tried to limit the powers of the Commonwealth Parliament to clearly defined areas, which allowed the states greater authority as new areas emerged that required regulation.

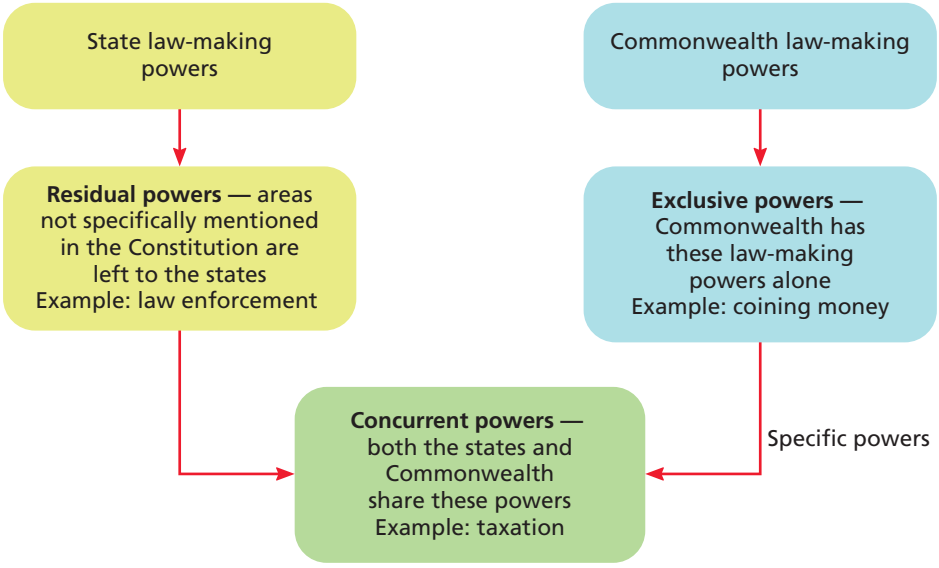
The role of the Constitution with respect to law-making powers

The Constitution determines the powers and duties of parliament and government. At the time of Federation in 1901, some powers were left with the states (**residual powers**), while other powers were given to the Commonwealth Parliament (**specific powers**, sometimes called enumerated powers). These specific powers can be either:

- **concurrent powers** — both the Commonwealth Parliament and the state parliaments can pass laws on these matters
- **exclusive powers** — only the Commonwealth Parliament can pass laws on these matters.

It is important to note that many colonial politicians at the conventions sought to protect the power they had and did not want the Commonwealth to be given unbridled (unlimited) power. They most certainly did not want to give the Commonwealth too many exclusive powers.

When parliaments disagree on who has responsibility for making laws on certain issues, the matter is decided by the High Court or the Federal Court.



Residual powers in constitutional law are all those powers to make laws that were not specifically granted to the Commonwealth Parliament and thus remain with the states; for example, road rules, criminal law and school education.

Specific powers are all powers given to the Commonwealth Parliament under the Constitution at Federation; for example, immigration, railway construction and quarantine.

Concurrent powers are law-making powers shared by federal and state governments — more specifically, the power of the Commonwealth Parliament to make law on a particular subject (for example, marriage and taxation) upon which the states may also make laws provided they do not conflict with Commonwealth laws.

Exclusive powers are powers that under the Commonwealth Constitution can be exercised only by federal parliament and not by a state parliament, such as the power to impose customs and excise duties, currency and defence.

DID YOU KNOW?

Specific powers are also referred to as enumerated powers because they are numbered and most of them are set out in s. 51 of the Constitution.

Specific powers

Specific powers are stated in the Constitution and provide the Commonwealth with law-making powers in particular areas (some of these areas are listed in table 2.1). Many of these powers are listed in s. 51 of the Constitution. There are 40 of these specific powers mentioned in this section (if you count s. 51(xxiiiA) that was inserted in 1946).

TABLE 2.1 Some specific powers listed in s. 51 of the Constitution

Section	Power
(i)	Trade and commerce with other countries, and among the states
(ii)	Taxation, but so as not to discriminate between states or parts of states
(iii)	Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth
(iv)	Borrowing money on the public credit of the Commonwealth
(v)	Postal, telegraphic, telephonic and other like services
(vi)	The naval and military defence of the Commonwealth and of the several states, and the control of the forces to execute and maintain the laws of the Commonwealth
(vii)	Lighthouses, lightships, beacons and buoys
(viii)	Astronomical and meteorological observations
(ix)	Quarantine
(x)	Fisheries in Australian waters beyond territorial limits
(xii)	Currency
(xxi)	Marriage
(xxix)	External affairs

study on
Summary
Unit 3: Law-making
Area of study 2: Constitution and the protection of rights
Topic 1: Legislative power in the Constitution

Exclusive powers

Exclusive powers are law-making powers contained in the Constitution over which only the Commonwealth Parliament can legislate. However, ss. 51 and 52 do not actually identify which areas are exclusive and which are concurrent. To discover that, we must read other sections of the Constitution. For example, s. 51(vi) gives the Commonwealth control over naval and military defence, and s. 51(xii) asserts that the Commonwealth shall have power in regard to 'currency, coinage and legal tender'.

Other sections of the Constitution confirm that these are exclusive powers:

114. A state shall not, without the consent of the parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a state.

115. A state shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

The intention of these sections is to prohibit the states from making laws in key areas such as defence or currency. It is still possible for one of the states to make law with regard to defence, but consent must be sought first. It is important to note that unless a clear prohibition applies, the states will share law-making power with the Commonwealth.

study on
Unit: 3
AOS: 2
Topic: 1
Concept: 1
Do more
Interactivity on the division of powers

Concurrent powers

Concurrent powers are the law-making powers listed in the Constitution that can be exercised by both the Commonwealth and the states. Most of these areas are found in s. 51. In fact, many of the powers mentioned in the Constitution are not exclusive to the Commonwealth. An example of concurrent power is taxation.

You may be starting to realise that having two parliaments responsible for law-making could cause inconsistencies in policy and legislation. Fortunately, during the constitutional conventions of the 1890s this was a major issue and s. 109 of the

Constitution provides for a solution in the event of a clash between Commonwealth and state laws in the exercise of concurrent powers.

Section 109 of the Constitution and its impact

Under s. 109, any conflict between Commonwealth and state legislation dealing with concurrent matters will result in the Commonwealth legislation prevailing (overriding) the state legislation to the extent of the inconsistency.

Section 109 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.' This means that particular sections of any state legislation that conflict with a Commonwealth law will be invalid and unenforceable. There may be only one aspect of the state legislation that ceases to operate, with the remainder continuing as enforceable law.

Since Federation, the Commonwealth has shown a tendency to create very broad legal principles. For example, the Commonwealth has passed anti-discrimination legislation on the basis of marital status, religion, physical disability, sexual preference and age. These broad principles created by the Commonwealth mean that the states cannot pass law that discriminates against people on a vast range of grounds.

Testing the law on access to IVF

In the case of *McBain v. State of Victoria (2000) FCA 1009,* the Federal Court ruled that provisions in the *Infertility Treatment Act 1995 (Vic.)* were inconsistent with the *Sex Discrimination Act 1984 (Cwlth)*. The Victorian law provided that a procedure such as IVF may only be carried out on a woman who is married or 'living with a man in a de facto relationship'. As the law stood, married women who are separated from their husbands are excluded from treatment, as were single and lesbian women.

The Sex Discrimination Act prohibits discrimination in the provision of goods and services on the grounds of sex or marital status. The term 'marital status' includes the status of being single, married, separated, divorced, or in a de facto relationship.

In the Federal Court, Justice Sundberg found that fertility treatments such as IVF are 'services' provided by medical practitioners, within the meaning of s. 22 of the Sex Discrimination Act. On this basis, the section of the Victorian law that discriminated against single women was struck out. This is an example of how s. 109 of the Constitution operates to clarify conflicts between Commonwealth and state legislation.

Commonwealth laws that protect the rights of children and unmarried people have, under s. 109 of the Constitution, made invalid many state laws that potentially interfered with human rights.

Residual powers

The state parliaments retain the power (residual) to make laws *unless* the Constitution hands this power to the Commonwealth Parliament. Residual powers cover all areas that were not given to the Commonwealth Parliament at Federation and which remain with the states. The Constitution guarantees that the states shall continue to have control over these matters.

The following sections provide this guarantee.

106. The Constitution of each state of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be, until altered in accordance with the Constitution of the state.

107. Every power of the parliament of a colony which has become or becomes a state, shall, unless it is by this Constitution exclusively vested in the parliament of the Commonwealth or withdrawn from the parliament of the state, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be.

As technology has progressed, these residual powers have become more important, especially in matters such as *in-vitro* fertilisation (IVF), surrogacy, euthanasia and forensic medicine. Other important areas covered by residual powers include education, criminal law and the environment.

One of the significant weaknesses of a federal system is that laws vary between the states in important areas such as road rules. This is especially seen in laws relating to the ages at which drivers can become fully licenced and peer passenger rules, which vary from state to state.

Practical application of residual powers

The exercise of residual powers can cause inconsistencies in the law and public policy from one state to another. This has been seen with different state laws on driving offences — for example, laws regarding the use of mobile phones, the age at which a young person can start driving and peer passenger restrictions for P-plate drivers. Even education systems are different from state to state although a national curriculum has been introduced to address these issues.

TEST your understanding

1. With reference to the Constitution, what are specific powers?
2. Define, and give one example of, the following terms:
   (a) exclusive powers
   (b) concurrent powers
   (c) residual powers.
3. Explain the purpose of s. 109 of the Constitution.
4. How do state governments know from the Constitution what their powers are?

APPLY your understanding

5. In terms of the creation of law by the states, what problems can arise in their exercise of residual powers?
6. Why was it appropriate for law-making regarding defence, customs, currency and external affairs to be given to the Commonwealth?
7. Explain how s. 109 of the Constitution was applied in *McBain v. State of Victoria (2000) FCA 1009*.

2.3 Constitutional restrictions on parliamentary law-making powers

KEY CONCEPT The Constitution places restrictions on both the federal and state parliaments with regard to law-making powers.

Restrictions on law-making powers are necessary to reduce the potential for conflict between the Commonwealth and states, and to ensure that the Commonwealth has exclusive control over areas of national security and financial management.

Restrictions on the Commonwealth Parliament

The Constitution restricts the law-making power of the Commonwealth in the following ways:

- The Commonwealth does not have the power to legislate where the states have residual power. For example, road rules are different across Australia with regard to the age at which a person can obtain a probationary licence.
- Some sections of the Constitution specifically restrict the Commonwealth legislating in certain areas; for example, s. 116 concerning freedom of religion.
- Sections of the Constitution explicitly refer to some areas of law. For example, the Constitution states the right to trial by jury on indictment for Commonwealth offences, so the Commonwealth could not legislate to take this power away (see Table 2.2).
- Sections of the Constitution also protect the states from interference by the Commonwealth in their powers and laws; for example, ss. 106 and 108.
- The Constitution also limits Commonwealth power through s. 128 which states that if the Constitution is to be changed, then that change must be put to a referendum.

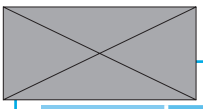
TABLE 2.2 Restrictions on Commonwealth power in the Constitution

Section 51(xxxi)	*Acquiring property on just terms* The Commonwealth is unable to acquire property unless it provides 'just' compensation.
Section 80	*Trial by jury* The Constitution explicitly states that trial must be by jury if there is an indictment and a Commonwealth offence is involved.
Section 92	*Trade and interstate movement shall be free* This provides that trade and the movement of people between states should be free so, for example, the Commonwealth would not be able to legislate to enforce a tax on goods that were traded between states.
Section 99	*All Australian states treated equally* The Commonwealth cannot give preference to one state over another in terms of legal rights, commerce, trade or revenue.
Section 128	*Amending the wording of the Constitution* The wording of the Constitution can only be changed by a referendum of all enrolled voters in Australia. A strict formula applies.
Section 117	*Protection against discrimination on the basis of residence* A person cannot be treated less favourably under the Commonwealth law as a direct result of the state of Australia in which he or she lives.
Section 116	*Religion* The Commonwealth shall not make any law for establishing a religion.

DID YOU KNOW?

When the massacre of 35 people occurred at Port Arthur in Tasmania in 1996, there was a call for national, uniform gun laws. The Commonwealth Parliament did not have the authority to act, because firearms are a residual power. Uniformity was achieved when each state passed identical legislation to impose tight restrictions on the purchase and storage of weapons.

States cannot raise or maintain any naval or military force without the consent of the Commonwealth Parliament.



Unit: 3
AOS: 2
Topic: 1

Practice VCE exam questions

Although the Commonwealth holds significant powers, the states still largely control major infrastructure works such as roads, dams, railways and bridges.

study on

Unit: 3
AOS: 2
Topic: 1
Concept: 5

See more PowerPoint on the restrictions on state parliaments' control of power

Restrictions on the state parliaments

The main restriction of state parliamentary law-making power is that, if the Commonwealth has been given exclusive power in a certain area, then the states cannot legislate. For example, the Constitution specifically forbids the states from making laws to do with defence or currency. Although s. 109 does not outline specific restrictions on the states, it does limit the capacity of the states to make law on matters that have already been dealt with by the Commonwealth. Table 2.3 sets out some of the restrictions on state parliaments in more detail.

TABLE 2.3 Constitutional restrictions placed on the states

Section 90	*The imposition of customs and excise duties* The states are not allowed to impose customs and excise duties (taxes) on imported goods.
Section 114	*The states cannot establish military forces* The states cannot establish their own military force (army, navy or air force).
Section 115	*The states cannot produce their own currency* Only the Commonwealth may produce currency.

TEST your understanding

1 Why does the Constitution place restrictions on the parliamentary law-making process?
2 Outline two restrictions imposed on the law-making powers of the Commonwealth Parliament and the state parliaments.

APPLY your understanding

3 For each restriction outlined below, give reasons why the Constitution imposes such a restriction:
(a) s. 116: freedom of religion
(b) s. 115: the coining of money
(c) s. 117: anti-discrimination
(d) s. 99: Commonwealth cannot discriminate between states
(e) s. 128: the Commonwealth can only amend the Constitution via a referendum
(f) s. 92: trade and commerce between the states must be free.
4 What was the original purpose of inserting s. 109 in the Constitution? In what ways does it act to greatly reduce the authority of the states to create their own law?

2.4 The process of change by referendum

KEY CONCEPT When a referendum is held, the people of Australia are asked to vote on parliament's proposed changes to the Constitution. Section 128 of the Constitution sets out the procedure for changing the wording of the Constitution by holding a referendum.

Changing the Constitution

The division of law-making power outlined by the Constitution can be changed through amending (changing) the actual wording of the Constitution according to s. 128, which necessitates holding a **referendum**. A referendum involves a direct vote on an issue by all people of voting age.

The referendum process under s. 128

The early writers of the Constitution knew that as times changed, the Constitution would need to be changed. To change the Constitution, a referendum must be held with the issue being voted on expressed as a question. All enrolled voters of Australia must answer either 'yes' or 'no' by ticking a box to indicate their response to the question being posed (see ballot paper below).

Section 128 of the Constitution describes the process by which an amendment (alteration) can be made to the wording of the Constitution. As you can see in the flowchart (page 60) the requirements for changing the Constitution are rigorous. Not only must at least one house of parliament approve that a referendum be put to the people, but it also must obtain a **double majority**.

Changing the referendum — why make it so difficult?

When the Australian Constitution was being drafted in the 1890s, some of the colonies were concerned that the larger states (New South Wales and Victoria) and the newly established Commonwealth Parliament would dominate the states with smaller populations. One of the major items discussed was the requirements for changing the wording of the Constitution.

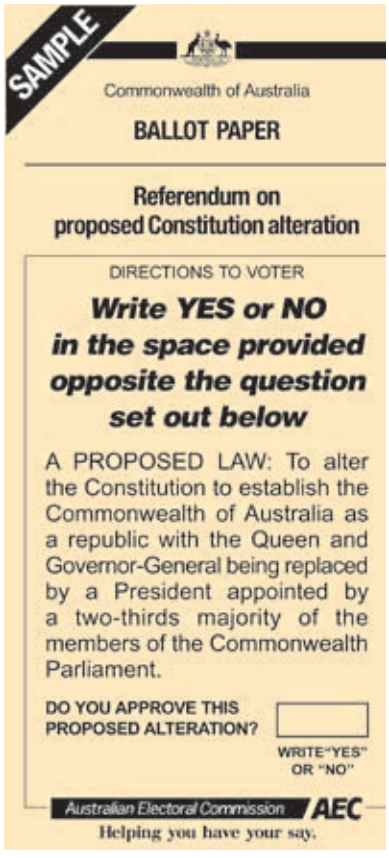
It is clear from an examination of s. 128 of the Constitution that the smaller states have relatively much greater impact than the larger states on whether any referendum proposal would succeed. For example, New South Wales, which in 2011 had a population exceeding 7.3 million people, has the same impact on a referendum outcome as Tasmania, which at that time had a population of about 500 000. The requirement that at least four states need to agree to a proposed change to the Constitution for it to succeed has fulfilled the wishes expressed in the 1890s that states with smaller populations, especially Tasmania, Western Australia and South Australia, have control over constitutional change. While this has met with agreement from the people of those states, others in the larger states, especially New South Wales and Victoria, would argue that their vote on referenda is worth considerably less than their counterparts elsewhere in Australia.

Where do proposals for change via referendum come from?

Proposals for change by referendum come from a variety of sources. One proposal came from the 1998 Constitutional Convention, which considered whether Australia should become a republic. Proposals for change may also come from the states, from parliamentary committees, royal commissions, or from community pressure groups such as the Australian Republican Movement (which was influential in the 1998 debates).

Referendum is the process through which changes can be made to the Commonwealth Constitution. Electors vote for or against a particular change. For the change to take effect, it must be supported by a majority of voters and a majority of states.

A **double majority** is required for a referendum to succeed. To obtain this double majority a majority of voters must say yes to the referendum proposal in a majority of states across Australia *and* a majority of voters in the whole of Australia must also vote yes to the proposed change.


SAMPLE

Commonwealth of Australia

BALLOT PAPER

Referendum on proposed Constitution alteration

DIRECTIONS TO VOTER

Write YES or NO in the space provided opposite the question set out below

A PROPOSED LAW: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.

DO YOU APPROVE THIS PROPOSED ALTERATION?

WRITE "YES" OR "NO"

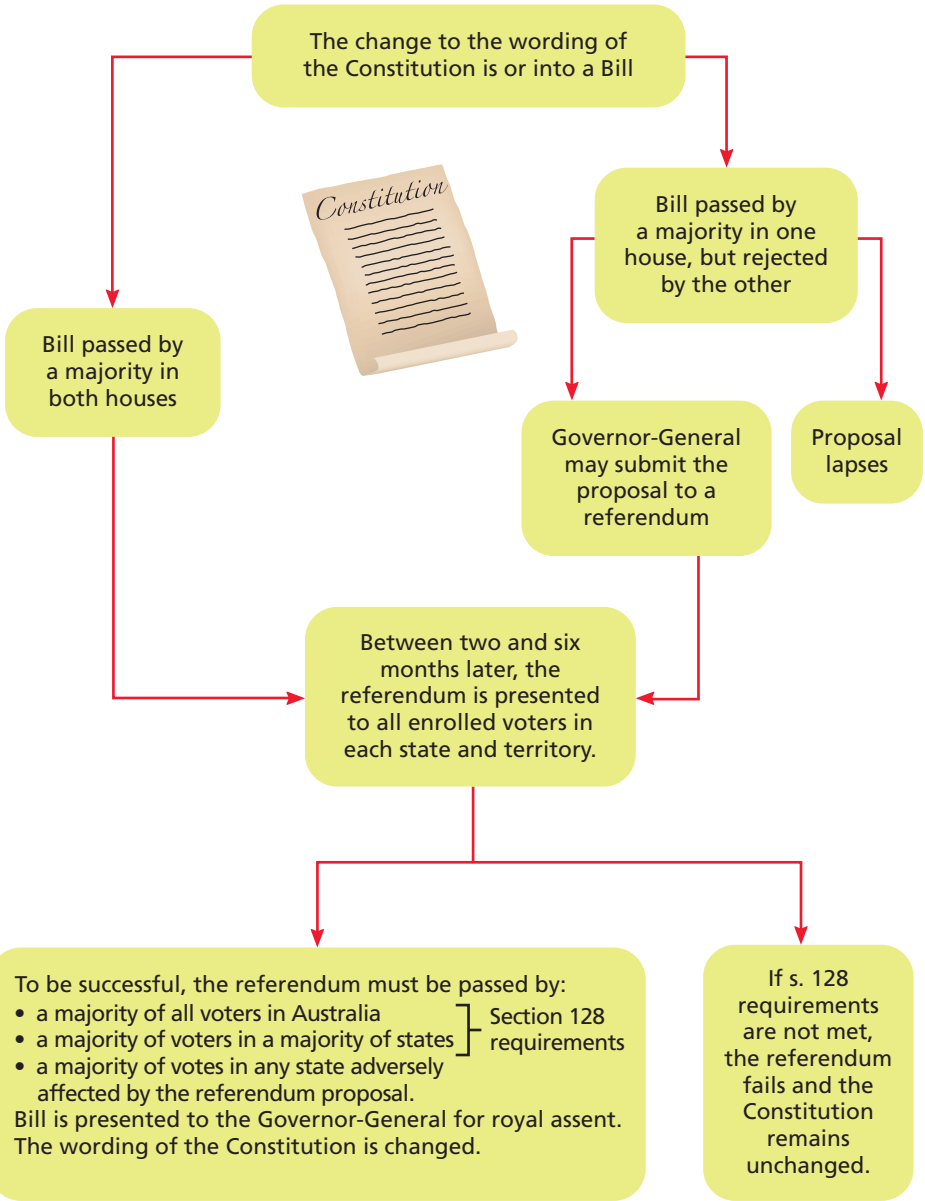
Australian Electoral Commission AEC

Helping you have your say.

On 6 November 1999, the Australian people voted in a referendum to decide whether they wanted a republic, based on a particular model. The majority (55 per cent) said 'no'. The proposal also was rejected in every state by a majority of voters.

DID YOU KNOW?

Referendum proceedings have proven very unsuccessful since Federation. Since 1901 there have been 19 referenda. In those 19 referenda, there have been 44 proposals. Only eight of the 44 proposals received support from the voters. This is due largely to the conservative nature of voters, especially in the smaller states, who tend to fear that any change to the Constitution may see domination by the Commonwealth and the larger states such as Victoria and New South Wales. Historically, some referendum proposals have not had the support of the leaders of the major political parties. In this situation it is very difficult for the 'yes' case to succeed.



study on

Summary

Unit 3:
Law-making

Area of study 2:
Constitution and the protection of rights

Topic 2:
Changing the Constitution through referendum

TEST your understanding

1 What is a referendum?
2 From what sources do ideas come for constitutional change?
3 Give two reasons why s. 128 was included in the Constitution.
4 Outline the process for changing the wording of the Constitution.

APPLY your understanding

5 Give one reason why the writers of the Constitution may have inserted the requirement into s. 128 that, after a proposal is supported by parliament, it must be presented to voters between two and six months later.
6 Working in pairs, write a 3-minute speech. Your purpose is to convince other members of the class to support a change to the Constitution to amend s. 128 to remove the requirement that a majority of voters in a majority of states must vote for a change to the Constitution for that change to occur. Be creative in your arguments and refer to failed referenda that achieved a majority of voter support across Australia.

2.5 Factors affecting the likely success of referenda

KEY CONCEPT Since Federation, referenda have been largely unsuccessful. On one level, this is surprising given that the Commonwealth Parliament has supported the proposal and yet voters have often rejected their ideas. It seems that many voters prefer to maintain the status quo than allow change.

While there are problems with the restrictions imposed by s. 128 procedure, there are still some benefits for a modern Australia. The following figure evaluates s. 128 as a means of changing the Constitution.

Strengths	Weaknesses
Section 128 reflects the concerns that the more populated states such as New South Wales and Victoria not dominate the lesser populated states such as Tasmania. If we only needed a national vote to change the Constitution, Victoria and New South Wales acting together could override the wishes of the other states and the territories.	Voters in the less populated states have a comparatively much more powerful voice when voting at referenda. This is in some ways undemocratic, especially as five of the referendum proposals failed because the majority of voters in a majority of states did not agree to the referendum proposal, even though the majority of Australians agreed to the referendum proposal.
The double majority requirement demands that the Commonwealth consult broadly with all states in an effort to reach agreement on the precise nature of the change. If a successful referendum only required majority support nationally, referendum proposals may not be fully developed.	The Commonwealth is often already burdened by voter mistrust and apathy when attempting to change the wording of the Constitution. The double majority requirement just adds another layer of difficulty in seeking to drive change. The failure of 36 referendum proposals since Federation highlights the complexity of this task.

Reasons why referenda may fail

Only 8 of 44 referendum proposals have been successful. Lets explore the reasons for this poor success rate.

Strict formula for change

The formula (set out in s. 128 of the Constitution) is rigid in demanding that the proposal satisfy more than half of voters and be accepted in at least four of our six states. For example, in 1977, there was a referendum involving simultaneous elections. This was supported by 62.2 per cent of all voters in Australia. However, because a majority of voters in only three states agreed to the proposal, it was defeated.

Complexity of proposal

Referendum proposals are often complex and are difficult to express in simple language. If voters are presented with an issue that they do not understand, they are unlikely to support the proposal, preferring to maintain the status quo. This is reflected in the fact that the most successful referenda dealt with issues that people easily understood. This was the case in the 1967 referendum that amended ss. 51(xxvi) and 127 to give the Commonwealth Parliament jurisdiction over Aboriginal affairs throughout the country.

The three proposals accepted in 1977 proved that non-contentious issues also generally receive support. (Note that these three proposals were supported by a majority in all states.) The 1977 amendments were:

- An amendment to s. 15 stated that if a senator departs the parliament, thus creating a vacancy, that senator should be replaced by a person from the same party. This gained 73.3 per cent support.

study on

Unit:	3
AOS:	2
Topic:	2
Concept:	1

See more PowerPoint on the process of a referendum

A case being heard in the High Court of Australia. Retirement age for High Court judges is an example of one of the few successful referenda held in this country.

The 1999 republic referendum in Australia split key members of the Coalition government, with the Prime Minister John Howard and Tony Abbott urging a no vote, while then treasurer Peter Costello argued strongly for the yes campaign.

DID YOU KNOW?

In 2010, the ALP Government committed itself to developing a program for another referendum on an Australian republic. The plan would involve an initial plebiscite, which means the entire electorate is asked to vote. Voters would be asked whether they support a republic. This would not produce a change to the Constitution but would give a general indication as to the mood of the nation on republicanism.

- An amendment to s. 72 established a retiring age for High Court judges at 70 years. This proposal was accepted by 80.1 per cent of all voters.
- The residents of the territories (the Australian Capital Territory and the Northern Territory) were to be allowed to vote in referenda. This received 77.7 per cent support.

Difficulty gaining bipartisan support

Unless referendum questions have bipartisan support (that is, two-party support) from the leaders of the major political parties, they will almost certainly fail. This generally requires that the Coalition and the Australian Labor Party support the proposition for it to have a realistic chance of success. Parties that do not support a proposal will sometimes urge their supporters not to vote in favour of the referendum. If the political leaders cannot agree, the referendum is almost guaranteed to fail, given the strict formula imposed by s. 128.

It is interesting to note that the 1967 referendum proposals gained bipartisan support and were also accepted by the Australian people. In this referendum Australians voted on the right for Aboriginal and Torres Strait Islander peoples to be included in the national census and to grant the Commonwealth Parliament the power to make laws on their behalf. The wording of the Constitution was amended to reflect these changes.

Suspicion of politicians' motives

Unfortunately for constitutional reform, some sections of Australian society mistrust politicians, and any referendum proposal is perceived as a 'grab for power' by our parliamentarians.

Desire to maintain states' rights

Many referendum proposals have been interpreted by the states as having the potential to shift too much power to the Commonwealth and on this basis have been rejected. When such proposals are put to voters, if state Premiers reject the referendum and urge a 'no' vote, constitutional change becomes almost impossible.

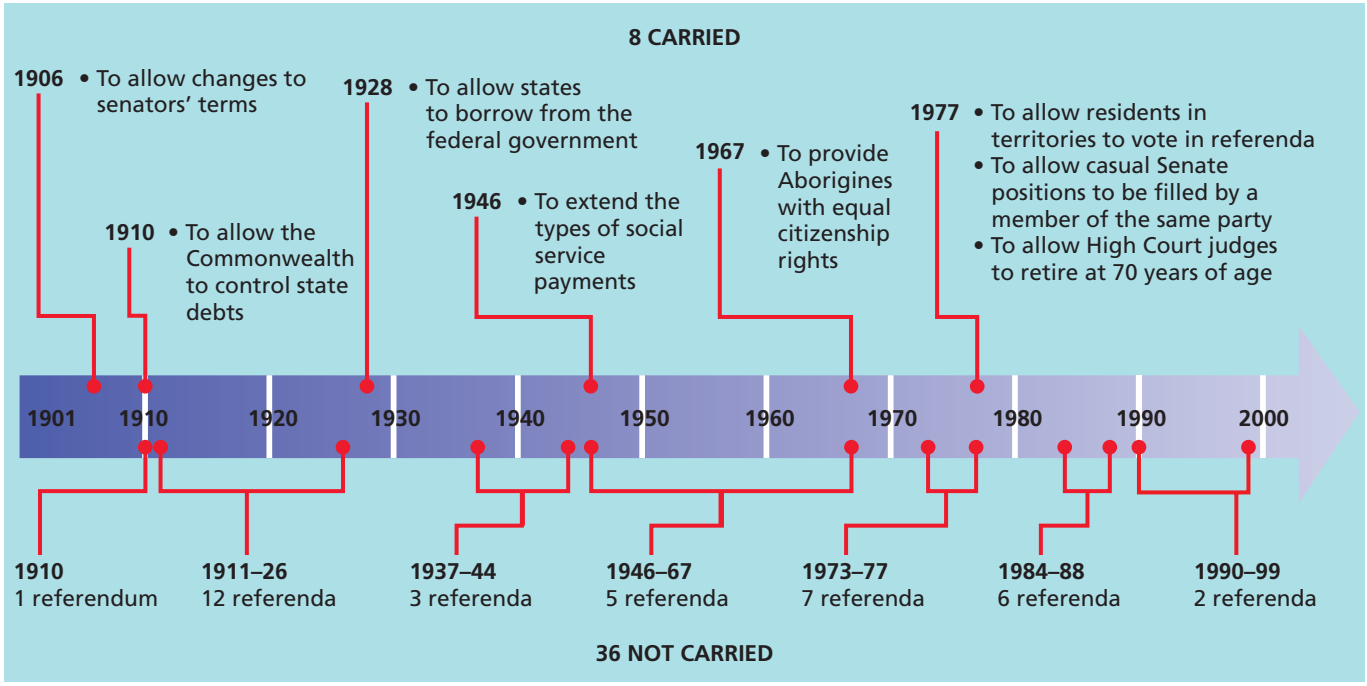
Table 2.4 provides examples of referendum proposals considered by the states to involve too much of a shift to Commonwealth control. Note that the more populated states have generally rejected proposals where it is considered that the Commonwealth would unduly interfere with their power.

TABLE 2.4 Examples of referendum proposals considered by the states to involve too much of a shift to Commonwealth control

Year	Proposal	States in support	Yes vote %
1913	Trade and commerce	3 (Qld, WA, SA)	49.38
1913	Corporations	3 (Qld, WA, SA)	49.33
1913	Industrial relations	3 (Qld, WA, SA)	49.33
1913	Disputes involving railways	3 (Qld, WA, SA)	49.13
1926	Industry and commerce	2 (NSW, Qld)	43.50
1944	Post-World War 11 reconstruction	2 (SA, WA)	45.99
1973	Control of incomes	0	34.42
1973	Control of prices	0	43.81

Impact of referenda on the Constitution

Successful referenda caused the actual wording of the Constitution to change. For example, in the 1967 referendum, the words 'other than the aboriginal race in any state' were removed from s. 51(xxvi) of the Constitution. This referendum also amended s. 127 which had provided 'that in reckoning the numbers of people of the Commonwealth ... aboriginal natives shall not be counted' (sadly, there was a time when Aboriginal Australians were not required to be counted in the population census).



This timeline shows the results of all referenda and the nature of all successful referenda since 1901.

TEST your understanding

1. Explain why the actual requirements needed to change the Constitution via a referendum have hindered change.
2. Give an example of a referendum proposal that may have been too complex leading to a 'no' vote.
3. Why is bipartisan support so crucial to achieving success in a referendum?
4. Explain why a desire to maintain states' rights may result in referenda not being passed.

APPLY your understanding

5. In the following examples state whether each referendum would have passed.
   (a) A majority of Australians agree to the referendum proposal and two out of the six states achieve a majority of votes for the proposal.
   (b) A majority of Australians do not agree to the referendum proposal and four out of six states achieve a majority of votes for the proposal.
   (c) A majority of Australians agree to the referendum proposal and five out of six states achieve a majority of votes for the proposal.

EXTEND AND APPLY YOUR KNOWLEDGE:
A failed referendum: the 1999 republic debate

DID YOU KNOW?

In the 1999 referendum to establish Australia as a republic, no state supported the proposal. Victoria registered the highest 'yes' vote.

In the early 1990s, Prime Minister Keating expressed a desire to consider making Australia a republic in time for the centenary of Federation in 2001. The Coalition won the 1996 election and as promised, established a constitutional convention, which met in February 1998.

The convention's role was to debate the proposed change to the Constitution, which would remove the monarchy from a role in the Australian legal system. A majority of attendees at the convention agreed on a model that was put to a referendum on 6 November 1999.

The referendum on whether Australia should become a republic was put to the people via a vote and failed.

The referendum questions and results

The 1999 referendum was a two-question referendum.

The first question asked whether Australia should become a republic with a President appointed by the Parliament. The question read as follows: *To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.*

The first question was rejected by 54.87 per cent of voters and did not receive majority support in any state. The 'yes' vote of 49.84 per cent in Victoria for the republic was the largest vote in any individual state.

The second question asked whether Australia should alter the Constitution to insert a preamble. The question read as follows: *To alter the Constitution to insert a preamble.*

The preamble would have read: *With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good. We the Australian people commit ourselves to this Constitution: proud that our national unity has been forged by Australians from many ancestries; never forgetting the sacrifices of all who defended our country and our liberty in time of war; upholding freedom, tolerance, individual dignity and the rule of law; honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country; recognising the nation-building contribution of generations of immigrants; mindful of our responsibility to protect our unique natural environment; supportive of achievement as well as equality of*

opportunity for all; and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

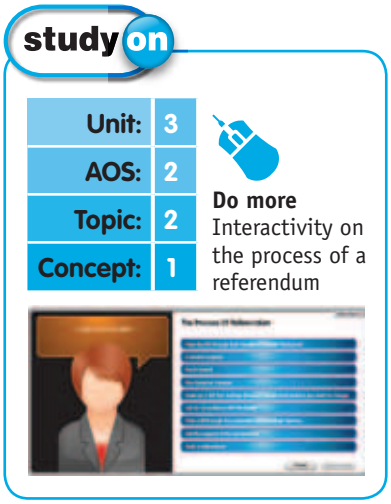
The second question was rejected by 60.66 per cent of voters and did not receive majority support in any state.

Analysis of the results

The strongest 'yes' vote for the republic came from inner metropolitan areas. Areas with a higher socioeconomic level overwhelmingly supported the idea of a republic. The lowest vote came from rural and remote areas, as well as many outer suburban areas.

Analysis of the results has produced key reasons for the referendum outcome.

- Australians are traditionally cautious of constitutional change.
- Public opinion varied widely on the issue and was not a simple positive or negative reaction. Traditional monarchists argued on the basis of attachment to the monarchy because of traditional associations with Britain. These people argued that a constitutional monarchy provides stable and democratic government, with the Governor-General acting as an impartial, non-political umpire of the legal process.
- Many people distrust politicians and believed allowing the Australian parliament to elect the president would result in a partisan head of state. These people preferred the current model where the Queen appoints the Governor-General on the advice of the Prime Minister.
- Many people who supported a republic voted 'no' because they believed that the president should be elected by the people rather than chosen by a two-thirds vote of the parliament. This effectively dented the republican vote.
- In the weeks before the referendum, then Prime Minister, John Howard, urged a 'no' vote on the grounds of maintaining our ties to Britain. This is considered a significant factor in swaying the undecided voters to vote 'no' at the referendum.



QUESTIONS

1. Outline the proposed changes to the Constitution that were put to voters in the 1999 referendum.
2. What was the outcome of the 1999 referendum on both questions?
3. In the 1999 republic referendum, where was the 'yes' vote strongest? Suggest two reasons for the strength of the vote in these areas.
4. What key role was played by then Prime Minister John Howard in the weeks before the 1999 referendum? What impact might this have had on the ultimate result?
5. In 2010, Prime Minister Gillard said that Australia should aim to become a republic before the reign begins of the monarch who succeeds Queen Elizabeth II. Do you think that a plebiscite, which would simply be a non-binding vote on whether Australia should become a republic, would be an effective way of encouraging people to ultimately support a referendum to replace the British monarchy in Australia? Explain your reasons fully. You may wish to address whether the wedding of Prince William and Kate Middleton has made Australians less likely to vote for a republic.

2.6 The ways in which one successful referendum changed the division of law-making power

KEY CONCEPT Referenda that succeed change the division of law-making power between the Commonwealth and state parliaments.

study on

Summary

Unit 3:
Law-making

Area of study 2:
Constitution and the protection of rights

Topic 3:
Changing the balance of power in the Constitution

There have been some successful referenda that have enhanced the capacity of the Commonwealth to manage the national economy. The 1910 referendum on state debts and the 1946 referendum on social security are two examples where there was a shift in power from the states to the Commonwealth regarding finances. The other successful referendum we will discuss in detail is the 1967 referendum on equal citizenship rights for Aborigines.

1910: state debts

The focus of the successful referendum question of 1910 was the enhanced capacity of the Commonwealth to manage the debts of the states. The proposal went on to become the *Constitution Alteration (State Debts) Act 1909* (Cwlth). The effect of the change was to allow the Commonwealth to take over state debts which were in existence at the time of Federation. The proposals received support in five out of the six states, with a national vote of 55 per cent.

1946: social security

The 1946 referendum on social security was supported in all states and established the rights of the Commonwealth to grant social security payments across a variety of areas.

Prior to this referendum, the only reference to social services in s. 51 involved invalid and old-age pensions. The amendment added further text to s. 51(xxii) as follows:

> The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances.

Oodgeroo (also known as Kath Walker) campaigned for equality for Aboriginal people prior to the 1967 referendum.

1967: equal citizenship rights for Aborigines

The rights of Australia's indigenous people go back to colonial times. When Victoria, New South Wales, Tasmania and South Australia established their individual colonial constitutions in the 1850s they gave voting rights to all male British subjects over 21, which included Aboriginal men. And in 1895 when South Australia gave women the right to vote and sit in Parliament, Aboriginal women shared that right. Only Queensland and Western Australia barred Aborigines from voting. Very few Aborigines knew they had the right to vote so very few voted.

As the twentieth century unfolded, there was a clear need to amend the Constitution to allow the Commonwealth to create law for indigenous people, who had enjoyed some rights under the old colonial rule. Equality could only be granted fully to indigenous people when the Commonwealth could make laws that allowed them to share the same rights and responsibilities of non-indigenous Australians. The rights of indigenous people varied from state to state, so the Commonwealth needed authority over this area to ensure consistency.

The 1967 referendum changed the division of law-making powers

The 1967 referendum contained two major proposals in the one question: to include indigenous Australians in the national census and to allow the Commonwealth to make laws for Aboriginal people.

Proposed constitutional changes in the 1967 referendum

The changes focused on two sections of the Constitution: 51 (xxvi) and 127.

'51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.'

Section 51 (xxvi) meant that the Australian Parliament could make laws for anyone except Aborigines.

'127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.'

Section 127 meant that when the population of the Commonwealth, of a state or territory was counted, Aboriginal people were not included.

From 1962 to 1964 more than 50 petitions were submitted to the Parliament, all asking for ss. 51 (xxvi) and 127 to be removed.

The 1967 referendum was successful. Indigenous Australians were to be counted in future census figures and the Commonwealth was given the power to make laws for Aboriginal people.

Arguments for change

On 2 March 1967 Prime Minister Harold Holt introduced legislation for a referendum, which was held on 27 May 1967. Significant reasons were put forward for the 'yes' vote:

- To allow Aborigines to share the same status as non-indigenous Australians
- To heal some of the wounds of discrimination that had been felt since the nineteenth century
- To give the Commonwealth the legal right under s. 51 of the Constitution to create special laws for the benefit of Aboriginal people
- To allow the Commonwealth to take control of law-making in this area and ensure uniformity throughout Australia for Aboriginal people. (Each state had its own laws regarding Aboriginal people and there were inconsistencies between those laws.)

DID YOU KNOW?

It is often wrongly quoted that the 1967 referendum was designed to give Aboriginal people the right to vote. This had already been given in 1962 with the passing of the Commonwealth Electoral Act.

The 1967 Referendum results

The referendum question was 'Do you approve the proposed law for the alteration of the Constitution entitled "An Act to alter the Constitution" so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population?'

In the eventual outcome, the national 'yes' vote was 90.77 per cent. The 'yes' vote was highest in Victoria at 94.68 per cent and lowest in Western Australia at 80.95 per cent. The heaviest 'no' vote came from rural and regional electorates (there was an 18 per cent 'no' vote in northern New South Wales). In the Western Australian seat of Kalgoorlie more than 28 per cent of votes opposed the proposal. The 'no' vote was strongest in states that had the largest Aboriginal population.

The impact of the 1967 referendum

Where the states could once make law for indigenous people that reflected their own local concerns, the 1967 referendum made this impossible, especially where the Commonwealth exercised its new powers that had been granted by the people. Section 109 of the Constitution has ensured that any state law that is inconsistent with the Commonwealth's approach to indigenous affairs would become invalid.

An example of such a law is the Racial Discrimination Act, which was Australia's first federal anti-discrimination law. This legislation aims to ensure that Australians of all backgrounds are treated equally and have the same opportunities regardless of race, colour, descent, national or ethnic origin, and immigration status. The Act also makes racial vilification illegal. This gives additional protection to people who are being publicly and openly offended, insulted, humiliated or intimidated because of their race, colour, or national or ethnic origin.

The Racial Discrimination Act meets Australia's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is committed. Without the success of the 1967 referendum, the Commonwealth could not have legislated to protect the rights of indigenous people in this way.

TEST your understanding

1 (a) Explain the proposal that was put to voters in the 1910 state debts referendum.
(b) What was the outcome of the 1910 referendum?
(c) In what ways did the referendum increase the powers of the Commonwealth?

2 (a) Why do you think the 1946 referendum on social security was considered so important?
(b) In what ways did this referendum increase the powers of the Commonwealth?

3 What referendum proposals were put to voters in the 1967 referendum?

APPLY your understanding

4 Section 109 of the Constitution was to have a profound impact on the rights of indigenous Australians, some of whom had suffered under discriminatory state laws.
(a) Outline the nature and purpose of s. 109 of the Constitution.
(b) In what ways would s. 109 have been effective in protecting the rights of indigenous Australians?

5 The 1967 referendum was the most well-supported proposal since Federation.
(a) In which state was the proposal supported the most strongly?
(b) In which areas was support the lowest?
(c) Give two reasons why there may have been such differences across Australia.

6 In a 500-word response, explain why it was so important that the Commonwealth Parliament be able to create laws for Aboriginal people.

2.7 The role of the High Court

KEY CONCEPT Although the Constitution contains clear rules about law-making power, conflicts still arise between the Commonwealth and state parliaments. Individuals can also challenge whether or not laws made by the Commonwealth are constitutional.

The role of the High Court

When the Constitution was drafted, the High Court was established as the arbiter of disputes involving law-making power and jurisdiction.

The High Court fulfils the following roles.

The High Court provides checks and balances regarding the use of Commonwealth power

The High Court provides checks on the exercise of executive and legislative power by the Commonwealth Government to ensure that it does not act in a way contrary to existing law. This was seen in the case of *Plaintiff M70/2011 v. Minister for Immigration and Citizenship [2011] HCA 32*, where the High Court ruled invalid the Minister for Immigration and Citizenship's declaration of Malaysia as a country to which asylum seekers who entered Australia at Christmas Island could be taken for processing of claims. In a majority (6-1) ruling, the Full Bench of the High Court ruling prevented the minister from taking to Malaysia two asylum seekers who had arrived at Christmas Island as part of a larger group four weeks earlier.

The Court ruled that under the *Migration Act 1958 (Cwlth)*, the minister cannot nominate a country to which asylum seekers can be taken for processing unless that country is legally bound to meet key criteria, including access for asylum seekers to effective procedures for assessing their need for protection. The High Court found that Malaysia is not legally bound to provide the protection that the Migration Act requires and Malaysia had not pledged to uphold international standards with regard to asylum seekers. All parties to the case agreed that Malaysia was not legally bound to, and did not recognise, the status of refugees in its domestic law.

The High Court has proven it has significant power in resolving disputes over the law-making powers of the Commonwealth. In 2011 the court held that under s. 198A of the Migration Act, the minister cannot validly declare a country as a country to which asylum seekers can be taken for processing unless that country is legally bound to meet certain criteria. The result was that asylum seekers could not be sent to Malaysia.

The High Court's role in interpreting the Constitution

The High Court reads, interprets and applies the words of the Constitution to reach decisions in cases as they arise. In the process, the judges seek to protect the original spirit of the Constitution, especially as it applies to the separation of powers and reducing the opportunity for undue influence being exerted over the three branches of government.

The High Court in Canberra

When interpreting the Constitution, the High Court seeks to read words in a manner that allows the Constitution to keep pace with the demands of a modern nation. The Australian Constitution was written in the 1890s and words such as 'external affairs' have very different meanings in the twenty-first century, especially in a global economy which is threatened by terrorism, than the relatively less complex world of the nineteenth century.

The High Court's powers

The High Court obtains its jurisdiction (powers) from ss. 75 and 76 of the Constitution (see below). Effectively it has power to hear and determine 'all matters' that are listed below, such as matters arising under any treaty and matters in which the Commonwealth is a party. Since its first case in 1903, the High Court has played a significant role in affecting the balance of power between the Commonwealth and the states.

DID YOU KNOW?

Appointments to the High Court officially are made by the Governor-General-in-Council. In practice, however, appointees are nominated by the Prime Minister, on advice from the Cabinet. The Attorney-General of Australia and the attorneys-general of the states and territories of Australia have input to the process of appointment.

Section 75 of the Constitution gives the High Court jurisdiction to hear cases

In all matters:

(i) arising under any treaty
(ii) affecting consuls or other representatives of other countries
(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party
(iv) between states, or between residents of different states, or between a state and a resident of another state
(v) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

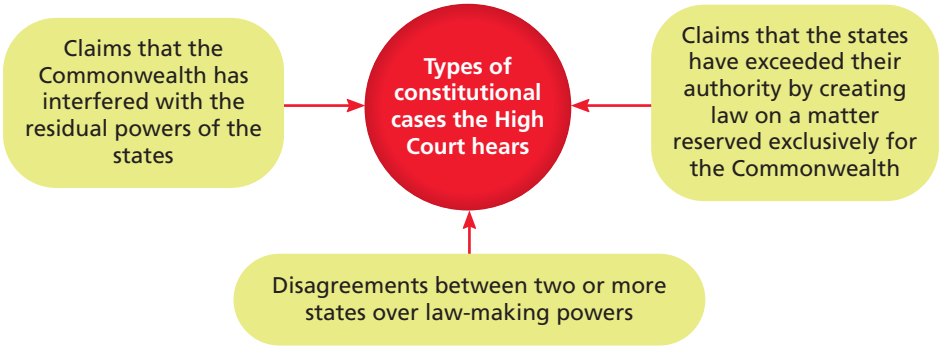
the High Court shall have original jurisdiction.

Section 76 of the Constitution further elaborates on the High Court's powers

The parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation
(ii) arising under any laws made by the parliament
(iii) of admiralty and maritime jurisdiction
(iv) relating to the same subject matter claimed under the laws of different states.

The High Court has had a much greater impact than referenda when it comes to altering the law-making capacity of parliaments. The High Court does not achieve this through amending the actual words of the Constitution. It reads, interprets and applies the Constitution and, in reaching decisions, it creates laws that then affect the powers of parliaments. The diagram below explains the types of constitutional cases the High Court is called upon to resolve.



Approaches to interpretation

The way the High Court has handled the balance of law-making power between the Commonwealth and the states has changed since Federation. The first approach adopted by the High Court was known as the **reserved powers doctrine**. This was based on the belief that the Constitution intended to give the states authority over those areas not expressly granted to the Commonwealth as specific powers. That is, the Commonwealth could not use its powers to intrude on residual powers.

The **reserved powers doctrine** is one in which a restrictive approach to the interpretation of the specific powers of the federal parliament is taken in order to preserve the residual powers of the states. This doctrine has since been abandoned by the High Court.

The High Court has adopted different approaches to interpreting the Constitution throughout its history.

As time passed, the High Court changed its approach to the interpretation of the Constitution. The following case study highlights how the High Court has had a tendency to broaden Commonwealth power, with some people suggesting the

High Court has adopted an activist role. These commentators argue that parliament is the supreme law-maker and the High Court should not undertake a reform agenda on important issues.

Two important cases: the *Engineers Case* and the *First Uniform Tax Case*

The *Engineers Case* established the Commonwealth's right to make law on industrial matters. The Commonwealth continues to make laws in this area today with the passing of the *Fair Work Act 2009* by the Labor Government.

In the 1920 case of *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (the *Engineers Case*) HCA 30, the High Court examined whether the Commonwealth had the power to make law on industrial matters under the 'conciliation and arbitration' power (s. 51(xxxv) of the Constitution). It was found that the Commonwealth did have power to make law in this area. The reserved powers doctrine was rejected by the High Court, which preferred to adopt a broader interpretation of the Constitution, rather than be too concerned about preserving absolutely the residual powers of the states. The Engineers case is widely regarded as one of the most important cases the High Court has decided.

In the case of *South Australia v. The Commonwealth* (the *First Uniform Tax Case*) [1942] HCA 14, the High Court's broad interpretation of s. 51 of the Constitution gave the Commonwealth increased financial control over the states by allowing it to become the sole collector of income tax across the country (prior to this, income tax was levied by both Commonwealth and state governments). It was anticipated that the right to collect income tax may have been returned to the states after World War II, but this has not occurred. It is important to note that the power of a government to collect revenue in the form of taxation brings with it a much higher level of control over policy making. This has become especially important in the twenty-first century where the Commonwealth, which collects the vast proportion of taxation raised in Australia, can grant money to the states and demand that the money be spent according to the particular demands of the Commonwealth.

TEST your understanding

1. Outline the jurisdiction of the High Court in relation to the hearing of cases involving the Constitution.
2. In your own words, explain the reserved powers doctrine.
3. What type of constitutional cases is the High Court frequently called upon to solve?

APPLY your understanding

4. Explain the following cases in terms of their importance in shaping the powers of parliaments in Australia:
   (a) the *Engineers Case*
   (b) the *First Uniform Tax Case*.

2.8 High Court cases involving the interpretation of the Constitution

KEY CONCEPT The external affairs power of the Commonwealth has grown in importance since the end of World War II and the establishment of the United Nations. Australia is a key member of the global community, and has generated significant international law and policy in areas such as the rights of children and the rights of women.

External affairs

The term, **external affairs**, refers to a country's interaction with another country and includes such things as foreign policy and international treaties (a treaty is an international agreement and frequently relates to human rights and the environment). Under s. 51(xxix) of the Constitution, the Commonwealth Parliament has the power to make laws with regard to external affairs. This has been interpreted to mean that the Commonwealth has the right to enter into international treaties with other nations. When the Commonwealth signs an international treaty, this does not automatically create new law in Australia. To do this, parliament must pass legislation based on the relevant treaty or convention, which then puts that treaty into effect. Sometimes law passed to give effect to an international treaty has meant that the Commonwealth has encroached upon the residual power of the states.

External affairs refers to the interactions with another country, including foreign policy and international treaties.

DID YOU KNOW?

Former Prime Minister Bob Hawke refers to the High Court decision on the Franklin Dam: 'Well, decisions of the High Court don't change the Constitution. The Constitution is a written document. What does change is the interpretation. And of course, we were sure on the advice that we'd been given and certainly on my own reading of the Constitution that the external powers (inaudible) gave the Commonwealth powers.'

Commonwealth v. Tasmania

Many commentators claim that the 'Green movement' emerged as a formidable force in *Commonwealth v. Tasmania* (1983) (the *Tasmanian Dam Case*), which involved a challenge to the *World Heritage Properties Conservation Act 1983* (Cwlth). This legislation had been passed by the Commonwealth Parliament to prevent all work on a hydro-electric dam planned for construction on the Gordon River in south-west Tasmania. It was claimed that this area, which also covered vast tracts of the Franklin River, was unique in terms of flora and fauna, and that Aboriginal artefacts in the region would have been destroyed if the dam were constructed.

The demonstration and blockade at the Franklin River gained widespread media attention, which provoked many people into demanding this pristine area be protected. The Hawke Government subsequently nominated the area for world heritage listing using the terms of an international treaty.

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Tassie's Franklin River — 20 years on

Explore the impact of the *Tasmanian Dam Case* — a victory that changed the national political landscape.

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A **treaty** is an agreement between two or more sovereign states to undertake a particular course of action. The international agreement may involve such subjects as human rights, the environment or trade.

The fight for gay equality came much later in Tasmania. Nick Toonen was awarded an Order of Australia medal for his human rights work, which included leading a nine-year international campaign for gay rights in Tasmania. The Human Rights (Sexual Conduct) Act came about as a direct result of his work in this area.

study on

Unit:	3
AOS:	2
Topic:	3

Practice VCE exam questions

Using the terms of an international **treaty**, the Commonwealth nominated for World Heritage listing the specific areas that the Tasmanian government planned to dam. This ensured the protection of much of the south-west wilderness regions of Tasmania. The resultant Commonwealth legislation, the World Heritage Properties Conservation Act, was created on the basis of this treaty.

The Tasmanian Government challenged the Commonwealth law and the High Court found itself involved in a split decision. The majority of the Court found that the Commonwealth legislation was valid. These judges adopted a broad view of the external affairs power, referring to Australia's obligation under this treaty to protect irreplaceable wilderness areas. In contrast, the dissenting judges, led by Chief Justice Gibbs, agreed with Tasmania's claim that to give s. 51(xxix) a broad reading was a gross interference with the residual powers. Never again would the Commonwealth be restricted merely to following ss. 51 and 52.

The impact of the *Tasmanian Dam Case*

The judgment in the *Tasmanian Dam Case* has reshaped the law-making relationships between the Commonwealth and the states. The Commonwealth now has the authority, through its external affairs power, to create broad-ranging legislation that has made invalid many pieces of state legislation that were inconsistent with Commonwealth law.

An example of this is the *Human Rights (Sexual Conduct) Act 1994* (Cwlth) which was created by the Commonwealth Parliament as a direct result of it having ratified the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the Covenant protects people from 'arbitrary or unlawful interference with . . . privacy'. The Commonwealth passed the 1994 legislation with the express purpose of overturning two sections of the Tasmanian Criminal Code which outlawed consensual, adult homosexuality in private. At that time, Tasmania was the only state that continued to outlaw sexual activities, that it deemed were 'against the order of nature'.

Having failed in its bid to convince the Tasmanian Parliament to change the law, the Commonwealth relied on the interpretation of s. 51(xxix) from the *Tasmanian Dam Case*, and proceeded to create the 1994 legislation. The explanatory memorandum of this legislation states that: 'sexual conduct involving only consenting adults acting in private is not to subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy'.

The Tasmanian Parliament did not challenge the Human Rights (Sexual Conduct) Act in the High Court. The precedent from the *Tasmanian Dam Case* clearly allowed the Commonwealth to create the 1994 legislation.

TEST your understanding

1 In your own words, define the term 'external affairs'. Why do you think that s. 51 (xxix) was included in the Constitution?
2 Outline the decision in the *Tasmanian Dam Case*.

APPLY your understanding

3 Outline the Tasmanian law that was the focus of debate over gay rights in the 1980s and 1990s.
4 What international treaty or convention is relevant to the gay rights debate?
5 Why is it important for Australia to sign treaties and conventions with other countries?
6 In your own words, explain the purpose of Article 17 of the ICCPR.
7 Do you agree with the statements made by the Tasmanian premier in 1994, that laws such as the Tasmanian Criminal Code have 'nothing at all to do with the United Nations or the Commonwealth'? Give reasons for your answer.
8 'The Australian Constitution has been reformed and modernised through the work of judges rather than through the ballot box. Although it would be preferable for the people to be involved in the reform of the Constitution, the strict requirements of s. 128 have not made this possible. Judges have done much to ensure that the legal processes on which our nation operates reflect the demands of a modern society.' Discuss this statement with reference to cases and examples featured in this chapter.

2.9 High Court cases involving interpretation of the Constitution: regulating mass communication technologies

KEY CONCEPT One of the great challenges facing the Constitution is to remain relevant in a world that changes by the day, especially in the area of technology. The High Court has issued a series of rulings that have ensured that the Commonwealth has control over emerging technologies such as mass communications and the internet.

We take for granted everything to do with modern communications. From one mobile device we can make phone calls to Paris or New York, play Angry Birds, send a text message, place a bet on an AFL game and update our social media status. However, who has the power to regulate technology such as this? When the Constitution was written, mobile phones would have been regarded as science fiction. This was a world of postal items arriving via horse-drawn carriage. So who holds the power to control all forms of modern communication, especially those that use wireless technology, which is also known as wi-fi? The High Court has decided that the Commonwealth should have the power to regulate such matters that go way beyond the humble letter or telegram.

In 2011 and 2012, many inquiries around the world were held into the illegal hacking of private communications by journalists. Rupert Murdoch's newspapers were the main target of such inquiries. The Australian Government signalled an intention to create tough laws to ensure privacy of individuals when communicating electronically, especially when using wireless technologies that are more readily subject to hacking.

Controlling communication: keeping it modern

Section 51(v) of the Constitution gives the Commonwealth the power to legislate on 'postal, telegraphic, telephonic, and other like services'.

At Federation, s. 51(v) was used by the Commonwealth to control telegraph and domestic telephone operations and mail, including the issue of postage stamps. As technology has increased over the past 110 years, the definition of what constitutes 'other like services' has been widely debated. Those who support Commonwealth control of technology in the area of communication argue that 'other like services' was included in s. 51(v) because of speculation in the late nineteenth century concerning the development of wireless technology as a means of communications. Of course, this was a very early form of what is found in millions of homes today, especially with wireless internet. In 1888, scientific experiments in Germany in wireless telegraphy were widely reported and this research would have been known to those who drafted our Constitution. In a series of cases, the High Court has adopted this broad approach to s. 51 (v), taking into account the latest in communications technology that has now gone way beyond that early ground-breaking research in Germany.

In the case of *R v. Brislan* [1935] HCA 78, the Commonwealth Parliament had passed the *Wireless Telegraphy Act (1905)* which required all people who owned a wireless set to be licensed. This required the payment of a fee. A challenge was made to the law on the basis that the Commonwealth did not have the power under the Constitution to impose the requirement of the licence. The High Court decided that s. 51(v) included the power to regulate radio broadcasting and on this basis, the 1905 legislation was valid law. The majority of the judges found radio to be a wireless type of 'telegraphic or telephonic service', rather than an 'other like service'. It is clear in the judgement that the Court considered the phrase 'other like services' should encompass developments in technology not anticipated at Federation and therefore not explicitly listed in the Constitution.

The legal reasoning from the Brislan case was expanded in *Jones v. Commonwealth (No 2)* [1965] HCA 6, when the High Court found that television broadcasting also came within s. 51(v), thereby allowing the Commonwealth control over this rapidly developing part of our lives. In his *ratio decidendi* ('the reason

DID YOU KNOW?

In 2011, there was uproar when it was discovered that journalists from News Limited had been hacking into private telephone and internet messages to gain access to information. In September 2011, the Australian Government announced that it would hold an inquiry into the activities of journalists who interfere with our privacy through hacking into communications between individuals.

for the decision') judgement in the Brislan case, Chief Justice Knox expanded the definitions in s. 51(v) to include reference to future developments in technology, which at that time were only the subject of research. The Commonwealth has used this decision to develop far-reaching laws on areas such as media ownership and the rollout of digital networks, which from 2013 have replaced the older systems.

To use a more recent example, the extent of the reach of 'other like services' under s. 51 (v) was also seen with the Commonwealth's passing of the *Interactive Gambling Act (2001)*, which tightly regulates online casinos in Australia and the advertising of online gambling. A 2004 review of the effectiveness of this law found that it had curbed the potential growth of online problem gambling in the community. Other forms of gambling such as on-course bookmaking are still regulated under state law.

In creating legislation to regulate the internet, the Commonwealth has assumed that the broad interpretations of s. 51 (v) delivered by the High Court in cases such as Brislan and Jones have given it wide-ranging authority over twenty-first century technologies, especially in the area of mass communications. The most ambitious Commonwealth legislation in this area involves the National Broadband Network (NBN), which is being implemented across Australia and will be fully effective by 2020. The NBN will affect every Australian and the Commonwealth has relied upon the High Court's interpretation of the Constitution to make this legislative control possible.

The national broadband network (NBN) is being implemented across Australia. The Commonwealth has the power to legislate in this area as under s. 51 (v) the Commonwealth has the power to legislate on 'postal, telegraphic, telephonic, and other like services'.

The impact of Brislan and Jones

As a direct result of High Court interpretation of the term 'other like services', the Commonwealth can now regulate radio, television, internet, satellite, cable and optic fibre technologies in ways that could not have been imagined ay Federation.

TEST your understanding

1. Describe three areas of emerging technologies that would not have been anticipated when the Constitution was being written. For each area mentioned, explain why that area needs to be regulated.
2. In your own words, explain the purpose of s. 51 (v) of the Constitution.
3. Outline the High Court's decision in the Brislan case. Give one reason why the judgement in the Brislan case was so significant for that time.

APPLY your understanding

4. What do you think was the basis of the High Court's decision in the case of *Jones v. Commonwealth* (No 2)? What difficulties may arise if television were considered a residual power of the states?
5. 'The power of the High Court to influence the law-making powers of the Commonwealth and the states was seen in the passage of Commonwealth legislation to regulate the internet. It makes sense that when the Commonwealth is spending over $40 billion on an NBN, that they should have exclusive control over the regulation of the project.' Discuss this statement in a 400-word response.

2.10 High Court cases involving the interpretation of the Constitution: financial relations

KEY CONCEPT The High Court established that the Commonwealth could make grants to the states for a specific purpose in the *Roads Case*. The impact of this case is that the Commonwealth has been able to direct where money will be spent, even in areas once considered to be residual powers of the states.

Australia's recent political history has seen arguments between the Commonwealth and the states over issues of funding. For example, the Commonwealth provides funding for public health according to a variety of financial packages. This usually causes argument among the states, which argue that they are not receiving fair treatment. You may ask: why should the states be so dependent on the Commonwealth? The answer lies in early, very important, High Court decisions.

State of Victoria v. The Commonwealth

The *State of Victoria v. The Commonwealth* (the *Roads Case*) [1926] HCA 48, enabled the Commonwealth to provide grants for specific purposes which, in this case, was for road building.

The *Roads Case* established that grants could be made by the Commonwealth for specific purposes such as roads.

The Victorian Government challenged the Commonwealth's power to make conditional or tied grants of financial assistance to the states under s. 96. Receiving a grant was welcome, but actually specifying what that grant was used for was considered by the Victorian State Government to be unconstitutional. Section 96 allows the Commonwealth to make grants 'on such terms and conditions as the parliament sees fit'. The High Court stated that the Commonwealth did have the right to dictate exactly how the grant was to be spent, even if the area being funded was not part of a specific power given to the Commonwealth at Federation. In this way, the Commonwealth can impose itself in areas once considered to be residual powers by granting money with strict conditions that may not reflect the policies of state governments. If the state refuses to accept the conditions imposed by the Commonwealth, it does not receive the grant. In 2004, for example, the Howard Government indicated that funding for schools would be partly dependent on state governments changing their assessment policies for students and ensuring that the Australian flag flies in each school ground. The Constitution does not expressly

DID YOU KNOW?

Geoffrey Goldsworthy in the *Melbourne University Law Review* said this on the High Court's interpretation of the Constitution in the modern day: 'It is uncontroversial that the application of the Constitution can change as circumstances change. The question is how, and to what extent, its meaning can legitimately be supplemented or adjusted to meet contemporary needs, without a formal amendment. Orthodox principles of interpretation already provide some scope for that to happen.'

give the Commonwealth this right, but the Commonwealth can use its powers under s. 96 to influence state government policy to a significant degree.

The Commonwealth has imposed tight restrictions on the states in terms of funding for education. In 2004, grants were dependent upon schools flying an Australian flag and, from 2012, funding for the national curriculum is dependent on states adopting Commonwealth policies. These areas are technically residual powers, belonging only to the states.

The impact of the *Roads Case*

Since the introduction of the goods and services tax in Australia (the GST), a wide range of state taxes have been abolished. This has increased the states' financial dependence on the Commonwealth. As a result of the *Roads Case* decision, the Commonwealth has been able to direct precisely how money is to be spent on a whole range of areas such as primary school education and roads, which were once considered residual powers.

The introduction of the Australian Curriculum from 2013 can also be linked to the *Roads Case*. The Constitution does not specifically allow the Commonwealth to control primary and secondary education. However, future Commonwealth grants to the states for education come with the demand that the Australian Curriculum be implemented in full. This now gives the Commonwealth full control over school curriculum.

TEST your understanding

1. State what principle was established in the *Roads Case*.
2. What section of the Constitution was being interpreted in the *Roads Case*?

APPLY your understanding

3. Explain how the Commonwealth has been able to impose the requirement of flying the Australian flag in schools.
4. Describe the impact of the *Roads Case* on the law-making power of the state and Commonwealth parliaments.

2.11 Referral of law-making power by the states to the Commonwealth Parliament

KEY CONCEPT Where referendum procedures have been unsuccessful in amending the wording of the Constitution, there is another means available which is more efficient and effective. It involves the referral of powers from the states to the Commonwealth. Importantly, it does not involve voters, so is a much more streamlined and efficient process than referendums.

Referral of powers

Referral of powers is the third way that the powers of the Commonwealth and the states can be changed; the others being statutory interpretation by the High Court and referenda under s. 128. An individual state can refer (hand over) some of their powers to the Commonwealth. Not all states need to agree. Under s. 51(xxxvii) of the Constitution, the Commonwealth is able to legislate on matters that have been referred to the Commonwealth by any state.

Examples of referral of power

The states have shown a willingness to refer some key areas of law-making power to the Commonwealth. Some of the main areas are discussed here.

De facto relationships

The Constitution gives legislative power to the Commonwealth over marriage (s. 51(xxi)) and matrimonial causes (s. 51(xxii)). However, the custody of children born outside of a marriage was not within the Commonwealth's power and, therefore, was a residual power for the states.

Between 1986 and 1990, all states, with the exception of Western Australia, referred the custody, maintenance, and access of ex-nuptial children to the Commonwealth. In 2003 Victoria, Queensland and New South Wales referred financial settlements to the Commonwealth. Western Australia has not referred powers, and has its own specialist court, the Family Court of Western Australia.

Corporations

In 1996, Victoria referred industrial relations matters to the Commonwealth. This allowed Commonwealth industrial relations law to have a broader reach in Victoria.

Terrorism

The defence power in s. 51(vi) of the Constitution allows the Commonwealth to legislate on military matters; however, it is unlikely that this power extends to laws regulating internal security.

In the wake of the September 11 attacks and the Bali bombings, in 2002–03, all states referred a limited power to allow the enactment of the *Criminal Code Amendment (Terrorism) Act 2003* (Cwlth). The referral required that that Act not be amended without consultation with the states.

Mirror legislation

Sometimes there is confusion between referral powers in s. 51(xxxvii) and the creation of 'mirror legislation'. Mirror legislation is when each state enacts identical legislation in order to provide for consistency across the states. The important distinction is that mirror legislation is state legislation and not enacted by the Commonwealth Parliament. Some states prefer mirror legislation because it allows

DID YOU KNOW?

It is unclear whether or not a referral of power from the states to the Commonwealth can be revoked (cancelled) by the relevant state. It is unclear also whether a power, once referred, becomes an exclusive power of the Commonwealth or a concurrent power.

The rights of children are an essential focus of any modern society. Those rights must be shared equally regardless of the status of the child. Most Australian states have referred their powers over ex-nuptial children in order that this equality occurs.

Under s. 51(xxxvii) of the Constitution, the Commonwealth is able to legislate on matters that have been referred to the Commonwealth by any state.

Mirror legislation means that all states enact identical legislation in a particular area.

greater control to repeal and amend legislation. The downside of this is that when legislation is amended in one state, but not in another, inconsistencies occur in the law between states.

Amendments to ensure an effective referral of consumer credit powers to the Commonwealth

Tomorrow the government will introduce legislation into the parliament that will give effect to the referral of responsibility for consumer credit to the Commonwealth.

Passage of the National Consumer Credit Protection Amendment Bill is the final step for the Commonwealth in creating a single, standard, national regime for the regulation of consumer credit.

'This landmark reform has been achieved through the strong commitment by the Commonwealth, State and Territory Governments working in a spirit of cooperation to build the COAG reform vision for a single, uniform national credit law,' Mr Bowen said.

As the Commonwealth legislative powers alone are not sufficient to enact a nationally comprehensive consumer credit regulatory framework the States have agreed to refer their powers to the Commonwealth, under s. 51 of the Constitution, by passing relevant referral legislation in their respective Parliaments. This is an integral element of the reform . . .

These amendments provide the flexibility sought by the States to enable them to refer their powers for consumer credit regulation to the Commonwealth. Following the Commonwealth's enactment of this Bill, the States wishing to refer powers excluding certain subject matters or using the adoption approach will be able to do so.

Following enactment of the Referral Bills, the States will be able to repeal their own state laws in time for the commencement of the National Credit legislation on 1 July 2010. This will put an end to the state-based credit regime that had formerly applied inconsistently across eight jurisdictions.

Source: Media release, 9 February 2010, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services.

TEST your understanding

1 Explain **two** circumstances in which the states have referred a part of their law-making powers to the Commonwealth.

2 For each of the examples provided, explain the reasons why the states have made this referral of power.

APPLY your understanding

3 In regard to the *Criminal Code Amendment (Terrorism) Act 2003* (Cwlth), the states have added a requirement in relation to any possible amendments to that legislation.
   (a) What provision was added by the states before this referral took place?
   (b) Do you think that this was an appropriate response by the states? What does it suggest about the states' relationship with the Commonwealth Parliament?

4 Explain what 'mirror legislation' is and why some states may prefer this to referring power.

5 Read the media release regarding consumer credit. Why do you think the regulation of consumer credit is better suited to Commonwealth control?

SKILL DRILL

KEY SKILL TO ACQUIRE:

- analyse the impact of referenda, High Court interpretation of the Constitution, and the referral of powers on the division of law-making powers.

Extended response practice

The question below is typical of what you might receive in the VCAA exam. This section also provides some case studies to assist your understanding, as well as a sample introduction and key questions to consider before writing your essay. Students who are able to illustrate the key knowledge in Legal Studies through the use of real cases are more likely to score higher in their final examination. Remember that when using case studies, ensure that you are able to relate the key facts and the legal reasoning behind the case to the relevant key knowledge and key skills in the study design.

'Altering the division of law-making powers between the state and Commonwealth parliaments is extremely difficult.'

With reference to two examples of shifts in law-making powers, discuss the above statement. In your answer, indicate the extent to which you agree with the statement, giving reasons for your answer. **8 marks**

SKILL DEFINITION

Analyse means to examine in detail. When examining in detail you will look at strengths and weaknesses.

Some examples you may use to illustrate your point

The following case highlights how law-making powers have shifted from the states to the Commonwealth and the role of the High Court.

Ha v. New South Wales (1997) 189 CLR 465

The Ha case was heard in the High Court and dealt with s. 90 of the Constitution. This section prohibits states from levying excise on imported goods. The plaintiffs in this case were charged under the *Business Franchise Licences (Tobacco) Act 1987* (NSW) with selling tobacco in New South Wales without a licence.

This law, which was made by the New South Wales Parliament, required the payment of a licence fee, which consisted of a fixed amount, plus an amount that was calculated by reference to the value of tobacco sold during a specified period. The plaintiffs argued that the licence fee imposed by the Act was an excise and because the law had been made by a state parliament, was therefore invalid according to s. 90 of the Constitution.

A majority of the Court ruled in favour of the plaintiffs. The court adopted the broad view of an excise that it was 'a tax on sale, production and manufacture of goods prior to consumption, applying to goods whether produced locally or not'. The Court viewed the New South Wales law as purely about raising tax revenue, which Australian states are constitutionally barred from imposing.

Following is an example of law-making powers being shifted from the states to the Commonwealth through the referral of powers.

The Murray-Darling Basin

An agreement was entered into in 2008 by the Commonwealth with the state parliaments of New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory regarding the Murray-Darling Basin reform. The Murray-Darling Basin reform sets out a process for the planning and management of the Basin's water and other natural resources. To undertake the referral of powers under s. 51(xxxvii) of the Constitution over this significant area of Australia, the Commonwealth introduced amendments to the *Water Act 2007* (Cwlth).

Sample introduction to extended response question

The division of law-making powers between parliaments in Australia is outlined in the Constitution. Section 51 of the Constitution specifically lists the powers to be exercised by the Commonwealth, while other sections of the Constitution exclude the state parliaments from legislating in particular areas. There are three means of amending this division of law-making powers: referendum process according to s. 128 of the Constitution; interpretation of the Constitution by the High Court; and the referral of powers by the states to the Commonwealth. To varying degrees, all three methods have played a role in greatly shifting powers from the states to the Commonwealth since Federation.

Key points regarding the division of powers

The next paragraph of this essay would involve an explanation of the division of powers. This is presented in dot point form below:

- Specific or enumerated powers: all powers of the Commonwealth (most are listed in s. 51 of the Constitution). These powers can be exclusive powers (not shared with the states such as currency and defence) or concurrent powers, over which both the Commonwealth and State Parliaments have authority. Under s. 109, if a federal law conflicts with a state law, the state law, to the extent of its inconsistency, is invalid.
- Residual powers: the states retain sole power to make law in areas not mentioned in the Constitution. The Constitution recognises the power of state parliaments (s. 107) and the validity of separate constitutions (s. 106) to ensure that only the states have control over these areas.

Key points regarding the difficulty of changing the division of law-making power between parliaments

Students should consider the following points when developing their essay:

- What are the three ways in which the Constitution can be altered?
- Under what circumstances can alteration occur? For example, can the Commonwealth act to change the Constitution whenever it wishes?
- With reference to the Ha case, what process was used to alter the division of law-making powers? Was this effective? What has been the lasting impact on the division of powers between parliaments in Australia?
- Why was referral of powers over the Murray-Darling Basin regarded as important?
- In comparing High Court decisions and referral of powers to referendum procedures, which has been the most effective? Give reasons. Why have the other means been considered less effective? Use case studies to justify your answer.

Your task

Within a 25 minute time limit, write a complete response to the essay question on page 81, using other cases that you have studied in this chapter.

CHAPTER 2 REVIEW

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

Please note: Outcome 2 contributes 50 marks of the 100 marks allocated to school-assessed course work for Unit 3. Outcome 2 may be assessed by one or more assessment tasks. This assessment task is designed to contribute 30 marks out of a total of 50 marks for Outcome 2.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- apply legal principles to relevant cases and issues
- explain the role of the Commonwealth Constitution with respect to law-making powers
- identify the types of law-making powers
- explain the methods and processes of changing constitutional power
- analyse the impact of referenda, High Court interpretation of the Constitution and the referral of powers on the division of law-making powers.

Structured questions

Question 1

Define the following terms:

a referendum

b constitution. **(1 + 1 = 2 marks)**

Question 2

Explain the purpose of s. 109 of the Constitution. To what extent does it guarantee the authority of the Commonwealth Parliament in law-making? **(2 + 2 = 4 marks)**

Question 3

Explain the methods and processes for changing constitutional power. **(2 + 2 + 2 = 6 marks)**

Question 4

Explain the division of power between the Commonwealth and state parliaments under the Constitution. **(4 marks)**

Question 5

Describe **one** constitutional restriction on the law-making powers of the Commonwealth Parliament and **one** constitutional restriction on the law-making powers of the state parliaments. In your answer, explain the reasons why these restrictions were included in the Constitution. **(2 + 2 = 4 marks)**

Question 6

'The High Court has played a far more significant role than referendum procedures in influencing the division of power between parliaments in Australia.' Discuss. **(6 marks)**

Question 7

What role does the Commonwealth Constitution play with respect to law-making powers? **(4 marks)**

(Total 30 marks)

Tips for responding to structured questions

Use this checklist to make sure you write the best responses to the questions that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You should at least define the following terms in your short-answer responses: referendum, constitution and division of power.		
Apply legal principles to relevant cases and issues.		
In particular, when answering question 6 you should refer to the *Tasmanian Dam Case* to support your answer.		
Explain the role of the Commonwealth Constitution with respect to law-making powers.		
Question 7 requires that you state that the Constitution plays a role in dividing law-making powers between the states and the Commonwealth, it provides for what will happen if there is a conflict in law-making power and also provides a means by which the Constitution can be amended via referendum.		
Identify the types of law-making powers.		
Specifically in question 4 you need to mention, exclusive, residual and concurrent law-making powers. You may also mention referral powers.		
Explain the methods and processes of changing constitutional power.		
When answering question 3 you need to explain that constitutional power can be changed via referendum, the High Court's interpretation of the Constitution and the states referring law-making power to the Commonwealth.		
Analyse the impact of referenda, High Court interpretation of the Constitution, and the referral of powers on the division of law-making powers.		
Question 6 is stating that the High Court has played the most significant role in influencing the division of power. The question is asking you to discuss this statement. Look at the facts and whether or not referenda have been successful and then look at how the High Court has influenced law-making power, providing examples where necessary. You should also mention that law-making power can also be changed via the states referring their law-making power to the Commonwealth.		
Your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used instead of point form. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- **Definition of Constitution**
  - The Constitution is a book of rules that describes the structure of parliament and how law-making power is divided between federal and state parliaments.
- **The role of the Constitution with respect to law-making powers**
  - The Constitution's role is to determine the powers and duties of parliament and government. The Constitution determines the law-making powers of both the state and federal parliaments.

- **The division of law-making powers (types of law-making powers)**
  - The Commonwealth Parliament is given specific law-making powers (this means that law-making power is stated explicitly) in the Constitution. Some of these powers are concurrent (shared between the Commonwealth and the states) and some are exclusive (the Commonwealth has sole law-making authority).
  - Residual powers are all areas of law-making that were not given to the Commonwealth at Federation and remain solely with the states.
- **Section 109 of the Constitution**
  - Section 109 of the Constitution provides that where both the Commonwealth and the state parliaments make law on the one area and those laws are in conflict, the Commonwealth law will prevail to the degree of the inconsistency.
- **Restrictions on the Commonwealth Parliament**
  - Restrictions are imposed on the law-making powers of the Commonwealth Parliament, most notably the existence of residual powers which remain with the states.
  - The Commonwealth is also restricted because it cannot amend the wording of its Constitution to increase its powers without putting the proposed change to a referendum.
  - The Constitution also provides that the Commonwealth cannot create any law either enforcing or prohibiting religious practice, or imposing a religious test for the holding of any government-related position.
- **Restrictions on state parliaments**
  - The state parliaments are restricted in that they cannot legislate on areas that have been specifically reserved for the Commonwealth Parliament. This includes areas such as the coining of money and defence.
- **Changing the Constitution via referenda**
  - The wording of the Constitution can be changed only by a referendum of all voters in Australia.
  - This is conducted according to a strict formula that requires a majority of support in a majority of states (at least four out of six states), a majority of support of all voters across Australia and a majority of all voters in any state that is directly affected by the change. The proposal must first be written into legislation that is passed through the Commonwealth Parliament. If either house of the Parliament fails to support the bill containing the proposed change to the Constitution, the Governor-General can refer the referendum proposal directly to the people.

- **The division of law-making power between state and Commonwealth parliaments under the Commonwealth Constitution, including specific (concurrent and exclusive) and residual powers and the impact of s. 109**
- **Explain the role of the Commonwealth Constitution with respect to law-making powers.**
- **Identify the types of law-making powers.**

- **The process of change by referendum under s. 128 of the Commonwealth Constitution and factors affecting its likely success**
- **Explain the methods and processes of changing constitutional power.**

Reasons why change via referenda has largely been unsuccessful

- **Referenda have largely been unsuccessful because**
  - the requirements under s. 128 set strict conditions before change can occur, especially that support should be gained from at least four out of six states
  - referendum proposals are often complex and voters may have difficulty understanding the task
  - of lack of bipartisan support across the major parties for some proposals
  - voters sometimes mistrust politicians
  - of the desire to maintain states' rights.
- **Successful referenda have generally not been controversial in nature.**
  - Most of the eight successful referenda have not increased Commonwealth powers.

- The role of the High Court in interpreting the Commonwealth Constitution

- **The High Court's jurisdiction**
  - According to ss. 75 and 76 of the Constitution, the High Court has the jurisdiction to hear and determine cases that involve disputes over law-making powers between the Commonwealth and the states.

- **The High Court's approach to interpreting the Constitution**
  - The first approach to interpreting the Constitution was the reserved powers doctrine, which sought to maintain the residual powers of the states. Since the 1920s the High Court has generally behaved in an activist role, which has seen a shift in powers from the states to the Commonwealth.

- The significance of two High Court cases involving the interpretation of the Commonwealth Constitution in terms of their impact on the law-making power of the states and Commonwealth parliaments

- **The Tasmanian Dam Case**
  - Commonwealth v Tasmania (the Tasmanian Dam Case) saw a broad interpretation of s. 51 (xxix) of the Constitution, which has expanded the powers of the Commonwealth in areas where they have signed an international treaty.
  - Using this power from the High Court's interpretation of the Constitution in the Tasmanian Dam Case, the Commonwealth has enacted legislation such as the Human Rights (Sexual Conduct) Act which has specifically overridden what was considered to be inappropriate state law in an area relating to human rights.

- ***R v. Brislan***
  - This case considered whether the Commonwealth Parliament had the power to pass the *Wireless Telegraphy Act (1905)*, which required all people who owned a wireless set to be licensed. The High Court decided that s. 51(v) included the power to regulate radio broadcasting and the Commonwealth Act was valid.
  - In *R v. Brislan* the majority of the judges found radio to be a wireless type of 'telegraphic or telephonic service'. The Court considered the phrase 'other like services' in s. (v) and interpreted the phase as encompassing developments in technology that were not anticipated at Federation.
  - The impact of the judgement in Brislan was seen in the 1965 case of *Jones v. Commonwealth*. In that case, the High Court found that television broadcasting also fell within the reach of s. 51(v).

- ***Roads Case***
  - In the case of *State of Victoria v. The Commonwealth* (the *Roads Case*) the High Court considered whether the Commonwealth, using its powers under s. 96, had the authority to deliver a grant of money to the states that stipulated precisely how that money was to be spent. The High Court found the Commonwealth had the right to dictate how grant money was to be spent, even if the area concerned was technically a residual power, such as road construction.
  - The impact of the *Roads Case* was that it increased the states' financial dependence on the Commonwealth. It has also allowed the Commonwealth to control the states' policies in areas such as education, by attaching specific requirements to the grant of money to the states for primary and secondary schooling. The precise demands placed on the states under the 2009 to 2011 Building the Education Revolution grants is an example of the influence of the Commonwealth in an area that is technically a residual power.

- The capacity of the states to refer law-making power to the Commonwealth Parliament

- **Referral powers**
  - Under s. 51 (xxxvii) of the Constitution, the states can refer some of their powers to the Commonwealth.
  - Only one state needs to agree to this referral of powers.
  - It is unclear constitutionally whether a referral becomes an exclusive power of the Commonwealth once it is made.

- **The impact of the referendum on the division of law-making powers**
  - Since Federation, only 8 out of 44 referendum proposals have been successful. Successful proposals have generally been in non-controversial areas such as stipulating the age at which High Court judges need to retire. The process under s. 128 of the Constitution has proven to be a major hurdle in preventing widespread change to the wording of the Constitution.
- **The impact of the High Court interpretation of the Constitution**
  - The High Court has played a key role in shifting the balance of power from the states to the Commonwealth. Until the 1920s, the High Court adopted the reserved powers approach, which respected the states' right to exercise residual powers.
  - Since the 1920s, and cases such as the *Roads Case*, the High Court has adopted a more activist role which has seen the Commonwealth granted increasing control over areas such as human rights and the environment.
  - The High Court is important because it is specifically given responsibility under the Constitution to settle disputes over law-making power. In reaching a decision in each case, the judges of the court have influenced the powers of parliaments through the ways in which they have interpreted the words of the Constitution.
- **The impact of the referral of powers on the division of law-making powers**
  - The states have rarely referred powers to the Commonwealth because they generally want to maintain the status quo.
  - Some important examples of where powers have been referred to the Commonwealth by the states include de facto relationships, corporations, industrial relations in Victoria, terrorism and consumer credit.

Analyse the impact of referenda, High Court interpretation of the Constitution and the referral of powers on the division of law-making powers.

Examination technique tip

Good study technique involves developing a set of notes and then summarising those notes so you can easily learn the key points. Consider organising your summary notes or the summary notes in this textbook using the study design dot points as your major headings.

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

'Changing law-making powers between the state and Commonwealth parliaments is difficult.'

Discuss this statement, indicating the extent to which you agree with it, providing reasons for your answer. In your answer, explain how the Commonwealth Constitution divides law-making powers between state and Commonwealth parliaments. **(10 marks)**

Question 2

Discuss the importance of two High Court cases that have interpreted the Commonwealth Constitution. Explain the impact on law-making powers of the state and Commonwealth parliaments that these two cases have had. **(8 marks)**

Question 3

'The Commonwealth Constitution of Australia divides law-making powers between the state and Commonwealth parliaments.' Explain the difference between exclusive, concurrent and residual powers. In your answer, include an example of each of these powers. **(6 marks)**

Question 4

a Explain why the Commonwealth Parliament and the state parliaments are sometimes able to make laws in the same area.

b Outline two restrictions imposed by the Constitution on state law-making powers.

(4 + 4 = 8 marks)

(Total 32 marks)

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Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10204

CHAPTER 3

The protection of rights under the Commonwealth Constitution

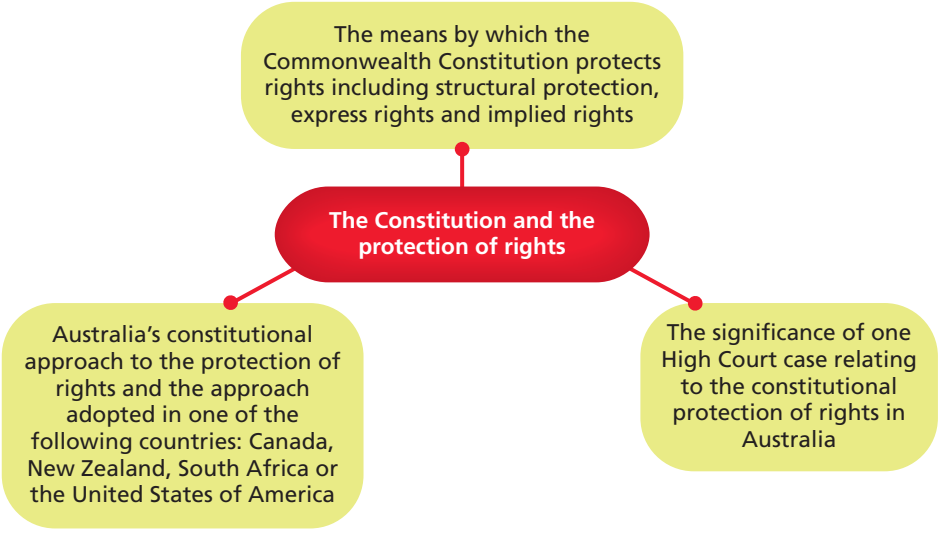
WHY IT IS IMPORTANT

The Australian Constitution lays out the rules by which Australia is governed, but unlike the situation in some other countries, it says very little about the rights of our citizens. Australia is the only advanced democratic country in the world that does not have a clear statement of this nature. Which rights does our constitution actually protect and how do we measure up against comparable countries?

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- apply legal principles to relevant cases and issues
- explain the role of the Commonwealth Constitution with respect to law-making powers and the protection of rights
- evaluate the means by which rights of Australians are protected by the Commonwealth Constitution, and the extent of this protection
- compare the approach used to protect rights in a selected country with the approach used in Australia.

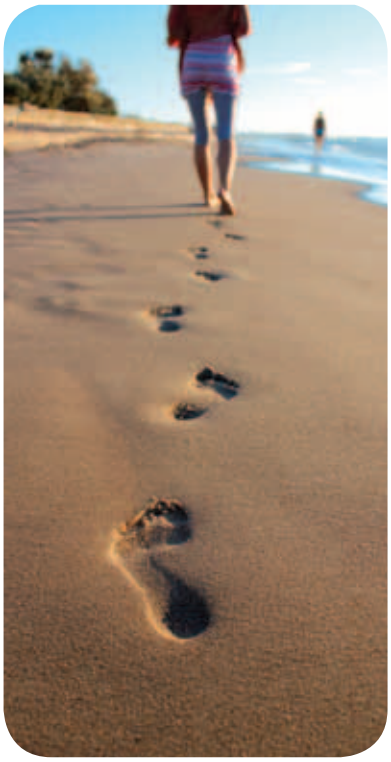
Can you demonstrate these skills?

The national debate about a charter of rights and responsibilities

Justice Kirby, former Justice of the High Court of Australia, comments on human rights in the following extract. He refers to a charter of rights in Victoria and the Australian Capital Territory, but as yet no national charter of human rights has been developed for Australia.

> The only proposal for a charter of rights that is presently on the table in Australia is one, like that of Victoria and the ACT, based on the statutory model accepted in Britain in the *Human Rights Act* 1998 (UK) ('the charter model'). That model does not give courts a power to override or invalidate a law made by Parliament. It simply encourages courts to interpret laws made by Parliament, in so far as they can, to be consistent with the charter. If an inconsistency exists, this is brought to the attention of Parliament. It still has the final say. Such a charter seems to enhance the operation of the elected legislature. It seems to improve responsiveness to felt concerns about injustice, inequality and departure from fundamental rights.
>
> Enhanced transparency in civic discussion and decision-making about basic rights is what I take the present charter model to offer. Potentially it is, in fact, a stimulus to the democratic process which, at least some Australians may feel, has slipped substantially out of the hands of the people, party members and even elected politicians into the relatively few hands of political organisations whose focus is on winning elections and power.
>
> Human rights are not new to Australia. They are deeply enshrined in common law principles given effect by the judges. However, such principles can all too easily be overridden, including thoughtlessly, by the legislature. The current charter model affords an opportunity to remind Parliament of any serious departures from fundamentals.

Source: The Hon. Michael Kirby, AC CMG. Extracts from an address to a president's luncheon of the Law Institute of Victoria, Melbourne, 21 August 2008, published in *The Law Institute of Victoria Journal*.



Protecting human rights is a matter all nations deal with. Some nations develop a charter of human rights to ensure rights are protected.

3.1 An introduction to rights

KEY CONCEPT In examining the rights protected under the Australian Constitution, it is important to examine the different types of rights that we might expect to have protected in some way. These include a number of rights that have been identified internationally by organisations such as the United Nations.

What are rights?

A **legal right** is an entitlement enforceable by law.

To **ratify** is the process by which the government of a country accepts an international treaty and agrees to be bound by it under international law.

There is no universal definition of what a right is, but generally, a right is an entitlement to be treated a specific way. A dictionary definition of a legal right states that a **legal right** provides an entitlement that is enforceable by law, such as the right not to be discriminated against on the basis of race or sex.

When we speak of rights, it is generally in the context of how individuals are treated as members of a particular organisation or community. This can include the rights that students and teachers have as members of a school community, the rights that employees have within a workplace, or the rights that citizens have as inhabitants of a particular state or country. Over the last 65 years, the international community, through the agency of the United Nations, has adopted a wide variety of treaties and covenants by which countries agree to support and enhance the rights of their citizens. Australia has **ratified** all of these international agreements and so has declared that it will abide by the expectations contained within them. The Universal Declaration of Human Rights (1948), the Convention Relating to the Status of Refugees (1951) and the International Covenant on the Elimination of All Forms of Racial Discrimination (1965) are examples of international treaties that have been ratified by Australia.

Let's now examine some of these rights in detail.

DID YOU KNOW?

The Constitution of the Commonwealth of Australia was drafted in the late nineteenth century at a time when there was social and political turbulence. A depression and high levels of unemployment magnified the inefficiencies that were starting to appear as a result of having separate colonies with no central government. Separate currencies existed and trade between states was not free but subject to customs duties. There was resistance to unification at first with the fears that smaller states would suffer at the hands of larger states. Despite these difficulties, unification of the states did occur and our federal system of government still survives today.

Right to life

The most fundamental right is the right to life. As citizens we would expect to be protected as far as possible from unnatural or arbitrary loss of life. We expect our police and legal system to provide that protection and to punish those who might take the lives of others. All Australian states have abolished the use of the death penalty. In March 2010 the Commonwealth Parliament passed the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act* (2010), making it impossible for any state parliament to re-introduce the death penalty.

Democratic rights

Sometimes known as civil or political rights, these are the rights of a citizen to participate in the government and political processes of their country. They also include the right to be protected by legal processes from the arbitrary abuse of government power over individuals. Some examples include:

- the power to determine who will represent our views, by electing members of parliament to act on our behalf
- equality before the law, irrespective of race, ethnicity, wealth or social position
- freedom from arbitrary arrest or detention without due legal process
- freedom of speech (within reasonable limits, including the responsibility not to defame others)
- freedom of assembly and movement without undue restriction within one's country, and the right to travel in and out of one's own country
- freedom from torture and other cruel or degrading punishment.

Economic, social and cultural rights

These include the rights to the resources necessary for an adequate standard of living, such as food, clean water, clothing, shelter, healthcare and education. More specifically, they include:

- *labour rights:* the right to be treated fairly in the workplace and freedom from child labour
- *adequate standard of living:* including the right to water, food and housing
- *access to health services:* including protection from disease and adequate levels of sanitation
- *access to free education:* to allow all individuals to achieve their full potential
- *cultural rights:* including the right to preserve language, religion and unique cultural practices, and access to the arts and to the benefits of scientific advancement
- *property rights:* the right to own property and not to be arbitrarily deprived of property
- *rights as refugees:* the right to escape persecution and to seek refuge in another country.

study on

Summary

Unit 3:
Law-making

Area of study 2:
Constitution and the protection of rights

Topic 4:
Protection of rights in the Constitution

How are rights protected in Australia?

Without a comprehensive charter of rights, the protection of rights in Australia is a very piecemeal array of different legal and constitutional instruments. Due to the division of powers, not all states have identical arrangements, so there is no consistency across the nation. The following diagram sums up the ways in which the rights of Australian citizens are protected.

Common law is a system of law based on judge-made law or case law, as opposed to legislation or statute law.

Express rights are rights that are clearly stated in the Constitution.

The wording of the Constitution clearly states a small number of rights. These are known as **express rights**.

Some rights are in force in Australia because of the international treaties that have been ratified by successive Australian governments (see below).

Both Commonwealth and state parliaments have sought to protect the rights of Australian citizens, through measures such as equal opportunity and anti-discrimination legislation.

Some states and territories have enacted their own charters of rights, as a means of protecting their citizens. Both Victoria and the Australian Capital Territory have taken this approach.

Some rights are protected by our **common law**, such as the right to silence when accused of a crime and the right to a fair trial before guilt or innocence is decided.

TEST your understanding

1 What is a right?
2 Name two international treaties aimed at protecting human rights that Australia is bound by under international law.
3 Explain the difference between democratic (or political) rights and economic, social and cultural rights, giving an example of each.

APPLY your understanding

4 From the examples of democratic and human rights provided, identify **two** rights that you do not believe are adequately guaranteed in Australia. Give reasons for your answer.
5 Explain why the variety of different ways by which rights are protected in Australia could lead to inconsistencies between different states.

3.2 Structural protection of rights

KEY CONCEPT The Commonwealth of Australia Constitution is a blueprint that provides the structure of our political system. The way our political system is structured seeks to protect rights by establishing a federal system of government where the power to govern is shared between the Commonwealth and the states, ensuring the separation of powers and the inbuilt systems of checks and balances.

Reasons why a detailed charter of rights was omitted from the Constitution

While it was passed as an Act in the British Parliament, the Australian Constitution was originally drawn up by groups of Australian colonial politicians and legal experts. These men, sometimes known as the 'founding fathers', saw no reason to include any detailed charter of rights in the Constitution, for the following reasons:

1. They based the constitutional arrangements on the structures existing in Britain at the time. As Britain had no comprehensive charter of rights, they saw no reason to include one for Australia.
2. Australia had inherited the British system of common law, by which judges were able to make judgements based on legal precedents that would protect the rights of the individual.
3. The division of powers between the Commonwealth and state parliaments would ensure that no one group of politicians could wield excessive power.
4. They believed that the existence of representative and responsible government through democratically elected parliaments would be sufficient to protect the rights of Australian citizens.
5. The separation of powers would provide the necessary checks and balances to safeguard the basic liberties of citizens, particularly through the power of the High Court to ensure that parliament could not exceed its constitutional powers.
6. The inclusion in s. 128 of the 'double majority' provision, which ensures that the larger states could not band together and make constitutional changes that may disadvantage inhabitants of the smaller states.

The structure of our political system and rights

Let's now look at how the very structure of our political system protects rights.

Representative government

The democratic nature of the parliamentary system as envisaged in the Constitution was designed to protect citizens' rights in the following ways:

- election of representatives for both houses of the Commonwealth Parliament is to be by a direct vote of the people (ss. 7 and 24)
- voters eligible to vote in existing colonial/state elections were given the power to vote for the Commonwealth Parliament, ensuring that members represented a broad cross-section of the community (ss. 10, 30 and 41)
- the bicameral system allows for scrutiny of all legislation by the upper house (s. 1)
- the democratic principle of one vote per person is guaranteed by the requirement that each elector can vote only once (ss. 8 and 30)

- parliaments are limited to three-year terms, so that members have to face the electors on a regular basis, to ensure they continued to represent the interests of the electorate (s. 28)
- questions decided within each house are decided by majority vote, which should reflect the will of the majority of electors (ss. 23 and 40)
- the division of powers provides a spread of legislative power between state and Commonwealth parliaments (ss. 51, 106, and 107)
- a deadlock between the two houses of parliament is decided democratically by a vote of the people through a double dissolution (s. 57).

Responsible government

The Constitution requires that members of the executive arm of government be responsible to the parliament and therefore ultimately responsible to the electors.

- The head of the executive arm of government, the Governor-General, should generally act on the advice of ministers (ss. 62 and 63).
- Ministers must be appointed from either of the two houses of parliament, so must be responsible to the parliament (s. 64).
- While not specifically dealt with in the Constitution, the Australian Parliament inherited a number of conventions observed in the British Parliament that relate to responsible government. These include the tradition of executive government being held by a political party that has a majority of members in the lower house of parliament. It also includes the convention of the leader of that party assuming the title and role of prime minister.
- The importance of the lower house is reinforced by its power over taxation measures (s. 53).

Electing politicians to represent our views in parliament is what representative government is about.

Separation of powers

Governments are subject to the rule of law, which means that a government, like everybody else, must act within the law. This is reinforced by the separation of powers.

- Those who enforce the laws — the judiciary — are independent of the government so that they will enforce the law fairly and treat all parties (including the government) equally.
- The High Court of Australia has the power to interpret the Constitution. Should an individual or organisation believe that any piece of legislation is contrary to the Constitution, that legislation can be challenged in the High Court and declared unconstitutional. In chapter 2, page 69, you will recall that the High Court ruled that Malaysia was not a country to which asylum seekers could be sent under Australian law.
- While legislative and executive power are not entirely separate in the Australian system, due to ministers being drawn from both houses of parliament, executive power ultimately rests with the Governor-General. The Governor-General retains the power to appoint and dismiss ministers (ss. 61, 62 and 64). This power was used in November 1975, when the Governor-General dismissed the Whitlam government and called a double dissolution election.

Right to change the Constitution

It is part of the democratic process that Australian citizens have the right to change the Constitution to reflect changing times and attitudes. The need to achieve the 'double majority' (a majority of voters in a majority of states) makes such changes difficult (as we saw in chapter 2), but does ensure that only those proposals that

DID YOU KNOW?

When voters considered the 1967 referendum relating to indigenous Australians, those living in the Northern Territory were ineligible to vote, even though it was the area with the highest concentration of Aboriginal people. Voters living in the territories, such as the Australian Capital Territory and the Northern Territory, did not gain the right to vote in referenda until 1977. In 1967, demonstrations were held in Alice Springs protesting against this restriction in the voting rights of Territorians.

can gain widespread support amongst voters will succeed. The most successful referendum in Australia's history was the 1967 referendum relating to the rights of indigenous Australians. This referendum enabled indigenous peoples to be counted in the census and enabled the Commonwealth to make laws with respect to those indigenous Australians.

Some referenda that have related to issues of human and democratic rights

22 September 1951
Communists and communism

That Commonwealth Parliament could make laws in respect of communists and communism where this was necessary for the security of the nation.

✗ Not passed

27 May 1967
Aboriginal rights

That the Constitution should not discriminate against Aboriginal people. At the same time this referendum sought to enact special laws for Aboriginal people.

✓ Passed

21 May 1977
Right of voters in the territories to vote in referenda

That electors in the territories be allowed to vote at referenda on proposed laws to alter the Constitution.

✓ Passed

3 September 1988
Guarantee of basic freedoms

That s. 80 be altered to guarantee a right to trial by jury in all state and territory jurisdictions; that the right to 'just terms' for the 'acquisition of property' be extended to include property acquired by state and territory governments; and that freedom of religion as guaranteed in s. 116 be extended to cover all state and territory laws.

✗ Not passed

6 November 1999
Establishment of republic

That the Constitution be altered to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a president appointed by a two-thirds majority of the members of the Commonwealth Parliament.

✗ Not passed

TEST your understanding

1. Why did the founding fathers not include a charter or bill of rights in the Australian Constitution?
2. Explain **three** ways in which the representative nature of the Australian system of government helps protect our democratic rights.
3. Explain **one** example of how the separation of powers can protect Australians' democratic rights.

APPLY your understanding

4. Explain how you believe our system of responsible government contributes to the protection of the democratic rights of Australian citizens.
5. Why do you think it is important that we limit the power of government through a system of checks and balances, and that each branch of government has separate powers?
6. Do you believe the method of changing the Constitution enhances or hinders our democratic rights? Give examples to support your answer.

3.3 The means by which the Constitution protects rights: express rights

KEY CONCEPT Some rights were considered so important they were expressly stated in the Constitution. Freedom of religion, the right to trial by jury (for Commonwealth indictable offences), the right not to be discriminated against because of place of residence, freedom of interstate trade and the rights of citizens to be compensated justly if their property is acquired are the few express rights that are included in the Constitution.

While the Australian Constitution does not contain a specific bill of rights, a number of express rights are scattered through the document. These largely reflect the views of the founding fathers in relation to particular issues of the time, rather than an attempt to lay down a comprehensive set of rights. Let us look at these express rights in more detail.

Freedom of religion

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 of the Constitution deals with freedom of religion and is one of the few rights that is protected explicitly under the Constitution. Section 116 sets out four ways freedom of religion is to be protected:

1. The Commonwealth cannot make a law to establish a national religion.
2. The Commonwealth cannot make a law requiring religious observance. For example, the Commonwealth cannot force people to take an oath in the name of God that they are telling the truth in a court of law.
3. The Commonwealth cannot make a law that stops people from freely practising their religion, although this is subject to restriction if it is seen to be against the public interest.
4. The Commonwealth cannot impose a religious test as a prerequisite for public office.

This section of the Constitution only applies to Commonwealth powers, and does not mention the ability of state parliaments to make laws in relation to religion. The High Court has found that s. 116 does not grant absolute freedom of religion, particularly if this freedom conflicts with other legal responsibilities. It also does not mandate a complete separation of church and state, as is the case in the United States (see page 114).

Freedom of religion is protected under the Constitution. Australians are affiliated with a wide range of religions. Out of the 22 major religions of the world, 18 are practised in Australia.

DID YOU KNOW?

At the time of the writing of the Australian Constitution, the Church of England was the official established religious institution in England, with special rights not available to the followers of other religions. The writers of the Constitution recognised that with a large population of Catholics, as well as the followers of protestant churches other than the Church of England, it would be inappropriate for the new Australian federation to follow the English example.

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See more PowerPoint on express rights

High Court cases dealing with s. 116

***Krygger v. Williams* [1912] HCA 65, (1912)15 CLR 366**

The Commonwealth *Defence Act* (1909) gave the government the power to make military training compulsory for all boys between the ages of 14 and 17, and this came into effect on 1 January 1911. Under s. 135 of the Act, anyone refusing to participate could be charged with an offence. Krygger claimed that his religion prevented him from taking part in military training and relied on s. 116 of the Constitution. The High Court found that the requirement to carry out training did not interfere with rights under s. 116, as it did not necessarily mean he would be required to actually take part in combat.

***Adelaide Company of Jehovah's Witnesses Inc v. Commonwealth* (1943) 67 CLR 116**

In 1941, in the early years of World War II, the Australian Government believed that the Adelaide branch of the Jehovah's Witnesses was a threat to national security, so it was dissolved and its premises seized by police. The Jehovah's Witnesses took the matter to the High Court, claiming their rights under s. 116 had been infringed. The Court found that the government had the right to make laws to protect the security of the nation, so the case failed.

***Attorney General (Vic.), Ex Rel Black v. Commonwealth (The 'DOGS' Case)* [1981] HCA 2; (1981) 146 CLR 559**

The Defence of Government Schools organisation (known as DOGS) brought an action claiming that Commonwealth funding of schools owned or operated by religious organisations was in breach of the requirement that the Commonwealth not make laws to establish any religion. The Court found that the funding did not establish any religion as it was provided to schools operated by a number of different religions.

***Williams v. Commonwealth* [2012] HCA 23**

Williams is the parent of four children at a Queensland Government primary school. He challenged the Commonwealth funding of the school chaplaincy program. The qualification for becoming a school chaplain is the endorsement of a religious organisation. Williams argued that the chaplaincy program is invalid under s. 116 because it imposes a religious test on anyone employed as a government-funded chaplain. The Court did not accept this argument.

Trial by jury

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

The right to trial by jury is actually quite limited under s. 80:

- The guarantee of a jury trial is limited to offences against laws of the Commonwealth. There is no guarantee so far as state laws are concerned, even though the majority of criminal cases are brought under state law.
- A 'trial on **indictment**' is what we would understand at state level to be a trial for an indictable offence. The Commonwealth Parliament has the power to determine what constitutes an indictable offence, so could avoid the necessity

An **indictment** is a written accusation or charge made against the defendant, filed in court before the trial commences.

for a jury trial by not declaring a particular offence as requiring the presentation of an indictment.

- The Constitution makes no mention of recognised procedures that occur within state jurisdictions, such as the composition of juries, or the possibility of majority verdicts.
- Rather than being seen purely as a right of a citizen, this provision has been used to deny citizens the right to choose between a jury trial and a trial by a judge alone (see case study).

Brown v. R [1986] HCA 11; (1986) 160 CLR 171

Under s. 7 of the South Australian *Juries Act* (1927), an accused in a criminal trial has the right to request a trial by judge alone, if the judge is satisfied that the accused has sought legal advice before making such a request. Michael Brown was charged with the possession of illegal drugs, under the Commonwealth *Customs Act* (1901). The case was to be heard in the Supreme Court of South Australia and Brown requested that the case be heard by a judge alone. The court ruled that this was not possible because the accused was charged with an offence under Commonwealth law and s. 80 of the Constitution required that such a case be heard before a jury. Brown appealed to the High Court, but that court found that under s. 80, his case must be heard before a jury.

Compensation for acquired property

51. 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:
(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

It is an important right in any democratic society that a person has the right to own property, and this right is included in the Universal Declaration of Human Rights. Section 51(xxxi) of the Constitution gives the Commonwealth the right to acquire (or take) property from any state or person for any purpose for which it has the power to make laws on 'just terms'. For example, the Commonwealth has the power to make laws in regard to air travel. Therefore, if the Commonwealth is building a new airport, it could 'acquire' people's property or state property, and compensation would have to be paid. You may have seen the film, *The castle* which is about a fictitious family, the Kerrigans, who fought to keep their land, which was going to be taken by the government. Darryl Kerrigan argued that there could be no acquisition of his land on 'just terms' because a man's home

Have you heard the saying that every man's home is his castle? Whether it is a castle like this or an old weatherboard home, everyone has the right to their home. If their home is taken from them it must be done on `just terms'. In the movie *The Castle* Darryl Kerrigan's humble home was his castle, and he and his family fought all the way to the High Court to stop their property from being `acquired' by the government.

is his castle and, according to Darryl, you could not put a price on such treasured property. This of course is a film for entertainment, and poor Darryl Kerrigan in real life would probably have been evicted and paid a very good sum of money to compensate him for the loss of his property in a material sense.

Residential non-discrimination

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The Constitution does not expressly state the notion of equality nor does it outlaw all the varieties of unfair discrimination such as race or sex discrimination. Section 117 does, however, ban discrimination against people on the basis that they are residents from another state (see case study below). It is not clear whether s. 117 refers to discriminatory federal or state legislation on the basis of residence, but it is possible it applies to both. There are also some general exceptions to the rule. The High Court agrees that it is sometimes necessary for states to treat their own residents differently, even though this may discriminate against others. An obvious exception is that only residents of a state can vote in that state's elections.

Street v. The Bar Association of Queensland (1989) 168 CLR 461

The Queensland Bar Association brought in rules that permitted barristers to practice in that state only if their principal place of residence was within the state of Queensland. Street was a barrister resident in New South Wales, who wished to be able to practice in other states, while retaining his Sydney residency. He challenged the Queensland regulations in the High Court and they were found to be unconstitutional.

Interstate trade and commerce

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Prior to federation, each of the colonies had imposed various types of tariffs and duties on imported goods. This included goods that they imported from each other. It made no sense to have trade barriers of any type within a united country, so this provision in the Constitution was designed to ensure such barriers could no longer be applied. ss. 51(i), 86, 88 and 90 all support the principle that control of trade through tariffs and duties was to become an exclusive power of the Commonwealth. The High Court has had to interpret s. 92 on a number of occasions.

Constitutional cases involving interstate trade and commerce

***Cole v. Whitfield* [1988] HCA 18; (1988) 165 CLR 360**

Whitfield ran a seafood business in Tasmania, and as part of that business he bought crayfish from South Australia to be transported and sold in Tasmania. South Australia and Tasmania had different regulations relating to the minimum size at which a crayfish could be sold, with a smaller size allowable in South Australia. Whitfield was not permitted to sell the South Australian crayfish in Tasmania, as they were below that state's minimum size. Whitfield challenged the Tasmanian regulations, claiming they were in breach of s. 92. The High Court found against Whitfield, as they held that the Tasmanian regulations were designed as a conservation measure and not aimed at restricting free trade.

***Betfair Pty Limited & M. E. Erceg v. State of Western Australia* [2008] HCA 11; (2008) 234 CLR 418**

Betfair established a betting exchange in Tasmania that allowed gamblers to place bets either on the internet or by phone on horse races throughout Australia. The Western Australian government brought in legislation to prevent gamblers from that state from betting through Betfair. The stated reason was that Betfair allowed its customers to bet on horses losing a race and the Western Australian government did not believe this was a desirable type of bet. Betfair and Mr Erceg, one of its Western Australian customers, challenged the Western Australian legislation in the High Court. The Court found that the legislation was invalid, as it contravened s. 92 of the Constitution.

***AMS v. AIF* [1999] HCA 26; (1999) 199 CLR 160**

In this case a mother wished to move her child from Western Australia to the Northern Territory, despite a Family Court injunction preventing her from taking the child away from where the father could have regular access. The mother claimed before the High Court that the injunction restricted her freedom of movement under s. 92. The Court held that the injunction was not in breach of s. 92 and that such an injunction may be reasonably required if it was seen to be in the interests of the child.

TEST your understanding

1 List the rights that are expressly stated in the Constitution.

APPLY your understanding

2 Explain why the following activities would most likely be unconstitutional.
   (a) The Commonwealth makes a law that states all students should say prayers at the start of the day.
   (b) The Commonwealth passes a law that stops people driving to their place of worship.
   (c) The Commonwealth states the national religion is Catholicism.
   (d) The Commonwealth states that only Anglicans can become parliamentarians.

3 'The right to trial by jury is not clear in the Constitution.' Explain.

4 Why do you think the founding fathers expressly stated that discrimination on the basis of a person's state of residence was unconstitutional?

5 Give an example where the Commonwealth may need to acquire property from an individual. In this example, what would be considered 'just compensation'?

6 Explain the different interpretations of s. 92 as applied in the cases *Cole v. Whitfield*, *Betfair Pty Limited & M. E. Erceg v. State of Western Australia* and *AMS v. AIF*. Do you believe the High Court has applied a 'broad' or 'narrow' interpretation to this section? Give reasons for your answer.

3.4 The means by which the Constitution protects rights: implied rights

KEY CONCEPT Over the years since federation, the High Court has been called on to interpret many sections of the Constitution and to determine how they apply in practical situations. There have been a number of cases where the Court has had to determine whether or not the founding fathers might have intended that particular rights be protected, while not expressly including them in the wording of the Constitution.

At different times in our history, the High Court has adopted two approaches to the interpretation of the Constitution:

1. There have been times when the justices of the High Court have interpreted the Constitution 'widely' or 'broadly'. This has meant that they have attempted to 'read between the lines' to interpret what the founding fathers intended when they wrote the Constitution in the 1890s. The final version of the Constitution was the result of the deliberations of representatives of each of the colonies at a series of constitutional conventions. The Court has even examined the records of these conventions at times, in the hope that the actual discussions that took place amongst the delegates can assist constitutional interpretation.
2. At other times the judiciary has interpreted the Constitution 'narrowly', which means it has taken a more literal interpretation of the actual words written in the Constitution. In these cases, the Court has made no attempt to look more deeply at the intentions of the founding fathers.

When the High Court has been prepared to take a broad approach to constitutional interpretation, it has inferred that a particular right should be protected, even if it is not specifically stated in the Constitution. Such a right is known as an **implied right**. To date the High Court has only firmly established one implied right, the right to political communication. It has considered the issue of an implied right to vote, but has stopped short of a definitive ruling on this matter.

An **implied right** is a right not expressly stated, but inferred from a broad interpretation of the Constitution.

The High Court has established the implied right to political communication.

Freedom of political communication

As discussed earlier, a number of sections of the Constitution contribute to our structural right of being ruled by a democratic, representative government. As representative government is so central to the Constitution, the High Court has been prepared to infer that such a government could not operate effectively unless those voting had the right to access political information. Thus the High Court has established the implied right of freedom of political communication.

Constitutional cases on the freedom of political communication

Australian Capital Television and Ors v. Commonwealth [1992] HCA 45; (1992) 177 CLR 106

In 1991, the Hawke government passed the *Political Broadcasts and Political Disclosures Act 1991*, which banned paid political advertising during state and federal election campaigns. The Act did not ban political discussion on news or current affairs programs, and provided for TV and radio stations to provide equal free time to political parties to convey their policies to the voters. The stated aim of the Act was to attempt to prevent a situation where only those with large amounts of money could afford to engage in political advertising. Australian Capital Television and a number of other television broadcasters argued that the Constitution contained a right freedom of political communication, and that this Act infringed that right. They also argued that to demand free time for political parties was an unjust acquisition of property under s. 51(xxxi).

The Court held that an implied right to freedom of political communication existed because the Constitution contained an expectation of representative and responsible government, and this could not exist without the free interchange of political information. Those parts of the Act that restricted this freedom of political communication were declared invalid.

Nationwide News Pty Ltd v. Wills [1992] HCA 46; (1992) 177 CLR 1

Nationwide News published an article that was critical of the Australian Industrial Relations Commission (AIRC), describing it as corrupt. The *Industrial Relations Act 1988* (Clth) made it an offence to bring the AIRC into disrepute. The High Court was asked to determine whether attempting to prevent the publication of articles such as that published by Nationwide News was a breach of the right of freedom of political communication.

The Court found for the plaintiffs, and held that the use of the Industrial Relations Act to interfere with the right of freedom of political communication was unconstitutional.

Albert Langer v. Commonwealth of Australia [1996] HCA 43; (1996) 186 CLR 302

Prior to the 1993 federal election, Albert Langer had advocated that voters should vote in a particular way, so as to put candidates from both major parties last. The Australian Electoral Commission warned him not to continue with his campaign, as encouraging people to vote informally would contravene the *Commonwealth Electoral Act 1918* (Cwlth). Langer took the issue to the High Court, declaring that his rights of freedom of political communication had been infringed.

The Court held that a right to freedom of political communication is not absolute and could be restricted if it interferes with the democratic process, so Langer's case failed. The Electoral Commission then took out an injunction in the Victorian Supreme Court to prevent Langer from distributing his election material, but he ignored the injunction and was imprisoned for three weeks.

David Russell Lange v. Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520

David Lange was a former New Zealand Prime Minister, who believed that he had been defamed by the subject matter of an ABC *Four corners* program and sued the ABC for defamation. The ABC used a defence of the right of freedom of political communication and the High Court was required to rule on whether this defence was applicable in this case.

The court found that the implied right of freedom of political communication does not confer rights of free speech on individuals, but is designed to prevent attempts by the executive or legislative arms of government to interfere with the right of voters to have access to information necessary to maintain representative and responsible government. The court accepted the ABC's defence of the right of political communication.

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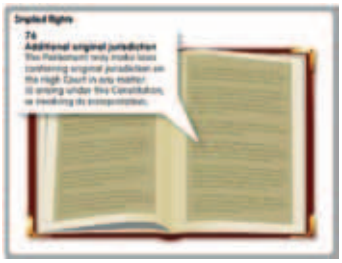
See more PowerPoint on implied rights



DID YOU KNOW?

When the Constitution came into force in 1901, only women in Western Australia and South Australia had the right to vote in state elections; so women in the four other states were unable to vote in the first federal election held in 1901. In 1902 the Commonwealth Parliament passed the *Commonwealth Franchise Act 1902* to give all non-Aboriginal adult women the right to vote in elections.

The right to vote

The right to be governed by a parliament that is both representative and responsible to the voters is recognised as one of the structural rights of Australian citizens. While this implies that there must be some right to vote by at least some of the citizens of the Commonwealth, it does not guarantee any clear rights to all citizens, for the following reasons:

- Sections 7 and 24 mandate an election for each house of parliament by direct vote of the people, but there is no definition of what constitutes the people.
- Sections 10 and 30 gave the right to vote for the Commonwealth Parliament to those who had the right to vote for the 'more numerous House of the Parliament of the state'. This was the lower house in each state, as most upper houses, or legislative councils, retained a limited franchise, where only those who owned property above a certain value were entitled to vote or to stand for election. However, the lower houses differed from state to state, with some allowing women the vote, others not; and with different arrangements for Aboriginal people within each state.
- The words 'Until the Parliament otherwise provides . . .' make it clear that the Commonwealth Parliament had the power to make laws to determine who might be given the right to vote. The parliament has exercised this power on a number of occasions. Women were granted the right to vote in federal elections in 1902, although the same Act specifically excluded Aboriginal and other 'non-white' inhabitants from voting. Any person who was under sentence or awaiting sentence for any offence that could be punished by a term in prison of one year or longer was also disqualified from voting. This was changed to specify a period of five years or longer in 1995, but shortened to cover those serving terms of three years or longer in 2004. Indigenous Australians were not given the right to vote in federal elections until 1962. The voting age was lowered from 21 to 18 years for federal elections in 1973. While the parliament retains this legislative power, it is difficult to be able to specify exactly who might be entitled to an implied right to vote.

An implied right to the freedom of political communication is said to exist because the High Court has specifically ruled that way in its interpretation of the Constitution. The High Court has not made any similar ruling in relation to an implied right to vote; however, the *Roach Case* considered this issue.

Everyone must vote in state and federal elections. Democratic societies give 'power to the people' through the right to vote for representatives to govern the state and country.

A significant High Court case on the implied right to vote — *Roach v. Electoral Commissioner* [2007] HCA 43

Facts of the case

The prisoner who challenged the validity of Commonwealth legislation that banned *all* prisoners from voting in federal elections was Vickie Lee Roach, an Aboriginal Australian who, in 2004, was convicted of five offences and sentenced to six years in jail. Roach robbed a milkbar and was driving her partner's car at high speeds to avoid police when her car and another car collided, engulfing both cars in flames. A 21-year-old man suffered severe injuries to 45 per cent of his body due to the incident.

Legislation since 1902 has provided that certain categories of prisoners are not permitted to vote in federal elections, but it was the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cwlth) that banned all prisoners serving full-time detention from voting. Prior to this legislation, a person serving a prison sentence of three years or more was not entitled to vote. In 2006, when the new legislation came into force, there were 20 209 people in Australian prisoners who were prevented from voting. This case is significant because the High Court found in a 4–2 majority that the Commonwealth legislation was inconsistent with a system of representative democracy that was established in the Constitution. While this is the case, it is interesting to note that the law upholding the prior exclusion that those serving a prison sentence of three years or more were not entitled to vote was upheld. Let us look more closely at the judgement handed down in this case.

Not all Australians have the right to vote in federal elections. Prisoners serving sentences of more than three years are excluded.

The judgement

In giving reasons for his decision in *Roach v. Electoral Commissioner* [2007] HCA 43, Justice Gleeson confirmed that the Constitution under ss. 7 and 24 did establish that senators and members of the House of Representatives be 'directly chosen by the people'. These sections, according to Gleeson, have come to 'be a constitutional protection of the right to vote'. Justice Gleeson goes on to say though that universal

adult suffrage does not mean that everyone must be given the right to vote and that the Commonwealth can make some exceptions if there is a 'substantial reason' to do so. Justice Gleeson noted that, in the past, some prisoners serving custodial sentences had been excluded from voting because the seriousness of their offence was thought to justify taking away their political right to vote. It was thought that only those who had engaged in 'serious criminal conduct' should not be entitled to vote and that in the past this was determined by the length of the custodial sentence.

The legislation (Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act), in withdrawing the right of all prisoners to vote, meant that short-term prisoners who had not engaged in 'serious criminal conduct' were disenfranchised and, according to Gleeson, the legislation was invalid. In his concluding remarks Gleeson said: 'The step was taken by parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.' Also, it was noted by Gleeson that s. 44 of the Constitution stated that anyone standing in a federal election must not be serving a sentence of one year or longer so the 2006 legislation, in taking away the voting rights of all prisoners (regardless of their length of sentence), had imposed stricter standards than the Constitution itself.

While the plaintiff, Vickie Roach, was successful in arguing that the 2006 legislation was unconstitutional, she did not convince the justices that all prisoners should be given the right to vote because it was held that prisoners serving a sentence of three years or more were not entitled to vote. Despite this, through her lawyers Vickie Roach made the following statement: 'This case stands for the principle that Aboriginal people and prisoners are human beings, and that they don't lose their humanity by reason of their imprisonment, and that they should not be excluded from the community or denied the ability to have their say.'

TEST your understanding

1 What is the difference between express rights and implied rights in the Constitution?
2 Give an example of an implied right that according to the High Court is upheld in our Constitution.
3 True or false? Give reasons for your answer.
   (a) The Constitution implies that everyone must have the right to vote in Australia.
   (b) The Constitution does not imply that we have the right to free speech on any matter.
4 Section 24 of the Constitution may imply we have the right to vote. Were all Australians given the right to vote when the Constitution came into force in 1901? Explain.
5 Identify and explain **three** occasions when the Commonwealth Parliament has successfully exercised its power to determine who is entitled to vote at federal elections.

APPLY your understanding

6 Examine the four cases above in which the High Court has ruled on the issue of the implied right to freedom of political communication, and answer the following:
   (a) Why was the *Political Broadcasts and Political Disclosures Act 1991* considered to be unconstitutional?
   (b) Does the implied right to the freedom of political communication provide a guaranteed right of free speech? Explain your answer, using examples from the cases outlined.
7 Read the *Roach Case* case study and answer the following questions.
   (a) Why did Roach challenge the validity of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act?
   (b) Explain when, according to Justice Gleeson, parliament does have a 'substantial reason' to withdraw the right to vote.
   (c) Explain why the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act was held to be invalid by the High Court.
   (d) Explain the significance of the *Roach Case* in relation to the protection of rights in Australia.

The *Rabelais Case*

The case of *Brown and Others v. Classification Review Board* (1998) (the *Rabelais Case*) 82 FCR 225 centres on the publication of a La Trobe University student magazine called *Rabelais* and the implied constitutional right to freedom of political speech. In 1995, one particular edition caused concern with the article 'The art of shoplifting'. It was written as a guide for the novice thief and covered topics such as 'preparing oneself for the big haul', 'blindspots and other lifting techniques' and 'leaving the store safely'.

The writers of this article were making a statement about large corporations that were so profitable they would not be affected by the thefts. The editors of the magazine defended the inclusion of the article by saying that the magazine allowed writers to highlight injustices in society and promote debate regarding the plight of the disadvantaged.

Not surprisingly, there was a huge reaction to such a controversial article, and the four editors of the magazine were charged with various offences under the *Classification of Films and Publications Act 1990* (Vic.). The prosecution alleged that the defendants had been responsible for the publication of 'objectionable material' that 'promotes, incites or instructs in matters of crime'. Note that this legislation was amended with the passing of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic.).

The article was banned following an application to the Office of Film and Literature Classification by the Retail Traders Association of Victoria. The article was 'refused classification' (rated RC) by the Classification Review Board, so the editors of *Rabelais* appealed to the High Court against the decision of the board.

DID YOU KNOW?

The 2008 prison census by the Committee to Protect Journalists found that the People's Republic of China followed by Cuba and Burma were the biggest jailers of journalists internationally.

The following discussion of the *Rabelais Case* was written by one of the solicitors who represented the parties.

The perspective of Marcus Bezzi, who worked on the *Rabelais Case* when he was a senior solicitor with the Sydney office of the Australian Government Solicitor

In this case, the editors of *Rabelais* argued that the board had not properly interpreted the relevant National Classification Code, and that before an article could be said to instruct in matters of crime, it must be shown that both the intent and likely effect of the publication is to cause the commission of the crime. They argued that the code and 'The art of shoplifting' should have been read in light of the implied constitutional right to freedom of political discussion, the common law recognition of freedom of speech and expression, and the provisions of the International Covenant on Civil and Political Rights.

The Federal Court rejected the editors' arguments on the grounds that 'The art of shoplifting' was not political in the sense envisaged by the High Court, and was not, therefore, protected by the constitutional implied freedom of speech. Justice Sundberg, whose conclusions were shared by the other judges, said:

> . . . the article is not within the ambit of the freedom. That is so for two reasons. One is that it is not a communication concerning a political or government matter . . . its true character is not political because it is overwhelmingly a manual about how successfully to steal. The other reason is that the article does not relate to the exercise by the people of a free and informed choice as electors . . .

The *Rabelais Case* highlights the need for editors and authors to understand the broad parameters within which speech is 'free', and emphasises that if a complaint is made about a publication which oversteps the mark, those responsible can be prosecuted.

In the *Rabelais Case* we saw that the right to freedom of speech has some restrictions. Every case is different because circumstances are different. In the case *Coleman v. Power* (2004) 220 CLR 1, the defendant, Patrick Coleman, handed out pamphlets in a Townsville shopping mall that alleged that the Townsville Police were corrupt. In this case the High Court decided that communications about the effectiveness of public servants (the police) were considered to be included in the freedom to communicate on political matters — that is, it was not restricted to communications about politicians alone.

QUESTIONS

1. Explain the implied right to freedom of political communication in the Constitution that the editors of *Rabelais* used as their defence.
2. The argument that the editors were given an implied right under the Constitution to publish the shoplifting article was rejected by the Federal Court. What reasoning did Justice Sundberg give?
3. Explain how the *Albert Langer Case* discussed earlier in the chapter placed limits on the implied right to freedom of political communication.
4. Use the **Freedom of speech** weblink in your eBookPLUS to investigate the right to use insulting words and behaviour in public and the right to freedom of speech. Investigate the case *Ferguson v. Walkley & Another* [2008] VSC 7. Explain the facts of the case and how the court interpreted the implied right to freedom of speech.

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3.5 Approaches to the protection of rights in Australia and overseas

KEY CONCEPT Australia does not have a bill of rights but this does not mean that our rights are unprotected. Many countries have protected rights through adopting a bill of rights that is either part of the constitution or contained within an Act of parliament.

As we have seen, the Australian Constitution contains some provisions that protect our rights. It was assumed, however, by those who wrote the Constitution that we all have certain rights and they do not need to be documented in a bill of rights. A bill of rights or charter of rights, is a document that lists certain democratic and human rights that are to be protected.

DID YOU KNOW?

Former Chief Justice Brennan of the High Court once said, '... international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.

In 2009 the Australian Government commissioned a national human rights consultation. One of the questions the public was asked to consider was how could Australia further protect and promote human rights. The background paper explored avenues such as the introduction of a national human rights Act or a community charter of people's rights and responsibilities, the aim of which is to raise awareness of human rights.

A bill of rights for Australia?

The question of whether or not to introduce a bill of rights in Australia has been a political, constitutional and legal issue that has been the subject of debate over many years. In 1988, a referendum to change the Constitution was put to the people. It included proposals to change s. 80 to guarantee a right to trial by jury in all state and territory jurisdictions; to extend the right to just terms for the acquisition of property to include property acquired by state and territory governments; and to extend s. 116 to guarantee that freedom of religion could not be infringed by state and territory laws. This referendum failed.

In December 2008, the Rudd Labor government established a consultative committee to investigate which human rights should be protected in Australia, whether human rights are sufficiently protected and how we might improve the protection of human rights. The committee received over 35 000 written submissions, and conducted 66 community consultations sessions and a three-day public hearing in Canberra. The committee presented its report to the government in September 2009 and recommended that Australia adopt a federal human rights Act. It also made a number of recommendations as to what should be included in such an Act and how it should operate. The government decided not to adopt a human rights Act.

TABLE 3.1 Arguments for and against a bill of rights

Arguments for a bill of rights	Arguments against a bill of rights
• Brings Australia into line with other Western democracies. • Creates more certainty that human rights will be protected, especially if we have an entrenched bill of rights. • Creates a culture where people are more educated about human rights and, therefore, human rights are more likely to be upheld. • Comprehensively documents human rights in one area instead of the law being held in a number of sources such as common law and various Acts of parliament.	• Rights are adequately protected now so a bill of rights is not needed. • Will make no practical difference to protecting rights as actions speak louder than words. • Society's view about which human rights should be protected may change over time and may result in rights actually being restricted because they are documented in this way. • May result in an avalanche of litigation as people seek to protect their rights.

DID YOU KNOW?

Two Australian jurisdictions have introduced bills or charters of rights in recent years. In 2004, the Australian Capital Territory Legislative Assembly enacted the *Human Rights Act 2004*, with some minor amendments introduced in 2008. The Victorian *Charter of Human Rights and Responsibilities Act 2006* came into force in July 2006. Neither of these statutory charters permit judges to overrule legislation that is inconsistent with the charter, but they can draw the attention of the parliament to such inconsistencies and recommend changes.

Different approaches to adopting a bill of rights in other countries

Countries that have adopted a bill or charter of rights have generally used one of two possible approaches.

1. **An entrenched bill or charter of rights** is part of the Constitution of that country and cannot be changed by a parliament or any other legislative body. It can only be changed through the processes that are allowed for amending the constitution within that country. An entrenched bill of rights is the most stable form of human rights protection, as it is difficult to amend or remove, but it is harder to introduce, because it requires constitutional change to enact it.
2. **A statutory bill or charter of rights** documents rights in an Act of parliament. It can be amended or repealed by an Act of the same parliament, so is not as permanent a means of protecting human rights. Statutory bills of rights are easier to enact because they do not need any constitutional change, only the support of the majority of both houses of parliament.

Entrenched bill of rights	A statutory bill of rights	No bill of rights
The bill of rights is part of the Constitution.	The bill of rights can be found in an Act of parliament.	No bill of rights but rights might be protected in other ways by legislation, common law and some constitutionally entrenched rights.
Rights are said to be entrenched and cannot be changed by an Act of parliament.	Rights can be amended or repealed by parliament at will.	Rights outlined in legislation may be amended or repealed but constitutionally entrenched rights cannot.
United States, Canada, South Africa	New Zealand	Australia

The types of rights that are protected in a bill of rights

As we have seen, human rights fall into two broad categories:

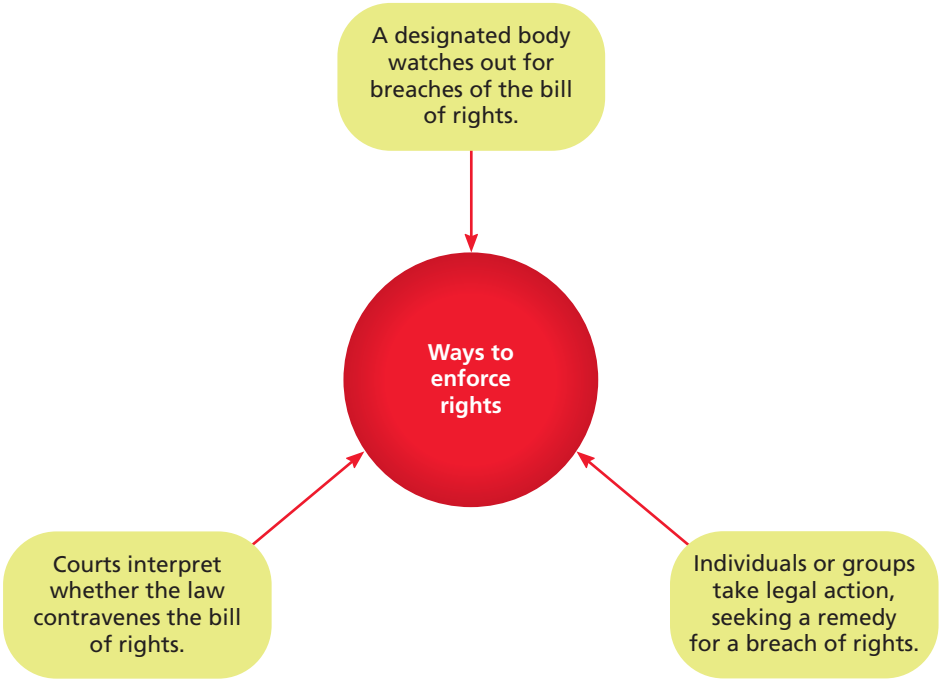
- *democratic, civil or political rights:* the rights of a citizen to participate in the government and political processes of their country, and the right to be protected by legal processes from the arbitrary abuse of government power

- *economic, social and cultural rights:* the rights to the resources necessary for an adequate standard of living, such as food, clean water, clothing, shelter, healthcare and education.

Countries with existing bills of rights include different combinations of these rights, often depending on the history of how and why the bill of rights was originally developed. The United States bill of rights has an emphasis on democratic and political rights, as these were central to the minds of those who established the American model of government in the 1780s. South Africa, on the other hand , also includes economic and social rights in its bill of rights. It has sought to overcome the social and economic disadvantage suffered by black South Africans during the many years of apartheid.

How bills of rights are enforced

There are various ways in which a country will seek to enforce rights that are enshrined in a bill of rights. Generally, there are three methods of enforcing rights outlined in the diagram below and some countries may use a combination of methods.



study on
Unit: 3
AOS: 2
Topic: 4
Practice VCE exam questions

TEST your understanding

1. Identify and explain **two** reasons why Australia does not have a bill of rights.
2. Explain the difference between an entrenched bill of rights and a statutory bill of rights.
3. Why might the types of rights included in a bill or charter of rights differ between different countries?
4. Explain the **three** different methods used to monitor and enforce rights included in a bill of rights.

APPLY your understanding

5. Why is it important to have a method of enforcing rights that have been enshrined in a bill or charter of rights?
6. Explain the major advantage of having an entrenched bill of rights rather than a statutory bill of rights.
7. The committee that investigated the introduction of a bill of rights for Australia in 2008–09 recommended a statutory approach rather than an entrenched bill. Why do you think they favoured the statutory model?
8. Investigate the Victorian Charter of Human Rights and Responsibilities. What are the main rights protected by the Charter? How are rights monitored and enforced under the Charter?
9. 'Australia should join the rest of the developed world and enact a bill of rights.' Discuss whether or not you agree with this statement, providing reasons for your opinion.

SKILL DRILL

KEY SKILL TO ACQUIRE:

- evaluate the means by which rights of Australians are protected by the Commonwealth Constitution and the extent of this protection.

SKILL DEFINITION

Evaluate means to make a judgement based on criteria and supported by evidence and examples.

Evaluating the means by which the Constitution protects Australians' rights

Exam questions assessing this skill can include the following:

- A simple 2-mark question asking you to identify and evaluate one means by which the Australian Constitution protects human and democratic rights
- A more general 6-mark question, asking you to comment on whether the Australian Constitution is effective or ineffective in protecting the rights of Australians
- The 10-mark extended response, in which you will be required to not only evaluate the means by which Australia's Constitution protects rights, but to make comparisons with another country.

In attempting any of the above types of questions, the following factors need to be considered:

- Does the Constitution as a whole provide an adequate protection of rights?
- How effectively are each of the five specific rights entrenched in the Constitution protected?
- To what extent has the High Court been able to interpret the Constitution to identify additional implied rights?

Let us take a sample question:

'The Australian Constitution is not very effective in protecting human and democratic rights.' To what extent do you agree or disagree with this statement? Justify your answer.

This is an evaluation question, as it is asking for an opinion, or judgement, on how effectively the Australian Constitution protects human and democratic rights.

Evaluation involves two processes:

- the establishment of criteria on which an evaluation is based
- supporting that evaluation with evidence and examples.

In answering the above question, it is important to make clear the criteria being used as the basis for an evaluation or judgement. You need to make the basis for your judgement clear to the examiners.

Examples of criteria that could be used in this example include:

- the range or variety of different rights protected (democratic, civil, legal, social , economic, cultural, etc.)
- whether rights are entrenched or statutory; how easily can they be changed or removed?
- enforcement mechanisms through the courts and the powers of the courts to act as a check on government.

Following is an example of how this might be approached:

In determining whether or not the Australian Constitution is effective in protecting human and democratic rights, it is necessary to identify the features that would make a Constitution effective in providing such protection. Such a Constitution should protect a broad range of civil, democratic, legal, social and economic rights; the rights should be entrenched in that Constitution, so that they cannot be undermined by politicians; and there should be a strong, independent judiciary to enforce those rights.

It is then possible to form a judgement on how well the Australian Constitution measures up to these criteria. Following is a possible approach:

The Australian Constitution has some positive features in relation to the above criteria. The five rights protected by the Constitution are entrenched rights, and cannot be changed or overridden without a referendum under s. 128 to change the Constitution.

The High Court of Australia is empowered to enforce the Constitution, and to declare legislation invalid if it interferes with rights contained in the Constitution. In the case of Betfair v. Erceg, the High Court found Western Australian legislation preventing gamblers from that state placing a bet with an interstate betting agency was in breach of the right of free trade between states under s. 92 of the Constitution.

The greatest weakness in the Australian Constitution is the limited number of rights protected. By protecting only freedom of religion, trial by jury, free trade between states, just compensation for acquired property and residential non-discrimination, the Constitution does not provide effective protection for the broad range of human and democratic rights that Australians might like to have protected.

The main thrust of this judgement is that the mechanism for protecting those rights included in the Constitution is very effective, but that the Constitution as a whole is not very effective, because the rights included are very limited. The underlined text in the above example represents evidence and examples that support the judgement.

Having suggested that there might be a number of rights that could be included to make the Constitution more effective in the protection of rights, the answer to the above question might be completed by commenting on some of the rights *not* included in the Constitution.

While we would consider that Australia is a democratic country, some of the features we would expect of a democracy are not fully protected by the Constitution. For example, the right to vote has no specific protection. The Commonwealth Parliament has the power to determine who has the right to vote, and has done so by granting the vote to women in 1902, to Indigenous Australians in 1962, and to eighteen-year-olds in 1973. In the Roach Case, *an unreasonable limitation of voting rights by removing the rights of all prisoners to vote was overruled by the High Court, but the Court stopped short of finding a guaranteed right to vote within the Constitution. The Constitution contains no guarantees of freedom from arbitrary arrest and no guarantees of due legal process for those arrested.*

In conclusion, the few rights that are included within the Constitution are effectively protected, but the range of rights included is so limited that the Australian Constitution as a whole cannot be considered very effective as a means of protecting human and democratic rights.

Developing your skills

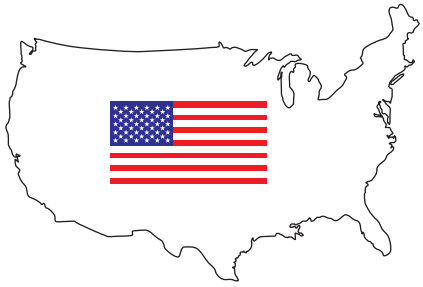
Apply the above model to the following two questions.

1. 'The Australian Constitution provides protection for only a limited number of rights, but these rights are protected very effectively.'

   To what extent do you agree with this statement? Justify your opinion by discussing **two** means by which the constitution protects rights.
2. Evaluate the effectiveness of the Australian Constitution in protecting rights, with specific reference to structural protection, express rights and implied rights.

3.6 The US Constitution and structural protection of rights

KEY CONCEPT The United States Constitution lays out the structure and powers of government, including the division of powers and separation of powers familiar to us in Australia. It was one of the first written constitutions ever adopted by any country in the world and forms the framework for the American system of democratic government.



The US Constitution came into existence as a consequence of 13 British colonies on the east coast of North America gaining independence from Britain through the War of Independence, fought between 1775 and 1783. Following the victory of the American colonists over the British forces, a constitutional convention in 1787 was given the task of creating a constitution for the newly established United States of America. Once this document had been officially ratified by the legislatures of each of the 13 states in 1788, it became the supreme governing law of the USA.

Structural protections in the US Constitution, compared with those in Australia

The United States adopted a federal system of government, with a division of powers between the central and state governments, as is the case in Australia. Some aspects of the US Constitution were adopted by the writers of Australian Constitution in the 1890s, although there are some significant differences.

Similarities between the US and Australian constitutions include the following.

- Law-making powers are divided, with listed or specific powers handled by the national legislative body, the US Congress and unlisted or residual powers handled by the individual state legislatures (of which there are 50).
- Bicameral legislatures at both federal and state level are supported by the principles of representative government though the direct election of members of those houses.
- Just as the Australian Constitution does not state specifically who is entitled to vote, the original US Constitution was similarly vague on who should hold this right. Voting rights were given to those eligible to vote in the 'most numerous Branch of the State Legislature', so the power to grant voting rights has remained with the state governments. A number of amendments to the US Constitution have modified the situation:
  - *fifteenth amendment* (1870): removed race or colour as grounds for denying any citizen the vote
  - *nineteenth amendment* (1920): gave women the right to vote, by removing sex as a basis for denying a citizen the right to vote
  - *twenty-sixth amendment* (1971): extended the vote to 18 year olds.

  Although each of these amendments is an entrenched part of the US Constitution, they have not removed the power of the states to determine voting rights. For example, the rights of prisoners to vote can vary enormously from state to state.
- The US Constitution enshrines the separation of powers between the legislative, executive and judicial arms of government, as is the case in Australia, ensuring the appropriate checks and balances to prevent abuse of power by any one arm. This means that the president, as head of the executive arm of government, has the right to veto legislation, but it also means the Congress, as the legislative arm, can impeach the president; and Cabinet appointments made by the president must be approved by the Senate. The US Supreme Court (the equivalent of our High Court) has the power to interpret the Constitution and to declare legislation unconstitutional.

DID YOU KNOW?

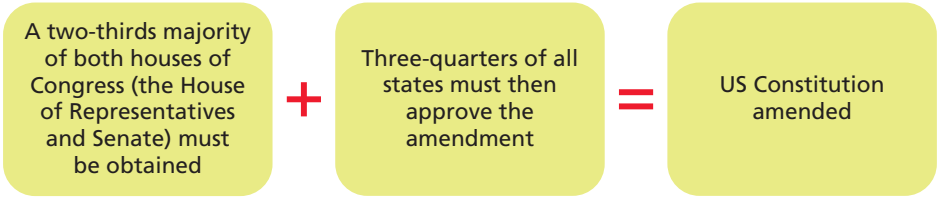
The US Constitution was drafted in 1787 at a Constitutional Convention, in Philadelphia, Pennsylvania.

Differences between the US and Australian Constitutions include the following

- The US Constitution contains an entrenched Bill of Rights that cannot be amended or repealed except by the processes allowed for constitutional change.
- The executive is more clearly separated from the legislature in the US. In Australia, ministers of state, as part of the executive arm of government, must be members of the parliament. The president, as head of the US executive arm of government, selects a Cabinet from outside the Congress. While this reinforces the separation of powers, it reduces the level of responsible government, because Cabinet members are not directly responsible to the legislative body as they are in Australia.
- The president of the United States combines the powers and responsibilities that we split between the prime minister and the Governor-General. The president is both head of state and head of government, while the monarch is our head of state and the prime minister is head of government.

Changing the US Constitution

The method for changing the US Constitution is specified in Article V of that Constitution. Unlike the Australian Constitution, the US does not require a referendum for constitutional change. The process for changing the Constitution is outlined in the following diagram.



Approval by three-quarters of the states can occur through either of the following methods.

- In most cases the state legislatures will be asked to approve the amendment, through a simple majority vote.
- It is possible for the Congress to specify that state conventions be called to gain popular support for a proposed amendment. This method has only been used once to achieve constitutional change.

While the process for constitutional change looks fairly simple, the need for approval from at least 38 of the current 50 states means it can become quite a complex process. If Congress imposes a time limit and the required number of states has not approved the amendment within this time, it lapses. If no time limit is imposed, the issue may remain unresolved for years.

TEST your understanding

1. Identify and explain **three** structural **similarities** between the Australian and US Constitutions.
2. Identify and explain **three** structural **differences** between the Australian and US Constitutions.
3. Explain the process that must be followed to change the US Constitution.

APPLY your understanding

4. 'While the United States and Australia share similarities in relation to representative government, the same cannot be said in relation to responsible government.' Explain this statement.
5. Do you think that constitutional change is easier or harder in the US than in Australia? Give reasons for your answer.

3.7 Protection of rights through the US Bill of Rights

KEY CONCEPT The United States has an entrenched Bill of Rights which is contained within the first 10 amendments to the US Constitution. These amendments were adopted in 1791, and set out the basic civil and democratic rights of US citizens.

While the original US Constitution provided structural protection to the citizens through a democratic system of government, many prominent Americans at the time felt that there was a need to include a set of additional rights and safeguards to protect individual civil liberties. Twelve amendments to the Constitution were proposed in 1789, with ten of them being successfully adopted by December 1791. These ten amendments collectively make up the constitutionally entrenched US Bill of Rights. This Bill of Rights is a document dealing with democratic, civil or political rights, rather than social or economic rights. It seeks to limit the power of the government to ensure individual rights and liberties are protected, including individual rights of freedom of speech, press, assembly and religion. The ten amendments that make up the Bill of Rights represent a set of express rights that cannot be diminished or denied by legislation at either state or federal level.

Some key protections in the US Bill of Rights

Let's look at how the US Bill of Rights seeks to protect rights.

Separation of church and state

The US Constitution and Bill of Rights contain similar references to freedom of religion to those included in s. 116 of the Australian Constitution. Article VI of the US Constitution states that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States', while the first amendment stipulates that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. The US Supreme Court has tended to interpret these clauses as creating a 'wall of separation' between religious organisations and government. Compare the following American case with the 1981 *DOGS Case* as decided by the High Court of Australia (see page 96).

Lemon v. Kurtzman (1971) 403 US 602

In 1968, the Pennsylvania State Legislature passed a law allowing the state government to reimburse non-government schools for the costs of teachers' salaries, and the cost of some textbooks and other teaching materials. As most of these non-government schools were run by the Catholic church, Lemon challenged this legislation, arguing that such payments were contrary to the 'wall of separation' between church and state. The US Supreme Court declared the Pennsylvania legislation to be unconstitutional in that it breached the first amendment. The Court established what has become known as the 'Lemon test' in relation to any legislation that applies to religious organisations. Under this test, legislation must have a secular purpose, it must not advance or inhibit religion, and it must not result in 'excessive government entanglement' with religion.

The right to bear arms

One of the more controversial clauses of the US Bill of Rights is the second amendment, which protects the rights of American citizens to own firearms. At

the conclusion of the War of Independence, many of those involved in framing the Constitution felt that their newly established country would need to be defended by ensuring that ordinary citizens could become part of a citizen army, or militia. Many have argued that this right is no longer necessary, as the US now has sufficient professional armed forces to protect the country, and the ownership of guns has led to large numbers of murders and other deaths through firearm accidents. Despite this, the US Supreme Court has continued to uphold the right of American citizens to keep and bear arms, even when this is unrelated to any involvement or service in a militia.

Criminal procedure

The fifth and sixth amendments provide protection for citizens in their dealings with the criminal justice system. These include the following entrenched rights:

- the right not to be subject to unreasonable searches, or seizures of property
- the right not to be tried twice for the same offence (the double jeopardy rule)
- the right to not be forced to self-incriminate in either police interrogation or in a court hearing
- the right to a speedy trial by jury in all criminal prosecutions
- the right to legal representation in a criminal trial
- the right to due process in criminal matters

The status of these rights in the US can be compared with the situation in Australia, where the protection of rights is not so clear.

- In each Australian state, most of the above rights are protected by either legislation or common law, and as such are not entrenched constitutional rights.
- New South Wales has abolished double jeopardy in some more serious cases and similar legislation is under consideration in Victoria.
- There is no stated right to a speedy trial in any Australian jurisdiction, although different states have attempted to introduce procedures at different times to streamline legal processes.
- Under the fourteenth amendment of the US Constitution, the right to a jury trial in serious criminal matters has been incorporated into each of the American states as an entrenched right, but remains far less definitive in Australia (see page 96, and chapter 10, page 368).
- The right to remain silent if charged with a criminal offence is an entrenched right in the US, but is only a legislated or common law right in Australia. In Victoria the right to silence is protected under s. 464A(3) of the *Crimes Act 1958* (Vic.). The US Supreme Court has strongly reinforced the right to silence under the fifth amendment.

Griffin v. California (1965) 380 US 609

Griffin was charged with murder and refused to testify in his trial. During his summing up, the prosecution counsel highlighted the defendant's refusal to testify. In his direction to the jury, the judge suggested that if a defendant failed to deny evidence presented in court, the jury could take that failure as an indication that the evidence was true. Griffin was convicted and sentenced to the death penalty. On appeal to the Supreme Court, the Court found that the judge's direction was in breach of rights protected by the fifth amendment. The court held that it is an infringement of a defendant's constitutional rights for a prosecutor to comment on the defendant's refusal to testify, or for a judge to suggest to a jury that such a refusal may be an indication of guilt. Griffin was eventually found guilty at a re-trial.

Implied rights

Just as the High Court of Australia has interpreted the Constitution to recognise an implied right of political communication, the US Supreme Court has recognised an implied right to privacy. It flows from:

- the fourth amendment, which guarantees the right of people to be secure in their persons and houses, and be protected from unreasonable searches and seizures.
- the fifth and fourteenth amendments, which guarantee a right of due process to protect the citizen from unlawful intrusion by the state.
- the ninth amendment, which allows for the people to have additional rights to those specifically covered by the Constitution.

This right of privacy has been interpreted to include the right to marriage, the right to have children, the right to have access to contraception and the right to abortion. The right to abortion was recognised by the court in 1973 and remains a controversial interpretation.

Roe v. Wade (1973) 410 US 113

This was a landmark case on abortion in the United States. The US Supreme Court had to interpret the US Constitution's fourteenth amendment which provided, among other things, the right to what is known as **due process**, where the government must respect all rights of a person according to the law. The court inferred that there is a constitutional right to privacy. It was found that a woman is legally able to obtain an abortion up until the time the foetus becomes viable (could live outside the mother's womb). Abortion could also be legal if it was required to protect the woman's health.

In his judgement, Justice Harry Blackmun said, 'the right of privacy, whether it be founded in the fourteenth amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the ninth amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.

Due process means that the state must respect the legal rights that are owed to a person.

Enforcement of rights

There is no designated body to oversee the Bill of Rights, so enforcement is through action taken by individuals or groups through the courts. This will occur if it is believed that legislation or any other government action infringes the Bill of Rights or any other part of the Constitution. Within the court system, the US Supreme Court has the ultimate power to declare legislation invalid if it is inconsistent with the Constitution, including the Bill of Rights.

Strengths and weaknesses of the US approach to the protection of rights through the constitution and the Bill of Rights

Strengths of the US approach to the protection of rights through the constitution and the Bill of Rights include:

- rights are entrenched in the Constitution and cannot be changed by legislation
- rights protected, and include a comprehensive list of civil and political rights
- the Supreme Court has the power to declare any legislation invalid if it contravenes Constitutional rights
- the Constitution provides structural democratic rights and the separation of powers as a means of ensuring a system of checks and balances on political power.

Weaknesses of the US approach to the protection of rights through the constitution and the Bill of Rights include:

- entrenchment in the Constitution makes the Bill of Rights difficult to change. For example, many would argue that the second amendment has outlived its usefulness, but it remains a part of the entrenched rights in the Constitution.
- social and economic rights are not protected in any way, as is the case in some other countries
- enforcement of rights depends on a person or group being prepared to take legal action before the Supreme Court, as there is no independent body to scrutinise legislation to ensure it does not infringe rights
- constitutional change occurs through agreement of the federal Congress and the state legislatures; there is no input from the people through a referendum.

Rights protection comparison

TABLE 3.2 Similarities between the approach to the protection of rights by Australia and the United States

Australia	United States
The structure of our political system protects rights through a system of checks and balances and the separation of powers doctrine.	The federal political system structure also provides for some protection of rights through a system of checks and balances on government power and separate arms of government.
Changing the Constitution is a complex process whereby the Australian people must decide via a referendum whether or not to change the Constitution.	Changing the Constitution is also a complex process with two-thirds of Congress agreeing to change and three-quarters of all states agreeing to change.
The High Court interprets the Constitution and interprets what it believes are implied rights.	The Supreme Court interprets the Constitution and has also declared that some rights are implied; for example, a right to privacy.
Rights such as freedom of religion and the right to trial by jury are expressly stated in the Constitution.	Freedom of religion and trial by jury are rights contained in the US Constitution although the right to trial by jury is much broader and covers all criminal prosecutions and not just commonwealth indictable offences.
Rights can be enforced through the courts, who will determine whether legislation is unconstitutional.	Individuals and courts can also take legal action and bring a case before the court to determine the constitutional validity of legislation.

TABLE 3.3 Differences between the approach to the protection of rights in Australia and the United States

Australia	United States
Very few rights are expressly stated in our Constitution (only five rights are specifically stated).	The United States Constitution contains a Bill of Rights that expressly states an extensive number of rights.
The process used to change the Constitution is different in that a referendum must be held.	The process used to change the Constitution has generally resulted in the legislature voting on change rather than change being put to a people's vote.

TEST your understanding

1. What is the relationship between the US Bill of Rights and the US Constitution?
2. Select five of the amendments contained within the US Bill of Rights and explain the rights protected by each amendment.
3. Identify and explain **two** differences between the US and Australia in the protection of the rights of those facing criminal charges.
4. Outline the types of rights that have been protected as a result of the US Supreme Court having recognised the right to privacy as a right implied in the Constitution.
5. How can the rights contained within the US Bill of Rights be enforced by citizens?

APPLY your understanding

6. Compare the freedom of religion clauses in both the Australian and US constitutions. Outline an example of the way in which these freedoms have been interpreted differently in the two countries.
7. Does the second amendment represent a strength or weakness of the US Bill of Rights? Explain your answer.
8. When comparing the Australian Constitution and the US Constitution and Bill of Rights, which of the two countries do you believe best protects the rights of its citizens? Outline **four** examples that support your opinion.

3.8 The Canadian Constitution and structural protection of rights

KEY CONCEPT Canada and Australia have a number of constitutional similarities. Both were formed from a federation of former British colonies and so have a division of powers between levels of government. Both are constitutional monarchies, with a Governor-General acting as the representative of the British monarch, and democratically elected parliamentary systems.

Legal conventions are legal principles and practices that have been accepted as part the legal framework through continuous use over a substantial period of time.

Unlike the Australian and US constitutions, the Canadian Constitution is not one document, but is recognised as including a number of different pieces of legislation, as well as some **legal conventions** that have been recognised by the Canadian Supreme Court as having constitutional authority.

The 1867 Constitution

Canada gained constitutional independence on 1 July 1867, with the passing of the *British North America Act 1867* (UK) in the British Parliament, in much the same way as the Australian Constitution was an Act of the British Parliament in 1900. Initially Canada was formed from a federation of four provinces (the equivalent of our states) and a number of territories, but over the years many of these territories have gained full status as provinces in their own right. The 1867 Act was the foundation of the Canadian Constitution at the time, and sections of it are still in force, providing the basis of much of Canada's constitutional arrangements. These include the following structural features, many of which are similar to those in Australia:

- division of powers between the federal parliament and the provincial legislatures
- the separation of powers between the executive, legislative and judicial arms of government
- the establishment of the position of Governor-General as head of the executive arm of the federal government, and lieutenant governors in each province to carry out similar duties
- a bicameral parliament consisting of an upper house (Senate) and a lower house (House of Commons)
- a set of exclusive powers assigned to the federal government, as well as a different set of exclusive powers assigned to provincial governments
- procedures for the appointment of an independent judiciary. The Supreme Court of Canada is the highest court in the country. It came into existence in 1875 and has the power to rule on constitutional issues.
- the prime minister and other Cabinet ministers are members of parliament, as in Australia, so Canada also observes the principle of responsible government
- the power to admit additional provinces to the Canadian federation (since 1867 an additional six provinces have been admitted to the federation, so that today Canada consists of ten provinces and three territories).

DID YOU KNOW?

The Canadian Senate is not an elected house. Its members are appointed by the Governor-General on the recommendation of the prime minister. A fixed number of Senate members is allocated to each province and territory. Once appointed, senators remain in their positions until the age of 75, although they can be removed if found guilty of treason or any other indictable offence, or if they are declared bankrupt.

The 1982 Constitution

Until 1982, the British Parliament retained the right to pass legislation that applied to Canada, although this usually only occurred at the request of, and with the consent of, the Canadian Parliament. In 1982, both the Canadian and British parliaments passed identical legislation to finally establish a totally independent Canadian Constitution. The *Canada Act 1982* (UK) and the *Constitution Act 1982* (Canada) were both given royal assent by Queen Elizabeth II at a ceremony in Ottawa, the capital of Canada, in April 1982. This Constitution contains a detailed set of entrenched rights, known as the Canadian Charter of Rights and Freedoms.

Other elements of the Canadian Constitution

Under s. 52(2) of the *Constitution Act 1982*, the Canadian Constitution also includes a number of statutes passed by either the Canadian Parliament or the British Parliament at various times in history. These include the *English Bill of Rights 1689* and the *Statute of Westminster 1931*, as well as a number of British and Canadian acts that gave provincial status to former territories. Each of these statutes has become entrenched in the Canadian Constitution and so can only be amended in their Canadian application through the process permitted under the Constitution.

Changing the Canadian Constitution

The method for changing the Canadian Constitution is outlined in ss. 38 to 48 of the *Constitution Act 1982*. Depending on the type of amendment required, a number of different methods can be used to change the Charter of Rights and Freedoms.

1. General procedure — under s. 38, the general procedure for amending the Canadian Constitution requires an identical motion be passed by both houses of the federal parliament, and at least two-thirds of the provincial legislatures (effectively seven out of ten), representing at least 50 per cent of the population.
2. Amendment by unanimous consent — under s. 41, there must be agreement by both houses of parliament and all provincial legislatures if the proposed amendment to the Constitution relates to matters such as the office of the Queen, the Governor-General, or any lieutenant governor; the composition of the Supreme Court of Canada; or the use of the English or French language.
3. Amendment relating to some but not all provinces — under s. 43, if a constitutional change does not affect all provinces, only the legislatures of those provinces affected, as well as both houses of parliament, need vote on the proposed amendment.
4. Amendment by parliament — under s. 44, if the proposed amendment only affects the executive government of Canada, the House of Commons or the Senate, and does not affect those matters requiring unanimous consent (under s. 41), the change can be made by the parliament alone.
5. Amendment by provincial legislature — under s. 45, a provincial legislature can make laws to amend its own Constitution, provided that such changes do not deal with matters requiring unanimous consent.

Since 1982, there have been ten successful amendments to the Constitution. Of these, only one has been passed using the general procedure; two have followed the s. 44 procedure; and seven that have only applied to some provinces have used the s. 43 procedure.

DID YOU KNOW?

The Canadian Constitution contains no provision for a referendum to be used as a method of constitutional change. On the small number of occasions that the Canadian Parliament or one of the provincial legislatures has called a referendum, it has simply been to gauge public opinion on a controversial issue. In 1980 and 1995, the government of Quebec held referendums on whether Quebec should break away from Canada and become a separate sovereign nation. Each referendum was defeated.

TEST your understanding

1. What are the two main pieces of legislation that make up the Canadian Constitution?
2. Identify **three** structural **similarities** between the Australian and Canadian constitutions.
3. Identify **two** structural **differences** between the Australian and Canadian constitutions.
4. Explain the process for changing the Canadian Constitution.

APPLY your understanding

5. Do you think that constitutional change is easier or harder in Canada than in Australia? Give reasons for your answer.

3.9 Protection of rights through the Canadian Charter of Rights and Freedoms

KEY CONCEPT In addition to the structural rights included in the Canadian Constitution, the 1982 constitutional legislation contains an entrenched set of rights known as the Canadian Charter of Rights and Freedoms. Rights protected include a range of civil and political rights, as well as some language and cultural rights.

DID YOU KNOW?

Canada first enacted a bill of rights in 1960, but it was a statutory bill, rather than a set of rights entrenched in the Constitution. Although the bill of rights has largely been superseded by the Charter of Rights and Freedoms, it has never been repealed, and so technically remains in force.

The Canadian Charter: an entrenched bill of rights

The Canadian Charter of Rights and Freedoms is fully entrenched in the Canadian Constitution and so can only be changed through the mechanisms used for constitutional change. It is covered by the first 35 sections of the *Constitution Act 1982* (numbered ss. 1 to 34, with s. 16.1 added in 1993).

Types of rights protected

The Charter protects primarily civil and political rights rather than economic or social rights, although language and cultural rights feature prominently in the Charter.

TABLE 3.4 Rights protected under the Canadian Charter

Right	Examples
Fundamental freedoms: the basic freedoms to be enjoyed by all Canadians	• Freedom of conscience and religion • Freedom of thought, belief, opinion and expression, including freedom of the press • Freedom of peaceful assembly • Freedom of association
Democratic rights: the rights to participate in political activities and be ruled by representative government	• All citizens have the right to vote for the election of members to the House of Commons (not the Senate) and provincial legislatures, and to stand for election themselves. • No elected House of Parliament can continue for more than five years without facing the voters (in practice, elections are routinely held every four years). • The House of Commons and each provincial legislature must sit at least once in any 12-month period.
Mobility rights: the right to move freely in and out of the country	• Every citizen has the right to enter, remain in and leave Canada. • Citizens have the right to take up residence in any province and pursue a livelihood in any province.
Legal rights: rights when dealing with the justice system and law enforcement	• The right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice • The right to be secure against unreasonable search or seizure • The right not to be arbitrarily detained or imprisoned • The right to be subject to due process when arrested and/or charged with an offence, including the right to be informed of the charge, to retain legal counsel, to be tried within a reasonable time, to be presumed innocent until proven guilty, and not to be subject to double jeopardy • The right not to be subject to any cruel or unusual punishment • The right not to self-incriminate when giving evidence • The right to an interpreter if required
Equality rights: provide equality before and under law, and equal protection and benefit of law	• Equal treatment before the law • The right not to be discriminated against on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability

Right	Examples
Language rights: a recognition of the bilingual nature of Canadian society	• French and English are recognised as the official languages of Canada, and have equal status. • All statutes are printed in both English and French, and parliamentary debates can be conducted either language. • Every citizen has a choice of which of the two languages to use when communicating with government officials.
Minority language education rights: the right to be educated in one's first language	• If a child lives in a province in which either French or English is the minority language, that child retains the right to be educated in that minority language if that is the child's first language.
General: how the rights contained in the Charter should be interpreted	• The Charter cannot reduce any Aboriginal rights and freedoms granted through any previous treaties or land claims agreements. • Rights included in the Charter should not be construed as denying the existence of any other rights that exist in Canada. • The Charter is to be interpreted in a manner consistent with Canada's multicultural heritage. • All rights and freedoms in the Charter are granted equally to both males and females.

Pre-legislative scrutiny

All Bills presented to the Canadian Parliament are subject to pre-legislative scrutiny to ensure that they are consistent with, and do not infringe, the rights contained in the Charter. As each Bill comes before the Parliament, the Minister for Justice is required to certify that it does not infringe the Charter. Each house of the parliament has a standing committee that will scrutinise the Bill following the second reading in that house, so there is a further safeguard to ensure the Bill is consistent with the Charter.

Enforcement of rights

The Charter of Rights and Freedoms can be enforced by the Canadian courts in the following ways.

- Any individual or group that believes their rights have been infringed or denied can take action through the courts. The courts can award a remedy in the form of damages.
- If a court concludes that evidence has been obtained in a manner that has infringed any rights guaranteed by the Charter, that evidence can be excluded from the court hearing.
- Any legislation passed by the Canadian Parliament, or a provincial legislature, can be challenged in the courts if it is inconsistent with the Charter. Under s. 52(1) of the *Constitution Act 1982*, 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.'
- Following a challenge to the validity of any legislation, the Supreme Court has the power to declare legislation that contravenes the Charter invalid. Alternatively, it can suspend the legislation temporarily while parliament makes necessary amendments to the law.
- The Supreme Court of Canada has the power to provide advisory opinions on any proposed legislation. The government, through the relevant minister, may forward a Bill or parts of a Bill to the court for advice on whether or not the proposed law infringes the rights contained in the Charter. In this way, the likely interpretation of the legislation can be determined beforehand. This contrasts with the situation in Australia, where the High Court can only decide on a constitutional matter retrospectively.

Same-sex marriages legalised in Canada

In 2005, Canada became the fourth country in the world to legalise same-sex marriage. The Civil Marriage Act 2005 was passed and applied nationwide. Prior to this, court decisions in eight of the 10 provinces and three territories had legalised same-sex marriage. The Civil Marriage Act sought to confirm what various courts throughout the nation had already decided upon. In fact, thousands of same-sex marriages had taken place legally before the national legislation was passed.

It is interesting to note that before the Civil Marriage Act was passed, the Bill, known as Bill C-38, was sent to the Supreme Court of Canada. Parliament was seeking prior approval of its proposed law. In particular, the Supreme Court was asked to consider whether restricting marriage to heterosexual couples only was consistent with the Charter and whether or not same-sex civil unions were an alternative. The Supreme Court of Canada found that marriage of same-sex couples was constitutional.

'Notwithstanding' clause and limitations clause

Despite its status as part of the supreme law of Canada, the Charter can be overridden or limited in the following ways.

- Under s. 33 of the Charter, the Canadian Parliament or a provincial legislature may declare legislation as operating 'notwithstanding a provision included in section 2 or sections 7 to 15' of the Charter. This clause is known as the 'notwithstanding clause' and it allows for legislation to be passed that overrides the rights included in the sections specified. Section 2 deals with the fundamental freedoms as listed in the Charter; ss. 7 to 15 include the legal rights and equality rights. Any legislation that overrides rights in freedoms through the notwithstanding cause can only operate for five years, before it has to be repealed or reviewed. This is a **sunset clause** and is used to prevent any permanent reduction in rights contained in the Charter. The notwithstanding clause has not been used by the Canadian Government, although it has been used on a small number of occasions by some provincial legislatures.

A **sunset clause** is a provision in a statute that is designed to terminate on a specific date unless legislative action is taken.

Under s. 1 (the limitations clause), the Charter guarantees a set of rights and freedoms, 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. This means that the parliament can place limitations on some of the rights included in the Charter, in particular circumstances, if it is possible to justify these limitations as contributing to the free and democratic nature of Canadian society. The Supreme Court has had to be convinced that there is a 'pressing and substantial objective' behind the decision to limit any person's rights and freedoms, and that there is a minimal impairment of rights.

R v. Oakes [1986] 1 SCR 103

Under s. 8 of the *Narcotic Control Act 1961* (Canada), a person in possession of certain quantities of illegal drugs was presumed to be guilty of trafficking, unless he or she could prove that there was no intention to traffic the drugs. Oakes was arrested in possession of illegal drugs, and he challenged the legislation on the grounds that the presumption of guilt contained in s. 8 infringed his right to be presumed innocent unless proven innocent. The Court found that the section of the legislation infringed Oakes' civil rights, in that there was no 'pressing and substantial objective' behind the legislation and that the infringement of rights was out of proportion to the crime committed.

Strengths and weaknesses of the Canadian approach to the protection of rights through the Charter of Rights and Freedoms

Strengths of the Canadian approach to the protection of rights through the Charter of Rights and Freedoms include the following.

- It covers a comprehensive range of entrenched civil and political rights and freedoms.
- It cannot easily be changed by legislation, but requires the implementation of constitutional change processes to introduce amendments.
- All legislation is subject to pre-legislative scrutiny to ensure conformity with the Charter.
- The courts have the power to declare any legislation not consistent with the Charter to be invalid and will take a **purposive** approach to ensure that interpretation is consistent with the aims of the Charter.
- Courts can award damages to any person whose rights and freedoms have been infringed.
- Parliament can seek advisory opinions from the Supreme Court to determine whether proposed legislation is consistent with the Charter.

Purposive is the interpretation of legislation to give effect to the purpose for which it was passed.

Following are weaknesses of the Canadian approach to the protection of rights through the Charter of Rights and Freedoms.

- The Charter is difficult to change and therefore may not be able to evolve to meet changing expectations.
- It provides too much power to unelected judges to declare legislation invalid.
- The notwithstanding clause could be abused by government to undermine some rights.
- The limitations clause could provide a means for parliament to bypass the Charter by claiming a law as justified in a free and democratic society

Rights protection comparison

TABLE 3.5 Similarities in the approach to the protection of rights in Australia and Canada

Australia	Canada
The process for changing the Constitution requires approval from parliament and then the people via referendum.	The process for changing the Charter is equally complex, requiring parliamentary approval and in some cases a referendum will be held.
The Constitution does expressly state some rights that are also expressly stated in the Charter such as freedom of religion.	The Charter also expressly states rights and freedoms.

TABLE 3.6 Differences in the approach to the protection of rights by Australia and Canada

Australia	Canada
The structure of our political system protects rights through a system of checks and balances and the separation of powers doctrine.	Canada has a federal system similar to Australia's, but the role of the judiciary has been greatly expanded since the Charter's introduction and parliament may pose questions for the court to answer in relation to the Charter. This is a variation to the separation of powers doctrine as it applies in Australia and the concept of parliamentary supremacy that is part of the Australian political system. The courts act almost as a guardian of the Charter.
Once the High Court has declared legislation to be unconstitutional, parliament cannot pass a law that disregards the High Court's ruling.	Parliament can pass new legislation if the courts have declared legislation is invalid because it infringes certain rights and freedoms in the charter. Laws can be made that infringe certain rights and freedoms in the Charter.
Proposed laws are not routinely checked to ensure they comply with the Australian Constitution.	Proposed laws are checked to ensure they do not infringe the rights and freedoms in the Charter.
Very few rights are mentioned in the Australian Constitution.	The rights and freedoms protected under the Charter are extensive.
If rights have been infringed as a result of legislation that is unconstitutional, there is no personal redress a litigant can seek apart from the fact that legislation has been declared invalid.	A litigant who has had his or her rights infringed as a result of legislation that contravenes the Charter can be awarded a remedy by the courts.

TEST your understanding

1. Why can the rights contained within the Canadian Charter of Rights and Freedoms be described as entrenched rights?
2. Why are language rights and minority language education rights so significant in the Canadian Charter?
3. Explain how the Canadian Parliament is able to ensure that proposed legislation is consistent with the Charter.
4. Explain the operation of each of the following:
   (a) the notwithstanding clause
   (b) the limitations clause.

APPLY your understanding

5. Identify **one** similarity and **one** difference between Canada and Australia in the role of the judiciary in the protection of rights under each country's Constitution.
6. Why did the Canadian Parliament seek judicial advice prior to passing the Civil Marriage Act?
7. Use the **Freedom of expression** weblink in your eBookPLUS to investigate the Canadian case *R v. Bryan* (2007) 1 SCR 527. Explain the facts of the case and why the Supreme Court of Canada decided that the Canada Elections Act 2000 did not contravene the Charter.
8. When comparing the Australian Constitution and the Canadian Charter of Rights and Freedoms, which of the two countries do you believe best protects the rights of its citizens? Outline **four** examples that support your opinion.

3.10 The South African Constitution and structural protection of rights

KEY CONCEPT South Africa has a long history of failing to recognise the basic civil and democratic rights of the majority of its inhabitants. After enforcing racial segregation and inequality for most of the twentieth century, South Africa finally gained a democratic Constitution in 1997.

Constitutional background

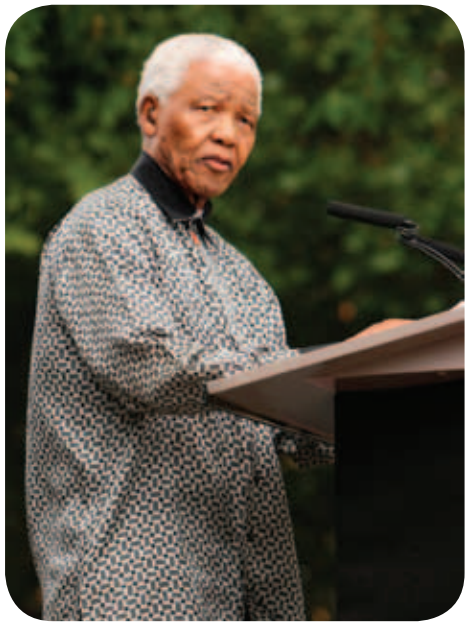
The current constitutional arrangements in the Republic of South Africa came into force in February 1997, replacing an interim constitution that had operated since 1993. South Africa gained independence from Britain through the *South Africa Act 1909* (UK), which united British colonies into one federation in much the same way as had been achieved in Australia in 1901. Like Australia, South Africa remained within the British Empire, which later became the Commonwealth of Nations. From the beginning, the South African Parliament brought in legislation that institutionalised racial segregation, culminating in the system of apartheid that was introduced in 1948. Under this system, inhabitants of South Africa were strictly classified according to their racial grouping, with different groups given different rights, and expected to live in different parts of the country.

In 1961, following criticism of the apartheid system by other Commonwealth countries, South Africa established itself as a republic, removing the British monarch from the constitutional role of Head of State. By 1970, all non-whites were deprived of the right to vote, with the black majority deprived of all citizenship rights. This system provoked a great deal of unrest and protest within the country, as well as international condemnation and trade restrictions enforced against South Africa. In 1990, President F. W. De Klerk began negotiations to abolish the apartheid system, leading to the development of an interim Constitution in 1993. Under this Constitution, elections were held in 1994, with universal adult **suffrage**. The newly elected parliament then had the role of developing a new Constitution, with the newly established Constitutional Court required to certify that the Constitution was consistent with principles that had been negotiated during the dismantling of apartheid. This certification was achieved in December 1996.

Suffrage is the right to vote.

DID YOU KNOW?

In 1952, the South African Parliament enacted the Pass Laws, which limited the rights of black South Africans to move freely around the country. All black inhabitants over the age of 16 had to carry a pass book, similar to a passport, that could be used to identify them if they ventured into designated white areas of the country. In 1960 a campaign of protests against these laws began. On 21 March 1960 between 5000 and 7000 protesters gathered at the police station in the town of Sharpeville without their pass books to surrender themselves to be arrested by the police. The police opened fire on the protesters, killing 69 of them and injuring more than 180. The Sharpeville massacre, as it became known, led to outrage within South Africa and around the world.



President Nelson Mandela was instrumental in bringing apartheid to an end in South Africa. As the first black President of the new democratic South Africa, Mandela signed the new Constitution into law on December 1996.

Structural protections

As is the case in Australia, the South African Constitution includes a number of structural features that assist in the protection of rights. These include the following constitutional arrangements.

- There is a division of powers between the federal parliament, the nine provincial legislatures and local municipal councils. This contrasts with the Australian Constitution, which recognises only federal and state governments, but does not mention local government. In each Australian state, local government gains powers from state government legislation.
- The separation of powers between the legislative, executive and judicial arms of government provides for checks and balances to avoid abuse of power.
- Federal legislative power lies with a bicameral parliament, consisting of a democratically elected lower house, the National Assembly, and an upper house, the National Council of Provinces, with members nominated by the provincial legislatures.
- Executive power rests with the president, who is both head of government and head of state. There is no prime minister in South Africa. The president has to provide the final signature to all legislation, similar to royal assent in Australia. The president is elected from and by the National Assembly, and will usually be the leader of the largest party in that house.
- Cabinet ministers are required to be members of parliament, so the executive is responsible to the parliament.
- The judicial system includes a Supreme Court of Appeal as the highest court that deals with appeals from lower courts on non-constitutional matters, and a Constitutional Court that has the responsibility of interpreting and enforcing the Constitution. In Australia the High Court covers both of these functions.

Amending the Constitution

Compared with the situation in many other countries, the South African Constitution is relatively easy to change if required.

- An amendment to the Constitution requires a vote of at least two-thirds of the National Assembly. In effect this means that 267 of the 400 members must vote in favour.
- Any change to s. 1 of the Constitution requires a vote in support by three-quarters of the National Assembly and two-thirds of the provinces represented in the National Council of Provinces. Section 1 of the Constitution establishes the country's founding values of democracy, human dignity, equality, advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution, and universal adult suffrage.
- If the proposed amendment affects any part of the Bill of Rights, or the powers of the provincial legislatures, it must be approved by at least six of the nine provinces represented in the National Council of Provinces.

TEST your understanding

1. Identify **three** structural similarities between the Australian and South African constitutions.
2. Identify **two** structural differences between the Australian and South African constitutions.
3. Explain the process for amending the South African Constitution.

APPLY your understanding

4. The South African Constitution has been amended 16 times since 1996. Do you think the South African Constitution is too easy to change? Give reasons for your answer. Support your opinion by researching some of these 16 changes.

3.11 Protection of rights through the South African Bill of Rights

KEY CONCEPT The 1997 South African Constitution contains an entrenched Bill of Rights that includes probably the most comprehensive list of rights protected by any such Bill or charter anywhere in the world. It seeks to protect not only civil and democratic rights, but also a broad range of economic, social and environmental rights.

South African Bill of Rights: an entrenched bill of rights

The South African Bill of Rights is contained in chapter 2 of the South African Constitution. As well as civil and political rights, it also protects social and economic rights. These include environmental rights, and the right to healthcare, food, water, housing, social security and education. Most of these rights are not found in other bills of rights around the world, but are a reflection of the history of apartheid, and the many basic rights that were denied the black majority during that time. The framers of the Constitution were determined to ensure that the protection of rights would be central to the new South Africa.

TABLE 3.7 Some rights protected under the South African Bill of Rights

Right	Examples
Jurisdiction and application: establishes the legal supremacy of the Bill of Rights and its application to all inhabitants	The Bill is binding on all organs of government, and must be respected, protected and promoted by the State.
Equality: all people are equal before the law and should be given equal protection and the benefit of the law	Outlaws discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth
Human dignity: everyone is worthy of respect	'Everyone has inherent dignity and the right to have their dignity respected and protected.'
Life: everyone has the right to life	The death penalty is banned under this provision. It was eventually made illegal in South Africa in 1997.
Freedom and security of the person: the right not to be deprived of personal freedom	The right not to be arrested without good cause; not to be detained without trial; not to be tortured or subject to cruel or inhuman punishment; and the right to make decisions concerning reproduction
Slavery, servitude and forced labour: no-one may be subjected to slavery, servitude or forced labour	The right not to be forced to undertake any work without fair remuneration and fair conditions
Privacy: the right to keep information and possessions personal	The right not to have one's person, home or property searched; their possessions seized; or the privacy of their communications infringed
Freedom of religion, belief and opinion: freedom of conscience and personal beliefs	Freedom of religious observance, including the right of marriage under any tradition or system of religious belief, subject to other sections of the Constitution
Freedom of expression: freedom to speak without being censored	Freedom of the press and other media; freedom to discuss ideas; artistic and academic freedom, freedom of scientific research. Incitement to violence or hatred are specifically excluded.
Assembly, demonstration, picket and petition: the freedom to congregate with others in public	The right to peacefully demonstrate and to petition government

(continued)

TABLE 3.7 *(continued)*

Right	Examples
Freedom of association	The right to choose any person or group with whom to associate
Political rights: the right to participate in the democratic processes of society	The right to form a political party or campaign for a political cause; the right to vote and to stand for election
Citizenship	No citizen may be deprived of citizenship (as had happened under apartheid).
Freedom of movement and residence: the right to travel and live where one chooses	The right to travel in and out of the country; the right to live anywhere within the country; and the right to a passport
Freedom of trade, occupation and profession	The right to choose and pursue any job or profession, within the rules that may be established for that occupation
Labour relations: the relationship between employers and employees	The right to join a trade union and participate in its activities, including strikes; the right to join an employer organisation; access to collective bargaining over pay and working conditions
Environment	The right to live in an environment that is not harmful to health or wellbeing; the right to have the environment protected for future generations

DID YOU KNOW?

The Constitutional Court legalised same-sex marriage in 2005 finding that there was protection of sexual orientation under Chapter 2 of the South African Constitution.

Enforcement of rights

The courts have the role of enforcing the South African Bill of Rights. Legislation that contravenes the Bill of Rights can be declared unconstitutional and will cease to have any effect. The Constitutional Court of South Africa (the highest court in South Africa for constitutional matters) can declare that legislation is invalid. Parliament cannot override a decision of the court so, in this regard, both South Africa and Australia provide that the judiciary has the 'final say'. Unlike Australia though, the courts can provide appropriate remedies if rights have been infringed.

Rights can be limited

The provisions of the South African Bill of Rights may be limited if it is 'reasonable and justifiable' in an open and democratic society. If a state of emergency is called, some rights might be limited but the court must decide whether or not there is a valid state of emergency. There are some rights, however, that cannot be limited or restricted; these rights are called 'non-derogable' rights. Examples of non-derogable rights include the right to equality, human dignity, the rights of children, rights against slavery and servitude and freedom and security of the person.

Interpretation of rights by the court

Courts in South Africa must promote the spirit of the Bill of Rights when interpreting statutes and developing common law. The South African Constitutional Court also is required to consider international human rights law and may consider human rights law in other democratic nations.

The right to wear a nose stud

In 2007, the Consitutional Court heard the case *MEC for Education: Kwazulu–Natal and Others v. Pillay* [2007] ZACC 21. A father (on behalf of his daughter) commenced legal action against his daughter's school for refusing to allow her to wear a nose stud. Wearing the nose stud was in accordance with the student's Hindu religion. The Constitutional Court found that the school and the Department of Education had discriminated against the student on the grounds of religion and culture. The result was that the school rules had to be amended to allow for religious and cultural differences.

Strengths and weaknesses of the South African approach to the protection of rights through the Bill of Rights

Strengths of the South African approach to the protection of rights through the Bill of Rights include the following.

- The South African Bill of Rights contains one of the most comprehensive lists of rights of any country in the world, and is one of the few to include social and economic rights.
- The Constitutional Court can override any legislation that infringes any of the rights contained within the Bill of Rights.
- As an entrenched Bill of Rights, changes can only be made through the recognised mechanism for constitutional change.
- The courts are able to award damages to individuals or groups whose rights have been infringed.

There are also weaknesses in the South African approach to the protection of rights through the Bill of Rights.

- Constitutional change is relatively easy in South Africa, requiring only a parliamentary vote to change any part of the Bill of Rights. Since 1996, 16 amendments to the Constitution have been passed, although none have directly changed any of the rights contained in the Bill of Rights.
- Rights can be limited by the parliament, if such limits are deemed to be reasonable and justifiable, such as in state of emergency.
- The South African Bill of Rights provides too much power to unelected judges to declare legislation invalid.

Rights protection comparison

TABLE 3.8 Similarities between the approaches to the protection of rights in Australia and South Africa

Australia	South Africa
Australia expressly protects some rights that are also protected in South Africa, such as freedom of religion.	Rights expressly mentioned in the Bill of Rights
If the courts declare legislation to be unconstitutional parliament cannot pass legislation that disregards this decision.	The courts in South Africa also have the 'last say' if legislation is declared to be unconstitutional.

TABLE 3.9 Differences between the approaches to the protection of rights in Australia and South Africa

Australia	South Africa
Very few rights are expressly mentioned in our Constitution, particularly not the right to enjoy an environment that does not harm one's health or the express protection of children. Social and cultural rights are not included in our Constitution.	Extensive lists of rights are stated in the Bill of Rights and they also provide for environmental rights and the rights of children.
The Constitution does not contain a provision that allows rights in general to be limited as the South African Bill of Rights does.	Certain rights mentioned in the Bill of Rights may be limited by parliament.
When enacting law, parliament is not required to check whether laws are consistent with the Constitution.	Judges must interpret statutes and develop common law with reference to the protection of rights upheld in the Bill of Rights.
Legislation can be declared invalid if it contravenes the Constitution but remedies cannot be given if legislation has resulted in rights being infringed.	The courts can declare legislation that contravenes the Bill of Rights to be invalid and an appropriate remedy such as payment of damages may be provided.

TEST your understanding

1. Why can the rights contained within the South African Bill of Rights be described as entrenched rights?
2. Identify and explain **five** examples of rights contained within the South African Bill of Rights.
3. What is the role of the courts in enforcing the South African Bill of Rights?
4. In what circumstances can the provisions of the South African Bill of Rights be limited by the government?

APPLY your understanding

5. The South African Bill of Rights includes possibly the most comprehensive list of rights of any such bill or charter in the world. Explain why you think this is the case.
6. Use the **Gay decriminalisation** weblink in your eBookPLUS to investigate the South African case *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* (1998) (12) BCLR 1517. Explain the facts of the case and why the Constitutional Court of South Africa decided that legislation did in fact contravene the South African Bill of Rights.
7. When comparing the Australian Constitution and the South African Bill of Rights, which of the two countries do you believe best protects the rights of its citizens? Outline **four** examples that support your opinion.

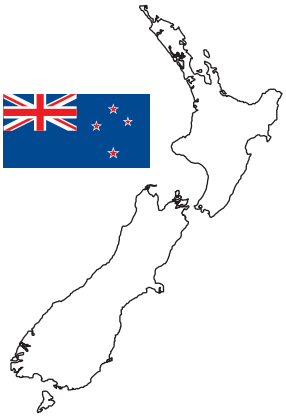
3.12 The New Zealand Constitution and structural protection of rights

KEY CONCEPT While Australia and New Zealand are neighbours and have many features in common, they are constitutionally quite different. New Zealand does not have an entrenched constitution as the supreme source of its governmental and legal systems. The structural protection of rights is based entirely on a combination of parliamentary legislation, common law and legal convention.

Unlike Australia, the New Zealand Constitution does not reside in a single document with supreme legal authority. New Zealand's constitutional arrangements have come about as a result of legislation in both the British and New Zealand parliaments over the space of more than 150 years. When the Australian continent was settled by the British in 1788, the islands of New Zealand were included in the jurisdiction of Governor Phillip, and succeeding colonial governors, but it was not until 1832 that a British representative was appointed with official authority in New Zealand.

In 1840, many of the Maori chiefs in New Zealand were persuaded to sign the Treaty of Waitangi. This was designed to give Britain overall sovereignty over New Zealand, while giving the Maori full British citizenship rights and some control over their traditional lands. The Treaty of Waitangi is today still recognised amongst the many documents that make up the New Zealand Constitution. The British Government granted self-government to New Zealand in 1852. The *New Zealand Constitution Act 1852* (UK) remained the basis for New Zealand's constitutional arrangements until 1986, when the current *Constitution Act* was enacted. In 1857, the New Zealand parliament was given the power to amend the New Zealand Constitution Act, so that, unlike Australia's Constitution, the constitution could be changed by simple parliamentary vote.

Today the sources of the New Zealand Constitution include the *Constitution Act 1986*, the *Electoral Act 1993*, the *Imperial Laws Application Act 1988*, the *Treaty of Waitangi Act 1975*, the *Supreme Court Act 2003*, and the *Bill of Rights Act 1990*.



This building is known as the beehive, where the government of the day carries out its work. To the right of the beehive is Parliament House. The New Zealand parliament is unicameral.

Unicameral means a parliament with only one house.

Structural rights in New Zealand

The *Constitution Act 1986* sets out the structure of New Zealand's system of government, allowing for democratic, representative and responsible government through the following structures.

- There is separation of powers through the legislative, executive and judicial arms of government.
- A **unicameral** parliament, the House of Representatives, is elected through a universal adult suffrage. The parliament includes a number of seats set aside specifically for Maori members, although Maoris can vote and stand for any seat. No more than three years can elapse between elections.
- There is no mandated division of powers between different levels of government. New Zealand is not a federation, so there are no state or provincial parliaments. Regional councils have a similar role to that of local municipal councils in Australia, but have their powers delegated to them by the central parliament.
- Executive power is in the hands of the Governor-General, as the representative of the British monarch.
- The prime minister and Cabinet are members of parliament. They are drawn from the majority party in the House of Representatives and so are responsible to the parliament.
- There is an independent judiciary, which includes the Supreme Court of New Zealand as the highest court in the land.

The Supreme Court of New Zealand

An **appellate court** is a court able to hear appeals by litigants from lower courts.

The Supreme Court was established in 2003, as the highest **appellate court** in the land. Prior to its establishment, litigants in New Zealand had the right to take legal appeals to the Privy Council in London, but this right was abolished with the passing of the *Supreme Court Act 2003*. Unlike the High Court in Australia, the New Zealand Supreme Court has no overriding constitutional jurisdiction. It cannot declare legislation invalid because of any apparent unconstitutional actions on the part of the government, so does not provide the same sorts of safeguards that can be provided by the High Court of Australia.

DID YOU KNOW?

Although it is unusual for a democratic country not to have a written constitution, New Zealand is not unique in this. Great Britain, as the original source of parliamentary democracy, has no written constitution, but observes constitutional arrangements based on a combination of common law, legal conventions and a number of different statutes passed by parliament over the centuries.

The electoral system

Under the *Electoral Act 1993*, New Zealand has a mixed member proportional system of voting, which is designed to ensure that the numbers of members in the House of Representatives reflects the proportion of votes received by the political party to which they belong. It is considered to provide a parliament more representative of the preferences of voters than the first-past-the-post system it replaced. The Electoral Act also contains the closest provision in New Zealand law to an entrenched constitutional feature. Under s. 268 of the Act, certain electoral rights of citizens are protected from political interference, because they require a vote of three-quarters of the House of Representatives, or a majority vote in a referendum, to change them. These rights include the right to a secret ballot, the voting age and the maximum term of three years between elections. While a government could technically override these rights by simply repealing s. 268, it would be an unpopular move and probably lead to electoral defeat at the next election.

Maori rights

As well as having a number of parliamentary seats reserved for them, Maori individuals and groups are able to lodge claims on the government if they believe the promises made under the Treaty of Waitangi have been breached.

Changing the Constitution

There is no supreme constitutional document, so parliament effectively has the power to change any part of the Constitution through the normal legislative processes. There is no binding requirement for a referendum to effect constitutional change, except under s. 268 of the Electoral Act (see above). On the small number of occasions that governments have conducted referenda, they have simply been a means of gauging public opinion and the results have not been binding on the parliament.

TEST your understanding

1. Identify **three** similarities between the ways in which the Australian and New Zealand constitutions ensure the structural protection of rights.
2. Identify **three** differences between the Australian and New Zealand constitutions in the structural protection of rights.
3. Explain the process for achieving constitutional change in New Zealand.

APPLY your understanding

4. Although New Zealand does not have an entrenched constitution, it is still able to function as a democratic society with most of the structural protections existing in countries that do have entrenched constitutions. Explain why you think this is so.
5. Compare the ways in which New Zealand has legally recognised its indigenous people with the approach adopted in Australia. Identify **two** key differences in approach between the two countries.

3.13 Protection of rights through the New Zealand Bill of Rights Act

KEY CONCEPT New Zealand has attempted to protect the civil and democratic rights of its citizens through the development of a Bill of Rights. This is a statutory Bill rather than an entrenched Bill, and so can be changed by Parliament.

Because New Zealand does not have an entrenched constitution as a supreme source of its legal and governmental systems, it is effectively impossible for it to entrench a Bill of Rights as has occurred in countries such as the United States, Canada and South Africa. In each of these countries the protection of rights is entrenched in a Constitution that requires a specific process to be followed before it can be changed. In New Zealand, with its Constitution based on a combination of legislation, common law and legal convention, a statutory Bill of Rights is consistent with the rest of its constitutional arrangements.

DID YOU KNOW?

During the public discussion on the proposed Bill of Rights, a variety of suggestions were debated. These included the possible incorporation of the Treaty of Waitangi into the Bill of Rights, to give that treaty greater legal status; the possibility of entrenching the Bill by including a requirement that it could only be changed by a 75 per cent majority vote of parliament; and giving the courts the power to invalidate any law inconsistent with the Bill of Rights. None of these ideas were successful.

The New Zealand Bill of Rights Act 1990: a statutory bill of rights

The *Bill of Rights Act 1990* (NZ) came into force in September 1990. It was the result of several years of political debate and examination by a parliamentary committee. Ultimately, the House of Representatives supported a statutory bill of rights, with the same legal status as any other legislation. It was based on the Canadian Charter in terms of the rights protected, but without the entrenched constitutional status of Canada's Charter. The purpose of the Act is:

(a) to affirm, protect and promote human rights and other fundamental freedoms in New Zealand
(b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

Features of the Bill of Rights

The protection of rights under the Bill is applied within the following framework.

- The Bill of Rights concentrates on civil and democratic rights, rather than economic or social rights, although it does include protections for minorities and freedom from discrimination.
- The Bill only protects citizens from the actions of the legislative, executive or judicial branches of government, or persons acting on behalf of any of these branches.
- The Bill of Rights may be subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. For example, there may be circumstances where freedom of expression may be limited, such as the case of sexually explicit material, or material aimed at inciting racial hatred.
- All proposed legislation is subject to scrutiny before being presented to parliament to identify any inconsistencies with the Bill. The Attorney-General is then required to bring these inconsistencies to the attention of the parliament, which then has the power to decide how to deal with these inconsistencies.
- In addition to the Bill, legislation such as the *Human Rights Act 1993* (NZ) has similar aims to Australia's anti-discrimination legislation, and is administered by the New Zealand Human Rights Commission, which has a similar role to the Australian Human Rights Commission.

Types of rights protected

Table 3.10 outlines some of the civil and political rights that are included in the New Zealand Bill of rights.

TABLE 3.10 Rights protected under the New Zealand Bill of Rights

Right	Examples
Life and security of the person	Right not to be deprived of life Right not to be subject to torture
Democratic and civil rights	Electoral rights: those 18 years and over have a right to vote and become a member of parliament Freedom of expression Freedom of religion Freedom of assembly Freedom of movement
Non-discrimination and minority rights	Freedom from discrimination as set out in the Human Rights Act 1993
Search, arrest and detention	Right not to be subject to unreasonable search Right not to be arbitrarily arrested or detained
Rights when charged with an offence	Right to consult lawyer Informed of the nature and cause of charge
Fair trial	The right to a fair and public hearing by an impartial court Everyone has a right to be presumed innocent until proven guilty
Double jeopardy (concept that you should only be tried once for the same offence)	Person acquitted, convicted or pardoned of an offence cannot be tried or punished again for the same offence

DID YOU KNOW?

Former New Zealand Prime Minister Geoffrey Palmer once said that the New Zealand Bill of Rights was like a 'a set of navigation lights to the executive and legislature when they prepare legislation'.

A **stay of proceedings** is a ruling by a court that halts the continuation of a trial.

Enforcement and interpretation by the courts

Because the Bill of Rights does not have the status of an entrenched supreme law, there are some limits on the enforcement of rights.

- The Bill does not have supremacy over any other legislation and there is no requirement for any other statute to be considered invalid, just because it conflicts with the Bill.
- If a judge is able to interpret other legislation in a manner that is consistent with the Bill of Rights, then that interpretation should be preferred over alternative interpretations.
- The courts can reveal inconsistencies between the Bill and other legislation, but have no power to declare any legislation invalid.
- Under s. 27 of the Bill, every person has the right to bring civil action against the Crown and proceedings are to be heard in the same way as civil proceedings between individuals.
- The Bill of Rights does not contain any specific remedies for those who believe their rights have been infringed, but the courts have provided remedies appropriate to the cases brought before them. These have included:
  (a) excluding evidence from a trial because it has been tainted
  (b) providing that **proceedings** in a case be **stayed**
  (c) reducing an offender's sentence
  (d) providing monetary compensation.
- The courts are expected to give a broad purposive interpretation to the Bill and other human rights legislation, so that the court's decision is guided by the legislation's purpose, or what was intended by the parliament.

Hopkinson v. Police (2004) 3 NZLR 704

In this case, a Wellington schoolteacher, Paul Hopkinson, burned the New Zealand flag outside parliament to protest against the New Zealand Government hosting the prime minister of Australia and Australia's support for the war in Iraq. Flag burning that is done with intent to dishonour the flag is illegal and Hopkinson was convicted. The appeal court overturned the conviction, stating that Hopkinson had not acted with the intention of dishonouring the flag and he had a right to freedom of expression under the Bill of Rights Act. In this case the court agreed that the legislation and the Bill of Rights Act did not contravene each other and that flag burning with the intention of dishonouring the flag of New Zealand was still illegal.

Burning a New Zealand flag with the intent to dishonour the flag is illegal in New Zealand.

Strengths and weaknesses of the New Zealand approach to the protection of rights through the Bill of Rights

The New Zealand approach to the protection of rights through the Bill of Rights has some strengths.

- It provides a reasonably comprehensive list of civil and democratic rights that should be protected.
- As a statutory Bill, additional rights can be added at any time and amendments made to improve the rights protected.
- Pre-legislative scrutiny of other proposed legislation gives the Parliament power to ensure all new legislation is consistent with the Bill of Rights.

There are also weaknesses in the New Zealand approach to the protection of rights through the Bill of Rights

- Rights could be removed by an unscrupulous government because the Bill of Rights can be easily changed.
- The courts have no power to rule on the validity of legislation that is inconsistent with the Bill of Rights.

- There is no overriding requirement that all legislation must be consistent with the Bill of Rights.

Rights protection comparison

TABLE 3.11 Similarities between the approaches to the protection of rights in Australia and New Zealand

Australia	New Zealand
Some of the rights protected under the Constitution are similar to the New Zealand Bill of Rights, such as freedom of religion.	Certain rights mentioned in the New Zealand Bill of Rights are also mentioned in the Australian Constitution.
No specific remedies are mentioned in the Constitution if it is found that rights have been infringed.	The Bill of Rights Act also does not expressly state the remedies that might apply if rights are infringed.

TABLE 3.12 Differences between the approaches to the protection of rights in Australia and New Zealand

Australia	New Zealand
Rights in the Constitution are entrenched, meaning they cannot be changed without prior approval of parliament and then referenda.	The Bill of Rights Act may be amended by an Act of parliament.
Very few rights are mentioned in the Constitution.	Extensive civil and political rights are mentioned.
No pre-legislation scrutiny exists as far as checking whether or not legislation contravenes the rights contained in the Constitution (there are so few rights this would not be useful).	Proposed laws are scrutinised to detect any inconsistencies with the Bill of Rights Act.
The courts may declare legislation invalid.	The courts do not have the power to declare legislation invalid.
The Constitution has 'the last say' and if an Act of parliament contravenes the Constitution it will be invalid.	The courts must endeavour to interpret the meaning of an Act to be consistent with rights and freedoms contained in the Bill of Rights.
The High Court will decide whether an Act of parliament is unconstitutional but cannot offer individual compensation for constitutional rights that have been infringed.	Complainants can seek a remedy if it is found their rights have been infringed.

TEST your understanding

1. What does it mean when we say New Zealand has a statutory bill of rights?
2. Give **three** examples of rights contained in the Bill of Rights Act.
3. What is the purpose of pre-legislation scrutiny in New Zealand?
4. If rights contained within the Bill of Rights Act are infringed, can a remedy be sought? Explain.

APPLY your understanding

5. 'The New Zealand Bill of Rights is weak — what is the purpose of having human rights legislation if the courts have no power to meaningfully enforce it?' Discuss.
6. When comparing the Australian Constitution and the New Zealand Bill of Rights, which of the two countries do you believe best protects the rights of its citizens? Outline **four** examples that support your opinion.

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

Please note: Outcome 2 contributes 50 marks out of the 100 marks allocated to School-assessed Coursework for Unit 3. Outcome 2 may be assessed by one or more assessment tasks. This assessment task is designed to contribute to 20 marks out of the total of 50 marks for Outcome 2.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- apply legal principles to relevant cases and issues
- evaluate the means by which rights of Australians are protected by the Commonwealth Constitution, and the extent of this protection
- compare the approach used to protect rights in a selected country with the approach used in Australia.

Essay

The United States of America, Canada, New Zealand and South Africa have adopted different approaches than that used by Australia for the constitutional protection of democratic and human rights.

Explain how the Commonwealth Constitution protects democratic and human rights. In your answer, identify and explain **three similarities** and **three differences** between the approach adopted by Australia and the approach adopted by any **one** of the countries listed in the above statement. Indicate clearly which country you have chosen.

Tips for writing your essay

Use this checklist to make sure you write the best essay you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
• Defines implied and express rights • Defines what our Constitution is. Mentions that some rights are constitutionally entrenched and explains what this means.		
Introduces the topic to the reader		
• Explains that the way our political system is structured seeks to protect us • Mentions that Australia's approach to the protection of rights is unique and will be discussed in relation to another country's approach		
Uses a logical sequence that focuses on the topic		
• Rights are protected under a representative and responsible government. • The five express rights in the Constitution are covered. • The implied right to freedom of communication is mentioned. *Tip: the main focus though is answering the question. The essay should not focus on whether Australia needs a bill of rights.*		

(continued)

study on

Summary

Unit 3: Law-making

Area of study 2: Constitution and the protection of rights

Topic 5: An integrated comparison of rights protection

study on

Unit:	3
AOS:	2
Topic:	5
Concept:	2

Do more Interactivity on the rights that are protected

study on

Unit:	3
AOS:	2
Topic:	5
Concept:	5

See more PowerPoint on a comparison of foreign rights protection methods

Performance area	Yes	No
Apply legal principles to relevant cases and issues.		
When discussing how the Constitution seeks to protect our rights include some cases to help you illustrate the point. For example, when talking about the right that interstate trade and commerce be 'absolutely free' you might mention the *Betfair Case* on page 99. To use another example, when talking about the implied right to freedom of political speech you could mention one of the relevant cases dealing with this issue.		
Evaluate the means by which rights are protected under the Constitution.		
A balanced discussion will mention that some rights are protected but in fact it was never intended that the Constitution would comprehensively state all rights to be protected. It was thought that parliament and the courts would uphold our rights. It should be mentioned that the Constitution provided a political structure to ensure representative and responsible government. Opinions may differ as to whether our rights are sufficiently protected.		
Compare the approach used to protect rights in a selected country and compare it with the approach used in Australia.		
A comparison should include: whether rights are entrenched types of rights protected enforcement of rights courts' role in the protection of rights		
Your response is easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- **The means by which the Commonwealth Constitution protects rights, including structural protection, express rights and implied rights**

- **Evaluate the means by which rights of Australians are protected by the Commonwealth Constitution and the extent of this protection.**

- **Our Constitution concentrates on the actual structure of parliament and the division of power** between the Commonwealth and state governments, rather than expressly stating all rights that should be protected.
- **The Constitution says very little about rights.**
  - It was assumed parliament and common law principles would protect our democratic rights.
- **Our Constitution guards against the possibility of the government becoming too powerful.**
  - The federal system itself, the separation of powers, and systems of checks and balances restrict the possibility of the government becoming oppressive.
- **The political structure created by the Constitution protects our rights by:**
  - establishing a federal system of government
  - bicameral legislature that reviews legislation
  - governments subject to the rule of law
  - the separation of powers
  - representative and responsible government
  - a democratic way of amending the Constitution.

- **The means by which the Constitution protects rights: express rights**
  - Freedom of religion is one of the few human rights expressly mentioned in the Constitution.
  - Trial by jury on indictment is expressly stated in the Constitution, although it strictly applies only to offences under Commonwealth law.
  - The Constitution expressly mentioned the right not to be discriminated against due to one's state of residence.
  - Protection of property in the Constitution refers to a person's right to be justly compensated if his or her property is acquired by the government.
  - Free trade between states is a right protected by the Constitution.
- **The means by which the Constitution protects rights: implied rights**
  - Implied rights are rights not expressly mentioned in the Constitution.
  - In giving people the constitutional right to choose both houses of parliament it has been inferred by the High Court that we have the implied right to freedom of political communication.
  - The *Roach Case* challenged the validity of legislation that came into force in 2006, withdrawing the right of all prisoners to vote at federal elections.
  - The *Roach Case* is significant because it considered the implied right to vote.
- **Approaches to the protection of rights in Australia and overseas**
  - An entrenched bill of rights means that rights are constitutional and cannot be changed by an Act of parliament. A statutory bill of rights is contained within legislation and may be amended or repealed by a subsequent Act of parliament.
  - Rights protected in a bill of rights may be protected through courts interpreting whether or not there has been an abuse of rights, an independent watchdog body set up to detect rights abuse, individual or group legal action, or a combination of these methods.
- **The US Constitution and the structural protection of rights**
  - Both Australia and the United States have a federal system of government.
  - Structural rights are protected through the separation of powers, elections for bicameral legislatures at federal and state levels.
  - Unlike Australia, the USA does not have responsible government as Cabinet members are chosen from outside Congress.
  - To change the US Constitution, two-thirds of both houses of Congress must approve of the change and then three-quarters of all states must approve of the change.
- **Protection of right through the US Bill of Rights**
  - Rights within the United States are entrenched in the US Constitution's Bill of Rights.
  - Numerous rights are stated expressly in the US Bill of Rights. In particular, the rights ensure individual liberties and freedoms are protected.
  - The US Supreme Court interprets the US Constitution because some rights may be implied.
  - The courts can declare legislation that contravenes the US Constitution invalid.
- **The Canadian Constitution and the structural protection of rights**
  - The Canadian Constitution is based on a number of different sources, rather than one overriding document.
  - Structural rights are protected through the existence of a bicameral parliament, with representative and responsible government, and the separation of powers.
  - The Canadian Constitution may be changed after gaining approval from federal parliament and any provincial legislatures in provinces affected by the proposed change.

- **The significance of one High Court case relating to the constitutional protection of rights in Australia**

- **Australia's constitutional approach to the protection of rights and the approach adopted in one of the following countries: Canada, New Zealand, South Africa, or the United States of America**
- **Compare the approach used to protect rights in a selected country with the approach used in Australia.**

- **Protection of rights through the Canadian Charter of Rights and Freedoms**
  - Canada's Charter of Rights and Freedoms is an entrenched bill of rights.
  - The rights protected under the Canadian Charter include fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, language rights and minority language education rights.
  - The Canadian Charter has a pre-legislative scrutiny provision.
  - Rights or freedoms infringed under the Canadian Charter may result in legislation being declared invalid by the court and a remedy may be provided to those bringing legal action.
  - Parliament can pass legislation to override certain provisions in the Canadian Charter through the notwithstanding clause.
  - In some cases infringement of rights and freedoms in the Canadian Charter may be justified for the sake of a free society.
  - Since the Canadian Charter's introduction, the role of the courts has expanded, with the court not only determining whether or not legislation contravenes the Charter, but parliament also may seek advice from the court regarding interpretation of the Charter.
  - Courts seek to interpret the Charter with regard to the meaning of rights today as opposed to their meaning when the charter was first written.

- **The South African Constitution and the structural protection of rights**
  - Power is divided between the federal parliament, the nine provincial legislatures and local municipal councils.
  - The separation of powers between the legislative, executive and judicial arms of government provides for checks and balances to avoid abuse of power.
  - Federal legislative power lies with a bicameral parliament.
  - Executive power rests with the president, who is both head of government and head of state.
  - Cabinet ministers are required to be members of parliament, so the executive is responsible to the parliament.
  - The judicial system includes a Supreme Court of Appeal as the highest court that deals with appeals from lower courts on non-constitutional matters, and a Constitutional Court that has the responsibility of interpreting and enforcing the Constitution.

- **Protection of rights through the South African Bill of Rights**
  - The Bill of Rights is entrenched in the Constitution of South Africa.
  - The South African Bill of Rights contains political, civil, social and economic rights.
  - The courts can declare legislation that contravenes the South African Bill of Rights to be invalid and the court may also order remedies for infringed rights.
  - Some rights contained in the South African Bill of Rights can be limited, but others are non-derogable.
  - When interpreting statutes or developing common law, courts must promote the spirit of the Bill of Rights.

- **The New Zealand Constitution and the structural protection of rights**
  - Power is separated through the legislative, executive and judicial arms of government.
  - A unicameral parliament, the House of Representatives, is elected through a universal adult suffrage, with a number of seats set aside specifically for Maori members.
  - There is no division of powers between different levels of government. New Zealand is not a federation, so there are no state or provincial parliaments.
  - Executive power is in the hands of the Governor-General, as the representative of the British monarch.

- The prime minister and Cabinet are members of parliament and are responsible to the parliament.
- There is an independent judiciary, which includes the Supreme Court of New Zealand as the highest court in the land.

- **Protection of rights through the New Zealand Bill of Rights Act**
  - New Zealand has a statutory bill of rights.
  - The New Zealand Bill of Rights Act protects civil and political rights.
  - Proposed law that is inconsistent with the New Zealand Bill of Rights Act must be brought to the notice of parliament.
  - The courts cannot declare legislation that contravenes the New Zealand Bill of Rights Act invalid. Remedies may be sought if it is found that rights have been infringed, but these remedies are not stated specifically within the Bill of Rights itself.
  - There are some circumstances where rights may be justifiably limited.
  - If the court's interpretation of legislation is consistent with the meaning of the New Zealand Bill of Rights Act, then that interpretation should be preferred to any other.

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

Explain **two** ways in which the approach to the constitutional protection of rights in one of the countries listed below is similar to, or different from the way rights are protected by the Commonwealth Constitution of Australia.

Choose **one** country for your comparison from the following list:

- Canada
- New Zealand
- South Africa
- United States of America

In your answer you may choose to cover **two** similarities, **two** differences or **one** similarity and **one** difference. **(6 marks)**

Question 2

'Australia's approach to the constitutional protection of rights is unique compared to other western democracies and should better protect the rights of Australians.'

Compare how Australia protects rights with the approach adopted in **one** of the following countries:

- Canada
- New Zealand
- South Africa
- United States of America

Include an evaluation of how effective the Commonwealth of Australia's Constitution is in protecting rights. **(8 marks)**

Question 3

a Explain how the Commonwealth Constitution protects **one** of our rights.

b Compare Australia's approach to the constitutional protection of rights with **one** of the following countries:

- Canada
- New Zealand
- South Africa
- United States of America

(2 + 4 = 6 marks)

(Total 20 marks)

Examination technique tip

Make sure you answer the question asked. Avoid writing a pre-prepared response that shows no application to the question at hand.

eBookplus

Digital doc:

Access a list of key terms for this chapter.

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Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

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Practice VCE exam questions

CHAPTER 4

The role of the courts as law-makers

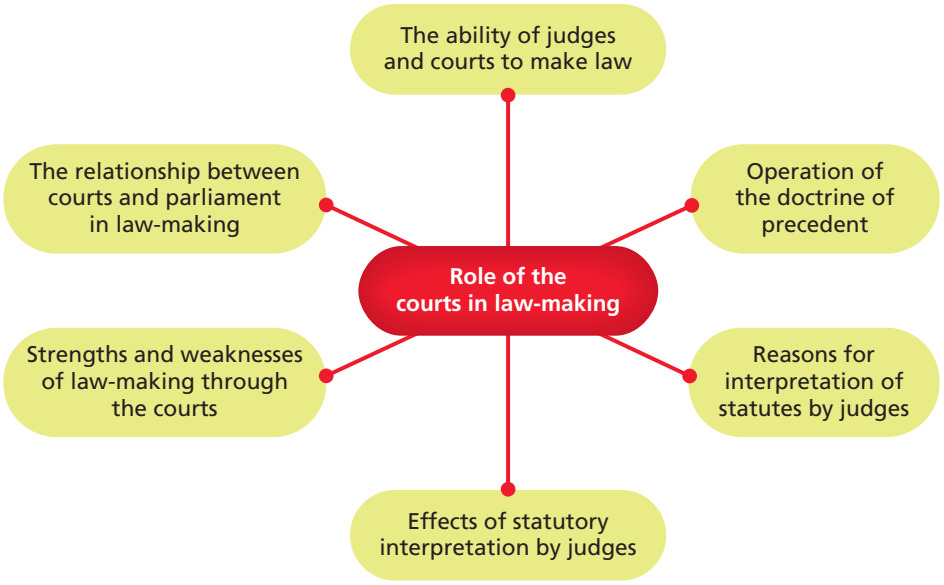
WHY IT IS IMPORTANT

Parliament is seen as the key law-maker in our society, with courts settling disputes that arise under those laws. In fact, the courts have a much broader role than this. The courts develop laws in areas not covered by legislation and interpret the legislation passed by parliament. Our courts have a vital role as law-makers in our legal system.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the nature, importance and operation of courts as law-makers
- analyse the impact of courts in law-making
- critically evaluate the law-making processes of courts
- discuss the relationships between law-making bodies.

Can you demonstrate these skills?

Chief Justice Marilyn Warren at the Supreme Court in Melbourne.

The relationship between the courts and parliament as law-makers

Just as all legislation is printed, court decisions are gathered together in books known as law reports. These reports contain details of judgements made in the courts. In one judgement, Justice Murphy of the High Court of Australia made the following comments on the respective roles of the courts and parliament as law-makers:

> The virtue of the common law is that it can be adapted day by day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that Parliament has to intervene. The extreme case is where the judiciary recognizes that a rule adopted by its predecessors was either unjust or has become so and yet still maintains it, suggesting that the legislature should correct it.

Justice Lionel Murphy in *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617; [1979] HCA 40

Court decisions collected in law reports form a coherent body of law.

4.1 What is the common law?

KEY CONCEPT Australia's courts operate as a common law system. This means that judges make judgements based on decisions made in previous cases where the facts were similar. Common law originally developed in England and is a significant part of the law of English-speaking countries around the world, as well as those countries that were influenced by the English legal system.

The development of the common law

Step back in time at least 1000 years and imagine you live in England. Solving disputes mainly occurred largely at a local level. Disputes were resolved by periodic meetings of local **freemen**, who would listen to the arguments of each side, then submit an accused to **trial by ordeal**. In some cases, a local landlord would convene a court to enforce justice within the boundaries of his landholdings.

Freemen were men in medieval times who were not bound to the land as serfs.

Trial by ordeal is a medieval method of determining the guilt or innocence of an accused by subjecting them to a painful test. If they were unharmed, they were considered to be innocent.

Early trials were conducted using trial by ordeal or trial by combat, where the accused had to fight for their innocence. In some cases, if they survived the ordeal, or if their injuries healed, they were thought to be innocent but, in other instances, death signified that the accused was innocent!

After the Norman conquest of England in 1066, King William I and his successors set out to strengthen royal control over the country. The number of courts convened by wealthy landlords increased in number and power, and the king had his own court (the *Curia Regis*) for resolving disputes between these landlords. In 1166, King Henry II enacted the Assize of Clarendon, which included a set of principles to be followed by members of the *Curia Regis* who were to be sent around the country to hear criminal cases. This was the first time that a centralised group of judges were empowered to administer the law consistently across the whole country. They became known as circuit judges and over time they developed a set of consistent legal principles by which disputes could be resolved, wherever they occurred.

Written records of cases were kept in documents known as *rolls of the court*. These were written in Latin, and included the issues and decisions of the courts. From about 1270, more detailed notes of the facts and arguments of many cases were kept, and these were eventually compiled in the Year Books of England. These became the first law reports, and a means by which judges could refer to previous cases to help them determine a judgement in each new case that came before them. The legal principles collected in these year books became the basis for the English system of **common law**. The name 'common law' originally referred to the fact that it was a system of law that was common (that is, widespread and universal) to the whole country.

The doctrine of precedent

As a former British colony, Australia has adopted the common law approach within its court system. The common law also applies in countries such as the United States of America, Canada, New Zealand, India, Malaysia and a number of African countries that are former British colonies.

The central feature of common law is the doctrine of precedent. In essence this means that when deciding the outcome of a case, judges will look to the results of similar cases and will tend to be guided by the decision in those cases. The doctrine of precedent relies on the following set of principles.

- There is a hierarchy of courts, in which higher courts are referred to as **superior courts of record** (see following diagram).
- The principle of ***stare decisis*** ('to stand by what has been decided') is applied. Lower courts in the hierarchy are required to follow the decisions of higher courts in the same hierarchy.
- A higher court can overrule or reverse a decision of a lower court within the same hierarchy (for more detail see page 151).
- The highest court in the hierarchy (in Australia, the High Court) has the power to overrule its own decisions.
- Details of decisions made by superior courts of record are kept in law reports, which are readily available to all legal practitioners.
- Cases that are similar in facts are decided in a similar manner to provide consistency within the legal system.
- Common law rules can always be overruled by parliament through the legislative process.
- When a new issue comes before a court, the judge is empowered to effectively create new law, provided that it is not inconsistent with existing precedent, or with relevant legislation.

The hierarchy of court and binding precedent

DID YOU KNOW?

The Supreme Court of Victoria still operates circuit sittings in different parts of the state. Individual judges go to provincial centres such as Geelong, Ballarat, Bendigo, Sale and Mildura at different times throughout the year to hear both criminal and civil matters that come within Supreme Court jurisdiction. The County Court also holds regular circuit hearings throughout the state, although these are far more frequent than Supreme Court sittings.

Common law is a system of law based on judge-made law or case law, as opposed to legislation or statute law.

A **superior court of record** is a court that reports and publishes decisions in law reports.

Stare decisis means to stand by what has been decided and is the basis of the doctrine of precedent.

study on

Summary

Unit 3:
Law-making

Area of study 3:
Role of the courts in law-making

Topic 1:
The doctrine of precedent

What makes a precedent?

To find a legally binding precedent, we have to examine the written judgement as delivered by the judge in a case.

Ratio decidendi

The ***ratio decidendi*** is the reason for the decision in a court judgement. As the legal reasoning that is binding, *the ratio decidendi* must be followed by lower courts in the hierarchy.

Courts are generally bound to follow precedents set in previous cases, but not everything that is said in a judgement is necessarily a binding precedent. It is the ***ratio decidendi*** ('the reason for the decision') that is binding on lower courts. The *ratio decidendi* may or may not be obvious in a judgement. Sometimes the judge will make a clear statement of the reasons for a particular decision and this is then regarded as a clear statement of the law as it applies to that case. Sometimes the *ratio decidendi* will not be so obvious and may have to be inferred from the language used. In these cases, interpretation by a judge in a later case can help identify the relevant legal principles. In legal terms, it is not the result of the case that is important, in terms of who wins, but the reasons for that result that contributes to the common law.

Obiter dictum

Obiter dictum is that part of a judge's decision that is not binding because it is not directly part of the matter the judge has been asked to consider.

During the course of making and explaining their decisions, judges will say other things — comments on important facts and legal principles that helped them arrive at a decision. These statements are referred to as ***obiter dictum*** ('things said by the way') and do not constitute a binding precedent.

In some cases a judge may speculate on how the decision might not be the same if one or more facts of the case were different. The following English case illustrates this.

study on

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Do more Interactivity on binding and persuasive precedent

Cohen v. Sellar [1926] 1 KB 536

In the case *Cohen v. Sellar* the court decided that since Mr Sellar had broken the engagement, Miss Cohen could keep the ring.

Miss Cohen and Mr Sellar were engaged to be married, and Mr Sellar gave his fiancée an engagement ring. After a while they began to argue frequently and the defendant Sellar broke off the engagement. The question arose as to who was entitled to keep

the engagement ring. In previous cases where the woman had broken off the engagement, she had been required to return the ring. The judge in this case decided that since the man had broken off the engagement, he had no right to demand the return of the ring. In delivering his judgement, the judge speculated on what might have been the situation if circumstances had been different. His opinion was that if the engagement had been dissolved by mutual consent or if the marriage had not occurred because of illness or disability, then the ring should be returned. If the marriage had gone ahead, but the couple had later divorced, the ring should remain with the woman. In this case, the fact of the man breaking off the engagement constituted the *ratio decidendi*, because it involved the application of established legal principle. The judge's opinion relating to other possible circumstances is an example of *obiter dictum*.

Persuasive precedent

Sometimes a case arises when there is no specific binding precedent from a higher court in the same hierarchy that can be applied to the facts of a case, and no applicable legislation. In these cases it is technically possible for the judge to create completely new law. In reality, and in the interests of consistency, the judge will seek guidance in decisions that have been made in similar cases elsewhere. These can include decisions made in lower courts and decisions made in interstate courts, or even overseas. While not bound to follow such a precedent, if it can be sensibly applied to the case at hand, the judge will often do so. This is known as a **persuasive precedent**. Persuasive precedents can include:

- decisions made in another court hierarchy, either interstate or in another common law country
- decisions made in a lower or equal court in the same hierarchy
- *obiter dictum* from a case either from within or outside the same hierarchy
- the opinion of an eminent legal expert, as expressed in textbooks or legal journals.

A **persuasive precedent** is a precedent originating in a lower or equal court in the same hierarchy, or an interstate or overseas court, which may be adopted in a similar case, even though it is not binding.

The use of law reports

Law reports form the major source of common law. These reports record the actual decision made by a judge (or judges) in a case and are grouped according to the courts involved. In preparing to argue a case in court, lawyers will gather together copies of all those cases they believe provide precedents that will help their client's case. They refer to those cases in presenting their arguments to the judge. The report of a case follows the format shown in the example below.

Legal citations

You will have noticed in this book that the names of parties in court cases are followed by a citation, or reference. These tell us the name of the reports in which the case can be found, the year the case was heard, the volume number of the reports and the page number on which it appears. Decisions of the High Court are recorded in the Commonwealth Law Reports, which is abbreviated to the letters CLR. These reports have been kept since 1903, when the Court first sat, with several volumes published each year. For example, the case *Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 CLR 116 was decided in 1943 and is reported in the Commonwealth Law Reports, volume 67, beginning on page 116.

Sometimes volumes of reports are kept according to the year in which cases are decided, so the year represents the volume number. In these reports the year is shown in a square bracket. This is the situation with cases decided in the Supreme Court of Victoria. These are reported in the Victorian Reports, abbreviated to VR, so the case illustrated above is cited as *Brisbane v. Cross* [1978] VR 49, indicating it is to be found on page 49 of the 1978 volume of the Victorian Reports.

study on

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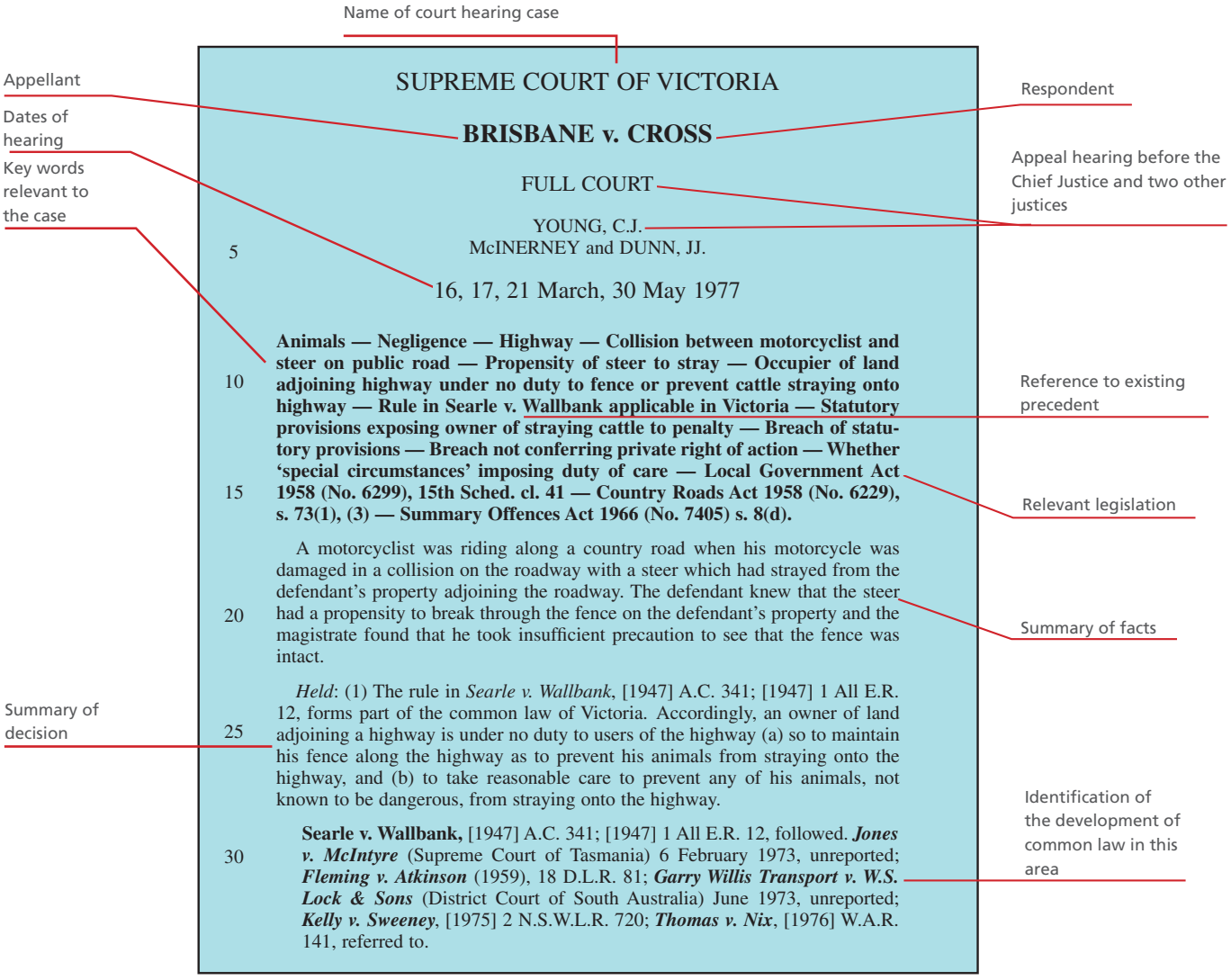
See more PowerPoint on *ratio decidendi* and *obiter dicta*

DID YOU KNOW?

Cases that are decided by a jury are not recorded in law reports because the decision has not been made by a judge, so there can be no *ratio decidendi*. A jury is not required to give reasons for its decision and is actually prohibited from doing so.



Above is an extract from the law report of *Brisbane v. Cross*, which has been labelled to indicate the key components of a law report. These reports are published and judges are able to then refer to previous decisions.

TEST your understanding

1. What is common law?
2. Identify and explain the key principles of the doctrine of precedent.
3. What is the significance of the principle of *stare decisis*?
4. Explain the importance of law reports in the operation of the common law system.

APPLY your understanding

5. Explain the difference between:
   (a) *ratio decidendi* and *obiter dictum*
   (b) binding precedent and persuasive precedent.
6. Explain the link between the court hierarchy and the doctrine of precedent.
7. Decide whether or not the following decisions would create a binding precedent, persuasive precedent or no precedent for Victorian courts (explain your answers):
   (a) a decision by a magistrate in the Magistrates' Court
   (b) an appeal decided by the Court of Appeal sitting in Victoria
   (c) a decision by the New South Wales Supreme Court
   (d) a guilty verdict by a jury
   (e) a 20-year sentence given to a murderer by the Supreme Court
   (f) a decision on the meaning of some words in the Constitution by the High Court
   (g) an award of $2 million damages given by a jury in a civil case in the Supreme Court.

4.2 The role of judges in the common law

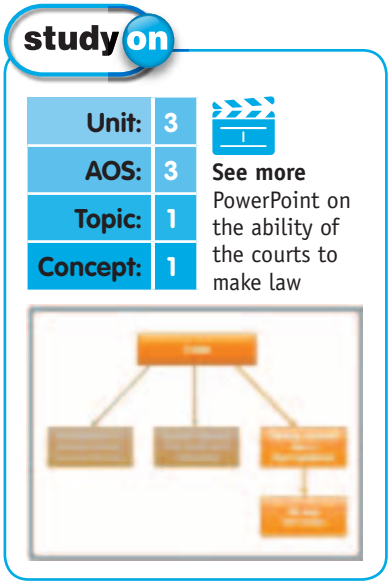
KEY CONCEPT The operation of the common law depends heavily on the expertise of the judge. He or she must be able to identify and apply appropriate precedents to match the facts of the case being heard, and also to recognise when no binding precedent is apparent.

How do judges make law?

Judges can only make new law when there is an actual case before the court that requires a decision and the following conditions are met:

- no relevant legislation can be applied to the facts of the case
- there are no binding precedents from higher courts within the same hierarchy
- the case is being heard in a superior court of record, usually the High Court, Federal Court or state Supreme Court.

When parliament passes legislation it is looking to the future, creating law that is expected to cover a variety of circumstances that may arise over time. When judges makes law, they are doing so retrospectively, dealing with a set of events that have already occurred and attempting to resolve a dispute arising from those events.



Techniques used by judges in applying precedents

Judges do not apply precedents in isolation. When a matter comes before a court, barristers for both sides will have thoroughly prepared their cases and will refer to any precedents they believe to be relevant when they present their arguments. A precedent will only be strictly binding when the facts of the case before the court are identical to the facts of the case in which the precedent was established. It is extremely rare for this to occur, so arguments presented to the court usually refer to precedents that have arisen in similar cases. Most precedents are applied in similar rather than identical situations.

Judges will use one or more of the following techniques when seeking to apply relevant precedents:

- Analyse previous judgements to determine if a binding precedent exists and apply it in the case before them. This usually involves an analysis of the previous cases presented in argument by counsel.
- Identify and extract the relevant *ratio decidendi* that can be applied.
- Adapt existing *ratio decidendi* if the facts of the current case differ from the case in which the precedent was established.
- Identify and apply any persuasive precedents that may be relevant if no binding precedent can be identified. Possible persuasive precedents will also be identified and argued by counsel during the proceedings.
- Develop a new precedent if the situation makes it necessary.

It may appear that by rigidly following precedents, judges have very little scope to update or modernise common law. However, common law is quite flexible, and allows judges the opportunity to change and adapt it to ensure it remains relevant and reflective of changing social attitudes and values.

Four techniques are available to judges confronted by a precedent they feel is inappropriate, or that does not fit the circumstances of the case before them. These four techniques are reversing, overruling, disapproving and distinguishing, and are outlined in the diagram on the following page.

Overruling
- A Supreme Court judge can overrule a decision made in a lower court in an earlier different case with similar facts.

Reversing
- When hearing a case on appeal, a judge can reverse the earlier decision.
- This creates a new binding precedent.

Disapproving
- Judges can disapprove one of their own decisions made earlier in a similar case.
- If there are a number of binding precedents, lower courts must decide which is the most appropriate.

Distinguishing
- If judges can identify substantial differences in facts, they can distinguish the case before them and not be bound by an existing precedent.

When hearing cases, either for the first time or on appeal, judges have a number of techniques under the rule of precedent.

The following cases demonstrate the practical application of these four techniques.

Reversing

A judge or judges, hearing a case on appeal from a lower court in the hierarchy, can reverse the decision made in that court.

Rosenberg v. Percival (2001) 205 CLR 434

Ms Percival was suffering from a dental condition known as temporo-mandibular joint disorder (TMJ) which was becoming worse. She sought the advice of Dr Rosenberg, a dental surgeon, who operated to try to resolve the problem. Ms Percival then suffered a worse form of TMJ, that left her permanently disabled. She sued Dr Rosenberg in the Western Australian Supreme Court for failing to warn her of the risks associated with the operation.

The trial judge found in favour of Dr Rosenberg, as there was no evidence of negligence on his part, and Ms Percival had admitted in her evidence that she would probably have proceeded with the operation even if she had been warned of the risks. Ms Percival appealed to the Full Bench of the Western Australian Supreme Court, which reversed the decision of the lower court, finding in favour of

Ms Percival. Dr Rosenberg appealed to the High Court, which found that the Full Bench of the Supreme Court had erred in its application of a precedent established in the case of *Rogers v. Whitaker* (1992) 175 CLR 479 and reversed the decision of the state court, finding in favour of the appellant, Dr Rosenberg.

Overruling

The High Court is not bound by its own decisions and so can overrule one of its own previous decisions if it believes that decision was not sound in law.

Imbree v. McNeilly (2008) 236 CLR 510

In 1986, the High Court had ruled in the case of *Cook v. Cook* (1986) 162 CLR 376 that an inexperienced learner driver owed a reduced standard of care to his or her instructor, when compared to the standard owed by a fully licensed driver. This would mean that there was a reduced liability on the part of the learner driver in the case of an injury to the instructor. While on a trip to the Northern Territory, Mr Imbree allowed McNeilly, a sixteen-year-old, to drive his car. When McNeilly swerved to avoid an obstacle, the car overturned and Imbree was injured. The High Court was required to consider whether or not the rule in *Cook v. Cook* was appropriate. The High Court decided to overrule *Cook v. Cook* and held that the standard of care owed by a learner driver should be the same as that owed by other road users. This decision reflects the fact that legislation relating to learner drivers places the same legal obligations on them as it does on licensed drivers.

Disapproving

A judge can disapprove an earlier decision made in the same court, but this only serves to create contradictory precedents that must be resolved by either a decision of a higher court, or by legislation.

Re Soukup (Unreported, 15 October 1997, Supreme Court of Victoria)

Soukup was an elderly man suffering from dementia and subject to delusions. He killed his wife with a knife, but had no memory of what he had done. He was found guilty of manslaughter and released on a good behaviour bond, after the judge accepted his level of diminished responsibility for the killing. State Trustees then made an application to the Supreme Court for a ruling on whether Soukup was entitled to benefit from his wife's estate. The legal position had generally been that a murderer should forfeit any benefit from the death of his victim, but in the case of *Re Keitley* [1992] 1 VR 583, a battered wife who had killed her husband was excused from this forfeiture rule, due to her low level of culpability. The judge in *Re Soukup* disapproved the ruling in *Re Keitley* and ruled that Soukup could not benefit from his wife's estate. In his judgement, the judge considered that legislative change would be appropriate to settle the issue.

Distinguishing

Judges can distinguish the case before them from previous cases and not be bound by precedent.

Davies v. Waldron [1989] VR 449

Waldron was found in the driver's seat of his car with a blood alcohol level above the legal limit. His keys were in the ignition and he had attempted to start the car. In court he claimed he was starting it for a friend who was going to drive him home. His counsel argued that the precedent established in a previous case, *Gillard v. Wenborn* should be applied. In this case a driver also over the legal blood-alcohol limit had been found not to be in charge of a motor vehicle. He was asleep in the driver's seat, with the engine running, but had only turned the engine on to get the heater working. The judge in *Davies v. Waldron* distinguished this case from *Gillard v. Wenborn*, based on the likelihood of the driver actually attempting to drive the car. Waldron had been found actually trying to start the car, so was at risk of driving, while the accused in *Gillard v. Wenborn* was asleep and not at risk of driving the car. Waldron was found guilty.

A drunk driver may be not be in charge of a motor vehicle if he is asleep and unlikely to drive.

study on

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Practice VCE exam questions

TEST your understanding

1 Under what circumstances can judges make law?

3 Explain **three** techniques used by judges to apply precedents to cases before them.

3 Differentiate between each of the following terms:
- reversing
- overruling
- disapproving
- distinguishing.

APPLY your understanding

4 It has been argued that having to follow decisions from the past is too restrictive for judges and denies them flexibility. Give reasons for why you either agree or disagree with this opinion.

5 For each of the following situations, explain whether the court was reversing, overruling, disapproving or distinguishing previous judicial decisions:

(a) a judge in the Supreme Court of Victoria decides not to follow a precedent set in the same court in 1956 because she does not believe the precedent is relevant in today's society

(b) in dealing with an appeal from a state Supreme Court, the High Court of Australia decides not to apply one of its previous decisions because it will lead to an undesirable result and creates a new precedent instead

(c) a Supreme Court judge decides not to apply a precedent because the facts of the current case are substantially different from the previous case

(d) the Victorian Court of Appeal determines that a judge in the Supreme Court has wrongly applied the law and decides in favour of the appellant.

EXTEND AND APPLY YOUR KNOWLEDGE:
Developing law through precedent

One of the landmark cases of the twentieth century was the case of *Donoghue v. Stevenson*, decided in the English House of Lords, in 1932. It was the decision in this case that largely established the tort of negligence. Although the case established a precedent that has been applied in many cases since, the House of Lords was guided largely to persuasive precedents in arriving at its decision. As the highest British court at the time, it effectively overruled existing precedents to arrive at its decision in this case.

Donoghue v. Stevenson [1932] AC 562

In 1928, a friend bought May Donoghue a bottle of ginger beer. The drink was in an opaque bottle, so it was not possible to see the contents. Donoghue drank some of the ginger beer, but when the last of the bottle was poured into a glass, the remains of a decomposed snail came out into the glass. Donoghue suffered from illness and shock as a result of drinking the ginger beer and sued Stevenson, the manufacturer of the ginger beer. Prior to this case, it was generally accepted in law that there had to be a direct contractual relationship between a buyer and seller before the buyer could sue a seller for providing a dangerous or defective product. There was no such relationship in this case, as Donoghue's friend had actually bought the drink and had not bought it directly from Stevenson, but from a cafe supplied by his business. The case went on appeal to the House of Lords, which delivered a decision in favour of Donoghue by a majority of 3-2. The leading judgement was delivered by Lord Atkin. The following words within Lord Atkin's judgement are accepted as the *ratio decidendi* of the case and therefore constitute the binding precedent:

> . . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with knowledge that the absence of reasonable care in the preparation or putting up of products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

When May Donoghue found a decomposed snail in her bottle of ginger beer she sued the manufacturer.

DID YOU KNOW?

Until 2009, the House of Lords was the highest court in the English hierarchy and the final court of appeal. This was not the entire House of Lords that sits as the upper house of the British parliament, but a group of 12 appointed law lords. Their jurisdiction flows historically from the days of the medieval *Curia Regis*, when members of the king's court would hear cases as representatives of the monarch. Appeals until 2009 were usually heard by five law lords, sitting as an appellate committee. Since 2009, the highest court of appeal in Britain has been the Supreme Court of the United Kingdom.

study on

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See more
Video on the ability of the courts to make common law rules

Given the importance of precedent in the common law, how was it possible for Lord Atkin and the majority of judges in this case to arrive at this conclusion? An examination of some of the preceding cases can show how the doctrine of precedent provides judges with considerable flexibility when required.

Langridge v. Levy (1837) 2 M&W 519

A father bought a gun from a seller, who guaranteed that it was made by a well-known manufacturer and that it was in good condition. When his son used the gun it exploded and severely injured him. When legal action was commenced, the supposed manufacturer stated that he had not made the gun and the defendant denied he had made any claims about the condition of the gun. Because the son was not a party to the contract between his father and the gun-seller, he had no claim for breach of that contract. However, the court found that the seller had engaged in fraud and so was liable for the harm done to the plaintiff:

> The defendant has knowingly sold the gun to the father, for the purpose of it being used by the plaintiff . . . , and has knowingly made a false warranty that it might be safely done, in order to effect the sale;
>
> . . . as there is fraud, and damage, the result of that fraud, . . . the party guilty of the fraud is responsible to the party injured.
>
> . . . he is responsible in this case for the consequences of his fraud whilst the instrument was in possession of a person to whom his representation was either directly or indirectly communicated and for whose use he knew it was purchased.

The success of the plaintiff's case rested on the fraudulent behaviour of the defendant, as the court was not prepared to recognise that any duty of care existed beyond that of a contractual relationship. In the following case, the precedent in *Langridge v. Levy* was followed, but extended to include negligent actions as well as fraud.

In *George v. Skivington* the notion that manufacturers use reasonable care in producing their products was beginning to emerge. When we buy shampoo or any other product today, we are protected by the law of negligence derived from common law.

George v. Skivington (1869) LR 5 Exch. 1

A husband bought some 'hair-wash' for his wife from the defendant, who was a chemist and had made the product himself. When the product was purchased, the husband made it clear that it was for his wife. When she used the product, the wife suffered from skin damage and loss of hair, so she and her husband took legal action against the seller. The court stated:

> . . . everyone who compounds an article for sale has a duty imposed upon him to use ordinary and reasonable skill in compounding the article, so as to prevent personal injury to the person who has to use it.
>
> . . . he did not use ordinary skill and care, but he made this article so unskilfully, carelessly and negligently, that by reason of his unskilfulness, carelessness, and negligence the injury resulted to the female plaintiff.
>
> . . . this duty having arisen, and this duty having been violated, he, the seller, having failed to use reasonable care and skill in the compounding of the article is liable in an action at the suit of the person for whom he knew the article was purchased, and by whom he knew it was intended to be used.

The concept of a duty of care that extends beyond a direct contractual relationship was further enforced in the following case.

Heaven v. Pender (1883) 11 QBD 503

In this case, Gray had a contract to paint a ship. The ship was moored in Pender's dock and Pender provided a platform to be hung over the side of the ship to assist with this task. The plaintiff, Heaven, was employed by Gray to carry out the painting, but while he was doing so, the ropes holding the platform broke, leading to injury to the plaintiff. The court found similarities with *George v. Skivington*, in that no contract existed between the parties, but that the defendant had a duty to any person who might be required to use the platform. The court held that whenever one person supplies goods or machinery to be used by another person and there is the likelihood of injury to the person to whom the item is supplied, there is a duty of care to use ordinary skill and care in relation to the condition or manner of supply. One judge, Brett, went further in *obiter dictum*, by suggesting that:

> . . . whenever one person is by circumstances placed in such a position in regard to another, . . . that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

It was the *obiter dictum* in this case that Lord Atkin used as a persuasive precedent in *Donoghue v. Stevenson*, by enlarging the group of people to whom a duty of care might be owed. All of the above cases were British cases, but the principles established in *Donoghue v. Stevenson* were soon taken as persuasive precedent in other common law countries. The following case saw the establishment in Australia of the common law in relation to negligence.

Grant v. Australian Knitting Mills [1936] AC 85

Dr Grant purchased a pair of underpants manufactured by the defendant company. During the manufacturing process, a chemical was left in the fabric and Grant suffered from severe dermatitis as a result of wearing the underpants. He sued the company and the court found in his favour, applying the persuasive precedent relating to defective products established in *Donoghue v. Stevenson*.

Grant v. Australian Knitting Mills established the common law relating to the negligent supply of defective or dangerous products in Australia. It provided a binding precedent for Australian courts.

QUESTIONS

1. On what grounds was the court in *Langridge v. Levy* able to award damages to the plaintiff in the absence of a contract between the plaintiff and the defendant?
2. In what way did the court in *George v. Skivington* extend the grounds for possible legal action against a manufacturer?
3. What is the significance of the *obiter dictum* in *Heaven v. Pender*?
4. What does the case of *Donoghue v. Stevenson* tell us about the importance of persuasive precedents in the development of common law?
5. Why do you think the British precedent set in *Donoghue v. Stevenson* was followed so closely in the Australian case of *Grant v. Australian Knitting Mills*?
6. It could be argued that judges have made use of common law processes to bring greater fairness to the law relating to negligence. Indicate whether or not you agree with this proposition and provide examples to support your opinion.

4.3 Statutory interpretation

KEY CONCEPT Precedent operates when judges make decisions on the facts of a case and, in so doing, establish a new legal principle. Judges can also make decisions on the meaning of words and phrases in legislation and delegated legislation. This is referred to as statutory interpretation and when a judge interprets a statute, he or she is making law.

Why interpret legislation?

Federal and state parliaments usually make laws to satisfy a recognised need in society. As we saw in chapter 1, a variety of influences in society can lead to the enactment of statutes. Legislation is written in general terms, with the intention of covering a wide variety of specific situations. Laws are also made ***in futuro***, with the intention of covering future circumstances, but the unexpected can always occur. This can leave open the question of whether a particular piece of legislation is relevant to an event that appears to be outside the wording of an Act. Let us take a closer look at why statutes need to be interpreted.

Laws made ***in futuro*** are designed to cater for circumstances likely to occur in the future.

study on

Summary

Unit 3: Law-making

Area of study 3: Role of the courts in law-making

Topic 2: The two ways courts make law

Legislation may be complex

As laws are designed to serve the community, they should be written in plain English so people with a reasonable competency in English should be able to read and understand what has been written. Unfortunately not all legislation is written this way and complex language may need to be interpreted so it can be applied to today's circumstances.

Legislative intention is unclear

What did parliament intend when drafting a particular law? This question may need to be answered so a law can be applied correctly.

If the wording is too restrictive, it may prevent the law being applied as parliament intended. It is only when a court is called on to interpret legislation that such weaknesses become obvious. The following English case illustrates this.

Fisher v. Bell [1961] 1 QB 394

Common law rules relating to the law of contract make it clear that when an item is displayed in a shop, this is regarded as an *invitation to treat*. The legally binding offer and acceptance required for a contract to be enforceable occurs when a buyer makes an offer to buy the item and the shopkeeper accepts that offer. Simply displaying an item does not constitute an offer. The defendant in this case had a flick knife on display in the window of his shop. Under the *Restriction of Offensive Weapons Act 1959* (UK), it was illegal to 'offer for sale or hire . . . any knife which has a blade which opens automatically'. The defendant was prosecuted under this Act, but his counsel successfully argued in his defence that the display of the knife was an invitation to treat, not an offer, so the exact wording of the Act did not apply to this situation. The Restriction of Offensive Weapons Act was amended in 1961 to insert the words 'or has in his possession for the purpose of sale or hire' to close this legal loophole.

Legislators may fail to take account of all possibilities that could be covered by a statute. In these circumstances the courts will seek to fill in the gaps, as the following case illustrates.

We do not always express ourselves clearly. Unfortunately, the words of statutes can also be ambiguous and judges must interpret what was meant.

Attorney-General (Cth) v. Kevin and Jennifer [2003] FamCA 94

Kevin was a transsexual, who was born female but had grown up identifying as a male, and had had gender reassignment treatment. In August 1999, he and Jennifer were married. In October 1999 they applied to the Family Court of Australia to have their marriage declared valid under the *Marriage Act 1961* (Cth). The Act specifies that marriage is a union between a man and a woman, but does not define the terms man and woman, and makes no provision for transsexual marriage. In 2001 the Family Court found that since Kevin was considered to be a man at the time of the marriage, the marriage was legal. The Commonwealth Attorney-General appealed to the Full Bench of the Family Court to have the decision reversed, but in February 2003 the Full Bench upheld the original decision.

The meaning of some words may be ambiguous

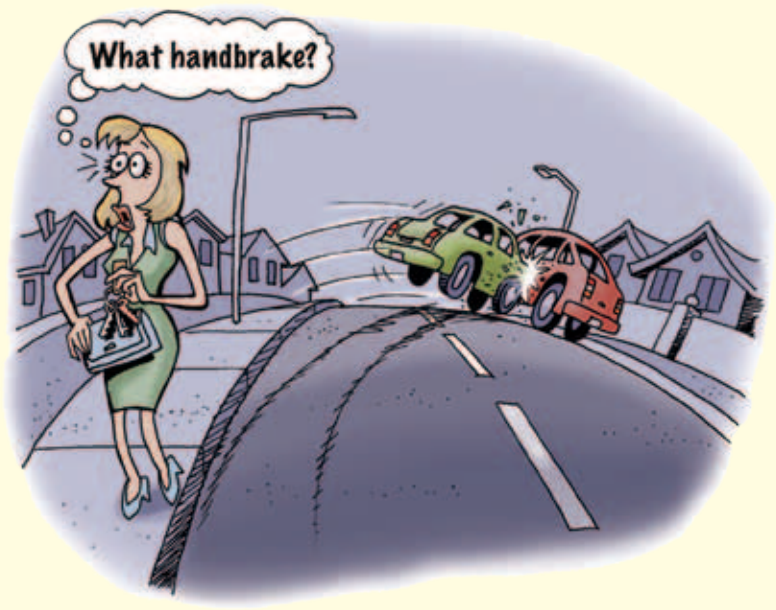
Many words in the English language have more than one meaning and while parliament may try to avoid including ambiguous words into a statute, quite common words often need to be interpreted by the courts. In the case of *Davies v. Waldron* (page 152), the words 'in charge of a motor car' required interpretation. In the following case, the court was required to determine what constitutes driving.

When is a person considered to be driving a car?

In 1982 the Supreme Court had to determine at what point a person is considered to be 'driving'.

Facts of the runaway car case — *Grace v. Fraser*

In the case of *Grace v. Fraser* [1982] VR 1052, the defendant left her car parked out of gear and without the handbrake engaged. Her vehicle rolled across the road and into another vehicle. The defendant did not report the accident as required under law and she was charged with an offence. The Magistrates' Court ignored her defence that she was not driving and was, therefore, under no obligation to report the accident — she was found guilty of the offence of not reporting an accident. The defendant appealed against this decision.



The decision

The Supreme Court overturned the original verdict and accepted the appellant's defence that she was not driving and not obligated to report the accident. The magistrate in the original case had used a narrow interpretation of the term 'driving' and so the appeal was upheld. The Victorian Parliament disagreed and passed the *Motor Car (General Amendment) Act 1982* to avoid this situation in the future.

The meaning of words in legislation may change over time

Dictionary definitions of words can change over time. For example, the word 'text' may mean one thing to an 18-year-old and another to a 60-year-old. Courts are frequently asked to interpret legislation in a broader sense, taking into account common and modern usage. Words contained in legislation often have a narrow, legalistic scope, yet they must somehow be made applicable to our ever-changing society.

As we have seen in the case of *Kevin and Jennifer* (page 157), medical advances allowing for gender reassignment surgery has meant that the strict meaning of the words man and woman are not as may have been originally envisaged by legislators.

Technological changes

As technology changes, our laws must change to keep pace. However, technology may develop more quickly, leaving gaps in the law that judges must deal with. Courts today have had to grapple with issues such as 'upskirting', cyberstalking, IVF and surrogacy as products of the technological age.

In the following case, the High Court was required to rule on whether or not the Australian Constitution allowed the Commonwealth to make laws in respect of television, even though television had not been invented at the time of federation.

Jones v. Commonwealth (1965) 112 CLR 206

Section 51(v) of the Constitution gives the Commonwealth power to make laws with respect to 'postal, telegraphic, telephonic, and other like services'. Jones challenged the validity of the *Broadcasting and Television Act 1942–62* (Cth), which allowed for land to be acquired to build studios for the ABC's television service. Jones argued that television was unknown at the time of the framing of the Constitution, so could not be included in Commonwealth constitutional powers. The High Court found that 'other like services' could include television, so the Commonwealth had the power to enact the legislation under challenge.

DID YOU KNOW?

The meaning of words changes over time. 'Silly' actually meant 'blessed' or 'happy' rather than 'foolish', and 'awful' was used to indicate something 'wonderful' rather than something 'terrible'.

Legislation may contain too many amendments to be clear

Where legislation has been amended over time, the courts will sometimes be required to read a number of Acts to decipher the precise meaning of the existing statute law. This is quite a task when it is considered that any number of seemingly minor subsections in legislation may be relevant to a particular case. For example, the *Crimes Act 1958* (Vic.) has been amended regularly over the past 40 years, and interpretation of its provisions may be difficult due to the wide array of changes that have been made.

The meaning of words in statutes may not always be clear. It is up to the judge to interpret the correct meaning of a statute.

TEST your understanding

1. Identify **four** reasons why statutes may need to be interpreted by judges and explain each.
2. Identify **two** situations in which it may be difficult to simply rely on the words of a statute to assist with interpretation.
3. How can changing technology make statutory interpretation more difficult?

APPLY your understanding

4. In the case of *Fisher v. Bell* the court adopted a very narrow, legalistic interpretation of a statute. Do you think it was appropriate for the court to take this approach? Give reasons for your answer.
5. Identify two examples from the cases included in this spread where a set of clear definitions in the relevant Act may have made statutory interpretation simpler.
6. Why do you think the High Court might have to take a relatively broad interpretation of the Constitution to deal with cases like that of *Jones v. Commonwealth*?

4.4 Tools used to interpret legislation

KEY CONCEPT Judges use a variety of tools and techniques to help them in the process of statutory interpretation. In addition to examining the words used within a statute, judges may attempt to determine the purpose of the legislation, and what the relevant parliament was hoping to achieve by enacting it.

Intrinsic sources

Judges will first examine the Act that is relevant to the case before them. Intrinsic sources are those that are contained within that legislation and include:

- the actual words of the Act, including the particular section requiring interpretation and other sections dealing with similar issues
- the long title of the Act, usually found at the beginning of the printed Act and often containing a statement of the purpose of the Act
- any preamble (introduction) to the Act, which may also contain information relevant to the purpose of the Act
- headings used to group the sections of the Act
- any margin notes or footnotes that can help clarify sections of the Act
- definitions, often provided at the beginning of the Act, to identify technical terms, or words that may have more than one meaning in general usage, and to clarify the meaning parliament wishes applied to the terms
- any schedules contained at the end of the Act.

A broad look at all the material contained within a statute may assist in interpreting the specific section or sections relevant to the case before the court.

Extrinsic sources

If necessary, judges can also examine other material not contained within the Act under examination. Extrinsic sources are those found outside the Act, but may assist in its interpretation. Extrinsic sources include the following.

- The record of parliamentary debates, known as Hansard, that occurred during the legislative process. The second reading speech of the minister introducing the Bill often contains details of exactly what the government hopes to achieve through the particular legislation. This may be clarified through further debate during the second reading stage. The consideration in detail stage, which allows for amendments of individual sections of the Bill, can also provide a focus on a particular section and its purpose.
- Reports of committees, law reform bodies and other bodies, such as royal commissions. Legislation often occurs as the result of an inquiry of some type. Parliamentary committees are often set up to investigate an issue and make recommendations to government. The Victorian Law Reform Commission will receive a reference from the Attorney-General, instructing it to investigate an issue and prepare recommendations for possible legislation. Royal commissions investigate issues or incidents and also make recommendations to government. The reports of these bodies can provide background relating to the purpose of a particular statute.
- Dictionaries can provide definitions of words, and often point to different meanings, and the circumstances in which those different meanings might be used.
- Acts interpretation legislation. Parliaments have passed legislation that is specifically designed to provide guidelines on how judges should interpret statutes. In Victoria, the *Interpretation of Legislation Act 1984* provides guidance in relation to Victorian legislation, while the Commonwealth *Acts Interpretation Act 1901* provides similar guidance in relation to Commonwealth statutes. An

example of the type of guidance given is illustrated in s. 35 of the Victorian *Interpretation of Legislation Act*. This section mandates the 'purposive' approach to statutory interpretation. This means that judges must give preference to an interpretation that is consistent with the original intention or purpose of the legislation. Section 15AA of the Commonwealth *Acts Interpretation Act* also indicates that the purposive approach is preferred for the interpretation of Commonwealth statutes. A purposive approach supports the use of extrinsic sources to help determine the original intention of the Act. Section 15AB of the same Act encourages judges to make use of extrinsic materials.

Parliamentary debates can provide guidance for judges in determining the purpose of an Act.

Other approaches used by judges

Let us now look at the various approaches a judge may take when interpreting words in a statute.

The literal approach

Under this approach, judges look first at the literal meaning of a word. Many statutes include definitions of terminology used at the beginning of the Act. These definitions represent the legislators' preferred interpretation of the word, particularly if the word has more than one meaning in common usage. In the absence of a definition within the act, judges will use dictionaries to find a literal definition.

The purposive approach

Judges are required to look to the purpose or intention of an Act when applying it to a case before them. This includes the use of extrinsic materials. The possible conflict between a literal approach and purposive approach has been recognised by judges.

Adding value to law-making

There are well-recognised rules for interpreting statutes. Usually the judge begins with the ordinary meaning of the words of the Act. However, anyone who has read a dictionary knows that most words have more than one definition. Sometimes the applicable definition is obvious. On other occasions, it is not so obvious. The correct meaning of statutory words must be identified by reference to their context and legislative purpose. Increasingly Acts of Parliament specify what their objectives are. However, these statements are at such a level of generality as to be of limited assistance in solving particular problems of interpretation. Sometimes the court will have regard to other material such as the Minister's Second Reading Speech, the Explanatory Memorandum which was tabled in Parliament and, perhaps, Law Reform Commission Reports or other Reports which have been the moving force behind the enactment of the law.

The problem is not readily solved simply by saying that judges have to construe Acts in accordance with the intention of the Parliament. That concept is of limited use. Individual Members of Parliament may have different views of the meaning and purpose of the Bill on which they are voting. Sometimes, although not often, the Minister's Second Reading Speech cannot be reconciled with the words of the Act which he or she is explaining. In that case it is the words of the Act which will prevail over the Minister's intention.

Source: Robert French, Chief Justice of the High Court of Australia, Australia and New Zealand Scrutiny of Legislation Conference, Canberra, 6 July 2009.

Binding and persuasive precedents

When interpreting legislation for application in a case before them, judges may look at past decisions for guidance. If a statute or section of a statute has been interpreted in a particular manner by a higher court in a similar case, a binding precedent will have been created. If the interpretation has occurred in a case before the same court on a previous occasion, or if the facts of the case are not the same, a persuasive precedent may still apply.

The impact of human rights

Under s. 32(1) of the *Victorian Charter of Human Rights and Responsibilities 2006*, courts in Victoria are required to interpret statutes in a way that is compatible with human rights, as far as it is possible to do so. In the following case, the High Court had to determine whether or not the Victorian Supreme Court had interpreted a statute in this way.

Momcilovic v. The Queen & Ors [2011] HCA 34

Ms Momcilovic had been convicted of possessing illegal drugs after these were found in her apartment. They actually belonged to her partner, who owned an apartment in the same building. Under s. 5 of the Drugs Act, a person is deemed to be in possession of illegal drugs if they are found on that person's property, unless that person satisfies the court to the contrary. Ms Momcilovic argued that this represents a reversal of the normal burden of proof in a criminal case, and that the interpretation of s. 5 by the trial judge in his direction to the jury was an infringement of her human rights. The High Court upheld her appeal and held that s. 32(1) of the Charter is a valid rule of statutory interpretation and that the jury had been misdirected. A new trial was ordered.

Common law rules

The courts have developed a number of rules for the interpretation of statutes over time. These rules include:

- *ejusdem generis*. The translation means 'of the same kind'. It is relevant to legislation where a number of *specific terms* are followed by a *general term*. In this situation, the general term is to be read narrowly so as to relate only to items of the actual type found in the specific list. For example, if 'diamonds, sapphires and other stones' are mentioned in a statute, 'other stones' is the general term that comes after the specific terms 'diamonds and sapphires'. Therefore, 'other stones' must be interpreted narrowly as referring to only precious stones such as diamonds and sapphires and not stones such as granite, slate or marble.
- *expressio unius exclusio alterius*. This term means that the express mention of one term excludes all others. In other words, if the item is not on the list, it is not meant to be covered. To use our previous example, if the words 'diamond and sapphires' are expressly mentioned in a statute, the interpretation should be that the law refers to those two stones solely and not to other precious stones such as rubies or emeralds.

Under the *ejusdem generis* rule, the term 'diamonds, sapphires and other stones' would include only precious stones.

TEST your understanding

1. Identify three examples of intrinsic sources that might be used to aid in the interpretation of a statute.
2. Why should intrinsic sources be the first place a judge looks to assist with statutory interpretation?
3. Explain why a judge might look to extrinsic sources as an aid to statutory interpretation.
4. What role does the Victorian Charter of Human Rights and Responsibilities have in the interpretation of legislation?

APPLY your understanding

5. Identify two problems identified by Chief Justice Robert French that can be encountered by judges in attempting to interpret legislation.
6. If a judge is called on to interpret a particular section of an Act, how can he or she be guided by the ways in which other sections of the same Act have been interpreted in previous cases?
7. If an Act referred to 'motor cars, trucks and other vehicles', explain why each of the following would be likely to be included or excluded as being covered by that Act:
   (a) motorised wheelchairs
   (b) bicycles
   (c) motorbikes.
   What is the name of the rule of statutory interpretation that is applicable here?
8. If a section of the *Food Act 1984* refers to 'beef and lamb products', why would fish, chicken or pork be excluded? What rule is applied here?

4.5 The effect of statutory interpretation

KEY CONCEPT Judges will often be required to interpret a statute in the process of arriving at a decision in a case before them. When they do so, that interpretation becomes part of the common law and is likely to be considered in future cases. If a government does not agree with a court's interpretation of legislation, it needs to amend the legislation to ensure a different interpretation in future.

Creation of precedent

When a judge interprets a statute, that decision creates a new precedent and the principles of *stare decisis* will apply to that precedent. The following points should be noted, however.

- Courts are expected to adhere to precedents when dealing with the same sections of the same statute in future cases, but this does not mean that a precedent is created for similar sections in other statutes. Each piece of legislation should be interpreted according to its own wording and purpose.
- Statute law will always override common law, so judges must always ensure that the interpretation of one section of a statute does not contradict any other sections of that statute, or any other legislation.
- Any precedent arising from the interpretation of a statute remains in force on the assumption that, if parliament has not made any changes to a statute after a court ruling, the parliament must be satisfied that the ruling is consistent with its intentions.

A precedent created through statutory interpretation in one case can have an influence on whether a litigant will choose to take action on a different issue in the future, as the following case illustrates.

Toonen v. Australia [1994] PLPR 33

Nicholas Toonen brought an action against Australia before the United Nations Human Rights Committee (UNHRC), in which he claimed that sections of the Tasmanian Criminal Code infringed his rights under the International Covenant on Civil and Political Rights (ICCPR). The sections in question criminalised sexual contact between consenting adult males in private. He claimed that this legislation breached the ICCPR because its enforcement infringes his right to privacy by bringing private sexual activity into the public domain. The UNHRC found that he was a victim of the legislation, although he had no actual remedy under Australian law. In response to this finding, the Australian government enacted the *Human Rights (Sexual Conduct) Act 1994 — Section 4*, prohibiting any state from making laws that interfere with private sexual activity between consenting adults. Although legislation relating to sexual matters was considered a state residual power, the Commonwealth claimed the legislation was necessary to fulfil international treaty obligations. Just as it had done in the *Tasmanian Dam Case* (see page 73), it had the power to override state jurisdiction on this issue under its external affairs powers. The Tasmanian government repealed the offending section of its Criminal Code, in the realisation that the precedent of the *Tasmanian Dam Case* would prevent it from successfully challenging the Commonwealth legislation on this issue.

Gay rights activists march in support of equal rights.

Words are brought to life

The interpretation of a word or phrase in a statute does not change the actual Act; it merely clarifies the meaning of the word or phrase for future reference. When a generic word such as 'weapon' is used in legislation, it may be necessary to determine what types of items are included within this broad term, as the following case illustrates.

Deing v. Tarola [1993] 2 VR 163 (the Studded Belt Case)

Under the *Control of Weapons Act 1990* (Vic.) it is illegal to possess, carry or use any regulated weapon without lawful excuse. The term *regulated weapon* was not fully defined in the Act, but under s. 3 could include 'an article that is prescribed by the regulations to be a controlled weapon'. The regulations referred to are the *Control of Weapons Regulations 1990*, as made by the Governor-in-Council. These regulations provide a more specific list of items that are to be considered regulated weapons, and include 'any article fitted with raised pointed studs which is designed to be worn as an article of clothing'. The defendant Deing was a 20-year-old man who was arrested in a restaurant wearing a studded belt to hold up his trousers, and charged under the *Control of Weapons Act*. The Magistrates' Court found him guilty, so he appealed to the Supreme Court. Justice Beach in the Supreme Court found that a regulated weapon should be defined as anything that is not commonly used for any other purpose than as a weapon. He also found that the Governor-in-Council had exceeded its authority under the Act by including studded belts on the list of items included in the regulations. Deing had his conviction overturned, the regulations were changed to remove the section relating to studded belts and the Act was eventually changed to better define what constituted a prohibited weapon.

Is this an offensive weapon?

study on

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Practice VCE exam questions

Parliamentary action

Decisions by the courts will sometimes result in parliament taking action to clarify an issue, or act to limit the powers of the courts to apply an interpretation that is not considered appropriate in today's society. The following case led to changes in Victorian statue law.

de Sales v. Ingrilli [2002] HCA 52

In 1990, Teresa de Sales's husband was killed in an accident on a farm in Western Australia owned by Ingrilli. Ms de Sales took action under the *Fatal Accidents Act 1959* (WA), which provides compensation to the relatives of a deceased person. The District Court of Western Australia determined a level of compensation, but discounted the amount by five per cent. This discount was based on an old English common law precedent that allowed courts to reduce a widow's compensation if the court believed she had a good chance of remarriage. Ingrilli appealed to the Full Court of the Supreme Court on the grounds that the discount should have been 20 per cent, given Ms de Sales's age and attractive appearance. The Full Court upheld the appeal and increased the discount to 20 per cent. In 2002, Ms de Sales appealed to the High Court which upheld her appeal and restored the original five per cent discount. The Victorian Attorney-General of the time, Rob Hulls, regarded the whole concept of the 'widow's discount' as sexist and discriminatory. The Victorian Government enacted the *Wrongs (Remarriage Discount) Act 2004* to provide that no discounts be made to any damages awarded based on the remarriage prospects of a plaintiff.

TEST your understanding

1. Explain how the interpretation of a statute can create a precedent.
2. Why did the Tasmanian Government choose not to challenge the *Human Rights (Sexual Conduct) Act 1994 — Section 4* in the High Court, even though it invalidated Tasmanian legislation?
3. What was the impact of Justice Beach's finding in the Studded Belt Case, that a regulated weapon should be defined as something not commonly used for any other purpose than as a weapon?

APPLY your understanding

4. Is it possible for a judge interpreting a section of an Act to follow a precedent set by another judge interpreting a different section of a different Act? Explain your answer.
5. Do you think a leather glove with pointed metal studs across the knuckles would be treated as a weapon by the courts? Give reasons for your answer, with reference to the Studded Belt Case.
6. Identify and explain two possible situations in which a decision by a court might lead parliament to develop new legislation.

4.6 Strengths and weaknesses of law-making by courts

KEY CONCEPT Courts play a key role in law-making. They often make laws in areas where parliament is reluctant to act. On the other hand, courts can be slow to act and conservative in their decisions. On balance, how important are courts to the process of law-making in our legal system?

Strengths of law-making through courts

As courts primarily make law through precedents, many of the strengths of courts as law-makers reflect the strengths of precedent that were outlined on pages 164–6. Let us now take a closer look at just how effective the courts are as law-makers.

- **Courts act independently.** Because judges are appointed, not elected, they are not subjected to the same level of political scrutiny. Because they do not need to be re-elected, their decisions can reflect the law rather than the populist view.
- **Courts apply legislation to day-to-day cases.** Judges rule on cases before them. This makes their decisions relevant to today's circumstances. Interpretation of words in statutes allows for common, modern-day usage of words to be considered and applied.
- **Courts can act quickly.** As courts are not burdened by the strict parliamentary processes involved in passing a Bill (the various reading stages and debates in both houses of parliament), courts can quickly change the law through their decisions in the cases before them.
- **Courts can fully consider all arguments.** Precedents are the result of court cases, where the adversary system allows all arguments and evidence to be examined and cross-examined. This helps to ensure judges are fully informed when arriving at a decision.
- **Courts can develop areas of law.** As society changes, courts can develop areas of law to keep pace with society's views and values. The development of the law of negligence, liability for the safe-keeping of animals and native title are examples where courts have developed an area of law.
- **Courts provide consistency and fairness.** Precedents allow for the law to be applied consistently where the material facts of a case are similar. This provides certainty and helps to ensure that all people are treated equally and fairly before the law.
- **Courts can provide flexibility.** By allowing judges to distinguish, overrule and reverse precedents, courts have a degree of flexibility in the manner in which they apply the law and create new laws.

This flexibility ensures that the application of precedent allows for the law in a particular area to be further developed and clarified, as the following cases demonstrate.

Negligent advice

***Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465**

In this English case, the House of Lords found that a bank providing advice on the creditworthiness of one of its customers did not owe a duty of care in relation to that advice, because it had included a disclaimer that the advice was given 'without responsibility'. In *obiter dictum*, the judges made it clear that if the disclaimer had not been included, the bank could have been found negligent if the advice was inaccurate and had been prepared without an appropriate standard of care.

study on

Summary

Unit 3: Law-making

Area of study 3: Role of the courts in law-making

Topic 4: Strengths and weaknesses of law-making through the courts

study on

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See more PowerPoint on independence of the judiciary

***Shaddock & Associates Pty Ltd v. Parramatta City Council* (1981) 150 CLR 225**

In this Australian case, the High Court applied the *obiter dictum* in *Hedley Byrne v. Heller* when it found Parramatta Council to be negligent when it provided inaccurate advice to the plaintiff in relation to land he wished to develop. This case established the principle that a duty of care is owed to any person seeking advice or information from an individual or organisation that presents itself as a reliable or expert source of that information.

***Norris v. Sibberas* [1989] VR 161**

In this case, Mr and Mrs Sibberas relied on the advice of an estate agent, Mrs Norris when purchasing a motel and milk bar. The business proved to be unsuccessful. The Full Court of the Supreme Court found in favour of Mrs Norris, because she only owed a duty of care on matters in which she had actual expertise, which was buying and selling property, rather than running a motel.

study on

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Do more
Interactivity on the strengths and weaknesses of law-making through the courts

Weaknesses of law-making through courts

While courts are competent law-makers, their effectiveness is limited by a number of weaknesses in their law-making ability.

- **Courts act retrospectively.** Judges make laws when settling disputes in cases before them. As the act (or omission) has already occurred, the law is, therefore, made *ex post facto* — after the fact.

Have you ever heard of the saying that it is like 'closing the door after the horse has bolted'. In a sense, court-made law is like that, because judges can only make law when a case comes before them.

- **Judges are not elected.** When parliament creates a law it is using the authority given to it by the electorate. Judges are not elected and, therefore, groups affected by court-made law have no recourse to democratic processes to challenge the decision.
- **Courts can only act on cases before them.** Courts must wait for a case to come before them. People must have 'standing' to be involved in a court case and must be able to afford to take their case to the higher courts in order for a court to create a precedent. In this sense, the courts' ability to make law that is far-reaching is limited because they must confine themselves to the case at hand.
- **No guarantee of predictability.** It may be difficult to predict an outcome because a number of conflicting precedents may be applied to the facts of the case. The ability of judges to distinguish between previous cases and the one before them only adds to this lack of predictability.
- **Courts cannot seek public input.** Parliament can use law reform bodies to investigate areas of law requiring change. Courts are unable to seek public views and input when deliberating on a case. In this sense, law-making through the courts is limited because judges are not privy to extensive consultation that often takes place before parliament enacts law.
- **Courts can be slow to make law.** Courts are not able to act independently and must wait for a case to come before them. This can lead to the law changing slowly through the courts. Almost 100 years elapsed from the time the courts recognised a limited duty of care outside a contractual arrangement in *Langridge v. Levy* in 1837, until the broader principles relating to negligence in relation to defective products were established in *Donoghue v. Stevenson* in 1932.
- **Courts can be inflexible.** Judges are not elected and law-making is not their primary role. These factors can see them reluctant to distinguish or overrule precedents and create new laws.

The following case demonstrates the conservatism of judges. Even though they may recognise that a precedent is no longer appropriate, they can be reluctant to depart from it. Sometimes it requires legislative action to bring the law up-to-date.

State Government Insurance Commission (South Australia) v. Trigwell (1979) 142 CLR 617

In this case, Mr and Mrs Trigwell were injured when a car that had collided with two sheep on a country road swerved and crashed into their car. The driver of the first car was killed and Mr and Mrs Trigwell sued both the insurer of the deceased driver and the owner of the sheep. The Supreme Court of South Australia found the deceased driver had been negligent and that the State Government Insurance Commission should pay damages to the Trigwells, but that there was no liability on the part of the owner of the sheep. The Insurance Commission appealed to the High Court, in the hope of establishing some liability on the part of the landowner. The High Court applied the precedent established in an English case, *Searle v. Wallbank* [1947] AC 431. In this case, an escaped horse injured a cyclist, but the court had held that the owners of farm animals had no obligation to prevent them straying, based on an ancient right of farmers to allow their animals to roam. This precedent had also been followed in Victoria the previous year, in the case of *Brisbane v. Cross* [1978] VR 49, where a farmer had not been held negligent when his steer escaped and injured a motorcyclist. While several of the Justices of the High Court agreed that the right of farmers to allow their animals to roam free was no longer appropriate, they were not prepared to overrule the established common law

precedent, preferring to leave such a task to parliament. In 1984, the Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act* which inserted the following s. 33 into the *Wrongs Act 1958* (Vic.):

> So much of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take reasonable care to see that damage is not caused by animals straying on to a highway is hereby abolished.

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Practice VCE exam questions

In 1984 the Victorian Parliament overrode the legal principle upheld in the *Trigwell Case*.

TEST your understanding

1. In what way did the decision in *Norris v. Sibberas* help clarify and refine the law relating to negligent advice?
2. The *Trigwell Case* demonstrates both strengths and weaknesses of law-making through the courts. Explain both the positive and negative aspects of this case.
3. Many of the strengths of the courts as law-makers are also weaknesses. Discuss how the following points can be interpreted as either a strength or a weakness:
   (a) judges not being elected
   (b) the operation of the doctrine of precedent
   (c) creating the law after the event — *ex post facto*.
4. How does precedent allow for 'certainty and consistency'?
5. Courts make laws when deciding cases that come before them. Explain how this can be a restriction on the law-making powers of the courts.
6. Only persons with 'standing' in a case can influence law-making by the courts. Explain what is meant by 'standing'.

APPLY your understanding

7. On balance, do you believe that law-making through the courts makes a positive or negative contribution to law-making in our society? Support your opinion by discussing **three** strengths and **three** weaknesses of law-making through the courts, and refer to at least **four** cases you have studied in this chapter as examples to support your opinion.

SKILL DRILL

KEY SKILL TO ACQUIRE:

- apply legal principles to relevant cases and issues.

Consider the following situation:
A judge in the Supreme Court is required to deal with a dispute between the buyer and seller of a motor car. The relevant statutes covering the case include the *Motor Car Traders Act 1986* (Vic.), and the *Competition and Consumer Act 2010* (Cth). A number of common law precedents also cover areas of contract law that are relevant to the dealings between the buyer and seller.

You are asked to complete the following questions. The section that follows after these questions will give you some guidance on how to write the best answers.

1. Which decisions from which courts will be binding on the judge in this case?
2. Identify and explain two possible sources of persuasive precedent that could be used by the judge.
3. Under what circumstances would it be appropriate for the judge to apply a persuasive precedent in the case before her?
4. Outline a process the judge might use to identify a possible common law precedent that could apply to this case.
5. The plaintiff's counsel puts forward an argument relying on sections of the relevant legislation, while the defendant's counsel counters with a number of common law precedents that support a different legal principle. Explain how the judge should deal with this apparent conflict in the law.
6. The plaintiff's counsel argues that certain words within the Act should be interpreted in a particular way, while the defence counsel argues in favour of a different interpretation. Explain **two** methods the judge can use to decide which interpretation to adopt.
7. In weighing up the evidence and the arguments from both sides, the judge finds that the legislation does not adequately cover the facts in this case, and the only common law precedents would lead to a severe injustice. What can she do to arrive at the most appropriate resolution?
8. Despite the injustice that results, the judge decides to strictly apply the relevant precedent. When the result of the case becomes public, it causes an uproar, with letters to the newspapers and talk-back radio callers complaining loudly.
   (a) What steps are open to the unsuccessful party?
   (b) How might the issue be dealt with to ensure the same problem does not arise again?

SKILL DEFINITION

In order to perform this skill, you need to be able to recognise which legal principles are relevant to a given situation. This could be a particular case that has come before the courts or a hypothetical set of facts.

Advice on how to write your best answer to these questions

In each of these questions or activities, you are being asked to apply legal principles that you have learnt in relation to the operation of the common law and the role of the courts in statutory interpretation.

1. This question requires an understanding of the court hierarchy and the operation of the doctrine of precedent within that hierarchy. You need to be able to identify the courts that are above the Victorian Supreme Court in the hierarchy and how their decisions are binding on the Supreme Court.
2. You need to be able to identify exactly what constitutes a persuasive precedent and where such precedents can be found. This may include courts outside the hierarchy in which the Supreme Court functions.
3. This question requires an understanding of the occasions when a persuasive precedent can be applied in a case. There are many examples in the cases in this chapter of judges applying a persuasive precedent.

4. You require a knowledge of the techniques or tools used by a judge to analyse a possible precedent, including differentiating between the *ratio decidendi* and *obiter dictum*. It should be possible to place these tools into a sequence or process that a judge might use.
5. What happens if there is a contradiction between common law and statute law? Which one can override the other?
6. This question requires an explanation of the tools and techniques used by judges in interpreting legislation. You could provide examples of the use of intrinsic or extrinsic sources, the literal or purposive approach, or the use of some of the common law rules.
7. You need to consider the possibility of the judge reversing, overruling, disapproving or distinguishing, although not all of these are possible, relevant or within the power of the judge. The judge could also follow the inappropriate precedent but make use of *obiter dictum*. How would he do this? What might he be trying to achieve?
8. (a) An appeal to a higher court may be the sort of option that could be considered, but how can this be done in such a way that allows the appellant the possibility of getting a different result? In other words, what steps can be taken to take the case to a court where the inappropriate precedent need not be followed?
   (b) How can the inappropriate precedent be removed forever? Who can take action and what can they do? The *Trigwell Case* provides a clue.

These clues should give you enough information to complete the above exercise. When you have done so, you can attempt the following.

An employer gave his employee a lift home after a work party. Both men had been drinking. They had an accident and the employee was killed. The deceased's wife sought damages before the Supreme Court. The facts of the case were such that that they were covered by both legislation and common law.

1. Outline two examples of precedents that will be binding on the judge in this case.
2. What is a persuasive precedent? Where might the judge look to find persuasive precedents he can apply to the case before him?
3. Why might it be appropriate for the judge to look at persuasive precedents to help decide the case?
4. Identify and explain three techniques used by judges to find and apply relevant precedents.
5. Explain **three** reasons why the judge might have to interpret the relevant legislation that applies to the case.
6. Differentiate between the literal approach and the purposive approach to the interpretation of statutes. How could the judge in this case make use of both approaches to arrive at the most appropriate interpretation of the relevant legislation?
7. The judge finds that there is a precedent in the form of a previous interpretation of the legislation, but it was applied in the same court and the facts of the case were not identical. To follow this precedent would severely disadvantage the plaintiff and her family. Describe two techniques he has at his disposal to deal with this problem.
8. After the case is over, it is clear that the judge had to develop a completely new precedent to deal with the facts of the case and that the law is far too vague to deal decisively with incidents of this type. The relevant minister is not sure whether or not to legislate to clear up the uncertainty. Identify **two** advantages and **two** disadvantages of leaving the issue alone and allowing further development of the common law to resolve future cases.

4.7 Relationship between the courts and parliament in law-making

KEY CONCEPT Parliament and courts work together to provide a system for law-making and dispute resolution. While parliament generally makes the laws and courts settle disputes, at times the courts must participate in law-making to support or challenge the laws made by parliament.

Role of parliament

Let's first look at the various roles of parliament relevant to law-making.

Parliament creates courts

All courts in Australia have been created by legislation. The High Court of Australia was created by s. 71 of the Constitution, which was a statute of the British parliament. The same section of the Constitution empowers the Commonwealth Parliament to legislate to create other courts with federal jurisdiction. The Family Court of Australia was created by the *Family Law Act 1975* (Clth), while the Federal Court was established in 1976 and began sitting in February 1977. The Supreme Court of Victoria was created by the Victorian parliament in 1852. More recently the state parliament has used its powers to create specialist courts such as the Koori Court and the Drug Court. With the exception of the High Court, all other courts can be abolished by the relevant parliament.

Parliament empowers the courts

The powers and jurisdiction of the courts are determined by the relevant parliaments. For example, sentences imposed by Victorian courts for criminal offences are determined under the *Sentencing Act 1991*. The powers, structure and jurisdiction of the Supreme Court are governed by the *Supreme Court Act 1986*. Parliament will sometimes act to increase minimum or maximum sentences in response to changes in community attitudes and can legislate to change the nature of particular offences, as well as defences to those offences. In 2005, the Victorian Parliament introduced the new offence of defensive homicide as a means of providing battered wives with an appropriate avenue if charged with the killing of a spouse. This has changed the way in which a number of homicide cases have been dealt with before the Supreme Court since then.

Appointment of judges

The appointment of judges is part of the role of the executive arm of government. At federal level, appointments are made by the Governor-General, acting on the advice of the government of the day. At the state level, the state governor makes the appointment, also acting on the advice of the government. In practical terms, this means that appointments are effectively made by the Cabinet at each level, usually on the recommendation of the minister responsible for justice and the legal system. In both the High Court and Victorian Supreme Court, judges are appointed for life, but are expected to retire at the age of 70.

Parliament can override decisions of the courts

In both state and federal jurisdictions, parliament is the supreme law-making authority. It can override decisions made under the common law by courts. The exception, of course, are cases decided in the High Court on constitutional matters. Both state and federal parliaments have at times legislated to overturn or modify

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common law if they believed that the decision of a court was wrong or required clarification. The *Mabo Case* in 1992 took Australian law in a dramatic new direction, requiring legislation to complement and clarify the decision in the High Court.

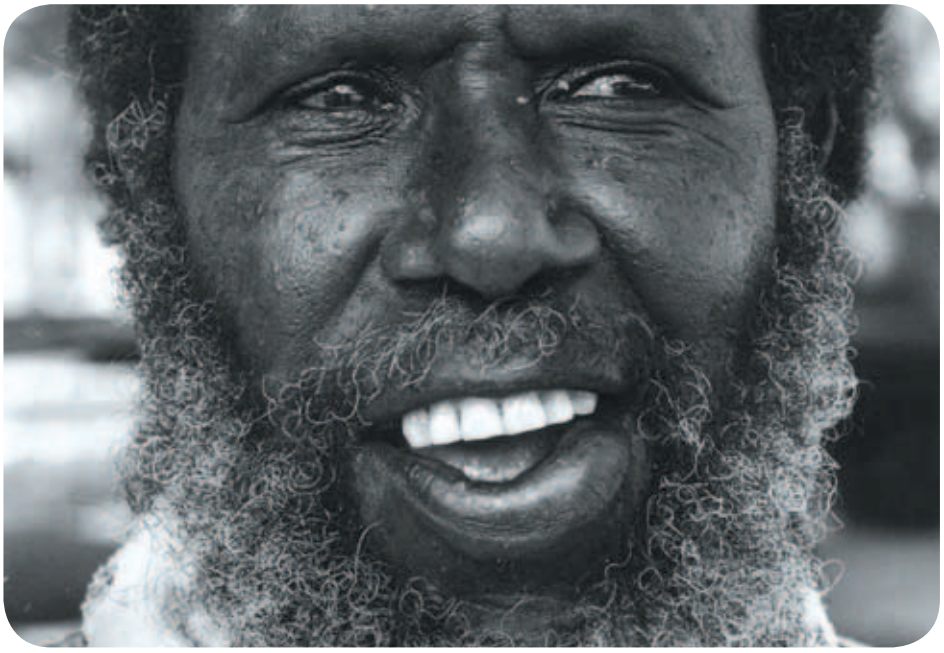
Mabo & Ors v. The State of Queensland (No. 2) (1992) 175 CLR 1

In 1982, Eddie Mabo, an inhabitant of Murray Island in the Torres Strait, began legal action against the State of Queensland, claiming that he and his people were the legal owners of Murray Island. Mabo was joined in this action by a number of other indigenous inhabitants of Murray Island. The action was brought largely as a test case. The Murray Islanders believed they owned the land, as their people had occupied it for centuries, long before European settlement of Australia, but Queensland statute law appeared to designate the Torres Strait Islands as being under the ownership and control of the Queensland government. The Full Bench of the High Court decided in favour of the islander plaintiffs, declaring that the Murray Islanders were entitled to possession, occupation and enjoyment of their lands. They based their decision on the following principles:

- British colonists had wrongly treated the Australian continent as *terra nullius* (empty land), when in fact it was inhabited, and the inhabitants held *native title* to their land.
- Native title had long been accepted in British law as a legal recognition of the traditional land usage by indigenous peoples prior to European colonisation, but had not previously applied in Australia.
- The nature of native title would be determined by the traditions and customs of a group claiming that title, but could be **extinguished** in a number of ways, including by legitimate government action such as the granting of freehold title, and by indigenous people themselves.

The court also expressed a view in *obiter dictum*, that land granted under a leasehold title may or may not extinguish native title, dependent on individual circumstances. The court also expressed a view that indigenous groups in other parts of Australia may be entitled to native title over their traditional lands if they had a continuing attachment to that land.

When native title over an area of land is **extinguished**, it has been destroyed forever and cannot be revived.



Eddie Mabo challenged the state of Queensland in the High Court, resulting in changes to the law concerning indigenous land rights.

The success of the *Mabo Case* encouraged other indigenous groups to put native title claims before the courts. The case had left a number of questions open, such as the exact legal status of native title and the circumstances under which extinguishment of native title could be said to have occurred. The issue of what constitutes a continuing and traditional attachment to land was also left to be further defined. In December 1993 the Commonwealth Parliament passed the *Native Title Act 1993*, in an attempt to clarify some of these issues, as well as to set up a process for native title claims. Further issues relating to the legal status of indigenous land rights were raised during the *Wik Case* in 1996.

The Wik Peoples v. State of Queensland and Ors; The Thayorre People v. State of Queensland and Ors (1996) 187 CLR 1

The Wik and Thayorre peoples laid claim to native title over an area of 3765 square kilometres that were included in pastoral leases. They believed that their title could exist at the same time as the pastoral lease. Although the case was launched before the Native Title Act was passed, the High Court was required to decide whether or not the granting of a pastoral lease extinguished native title rights. The Court decided by a majority of four to three that:

- native title rights can co-exist with the granting of a pastoral lease
- rights and obligation under a lease depend on the details of that lease
- if there is a conflict between the rights established under the lease and native title rights, the rights of the leaseholder will prevail.

The court found that there was no conflict between the land use specified in the pastoral leases that applied to the Wik and Thayorre land and the indigenous peoples' traditional occupation and use of that land.

This case attempted to clarify the relationship between native title and pastoral leases, but holders of those leases were afraid that their leasehold rights could be undermined by native title claims. They began to campaign for further legislation to limit the native title rights of indigenous people. The *Native Title Amendment Act 1998* (Clth) was a further attempt to clarify issues raised by the *Wik Case*.

Role of the courts

Courts interpret legislation

It is only when legislation has to be applied in real-life situations that its effectiveness can be assessed. This usually means that a dispute arising from provisions of that legislation has come before the courts and the legislation needs to be applied to resolve the dispute. By using the various techniques and tools at its disposal, and by adopting a purposive approach, the courts have been able to bring legislation to life, giving it practical application in everyday situations.

Courts can influence decisions made by parliament

The courts cannot override a decision of the Commonwealth or a state parliament if the relevant Act is within the constitutional jurisdiction of that parliament. However, the courts can influence decisions made by parliament and some judicial decisions can point to a need for legislative change.

Courts confirm laws passed by parliament

On occasions, courts may be asked to confirm that a law passed by parliament is valid — that is, parliament has not gone outside its jurisdiction and passed a law that is ***ultra vires***. In early 2009 Bryan Pape challenged the *Tax Bonus for Working Australians Act (No. 2) 2009* (Cwlth) in the High Court. This Act was designed to provide up to $900 assistance for Australians who qualified, and was designed to stimulate the economy in response to the global financial crisis. Mr Pape argued that the Australian Government did not have the power under the Constitution to pass such a law. The High Court held that there was power under ss. 81 and 83 of the Constitution for this law to be passed.

A law that is ***ultra vires*** is beyond the power of that particular law-maker. It usually refers to situations where a parliament passes a law outside its area of authority.

Courts fill gaps in legislation

Changing circumstances or community values can make the provisions of some legislation outdated or redundant. Courts can often adapt the law to deal with changes in society, while the relevant legislation remains unchanged. When an issue is controversial or contentious, parliament will sometimes remain silent and rely on the courts to develop legal principles through the application of precedent. Parliament is then able to 'catch up' and formulate legislation that best reflects prevailing community values and the ways in which these have been applied through the courts. The legalising of abortion in Victoria provides an example of parliament leaving the development of law to the courts, but then stepping in to legislate to provide clarity and certainty.

DID YOU KNOW?

In 1987, the Victorian Parliament passed an Act to consolidate the laws involving the Supreme Court of Victoria. Since that time, the Victorian Parliament has further amended the Supreme Court Act 65 times in an effort to improve its processes and procedures, extend its jurisdiction, change penalties and generally ensure that the court is better able to work with parliament to achieve an effective relationship.

Abortion — legal or illegal?

In Australia, abortion laws vary from state to state, and stem from laws that are no longer used in Britain.

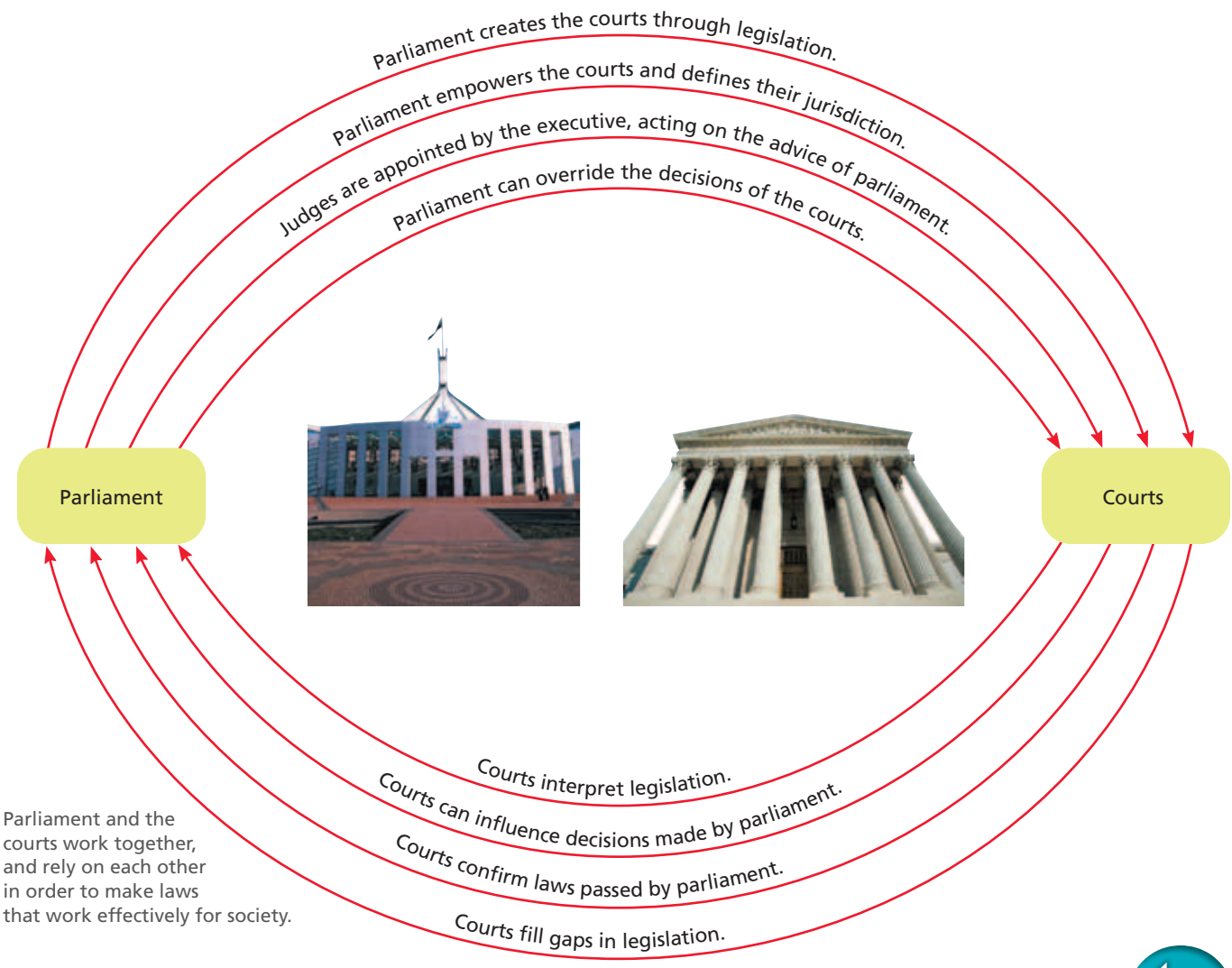
A landmark case in 1969 resulted in a precedent that effectively allowed an abortion to take place when there was a serious risk to a woman's mental or physical health. The case was *R v. Davidson* (1969) VR 667, often referred to as the 'Menhennitt ruling' after the presiding judge. In this case, a doctor was charged under the Crimes Act with having performed an abortion. Justice Menhennitt looked closely at the wording of the Act, especially the term 'unlawfully administers'. He advised the jury that any person who performs a prohibited act on a woman to procure a miscarriage does so lawfully if there are reasonable grounds that the woman's mental or physical health is in danger and, hence, cannot be prosecuted. The jury acquitted the accused and there have been no prosecutions for abortion since. Therefore, even though performing abortions was still illegal under the legislation, common law had effectively changed this to enable abortions to be carried out lawfully. A precedent had been established. The Menhennitt ruling, however, did not comment on how far into a pregnancy an abortion can be performed.

In 2000, a 40-year-old Victorian woman became suicidal when her unborn child was diagnosed with dwarfism. An abortion was performed at 32 weeks. Five years later, a complaint was filed against the hospital for carrying out the late-term abortion.

In 2008 the Victorian Parliament re-opened the debate in the area of abortion. The first step was when parliament asked the Victorian Law Reform Commission for legislative advice on the decriminalisation of terminations of pregnancy.

The result was the Abortion Law Reform Act which came into effect on 22 October 2008. The new legislation removed abortion from the *Crimes Act 1958* (Vic.) and, among other things, allows any woman up to 24 weeks pregnant to obtain an abortion from a qualified medical practitioner.

Despite protests, the parliament passed the *Abortion Law Reform Act 2008* and it is legal for a woman to seek an abortion from a qualified medical practitioner if she is no more than 24 weeks pregnant.



Parliament and the courts work together, and rely on each other in order to make laws that work effectively for society.

TEST your understanding

1 State whether the following statements are true or false and provide a reason for your answer.
   (a) The High Court is the only court in Australia not created by an Act of parliament.
   (b) A court can change the words of a statute.
   (c) Courts are unable to influence the laws made by parliament.
   (d) Parliament is the supreme law-making body.

APPLY your understanding

2 Courts are better at responding to community concerns regarding legal issues. Do you agree? Present an argument in support of your response.

3 'Courts can only apply the laws in existence at the time. If they disagree with a law they are unable to do anything about the situation.' Respond to this statement, either agreeing or disagreeing, providing reasons for your response.

4 It was not until the decision in the *Mabo Case* that parliament saw any need to legislate on the issue of native title. What does this case, and the ensuing *Wik Case*, tell us about the relationship between the courts and parliament?

5 What legislation dictated the law on abortion in Victoria until 2008?

6 If abortion was illegal according to the statutes, why were so many performed every year? Why do you think that the Victorian Parliament had not acted to codify the Menhennitt ruling prior to 2008? What weaknesses does this suggest about parliament as a law-maker?

7 Why did the laws on abortion become an issue in 2005?

8 'Parliament and the courts rely on each other to produce the most efficient and practical laws for the benefit of society.' Indicate whether or not you agree with this statement, giving examples to support your opinion.

Assessment task — Outcome 3

On completion of this unit the student should be able describe the role and operation of courts in law-making, evaluate their effectiveness as law-making bodies and discuss their relationship with parliament. Please note: outcome 3 contributes 25 marks out of a total of 100 marks allocated to school-assessed coursework for unit 3.

Practise your key skills

Use this assessment task to practise the following skills:
- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the nature, importance and operation of courts as law-makers
- analyse the impact of courts in law-making
- critically evaluate the law-making processes of courts
- discuss the relationships between law-making bodies.

Structured questions

Question 1

Explain **two** reasons why a court hierarchy is necessary. **(2 marks)**

Question 2

Explain **three** reasons why it is necessary for courts to interpret statutes. **(3 marks)**

Question 3

Critically evaluate **two** strengths of the courts as law-makers. **(8 marks)**

Question 4

Discuss, using an example or examples, the relationship between parliament and the courts. **(6 marks)**

Question 5

'Parliament is better than the courts at law making and responding to the needs of society. The courts have little to contribute in these areas.'

Critically evaluate this statement indicating the extent to which you agree or not.

(6 marks)
(Total 25 marks)

Tips for responding to structured questions

Use this checklist to make sure you write the best responses to the questions that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You should at least include a definition of statutory interpretation and precedent.		
Discuss, interpret and analyse legal information.		
Apply legal principles to relevant cases and issues.		

Performance area	Yes	No
Describe the nature, importance and operation of courts as law-makers. **Critically evaluate the law-making processes of courts.** **Analyse the impact of courts in law-making.**		
Question 1 asks you to explain why a court hierarchy is necessary. When answering this question you must explain how precedent works. Question 2 asks you to give reasons why statutes need to be interpreted. In giving your answer you are describing the nature and importance of courts as law-makers. Refer to cases where the courts were required to interpret a statute. Question 3 asks you to evaluate two strengths of the courts as law-makers. Support your answers with real cases from this text or further research. Question 5 asks you to evaluate whether or not the parliament is better than courts at law-making. You can agree or disagree with the statement but must explain the extent to which you agree or disagree and provide reasons. Enhance your arguments by using real cases and issues.		
Discuss the relationships between law-making bodies.		
You must mention in question 4 that the court's main role is to enforce the law that parliament makes and there is a need for the courts to interpret legislation to give effect to the words in statute law. Illustrate your answer by referring to the abortion issue in Victoria or a more recent case.		
Your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- **Common law**
  - Common law relies on the application of the doctrine of precedent through the principle of *stare decisis*.
  - Court are bound to follow the *ratio decidendi* in a case in a higher court, but can be influenced by persuasive precedents such as the *obiter dictum* in a case.
  - Judges and lawyers refer to law reports to determine appropriate precedents that may be applied in a case before the courts.
  - Precedent requires a court hierarchy because decisions made by superior courts are followed by lower courts.
- **Judges and precedent**
  - Judges cannot make laws at any time — they must wait for a case to come before them.
  - When making decisions regarding cases currently before them, judges look at past decisions and must decide whether or not they are applicable.
  - When a judge reverses, overrules, disapproves or distinguishes a decision, a new precedent is created.

- **The ability of judges and courts to make law**
- **Describe the nature, importance and operation of courts as law-makers.**
- **The operation of the doctrine of precedent**

- Reasons for interpretation of statutes by judges

- **Reasons for courts interpreting legislation**
  - Judges must interpret legislation to clarify words and the intention of parliament.
  - Legislation can be written in complex, legalistic language, necessitating the courts to determine what the law means.
  - The intention of parliament may not always be clear to the courts when interpreting legislation.
  - Legislation may not cover all circumstances, making it necessary for judges to make a decision in the absence of comprehensive law.
  - The meaning of words can change over time, and judges may need to interpret legislation with regard to the common or modern usage of a word.
  - Changes in technology may mean the law is not up-to-date, necessitating the need for courts to decide on the case before them without legislative guidance.
  - Consistent amendments to statutes lead to judges having to interpret words or phrases.
- **Tools used to interpret legislation**
  - Judges use various sources to assist them in interpreting words in statutes.
  - A literal interpretation of a statute may be made, but these days judges are encouraged to take into consideration the purpose of legislation.
  - Judges sometimes look at past decisions for guidance regarding the meaning of words in a statute.
  - Judges should interpret statutes in such a way that they do not contravene the Victorian Charter.

- Effects of statutory interpretation by judges

- **Effects of statutory interpretation by judges**
  - Interpretation creates precedents.
  - Interpretation gives meaning to words within legislation.
  - Interpretation by courts may lead to parliament acting to pass new, clearer laws.

- Analyse the impact of courts in law-making.
- Critically evaluate the law-making processes of courts.
- Strengths and weaknesses of law-making through the courts

- **Strengths of law-making through the courts**
  - Judges do not answer to, or draw power from, an electorate. Judges may apply modern meaning to 'old' words.
  - Court processes are quicker than parliament. Judges rule after listening to arguments.
  - Courts can develop an area of law as more complex issues develop. Cases with similar facts will have a similar outcome.
  - The ability to overrule and reverse precedents provides flexibility.
- **Weaknesses of law-making through the courts**
  - Judges are not representative. Judges must wait for cases to come before them; they are unable to act independently. Judges have no access to public opinion when making decisions.
  - Changes through courts can be slow.
  - Judges can be reluctant to act because they are not elected.
  - Judges make laws after an issue has arisen.

- The relationship between courts and parliament in law-making
- Discuss the relationships between law-making bodies.

- **Relationship between courts and parliament in law-making**
  - Parliament creates the courts through legislation
  - Parliament empowers the courts and defines their jurisdiction
  - Judges are appointed by the executive, acting on the advice of parliament
  - Parliament can override the decisions of the courts
  - Courts interpret legislation
  - Courts can influence decisions made by parliament
  - Courts confirm laws passed by parliament
  - Courts fill gaps in legislation

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

Joshua took action in the Supreme Court but lost. He has experienced difficulty reading the final judgement and is unsure why the judge interpreted a Victorian Act of Parliament the way he did.

a Provide **two** reasons why statutes may need to be interpreted. **(2 marks)**

b Explain how the judgement in this case may lead to a binding precedent to be followed by courts lower in the Victorian hierarchy. **(2 marks)**

Question 2

'Parliament can make laws that reflect the views of the community and can make laws whenever the need arises.'

Critically examine these two strengths of parliament as a law-maker. **(6 marks)**

Question 3

'The courts are limited in their role as law-makers because they must adhere to the doctrine of precedent. The courts can still, however, make significant changes to the law.'

To what extent does the doctrine of precedent allow the courts to change the law? **(8 marks)**

Question 4

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

Question 5

Identify and critically examine two strengths of parliament as a law-maker. **(6 marks)**

(Total 26 marks)

Examination technique tip

Each question in the real examination paper provides lined spaces for your answers. This is an indication of how much you should write on each question.

eBookplus

Digital doc:

Access a list of key terms for this chapter.

Searchlight ID: doc-10207

eBookplus

Digital doc:

Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10208

UNIT 4

RESOLUTION AND JUSTICE

Sending someone to jail may be the only way to resolve a legal dispute, especially one that involves a serious crime such as murder. Chapters 5 to 11 look at how we resolve legal disputes of both a criminal and civil nature and how fair and just our dispute resolution system is. We will examine how institutions such as courts and tribunals provide methods for dispute resolution. At the end of this unit you will be able to evaluate how these dispute resolution bodies contribute to the effective operation of our legal system.

CHAPTER 5

Dispute resolution methods

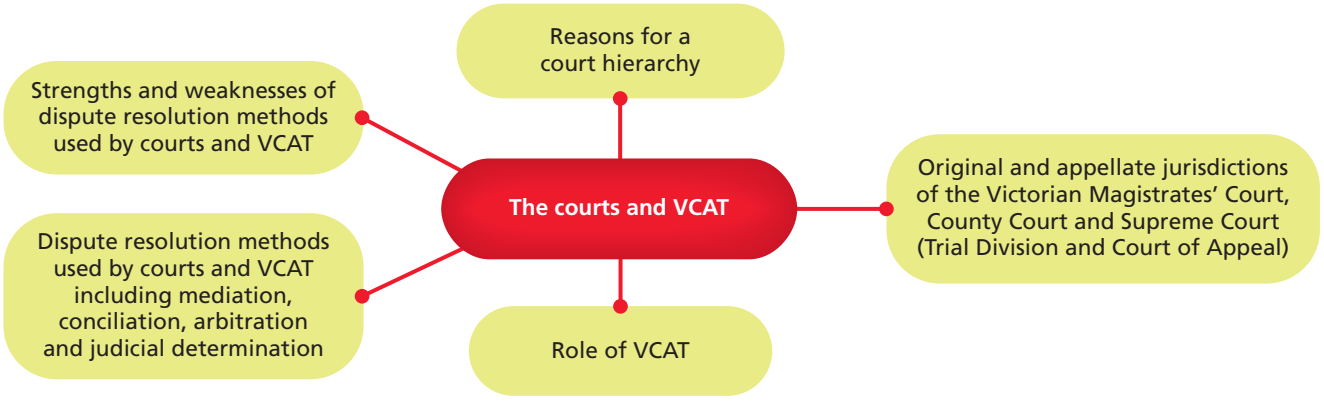
WHY IT IS IMPORTANT

Every day in the media we read or hear about people being involving in a range of legal disputes. For example, we hear about individuals who have been charged with, or are being sentenced for, committing criminal offences. We hear stories from victims of crime. We also hear about legal disputes involving an alleged breach of an individual's rights; for example, disputes where individuals claim they have been discriminated against or have suffered due to someone else's carelessness. In Victoria the legal system provides courts as well as less formal tribunals to help resolve the wide range of legal disputes that arise within our community. We also have a range of methods that can be used to resolve legal disputes, including having a judge determine the outcome, or having parties discuss and negotiate their own settlement.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE

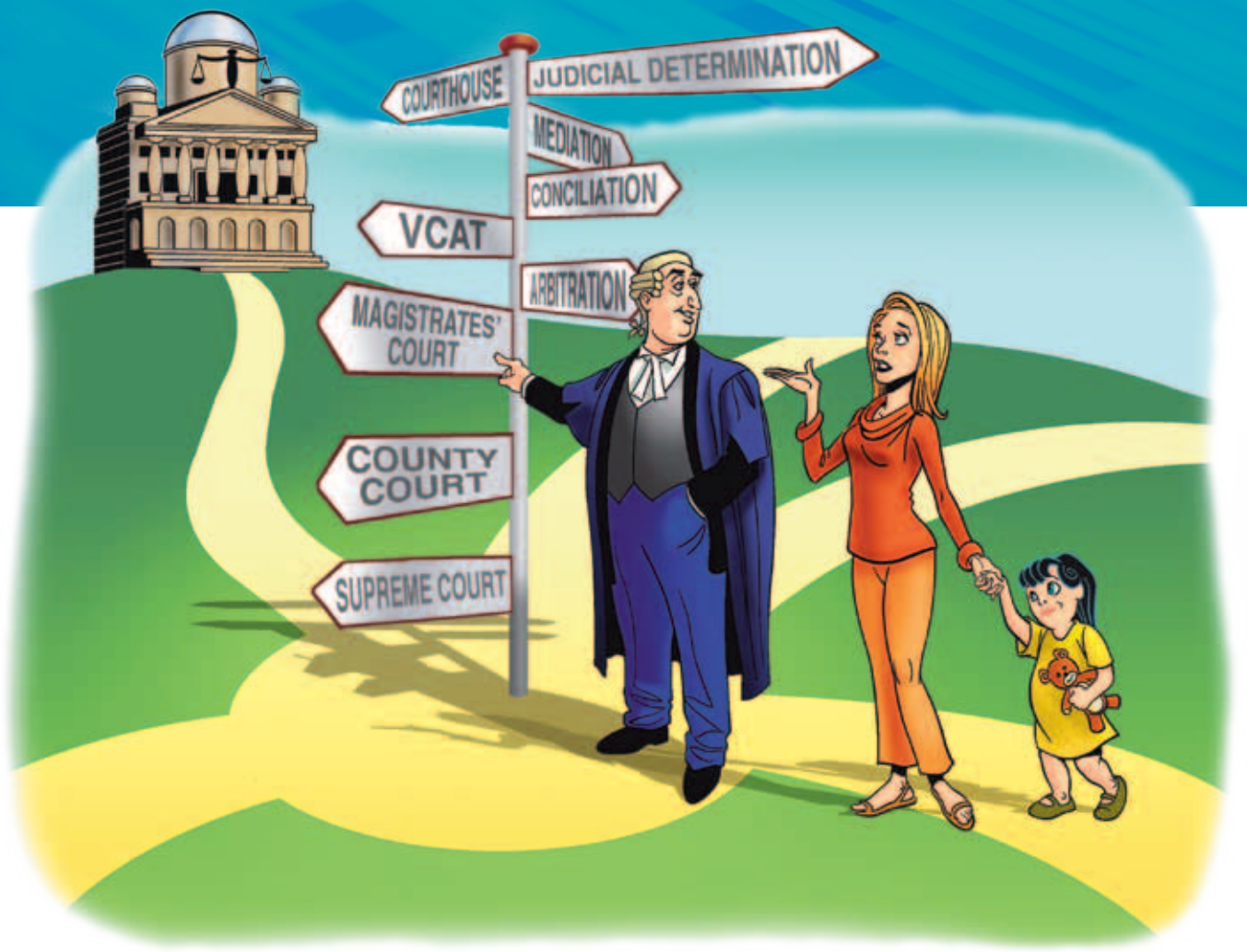


KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- justify the existence of a court hierarchy in Victoria
- describe the jurisdiction of specific courts within the Victorian court hierarchy
- compare and evaluate the strengths and weaknesses of dispute resolution methods, and the way courts and VCAT operate to resolve disputes.

Can you demonstrate these skills?



Swimmer in hot water

In March 2008, 20-year-old Nick D'Arcy, a member of the Australian Olympic Swimming squad, assaulted fellow swimmer Simon Cowley, aged 27 years, at a hotel in Sydney. Mr D'Arcy admitted striking Mr Cowley once in the face with his elbow, fracturing his nose, jaw and eye socket in several places, although claimed he was acting in self-defence after being slapped by Mr Cowley. The incident resulted in both criminal and civil actions and therefore different methods of dispute resolution.

After the incident, criminal proceedings were commenced against Mr D'Arcy and, in 2009, he pleaded guilty to the charge of 'recklessly causing grievous bodily harm'. He was sentenced to 14 months imprisonment, wholly suspended, meaning he was not required to attend prison providing he adhered to certain conditions imposed by the court.

Mr Cowley also sued Mr D'Arcy in a separate civil action. In July 2011, Judge Puckeridge found that Mr D'Arcy had assaulted Mr Cowley and breached his individual rights. Mr D'Arcy was ordered to pay Mr Cowley $180 000, plus interest (referred to as damages) to compensate Mr Cowley for the losses he had incurred as a result of the assault.

Olympic swimmer Nick D'Arcy faced both criminal and civil court actions for assaulting Simon Cowley.

5.1 An introduction to the jurisdiction of the courts

KEY CONCEPT The Victorian legal system provides a range of courts and less formal tribunals with the power or jurisdiction to hear and determine both criminal cases and civil disputes that arise within our community. It is important to distinguish between criminal and civil matters because different legal processes and procedures are applied to each.

Criminal cases

Criminal cases involve an individual, or individuals, behaving in a manner that is considered to be harmful to society, in breach of the law and deserving of a punishment.

Criminal cases typically involve an individual, or individuals, behaving in a manner that is considered to be harmful to society, in breach of the law and deserving of a punishment or penalty.

When a criminal offence has been committed it is the responsibility of Victoria Police to investigate the circumstances of the offence and commence criminal proceedings by laying formal charges against the alleged offenders. After charges have been laid, the police or the Office of Public Prosecutions, depending upon the seriousness of the offences committed, are responsible for prosecuting or preparing and conducting the case against the alleged offender on behalf of the community.

Summary offences

A **summary offence** is a less serious offence, such as minor traffic offences and shop stealing, heard in the Magistrates' Court.

A **sanction** is punishment, determined by a magistrate or judge, and imposed upon an offender who pleads or is found guilty of a criminal offence.

An **indictable offence** is a serious offence, such as drug trafficking and dangerous driving causing death.

If an alleged offender is charged with committing a less serious offence, referred to as a **summary offence**, such as a traffic infringement or minor theft, the matter will be heard in the Magistrates' Court — the lowest court in the Victorian court hierarchy. In these cases the police are responsible for prosecuting the case against the alleged offender, called the defendant, and a magistrate determines the outcome of the case.

If the defendant pleads guilty to the charges laid against them the magistrate will determine their **sanction** or punishment. If the defendant pleads not guilty the magistrate will determine the verdict (whether the defendant is guilty or not guilty) and the sanction.

Indictable offences

Indictable offences are heard in the county or supreme courts.

If an alleged offender is charged with committing a serious offence, referred to as an **indictable offence**, such as drug trafficking, serious sexual assault and homicide, the Office of Public Prosecutions (OPP) is responsible for prosecuting the case against them. While some indictable offences may be heard by a magistrate, if the OPP can establish they have sufficient evidence against a defendant, generally a trial will be held in a higher court — either the Victorian county or supreme courts.

In county or supreme court trials the Director of Public Prosecutions is responsible for preparing and conducting the case against the defendant (on behalf of the community). A judge and jury determines the outcome of the case.

If the defendant pleads not guilty a jury of 12 ordinary citizens determines the verdict. If the defendant is found guilty, or pleads guilty, the judge will determine the sanction.

Burden and standard of proof in criminal cases

The **burden of proof** refers to the party who has the responsibility of proving the case. In a criminal trial, the prosecution must prove the guilt of the accused. The **standard of proof** is the level of proof required to succeed in the case. In a criminal trial the prosecution must prove the guilt of the accused beyond reasonable doubt.

Civil disputes

Civil disputes typically involve an individual, or group, taking action against another individual, or group, who has allegedly breached their rights. The aim of undertaking a civil action is to seek a **remedy** that will restore the party who has suffered the breach of rights, as far as possible, to their original position prior to the breach. For example, an individual who has had their rights infringed may seek **damages** (a sum of money) to compensate for their loss.

Civil disputes may involve many different types of claims, including those involving negligence, defamation, contracts, family law, and wills and inheritance. For example, an individual may pursue a civil action for negligence if they suffer injury because another has failed to take reasonable care when there is a responsibility to do so. A claim may arise under contract law if a person or business fails to carry out the terms of a legally binding agreement. See page 330 for further explanation of types of civil law.

In a civil dispute the party who initiates the action and alleges their rights have been breached is called the **plaintiff**. The party responding to the claims is called the **defendant**.

Mechanisms and methods of dispute resolution

Civil disputes may be resolved through various mechanisms (legal bodies), including the courts and less formal tribunals, depending on the type of dispute and the amount of money, if any, being claimed. For example, the Magistrates' Court can resolve minor civil disputes involving claims of less than $100 000, whereas civil disputes involving unlimited amounts can be heard at trial in either the county or supreme courts.

Court action, however, can be very expensive, time consuming, complex and stressful. In an attempt to combat some of these problems, various specialised tribunals have been created to resolve minor civil disputes in a less formal, more efficient and cost-effective manner. For example, the Victorian Civil and Administrative Tribunal (VCAT) specialises in resolving a range of minor civil disputes including disputes between consumers and traders, renters and landlords, and involving discrimination.

Civil disputes can be resolved at a court or tribunal using a range of different methods, depending on the type and nature of the dispute. For example, it may be more effective and efficient for parties involved in a minor civil dispute to resolve the matter using mediation (where the parties are encouraged to resolve the matter between themselves, in an informal manner, with the assistance of an independent third party), rather than having the case decided by a judge or jury (which is optional in civil cases). Methods of dispute resolution are examined in detail on page 215–18.

Burden and standard of proof in civil disputes

If a civil dispute is resolved at a court hearing or trial, the burden of proof is on the plaintiff to prove the defendant's actions breached their rights. The standard of proof required is for the plaintiff to prove the defendant most likely, on the **balance of probabilities**, breached their rights.

The **burden of proof** is the obligation on a party to prove matters that it alleges during a court trial. The general burden of proof rests on the party that began the proceedings — that is, the prosecution in a criminal case, or the plaintiff (or applicant) in a civil dispute.

The **standard of proof** is the extent to which a party must prove a case or an assertion during a trial. The criminal standard (beyond reasonable doubt) is a much higher standard than the civil standard (balance of probabilities).

Civil disputes involve an individual, or group, taking action against another individual, or group, who has allegedly breached their rights with the aim of seeking a remedy.

A **remedy** is an action undertaken by the party deemed at fault in a civil dispute to restore the plaintiff, as far as possible, to their original position prior to the breach of rights.

Damages are a monetary amount paid in a civil action by the defendant to the plaintiff to compensate for losses suffered.

A **plaintiff** is the party who alleges their rights have been breached and is responsible for initiating civil proceedings.

A **defendant** is the party who has allegedly infringed the plaintiff's rights in a civil case (or the party being prosecuted in a criminal case).

DID YOU KNOW?

In 2009–10 the Office of Public Prosecutions (OPP) prosecuted 399 criminal trials in the Victorian county and supreme courts. Eighty-five per cent of prosecutions resulted in a guilty outcome (in 71.8 per cent of these cases the defendant pleaded guilty and in 13.5 per cent the defendant was found guilty).

Balance of probabilities is the standard (level) of proof required by the plaintiff to prove the defendant breached their rights in a civil case.

TABLE 5.1 Summary of criminal cases and civil disputes

	Criminal cases	Civil disputes
Definition	Case where an individual commits a harmful action, which is in breach of the law and deserving of punishment (a sanction)	A dispute between individuals over an alleged breach of rights undertaken with the aim of seeking a remedy
Party who initiates the court action	The prosecution (police or Office of Public Prosecution) on behalf of society	The plaintiff
Burden and standard of proof required	The prosecution must prove the defendant guilty beyond reasonable doubt	The plaintiff must prove the defendant most likely breached their rights on the balance of probabilities
Verdict	The defendant is found guilty or not guilty	The defendant is found liable or not liable
Examples	Assault, theft, drug possession	Negligence, breach of contract, defamation

Jurisdiction refers to the power, or authority, of a court to hear and determine specific types of disputes and cases.

Original jurisdiction refers to the power to hear and determine a case for the first time.

Appellate jurisdiction refers to the power to review a decision on appeal from a lower court.

Original and appellate jurisdiction

Jurisdiction refers to the power, or authority, of a court to hear and determine specific types of disputes or cases. **Original jurisdiction** refers to the power of a court to hear and determine a case for the first time, whereas **appellate jurisdiction** refers to the power to review a decision on appeal from a lower court. For example, the Magistrates' Court has original jurisdiction to hear many criminal cases, including all summary offences. However, as the Magistrates' Court is the lowest ranked court in Victoria, it cannot hear cases on appeal and so has no appellate jurisdiction.

Barriers have now been installed along the West Gate Bridge. The death of Darcey Freeman resulted in both criminal and civil action.

Darcey's death causes criminal and civil actions

In March 2011, a Supreme Court jury found Mr Arthur Freeman guilty of murder after he threw his 4-year-old daughter, Darcey, from the West Gate Bridge in January 2009. Mr Freeman pleaded not guilty and his lawyers argued the defence of mental impairment, claiming Mr Freeman was suffering a significant depressive disorder at the time of the incident. Mr Freeman was sentenced to life imprisonment and, after losing an appeal against the severity of his sentence in 2012, will spend 32 years in prison before being eligible for parole.

In January 2012, Ms Peta Barnes, Darcey's mother, commenced a civil action against VicRoads, claiming the Victorian Roads Authority was negligent by ignoring recommendations to install anti-jump fencing along the West Gate Bridge and therefore contributed to Darcey's death. Ms Barnes sued VicRoads for losses she suffered as a result of the nervous shock caused by the death of her daughter.

TEST your understanding

1. Distinguish between a criminal case and civil dispute. Use examples to support your response.
2. Distinguish between a summary and indictable offence.
3. Suggest two types of criminal sanctions and two types of civil remedies.

APPLY your understanding

4. Read the case study 'Swimmer in hot water' on page 185 and complete the following questions.
   (a) Explain why Mr D'Arcy had both criminal and civil actions initiated against him.
   (b) State the sanction and remedy imposed in Mr D'Arcy's criminal and civil cases respectively, and suggest the purpose of each.
   (c) With reference to Mr D'Arcy's criminal and civil cases, distinguish between the burden and standard of proof.

EXTEND AND APPLY YOUR KNOWLEDGE:
Criminal cases and civil disputes

Victorian courts hear and determine a range of different criminal cases and civil disputes. Read the following two cases studies, which illustrate the difference between criminal cases and civil disputes, and answer the questions that follow.

Case study one: speeding driver kills a friend

In June 2011, Victorian County Court Judge Michael McInerney sentenced Petros Ttofari, aged 22, to two years imprisonment, with a minimum of 10 months, after a jury found him guilty of dangerous driving causing death.

Mr Ttofari was charged in May 2009 after he crashed his car in a suburban street and killed his passenger and friend, Mr George Petrou, aged 20 years. At the time of the crash it was estimated that Mr Ttofari was travelling at a speed at least 35 kilometres per hour over the speed limit.

Dangerous driving causing death has a maximum penalty of 10 years imprisonment, although Mr Ttofari may be eligible for parole, or release from prison, after serving 10 months. The deceased's mother, Mrs Koula Petrou, was very disappointed with what she perceived to be a lenient sentence.

Dangerous driving has a maximum penalty of 10 years imprisonment, whereas culpable driving causing death has a maximum penalty of 20 years. Both offences are generally heard in the County Court.

Case two: parents sue after daughter falls to her death

In October 2009, three Justices of the Victorian Supreme Court of Appeal found the Lorne Foreshore Committee of Management was responsible for the death of Ms Samantha Gosling, aged 18 years (*Gosling & Ors v. Lorne Foreshore Committee of Management Inc. & Anor* [2009] VSCA 228). Ms Gosling died in February 2003 after she fell down a 13 metre embankment and struck her head on concrete while walking with friends back to her campsite after an evening at the Lorne Hotel.

The Court of Appeal decided that the Lorne Foreshore Committee of Management should have recognised that the track along the embankment was used by pedestrians as a shortcut to the beach and campsites, and therefore should have taken action, such as installing a fence or warning signs, to ensure the embankment was reasonably safe for use. The Court ordered the Lorne Foreshore Committee of Management pay $375 000 in damages and $75 000 interest to Ms Gosling's parents.

Local councils and foreshore management committees owe a duty of care to the public to ensure beach foreshore areas are reasonably safe.

QUESTIONS

1 Explain the difference between a criminal case and civil action.
2 Explain the difference between a summary and indictable offence.
3 Distinguish between a sanction and a remedy.
4 Refer to both case studies above and complete the following table.

Question	Case one	Case two
(a) Is the case criminal or civil?		
(b) List the key words that indicate whether the case is criminal or civil.		
(c) Which court is identified as determining each case?		
(d) Which party was responsible for bringing the action to court?		
(e) Who was responsible for deciding the verdict?		
(f) Who was responsible for deciding the sanction or remedy?		
(g) Which party had the burden of proof?		
(h) Identify the standard of proof required in each case.		

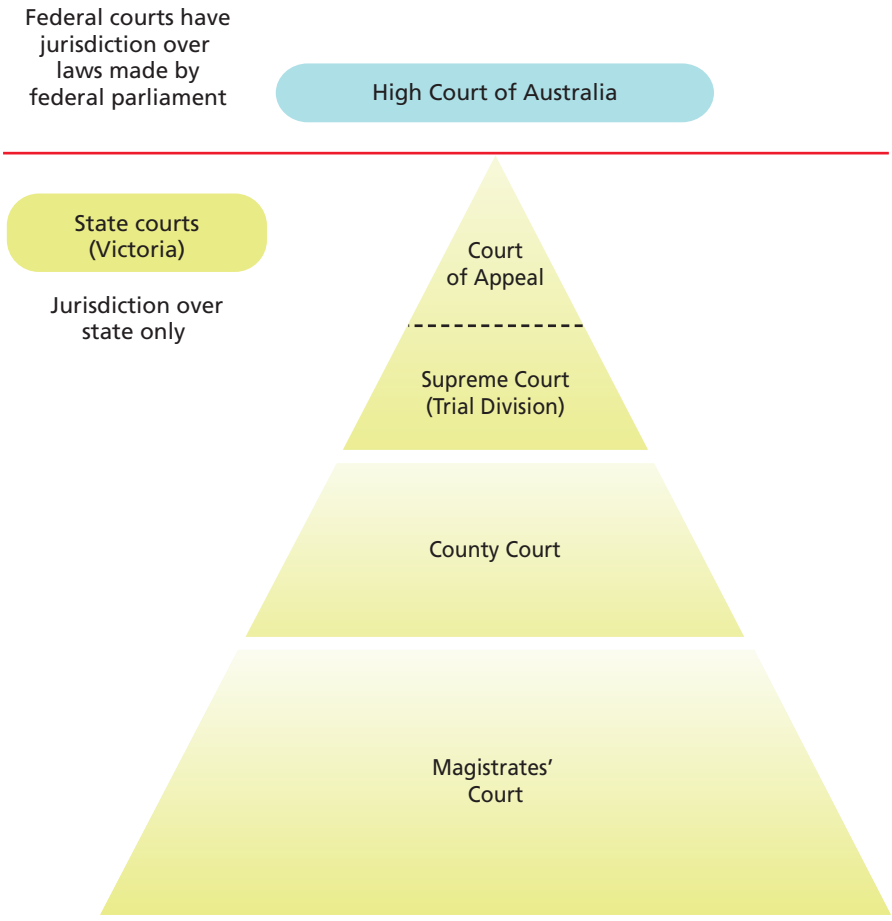
5 Referring to case study one, answer the following.
   (a) State the main offence committed by Mr Ttofari, explaining whether it was a summary or indictable offence.
   (b) Suggest reasons why Judge McInerney did not impose the maximum sentence of 10 years imprisonment on Mr Ttofari.
   (c) Some individuals and groups have called for the state government to impose mandatory minimum sentences for certain serious offences, including dangerous driving causing death. Discuss whether you believe a fixed minimum sentence of two years imprisonment for those found guilty of dangerous driving causing death should be introduced.
6 Referring to case study two, answer the following questions.
   (a) Suggest reasons why Ms Gosling's parents sued the Lorne Foreshore Committee of Management.
   (b) Imagine you were the Lorne Foreshore Committee's legal representative (lawyer). Suggest what arguments you might put to the court in their defence.
   (c) Explain why the Supreme Court of Appeal ruled in favour of Ms Gosling's parents.
   (d) Explain what remedy Ms Gosling's parent were most likely seeking.
7 Define the term *jurisdiction* and explain the difference between an original and appellate jurisdiction.

5.2 Reasons for a court hierarchy

KEY CONCEPT At some stage, you may find yourself in the courts. You may work there, report for jury duty, attend as a witness to a crime or disagreement, or you may be one of the parties in a legal dispute. In Victoria, a number of different courts deal specifically with certain types of cases, depending on the seriousness of the crime or the level of damages being sought if it is a civil case.

Each state in Australia provides a range of courts to hear and determine criminal cases and civil disputes that occur within that state. In addition to these state courts, federal courts enforce the commonwealth laws that apply to the whole of Australia. The courts in each state are arranged in a **hierarchy**, meaning the courts are ranked in order from lowest to highest according to the seriousness and complexity of the types of cases and disputes they can hear. For example, the lowest court in the Victorian state court hierarchy is the Magistrates' Court, which can hear various matters including summary offences, such as minor theft and traffic offences. The highest court, at the top of each state court hierarchy, is the High Court of Australia. The High Court hears a variety of cases, including matters involving the interpretation of the Australian Constitution and appeals from each of the state supreme courts of appeal.

A court **hierarchy** is a ranking of courts in order from lowest to highest according to the seriousness and complexity of the types of cases and disputes they can hear.



The Victorian court hierarchy

There are four reasons why our courts are arranged in a court hierarchy. A court hierarchy is necessary for the doctrine of precedent to operate, it enables a system of appeals, and provides for specialisation and administrative efficiency.

study on

Summary

Unit 4: Resolution and justice

Area of study 1: Dispute resolution methods

Topic 1: The court hierarchy

DID YOU KNOW?

In 2009–10, the Supreme Court of Appeal heard approximately 725 criminal and civil appeals (formally called applications for leave to appeal).

Doctrine of precedent

The existence of a court hierarchy allows for the operation of the doctrine of precedent, where lower courts must follow the legal reasoning behind the decisions (referred to as the *ratio decidendi*) made by superior (or higher) courts in the same hierarchy, in cases where the material facts are similar. For example, the Magistrates' Court of Victoria and Victorian County Court must follow legal reasoning behind decisions set by the Victorian Supreme Court, because the latter is a superior court. The doctrine of precedent allows similar cases to be decided in a similar manner and helps ensure courts' decisions are consistent and predictable. Without the existence of a court hierarchy, the doctrine of precedent could not operate.

Appeals

The existence of a court hierarchy allows a system of appeals to work effectively. Within our court system, parties who are dissatisfied with the outcome in their dispute may have the opportunity to lodge an appeal or have their case reviewed by a superior court. For example, if a defendant is dissatisfied with the verdict or the severity of the sentence imposed upon them by the Magistrates' Court they may, with grounds or justification, appeal their case to the next highest court, the County Court, for review. Similarly, the prosecution may wish to appeal against the leniency of the sentence imposed.

Man jailed for firing 'pellet gun'

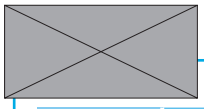
In April 2010, Magistrate John Doherty sentenced Andrew Cotanidis, aged 25 years, to eight months imprisonment after he pleaded guilty to possessing illegal drugs and an unregistered imitation handgun that fired pellets. During sentencing the court heard that Mr Cotanidis had more than 38 prior convictions since 2002, although none involved drug or weapon-related offences.

Mr Cotanidis felt the sentence imposed by the magistrate was too severe and lodged an appeal to have the case reviewed by a higher court. In August 2010, Victorian County Court Judge Sue Pullen upheld Mr Cotanidis's appeal and effectively reduced his term of imprisonment to five months (by suspending three months of his original eight month sentence). It was the first time Mr Cotanidis had received a sentence of imprisonment for his minor criminal offences.

It is a criminal offence to own an unregistered handgun.

Specialisation

The existence of a court hierarchy allows each court to specialise in hearing specific types of cases. This means that the legal and court personnel who work within a particular court can develop their expertise and become proficient in dealing with the specific types of cases heard within that court and the procedures that take place within that court. For example, the Magistrates' Court specialises in hearing, amongst other matters, all summary offences such as minor traffic offences, shop stealing and minor civil matters. This means magistrates and other court personnel can develop an understanding of the clientele, law, procedures and appropriate penalties associated with such matters so they can deal with these minor offences more efficiently. By contrast, a justice in the Supreme Court who hears very serious criminal offences such as murder and attempted murder will need to develop expertise in dealing with complex rules of evidence and procedure so they can deal with these matters in an efficient manner.



Unit:	4
AOS:	1
Topic:	1
Concept:	2

Do more
Interactivity on the court hierarchy

Administrative efficiency

The existence of a court hierarchy also allows for administrative convenience, which may assist a more efficient and timely resolution of disputes. For example, having the majority of minor cases heard more quickly and in a more cost-effective manner in the Magistrates' Court can reduce delays and increase efficiency. Similarly, having more serious and lengthy cases heard in superior courts enables these cases to be heard by judges and justices who generally have more years of experience and are more familiar in dealing with more complex cases compared to magistrates.

Doctrine of precedent. A court hierarchy allows for the operation of the doctrine of precedent, which helps ensure consistency and predictability within the court system as lower courts must follow the legal reasoning behind the decisions of higher courts in the same hierarchy, in cases where the material facts are similar.

Administrative efficiency. A court hierarchy allows for administrative convenience (for example, more serious and lengthy cases can be heard in superior courts where legal and court personnel are experienced in dealing with complex cases) to assist an efficient and timely resolution of disputes.

Reasons for the existence of a court hierarchy

Appeals. A court hierarchy allows for the operation of a system of appeals so that parties who are dissatisfied with the outcome in their dispute may, with grounds, have their case reviewed by a higher court.

Specialisation. A court hierarchy allows each court to specialise in hearing specific types of cases so legal and court personnel become proficient in dealing with the specific types of cases and procedures that take place within each court. This assists an efficient and timely resolution of disputes.

study on

Unit:	4
AOS:	1
Topic:	1
Concept:	4

Do more Interactivity on the court hierarchy (civil jurisdiction)

study on

Unit:	4
AOS:	1
Topic:	1
Concept:	5

Do more Interactivity on the court hierarchy (criminal jurisdiction)

TEST your understanding

1. What is a hierarchy? How does it operate in the legal system?
2. Why does Australia have two court systems: state and federal?
3. Explain how the existence of a court hierarchy achieves the advantages of specialisation and administrative efficiency.
4. Explain why a court hierarchy is necessary for the doctrine of precedent and the system of appeals to operate.

APPLY your understanding

5. Explain two reasons for the existence of a court hierarchy, other than allowing for specialisation.
6. Refer to the case study 'Man jailed for firing "pellet gun"' to answer the following questions.
   (a) What was the original sentence imposed on Mr Cotanidis by the Magistrate?
   (b) On what grounds did Mr Cotanidis appeal the original sentence?
   (c) Do you agree with the sentence imposed by Judge Pullen in the appeal case? Give reasons for your answer.

5.3 The Victorian court hierarchy — the Magistrates' Court of Victoria

KEY CONCEPT The Victorian state court hierarchy consists of many courts, each with its own jurisdiction to hear and determine particular types of cases. The Magistrates' Court is the lowest ranked court in the hierarchy and the busiest.

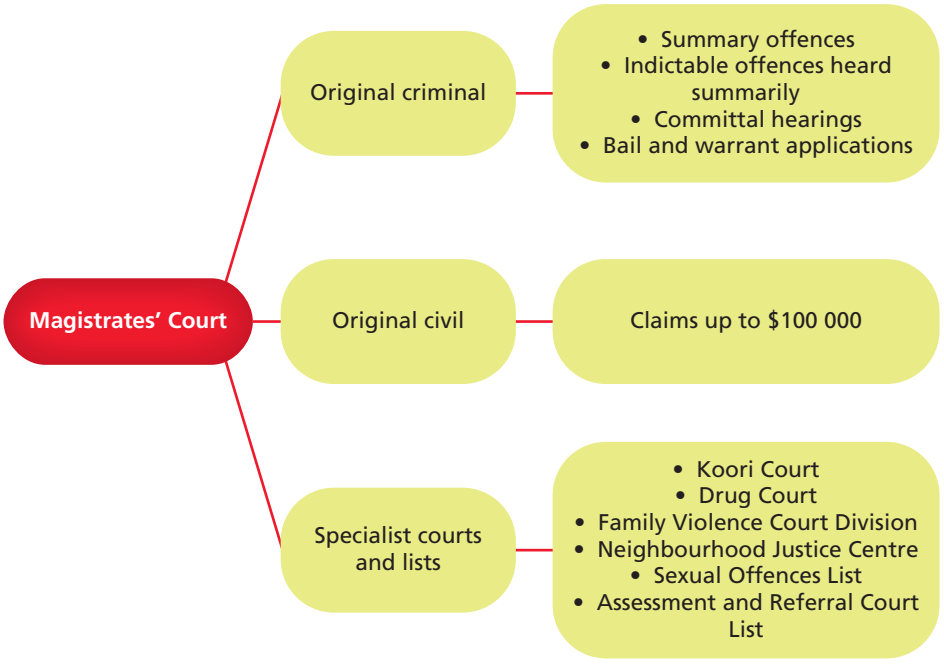
The **Magistrates' Court** has the power to deal with a wide range of less serious criminal matters and minor civil disputes.

The role of the Magistrates' Court

Although the Magistrates' Court is the lowest court in the Victorian court hierarchy, it is an extremely busy court, with a wide and varied jurisdiction. There are magistrates' courts at over 50 locations throughout the Melbourne metropolitan, suburban and regional areas. In 2009–10 the court heard over 220 000 criminal and civil cases. The Magistrates' Court has the power to deal with a wide range of less serious criminal matters and minor civil disputes. It also deals with a wide range of other legal matters including hearing cases involving 'less serious' family violence, industrial disputes between employers and employees, and some family law matters.

The **Magistrates' Court** is presided over by a single magistrate (there is no jury). The Magistrates' Court is the lowest court in the court hierarchy, so it has no appellate jurisdiction. The following diagram shows the jurisdiction of the Magistrates' Court.

The Magistrates' Court of Victoria can hear a range of matters, including both minor criminal cases and civil disputes.



Jurisdiction of the Magistrates' Court of Victoria. The Magistrates' Court has many specialist courts and lists; not all have been listed.

Original criminal jurisdiction

The Magistrates' Court has original criminal jurisdiction to hear and determine less serious criminal cases including summary offences, indictable offences heard summarily, committal hearings, bail and warrant applications. As there is no jury, the magistrate decides the verdict (guilty or not guilty) and the sanction (or punishment).

Summary offences

The majority of criminal matters that appear before the Magistrates' Court are summary (less serious) offences, such as minor theft, traffic offences like speeding and driving while disqualified, possession of small quantities of illegal drugs, and being drunk in a public place.

Indictable offences heard summarily

In addition to hearing all summary offences, the Magistrates' Court can also hear some indictable (serious) offences that otherwise would be heard at the Victorian County Court. Indictable offences tried summarily refers to cases where the accused who has been charged with an indictable offence is given the opportunity to have their case heard by a magistrate rather than a judge and jury in County Court. Examples of **indictable offences** that can be **heard summarily** include theft, causing injury recklessly or intentionally and indecent assault.

One reason why it may be advantageous for an accused to have an indictable offence heard summarily by a magistrate is because the maximum term of imprisonment that a magistrate can impose for a single offence is two years (and, for multiple sentences, five years).

Committal hearings

For all indictable cases that cannot be heard summarily in the Magistrates' Court, the Magistrates' Court must conduct a **committal hearing** to determine if the prosecution has enough evidence against the accused to secure a guilty verdict at trial in a higher court (either the Victorian County or Supreme Court, depending on the offence). For example, an armed robbery or drug trafficking case would proceed to trial in the County Court, whereas a murder case would proceed to trial in the Supreme Court.

Bail applications

The Magistrates' Court also has the criminal jurisdiction to determine bail and warrant applications. Individuals who have been charged with an indictable offence may apply to a magistrate to be granted **bail**; that is, to be released from custody on a written promise to appear in court at later date (for example, at a committal hearing or trial). If bail is refused, the accused is held on **remand** (remain in custody) until their committal hearing, trial or sentencing.

Warrant applications

The Magistrates' Court has the power to grant a range of **warrants** or orders giving the court's permission for an authority, such as Victoria Police, to undertake certain actions, including searching premises or vehicles, arresting an alleged offender and seizing property.

Judy Moran denied bail

In April 2010, after being committed to stand trial for the murder of her brother-in-law, Desmond Moran, Judith Moran made an application to the Melbourne Magistrates' Court to be granted bail pending her trial. At the hearing, Chief Magistrate Popovic explained that, because Mrs Moran was charged with murder, she was refused bail unless the court could be satisfied that exceptional circumstances existed to release Mrs Moran from custody.

DID YOU KNOW?

In 2009–10 the Magistrates' Court heard and finalised 176 132 criminal cases and 2834 committal hearings.

An **indictable offence heard summarily** refers to a serious offence, which could be heard at a County Court trial, being heard by a magistrate in the Magistrates' Court, with the consent of the accused.

A **committal hearing** or committal proceeding is the preliminary hearing (in criminal law) of an indictable offence in the Magistrates' Court to determine whether a *prima facie* case has been established — that is, whether the prosecution has sufficient evidence for the case to proceed to trial and gain a conviction in a higher court.

Bail refers to an accused being released from custody into society, on a written promise to appear in court at a later time (at a committal hearing or trial).

Remand refers to an accused being denied bail and held in custody until their committal hearing, trial or sentencing.

A **warrant** is an order issued by a court that allows the arrest of a person named in the order, the search of premises or the seizure of property.

Judy Moran awaited her trial while in prison.

A range of factors were presented to Magistrate Popovic supporting Mrs Moran's bail application, including Mrs Moran's age (64 years), minimal prior criminal record, medical condition (she had extensive hip and knee surgery that could make prison detention more difficult) and the likelihood that her trial would be postponed due to delays in completing forensic evidence. Detective Senior Constable Reidy, who was responsible for opposing Mrs Moran's bail application, argued Mrs Moran was an unacceptable risk of committing further offences and interfering with evidence.

Mrs Moran was denied bail and 12 months later was found guilty of murder by a Supreme Court jury.

Original civil jurisdiction

The Magistrates' Court has civil jurisdiction to hear claims involving amounts up to $100 000 (including contractual disputes and claims arising from motor vehicle accidents, assaults or negligence). Claims under $10 000 are referred to compulsory **arbitration**, where they are resolved in a less formal manner (arbitration is examined in more detail on page 218).

Arbitration involves an independent third party (arbitrator) making suggestions to help parties resolve their dispute. If they cannot reach a mutually acceptable agreement, the arbitrator imposes a legally binding decision on the parties.

Appeals from the Magistrates' Court

The Magistrates' Court is the lowest in the Victorian court hierarchy so it does not have appellate jurisdiction; however, parties may, in certain circumstances, appeal the decision of a magistrate to a higher court.

Criminal

Parties can appeal to the County Court against a conviction or sentence imposed by a magistrate. For example, with grounds an offender may lodge an appeal against their conviction or the severity of their sentence. Likewise, the prosecution may lodge an appeal against the perceived leniency of a sentence. Parties may also appeal to the Supreme Court (Trial Division) on a point of law, if they can reasonably show that the magistrate may have made an error in applying the law.

DID YOU KNOW?

In 2009–10, the Magistrates' Court heard and finalised 44 926 civil disputes, with 2706 defended claims being finalised using arbitration.

Civil

Parties to a civil case heard in the Magistrates' Court can only appeal to the Supreme Court (Trial Division) on a point of law. Parties cannot appeal against the verdict or remedy imposed by a magistrate in a civil case.

TEST your understanding

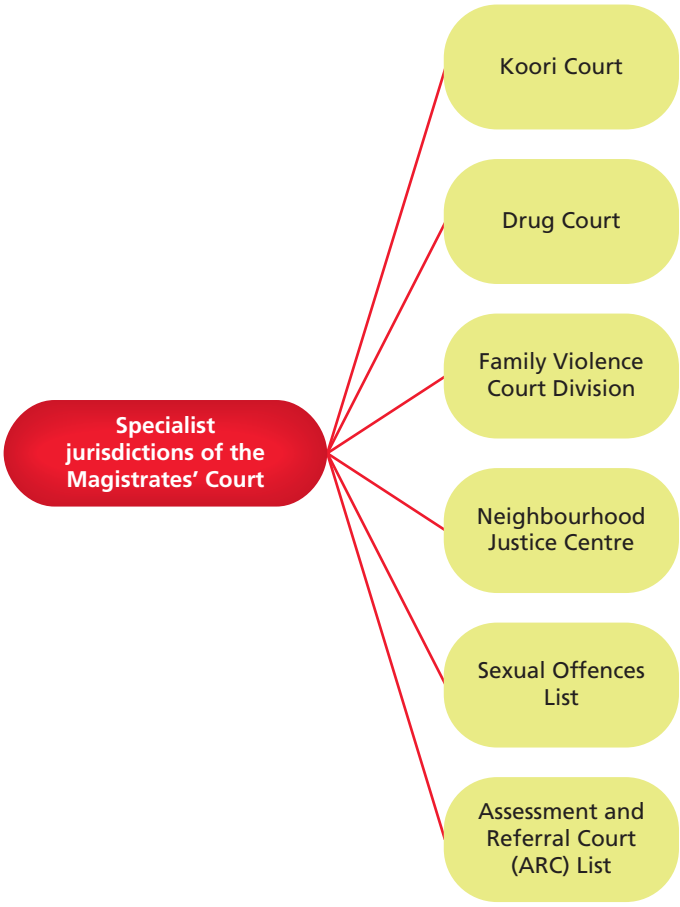
1. Outline the criminal and civil jurisdiction (original and appellate) of the Magistrates' Court.
2. Distinguish between summary offences, indictable offences heard summarily, and indictable offences, including at least **two** examples of each type of offence.
3. Explain the difference between being released on bail and being remanded in custody.

APPLY your understanding

4. Refer to the case study 'Judy Moran denied bail', then answer the following questions.
   (a) Explain which party had the responsibility of demonstrating that Mrs Moran should be released on bail.
   (b) Identify the factors that supported Mrs Moran's bail application.
   (c) Suggest at least three reasons why Mrs Moran's bail might have been refused.

5.4 The Victorian court hierarchy — specialist jurisdictions within the Magistrates' Court

KEY CONCEPT The Magistrates' Court has a number of specialist courts and lists to deal with offenders dealing with particular circumstances, such as substance abuse or mental health issues that influence their criminal behaviour, in an effective manner and in order to reduce their risk of reoffending.



The specialised jurisdiction of the Magistrates' Court of Victoria (This is not an exhaustive list; other specialised divisions of the Magistrates' Court exist.)

The Magistrates' Court has a number of specialist courts and lists (or divisions of a court) to deal with matters where the individuals involved may have particular circumstances or issues that require special consideration, such as a disability, substance abuse, or cultural or social disadvantage.

Specialist courts and lists deal with matters in an informal manner. Specialised courts and lists also focus on achieving an outcome that addresses any pre-existing issues that may have significantly contributed to an individual committing an offence in the hope of reducing the risk of reoffending and improving the offender's wellbeing. For example, when sentencing offenders in the Drug Court (who have committed an offence as a result of drug abuse), magistrates may use rewards (including praise, certificates and food vouchers) and sanctions (including supervision and drug testing) to assist in changing an offender's actions.

The varied specialist jurisdictions of the Magistrates' Court include the:

- Koori Court
- Drug Court
- Family Violence Court Division
- Neighbourhood Justice Centre
- Sexual Offences List
- Assessment and Referral Court (ARC) List.

Koori Court

The Koori Court specialises in hearing and sentencing Australian indigenous defendants who plead guilty to committing offences other than family violence and sexual offences that fall within the jurisdiction of the Magistrates' Court.

The **Koori Court** hears and sentences Australian indigenous defendants who plead guilty to committing offences, other than family violence and sexual offences, that fall within the jurisdiction of the Magistrates' Court. The Koori Court attempts to increase the participation of Aboriginal (Koori) offenders, their families and community in the legal process, increase the accountability of offenders, and reduce the incidence of reoffending and breaches of community-based orders. The court encourages the Koori community to participate during court hearings by allowing Koori elders or respected persons and the Koori Court Officer to participate in the court process (including to advise magistrates on cultural issues and the sentence being considered), as well as the defendant and their family.

The Koori Court specialises in hearing and sentencing Australian indigenous offenders in a more informal and culturally sensitive manner.

DID YOU KNOW?

An intervention order is a court order that prohibits an offender from actions such as contacting, harassing, or being within a prescribed area of the applicant (or victim). Approximately 75 per cent of intervention orders granted by the Magistrates' Court relate to family violence. In 2009–10, the Magistrates' Court issued more than 30 000 family violence intervention orders.

Drug Court

The Drug Court is responsible for sentencing and supervising the treatment of offenders who have pleaded guilty to committing offences that fall within the jurisdiction of the Magistrates' Court, other than assault causing bodily harm or sexual offences, while under the influence of drugs or alcohol, or to support a drug or alcohol addiction.

A **drug treatment order (DTO)** is a criminal sanction where an offender is sentenced to a period of imprisonment not greater than two years, but is not required to serve the time in prison provided they comply with certain conditions such as undertaking treatment for their substance dependency and supervision.

The **Family Violence Court Division** specialises in dealing with family violence cases. The court aims to protect victims from violence and harassment by a family member.

The **Drug Court** is responsible for sentencing and supervising the treatment of offenders who have pleaded guilty to committing offences, other than assault causing bodily harm or sexual offences, that fall within the jurisdiction of the Magistrates' Court, while under the influence of drugs or alcohol, or to support a drug or alcohol addiction. A magistrate sentences a defendant by imposing a **drug treatment order (DTO)**.

Under a DTO, the magistrate sentences the offender to a period of imprisonment not greater than two years. However, the offender does not have to serve time in prison provided they comply with the conditions of the DTO that require the offender to undertake treatment for their substance dependency and supervision. DTOs aim to encourage offenders to address their addiction, improve their general health and reduce their likelihood of reoffending.

Family Violence Court Division

The **Family Violence Court Division** is a specialised division of the Magistrates' Court, sitting at the Heidelberg and Ballarat courts, that deals with family violence cases. It aims to protect victims from violence and harassment by a family member, ensuring the victim feels safe and the offender (often an abusive partner) is made more accountable for their actions. The court division can hear family violence matters, including intervention order applications and criminal charges arising from incidents involving family violence. When determining the sanction the

magistrate focuses on having the offenders accept responsibility for their violence and commit to rehabilitation.

Neighbourhood Justice Centre

The Collingwood **Neighbourhood Justice Centre** (NJC) is a community court and neighbourhood centre that offers a range of support services, including providing legal advice, housing and employment support, mental health, mediation and community engagement services to residents and businesses within its local community (City of Yarra). The NJC has a single multi-jurisdictional court presided over by a single magistrate with the power to hear a range of civil and criminal cases, in an informal manner and supportive environment. The NJC's aim is to improve community access to the justice system and reduce the incidence of reoffending.

The **Neighbourhood Justice Centre** (NJC) is a community court and neighbourhood centre that offers a range of support services, including providing legal advice, housing and employment support, mental health and mediation services to residents and businesses within its local community.

The Neighbourhood Justice Centre in Collingwood (Melbourne) is the first multi-jurisdictional community court in Australia.

Sexual Offences List

The **Sexual Offences List** operates at the Melbourne Magistrates' Court and all main (headquarter) rural courts throughout Victoria. It specialises in hearing summary offences and committal hearings relating to a charge for a sexual offence. The list aims to improve the way in which the court deals with sexual offences by improving court processes and recognising the difficulties faced by victims of sexual offences, particularly children and cognitively impaired individuals.

The **Sexual Offences List** specialises in hearing summary offences and committal hearings relating to a charge for a sexual offence.

Assessment and Referral Court (ARC) List

The Assessment and Referral Court (ARC) List at the Melbourne Magistrates' Court was established in 2010 for a three-year trial period. It was set up to deal with cases in which the defendant suffers mental illness and/or cognitive impairment, including acquired brain injury, autism spectrum disorder and dementia, and who pleads guilty to a summary offence. The court places offenders on a program for three to twelve months that offers treatment and support services to assist their general heath. Hopefully the program will reduce their likelihood of reoffending and reduce the risk of harm to the community by addressing the key factors contributing to the offender's mental health issues.

DID YOU KNOW?

The NJC in Collingwood was the first of its kind set up in Australia. In the first year of operation (2007–08) more than 11 000 local residents contacted the centre for assistance and support.

TEST your understanding

1 Explain why the Magistrates' Court has specialist jurisdictions. Support your response by outlining the jurisdiction and purpose of one specialised court or list that exists within the Magistrates' Court.

APPLY your understanding

2 Use the **Magistrates' Court virtual tour** weblink in your eBookPLUS to access further information and go on a virtual tour of the Magistrates' Court. Write one paragraph summarising the main functions and jurisdiction of the Magistrates' Court.

eBookplus

5.5 The Victorian court hierarchy — the Victorian County Court

KEY CONCEPT The County Court is ranked directly above the Magistrates' Court in the Victorian court hierarchy and is the busiest trial court in the state, hearing most indictable offences, civil disputes involving unlimited amounts and some appeals from the Magistrates' Court.

The role of the County Court

The **County Court** is an intermediate court and the largest and busiest trial court in Victoria, having original jurisdiction to hear all indictable criminal offences (except murder and murder related offences), civil claims for an unlimited amount, and criminal appeals from the Magistrates' Court on conviction and sentence.

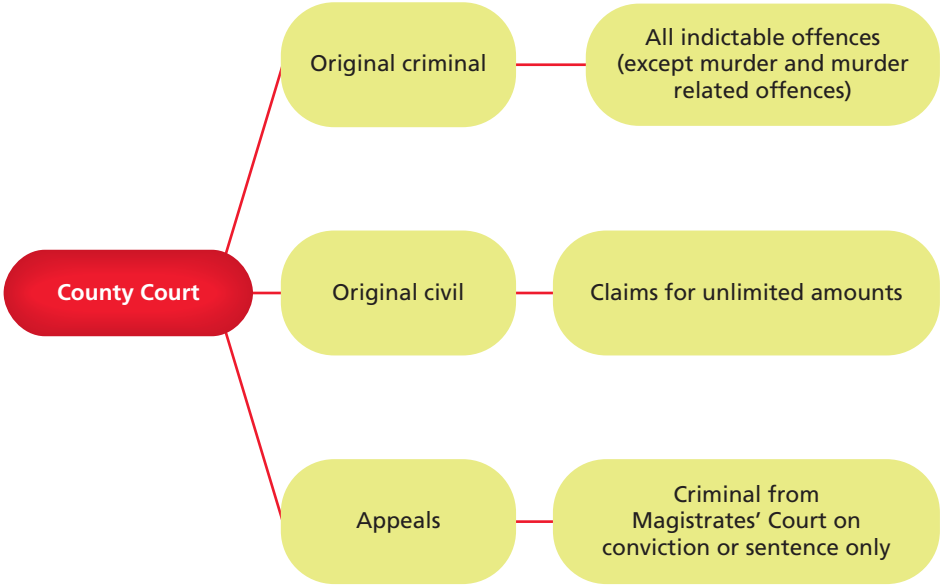
The **County Court** is an intermediate court in the Victorian court hierarchy between the magistrates' and supreme courts. The County Court is the largest and busiest trial court in Victoria, having jurisdiction to hear a range of criminal and civil trials, including criminal appeals from the Magistrates' Court on conviction and sentence. The County Court is presided over by a single judge, and has a specialist Koori Court and various lists to deal with particular types of cases in a more efficient and effective manner.

The County Court is located in Melbourne and also sits in major regional areas throughout Victoria.

DID YOU KNOW?

In 2009–10, the County Court heard and finalised approximately 4900 criminal cases (including appeals) and 5500 civil cases.

The following diagram shows the jurisdiction of the County Court.



The jurisdiction of the Victorian County Court

Original criminal jurisdiction

The County Court has original criminal jurisdiction to hear and determine all indictable (serious) offences except for treason, murder and murder related offences (such as attempted murder and child homicide). Indictable offences heard by the court include armed robbery, serious drug related offences, dangerous and culpable driving causing death, and serious sexual offences.

A jury of 12 determines the verdict in all original criminal trials where the accused pleads not guilty. The judge determines questions of law and the sanction.

DID YOU KNOW?

In 2009–10, the County Court heard approximately 2300 original criminal trials. In approximately 75 per cent of these trials the accused pleaded guilty.

Original civil jurisdiction

The County Court has the same original civil jurisdiction as the Supreme Court (Trial Division) and can hear all civil disputes involving an unlimited monetary amount. Civil disputes heard include claims made for workplace and motor vehicle injury, and disputes involving negligence, defamation and commercial (business) dealings.

A jury of six is optional in civil trials and used only if requested by either party or the judge. When present, the jury determines the verdict and amount of damages to be awarded. If a jury is not requested, a single judge will determine questions of law, the verdict and the remedy.

Appeals

The County Court has appellate jurisdiction to hear certain types of criminal appeals from the Magistrates' Court. Parties wishing to appeal against a decision imposed by the County Court may appeal to the Supreme Court of Appeal.

Appellate jurisdiction

The County Court has only appellate criminal jurisdiction (that is, it cannot hear any civil appeals) to hear criminal appeals against a conviction or sentence imposed by the Magistrates' Court. Both the prosecution and defendant may appeal against the leniency or severity of a sentence respectively, but only the defendant may appeal against a conviction because the **double jeopardy rule** prevents an individual who has been acquitted (found not guilty) of a charge from being retried for the same offence.

The **double jeopardy rule** provides that, once acquitted (found not guilty) of a charge, an accused cannot be retried for the same (or a similar) offence.

Appeals from the County Court

Parties may appeal against a decision imposed by the County Court in both criminal and civil cases to the Supreme Court of Appeal.

Criminal

The Supreme Court of Appeal hears all appeals from the County Court. In a criminal case, if sufficient grounds exist, a defendant may appeal from the County Court against their conviction and sentence, or on a point of law, to the Supreme Court of Appeal. The prosecution may appeal against the leniency of the sentence and on a point of law.

Civil

Parties to a civil case heard in the County Court may appeal to the Supreme Court of Appeal against the verdict, remedy, or on a point of law.

DID YOU KNOW?

Approximately 25 per cent of all criminal cases heard and finalised in the County Court relate to sexual offences and almost 50 per cent of these involve a child or cognitively impaired victim.

Specialist jurisdictions within the County Court

The County Court has a specialised County Koori Court and Sex Offences List within its original criminal jurisdiction and various civil lists, including the Damages List and Commercial (Business) List. These specialist jurisdictions aim to improve the effectiveness and efficiency of the court. For example, the Sexual Offences List specialises in managing pre-trial hearings in criminal cases involving sexual offences in a compassionate manner to reduce delays.

The County Koori Court aims to encourage the Koori community to participate in the legal process, increase the accountability of Koori offenders and reduce the incidence of reoffending in a manner similar to the Koori Court Division of the Magistrates' Court. The County Koori Court deals with indigenous defendants who plead guilty to committing offences (other than family violence and sexual offences) that fall within the jurisdiction of the County Court.

A County Court judge had to determine an appropriate sanction for a learner driver who injured herself and seven passengers while drunk driving.

Learner driver who injured seven passengers avoids prison

In August 2010, County Court judge Paul Lacava sentenced Ms Kuong Majak, aged 25 years, to 3.5 years imprisonment, to be wholly suspended, after she pleaded guilty to culpable driving. Ms Majak, a learner driver, crashed her car into a pole and injured all seven passengers in her car (five were severely injured). At the time of the crash Ms Majak was driving more than 120 km/h in an 80 km/h zone, with a blood alcohol content (BAC) of approximately 0.15 (rather than having a BAC of zero as required of learner drivers).

The imposition of the suspended sentence meant that Ms Majak would not be required to serve her sentence in prison providing she adhered to certain conditions, including remaining on good behaviour and committing no further criminal offences.

When determining the sentence to be imposed, Judge Lacava considered Ms Majak's personal circumstances, including that she had fled war-torn Sudan and was herself severely injured in the incident. Ms Majak is now a paraplegic who requires constant care and Judge Lacava expressed concern that the Dame Phyllis Frost Centre (the Victorian women's prison) was not equipped to provide Ms Majak the high level care she requires.

TEST your knowledge

1 Outline the original and appellate jurisdictions of the County Court to hear criminal and civil cases. Include the grounds for criminal and civil appeals.
2 Describe the use of a jury in criminal and civil cases in the County Court.

APPLY your knowledge

3 Identify which of the following cases would be heard in the County Court. Give reasons for your answer.
(a) Marge, aged 24, is charged with drug trafficking and intends to plead not guilty.
(b) Crawford, aged 23, is charged with being drunk and disorderly in a public place after being a nuisance at an AFL football match at the MCG. He intends to plead guilty.
(c) Katy, aged 32, is suing a magazine for $200 000 in damages, after the magazine published false statements implying she had been involved in using and supplying illegal drugs.
(d) Van, aged 36, is charged with driving an unregistered vehicle after being pulled over for a random breath test. He intends to plead guilty.
(e) Beatrice, aged 62, is charged with dangerous driving causing death after she lost control of her car and collided with an oncoming car and killed two people. She intends to plead not guilty, claiming she was temporarily blinded by the sun.

5.6 The Victorian court hierarchy — the Supreme Court of Victoria

KEY CONCEPT The Supreme Court is ranked directly above the County Court in the Victorian court hierarchy and is the highest court in the Victorian court hierarchy. It consists of two divisions: the Trial Division and the Court of Appeal.

The role of the Supreme Court

The **Supreme Court** is the superior court in the Victorian court hierarchy and is divided into two divisions: the Trial Division and the Court of Appeal. The **Trial Division** has original jurisdiction to hear all indictable criminal offences (but generally hears the most serious indictable offences such as murder and attempted murder) and civil cases for unlimited amounts. It can also hear appeals from the Magistrates' Court on a point of law. The **Court of Appeal** hears all appeals from criminal and civil trials heard in the County Court and the Supreme Court (Trial Division).

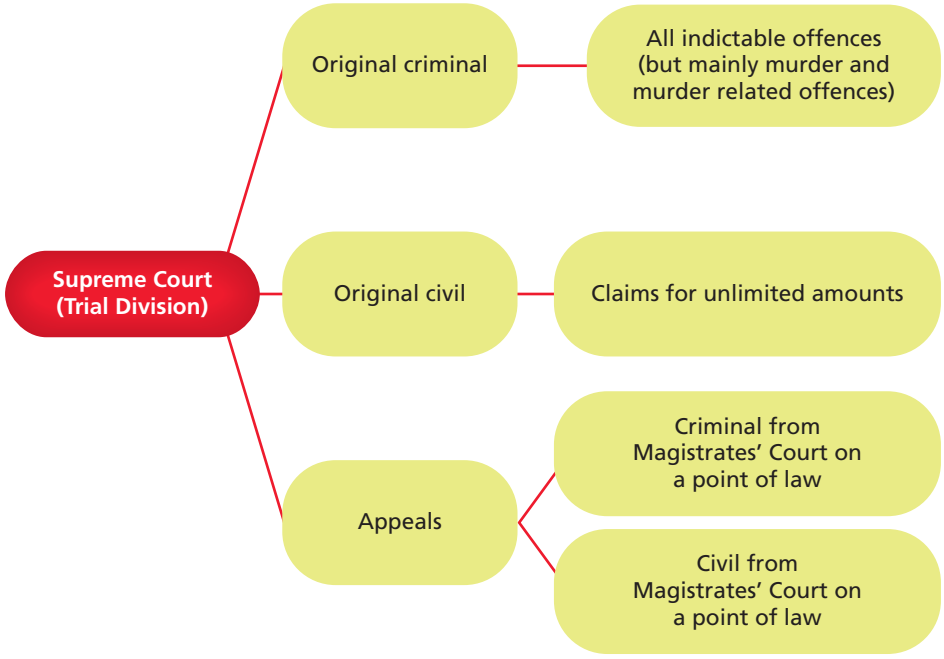
The Supreme Court is located in Melbourne and also sits in major regional areas throughout Victoria. The Trial Division is presided over by a single justice. The Court of Appeal is generally presided over by three to five justices, depending on the seriousness of the appeal.

The following diagram shows the jurisdiction of the Supreme Court (Trial Division).

The **Supreme Court** is the superior court in the Victorian court hierarchy and is divided into two divisions: the Trial Division and the Court of Appeal.

Supreme Court (Trial Division) has jurisdiction to hear all indictable criminal offences (but hears mainly murder and attempted murder) and civil cases for unlimited amounts, as well as appeals from the Magistrates' Court on a point of law.

The **Supreme Court of Appeal** hears all appeals from criminal and civil trials heard in the County Court and the Supreme Court (Trial Division).



The jurisdiction of the Victorian Supreme Court (Trial Division)

Supreme Court (Trial Division)

Original criminal jurisdiction

The Supreme Court (Trial Division) has original criminal jurisdiction to hear and determine all indictable (serious) offences, but mainly hears major criminal offences including all treason, murder and attempted murder cases.

A jury of 12 determines the verdict, which must be unanimous, in all original criminal trials where the accused pleads not guilty. A single justice determines questions of law and the sanction.

DID YOU KNOW?

In 2009–10, the Supreme Court (Trial Division) finalised approximately 5800 cases.

Original civil jurisdiction

The Supreme Court (Trial Division) has the same original civil jurisdiction as the County Court and can hear all civil disputes involving an unlimited monetary amount. Civil disputes heard include cases involving large claims in a variety of actions involving negligence, defamation and commercial (business) dealings and contract law.

As in the County Court, a jury of six is optional in civil trials and used only if requested by either party or the judge. If a jury is used, it determines the verdict and amount of damages to be awarded. The jury must aim to deliver a unanimous verdict; however, a majority verdict (of five jurors in agreement) will be accepted if a unanimous verdict cannot be reached after a minimum of three hours of jury deliberations. If a jury is not requested, a single justice will determine questions of law, the verdict and the remedy.

The Victorian Supreme Court has two divisions, a trial division and a court of appeal.

Appellate jurisdiction

The Supreme Court Trial Division has both appellate criminal and civil jurisdiction as it has the power to hear criminal and civil appeals on a point of law from the Magistrates' Court. It can also hear some appeals of a point of law from the Victorian Civil and Administrative Tribunal (VCAT) and other tribunals.

Appeals from the Supreme Court Trial Division

Parties may appeal against a decision imposed by the Supreme Court Trial Division in both criminal and civil cases to the Supreme Court of Appeal.

Criminal

In a criminal case, if sufficient grounds exist, a defendant may appeal from the Trial Division against their conviction and sentence, or on a point of law, to the Supreme Court of Appeal. The prosecution may appeal against the leniency of the sentence and on a point of law.

Civil

Parties to a civil case heard in the Supreme Court Trial Division may appeal to the Supreme Court of Appeal against the verdict, remedy or on a point of law.

DID YOU KNOW?

In 2009–10, approximately 1500 matters were dealt with in the specialist Common Law Division.

Specialist jurisdictions within the Supreme Court

In an attempt to manage particular types of cases in a more efficient manner, the Supreme Court also has many specialised divisions and lists, such as the Commercial Court (dealing with large business and corporations disputes) and the Common Law Division (dealing with a range of cases including those involving personal injuries, human rights, and environmental and bushfire cases).

Black Saturday bushfire conviction

In March 2012, a Supreme Court jury found Mr Brendan Sokaluk, aged 42 years, guilty of 10 counts of arson causing death after he deliberately started a bushfire in Churchill, Victoria in which 10 people were killed. Mr Sokaluk, who had worked as a volunteer for the Country Fire Authority in the late 1980s, started the fire on a total fire ban day in which strong winds raged and temperatures soared to over 43 °C. In his defence, Mr Sokaluk's legal counsel, Ms Jane Dixon, told the court Mr Sokaluk suffered from autism and after the trial indicated they would most likely appeal the conviction. The maximum penalty in Victoria for one count of arson causing death is 25 years imprisonment.

Bob blames Brimbank and sues for trespass

In 2011, business entrepreneur, Bob Jane, commenced a civil action against Brimbank City Council and JLKJ Enterprises (a mowing contractor), claiming they trespassed onto his Calder Park property and caused significant damage. In a writ filed in the Supreme Court of Victoria, Mr Jane claimed that, while he agreed to contract JLKJ Enterprises to mow a firebreak on his property (to meet Brimbank City Council requirements), rather than simply mowing a firebreak, the contractor cut an entire area and destroyed his hay harvest. Mr Jane also alleged that the contractors failed to leave his property despite many requests. Mr Jane sued the council and the contractor for $10 million exemplary damages, plus approximately $15 000 damages for loss of earnings and $550 000 for trespass. In their defence, JLKJ Enterprises claimed they were acting on instructions from the council.

TEST your understanding

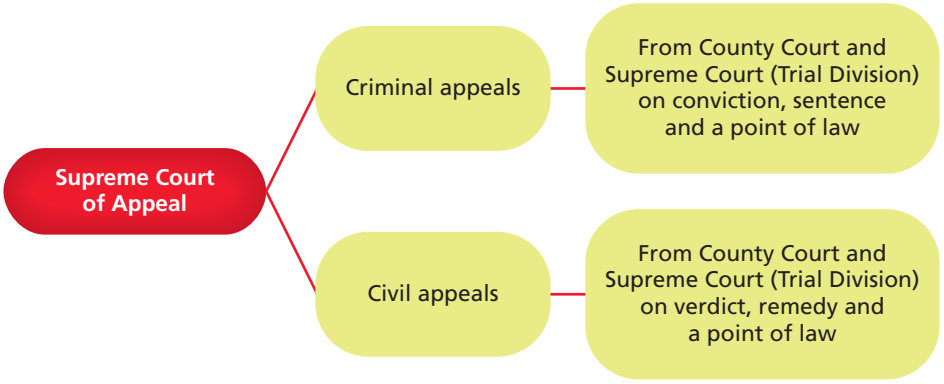
1 Identify the two divisions of the Supreme Court of Victoria and outline the jurisdiction of each division. Make sure you include the grounds for criminal and civil appeals.
2 Explain the use of the jury in the Supreme Court Trial Division.

APPLY your understanding

3 Identify which of the following cases would be heard in the Supreme Court Trial Division. Give reasons for your answer.
   (a) Ali, aged 22, is charged with manslaughter after he punched and killed another man in a hotel brawl. Ali is pleading not guilty, claiming he was acting in self-defence and had no intention to kill.
   (b) Leanne, aged 65, was charged with murder after she killed her best friend, who was suffering a serious illness, by assisting her to take an overdose of prescription drugs. She is pleading not guilty, claiming she was carrying out her friend's wish to end her life.
   (c) Carlos, aged 32, is charged with attempted murder after stabbing his wife 15 times while in a violent rage. He is pleading not guilty and will use the defence of mental impairment, claiming that he was suffering severe depression at the time of the attack.
   (d) Mr Tan is suing Burwood Netball Association for negligence on behalf of his daughter, Vanessa, aged 15, who was injured when a temporary seating stand collapsed during a netball game. Kelly suffered severe spinal injuries and her father is seeking $1 million in damages.
   (e) Tony is charged with culpable driving causing death after he crashed his car into a tree and killed two passengers. Tony was over the legal blood alcohol limit at the time and was speeding excessively. He is pleading guilty.
   (f) Ping was convicted of drunk driving in the Magistrates' Court. She believes the magistrate made an error in law when determining the case and is lodging an appeal.

5.7 The Victorian court hierarchy — the Supreme Court of Appeal

KEY CONCEPT The Supreme Court is divided into two divisions: the Trial Division and the Court of Appeal. The Supreme Court of Appeal, as the name suggests, specialises in hearing all appeals from County Court and Supreme Court (Trial Division) trials.



Jurisdiction of the Victorian Supreme Court of Appeal

The Supreme Court of Appeal is presided over by three to five justices, depending on the seriousness of the case and has only appellate jurisdiction (it cannot hear original trials).

Appellate jurisdiction

DID YOU KNOW?

In 2009–10, the Court of Appeal heard 518 criminal appeal cases (applications for leave to appeal and actual appeals), taking approximately 10 months to finalise each case. It also heard 208 civil case applications (applications for leave to appeal and actual appeals).

The Supreme Court of Appeal has appellate jurisdiction to hear all criminal and civil appeals from trials held in the County and Supreme Court (Trial Division). Criminal appeals can be heard against a conviction, sentence or on a point of law. Both the prosecution and defendant may appeal against the leniency or severity of a sentence respectively and on a point of law, but only the defendant may appeal against a conviction. Civil appeals can be heard against the verdict, remedy or on a point of law.

The Court of Appeal may also hear some appeals on a point of law from the Victorian Civil and Administrative Tribunal (VCAT) if the president of VCAT, who is a Supreme Court justice, has determined the matter.

After considering an appeal, the Court of Appeal can

- dismiss the matter (affirming the original decision)
- amend the outcome of the first trial as necessary; for example, a sentence can be reduced or increased (or remain the same)
- refer the case back to the original court for retrial. In this case, the original verdict will be quashed and a new trial will take place.

Appeals from the Supreme Court of Appeal

The High Court of Australia has the jurisdiction to hear all criminal and civil appeals from state and territory courts of appeal, including the Victorian Supreme Court of Appeal. The High Court can hear criminal appeals (against a conviction, sentence and on a point of law) and civil appeals (against the verdict, remedy or on a point of law) if grounds exist. Parties must apply to the High Court of Australia for special permission to have their appeal considered.

TABLE 5.2 Summary of court jurisdictions

Court	Original jurisdiction		Appellate jurisdiction	
	Criminal	Civil	Criminal	Civil
Supreme Court of Victoria (Court of Appeal)	No original jurisdiction	No original jurisdiction	All appeals from County Court and Supreme Court (Trial Division) trials	All appeals from County and Supreme Courts (Trial Division) trials (and some VCAT hearings)
Supreme Court of Victoria (Trial Division)	All indictable offences (mainly murder and murder-related offences)	Unlimited jurisdiction	All appeals from the Magistrates' Court on a point	All appeals from the Magistrates' Court and VCAT on a point of law
County Court of Victoria	All indictable offences (except murder and murder-related offences)	Unlimited jurisdiction	Appeals from Magistrates' Court on conviction or sentence (leniency or severity) only	No appellate jurisdiction
Magistrates' Court of Victoria	• Summary offences • Indictable offences heard summarily • Committal hearings • Bail and warrant applications	Claims involving up to $100 000	No appellate jurisdiction	No appellate jurisdiction

TEST your understanding

1 Outline the jurisdiction of the Supreme Court of Appeal. Include the grounds for criminal and civil appeals.

2 Explain the avenue of appeal from the Supreme Court of Appeal for both criminal and civil cases.

APPLY your understanding

3 Draw a table like the one below, then complete the following questions for each of the case scenarios.
   (i) State which court would hear the case.
   (ii) Identify whether the case is criminal or civil and whether it will involve the original or appellate jurisdiction of the court. Give reasons for your answer.
   (iii) State whether a jury would be present. Give reasons for your answer.

Case	Criminal or civil	Original or appellate	Court	Jury	Reason
(a) Jessica, aged 25 years, is charged with killing her gym instructor. She intends to plead not guilty.					
(b) Wei Lin, 21 years old, is charged with culpable driving. He intends to plead guilty.					
(c) Dora could no longer control her 19-year-old son Aaron. He had become involved in drugs and often stole from the family home to obtain goods to sell for drug money.					
(d) Twenty-five-year-old Xavier is suing the local council for $80 000 for serious injuries he obtained when a rubbish collection truck reversed into him.					
(e) Nineteen-year-old Ahmed was caught driving with a blood alcohol level of 0.12. He was also charged with dangerous driving and damaging property to the value of $1500. He intends to plead not guilty.					
(f) Charlize, 16 years old, is charged with theft of a motor vehicle and intends to plead not guilty.					
(g) Twenty-four-year-old Rohnan was charged with manslaughter yesterday. The prosecutor will outline the details of the case at the committal.					
(h) Ryan, 37 years old, intends to appeal against the sentence a magistrate gave him for assault. He thinks five years imprisonment is too severe.					

SKILL DRILL

KEY SKILLS TO ACQUIRE:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- describe the jurisdiction of specific courts within the Victorian court hierarchy.

SKILL DEFINITION

Define means to provide a precise meaning.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

Describe means to accurately depict or outline in a logical sequence.

Identify the errors

The following case studies, while being factually correct, contain several errors in relation to the key terminology used and courts mentioned. Draw up a table similar to the table below and for each scenario:
(a) identify and explain the errors
(b) provide the correct terminology and court. Give reasons for your answer.

The first **two errors** in case study one have been highlighted for you and the error fully explained in the table below. There are two more errors for you to find in the first case study.

Case study one: spectator assaulted at under 16 footy final

Charlie Tannous was sentenced to three years imprisonment after seriously assaulting a spectator at an under 16 football match.

In 2011, Judge Michael Bourke sentenced Charlie Tannous, aged 21 years, to three years imprisonment with a minimum of 12 months to be served before being eligible for parole after Mr Tannous pleaded guilty to the charges of intentionally causing serious injury and serious assault. During the trial, held in the **Magistrates Court**, Mr Tannous, the **plaintiff**, admitted striking Tutaki Olsen, aged 17 years, in the face with a steel-headed mallet (hammer) while the two were supporting opposing teams at an under 16 Essendon District Football League football match. Mr Tannous struck Mr Olsen while he was not looking, breaking Mr Olsen's jaw and chipping his teeth. With grounds, Mr Tannous could lodge an appeal against his sentence in the Supreme Court (Trial Division). The appeal would be determined by a jury of 12.

Error number	Error and explanation	Correct terminology/ explanation
1	*The case would not be heard in the **Magistrates' Court** as Mr Tannous was charged with serious indictable offences.* *The matter was not heard in the Magistrates' Court as an indictable offence heard summarily because the case was sent to trial and a judge determined the sentence (not a magistrate).*	*Mr Tannous was charged with indictable offences so the matter would be heard in the **County Court**, which hears all indictable offences except murder, murder related offences and treason.*
2	*Mr Tannous was not the **plaintiff**, as the plaintiff is the party who initiates a civil action and this case is a criminal dispute.*	*Mr Tannous is the **defendant** because he has pleaded guilty to the criminal offences. If he pleaded not guilty he could also be referred to as the accused.*

Case study two: murdering mother pleads mental impairment

In 2008, Donna Fitchett, aged 51 years, pleaded not guilty to the murder of her two sons, Thomas and Matthew (aged 11 and 9 years respectively) (*R v. Fitchett* [2009] VSCA 150). At the trial, held in the County Court, the prosecution argued that Mrs Fitchett suffocated her sons after giving them an overdose of prescription drugs, in an act of revenge against her estranged husband. Mrs Fitchett, the plaintiff, pleaded not guilty, claiming the defence of mental impairment. After days of deliberations, the judge found Mrs Fitchett guilty and the jury of eight sentenced her to 24 years, with a minimum of 18 years to be served in a secure psychiatric hospital.

In 2009, the Director of Public Prosecutions lodged an appeal at the County Court against Mrs Fitchett's sentence, claiming it was most inadequate. Mrs Fitchett also lodged a separate appeal in the Supreme Court (Trial Division) against her conviction and sentence, arguing that miscarriage of justice had taken place. Mrs Fitchett's appeal was upheld and a retrial ordered. In May 2010, after a three week retrial, held in the Magistrates' Court, Mrs Fitchett was once again found guilty of murder.

Case study three: bully victim sues secondary school

In 2010, the mother of a 17-year-old girl commenced a civil action on behalf of her daughter in the Magistrates' Court against the Victorian Education Department (state government) after her daughter had been the victim of bullying at a state secondary school in Kerang. The mother, referred to as the prosecution, claimed the school had breached their duty of care by failing to reasonably protect her daughter against the bullying, which included the daughter being repeatedly abused and harassed by other students, having chairs thrown at her, being spat at and receiving death threats, over an 18 month period. In an effort to settle the dispute early, the state government, referred to as the accused, agreed to pay the daughter $290 000 in damages.

5.8 The role of the Victorian Civil and Administrative Tribunal (VCAT)

KEY CONCEPT VCAT is the busiest tribunal in Victoria and specialises in hearing a wide range of civil disputes (including disputes involving the purchase of goods and services, rental agreements and property, taxation issues, local council decisions and discrimination) in an informal, cost-effective and timely manner.

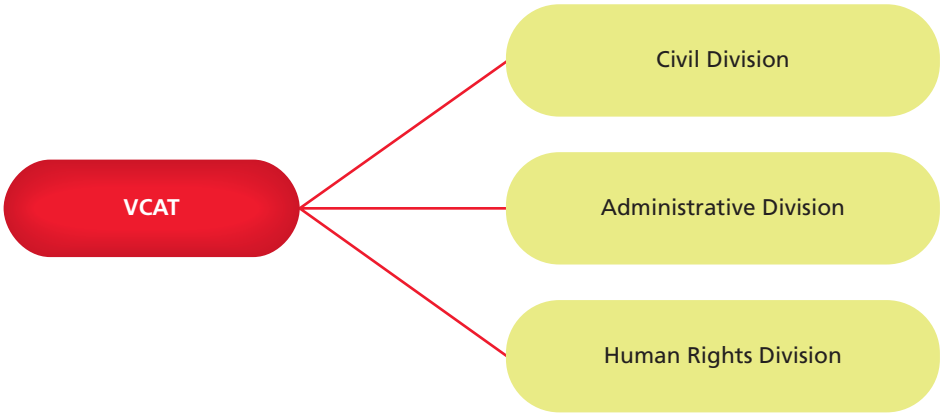
Tribunals are legal bodies that specialise in resolving specific types of disputes in an informal, relatively quick and cost-effective manner.

VCAT is a 'super tribunal' with jurisdiction to deal with a wide range of minor civil disputes, including those involving discrimination, racial and religious vilification, guardianship issues, consumer complaints, rental disputes and reviewing decisions of government authorities such as local councils.

DID YOU KNOW?

In 2009–10 approximately 9700 applications were made to resolve civil disputes at VCAT, with approximately 90 per cent of these applications involving claims of less than $10 000 or no monetary amount.

As we have seen, each of the courts in the Victorian Court hierarchy has civil jurisdiction; that is, they can hear and determine a range of civil disputes. For example, the Magistrates' Court can hear civil matters involving up to $100 000, and the county and supreme courts can hear civil disputes for unlimited amounts. The courts, however, are not the only institutions that can hear and determine civil disputes. In addition to courts, the Victorian legal system provides various **tribunals** that can resolve particular types of civil disputes in a less formal and more cost-effective and timely manner than the courts. The main tribunal in Victoria that exists to resolve civil disputes is the **Victorian Civil and Administrative Tribunal (VCAT)**.



The three divisions of VCAT

The structure and jurisdiction of VCAT

The Victorian Government established VCAT in July 1998 to join together, and replace, 15 different boards and tribunals that operated throughout Victoria at the time, and to offer a 'one stop shop' to deal with a wide range of civil disputes using a common set of procedures.

VCAT is located in central Melbourne and also conducts hearings at various suburban and regional locations (for example, in regional Mildura and Geelong). VCAT is led by a Supreme Court judge who acts as the president and various County Court judges who act as vice-presidents to oversee each division. It also employs deputy presidents to oversee the operation of each list (specialised section) and members (lawyers and experts with specific qualifications, skills and training) who can determine cases.

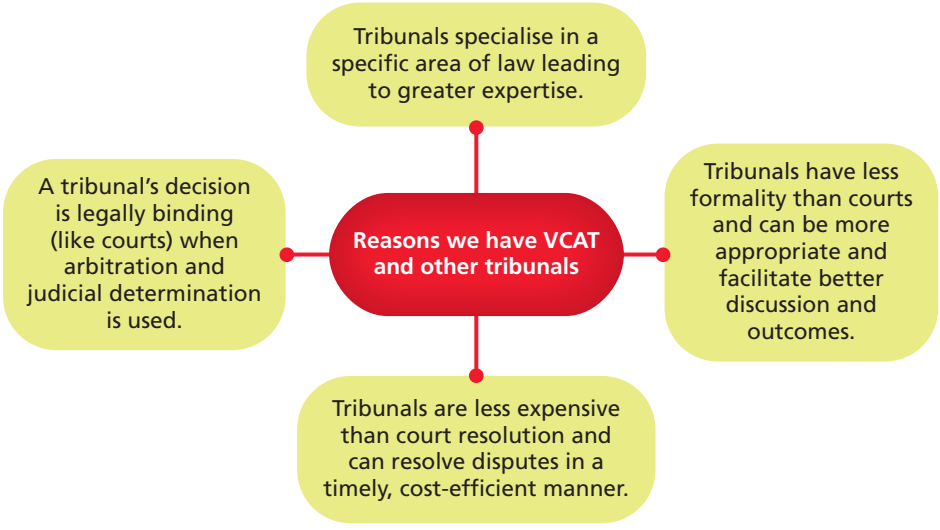
VCAT is divided into three divisions. The Civil Division deals with a range of civil disputes. The Administrative Division reviews decisions made by government agencies and local councils. The Human Rights Division deals with matters including those relating to discrimination, racial and religious vilification, and guardianship.

Each of the three divisions of VCAT contains specific sections, or lists, which specialise in dealing with certain types of disputes. The following table provides brief explanations of the types of disputes dealt with by the various VCAT lists.

Civil Division	Administrative Division	Human Rights Division
• Civil Claims List — deals with disputes between consumers and traders over the purchase and supply of goods and services	• General List — reviews decisions made by government agencies including the Transport Accident Commission and Victims of Crime Assistance Tribunal	• Anti-discrimination List — deals with disputes involving discrimination on various grounds including age, sex and marital status, and racial and religious vilification
• Credit List — deals with disputes between borrowers and financial institutions, including those involving the supply of credit and seizing of property	• Land Valuation List — reviews land valuations made by local councils or other agencies for tax purposes	• Guardianship List — deals with the appointment of guardians to make financial and personal decisions on behalf of those who are unable to make their own decisions, such as cognitively impaired people
• Domestic Building List — deals with disputes between owners and builders over small and large scale building works, such as bathroom and kitchen renovations and housing construction	• The Legal Practice List — deals with disputes between clients and legal representatives, and reviews misconduct charges brought against lawyers	• Health and Privacy List — reviews decisions made by government bodies and medical professionals that affect an individual's rights, such as the denial of IVF treatment and denial of personal records
• Owners Corporations List — deals with disputes involving owners' corporations ('body corporates') that manage the common ownership of shared property (such as ownership of common garden areas in unit blocks)	• Occupational and Business Regulation List — reviews decisions made by agencies with regard to the granting of licences and misconduct cases for a range of businesses and occupational groups, such as motor vehicle traders, clubs and bars	• Mental Health List — reviews decisions made by the Mental Health Board about applicants' involuntary treatment
• Real Property List — deals with disputes over real estate, real estate agent commissions, and the use and flow of water between properties	• Planning and Environment List — reviews decisions made about planning permits	
• Residential Tenancies List — deals with disputes between tenants and landlords over the rental of property	• Taxation List — reviews decisions and assessments made by the state taxation office	

The role of VCAT

According to VCAT, their main purpose and reason for existence is to 'provide Victorians with a low cost, accessible, efficient and independent tribunal that delivers high quality dispute resolution'. In striving to achieve this aim VCAT specialises in resolving minor civil disputes in an informal, cost-effective and timely manner, using a range of different methods of dispute resolution.



Reasons for the existence of VCAT and other tribunals

DID YOU KNOW?

Approximately 86 000 cases are lodged at VCAT each year. The Residential Tenancies List is the busiest, accounting for approximately 66 per cent of all cases, followed by the Guardianship List hearing 12 per cent, the Civil Claims List hearing 11 per cent, and the Planning and Environment List hearing 4 per cent.

DID YOU KNOW?

In 2009–10, approximately 57 per cent of disputes heard at the major lists of VCAT were resolved either prior to or at mediation. Approximately 70 per cent of cases at the Residential Tenancies and Civil Claims Lists were solved prior to or at mediation.

DID YOU KNOW?

In 2009–10, approximately 80 per cent of all claims at the Civil Claims List involved amounts under $10 000, 9 per cent involved amounts between $10 000 and $100 000, only 1 per cent involved amounts over $100 000 and 10 per cent of claims involved no value.

Less formality

VCAT and other tribunals resolve disputes with less formality than the courts because parties to a dispute are not required to follow the strict rules of evidence and procedure of court. This may encourage parties to feel more comfortable and willing to discuss and resolve their dispute. VCAT parties are encouraged to resolve their dispute between themselves, with the assistance of an independent third party, rather than have a third party determine the dispute on their behalf and impose a binding decision (as is more likely to occur in court). This may lead to the parties feeling more satisfied with the final outcome because they have negotiated the outcome between themselves, rather than having it imposed upon them.

The environment at VCAT is also less formal than a traditional courtroom, which may help parties feel more relaxed and willing to participate in the resolution process, which in turn increases access to the legal system.

More cost effective

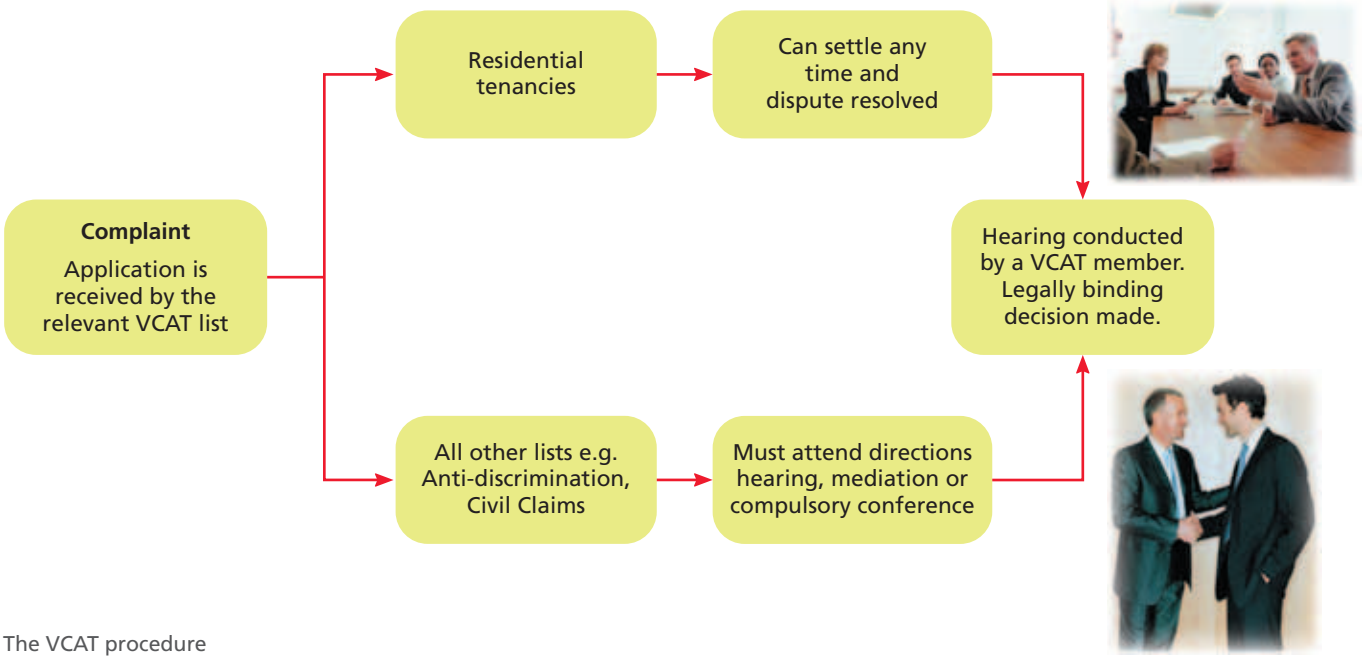
VCAT aims to provide low cost dispute resolution by using various strategies and to keep application fees low. Fees vary, depending on the type of dispute being resolved and the list involved, with application costs generally ranging from no fee to $310. For example, application fees for the Civil Claims List range from approximately $37 (for claims under $10 000) to $615 (for claims over $100 000).

The use of legal representatives is also often discouraged or not permitted at VCAT, which can further reduce costs. By contrast, the strict rules of evidence and procedure that exist at court necessitate the use of legal representatives.

More timely

VCAT can generally resolve disputes with greater speed than the courts because the less formal processes and procedures aim to increase the speed of proceedings. VCAT also constantly aims to improve its processes and procedures so that applications can be dealt with more efficiently. For example, applications can be lodged online and in some cases, hearings can be conducted via telephone conferencing or video links.

Resolving a dispute at VCAT



The VCAT procedure

While the main processes and procedures used at VCAT to resolve disputes are relatively similar in an effort to achieve consistency, procedures may differ depending on the type of dispute being heard and the list involved. For example, while VCAT prefers to have disputes resolved using mediation or conciliation (at a compulsory conference) prior to judicial determination (at a hearing), many cases can proceed directly to a hearing.

Compulsory conference

In an attempt to settle a dispute, VCAT may require parties to attend a compulsory conference with the aim of identifying and clarifying the key issues in dispute and promoting an early settlement. Compulsory conferences use conciliation as a method of dispute settlement.

Hearings

If parties cannot resolve their dispute with mediation and conciliation, it may be resolved at a hearing using judicial determination (where a member makes a legally binding decision on behalf of the parties). While VCAT hearings follow certain procedures (for example, parties and witnesses give evidence under oath or affirmation), there are no strict rules of evidence and procedure, as required in court cases.

The preferred method of dispute resolution at VCAT is mediation, although other methods of dispute resolution are used, including judicial determination used at VCAT hearings.

A VCAT member may order a variety of remedies to resolve a dispute, including making an order for the payment of damages or fulfilment of the terms of a contract.

Appeals

Decisions made by VCAT are generally final, although parties may appeal on a point of law to the Supreme Court. VCAT also has the power to review decisions made by specific government agencies and statutory authorities.

Appeals from VCAT

Parties who are not satisfied with the legally binding decision at a VCAT hearing can only appeal the decision on a point of law to the Supreme Court (Trial Division)

DID YOU KNOW?

On average, VCAT takes 18 weeks to resolve a dispute from the time the matter is lodged at the tribunal. By contrast, many pre-trial procedures must be followed before the courts can resolve a dispute, and waiting lists for hearings and trials are long. Court cases take many months, even years, to resolve from the time of initiation.

or the Court of Appeal (if the order under review was originally made by either the president or a vice-president of VCAT).

In deciding an appeal case from VCAT, the Supreme Court or Court of Appeal may uphold VCAT's original order, make a new one, or return the case to VCAT for a rehearing.

Jurisdiction to review decisions

VCAT does not have any appellate jurisdiction; however, it does have the power to review decisions made by specific government agencies and statutory authorities.

Dangerous dog decision goes to VCAT

In 2011, Kooda and Bear, two dogs owned by Mr Nathan Laffan and Ms Samantha Graham (both aged 20 years) were seized by the Moira Shire Council after the council deemed them to be dangerous dogs. The council seized the dogs shortly before new laws restricting the ownership of dangerous dogs were introduced into Victoria.

In 2012, Mr Laffan and Ms Graham were granted permission to appeal the decision of the council and have their case reviewed at the Victorian Civil and Administrative Tribunal. The owners were appealing the council's decision on the basis that their dogs were incorrectly identified as pit bull terriers (a breed of restricted dogs) when in fact the owners believed them to be bullmastiff-cross American bulldogs.

Under Victorian laws introduced in 2011 (after a young child was tragically mauled to death by a pit bull terrier) local councils can seize and destroy unregistered pit bulls and their crosses based on visual identification.

VCAT aims to resolve a wide range of civil disputes in an informal, timely and cost-effective manner.

TEST your understanding

1. Provide four reasons for the existence of VCAT.
2. Explain the role of VCAT and describe how courts differ from VCAT when it comes to resolving civil disputes.
3. Explain the three main methods used to resolve disputes at VCAT.
4. List two types of remedies VCAT can order.
5. Explain the avenues of appeal available to a party dissatisfied with a VCAT decision.

APPLY your understanding

6. Consider the following case scenarios and explain which VCAT list would most likely determine the disputes.
   (a) James, a physical education teacher, was dismissed because his employer (the school) said he was overweight and a poor role model for his students.
   (b) Billy refuses to pay his landlord rent because the landlord has failed to make various maintenance repairs despite months of requests.
   (c) Dally has changed to a new dentist, but her previous dentist will not forward her medical records despite several requests.
   (d) Lou, the owner of a restaurant, has been refused a license to sell liquor and wishes to have the decision reviewed.
   (e) Ben, aged 22, who enjoys the movement and strength skills involved in calisthenics, has be banned from competing in the Victorian Callisthenic Competition because he is male.
   (f) Jamie's parents want the private school she attended for four years to refund one term's school fees (which were paid in advance) after withdrawing Jamie from the school because she was being bullied.

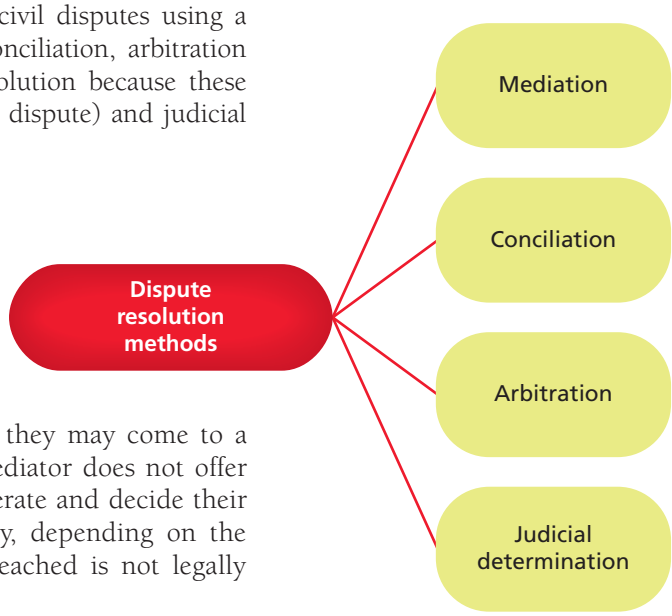
5.9 Dispute resolution methods used by the courts and VCAT: mediation and conciliation

KEY CONCEPT Both the courts and VCAT use a range of different methods to resolve criminal cases and civil disputes, including mediation, conciliation, arbitration and judicial determination.

Most criminal cases are resolved using judicial determination, where an independent judge or magistrate determines the outcome of the case. By contrast, it is often more efficient and effective to resolve civil disputes using a range of dispute resolution methods such as mediation, conciliation, arbitration (often referred to as alternative or appropriate dispute resolution because these methods may be the most suitable way to determine a civil dispute) and judicial determination.

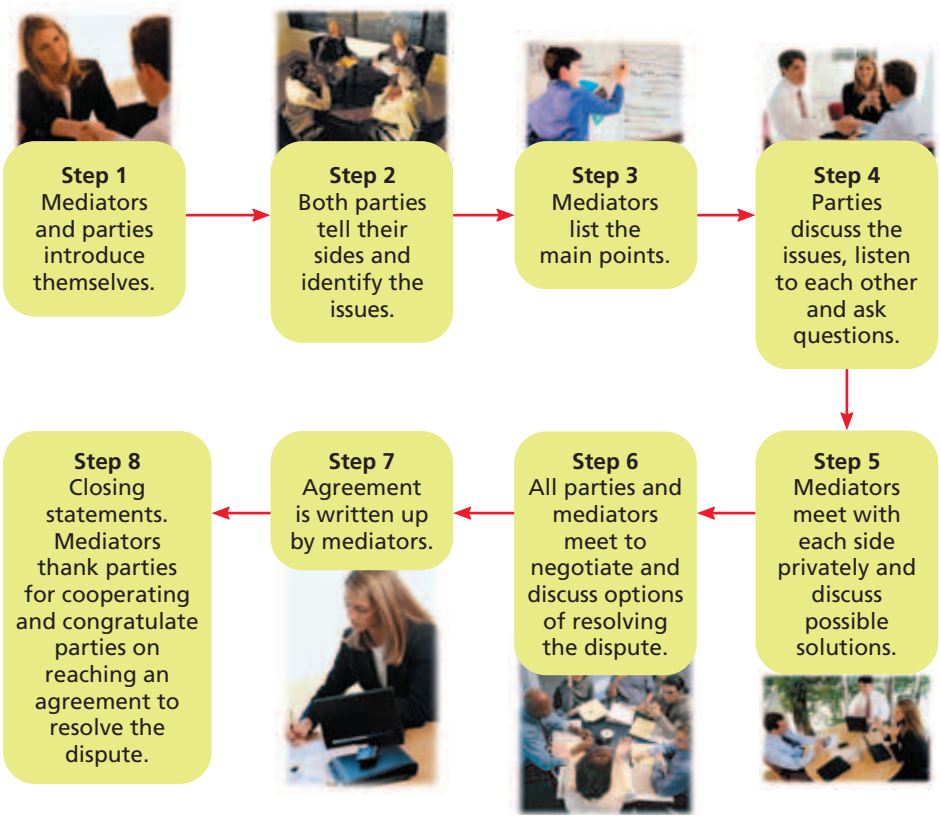
Mediation

Mediation is a method (process) of dispute settlement where parties are encouraged to resolve their dispute between themselves, with the assistance of an independent and impartial third party, referred to as a mediator. The role of the mediator (or mediators as there may be more than one) is to facilitate the discussion between the parties so they may come to a mutually accepted agreement between themselves. The mediator does not offer suggestions or give advice, but encourages parties to cooperate and decide their own solution. Mediation can be compulsory or voluntary, depending on the court or tribunal resolving the dispute. Any agreement reached is not legally binding.



Dispute resolution methods

Mediation involves an impartial third party (mediator) assisting the parties to discuss their dispute and determine a mutually acceptable resolution between themselves.



Typical steps involved in mediation

Mediation at VCAT and the courts

Mediation is generally the preferred method of dispute resolution at VCAT, which is equipped with a purpose-built mediation centre with hearing rooms, meeting areas and break-out rooms. Mediation is particularly successful in the following VCAT lists.

TABLE 5.3 Mediation statistics at VCAT (2009–10)

List	% of cases finalised at mediation
Legal Practice Lists	80%
Retail Tenancies List	71%
Civil Claims List	70%
Planning and Environment List	65%
Owner's Corporation List	57%
Domestic Building List	56%
Credit List	55%
Anti-discrimination List	48%

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Audio:

Kirby on mediation

Former high Court judge Michael Kirby thinks that court action ought to be the very last resort and that mediation should be strongly encouraged as an alternative to litigation.

Searchlight ID: aud-0006

Mediation is used at the magistrates', county and supreme courts in civil cases, and at other specialist courts, divisions and lists. For example, the various suburban and regional Magistrates' Courts have introduced court-annexed mediation, which requires all defended civil disputes under a specific amount (generally $10 000) to be referred to compulsory mediation, where skilled judicial registrars assist in the resolution of the claim.

In 2008–09 an initiative to implement judge-led mediation was implemented in the supreme and county courts. The County Court particularly uses mediation in general commercial and damages cases, and in family property cases; it is now very rare for a civil case in the Supreme Court (Trial Division) to go to trial without at least one round of mediation. Private mediators usually conduct civil mediations in the Supreme Court; however, associate judges can conduct mediations where this is deemed appropriate.

Conciliation

Conciliation involves an impartial third party (conciliator) assisting the parties to discuss their dispute, and offering suggestions and advice to help the parties determine a mutually acceptable resolution between themselves.

Conciliation is a method of dispute settlement, similar to mediation, in that an independent and impartial third party (conciliator) facilitates the discussion between the parties so they may come to a mutually accepted agreement between themselves. However, the conciliator can also offer suggestions and give advice regarding the terms of settlement. Conciliation, like mediation, can be compulsory or voluntary depending on the court or tribunal resolving the dispute and any agreement reached is not legally binding.

Conciliation used at VCAT and the courts

Conciliation is used at VCAT compulsory conferences (where parties are often encouraged to reach a mutually acceptable decision before judicial determination at a hearing) and at pre-hearing conferences in the Magistrates' Court (where parties try to reach an out-of-court settlement to avoid formal court procedures). The county and supreme courts also encourage the use of conciliation to resolve civil disputes before trial.

Strengths and weaknesses of mediation and conciliation

The strengths and weakness of mediation and conciliation are listed below.

Strengths of mediation and conciliation	Weaknesses of mediation and conciliation
These methods are informal as strict rules of evidence and procedure are not used, which may allow parties to feel more comfortable and confident to present their evidence and discuss key issues. The informality may also assist a faster resolution of the dispute.	With no strict rules of evidence and procedure, a more confident or knowledgeable party may be able to take advantage of informality and dominate proceedings, or a less confident party may compromise too easily.
Legal representatives are not necessary when these methods are used, which lowers costs. If successful, high costs of litigation can be avoided by using these methods.	Without the use of legal representatives parties may not be able to ensure their case is prepared and presented in the best possible manner.
As parties compromise and resolve the dispute between themselves, in a confidential environment, they may feel more at ease to discuss their dispute in a more open and safe manner, and be more satisfied with the outcome, rather than having the resolution imposed upon them by a third party.	The decision is not legally binding which means one party may decide not to adhere to the agreement, resulting in a waste of time and effort. Similarly, if parties cannot reach an agreement, the matter may end up being taken to court to be resolved through judicial determination anyway.
Parties resolve their dispute in a non-confrontational manner, which may be important in disputes where the parties must maintain an ongoing relationship in the future; for example, neighbours and employers/employees.	As mediation or conciliation is voluntary, parties may decide not to attend and the matter may end up going to court and being resolved in a more adversarial manner.

DID YOU KNOW?

Over recent years, the Victorian Supreme Court has found mediation to be a very effective method of dispute resolution and now virtually no civil action proceeds to trial without at least one round of mediation. Most civil mediations are conducted by private mediators, although associate judges also conduct mediations.

TEST your understanding

1. Distinguish between mediation and conciliation.
2. Explain why the Supreme Court extensively uses mediation to encourage parties to resolve their dispute prior to a trial.
3. Evaluate three strengths associated with resolving a civil dispute through mediation or conciliation.

APPLY your understanding

4. Working with a partner or in small groups, select one scenario below and conduct a role play demonstrating how the dispute would be resolved using mediation. Each group will act out their role play to the class. Use the **Mediation** weblink in your eBookPLUS to prepare for your mediation session and read the code of conduct for mediators.

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(a) Jennifer lives next to a petrol station, which has an old air conditioner that makes a lot of noise. Jennifer cannot sleep at night and the petrol station owner refuses to do anything about the air conditioner.

(b) The fence dividing the properties of neighbours Kurt and Hans fell down. A new fence needs to be erected, but Hans refuses to pay for half of the cost of the fence, as he is happy not to replace the fence. Kurt is angry and feels Hans should pay half, as he will benefit from the fence.

(c) Felicity applied for a job as a nightclub promoter. She was refused the job because she is married and pregnant. The nightclub owner did not employ her because he thinks she would not attract single people to the club.

5.10 Dispute resolution methods used by the courts and VCAT: arbitration and judicial determination

KEY CONCEPT Parties who cannot resolve their civil dispute using mediation and conciliation may need an independent third party to listen to their case and impose an outcome using either arbitration or judicial determination.

Judicial determination involves parties presenting their case, generally according to rules of evidence and procedure, before an independent judicial officer (judge, magistrate or VCAT member) who makes a legally binding decision.

Arbitration

Arbitration is a method of dispute settlement where an independent third party (arbitrator) listens to each party's evidence and makes a legally binding decision to resolve the dispute on their behalf. During arbitration, the arbitrator may make suggestions to the parties regarding ways to resolve their dispute (in the hope that the parties come to a mutually agreeable settlement) but, if this is not possible, the arbitrator settles the dispute.

Arbitration is a more formal method of dispute settlement than mediation and conciliation because proceedings are governed by rules of procedure. However, these rules are not as formal as the strict rules of evidence and procedure used in judicial determination (commonly used in court trials). Parties may agree to have their dispute resolved via arbitration or, as in the Magistrates' Court, arbitration may be compulsory.

While legal representatives ensure a case is prepared and presented in the most effective manner, they are costly.

Arbitration at VCAT and the courts

Generally VCAT uses mediation and conciliation as preferred methods of dispute settlement. However, arbitration is used at some lists, most notably the Residential Tenancies List. Arbitration is used in the Magistrates' Court for all civil disputes involving claims less than $10 000, allowing parties to have disputes settled in a less formal atmosphere without the strict rules of evidence and procedure required in a courtroom.

Arbitration is also used to resolve commercial civil disputes in the Supreme Court. In 2010, one of the Supreme Court's specialist court divisions, the Commercial Court (which deals with cases involving corporations and business disputes) set up an Arbitration List to resolve disputes using a judge as the experienced arbitrator.

Judicial determination

Judicial determination is a method of resolving disputes where parties present their case before an independent judicial officer (a judge, magistrate or VCAT member) who makes a legally binding decision on their behalf. Typically, judicial determination also involves the use of strict rules of evidence and procedure, although VCAT hearings, which use judicial determination, are less formal and do not follow strict rules of evidence and procedure as used in civil court trials.

Judicial determination used at VCAT and the courts

Judicial determination is used at VCAT hearings in the situation where parties cannot resolve their dispute between themselves using mediation or conciliation (at a compulsory conference), although without the use of strict rules of evidence and procedure required in courts. Judicial determination is also used in all criminal cases held in the Victorian courts and civil disputes determined at Magistrates' Court hearings, and in civil trials held in the county and supreme courts.

Strengths and weaknesses of arbitration and judicial determination

The strengths and weaknesses of arbitration and judicial determination are listed below.

Strengths of arbitration and judicial determination	Weaknesses of arbitration and judicial determination
Strict rules of evidence and procedure, typically used in judicial determination, ensure that both parties have an equal opportunity to present their case and prevent a more confident party from dominating proceedings.	Judicial determination involves the use of strict rules of evidence and procedure, which necessitates the use of legal representation and increases costs. Complex rules also may alienate the parties from the resolution process and increase the time it takes to resolve a dispute.
Generally parties involved in arbitration and judicial determination employ legal representatives who ensure their case is prepared and presented in the best possible manner.	The use of legal representatives increases costs and may disadvantage a party who is unable to afford legal representation.
The decision made is legally binding and fully enforceable by the courts.	As the decision is imposed upon the parties, they may not feel as satisfied with the outcome compared to if the parties resolved the dispute themselves. The adversarial nature of proceedings may also make it difficult for parties to maintain an ongoing relationship.

TEST your understanding

1. Distinguish between arbitration and judicial determination.
2. Evaluate three strengths associated with resolving a civil dispute through judicial determination.
3. Distinguish between conciliation and arbitration. Explain which method of dispute settlement is most effective.

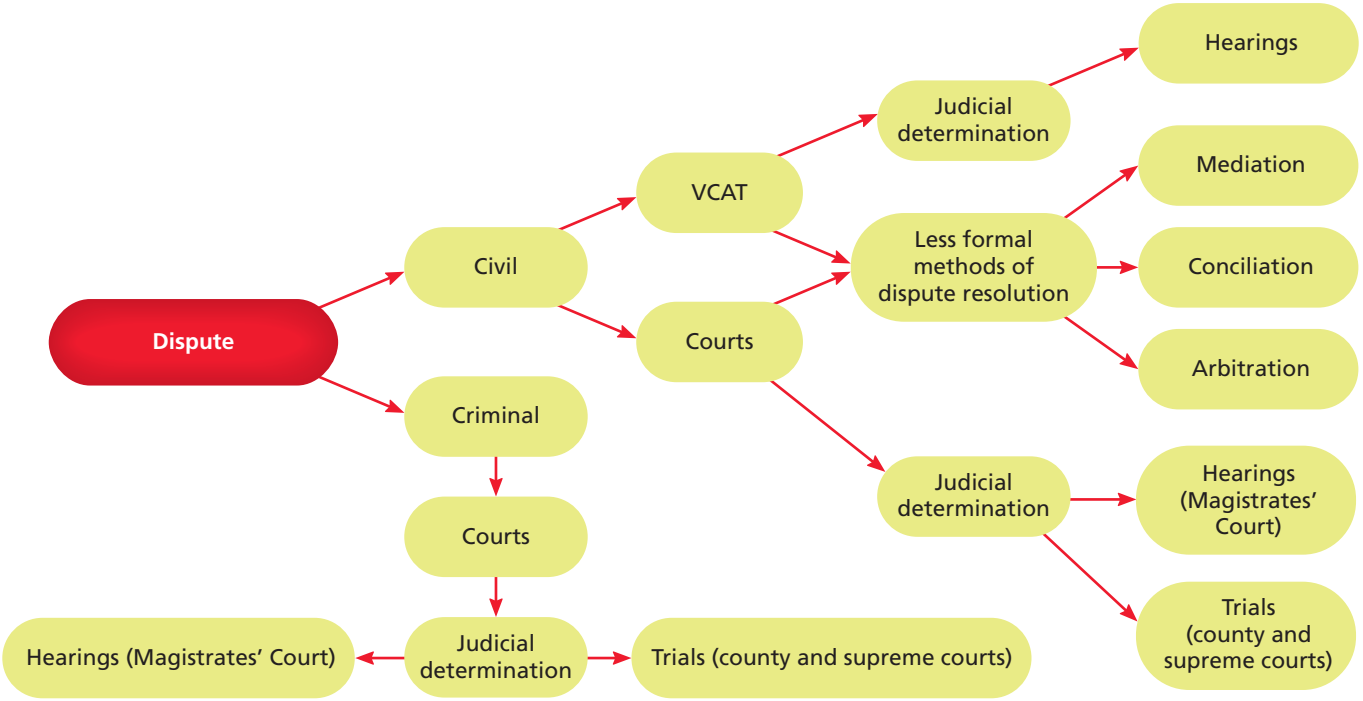
APPLY your understanding

4. Suggest reasons why the Magistrates' Court refers all civil disputes involving claims under $10 000 to compulsory arbitration.
5. Imagine a teacher at your school has been dismissed because they failed to break up a physical fight between two 17-year-old male students. The school claims the teacher neglected their duties by failing to physically stand between the two boys through fear of being injured (this question is based on a real VCAT case).

   Write a letter to your teacher explaining the avenues and methods of dispute resolution available to him to resolve this dispute.

5.11 An evaluation of the way the courts and VCAT operate to resolve disputes

KEY CONCEPT You may be wondering, with regard to dispute resolution, how VCAT compares with courts. Which is more efficient and which resolves disputes in the most timely and cost-effective manner? To answer these questions, you need to consider and compare the strengths and weaknesses of resolving disputes through each of these avenues.



Dispute resolution methods used by the courts and VCAT

Comparing the way VCAT and the courts resolve disputes

Making a comparison between the way VCAT and the courts operate can be difficult. Both operate to resolve disputes in different ways, and both have their strengths and weaknesses. For example, VCAT resolves disputes in a less formal and more cost-effective and timely manner compared to the courts. However, the formality of the court ensures both parties have an equal opportunity to present their case, and all court decisions are binding and legally enforceable. The courts can also determine all types of disputes and have more avenues of appeal.

Both VCAT and the courts resolve civil disputes using a variety of dispute resolution methods including mediation, conciliation, arbitration and judicial determination. It is important to understand which methods are preferred and predominantly used by each institution. In simple terms:

- VCAT generally prefers to resolve disputes in an informal manner using mediation and conciliation. However, disputes can be resolved using arbitration and, at VCAT hearings, judicial determination, although hearings at VCAT are less formal than a court hearing or trial in that there are no strict rules of evidence and procedure as required in court. VCAT also discourages the use of legal representation, whereas the strict rules of evidence and procedure that exist at court necessitate the use of lawyers.

- all criminal disputes and civil disputes that are resolved at a trial (in the county or supreme courts) are resolved by judicial determination, although all Victorian courts offer (and sometimes require) parties to a civil dispute to undertake mediation or conciliation in an attempt to have them resolve their dispute out of court. The courts may also resolve disputes using arbitration; for example, all civil disputes heard in the Magistrates' Court involving amounts under $10 000 are resolved at arbitration.

As both VCAT and the courts use all methods of dispute settlement to resolve civil disputes (albeit to differing degrees) parties must consider a range of factors when deciding whether to take their case to VCAT or a court, including the:

- type, seriousness and complexity of dispute
- remedy being sought (for example, the monetary amount of the claim if damages are being sought)
- potential costs involved (including fees and costs of legal representation)
- potential length of time it may take to resolve the dispute.

The strengths and weaknesses of dispute resolution methods used by both VCAT and courts, and the way they operate to resolve civil disputes are outlined in table 5.4.

DID YOU KNOW?

Approximately 80 per cent of criminal trials and 50 per cent of civil trials in the County Court are resolved within 12 months. Approximately 90 per cent of criminal cases and 80 per cent of civil cases in the Magistrates' Court are resolved within six months.

TABLE 5.4 A comparison of the strengths and weaknesses of the way courts and VCAT operate to resolve disputes

	VCAT		Courts	
Considerations	**Strengths**	**Weaknesses**	**Strengths**	**Weaknesses**
Attendance	Attendance at hearings is voluntary, which may increase party satisfaction and assist parties to maintain a positive ongoing relationship.	Hearings will not proceed if one party does not attend.	Compulsory attendance ensures parties attend court.	In civil cases, if parties do not attend the case may proceed in their absence.
Cost	Application fees are low (between $30 to $600) and legal representatives are discouraged, which reduces costs.		The high cost involved may discourage frivolous claims.	Very costly as parties must pay for the cost of preparing and presenting their case (including legal representatives). Court fees are also expensive.
Access to legal representation	Legal representation is generally discouraged, which lowers costs and may encourage parties to use VCAT to resolve their disputes.	Legal representations can be used (usually if both parties agree) and their use is increasing, which increases costs and may deter access. Legal representatives can ensure the case is prepared and presented in the best possible manner.	Parties who might lack confidence to present their case are able to engage legal representatives to ensure their case is prepared and presented in the best possible manner.	The strict rules of evidence and procedure necessitate the use of legal representatives, adding to costs and perhaps discouraging access.
Decision	If mediation and conciliation is unsuccessful or inappropriate, a dispute may be resolved using arbitration or judicial determination (at a hearing), which is legally binding.	Agreements made in mediation and conciliation are not legally binding so if one party chooses not to adhere to the agreement the process has been a waste of time.	All court decisions made at hearings or trials are legally binding.	In civil cases, parties may be less satisfied with an outcome that is imposed upon them compared to a decision reached through mediation and conciliation (although courts also encourage these methods).
Confidentiality	Mediation, conciliation and arbitration are confidential so the dispute and negotiations remain private.	Most hearings are open and decisions made public.	Court cases are generally open to the public, allowing for transparency.	Parties may feel their privacy is compromised.

(continued)

TABLE 5.4 *(continued)*

	VCAT		Courts	
Considerations	**Strengths**	**Weaknesses**	**Strengths**	**Weaknesses**
Formality	VCAT is informal, with a less intimidating environment and no strict rules of evidence and procedure, so parties may feel more comfortable and confident to present their evidence and discuss key issues in their own words.	There are no strict rules of evidence and procedure, which may allow a more confident or knowledgeable party to dominate proceedings.	Courts have formal strict rules of evidence and procedure to ensure each party has an equal opportunity to present their case.	A formal courtroom environment may be intimidating. The strict rules of evidence and procedure can be confusing for the parties and necessitate costly legal representatives.
Adversarial nature	Mediation and conciliation are less adversarial in their nature; parties discuss and compromise rather than aim to win.	Hearings are more adversarial in nature, with more formal procedures and parties aiming to win.	An adversarial approach is used, where two opposing parties present their case before an independent adjudicator in an attempt to win their case. In an attempt to win, parties should present the best evidence and the truth will emerge.	The emphasis on winning can increase animosity between the parties and create a negative attitude towards the legal system. Parties may deliberately omit (or inadvertently miss) vital evidence in an attempt to win their case.
Jury	Juries are not used at VCAT and experienced legal professionals make decisions at hearings.	Juries allow ordinary citizens to determine the outcome and reflect the current views and values of the community in their deliberations.	The parties in civil trials may request juries. Juries reflect the views and values of the community.	Jurors are not trained legal professionals and may not understand the complexity of cases. Parties incur the cost of a jury.
Suitability	VCAT is generally most suitable for minor civil disputes and disputes where parties will have an ongoing relationship. Also suitable for disputes that need a timely and cost-effective resolution.	VCAT is not suitable for criminal cases or civil cases where parties are not willing to discuss and compromise.	Courts are effective for large and most significant civil claims, and claims where the parties are unable to discuss the dispute between themselves.	Due to the high cost involved, courts are less suitable for minor civil claims.
Timeliness	Disputes at VCAT are resolved relatively quickly. Mediations often take one to three hours and matters can be finalised within one to three months from time of application.		In an attempt to increase timeliness, civil claims of less than $10 000 are sent to arbitration and pre-trial mediation is extensively used in the county and supreme courts.	Courts aim to resolve disputes quickly, but cases are often time-consuming and can experience delays, due to lengthy waiting lists, time required to prepare the case and cross-examination of witnesses.
Appeals	Appeals from VCAT are limited to save costs and ensure disputes are resolved with finality. The Supreme Court (Trial Division) hears appeals from VCAT hearings, on a point of law only.		Courts have more avenues of appeal (e.g. Supreme Court of Appeal can hear appeals against verdict, remedy and on a point of law from the County Court and Supreme Court (Trial Division).	Appeals can be costly, time consuming and extend the time it takes to resolve a dispute.

Culpable driving case: from County Court to High Court

In 2008 a Victorian County Court jury found Mr Trent King, aged 25 years, guilty of two counts of culpable driving causing death after he crashed his car into an oncoming truck, killing his two friends who were passengers in his car. It was found that Mr King had used illegal drugs prior to the crash. After the jury's verdict, Judge Carolyn Douglas sentenced Mr King to 7.5 years imprisonment, with a minimum non-parole period of 4.5 years to be served before he was to be eligible for release.

Following the original trial Mr King lodged an appeal against his conviction and sentence at the Victorian Supreme Court of Appeal. While the appeal against his conviction was dismissed, his sentence was reduced by one year. Interestingly, in September 2011, Mr King was granted leave (permission) to appeal against his conviction to the High Court of Australia on the grounds that Justice Douglas made an error in law in the original trial by misdirecting the jury when explaining key features of the crime dangerous driving causing death (which was put by the defence as a possible alternative conviction to culpable driving causing death). Under Victorian sentencing law, dangerous driving causing death has a maximum penalty of 10 years imprisonment per count compared to culpable driving, which has a 20-year maximum term of imprisonment.

A driver convicted of culpable driving in the Victorian County Court appealed his conviction to the Victorian Supreme Court of Appeal and then the High Court of Australia.

study on

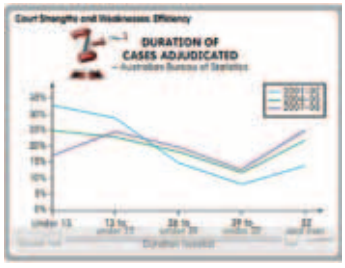
Unit:	4
AOS:	1
Topic:	1
Concept:	6

See more PowerPoint on court strengths and weaknesses: costs

study on

Unit:	4
AOS:	1
Topic:	1
Concept:	7

See more PowerPoint on court strengths and weaknesses: efficiencies



TEST your understanding

1. Explain three strengths associated with having a civil dispute settled at court by way of judicial determination, other than that the decision is legally binding.
2. Explain two benefits to be gained from having a dispute settled through a VCAT list compared with taking the matter to a court.
3. Describe two ways VCAT is similar to courts when it comes to resolving civil disputes.

APPLY your understanding

4. Imagine you are renting an apartment with two friends and despite several requests the landlord refuses to replace a damaged fence (valued at $3000) and remove a tree from the garden, which is in severe danger of falling over the driveway (estimated cost of removal $1500). Explain what action you would take to resolve your dispute. In your answer:
   (a) identify whether you would attend court or VCAT (describe the jurisdiction of the particular court or list you would attend)
   (b) explain how the dispute might be resolved at your chosen court or list
   (c) evaluate the strengths associated with attending your chosen court or list.
5. 'While VCAT is an effective alternative to courts with many advantages, when it comes to resolving civil disputes it has some weaknesses.' Discuss this statement, providing a comparison with courts, and the extent to which VCAT and courts effectively resolve civil disputes.

Assessment task — Outcome 1

On completion of this unit the student should be able to describe and evaluate the effectiveness of institutions and methods for the determination of criminal cases and the resolution of civil disputes.

Please note: outcome 1 contributes 40 marks out of a total of 100 marks allocated to school-assessed coursework for unit 4.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- describe the jurisdiction of specific courts within the Victorian court hierarchy
- compare and evaluate the strengths and weaknesses of dispute resolution methods and the way courts and VCAT operate to resolve disputes.

Case studies

Read the case studies below and answer the questions that follow.

Case study one: brave student survives senseless attack

In June 2008, Robert Farmer (aged 39 years) was sentenced to 24 years imprisonment (with a minimum non-parole period of 20 years) after being found guilty of the attempted murder of Lauren Huxley (aged 21 years) in 2005 (*R v. Farmer* [2008] NSWSC 581). In an unprovoked attack, Farmer viciously beat Ms Huxley, doused her in petrol and left her to die. Miraculously, after spending 23 days in intensive care, surgeons were able to reconstruct her face and skull and save her life.

Case study two: women-only swimming centres cause controversy

In 2011, the Anti-discrimination List of VCAT granted the Thomastown Recreation and Aquatic Centre (City of Whittlesea) an exemption from anti-discrimination laws allowing them, amongst other things, to provide women-only swimming sessions in the warm water pool and fitness sessions and to advertise these services (The City of Whittlesea-Thomastown Recreation and Aquatic Centre (Anti-discrimination Exemption) [2011] VCAT 250). In making the order, the VCAT member stated they were satisfied that the Recreation and Aquatic Centre had shown that the sessions would be of great benefit to those in the community who currently did not use the facility due to cultural or religious reasons. The member was also satisfied that existing swimmers, including those with special needs and the general public, would not be disadvantaged by the sessions.

Questions

1 Read case study one, then answer the following questions.

- **a** Identify the court that would have heard Mr Farmer's committal hearing and bail application, and explain the purpose of both procedures.
- **b** State and explain the jurisdiction of the court that would have heard Mr Farmer's trial.
- **c** Who would have been responsible for taking this case to court?
- **d** Who would have determined both the verdict and sentence in the trial?
- **e** Explain the avenue, and possible grounds, of appeal available from this trial. **(5 + 3 + 1 + 2 + 1 = 12 marks)**

2 Read case study two, then answer the following questions.
- **a** State and explain the jurisdiction of the list involved in this case.
- **b** Identify and explain the jurisdiction of two other VCAT lists.
- **c** Explain the decision imposed in this case and comment on whether or not you agree with it.
- **d** Explain what action can be taken, if any, by a party who may be dissatisfied with the decision. **(2 + 2 + 2 + 1 = 7 marks)**

3 **a** Identify and explain the dispute resolution method that was used in the case studies and evaluate two strengths associated with having a dispute resolved using this method.
- **b** Explain one other dispute resolution method that may be used with VCAT or the courts and explain two advantages of using this method of dispute settlement. **(5 + 3 = 8 marks)**

4 Using the **VCAT weblink** in your eBookPLUS, select one recent significant VCAT decision and complete the following tasks.

- **a** Identify the parties to the case and the list in which the case was heard.
- **b** Explain the facts of, and decision imposed, in the case and comment on whether or not you agree with the decision. **(1 + 4 = 5 marks)**

5 Evaluate four strengths associated with having a dispute resolved by VCAT compared to the courts. **(8 marks)**

(Total 40 marks)

Tips for responding to the case study

Use this checklist to make sure you write the best responses to the question that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You should at least define summary and indictable offence, committal hearings, bail and two dispute resolution methods.		
Discuss, interpret and analyse legal information.		
Questions 1 and 2 require that you refer specifically to the case studies. You must determine which courts and lists were involved and who determined the outcomes. Questions 2(c) and 4(b) require you to discuss the decision imposed in case study two and another VCAT case.		
Describe the jurisdiction of specific courts within the Victorian court hierarchy.		
Questions 1 and 2 require you to outline the jurisdiction of various courts and lists. Ensure you include all relevant jurisdictions (for example, civil, criminal, original and appellate) as requested.		
Compare and evaluate the strengths and weaknesses of dispute resolution methods, and the way courts and VCAT operate to resolve disputes.		
Questions 3 and 5 require you to explain the strengths and weaknesses of various methods of dispute resolution, and to evaluate the way VCAT operates compared to a court.		
Ensure your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- Reasons for a court hierarchy

- **The court hierarchy** is the ranking of courts from lowest to highest in order of importance and seriousness or complexity of the cases heard.
- **The court hierarchy allows for:**
  - the doctrine of precedent to operate
  - a system of appeals to operate
  - the specialisation of courts and court personnel
  - administrative convenience.

- The original and appellate jurisdictions of the Victorian Magistrates' Court, County Court and Supreme (Trial Division and Court of Appeal) Courts

- **Original jurisdiction of Magistrates' Court:**
  - civil — hears claims up to $100 000
  - criminal
    - summary offences
    - indictable offences heard summarily
    - committal hearings
    - bail and warrant applications.
- **Specialist courts and lists** deal with matters where the individuals involved may have particular circumstances or issues, including suffering cultural or social disadvantage and/or mental health or substance abuse issues.
- **Specialist jurisdictions include:**
  - Koori Court
  - Drug Court
  - Family Violence Court Division
  - Neighbourhood Justice Centre
  - Sexual Offences List
  - Assessment and Referral Court (ARC) List.
- **Original jurisdiction of County Court:**
  - civil — hears cases involving claims for unlimited amounts
  - criminal — all indictable offences except for treason, murder and murder related offences.
- **Appellate jurisdiction of County Court** hears criminal appeals from Magistrates' Court against conviction and sentence
- **Specialised jurisdiction of the County Court includes:**
  - County Koori Court
  - Sex Offences List.
- **Original jurisdiction of the Supreme Court Trial Division:**
  - civil — hears cases involving claims for unlimited amounts
  - criminal — hears all indictable offences, but mainly major criminal offences including all treason, murder and attempted murder cases.
- **Appellate jurisdiction of the Supreme Court Trial Division** hears all criminal and civil appeals from Magistrates' Court (and VCAT) on point of law.
- **Appellate jurisdiction of the Supreme Court of Appeal:**
  - hears all civil and criminal appeals (against verdict, sentence [criminal] or remedy [civil] and point of law) from County Court and Supreme Court (Trial Division)
  - hears appeals from VCAT (if original hearing heard by president or vice-president).

- **VCAT divisions**
  - VCAT consists of the civil, human rights and administrative divisions, which contain specialised lists that use a range of different methods (mediation, conciliation, arbitration and judicial determination) to resolve a variety of civil disputes between individuals and individuals and the government.

- **The main role of VCAT is to resolve disputes in:**
  - an informal (parties not bound by strict rules of evidence and procedure)
  - cost-effective (fees are low and legal representation is discouraged)
  - timely manner.

- **Methods used to resolve disputes**
  - Mediation
  - Conciliation
  - Arbitration
  - Judicial determination

- **Strengths and weaknesses of mediation, conciliation and arbitration**
  - Informal because strict rules of evidence and procedure are not used; however, a more confident party may dominate proceedings.
  - Cost effective because of low fees and use of lawyers is discouraged; however, without lawyers the case may not be prepared and presented in the best possible manner.
  - Increased satisfaction because parties aim to resolve the dispute between themselves with third party assistance (although in arbitration, a decision can be imposed); however, decisions are not legally binding (other than in arbitration).
  - Non-confrontational which may assist ongoing relationships; however, it is voluntary.

- **Strengths and weaknesses of judicial determination**
  - Strict rules of evidence and procedure ensure that both parties have an equal opportunity to present their case; however, it is complex, alienating and creates need for lawyers, which is costly.
  - Use of lawyers ensures cases are prepared and presented in the best possible manner; however, it is costly and adversarial nature of proceedings may damage the party's ongoing relationship.
  - Decision made is legally binding; however, parties may be less satisfied as the decision is imposed.

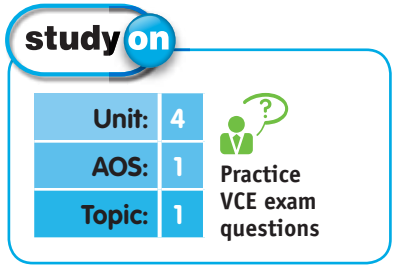
- **Strengths and weaknesses of VCAT compared to courts**
  - Less expensive and more timely (encourages access); however, increasing use of legal representative is adding expense and delays.
  - Less formality (in procedures and environment); however, may allow a confident party to dominate.
  - Increased satisfaction for parties if mediation and conciliation is used (which is preferred); however, decision is not binding.
  - Confidential and voluntary; however, limited appeals — from hearings only on point of law.

- **Strengths and weaknesses of courts compared to VCAT**
  - Formality ensures parties have equal opportunity to present their cases; however, it necessitates costly lawyers and increases delays.
  - Use of lawyers ensures cases are prepared and presented in the best possible manner; however, expensive and time consuming.
  - Legally binding decision; however, parties may be less satisfied with imposed decision.
  - Optional use of jury in trials; however, parties bear cost.

- The role of VCAT

- Dispute resolution methods used by courts and VCAT

- Evaluation (strengths and weaknesses) of dispute resolution methods used by courts and VCAT



- Evaluate (strengths and weaknesses) of the way courts and VCAT operate to resolve disputes.

Examination technique tip

Good examination technique involves understanding what the question is asking. For example, if you are asked to compare it means you must point out the similarities and differences. Make sure you read the section on interpreting examination questions in chapter 12 in the ebook.

eBookplus

Digital doc:

Access a list of key terms for this chapter.

Searchlight ID: doc-10209

eBookplus

Digital doc:

Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10210

– Greater avenues of appeal; however, costly.
– Mediation and conciliation encouraged pre-trial.
– Compulsory, open and transparent.

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

'Mediation is the most effective way to resolve civil disputes.'

Critically evaluate mediation as an effective way of resolving disputes and indicate whether or not you agree with the writer's statement. **(6 marks)**

Question 2

Tim, aged 19 years, unlawfully entered a house and stole a laptop. He has been charged with breaking and entering. Tim has pleaded not guilty and is having the case heard in the Magistrates' Court. Tim is told that he could have this case heard in another court if he wished; and if convicted in the Magistrates' Court, will have more than one possible appeal available to him.

Do you agree with the advice given to Tim? Give reasons for your answer. **(3 marks)**

Question 3

Outline the jurisdiction of the County Court and explain two main benefits associated with having a case resolved in this court. **(2 + 2 = 4 marks)**

Question 4

Explain two reasons why the courts are arranged in a hierarchy and two reasons why VCAT is an important part of our legal system. **(2 + 2 = 4 marks)**

Question 5

Distinguish between two types of dispute resolution methods other than judicial determination. **(4 marks)**

Question 6

Evaluate three strengths associated with resolving a dispute at VCAT compared to resolving the dispute at court. **(4 marks)**

(25 marks)

CHAPTER 6

The elements of an effective legal system

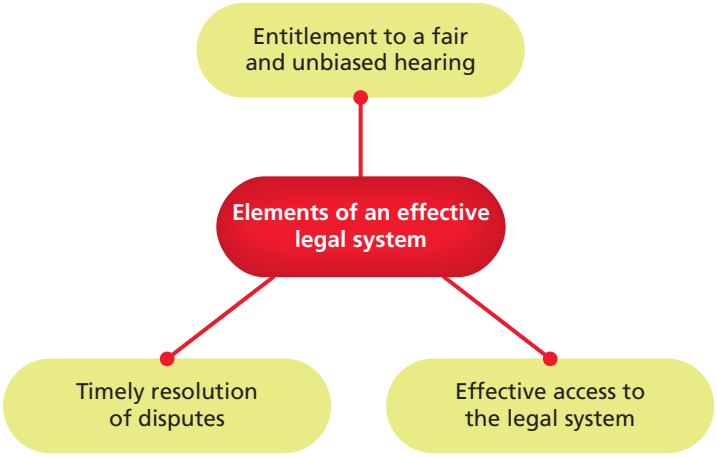
WHY IT IS IMPORTANT

What would you think of a legal system where the accused was sent to jail without even a hearing? How would you view a legal system that resulted in only the wealthy being able to access appropriate legal advice to solve their disputes? Finally, how would you assess a legal system that couldn't resolve disputes within a reasonable time frame? The likely answer to these questions is that the legal system is ineffective. An effective legal system should provide mechanisms, processes and procedures that ensure individuals receive a fair and unbiased hearing. Individuals must also be able to access the legal system to gain legal advice and assistance with the resolution of their disputes within a reasonable time frame.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Can you demonstrate these skills?

The *Jetcorp Case*

In 1995, one of the longest Victorian criminal trials took place when co-defendants, Wilson and Grimwade, stood trial for fraud after it was alleged they deceitfully encouraged money to be invested. The trial, which became known as the *Jetcorp Case* (because it involved a company called Jet Corporation of Australia), lasted for approximately two and a half years and cost the prosecution an estimated $3 million (*R v. Wilson & Grimwade* (1995) 1 VR 163).

The *Jetcorp Case* involved two trials because the first was abandoned after seven and a half months (just prior to its conclusion), after the wife of one of the defendants died, and a new trial was granted. The second trial, which lasted 22 months, experienced many delays due to a variety of reasons including the trial judge and one of the jurors becoming ill and another juror falling pregnant (which caused the trial to be adjourned for a period, so she could give birth, and then resumed once she could return to jury duty). The extreme complexity of the case, which involved a huge volume of documents being presented to the court and complex legal argument, and the conduct of the legal representatives also increased the length of the trial. The legal representatives for one defendant insisted on challenging all evidence, despite not having a strong defence, while the counsel for the other defendant failed to admit to any of the charges, meaning all matters had to be raised and dealt with in court.

Interestingly there was a six and a half month gap between the close of evidence and the jury returning to consider, and ultimately give, a guilty verdict. Not surprisingly, the defendants lodged a successful appeal with the Supreme Court of Appeal ruling the original trial was not conducted in a manner that allowed the jury to give a verdict based on properly considered evidence.

6.1 The adversary system of trial aims to achieve a fair and unbiased hearing

KEY CONCEPT For a legal system to operate effectively it must provide processes and procedures to help ensure that all parties involved in a legal dispute receive a fair and unbiased hearing. This means that all parties must be given an equal opportunity to present their case and be heard by an impartial adjudicator.

The **adversary system** of trial refers to a system where two opposing parties prepare and present their case, in accordance with strict rules of evidence and procedure, before an independent and impartial adjudicator (judge or magistrate).

Evidence refers to statements, testimonies (evidence given under oath or affirmation), objects (for example, a weapon or photos) or records that assist in establishing the facts of the case.

An effective legal system must provide mechanisms or systems to resolve legal disputes. Our legal system achieves this by providing courts, tribunals, police and legal aid bodies to help resolve legal disputes. Each of these bodies has various processes and procedures in place to ensure that individuals who come before them are treated equally and given a fair and unbiased hearing. In Australia, our legal system is based on the **adversary system** of trial to help ensure individuals are given a fair and impartial hearing and trial. Let's look at the features of the adversary system of trial that helps achieve a fair and unbiased hearing.

The role of the judge

Under the adversary system, all trials are presided over by an independent and impartial adjudicator (judge or magistrate). The main role of the adjudicator is to make sure that both parties are treated consistently and have an equal opportunity to present their case to the court. This is achieved by ensuring each party adheres to the strict rules of evidence and procedure (explained below) when presenting their case. The judge remains independent throughout the entire trial and does not assist either party with the preparation and presentation of their case. This ensures that neither party has an unfair advantage over the other and should lead to greater acceptance of the judge's decision by the parties to the dispute. It can mean, however, that the judge's independence may at times detract from the achievement of a fair hearing because the judge cannot assist a party who may be disadvantaged by having inadequate or no legal representation, or who has unintentionally omitted vital evidence. Similarly, it can be argued that the judge's expertise and experience is wasted under the adversary system of trial because the judge is not permitted to call or question witnesses to establish the facts of the case, or be involved in the determination of the verdict when a jury is present.

A judge acts like an umpire in a tennis match, ensuring both parties follow the rules when presenting their case to the court.

Strict rules of evidence and procedure

Under the adversary system, strict rules of evidence and procedure govern the trial and aim to ensure the parties to a trial receive a fair and unbiased hearing. Parties must follow these rules when they present their **evidence** to the court. For example, the *strict rules of evidence* insist that parties present only relevant, reliable and legally obtained evidence to the court. This means evidence that has not been obtained in accordance with the law is generally inadmissible; for example, police must ensure all their evidence is gathered using correct and lawful procedures (including obtaining necessary search and arrest warrants, and informing alleged offenders of their individual rights prior to questioning) or risk their evidence being ruled inadmissible by the judge. Similarly, in a criminal trial, previous convictions relating to the past criminal record of the accused are generally inadmissible in court as they might prejudice or bias the jury (when present).

Strict procedural rules exist to govern the order and manner in which a party must present their case to the court (including rules relating to the examination or questioning of witnesses) to ensure the trial is fair. The existence of strict rules of evidence and procedure throughout the trial process helps ensure parties receive a fair and unbiased hearing by having parties treated consistently and giving each an equal opportunity to present their case. As we examine in chapter 7, however, the existence of strict and complex rules can at times detract from the achievement of a fair and unbiased hearing. For example, the existence of strict rules necessitates the use of legal representatives, which can disadvantage those parties unable to afford high quality legal counsel. Similarly, the heavy reliance on verbal evidence during the trial can impede a fair trial in cases where witnesses give the wrong impression to the judge or jury due to anxiety, low confidence, or poor English and comprehension skills.

The role of the parties

The adversary system of trial aims to ensure individuals receive a fair hearing or trial by having the parties responsible for, and in control of, the preparation and presentation of their own case. For example, each party is responsible for investigating the law, gathering evidence that is relevant to their case and determining how best to present their evidence to the court. By being directly in control of the preparation and presentation of their case, each party should feel empowered to seek the best possible evidence and strongest arguments to win their case and feel a sense of satisfaction with the trial process, although parties may deliberately omit, or inadvertently miss, vital evidence that may impede the discovery of the truth and lead to an incorrect verdict.

The need for legal representation

To help ensure fairness and impartiality, parties to a case conducted under the adversary system of trial are entitled to engage legal representatives (lawyers) to provide expert legal advice and ensure their case is prepared and presented in the best possible manner. The existence of strict rules of evidence and procedure and the formality of the trial process necessitates the use of legal representatives. Similarly, for the adversary system of trial to work effectively both parties need to be equally represented in court and have the same opportunity to present their case. However, as we examine in chapters 7 and 11, legal representation is generally expensive and not all parties can afford it.

DID YOU KNOW?

Legal practitioners (solicitors) can charge approximately $1700 to prepare and present a bail application in the Magistrates' Court.

Many legal representatives provide pro-bono or free legal assistance and representation to assist parties who cannot afford a lawyer.

Self-representation is difficult

In March 2009, Mr Shane McWhinney sued Melbourne Health (*McWhinney v. Melbourne Health* [2011] VSCA 22). He claimed three Melbourne Health employees acted negligently and caused him significant loss when, on admission to the hospital, they wrongfully classified him as an involuntary patient (under the *Mental Health Act* 1986) and, as a consequence, gave him medical treatment for an alleged psychiatric condition without his consent.

At the start of the trial, County Court Judge Robinson explained to Mr McWhinney, who chose to be self-represented, the difficulties associated with having no legal representation and stressed that he needed to provide relevant and admissible evidence to support his allegations. As Mr McWhinney provided no witnesses or relevant medical evidence, Judge Robinson dismissed the case.

In February 2011, however, with the assistance of *pro-bono* (free) legal representation, the Supreme Court of Appeal upheld an appeal lodged on behalf of Mr McWhinney and ordered a retrial with a different trial judge. The Court of Appeal held that, despite Judge Robinson's best efforts to ensure a fair trial by questioning Mr McWhinney about the contents of a hospital file, the judge had inadvertently introduced evidence that Mr McWhinney did not intend to submit. By attempting to assist Mr McWhinney, Judge Robinson may have disadvantaged Mr McWhinney and so a retrial was ordered.

This case illustrates the importance of judges remaining independent and not assisting parties with the preparation and presentation of their case, as well as the potential difficulties associated with parties being self-represented.

Burden of proof and standard of proof

The legal concepts of the burden and standard of proof apply in all criminal and civil trials, and help ensure trials conducted under the adversary system are fair and unbiased. The *burden of proof* refers to the party who has the responsibility of proving the case, which rests with the party who initiates the proceedings. In a criminal case the burden of proof rests with the prosecution and in a civil case it rests with the plaintiff. This ensures fairness, as the party making the allegations must provide sufficient evidence to prove their case. In a criminal trial, having the prosecution responsible for proving the guilt of the accused also upholds the right of the accused to a **presumption of innocence**; that is, to be assumed to be innocent until proven guilty by the prosecution.

The **presumption of innocence** is a fundamental right that exists within the criminal justice system, that an accused is presumed and treated as innocent until proven guilty by the prosecution.

The *standard of proof* refers to the level (or amount) of evidence required to substantiate or prove a case. In a criminal case, the prosecution must prove the accused guilty *beyond reasonable doubt*. In a civil case the plaintiff must prove the defendant most likely breached their rights, on the *balance of probabilities*. In a criminal trial, the high standard of proof required to find an accused guilty helps ensure certainty in the verdict and lessens the chance of an innocent person being convicted. Given the more serious nature of criminal offences, it is just and fair that the standard of proof required is higher than in civil cases.

TEST your understanding

1 Explain how the existence of a judge or magistrate helps ensure individuals receive a fair and unbiased hearing or trial.
2 Explain one way the adversary system of trial aims to ensure that individuals receive a fair and unbiased hearing or trial, other than by providing an independent and impartial adjudicator.
3 Explain two rules of evidence that help ensure criminal trials conducted in Australia are fair and unbiased.

APPLY your understanding

Read the case study 'Self-representation is difficult' on pages 233–4 and answer the following questions.

4 (a) Explain why parties should engage legal representation when involved in a court action.
(b) Suggest two specific difficulties faced by Mr McWhinney as a result of being self-represented during his trial.
5 (a) Explain the role of the judge under the adversary system of trial and outline one specific problem the judge faced in Mr McWhinney's trial.
(b) Discuss whether reducing the independence of judges by allowing them to call and question witnesses (to help establish the facts of a case) would improve the effectiveness of our trial system.
6 Suggest and discuss two ways the strict rules of evidence and procedure under the adversary system of trial could be adapted to assist in the achievement of a fair trial.

6.2 The jury system and court processes and procedures aim to achieve a fair and unbiased hearing

KEY CONCEPT Our legal system contains a range of processes and procedures that aim to ensure individuals receive a fair and unbiased hearing, including providing the right to silence and the right to appeal, allowing for the use of juries, and ensuring fair and consistent sentencing.

In addition to the adoption of the adversary system of trial, the Victorian legal system contains many other processes and procedures, at both the pre-trial and trial stages of a dispute, that aim to ensure individuals receive a fair and unbiased hearing, including the:

- existence of the right to silence and the right to bail in a criminal trial
- use of the jury system
- provision of an appeals process
- existence of processes and procedures to ensure fair and consistent sentencing
- provision of an open court system.

Justice is said to be blind — that is, all people must be treated equally before the courts.

Right to silence

The right to silence, which refers to the right of an accused to remain silent and not be compelled to give evidence during criminal proceedings, aims to ensure defendants receive a fair hearing in criminal cases. Under the right to silence, an accused can choose to remain silent throughout the entire criminal process; for example, an accused does not have to answer questions from police during the pre-trial process (other than giving his or her name and address in most circumstances), and cannot be forced to give evidence and be subjected to cross-examination during his or her trial. Furthermore, if an accused does remain silent during his or her trial, the judge must inform the jury (when present) not to interpret this silence as an indication of guilt. The existence of the right to silence upholds the individual's right to a presumption of innocence and aims to ensure a fair hearing by removing the likelihood of an accused giving self-incriminating evidence.

Those who oppose defendants having the right to silence, however, argue that it can hinder police investigations because suspects may refuse to answer questions. The right to silence can also be used by defence lawyers as a tactic so their clients can avoid cross-examination. Yet a basic premise of our criminal justice system is that the prosecution holds the burden or responsibility of presenting sufficient evidence to prove the guilt of the accused. The accused is not required to give evidence to potentially assist the prosecution's case. Furthermore there may be genuine reasons why some defendants may not wish to be cross-examined during their trial, including a fear that their evidence may lack credibility due to anxiety and nervousness and an inability to understand questions posed by the prosecution. Defendants from culturally and linguistically diverse (CALD) communities (including immigrants and refugees) and indigenous defendants also often suffer language barriers that can contribute to a lack of awareness and understanding of our legal processes and procedures, and detract from their ability to communicate effectively in court.

Right to bail

Individuals who have been charged with an indictable criminal offence have the legal right to apply to be granted *bail*; that is, to be released from police custody until their next court date (such as their committal hearing or trial). This release may be granted with or without conditions (such as reporting to the police or surrendering a passport). It may also be granted with other requirements (such as

the provision of a surety or a deposit of money which is forfeited if the accused fails to appear in court). These conditions and/or monetary requirements are set to encourage the accused to turn up to court at a later specified date. If granted bail the accused signs a written promise (undertaking) to appear in court.

Generally, to uphold the presumption of innocence and treat an accused as innocent until proven guilty at a trial, an accused will be granted bail unless the court has reasonable grounds for its denial. Being granted bail allows the accused to remain in society with their family and friends, and to prepare their defence. When determining whether or not to grant or deny bail the court will consider a range of factors, including the type and amount of crimes with which the accused is charged and the likelihood of the accused failing to attend court, committing further offences while on bail, interfering with witnesses, or endangering the safety and welfare of members of the public. An accused who is denied bail is held or remanded in custody.

Trial by jury

A **jury** is a group of independent and impartial individuals, randomly selected from the community, who are responsible for determining the verdict in a criminal trial, and the verdict and damages in a civil trial when requested.

A **unanimous verdict** refers to the requirement in a criminal trial that all 12 jurors must agree the accused is either guilty or not guilty.

A **majority verdict** refers to a situation in a criminal trial where an accused may be convicted or acquitted with 11 out of 12 jurors supporting the verdict. In a civil trial a majority verdict of five out of six jurors may be accepted.

The right of an individual to a trial by **jury** is another way our legal system aims to provide individuals with a fair and unbiased hearing. The use of a jury (a group of independent and impartial people who represent a cross-section of the community) to determine the verdict in a trial provides the opportunity for *trial by peers* and allows the views and values of the community to be reflected in the application of the law and determination of a verdict.

In the Victorian legal system, a jury of 12 independent and impartial people, rather than a single judge, determines the verdict, in all indictable (serious) criminal trials. Generally, a jury must reach a **unanimous verdict**, meaning all jurors must agree to a guilty or not guilty verdict (after six hours a **majority verdict** may be accepted, however, other than in serious cases including murder, trafficking large quantities of drugs and various Commonwealth offences). Having 12 jurors who reflect a cross-section of society determine a unanimous verdict, rather than one judge, can increase the likelihood of a correct verdict.

In Victoria, parties in a civil trial also have the option of requesting a jury of six to determine the verdict (and level of damages if appropriate) in all civil cases heard in the county or supreme courts.

Jurors are randomly selected from the community to determine the verdict in all criminal trials. Parties to a civil trial may request a jury to determine the verdict and damages.

While the use of the jury system aims to assist the achievement of a fair and unbiased hearing, there are weaknesses associated with the use of a jury. For example, the jury may not reflect a true cross-section of the community because certain groups of people are not able to serve on a jury (including those who are ineligible, such as judges, lawyers and people with inadequate English skills). Legal representatives may challenge potential jurors, influencing the composition of the jury. Opponents of the jury system also argue juries may impede the achievement of an unbiased hearing if members of the jury are influenced by their own personal prejudices or opinions expressed in the media. Similarly, juries contribute to a lack of transparency in the legal system because jurors are not required to give reasons for their verdict and their deliberations are made in private. The strengths and weaknesses of the jury are examined in depth in chapter 10.

Right to appeal

The existence of a system of appeals is a key feature of our legal system that helps ensure parties receive a fair and unbiased hearing. Within the Victorian court system, parties who are dissatisfied with the outcome in their dispute may have the opportunity to lodge an appeal or have their case reviewed by a superior court. For example, a defendant has a right to appeal against the verdict and the sentence (or remedy) imposed by the court, provided reasonable grounds for the appeal exist. Both parties may appeal if they believe the judge or magistrate has made an error in law that has led to an unfair trial. In a criminal case the prosecution may also appeal against the leniency of a sentence. While the right to appeal is vital in ensuring our legal system offers parties a fair hearing, due to complex processes and court delays it can take many years for parties to exhaust all avenues of appeal, during which time parties can suffer great hardship. For example, defendants who are held on remand are denied their freedom while awaiting appeal and plaintiffs may suffer financial hardship while awaiting damages.

Fair and consistent sentencing

The imposition of just and consistent sentences on criminal offenders is essential to provide individuals with a fair and unbiased hearing. While recognising that the circumstances of each case may differ, there is a need to ensure that offenders who commit similar crimes receive similar sanctions. In Australia, state legislation prescribes maximum sentences for crimes and the judge (or magistrate) has the responsibility of determining the sentence to be imposed after considering the purposes of a sanction and various other factors, including the severity of the crime, the degree or lack of remorse on behalf of the offender, a guilty plea and the offender's previous convictions. Consistent sentencing is vital to maintain confidence in the legal system; however, it can be difficult, as sentencing judges must impose a sanction that is fair for the offender, the victim and society.

Four years jail as one punch kills

In August 2011, RPJ (a male aged 17 years, who cannot be named to protect his identity) was sentenced to six years imprisonment, with a minimum four years non-parole period to be served before being eligible for release, after pleading guilty to recklessly causing injury to Zane McMillan in October 2010 and the manslaughter of Cameron Lowe, aged 17 years, one week later (*R v. R P J* [2011] VSC 363).

DID YOU KNOW?

In 2011, statistics released by the Sentencing Advisory Council indicated that approximately 60 per cent of Victorians who participated in the survey (of 1200 people) had confidence in the general effectiveness of the courts and legal system.

One punch can cause death. Cameron Lowe, aged 17, tragically died after being punched in an unprovoked attack. Maximum sentences for crimes are prescribed in legislation, but circumstances in each individual case must be taken into consideration. When it comes to sentencing a 'one size fits all' approach cannot be taken, but some consistency in sentencing must be maintained to ensure fairness.

In the first incident, RPJ punched Mr McMillan in the face and rendered him unconscious in an unprovoked attack at a Halloween party on 30 October 2010 because Mr McMillan 'had red hair'. One week later, in another unprovoked and senseless attack, RPJ punched Mr Lowe in the face and left him unconscious on the road. After the incident, Mr Lowe regained consciousness and was taken home, but the next day could not be woken and was rushed to the Alfred Hospital where he died. Prior to attacking Mr Lowe, RPJ had consumed 15 vodka energy drinks within three hours.

In determining a fair sentence to be imposed upon RPJ, Supreme Court Justice Beech considered many factors, including his early guilty plea, lack of prior convictions, previous good character, level of remorse and positive prospects for rehabilitation. Justice Beech also, however, had to impose a sentence to give satisfaction to Mr Lowe's grieving family and friends and society that justice had been achieved. In sentencing, Justice Beech remarked to RPJ that, 'Nothing I say, and no sentence I impose, can or will assuage the family's feelings of grief, anger and loss at what you have done. Further, there is simply no equating the loss of a human life with any period of years of imprisonment that I might impose on you.'

This case demonstrates the difficultly judges sometimes face when trying to determine sentences that will satisfy conflicting parties. In this case the judge was required to impose a sentence that was fair to the offender (and offered a chance for his rehabilitation) while satisfying the need of the victim's family, and society, to see the offender severely punished for his actions.

DID YOU KNOW?

Having an open and transparent court system has been viewed as an essential element of a fair legal system for centuries. In the 1800s philosopher and social reformer Jeremy Bentham was quoted as saying, 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'

Source: The Works of Jeremy Bentham, published under the superintendence of ... John Bowring, 11 vols., (Edinburgh: Tait, 1843) vol. iv, *p. 316.*

Right to an open hearing

Generally, all criminal and civil trials are open to the public and the media to ensure our court system is transparent and accountable. There are, however, some circumstances where the safety of witnesses or the public may be at risk, or the distress of a witness would be too great to have the court open to the public. In these cases a closed hearing will take place.

TEST your understanding

1 Explain how the right to silence and the right to bail help promote the achievement of a fair and unbiased hearing.
2 Explain three grounds for appeal in a criminal trial.
3 Explain two ways the use of a jury in a criminal trial promotes a fair and unbiased trial. Suggest two weaknesses associated with having a jury determine the verdict in a criminal trial.

APPLY your understanding

4 Read the case study 'Four years jail as one punch kills' on pages 237–8 and answer the following questions.
   (a) Suggest why the offender (RPJ) cannot be named in reference to this case. Discuss whether you believe this is fair for the accused, the victim and society.
   (b) With what was RPJ charged and what sentence did he receive?
   (c) State at least four factors Justice Beech considered when determining RPJ's sentence.
   (d) Explain the difficulties facing Justice Beech when determining a fair and appropriate sentence for RPJ.
   (e) Do you believe the sentence imposed in this case achieved a fair outcome for RPJ, Mr Lowe's family and friends, and society? Give reasons for your view.
5 Refer to Jeremy Bentham's quote in the 'Did you know?' above. Discuss the idea that 'publicity is the soul of justice'.

Sentencing reforms could improve justice for victims

In 2011, the newly elected Victorian Liberal government began reviewing sentencing laws in preparation to fulfil their election commitment to increase the effectiveness of the criminal sentencing processes by introducing more severe sentences to punish and deter criminals who commit serious crimes. The government claimed that leniency in sentencing was causing victims of crime, and society in general, to lose confidence in the criminal justice system.

In response to these claims, and while emphasising the professional and dedicated manner in which judges approached the difficult task of sentencing, Supreme Court Chief Justice Marilyn Warren suggested that sentencing reforms could be introduced to increase the involvement of victims and their families in the sentencing process. But rather than simply increasing sentences, Chief Justice Warren proposed that victims or their families (in situations where the victim had died) could participate in a post-trial debriefing session, where the judge could explain the reasoning behind the sentence imposed on the offender in their case. However, one difficulty involved in conducting such a meeting would be that it could cause injustice to the offender if they did not wish to participate.

Chief Justice Warren also proposed that the possibility of juries being involved in the sentencing process by recommending suitable sentences should be examined, although she emphasised the ultimate responsibility for determining sentences must remain with the judge. One benefit of allowing juries to recommend appropriate sentences is that it would allow community views and values to be reflected in sentencing; however, jurors are not experienced in sentencing and might be overly influenced by emotions. To ensure jurors' recommendations were fair, they would also have to be instructed on the purposes of sentencing and made aware of the variety of factors considered when sentencing, including the background of the offender and any previous convictions. This would add to the complexity of their task, increase the time it takes to resolve a criminal action and, given most offenders plead guilty and do not have a jury trial, could increase inconsistencies in sentencing.

Perceived leniency in sentencing is an ongoing problem for the criminal justice system as victims and their families can feel their rights and grief are not adequately reflected in sentencing imposed by judges, particularly for serious and violent crimes. The media can also compound this problem by reporting legal cases and sentencing issues in a selective manner and perhaps negatively shape public perceptions. For example, by reporting limited facts involved in a case and stating the penalty imposed, without explaining the range of factors considered by the judge when sentencing, the public can be misinformed. Similarly, in an effort to publish interesting cases, the media may focus on reporting cases with controversial outcomes and ignore the vast majority of uncontroversial sentences delivered each year.

In June 2011, many condemned the three year suspended sentence imposed on Mrs Manusiu Johnston, aged 72, who pleaded guilty to three counts of dangerous driving causing death after she killed three people when she had a lapse in concentration and collided with an oncoming vehicle. In sentencing, County Court Justice Taft acknowledged that some in the community would feel the consequences of Mrs Johnston's driving were so severe that she deserved to be imprisoned while others would view the offence as a tragic accident. The case highlights some of the difficulties in sentencing.

In 2011, statistics released by the Sentencing Advisory Council indicated that approximately 64 per cent of Victorians who participated in a survey of 1200 people did not feel that judges reflected community views when sentencing and 46 per cent did not feel judges were the best people to determine the appropriate sentences in each case. More than half those surveyed, however, did have confidence that judges imposed appropriate sentences most of the time.

eBook*plus*

Use the **sentencing reports** weblink in your eBookPLUS to access case information found at the Austlii website. You will find an outline the facts of the case, the sentence imposed and reasons for the sentence.

Sometimes judges are accused of being out of step with the community, almost as if they operate in a bubble, removed from the everyday world. Many judges have been criticised when it comes to sentencing, but recent research has found that the more people know about a case the more likely they are to accept a lenient sentence. Sometimes the media does not provide all the facts to provide a balanced opinion.

QUESTIONS

Read the case study 'Sentencing reforms could improve justice for victims' and answer the following questions.

1. Explain the two reforms suggested by Chief Justice Warren to help improve the criminal sentencing process. Discuss whether or not you believe each reform would improve the effectiveness of the sentencing process.
2. (a) Suggest two limitations associated with conducting public surveys to evaluate whether judges are imposing appropriate sentences.
   (b) Suggest how the media might be able to negatively influence public perceptions of the sentencing process.
3. Explain whether or not you agree with the sentence imposed on Mrs Johnston.
4. Use the internet to research a recent case in which the victim, their family, or the media has expressed concern over the leniency of the sentence imposed on the offender. For your selected case complete the following.
   (a) Briefly state the facts of the case, the sentence imposed and, if possible, the judge's reasons for the sentence.
   (b) Discuss whether or not you believe the sentence imposed was fair and just for both the offender, and the victim and their family.
   (c) Suggest what sentence you would impose on the offender. Justify your choice.

6.3 Access to the courts is vital for an effective legal system

KEY CONCEPT An effective legal system must be accessible; that is, individuals must be able to use the legal system to resolve their disputes. To be able to access the legal system individuals must be capable of paying the legal costs and fees associated with seeking legal advice, taking a case to court and undertaking an appeal if necessary

The Victorian court system provides a range of courts to resolve all types of criminal cases and civil disputes. Court processes and procedures are also constantly being reviewed and altered in an attempt to ensure the legal system is assessable. The following section discusses how the legal system aims to provide effective access to courts.

Greater access through specialisation

Courts are arranged in a hierarchy to allow for specialisation and administrative convenience, which aims to assist a more efficient and timely resolution of disputes and improve access to the courts. Cases to be resolved within the court system are allocated to courts according to the seriousness of the matter, or any special circumstances associated with the dispute, which allows legal and court personnel who work within a particular court to develop their expertise and become proficient in dealing with the specific types of cases heard, and the procedures that take place, within that court. This can increase the speed at which a case is resolved and subsequently lower some of the costs associated with taking a case to court.

The existence of specialised courts and lists within the traditional Victorian court system also improves access to the courts as specialised courts (and lists) deal with matters in an informal and more efficient manner, and improve access to the courts for those who may belong to a disadvantaged group or have special needs. The Magistrates' Court, for example, has a number of specialist courts and lists (including the Koori Court, the Drug Court and the Family Violence Court Division) to deal with matters where the individuals involved may have particular circumstances or issues, such as experiencing cultural or social disadvantage, mental health issues, substance abuse issues, a disability or any combination of these.

In addition to improving access to the courts, these specialised courts can also increase the ability of the legal system to provide a fair hearing because the courts focus on achieving an outcome that addresses any pre-existing issues that might have significantly contributed to an individual committing an offence (such as drug and alcohol addiction or mental illness) in the hope of reducing the risk of reoffending and improving the offenders' wellbeing.

Access to the court system has also been improved with the introduction of the Neighbourhood Justice Centre (NJC), a community court and neighbourhood centre that offers a range of support services including providing legal advice, housing and employment support, and mental health and mediation services to residents and businesses within its local community (Collingwood). The implementation of multi-jurisdictional community centres such as the NJC is another way to improve community access to the justice system.

For more information on the specialised courts within the Magistrates' Court see chapter 5, pages 197–9.

The Family Violence Court Division exists as a division of the Magistrates' Court to deal with family violence cases. The court aims to protect victims from violence and harassment by a family member.

Greater access by reducing legal costs

One of the main factors that limits individuals from accessing or using the legal system to resolve their disputes is the high cost associated with taking a case to court. Under the adversary system of trial, each party is responsible for, and incurs the costs associated with, the preparation and presentation of its case including court fees, the cost of legal representation (legal fees) and any costs involved with the gathering of evidence (such as charges for independent forensic testing and expert witnesses). The problem of high legal costs is also compounded by the fact that, due to the complex pre-trial procedures and strict rules of evidence and procedure that exist within the trial process, legal representation is vital and parties without it will be at a distinct disadvantage.

The following sections discuss actions that can be taken to lower the costs associated with taking a case to court, and therefore improve access.

DID YOU KNOW?

While rates vary, parties could expect to pay approximately $2800 per day for a barrister for proceedings in the Magistrates' Court. Senior counsel (more experienced barristers) may cost over $4000 per day.

Increase the provision of legal aid services

The Commonwealth and state government provide funding for **legal aid** (that is, legal assistance including the provision of legal advice and grants to allow parties to obtain legal representation) so that individuals who cannot afford legal assistance have an opportunity to obtain free or low cost legal representation. An ongoing problem associated with the provision of legal aid, however, is that government funding is limited and services are therefore restricted. Legal aid is generally only available for those on very low incomes and is mainly granted in criminal and family matters (which take priority over other civil disputes). Low funding also limits legal aid services in regional areas where individuals find it particularly difficult to access legal advice and assistance. The provision of legal aid is critically examined in greater depth in chapter 7.

Legal aid is legal assistance provided by government-funded agencies, such as Victoria Legal Aid, including the provision of legal advice and financial grants to allow parties to obtain legal representation to prepare and present a case to the court.

DID YOU KNOW?

In 2010, Victoria Legal Aid reported that Australia spends approximately $22 per capita per year on legal aid compared to $77 in England and Wales, which also use the adversary system.

The provision of legal aid is vital to ensure all individuals, regardless of their income level and wealth, have the opportunity to seek professional legal advice and representation.

Expand 'no win, no pay' legal services

The expansion of legal firms offering 'no win, no pay' services for civil cases, where the legal firm deducts their fee from any damages awarded to a successful client,

has increased access to the legal system. Under the system, if the client loses the case, most of their legal fees do not have to be paid, although some fees must be paid regardless of win or loss and the court can order the losing party to pay the opposing party's legal fees (which can be substantial). This feature may assist some people who genuinely believe they have a case but are unable to afford the cost of initiating proceedings, including the gathering of evidence and engagement of legal representatives. Parties must, however, ensure they clearly understand the conditions and precise nature of any 'no-win, no pay' agreements they undertake.

Increase the range of dispute resolution methods used within the court system

In an attempt to lower the costs, reduce delays and improve access to the court system, all courts within the Victorian Court hierarchy are now committed to resolving civil disputes in the most efficient manner possible, which includes using a range of dispute resolution methods, including mediation, conciliation and arbitration, in addition to judicial determination. For example, with regard to civil cases, county and supreme court judges now regularly order parties to engage in mediation (generally conducted by private mediators or associate judges) in the hope they can resolve their dispute prior to trial. Ongoing government funding is aimed at increasing the use of alternative (or appropriate) dispute resolution methods such as mediation and conciliation within the court system.

Woman claims she paid $10.5 million in legal fees

In 2010, an Adelaide woman lodged a Supreme Court civil action against a law firm that had previously represented her in a multi-million dollar divorce dispute, claiming the $10.5 million she paid the firm in legal fees over a five-year period was unreasonable, unjust and caused her tremendous stress. While acting for the woman, the law firm had produced over 480 000 computer files and 23 000 documents, which filled 182 storage boxes. The law firm being sued claimed the divorce proceedings were extremely complex and their charges were reasonable given the time and amount of resources they devoted to the preparation and presentation of the extremely complex case. They also claimed the woman was fully aware and informed of all costs throughout the divorce action.

Complex civil legal cases can take many years to settle, generate thousands of legal documents and cost millions of dollars in legal fees.

Reduce delays

Delays are another factor that can increase the cost and stress associated with undertaking court action, and deter individuals from using the court system to resolve their legal disputes and pursuing their rights. Delays may be caused by various factors including parties being unaware of their rights and unable to find legal assistance, and the time involved with gathering evidence and obtaining forensic testing. Although it is expected that unavoidable delays will occur in the court process, various procedures and processes exist to help reduce delays within the court system, including the:

- use of directions hearings prior to criminal and civil trials to clarify legal issues, allow parties to make admissions regarding the facts of the dispute, and set time limits for the exchange of information to help facilitate a faster and more efficient resolution or trial
- use of pre-trial conferences prior to civil trials to encourage the parties to discuss and clarify the issues in dispute and reach an early settlement
- use of information technology to provide for the electronic filing, storage and uploading of court documents.

- increasing use of alternative (or appropriate) methods of dispute resolution such as mediation, conciliation and arbitration
- increasing use and development of specialised courts.

See chapter 11, pages 423–6, for an explanation of reforms aimed at decreasing delays.

Reduce the formality of courts

Courts provide a formal approach to dispute resolution where strict procedures and rules of evidence are followed. This formality, however, can be intimidating and confusing and may discourage some individuals from pursuing court action. While a certain level of formality is desirable (due to the seriousness of matters being dealt with at court and the need for the courts and judges to maintain an image of authority), various initiatives including increasing use of specialised courts, allowing barristers to choose not to wear traditional robes and wigs, and the modernisation and simplification of the language used in the courtroom and legal documents have helped to reduce the formality of the courts.

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eLesson:

Courtroom dress

The eighteenth-century style uniform of criminal barristers comes into question in this audio podcast.

Searchlight ID: aud-0007

eBookplus

eLesson:

Koori Court

The Koori division of Victoria's County Court has been established as an extension of its Aboriginal Magistrates' Court system. Watch a re-enactment of a hearing in the Shepparton Koori Court.

Searchlight ID: eles-0637.flv

Expanding the Koori County Court can improve access for indigenous people

The Koori County Court was established in 2008–09 on a four-year pilot program at the La Trobe Valley Courts to hear and sentence indigenous Australian defendants who pleaded guilty to committing offences that fall within the jurisdiction of the County Court. Since its inception, the Koori County Court has aimed to provide a fairer and more unbiased hearing for Aboriginal (Koori) offenders by increasing the participation of Aboriginal offenders (and their families and community) in the legal process, reducing the incidence of reoffending and reducing the over-representation of indigenous offenders in the prison system. The court has also aimed to improve the ability of the indigenous community to access the legal system by allowing Koori elders or respected persons and specialised Koori Court officers to participate in the court process (including offering advice to judges on cultural issues and the sentence being considered), as well as the defendant and their family.

Despite the court having dealt with only 57 offenders by January 2012, the success rate in terms of recidivism has been most impressive, with only one person reoffending. County Court judge John Smallwood commented that this was particularly remarkable given that most of the cases involved serious violence and many of the defendants had multiple prior convictions. While commenting on the benefits of the Koori County Court, Judge Smallwood called for the Victorian government to fund an expansion of the program in Mildura and Shepparton.

TEST your understanding

1. Identify **two** specialist courts that exist within the Magistrates' Court and explain how the existence of **one** of these courts has improved the effectiveness of the legal system.
2. Explain how the existence of a court hierarchy improves the effectiveness of the legal system.
3. Explain how increasing the use of mediation within the court system can improve access to the courts.

APPLY your understanding

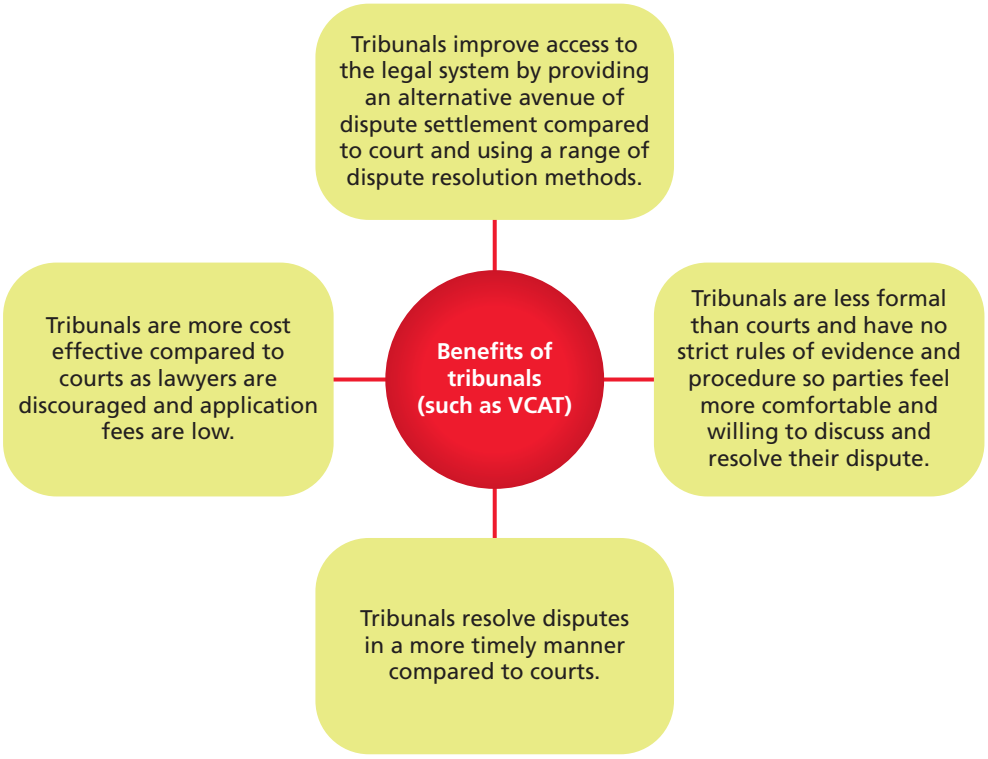
4. (a) Suggest three factors that contribute to the high cost of having a civil dispute resolved at court.
   (b) Suggest and explain two reforms that could be implemented to lower the costs associated with taking a case to court, therefore improving access.

6.4 Tribunals like VCAT increase access to the legal system

KEY CONCEPT The increasing use of tribunals, such as VCAT, can increase access to the legal system by allowing civil disputes to be resolved in an informal, cost effective and timely manner.

Tribunals increase access to the legal system

In addition to providing traditional courts to resolve all types of criminal and civil legal disputes, the Victorian legal system provides less formal tribunals, such as the Victorian Civil and Administrative Tribunal (VCAT), that specialise in resolving civil disputes and increase access to the legal system by providing an alternative avenue of dispute settlement for individuals who do not wish to take their dispute to court. Having a civil dispute resolved at a tribunal (like VCAT) rather than in a traditional court can be beneficial for reasons we will now discuss.



- **Tribunals are less formal.** Tribunals do not follow the strict rules of evidence and procedure that exist at court, so parties may feel more comfortable and willing to discuss and resolve their dispute. The environment of a tribunal is also less formal than a traditional courtroom, which may encourage access because parties feel less intimidated and more at ease to present their case.
- **Tribunals are more cost effective.** Having a dispute resolved at a tribunal is relatively inexpensive compared to taking a matter to court because tribunals offer their services for free or at a low cost. The use of legal representatives is also often discouraged or not permitted to help lower costs.
- **Tribunals resolve dispute in a more timely manner.** The less formal processes and procedures allow tribunals to resolve disputes with greater speed than the courts.
- **Tribunals use a range of dispute resolution methods.** Tribunals generally prefer to use methods of dispute settlement such as mediation and conciliation that encourage parties to discuss their issues and resolve their dispute between

VCAT uses various methods of dispute settlement including mediation and conciliation to help resolve disputes in a more timely manner and improve access.

themselves with the assistance of an independent third party. This can encourage access, as parties may feel more willing to discuss and resolve their dispute in an informal manner, rather than having their dispute resolved through judicial determination.

The Victorian Civil and Administrative Tribunal

As mentioned in chapter 5, the largest and busiest tribunal in Victoria is the **Victorian Civil and Administrative Tribunal** (VCAT), which was established in 1998 to improve access to the legal system by joining and replacing 15 different boards and tribunals that operated throughout Victoria at the time, and offering a 'one-stop-shop' to deal with a wide range of civil disputes using a common set of procedures.

VCAT has the jurisdiction to deal with a wide range of civil disputes that arise within the community between individuals, businesses, and state government authorities and agencies, including disputes involving discrimination, racial and religious vilification, guardianship issues, the purchase and supply of goods and services, domestic building works, and residential and retail tenancies. It also has the power to review decisions made by government agencies and local councils. For more detailed information on VCAT see chapter 5, pages 210–14.

VCAT offers online lodgement of claims and an online case management system to allow parties to store, upload and exchange documents electronically.

One of the main aims of VCAT is to provide an accessible and efficient avenue to resolve civil disputes. VCAT has improved the effectiveness of the legal system in the following ways.

Greater access through specialisation

As outlined on page 210, VCAT consists of three divisions and sixteen different lists that each have specialised jurisdiction to resolve particular types of disputes. The existence of these lists enables staff within each list to develop appropriate expertise and processes that work towards the efficient and effective resolution of disputes. This expertise creates confidence in the system and increases the likelihood that people will use the tribunal to help resolve their disputes.

VCAT aims to continually expand the range of lists offered in an attempt to constantly improve access to its services. For example, in 2010 the Owners Corporations List was created to deal with disputes involving owner corporations (body corporates), which manage the common ownership of shared property (such as ownership of common garden areas in unit blocks). VCAT has also developed specific services and strategies to assist the Koori community, including having support staff available to assist with preparing their claims.

Greater access through lower costs

VCAT is promoted as a low-cost alternative to courts. It aims to keep application fees low. This low-cost approach improves access to the legal system by encouraging people deterred from taking a matter to court due to the high cost to instead lodge an action at VCAT.

In addition to the low application fees, VCAT generally discourages the use of legal representation and in many cases does not allow legal representation, which significantly reduces the cost of resolution. In cases where the tribunal may grant permission for parties to engage legal representation (for example, in large civil claims or domestic building cases) each party must generally bear its own costs, although the tribunal does have discretionary power to award costs if satisfied that it is fair to do so.

VCAT also lowers costs by constantly improving its processes and procedures so applications can be dealt with more efficiently. For example, in 2011, VCAT introduced Smart Queue which allows individuals to lodge application forms and make payments online. During the same year, VCAT also became the first justice institution in Victoria to introduce an online case management system (VCAT Case Portal) to assist with management of cases and allow parties to store, upload and exchange documents electronically with 24 hour, 7 day access, and obtain information regarding their case, such as hearing dates. Case Portal has reduced delays and costs associated with management of documents and cases.

Greater access through quicker dispute resolution

VCAT resolves civil disputes in a more timely manner compared to courts. For example, VCAT takes, on average, 18 weeks to resolve a dispute from the time the matter is lodged at the tribunal. By contrast, many pre-trial procedures must be followed before the courts can resolve a dispute, and waiting lists for hearings and trials are long. Court cases take many months, even years, to resolve from the time of initiation. If people see that VCAT resolves disputes quickly, they will be more likely to use the tribunal.

Greater access due to less formality

VCAT resolves disputes in an informal manner because the tribunal does not adhere to the strict rules of evidence and procedures that exist at court. Parties are encouraged to resolve their issues, if possible, between themselves, using mediation or conciliation.

DID YOU KNOW?

VCAT has implemented an information technology system called SharePoint that enables more efficient case management by allowing parties to store and access documents relating to their case, and instructions from VCAT, online 24 hours a day, 7 days a week.

Discouraging the use of legal representatives (and in many cases not allowing legal representatives) also helps VCAT retain an informal approach that assists in lowering costs and improving access. The environment at VCAT is also less formal than a traditional courtroom, which may help parties feel more relaxed and willing to participate in the resolution process.

VCAT also provides more flexible operating hours to encourage access. For example, it offers twilight (sitting until 7 pm) and Saturday morning hearings, and provides services at a range of regional and metropolitan locations in unconventional settings such as shopping centres and community facilities. VCAT has also introduced telephone and video mediations and link ups for parties who cannot physically attend VCAT, which particularly assists parties in regional areas.

A variety of dispute resolution methods provides greater access to the legal system

As discussed in chapter 5, VCAT uses a variety of dispute resolution methods including mediation, conciliation, arbitration and judicial determination at hearings (although hearings are less formal than court and are conducted without the strict rules of evidence and procedure that exist in courts). VCAT prefers disputes to be resolved using mediation and conciliation, but in cases where these methods are unsuccessful or inappropriate, members can make binding decisions to resolve disputes via arbitration and judicial determination. One advantage of resolving disputes using mediation and conciliation is that, as these methods enable parties to resolve their dispute between themselves (with the assistance of an independent third party) in a confidential and informal environment, they may feel more at ease to discuss their dispute and participate in the process. They also may be more satisfied with the outcome, rather than having the resolution imposed upon them by a third party, as occurs under arbitration and judicial determination.

A disadvantage of mediation and conciliation, however, is that these methods of dispute settlement are not legally binding and so if one party does not adhere to the decision the case may go to court or be settled via judicial determination anyway. Similarly, in cases where legal representatives are not allowed, a more confident party may be able to dominate the proceedings and a less confident party may compromise too easily. For other strengths and weaknesses of mediation, conciliation and judicial determination, see chapter 5, pages 217 and 219.

TEST your understanding

1 Explain how the existence of VCAT provides greater access to the legal system.
2 Explain how resolving a dispute at VCAT can take less time and money than the resolution of the dispute in the traditional court system.

APPLY your understanding

3 Victorian man Mr Damian Clear used his workplace injury payout to join a dating agency, only to be disappointed when a meeting arranged on the Gold Coast did not eventuate. He was promised dates with a number of women and it was suggested he would receive first-class around-the-world airfares if he married one of the women he was supposed to meet. Mr Clear, who is profoundly deaf and now suffers from depression, is seeking a $110 000 refund plus $10 000 damages for stress and humiliation.
   (a) Where do you suggest Mr Clear goes to have this dispute resolved? Explain your answer.
   (b) Suggest a reason why Mr Clear may have considered mediation and conciliation an inappropriate means of settling this dispute.
   (c) Suggest one reason why Mr Clear could have decided not to use the court system to resolve this dispute.
4 Explain why it is important the legal system offers a range of dispute resolution methods to resolve civil disputes.

6.5 An effective legal system resolves disputes in a timely manner

KEY CONCEPT An effective legal system must resolve disputes within a reasonable time frame. What is considered 'reasonable' will depend on the severity and complexity of the dispute. If disputes are not resolved in a timely manner, further injustice may be inflicted on the parties.

Delays are a major factor that can limit the effectiveness of the legal system. Delays, which can occur at the pre-trial or trial stages of the court process, can increase the costs and stress associated with undertaking legal action, and can deter individuals from using the court system to resolve their legal disputes and pursuing their rights.

The causes of delays

Many different factors contribute to delays occurring in our legal system. Following are some of the main causes of delays.

Presentation of evidence

Under the adversary system of trial, which is used in most Australian courts, there is a heavy reliance on the presentation of verbal evidence so the opposing party can cross-examine testimony. Cross-examination allows for the reliability of the witnesses to be tested, but can add to the length of the trial as each witness may undergo examination, cross-examination and re-examination in an effort by parties to uncover the truth or present their case in the best possible light. It can also lead to an unfair hearing if witnesses give a wrong impression or become confused due to anxiety, limited English skills or aggressive questioning from legal representatives. The heavy reliance on verbal evidence can also increase the length of a trial because it is time consuming and can cause inconvenience for witnesses, particularly expert witnesses.

Time taken to prepare a client's case costs money.

Complex procedures and strict rules

Complex procedures associated with the pre-trial process and the requirement of parties to present their case to the court in adherence to strict rules of evidence and procedure may also increase the time it takes to resolve a legal dispute. For example, while civil pre-trial procedures (including the exchange of formal documents and evidence between the parties) are designed to clarify the facts and details of a case and prompt an early settlement, they may in reality increase delays because parties may deliberately stall proceedings in an attempt to frustrate the opposing party. The strict rules of evidence and procedure that exist during a trial may also lengthen proceedings as parties dispute the admissibility of evidence and other legal issues.

The use of juries

One weakness of the jury system is that juries increase the length of the trial and can cause delays. For example, the jury selection process is time consuming for the legal system, as potential jurors may ask to be excused right up to the point of **empanelment**. The empanelment process can also be time consuming because both parties to the dispute may challenge potential jurors. Finally, the judge must

Empanelment is the process of selecting a jury in the courtroom and involves each party being given the opportunity to challenge potential jury members.

also take time to explain points of law to the jury members at the commencement of and throughout the entire trial.

DID YOU KNOW?

In 2010, a report released by the Productivity Commission stated that, in 2008–09, 12.5 per cent of defendants who had their cases heard in the Victorian Supreme Court waited more than two years for a final outcome, although approximately 73.3 per cent of cases were resolved within a year (which was less than the national benchmark of 90 per cent).

The use of legal representatives

The strict rules of evidence and procedure and the desire of parties to prepare and present their case in the best possible manner necessitates the use of legal representatives in court actions. The use of legal representatives, however, may increase the length of a trial because they may engage in tactics that delay the trial process, including calling a large number of witnesses, questioning insignificant points of law and continually questioning witnesses in an attempt to find inconsistencies and gaps in their testimony. In civil cases, legal representatives may deliberately aim to delay the trial to maximise the expense incurred by the opposing party.

Parties who choose to represent themselves also usually increase the length of a trial, as they are unaware of the strict rules of evidence and procedure, which must constantly be explained to them by the judge in an attempt to ensure a fair hearing.

Self-represented shop owner sues police

In 2010, Mr Lupco Slaveski commenced a civil action in the Supreme Court to sue 23 members and former members of the Victoria Police for various civil breaches, including trespass to property, assault and battery. Mr Slaveski claimed the police spitefully prosecuted him and continually breached his rights over a six and a half year period between 2000 and 2007, and was seeking millions of dollars in damages.

Mr Slaveski chose to represent himself during the trial, which has become one of the longest cases initiated by a self-represented litigant in Victoria, with the trial lasting approximately four months. When giving his judgement the trial judge, Justice Kyrou, commented that the trial significantly exceeded a reasonable time frame and experienced considerable delays due to Mr Slaveski's choice not to engage legal representation and the fact he suffered from mental illness. If self-represented parties are not familiar with the strict rules of evidence and procedure that exist during a trial, including rules relating to the presentation of evidence and questioning of witnesses, cases take significantly longer than necessary to resolve. Mr Slaveski's case generated 16 166 pages of transcript.

Despite his inexperience, Mr Slaveski was awarded $28 300 in damages after Justice Kyrou found that on three occasions several police did inadvertently trespass onto Mr Slaveski's property by entering and remaining in his shop and taking video footage, which was beyond the terms of their search warrant.

DID YOU KNOW?

In 2009–10 the County Court reported that it disposed of (resolved or abandoned) 59 per cent of civil cases within 12 months of commencement, compared to disposing of only 37 per cent five years earlier in 2004–05.

Law reform

While the law must change to keep pace with changes in society, constant changes to the law (law reform) can lead to an increase in the time it takes to resolve legal disputes. Changes to the law, creation of new laws and the identification of new crimes can all lead to an increase in the number of disputes being brought before the courts, which can cause delays if court resources are not increased to meet rising demand.

Other factors

Delays can also occur due to parties being unaware of their rights and unable to find legal assistance. Gathering reliable evidence can also be time consuming and in criminal cases, significant delays are associated with obtaining forensic testing. For example, due to the high demand and limited testing facilities, it can take up to 12 months for forensic testing of illegal drugs. This can lead to injustices, especially if an accused is denied bail while awaiting their hearing or trial.

The impact of delays

Delays in the legal system can increase the cost associated with taking a case to court, and deter individuals from accessing the court system and pursuing their rights. Delays can also cause emotional stress and hardship for parties in both criminal and civil cases. For example, delays can cause considerable stress and hardship for defendants who have been denied bail and held in jail while awaiting their hearing or trial. Defendants who are subsequently found not guilty will have suffered the loss of their freedom and their family may have suffered great economic and emotional hardship. Those who are granted bail may still suffer hardship while they anxiously await their hearing or trial.

Delays in the criminal justice system can cause emotional and financial stress for defendants who have been denied bail and are held in custody while awaiting their hearing or trial.

Delays may cause hardship for parties involved in civil cases, particularly plaintiffs in commercial civil law actions who became ill or injured as a result of the defendant's negligence and must pay medical, living and legal expenses prior to the settlement of their dispute. Some plaintiffs may even tragically die before the dispute is settled and compensation awarded.

Reforms aimed at decreasing delays are examined in chapter 11 on pages 423–6.

TEST your understanding

1 Explain how resolving a dispute in a timely manner contributes to an effective legal system.
2 Explain two ways in which the adversary system itself may lead to delays in the settlement of a dispute.
3 Suggest and explain one possible impact of delays on the following parties to a dispute:
   (a) a victim of a serious crime
   (b) a witness to a crime who is required to give evidence in court
   (c) an individual who is charged with a crime and denied bail
   (d) a plaintiff injured in a negligence dispute.

APPLY your understanding

4 Suggest how resolving a dispute too quickly might hinder the effectiveness of our legal system.
5 Suggest two reforms that could be implemented to decrease delays in the legal system.
6 'While juries allow for trial by one's peers and may increase the likelihood of a correct verdict, they significantly increase the time taken to resolve a dispute.' Discuss this statement and explain the extent to which you agree with it.
7 Read the case study 'The *Jetcorp Case*' on page 231, then complete the following questions.
   (a) List the reasons why the *Jetcorp Case* experienced so many delays.
   (b) Suggest and explain at least two changes that could be made to the criminal trial system to avoid some of the problems experienced in the *Jetcorp Case*.

SKILL DRILL

KEY SKILLS TO ACQUIRE:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

SKILL DEFINITION

Define means to provide a precise meaning.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

Apply legal principles to relevant cases and issues means to select and explain legal theories or concepts that are relevant to the given case.

Evaluate means to explain the strengths and weaknesses.

Match the correct answer

Consider the following list of features, processes and procedures that exist within our legal system and complete the tasks that follow.

Features, processes and procedures that exist within our legal system
1 The judge remains independent and does not assist parties with the preparation and presentation of their case.
2 VCAT has an online case management system that allows parties to store, upload and exchange documents electronically.
3 There is a heavy reliance upon verbal evidence during the trial process.
4 An accused has the right to remain silent during both the pre-trial and trial stages of a criminal case.
5 A judge presides over each trial to ensure the strict rules of evidence and procedure are followed.
6 Courts can use a range of dispute resolution methods to resolve disputes.
7 Parties are responsible for and in control of the preparation and presentation of their own case.
8 Parties to a legal dispute are entitled to be represented by legal practitioners during their trial.
9 Judges and magistrates determine the sanction to be imposed upon criminal offenders.
10 Specialised courts (such as the Drug Court and Koori Court) exist to resolve particular types of criminal cases and civil disputes.
11 Parties must adhere to strict rules of evidence and procedure in all trials.
12 The prosecution holds the burden of proof in a criminal trial.
13 State and Commonwealth governments fund agencies, such as Victoria Legal Aid, to provide legal assistance.
14 Juries are used to determine the verdict in all criminal trials heard in the county and supreme courts.
15 The standard of proof in a criminal trial is beyond reasonable doubt.

Your task

(a) Explain how each feature, process or procedure listed contributes to and/or detracts from the achievement of an effective legal system. You may wish to present your responses in a table similar to the following table. The first three features, processes or procedures have been completed for you.

Sample answer

Feature, process or procedure	Element(s) of an effective legal system affected by this feature	How it contributes to an effective legal system	How it detracts from an effective legal system
1. The judge remains independent and does not assist parties with the preparation and presentation of their cases.	Affects the achievement of a fair and unbiased hearing.	Assists in achieving a fair and unbiased trial because the judge cannot assist, and therefore advantage, one party more than the other.	Detracts from a fair hearing in cases where one party may be disadvantaged (due to inadequate or no legal representation), or overlooks crucial evidence or argument.
2. VCAT has an online case management system that allows parties to store, upload and exchange documents electronically.	Affects a timely resolution of disputes and access to the legal system.	Assists in achieving a timely resolution of disputes because it improves efficiency of VCAT by reducing delays, and costs, associated with the lodging, storage and exchange of documents and 24/7 access to information, which may subsequently encourage individuals to access VCAT to resolve their disputes.	Detracts from a fair hearing if parties are unable to access the internet and have limited computer literacy. Security of online information may also cause problems.
3. There is a heavy reliance upon verbal evidence during the trial process.	Affects the achievement of a fair and unbiased hearing and a timely resolution of disputes.	Assists in achieving a fair and unbiased trial because parties are given the opportunity to cross-examine the opposing party's witnesses and test the reliability of their evidence.	May detract from a fair hearing in situations where witnesses give a wrong impression or become confused due to anxiety, limited English skills or aggressive questioning from legal representatives. Can increase the length of a trial as verbal examination of witnesses is time consuming. It may also cause inconvenience for witnesses (particularly expert witnesses).
4.			

(b) Select three features, processes and procedures that detract from the effectiveness of the legal system. Suggest one reform that could be implemented to improve each and by doing so improve the effectiveness of the legal system.

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, evaluate their operation and application, and evaluate the effectiveness of the legal system.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Structured questions

Question 1

Identify and explain the key elements of an effective legal system. **(3 marks)**

Question 2

Explain three ways the existence of the Victorian Civil and Administrative Tribunal has improved the effectiveness of the Victorian legal system. **(3 marks)**

Question 3

Using an example to illustrate your response, explain how the existence of specialised courts and lists can improve the effectiveness of the court system. **(3 marks)**

Question 4

Explain how delays in bringing a matter to court detract from the effectiveness of the legal system. **(2 marks)**

Question 5

a Explain the concept that financial inequalities limit the effectiveness of the legal system.

b Suggest and discuss one reform to the legal system that has (or could) reduce the cost associated with undertaking legal action. **(2 + 2 = 4 marks)**

Question 6

Read the following case study and answer the questions that follow.

Juror fined for own detective work

In June 2011, a member of a Supreme Court jury became the first person to be prosecuted in Victoria for breaching the *Juries Act 2008* by launching an independent internet investigation while sitting on a murder trial. The juror committed the offence while sitting on the trial of Anthony Sherna, aged 42. Mr Sherna was being tried for the murder of his de facto partner, Susanne Wild, after admitting that he killed her, but denying it was intentional. Court officials discovered that the juror had used an online Google search to conduct their own investigation into the case.

The juror pleaded guilty and received a $1200 fine without conviction. Jurors must remain independent and impartial, and determine the facts of a case on the evidence presented before the court. They are not permitted to conduct their own investigations into a case, including visiting an alleged crime scene or consulting any books or other sources of information (including the internet) to gain additional information.

In a second trial Mr Sherna was found guilty of manslaughter and sentenced to 14 years imprisonment.

a Outline the role of the jury in a criminal trial and explain how the use of a jury in a criminal trial can assist the achievement of a fair and unbiased hearing or trial.
b Explain how the use of the jury may detract from the achievement of an effective legal system.
c Identify and explain two features of the adversary system of trial and discuss the degree to which each would have ensured Mr Sherna received a fair and unbiased hearing or trial. *Please note:* the jury is not a feature of the adversary system.
d Explain one pre-trial procedure that would have occurred prior to Mr Sherna's trial and discuss the extent to which this procedure would have assisted the achievement of a fair hearing.

(3 + 3 + 6 + 3 = 15 marks)
(Total 30 marks)

Please note: Outcome 2 contributes 60 marks out of the 100 marks allocated to school-assessed coursework for Unit 4. Outcome 2 may be assessed by one or more assessment tasks.

Tips for responding to structured questions

Use this checklist to make sure you write the best responses to the questions that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
Ensure you at least define the three key elements of an effective legal system.		
Discuss, interpret and analyse legal information. Apply legal principles to relevant cases and issues.		
Question 3 requires you to refer to one specialised court or list. You should consider the specialised court divisions of the Magistrates' Court (refer to chapter 5 if necessary). Question 6 asks you to respond to a case study. When answering part (c) refer back to the text outlining the features of the adversary system.		
Evaluate the extent to which court processes and procedures contribute to an effective legal system.		
Questions 2, 3, 5 and 6(b) require you to examine the effectiveness of the legal system. When answering these questions refer to the three elements of a legal system (see diagram on page 230).		
Ensure your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- The elements of an effective legal system: entitlement to a fair and unbiased hearing, effective access to the legal system and timely resolution of disputes

- **Entitlement to a fair and unbiased hearing**
  - An effective legal system must provide mechanisms (e.g. courts, tribunals, police, legal aid centres, etc.), processes and procedures that help ensure all parties involved in a legal dispute are treated in a just and impartial manner, and are given a fair and unbiased hearing or trial.
- **Effective access to the legal system**
  - An effective legal system must be accessible; that is, individuals must be able to use the legal system to resolve their disputes. This means individuals must be able to afford the legal costs and fees associated with seeking legal advice, taking a case to court and undertaking an appeal if necessary.
- **Timely resolution of disputes**
  - An effective legal system must resolve disputes within a reasonable time frame. What is considered reasonable depends on the severity and complexity of the dispute. If disputes are not resolved in a timely manner, further injustice may be inflicted on the parties.

- Evaluate the extent to which court processes and procedures contribute to an effective legal system.

- **The features of the adversary system of trial ensures a fair trial**
  - The judge as an independent and impartial adjudicator who ensures the trial is fair and conducted in accordance with the strict rules of evidence and procedure.
  - Strict rules of evidence and procedure ensure parties are treated consistently and each has an equal opportunity to present their case, and only reliable, relevant and legally obtained evidence is presented to the court.
  - Party control — the two opposing parties are responsible for and in control of the preparation and presentation of their own case.
  - The use of legal representation — parties to a legal dispute are entitled to seek legal representation to provide expert legal advice and ensure their case is prepared and presented in the best possible manner.
  - The burden of proof — the party who initiates a court action has the responsibility of proving the case. In criminal trial, the prosecution has the burden of proof which upholds the right of the accused to a presumption of innocence.
  - The standard of proof — criminal cases must be proven beyond reasonable doubt, which increases the likelihood of a correct verdict. Civil cases must be proven on the balance of probabilities.
- **Processes and procedures that aim to ensure a fair and unbiased hearing**
  - The existence of the right to silence and the right to bail in a criminal trial
  - The use of the jury system
  - The provision of an appeals process
  - The existence of processes and procedures to ensure fair and consistent sentencing
  - The provision of an open court system
- **Increasing specialisation**
  - Courts are arranged in a hierarchy to allow for specialisation and administrative convenience, which assists a more efficient and timely resolution of disputes and improves access to the courts.
  - Specialised courts and lists exist to deal with specific matters in an informal and more efficient manner, and improve access to the courts for those who may belong to a disadvantaged group or have special needs (for example, the Koori Court and Drug Court divisions of the Magistrates' Court and the Neighbourhood Justice Centre).

- **Reducing legal costs** through the provision of legal aid services and the increase in the number of legal firms offering 'no win, no fee' services
- **Increasing the range of dispute resolution methods** used within the court system (including an increasing use of mediation, conciliation and arbitration, in addition to judicial determination, within the court system)
- **Reducing delays by the:**
  - use of directions hearings and pre-trial conferences
  - use of information technology for the electronic filing, storage and uploading of court documents
  - increasing use of alternative (or appropriate) methods of dispute resolution such as mediation, conciliation and arbitration
  - increasing use of specialised courts.
- **Reducing the formality of courts:**
  - providing tribunals, such as the Victorian Civil and Administrative Tribunal, to resolve civil disputes using a range of dispute resolution methods (including mediation, conciliation, arbitration and judicial determination).
- **VCAT increases access through:**
  - increasing specialisation
  - lowering the costs of dispute settlement (including discouraging the use of legal representatives and maintaining low application costs)
  - resolving disputes in a more timely manner
  - engaging less formal and more flexible processes and procedures.
- **The causes of delays in the legal system**
  - The heavy reliance on the presentation of verbal evidence
  - Complex pre-trial procedures and the existence of strict rules of evidence and procedure during trials
  - The use of juries
  - The use of legal representatives
  - Constantly changing laws
  - Parties being unaware of their legal rights and unable to find legal assistance
  - Difficulties involved in gathering reliable evidence and obtaining forensic testing.
- **The impact of delays**
  - Increases the cost associated with taking a case to court
  - Deters individuals from accessing the court system and pursuing their rights
  - Causes emotional stress and hardship for parties in both criminal and civil cases.

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

The legal system is not perfect and improvements could still be made to enhance its effective operation. Discuss one recent change, and one recommendation for change, to improve the effective operation of the legal system. **(4 marks)**

Question 2

Identify and describe **two** elements of a legal system required in order for it to be effective. **(4 marks)**

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Access a list of key terms for this chapter.

Searchlight ID: doc-10211

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Digital doc:

Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10212

Examination technique tip

Make use of your 15 minutes reading time. It is easy when you are feeling anxious to read too quickly, which may lead to you interpreting the question incorrectly. Read the question a couple of times at least and make note of verbs used, such as 'identify' and 'evaluate', to ensure you provide the correct response.

Question 3

An effective legal system aims to provide the timely resolution of disputes, and a fair and unbiased hearing. Discuss how our legal system attempts to achieve these two aims. **(8 marks)**

Question 4

The Victorian Civil and Administrative Tribunal aims to ensure that individuals have effective access to mechanisms for the resolution of disputes.

To what extent do you agree with the above statement? Justify your answer. **(6 marks)**

Question 5

An effective criminal justice system should contain processes and procedures that ensure all individuals receive a fair and unbiased hearing.

Describe and evaluate two processes or procedures that help make a criminal trial fair and unbiased. **(6 marks)**

Question 6

Identify and explain two court processes or procedures that have been implemented to overcome limitations faced by people wishing to gain access to the legal system. **(4 marks)**

Question 7

'While it is true that our legal system achieves the elements necessary for it to be effective, some changes are needed.'

Discuss this statement. In your discussion explain the main processes and procedures that assist in the achievement of an effective legal system and explain at least two recent changes or recommendations for change that have improved the effectiveness of the legal system. **(10 marks)**

Question 8

One aim of criminal pre-trial procedures is to protect those accused of a crime from being unfairly treated. Explain how one criminal pre-trial procedure attempts to achieve this aim. **(2 marks)**

Question 9

Discuss two ways in which the adversary system of trial aims to enhance the effective operation of the legal system. **(4 marks)**

Question 10

Explain two problems affecting our civil justice system that make it difficult for people to gain access to the legal system. In your answer, indicate how the Victorian Civil and Administrative Tribunal has attempted to overcome these problems. **(8 marks)**

(Total 56 marks)

CHAPTER 7

The adversary system

WHY IT IS IMPORTANT

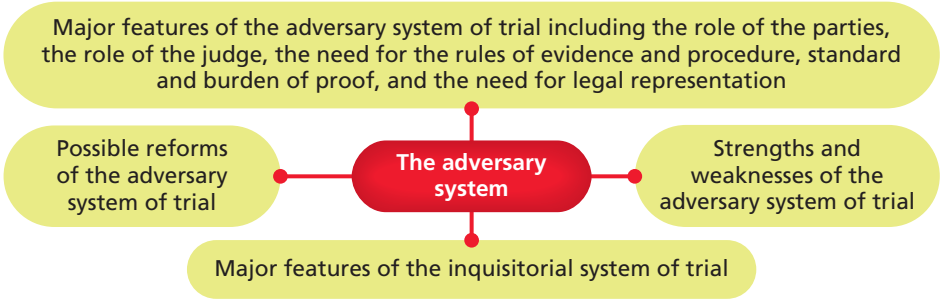
Different countries around the world have different legal systems and use different methods of trial to resolve legal disputes. In Australia, legal disputes that are determined in court are resolved using the adversary system of trial, where two opposing parties engage in a 'battle' to win their case. Each party presents their case, in accordance with strict rules of evidence and procedure, before an independent adjudicator who acts like an umpire to ensure the strict rules are followed and the trial is fair.

In this chapter we examine the key features of the adversary system of trial, its strengths and weaknesses, and compare it to an alternative system of trial — the inquisitorial system, which is used in many other countries, most notably in Europe, South America and many Asian nations. We also examine reforms and alternatives to the adversary system of trial.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- critically evaluate the adversary system of trial
- compare the operation and features of the adversary system with the inquisitorial system
- suggest and discuss possible reforms and alternatives to the adversary system
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Can you demonstrate these skills?

Innocent man spends 11 years in prison

In November 2005, five justices of the High Court of Australia unanimously set aside the wrongful murder conviction of Andrew Mallard and ordered a retrial on the grounds that the prosecution withheld vital evidence from the defence (and subsequently the jury) in the original trial, which denied Mr Mallard a fair trial (*Mallard v. R* [2005] HCA 68). In February 2006, after four appeals and having spent more than 11 years incarcerated, Mr Mallard was finally released from prison.

In November 1995 a Supreme Court jury originally found Mr Mallard guilty of the murder of Pamela Lawrence, a jewellery shop owner who was brutally killed in May 1994. On the day of the murder, Mr Mallard, who suffered from a mental illness (bipolar disorder) at the time, had been briefly taken into police custody for a minor theft and so, although there was no forensic evidence that suggested he had murdered Mrs Lawrence, was considered one of many suspects.

Subsequent to the murder, Mr Mallard was interviewed several times by police (including while in hospital seeking medical treatment for mental health issues) and, in an attempt to assist the police with their investigations, speculated about how Mrs Lawrence may have been murdered and in doing so, police alleged, confessed to the crime. He was subsequently convicted and sentenced to life imprisonment.

In 2005, Mr Mallard's legal representatives were finally successful in proving to the High Court that the prosecution failed to disclose vital evidence to the defence (in breach of their general duty to do so) that could have been used to cast doubt on the prosecution's case, including evidence that Mrs Lawrence could not have been killed in the manner described by Mr Mallard when he was speculating about how she may have been killed.

Mr Mallard was offered $3.25 million by the West Australian Government as compensation for his wrongful murder conviction.

eBookplus

The wronged man, parts 1 and 2

Use the **wronged man** weblink in eBookPLUS to watch Andrew Mallard talk about the circumstances leading up to his wrongful imprisonment and the failure of the criminal justice system on *Australian Story*.

7.1 The adversary system: role of the parties and the judge

KEY CONCEPT In Australia, most courts use the adversary system of trial to resolve disputes, whereby two opposing parties prepare and present their case in accordance with strict rules of evidence and procedure, before an independent and impartial adjudicator who ensures the strict rules are followed and the trial is fair.

Major features of the adversary system of trial

The **adversary system of trial** refers to a system where two opposing parties prepare and present their case, in accordance with strict rules of evidence and procedure, before an independent and impartial adjudicator.

The **adversary system of trial** evolved in England and was inherited by Australia, from the British, upon colonisation. Other countries that use the adversary system include most of the United Kingdom, Canada, India, Hong Kong, Pakistan, South Africa, New Zealand and the United States of America.

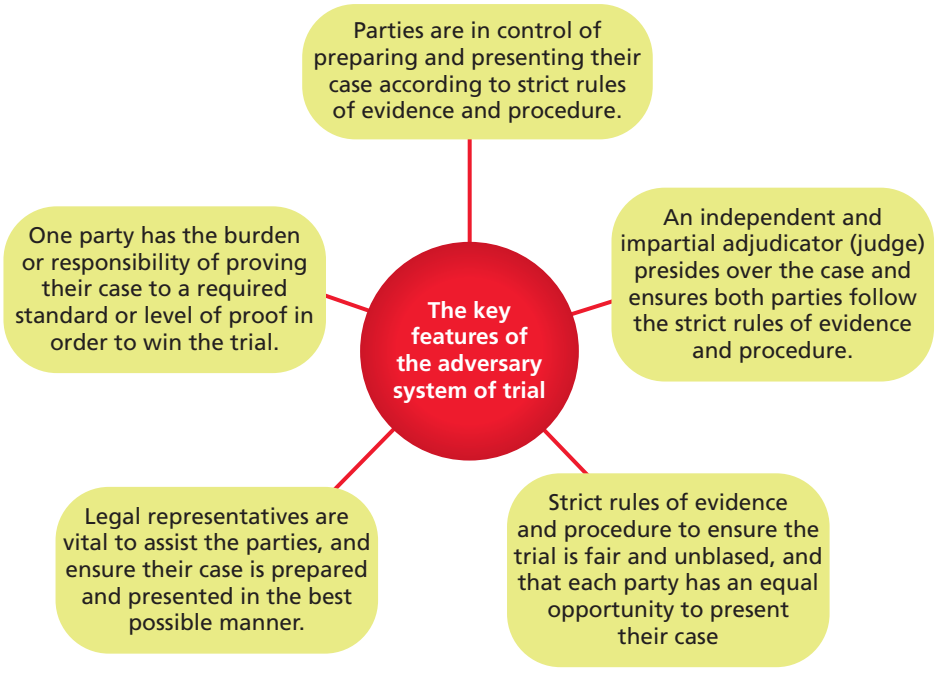
The adversary system of trial is used in most courts throughout Australia to resolve both *criminal* and *civil* cases. Under the adversary system of trial:

- two opposing parties (adversaries) are responsible for preparing and presenting their case, in accordance with strict rules of evidence and procedure, before an independent and impartial adjudicator (judge or magistrate)
- the independent judge (or magistrate) ensures each party adheres to the strict rules of evidence and procedure so both have an equal opportunity to present their case to the court and the trial is fair
- it is hoped that, by acting in self-interest and striving to win their case, each party will present the best possible evidence so the truth may emerge and justice prevail.

The following diagram outlines the major features of the adversary system of trial. Each of these features is present in every criminal and civil trial conducted throughout Australia. You will notice that the *jury* is not a feature of the adversary system of trial because juries are not used in all Australian trials; for example, while juries are used to determine the verdict in all criminal trials held in the Victorian supreme and county courts, the use of a jury in Victorian civil trials is optional. Each of the major features of the adversary system are examined more closely on pages 264–71.

DID YOU KNOW?

Some writers believe the adversary system originates from medieval times when trial was by combat or battle and the strongest of the opposing parties won the dispute.



study on

Summary

Unit 4: Resolution and justice

Area of study 2: Court processes, procedures, and engaging in justice

Topic 1: The adversary system of trial

The role of the parties

Legal representatives help a party win at trial by ensuring their case is prepared and presented in the most effective manner.

One of the most important features of the adversary system of trial is the presence of two opposing parties who control the preparation and presentation of their own case. For example, the parties are responsible for investigating the law and gathering evidence that is relevant to their case. The parties also determine how best to present their evidence and argue their case to the court, including deciding what evidence and witnesses should be presented, what questions they may ask witnesses and whether or not they will engage professional legal representation. Evidence must generally be presented in accordance with the strict rules of evidence and procedure, so it is advisable for parties to employ legal representatives to ensure their case is prepared and presented in the best possible manner.

The adversary system of trial relies on the assumption that, acting in self-interest and an attempt to win their case, each party will prepare and present the best evidence and strongest arguments to the court and, in doing so, expose the truth. Also, by giving each party the opportunity to **cross-examine** the opposing party's witnesses, the reliability of witnesses will be tested and flaws in the opposing party's arguments will be exposed.

Cross-examination refers to witnesses, who have been called to give evidence during the trial, being questioned by the opposing party to assess the reliability of their testimony and expose any inconsistencies in their evidence.

The following figure explains the strengths and weaknesses associated with the role of the parties in the adversary system of trial.

Strengths	Weaknesses
Being in control of the preparation and presentation of their case should empower parties to seek the best possible evidence and strongest arguments to win their case and expose the truth.	In an attempt to win their case, parties may deliberately omit unfavourable evidence (or inadvertently miss evidence), which may impede the discovery of the truth.
Parties may be more likely to feel a sense of satisfaction with the trial process if they are directly responsible for the preparation and presentation of their case.	Parties are responsible for the preparation and presentation of their case, so for the system to operate effectively both parties should be equally represented. A party with less experienced or no legal representation may be disadvantaged. Experienced legal representation is costly.
Having each party responsible for preparing and presenting their case is cost effective for the legal system.	The cost of preparing and presenting a case is incurred by the parties, which may discourage some individuals from pursuing legal action.
The adversary system has operated in Australia since colonisation and there is a level of confidence in the system.	Having parties engage in a battle to win the case can increase the friction and animosity between them.

The role of the judge

The role of the judge in the adversary system of trial is to ensure the trial is conducted in a fair and unbiased manner. The judge is an independent and impartial adjudicator who ensures both parties present their case in accordance with the strict rules of evidence and procedure that govern court proceedings so that each is given an equal opportunity to present their case and the trial is fair.

The independence and impartiality of the judge is central to the adversary system of trial. The judge must remain independent and not assist either party in the preparation and presentation of their case. This means the judge is not able to participate in the gathering and preparation of evidence, or call and question witnesses to help establish the facts of the case, even if it appears one party has

Under the adversary system, judges must remain independent and impartial and cannot assist parties with the preparation and presentation of their case.

DID YOU KNOW?

Former Chief Justice of the High Court of Australia, Murray Gleeson, AC, QC, once said, 'It is essential for a judge to maintain, in court, a demeanour which gives to the parties an assurance that their case will be heard and determined on its merits, and not according to some personal predisposition on the part of the judge.'

missed or omitted vital evidence or has failed to adequately cross-examine a witness. Generally, the judge is only allowed to recall witnesses and ask questions to clarify issues that have already been raised.

In addition to ensuring the trial is conducted in accordance with the strict rules of evidence and procedure, the judge must determine any questions or matters relating to the application of the law. The judge must also ensure that the party carrying the burden of proof has established the facts of the case and there is evidence to substantiate these facts. For example, in a criminal trial a judge may, at the conclusion of the prosecution's case, direct the jury to acquit (find not guilty) the accused if it is clear that the prosecution has failed to present sufficient evidence to satisfy the standard of proof required. The jury, however, is not compelled to accept this directive.

Jury trials

While the jury is not a feature of the adversary system of trial, the presence of a jury in a trial will influence the role of the judge. In trials where a jury is present, the judge is responsible for determining questions of *law* that are relevant to the case, whereas the jury is responsible for determining the *facts* of the case. The judge must also explain any relevant law to the jury so they can determine their verdict in accordance with the law. For example, in a murder trial the judge will explain to the jurors that, to be found guilty of murder, the prosecution must prove the accused had intention to kill (or cause grievous bodily harm) and that the death was a result of the actions of the accused. The jury must then, having listened to the evidence and determined the facts, apply the law to determine their verdict (that is, whether or not the accused has broken the law and is guilty of murder).

- In all criminal trials held in the county or supreme courts, the jury determines the guilt of the accused and the judge determines the sanction.
- The use of a jury is optional in civil trials heard in the Victorian county or supreme courts. When a jury is present they determine the verdict (assess the liability of the parties) and award damages (except in defamation cases).
- Juries are not used in the Magistrates' Court, so the magistrate determines both the verdict and sanction in a criminal case, or remedy in a civil case.

The following figure explains the strengths and weaknesses associated with the role of the judge in the adversary system of trial.

Strengths	Weaknesses
By using their legal expertise to determine the law and ensuring the trial follows the strict rules of evidence and procedure, the judge ensures the trial is fair and that both parties have an equal opportunity to present their case.	Judges are not permitted to call or question witnesses to establish the facts of the case, or to determine the verdict when a jury is present, so it can be argued their expertise and experience is wasted.
The judge remains independent and impartial and does not assist either party with the preparation or presentation of their case, ensuring that neither party has an unfair advantage over the other.	The judge must remain independent and impartial, so they cannot assist a party who might be disadvantaged due to having no (or inadequate) legal representation, or who has unintentionally omitted vital evidence.

TEST your understanding

1. Explain what is meant by the adversary system of trial.
2. List the key features of the adversary system of trial.
3. Explain the role of the parties in the adversary system of trial.
4. Explain how the judge's role might differ in a civil trial depending on the presence of a jury.

APPLY your understanding

5. Read the 'Did you know?' comment on this page and explain former High Court Justice Murray Gleeson's comment.
6. Evaluate two strengths associated with the role of the parties and the role of the judge in the adversary system of trial.

7.2 The adversary system: strict rules of evidence and procedure

KEY CONCEPT Another main feature of the adversary system of trial is that all trials must be conducted in accordance with strict rules of evidence and procedure to ensure the trial is fair and each party has an equal opportunity to present their case.

The existence of strict rules of evidence and procedure

Under the adversary system of trial, parties must present their evidence and conduct their cases in accordance with very strict rules of evidence and procedure. For example, the strict rules of evidence insist that parties present only *relevant, reliable* and *legally obtained* evidence to the court. Strict procedural rules govern the *sequence* and *manner* in which a party must present their case to the court (including rules relating to the examination or questioning of witnesses). The strict rules of evidence and procedure are enforced to ensure that parties are treated consistently and each has an equal opportunity to present their case.

The rules of evidence

The presentation of evidence is a vital part of every trial (and hearing) as parties present evidence in an attempt to prove their case. Without satisfactory evidence it is unlikely that a party will win their case. **Evidence** refers to statements, testimonies (evidence given under oath or affirmation), objects (for example, a weapon, photos or blood samples), or records (for example, an email, log book or medical records) that assist in establishing the facts of the case.

Evidence refers to statements, testimonies, objects or records that assist in establishing the facts of the case.

Under the adversary system, not all evidence is admissible in court; for example, parties are only permitted to present relevant, reliable and legally obtained evidence. It is the role of the judge to determine what evidence will be admissible before the court. Some types of evidence that are generally not admissible in court are explained below.

Hearsay evidence

Hearsay evidence refers to evidence that is given by a witness who did not experience an event firsthand, but is relying on another person's account of the

Hearsay evidence refers to evidence that is given by a witness who did not experience an actual event firsthand, but is relying on another person's account of the event.

event. Generally hearsay evidence is not admissible in court (with some exceptions) because the reliability of the evidence given cannot be tested.

Irrelevant evidence

Irrelevant evidence refers to extraneous evidence that is not directly related to the facts of the case and is not admissible in court.

Irrelevant evidence refers to evidence that is not directly related to the facts of the case and is not admissible in court. For example, evidence relating to how a victim might feel about an individual accused of assaulting them is generally not relevant to establishing the facts of the case. Similarly, evidence that aims to establish the bad character of the accused is generally inadmissible because it may influence and bias the jury (when present) and does not assist in establishing the facts of the case.

Retrial granted as relevance of evidence goes unexplained

In March 2009, Ms Kerry Ogden, aged 33 years, was sentenced to 10 years imprisonment, with a minimum non-parole period of seven and a half years, after a County Court jury found her guilty of two charges of culpable driving causing death. During the trial, the prosecution alleged Ms Ogden drove the car and caused the crash in which her partner, Murray Bothe and his friend, Neil Dunstone, were killed. Ms Ogden, however, pleaded not guilty, claiming her partner, Mr Bothe, was driving the car at the time of the accident and she was a passenger.

In July 2011, the Supreme Court of Appeal upheld Ms Ogden's appeal, setting aside her conviction and ordering a retrial, after finding the trial judge, Justice Lex Lasry, had made an error in law when giving directions to the jury regarding the evidence of three witnesses, which *may* have led to an incorrect verdict and an unfair trial. The Court of Appeal unanimously agreed that, because Ms Ogden's defence relied on her claim that she was not driving the car at the time of the crash, Justice Lasry made an error by not clearly explaining to the jury that evidence given by three independent witnesses — that Mr Bothe had intended to drive home on the evening of the crash — was relevant and admissible in determining who was driving the car when the accident occurred.

Kerry Ogden was found guilty of culpable driving causing death. Ms Ogden's defence counsel argued that she was not driving the car when it crashed. Witness evidence that Ms Ogden's deceased partner intended to drive home was therefore relevant and admissible.

Previous convictions

Previous (prior) **convictions** refer to the past criminal record of the accused and are generally inadmissible in court because they may prejudice the jury (when present). On occasion, judges allow previous convictions to be presented to the court if they demonstrate the tendency or propensity of the accused to commit certain types of crime (for example, a kleptomaniac who has a compulsion to steal).

Previous convictions refer to the prior criminal record of the accused and are generally not admissible as evidence in a trial conducted under the adversary system because they may prejudice the jury (when present).

Illegally obtained evidence

Illegally obtained evidence refers to evidence that has not been obtained in accordance with the law and is generally inadmissible. For example, police must ensure all their evidence is gathered using correct and lawful procedures, including obtaining necessary search and arrest warrants and informing alleged offenders of their individual rights prior to questioning, or risk their evidence being ruled inadmissible by the judge.

Illegally obtained evidence refers to evidence that has not been legally acquired, and is generally regarded as inadmissible under the strict rules of evidence.

Opinion evidence

Witnesses are generally not permitted to express opinions on matters that they did not directly observe, unless they are considered to be experts in a particular area or field. According to the Evidence Act, **opinion evidence** is only admissible if 'a person has specialised knowledge based on the person's training, study or experience'. For example, a witness to a car accident would not be allowed to give an opinion on whether the driver of the car was stressed or upset, although the opinions of a psychologist might be admissible in this regard.

Opinion evidence is evidence based on what a witness thinks, believes or infers to be the facts, rather than the witness's actual knowledge of the facts of the case.

Privileged information

Privileged information refers to evidence obtained in communications between a client and their legal representative, or a priest and confessor, and is generally inadmissible to protect confidentially between these parties.

Privileged information refers to evidence obtained in communications between a client and their legal representative, or a priest and confessor, and is generally inadmissible to protect confidentially between these parties.

Retrial granted as prosecution misleads jury

In February 2011, the Supreme Court of Appeal set aside Mr Brian Zerna's drug conviction and ordered a retrial on the basis that the prosecution in Mr Zerna's original trial misled the jury in relation to evidence (*Zerna v. The Queen; Johnson v. The Queen* [2011] VSCA 29). In the original trial in December 2007, a County Court jury found both the co-accused Mr Zerna and Mr Lance Johnson guilty of one charge of conspiracy to traffic illegal drugs. The Court of Appeal, however, found that the jury's verdict might have been based on an incorrect assumption because the prosecution misled the jury in regard to a vital point — whether or not a particular meeting between the two co-accused, and therefore the conspiracy, had actually taken place.

The rules of procedure

All trials (and hearings) that take place under the adversary system of trial must follow certain procedures and processes to ensure the trial is fair and parties have an equal opportunity to present their case. For example, the party initiating the case (the prosecution and plaintiff, in criminal and civil cases respectively) must present their case first as they hold the burden of proof, and both parties must be given the opportunity to cross-examine each other's witnesses and summarise the main issues of their case.

DID YOU KNOW?

Peter Murphy, in his *Practical guide to evidence*, recalls a perplexed English judge in an adversarial trial asking, 'Am I never to hear the truth?' Legal counsel replied, 'No, my lord, merely the evidence.'

It is hoped that the extensive oral questioning of witnesses will help reveal any inconsistencies in their testimony and assist the discovery of the truth. Witnesses may become intimidated and confused by legal representatives and court procedures, and may be disadvantaged if they cannot tell their version of the facts in their own words and without constant interruptions from legal counsel, however.

Reliance on verbal evidence

Under the adversary system of trial, the strict rules of evidence and procedure heavily rely on verbal evidence; that is, witnesses must attend court and give their evidence orally rather than by submitting written statements. Verbal evidence is preferred over written evidence as the reliability of a witness can be tested under cross-examination. Under the adversary system witnesses are also required to respond to questions posed by legal representatives, rather than presenting evidence in their own words, to help ensure their testimony is relevant to the case. The following figure explains the strengths and weaknesses associated with the existence of strict rules of evidence and procedure in the adversary system of trial.

Strengths	Weaknesses
Strict rules of evidence and procedure aim to ensure a fair and unbiased trial because each party has an equal opportunity to present their case and is treated fairly.	The strict rules of evidence and procedure necessitate the use of legal representatives, which can be expensive.
The heavy reliance on verbal evidence and the ability of parties to cross-examine witnesses allows the authenticity of evidence to be tested.	The heavy reliance on verbal evidence can increase the time it takes to present evidence to the court and disadvantage witnesses, who may give the wrong impression to the judge or jury due to anxiety or poor English skills.
	Some rules of evidence are complex and may not be understood by the parties and the jury (when present).

TEST your understanding

1 Describe **two** procedural rules followed in trials that operate under the adversary system and explain how each may assist the achievement of a fair hearing or trial.

APPLY your understanding

2 Explain whether or not the following evidence would most likely be admissible in court.
   (a) Jobe said that Charlotte had told him that her father had killed her mother.
   (b) The prosecution stated that 'this is not the first time the accused has been found to be violent, having served time in jail for rape'.
   (c) Alana, a friend of Joel, said that she thought he was very nervous on the night of the murder.
   (d) In an armed robbery case, Lewis was asked if his brother Axle, the accused, had played with toy guns as a child.
3 Explain how the heavy reliance on presenting evidence verbally in the adversary system of trial could lead to injustice.
4 Evaluate two strengths associated with the existence of strict rules of evidence and procedure as they exist under the adversary system of trial.

7.3 The adversary system: the need for legal representatives and burden and standard of proof

KEY CONCEPT When you visualise a courtroom you probably envisage a judge, the opposing parties and their lawyers. The use of legal representatives, to ensure parties present their case in the best possible light, is an integral part of the adversary system of trial, as is the existence of the legal concepts of burden and standard of proof.

The need for legal representation

One main feature of the adversary system of trial is the need for parties to obtain legal representation to ensure their cases are prepared and presented to the court in the most effective manner. The existence of strict rules of evidence and procedure throughout the trial process also necessitates the need for legal representation to ensure that parties present their evidence in accordance with these strict and complex rules. For example, the adversary system relies heavily on witnesses presenting verbal evidence so it is advantageous for parties to be represented by an experienced legal professional who is articulate and skilled in presenting arguments and extracting the truth from witnesses.

Being legally represented in court helps to present the party's case in the most favourable light.

Generally, for trials held in the higher courts (for example, the county and supreme courts), parties are represented by a **barrister**, who is responsible for presenting the case to the court on behalf of their client, and a **legal practitioner** (solicitor), who is largely responsible for preparing the case, gathering evidence and researching common law (past cases) that may be applicable to their client's case.

The following figure explains the strengths and weaknesses associated with the existence of strict rules of evidence and procedure in the adversary system of trial.

Strengths	Weaknesses
Each party has the right to be represented in court by an experienced legal professional to ensure their case is prepared and presented in the most effective manner.	For the adversary system to operate effectively both parties need to be equally represented in court. Both parties have the right to legal representation, but it is generally expensive and not all parties can afford it.
Given the heavy reliance on verbal evidence in the adversary system, it is particularly advantageous to engage articulate legal representatives who are skilled in cross-examination and extracting the truth from witnesses.	A party that has no legal representation, or is under-represented (perhaps by an overworked or less experienced lawyer) will be less likely to prepare and present their case in the most effective manner and be disadvantaged.

Barristers are legal representatives who specialise in presenting legal cases to the court in the most effective manner.

Legal practitioners (solicitors) are largely responsible for the preparation of a legal case, including gathering evidence and researching common law that may be applicable to their client's case.

The high cost of justice

Under the adversary system of trial, each party is responsible for, and incurs the costs associated with, the preparation and presentation of their case including legal fees (the cost of legal representatives), court fees (charged to register an action) and any costs involved with the gathering of evidence (such as charges for independent forensic testing, medical reports and expert witnesses). In civil cases, the losing party may also be ordered to pay the opposing party's legal costs.

Perhaps the single most expensive cost involved in taking court action is the legal fees. Legal fees vary, depending on many factors (including the experience

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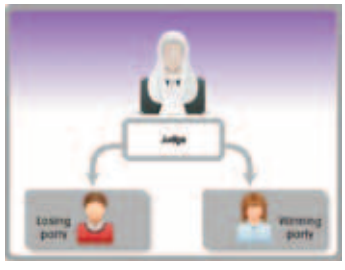
See more PowerPoint on the need for legal representation



and location of the legal representatives, the type and seriousness of the action being undertaken, the court in which the case is heard and length of the case) and are usually pre-determined by the legal representatives (at an hourly rate) or official court scales. While rates vary, parties could expect to pay approximately $350 per hour for the services of a senior legal practitioner (with more than five years experience) and approximately $2800 per day for a barrister for proceedings in the Magistrates' Court. Senior counsel (more experienced barristers) may cost over $4000 per day.

Legal fees are generally very costly, so in Victoria all legal practitioners must provide clients, as far as practical, with an estimate of the total legal costs likely to be incurred in their action and explain any factors that may alter these costs.

Burden of proof and standard of proof

All criminal and civil trials that take place under the adversary system of trial adhere to the legal concepts of the **burden of proof** and **standard of proof**. The burden of proof refers to the party who has the responsibility of proving the case and rests with the party who initiates proceedings. In a criminal case the burden of proof rests with the prosecution and in a civil case it rests with the plaintiff.

The standard of proof refers to the level (or amount) of evidence required to substantiate or prove a case. In a criminal case, the prosecution must prove the accused guilty **beyond reasonable doubt** and in a civil case the plaintiff must prove the defendant most likely breached their rights, on the **balance of probabilities**.

The following figure explains the strengths and weaknesses associated with the burden and standard of proof in the adversary system of trial.

Strengths	Weaknesses
The burden of proof ensures the party initiating the case, and making the allegations, is responsible for substantiating their claims. In a criminal trial, this assists in upholding the basic individual right of an accused to be presumed innocent until proven guilty (referred to as the **presumption of innocence**).	Having the parties responsible for preparing and presenting their cases and, more specifically, the party who initiates the case responsible for proving the case, may lead to parties omitting unfavourable evidence in an attempt to win a case.
In a criminal trial, the high standard of proof required to find an accused guilty helps ensure certainty in the verdict.	

Burden of proof refers to the party who has the responsibility of substantiating a case (the prosecution in a criminal case and plaintiff in a civil case).

The **standard of proof** refers to the level of proof required to succeed in a case (beyond reasonable doubt in a criminal case and on the balance of probabilities in a civil case).

Beyond reasonable doubt is the standard (level) of proof required by the prosecution to prove the accused guilty in criminal cases conducted under the adversary system of trial.

Balance of probabilities is the standard (level) of proof required by the plaintiff to prove the defendant breached their rights in a civil case.

The **presumption of innocence** is a fundamental right that exists within the criminal justice system: that an accused is presumed and treated as innocent until proven guilty by the prosecution.

In a criminal trial the prosecution has the burden of proving the accused is guilty beyond reasonable doubt.

Summary of the main strengths and weaknesses associated with the adversary system of trial

The following figure summarises the main strengths and weaknesses associated with the adversary system of trial.

Feature of the adversary system	Strength	Weakness
Each party is in control and responsible for presenting their own case.	• The truth should emerge as each party is empowered to present the strongest evidence and argument to win their case. • Having parties in control of preparing and presenting their case should increase party satisfaction and is cost effective for the legal system.	• In an attempt to win a case, parties may deliberately omit, or inadvertently miss, evidence that may impede the discovery of the truth. • A party with no (or less experienced) legal representation will be disadvantaged. • The high costs involved in preparing and presenting a case may discourage individuals from pursuing legal action. • Being engaged in a legal contest can increase animosity between the parties.
Independent and impartial judge oversees proceedings	The judge ensures the trial is fair by: • ensuring the strict rules of evidence and procedure are followed and determining questions of law • remaining independent and not assisting either party with their case.	The judge's expertise and experience is wasted, because they cannot actively participate in the trial to extract the truth or assist a disadvantaged party.
The existence of strict rules of evidence and procedure	• Strict rules of evidence and procedure ensure a fair trial as each party has an equal opportunity to present their case. • The heavy reliance upon verbal evidence and the ability of parties to cross-examine witnesses allows the authenticity of evidence to be tested.	• Complex rules of evidence and procedure necessitate the use of costly legal representatives and increase the length of trials. • The heavy reliance upon verbal evidence can disadvantage witnesses who may be nervous or have poor English skills.
The need for legal representation	Each party has the right to be represented in court by experienced legal professionals who ensure their case is prepared and presented in the most effective manner.	The adversary system relies on each party being equally represented and high quality legal representation is generally expensive. A party with no (or less experienced) legal representation will be disadvantaged.
The existence of the burden and standard of proof	The burden of proof helps achieve a fair trial, as the party initiating the action and making the allegations is responsible for proving their case.	Either party may omit unfavourable evidence in an attempt to win a case.

TEST your understanding

1. Explain why a party to a legal proceeding will be disadvantaged if they do not engage legal representation.
2. Distinguish between the legal concepts of the burden and standard of proof. Support your response with reference to both criminal and civil trials.
3. Describe two features of the adversary system of trial and explain how each aims to ensure the parties receive a fair and unbiased trial.

APPLY your understanding

4. Evaluate two major features of the adversary system of trial.
5. The adversary system has stood the test of time, so there must be valid reasons for retaining it. Discuss the advantages and disadvantages of the adversary system of trial.

7.4 The adversary system: achieving the elements of an effective legal system

KEY CONCEPT The key features of the adversary system of trial aim to ensure the effective operation of our legal system by providing processes and procedures to ensure a fair and unbiased hearing, promoting access to the legal system and resolving disputes in a timely manner.

study on

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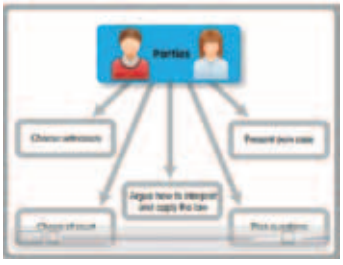
See more PowerPoint on the role of the parties



As outlined in chapter 6, an effective legal system must:
- ensure individuals are given a fair and unbiased hearing
- provide individuals with access to mechanisms (including courts and tribunals) for the resolution of disputes
- resolve disputes in a timely manner.

The key features of the adversary system of trial, including the provision of an independent and impartial judge, the ability of parties to control the preparation and presentation of their case, the existence of strict rules of evidence and procedure, and the existence of the burden and standard of proof, each assist in achieving these three key elements of an effective legal system.

The role of the parties

Having parties control the preparation and presentation of their case assists the achievement of *a fair and unbiased hearing* and may *encourage access to the legal system* (both key elements of an effective legal system) because parties are directly involved in their case. For example, parties can determine what evidence to present to the court and may be more likely to pursue civil legal proceedings knowing they will be in charge of managing their own case. The burden of incurring the costs associated with taking a case to court (especially the cost of engaging legal representatives and gathering evidence), however, can deter individuals from exercising their rights and limit *access to the legal system*. Similarly, the ability of parties to deliberately omit evidence (or inadvertently miss vital evidence) can detract from *a fair and unbiased hearing*.

The role of the judge

The existence of an independent and impartial judge who enforces the strict rules to ensure each party has an equal opportunity to present their case obviously assists the achievement of a *fair and unbiased hearing and trial*. For example, the judge remains independent and does not assist either party with the preparation and presentation of their case, so neither party gains an advantage over the other. However, the inability of the judge to assist an under-represented party and call and question witnesses may detract from a *fair hearing* and the *timely resolution of disputes*, because trials with self-represented parties, who are usually unfamiliar with court processes and procedures, often experience delays.

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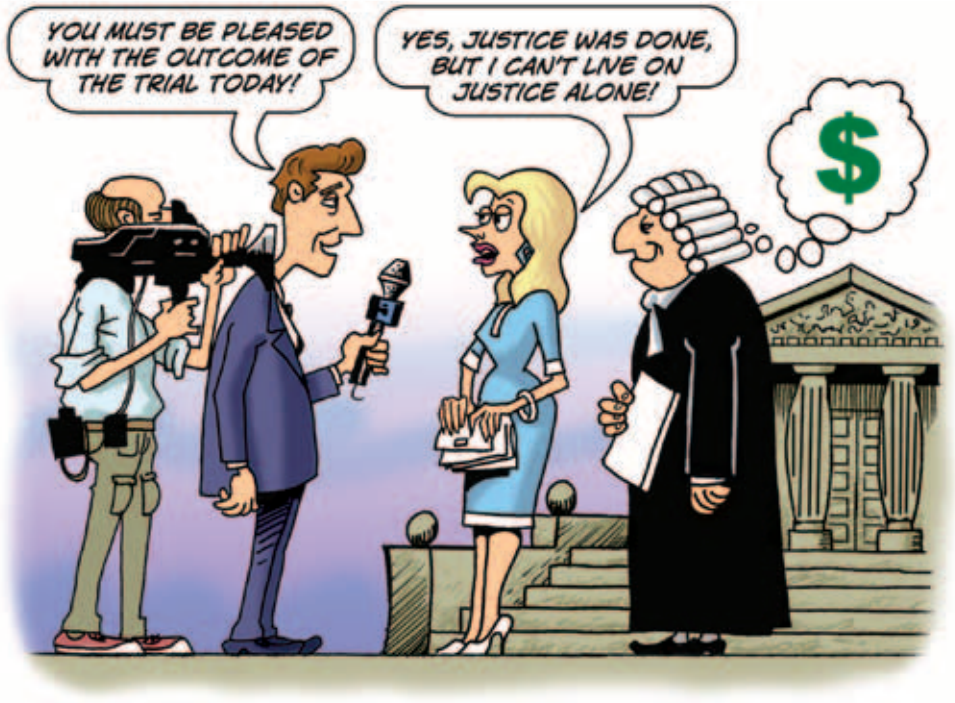
Strict rules of evidence and procedure and need for legal representation

The strict rules of evidence and procedure that exist under the adversary system of trial apply equally to both parties and are primarily designed to ensure a *fair and unbiased hearing*. For example, the rules relating to the admissibility of evidence (including that all evidence presented to the court must be relevant, reliable and legally obtained) aim to ensure a *fair, unbiased* and *timely* trial. It can be argued, however, that some rules of evidence and procedure detract from a *fair and unbiased hearing* and a *timely resolution of disputes*. For example, the heavy reliance on verbal

evidence can detract from a fair trial if the testimony of a witness appears unreliable (due to their anxiety, limited English skills or impaired memory) and may increase the length of a trial.

The complex rules of evidence and procedure also necessitate the use of legal representation, which is a cost incurred by the parties that may discourage individuals from undertaking legal proceedings (particularly civil actions and appeals) and therefore limit *effective access* to the courts. However, as mentioned on page 280, the state and federal government provide limited legal aid services to assist low-income earners.



The existence of complex rules of evidence and procedure may also disadvantage parties who suffer from cultural or social disadvantage (for example, those with limited English skills, mental health and drug dependency issues) who may not understand the court processes and procedures and detract from the ability of the adversary system to provide a *fair and unbiased hearing*.

Burden and standard of proof

The concepts of the burden and standard of proof aim to ensure a *fair and unbiased hearing*. For example, having the party who initiates a legal action responsible for proving their case ensures *fairness* because the party making the allegations must substantiate their claims. In particular, requiring the prosecution (in a criminal case) to prove the accused guilty beyond reasonable doubt upholds the basic right of an accused to be presumed innocent until proven guilty and requires a high level of certainty in a verdict. It may be argued, however, that the right of the accused to remain silent during the pre-trial and trial stages, while protecting themselves from self-incrimination, may disadvantage the prosecution (through limiting police investigations and the ability to ascertain evidence) and lead to a miscarriage of justice.

study on

Unit:	4
AOS:	2
Topic:	1

Practice VCE exam questions

TEST your understanding

1. Explain **two** ways the adversary system of trial aims to ensure individuals receive a fair and unbiased hearing.
2. Explain how the adversary system of trial may detract from a timely resolution of disputes.
3. Explain how the adversary system of trial might discourage individuals from accessing the legal system to resolve their disputes.

APPLY your understanding

4. Using your knowledge from chapters 5 and 6, explain why the emphasis on presenting verbal evidence in the adversary system of trial could lead to an unfair hearing.
5. Discuss the extent to which you believe the right of an accused to remain silent assists the achievement of a fair and unbiased hearing.

EXTEND AND APPLY YOUR KNOWLEDGE:
The adversary system of trial

While the adversary system aims to ensure a fair, unbiased and timely trial, the system has limitations and may not always achieve this aim. Read the following two criminal cases and apply your knowledge of the adversary system and key elements of an effective legal system to answer the questions provided.

Case study 1: Serial killer claims unfair trials

In August 2007, Peter Dupas, aged 57 years, was found guilty of the murder of Mersina Halvagis, aged 25 years, while she was visiting her grandmother's grave at the Fawkner cemetery in 1997. However, in 2009 Dupas lodged a successful appeal against his conviction and the Supreme Court of Appeal set aside this conviction and ordered a retrial (*R v. Dupas* (No. 3) [2009] VSCA 2002).

In a majority ruling, the Supreme Court of Appeal found that Justice Cummins, the original trial judge, made errors in law that prevented Dupas from receiving a fair and unbiased trial. The Court of Appeal found that Justice Cummins failed to adequately inform and caution the jury about specific matters that could have cast doubt on the reliability of evidence given by two witnesses (who claimed Dupas was at the Fawkner cemetery on the day of Ms Halvagis's murder).

The Court of Appeal also found that Dupas may have been disadvantaged by the decision of Justice Cummins to inform the jury that, at the time of his trial, Dupas was already serving a life sentence (with no parole) for two previous murder convictions. Justice Cummins did stress to the jury, however, that they must remain impartial and base their verdict solely on the evidence presented before the court and not be influenced by Dupas's previous criminal record or the media.

In April 2010, in an attempt to avoid his retrial, Dupas appealed to the High Court of Australia to be granted a permanent stay of trial, claiming that the media attention and sustained negative publicity regarding Ms Halvagis's murder and his two previous murder convictions prevented him from ever receiving a fair and unbiased trial. His appeal was dismissed and in November 2010, after three and a half days of deliberations, a Supreme Court jury found Dupas guilty of the murder of Ms Halvagis for the second time. Dupas is now serving life sentences for the murder of three women and will never be released from prison. In December 2010, Dupas's legal representatives announced he would seek to appeal his second conviction for the murder of Ms Halvagis.

Interestingly, the retrial for the murder of Ms Halvagis was not the first time Dupas's previous convictions had been mentioned during a case. Prior to being found guilty of Ms Halvagis's murder, Dupas was found guilty of murdering two other women, Nicole Patterson, aged 28 years (2001) and Margaret Mayer, aged 40 years (2003). In the trial for the murder of Ms Mayer, the judge allowed the prosecution to disclose evidence to the jury relating to Dupas's previous conviction for the murder of Ms Patterson. The judge allowed the evidence because it demonstrated a tendency for Dupas to commit particular types of crimes. In Ms Mayer's case, her body had similar patterns of injury and disfigurement to Ms Patterson's that could have been considered Dupas's murder 'signature'.

The parents of Mersina Halvagis, who was murdered in 1997. Peter Dupas was convicted of her murder, but in 2009 lodged a successful appeal against his conviction claiming the original trial judge had misdirected the jury. In an attempt to ensure Dupas received a fair and unbiased hearing the Supreme Court of Appeal granted a retrial.

Case study 2: The Skaf rape trial

In August 2002, Bilal Skaf, aged 20 years, was sentenced to 55 years imprisonment, with a non-parole period of 40 years, after a jury found him guilty of three brutal rapes, including the gang rape of a 16-year-old girl in Sydney in 2000. In 2006, the New South Wales Court of Criminal Appeal set aside his conviction and ordered a retrial after two jurors in the original trial independently visited the crime scene. The retrial again found Skaf guilty.

In 2006, Skaf appealed for a third time against his conviction and sentence in the retrial, claiming it was impossible for him to receive a fair trial because his name had been publicised so well that it was synonymous with gang rapes and he could never be assured an impartial jury. Skaf lost his third appeal and his conviction stood.

To enable the retrial to take place, the New South Wales Parliament passed laws altering the rules of evidence and procedure to allow the use of witness transcripts at retrials to avoid witnesses having to repeat their testimony. This change allowed a transcript of the evidence given by the 16-year-old victim in the original trial to be used in the retrial to save her from further distress and anxiety associated with repeating her testimony.

QUESTIONS

1. Draw a timeline that shows Dupas's murder convictions and subsequent appeals.
2. (a) In which court was Dupas's original trial for the murder of Ms Halvagis held?
   (b) What was the outcome of this trial? Who determined the verdict and the sentence?
   (c) With reference to Dupas's trial (and retrial) for the murder of Ms Halvagis, distinguish between the burden and standard of proof, and explain one strength of each.
3. Outline the main role of the parties and the judge in the adversary system of trial and explain how the role of each assists in, and detracts from, the achievement of a fair and unbiased trial.
4. (a) Explain why the Supreme Court of Appeal set aside Dupas's original conviction for the murder of Ms Halvagis and ordered a retrial.
   (b) Why do you think Justice Cummins disclosed Dupas's previous murder convictions to the jury in the original trial for the murder of Ms Halvagis?
5. Explain why Dupas lodged an appeal at the High Court in 2010, and discuss whether or not Dupas can ever receive a fair and unbiased trial for the murder of Ms Halvagis.
6. (a) Explain why the New South Wales Court of Criminal Appeal ordered a retrial after the original *Skaf Case*.
   (b) Explain how media attention directed towards a defendant in a trial might lead to a biased hearing.
7. (a) Explain the change made by the New South Wales parliament to the laws governing the rules of evidence and procedure in a criminal trial as a result of the *Bilal Skaf Case*.
   (b) To what extent do you think these changes increase the effectiveness of the legal system?
   (c) Describe two other rules of evidence that apply under the adversary system of trial and explain to what degree these rules increase the effectiveness of the legal system.
8. (a) Explain how the actions of the two jurors identified in Skaf's original trial may have affected Skaf's entitlement to a fair and unbiased hearing.
   (b) Explain whether or not the jury is a feature of the adversary system of trial.

7.5 The inquisitorial system

KEY CONCEPT Different countries use different methods of trial to resolve legal disputes. In Australia we use the adversary system of trial; however, many other countries use the inquisitorial system of trial in which the judge plays a more active role in finding the facts and establishing the truth.

Major features of the inquisitorial system

The **inquisitorial system** refers to a system of trial where an impartial adjudicator (judge or judges) plays a significant role in gathering the evidence for the trial, finding the facts in dispute, ascertaining the truth and determining the outcome of the case.

The **inquisitorial system** of trial is used in many countries around the world including throughout Europe (most notably in France and Germany), Asia and South America. It is based on a system of law developed centuries ago by the Romans called Roman civil law. In contrast, the adversary system of trial was developed by the British and based on their common law system.

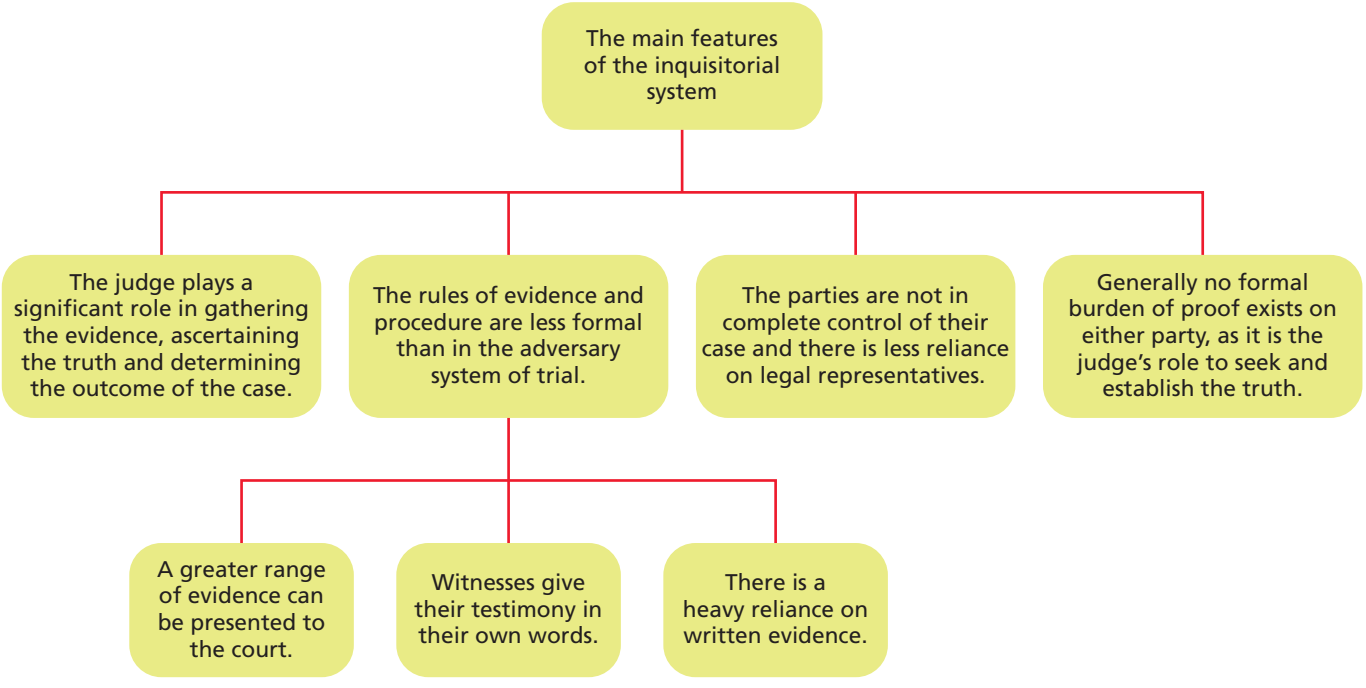
Many different versions of the inquisitorial system are in operation; however, the main common features of the inquisitorial system of trial are the:

- adjudicator (judge or judges) plays a significant role in gathering the evidence for the trial, finding the facts in dispute, ascertaining the truth and determining the outcome of the case
- rules of evidence and procedure are less formal than those in the adversary system of trial; for example, there is a greater reliance on written evidence, a greater range of evidence can be presented to the court and witnesses are able to give their testimony in their own words.

The following diagram outlines the major, and most common, features of the inquisitorial system of trial. It is important to note that, as in the adversary system of trial, the *jury* is not a feature of the inquisitorial system of trial, as most countries that use the inquisitorial system rarely use juries (although some, such as Germany, do use juries to determine the verdict in certain cases). Each of these features is examined more closely on pages 277–8.

DID YOU KNOW?

The inquisitorial system is more widely used than the adversary system of trial. Some countries, such as Italy, conduct trials using a mixture of features from both the adversarial and inquisitorial systems.



The role of the judge

Although the role of the judge may differ in detail between countries, the main role of the judge or judges (generally three judges preside over a case) in the inquisitorial system of trial is to assist in finding the facts, ascertain or extract the truth and determine the outcome of the case. To assist in establishing the facts of a case, the judge (or judges) is able to become involved in the investigation of the case and the gathering of evidence. For example, in France, one of the three judges in a criminal trial is involved in the pre-trial investigation, including collecting all necessary material (such as forensic samples), while another is responsible for questioning both suspects and witnesses and determining bail.

Another task undertaken by the judge to assist in extracting the truth in the inquisitorial system is to call and question witnesses so that all relevant facts are raised throughout the trial. Juries are not predominantly used in the inquisitorial system, so the judge or judges determine the verdict and outcome (sanction or remedy) of a case. The judge also ensures correct courtroom procedures are followed.

Rules of evidence and procedure

Under the inquisitorial system, there are no strict rules of evidence and procedure as exists in the adversary system of trial. For example:

- witnesses are able to give their testimony in their own words rather than being required to respond to questions posed to them by legal representatives. This can enable witnesses to feel less intimidated and more comfortable giving evidence.
- a greater range of evidence can be presented to the court. For example, hearsay evidence, previous convictions and evidence relating to the character of the accused (positive or negative) are permitted in criminal trials and the judges determine the relevance and weight of this evidence.
- written evidence is heavily relied on, which lessens the need for witnesses to be called to give evidence, saving time and costs (especially with regard to expert witnesses).

Role of the parties and legal representatives

Under the inquisitorial system it is the judge's role to ensure that all relevant evidence is brought before the court and the truth of the case is ascertained, so the parties to the dispute, and their legal representatives, have a lesser role compared to the adversary system of trial. Parties are permitted to have legal representation, but there is less reliance on legal representatives and their role is to not only assist the parties with the preparation and presentation of their case, but also to assist the court in discovering the truth (rather than controlling the evidence presented to the court; as occurs in the adversary system of trial).

The burden of proof

Many different versions of the inquisitorial system operate throughout the world, so the burden of proof may differ between countries; however, in general it can be said that no formal burden of proof exists on either party because it is considered the judge's role to seek and establish the truth.

It should be noted, however, that some countries (such as Indonesia) place the burden of proof on the prosecution and plaintiff (in criminal and civil trials respectively), while in other countries, in criminal trials the accused may hold the burden of proof and be required to prove their innocence.

DID YOU KNOW?

In most criminal trials conducted under the inquisitorial system, after the accused has been informed of the case against them, they must testify or give evidence to the court. In the adversary system, the accused has the right to silence and is not compelled to give evidence during the trial (or pre-trial stages).

DID YOU KNOW?

While criminal trials in the adversary system are continuous, under the inquisitorial system, trials take place in stages to allow the judges to gather evidence in a series of hearings.

DID YOU KNOW?

International courts, such as the International Criminal Court, which hears crimes against humanity, use the inquisitorial system of trial in preference to the adversary system.

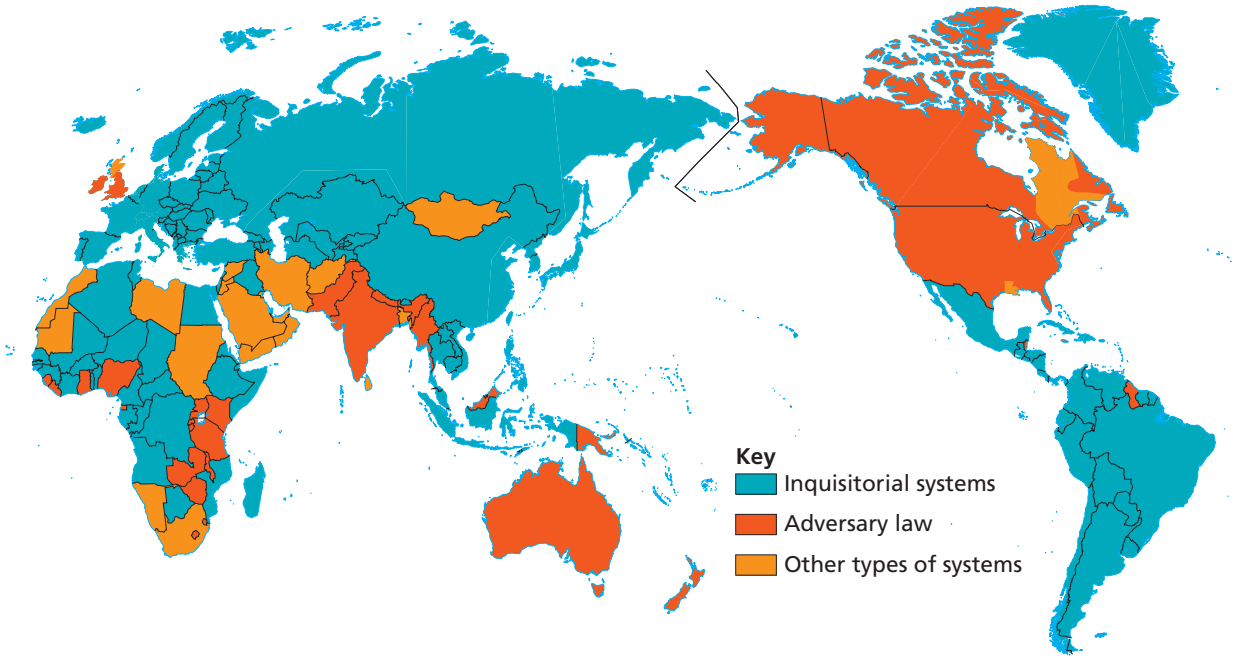
study on

Summary

Unit 4:
Resolution and justice

Area of study 2:
Court processes, procedures, and engaging in justice

Topic 2:
The inquisitorial system of trial

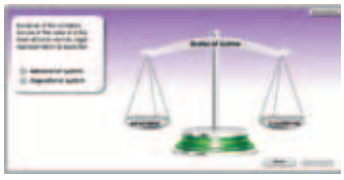


Legal systems around the world

study on

Unit:	4
AOS:	2
Topic:	2
Concept:	6

Do more
Interactivity on a comparison of the inquisitorial and adversarial systems of trial



DID YOU KNOW?

In criminal trials conducted under the inquisitorial system, rather than entering a guilty plea, the accused has their confession tendered as evidence and the trial continues until the final verdict and sentence is given.

Comparison of the inquisitorial and adversary systems of trial

The inquisitorial and adversary systems of trial mainly differ in the role of the adjudicator, the rules relating to the presentation of evidence, the role of the parties and legal representation, and the burden of proof. Table 7.1 outlines these differences.

TABLE 7.1 Comparison of the inquisitorial and adversary systems of trial

Feature	Adversary system	Inquisitorial system
The role of the judge	• The judge ensures the strict rules of evidence and procedure are followed throughout the trial and determines questions of law. • The judge remains independent and does not intervene in, or assist either party, with the preparation or presentation of their case.	The judge (judges) controls the trial process and plays a significant role in ascertaining the truth and determining the outcome of the case (including being involved in investigating the case, gathering evidence and questioning witnesses).
The rules of evidence and procedure	• Strict rules of evidence and procedure ensure each party has an equal opportunity to present their case; for example, certain types of evidence, including hearsay and prior convictions, are generally not permitted and witnesses are required to respond to questions put to them by legal representatives.	• No strict rules of evidence and procedure exist, allowing a greater range of evidence to be presented to the court and the judges to determine its relevance and weight. • Witnesses are able to give their testimony in their own words.

Feature	Adversary system	Inquisitorial system
	• There is a heavy reliance upon verbal evidence, allowing the authenticity of evidence to be tested.	• There is a heavy reliance on written evidence which saves time, stress and costs associated with verbal examination of witnesses.
The role of the parties and legal representatives	• Each party is in control of the preparation and presentation of their case and, acting in self-interest, should present the strongest evidence and argument to win the case. • The strict rules of evidence and procedure necessitate engaging experienced legal representatives to prepare and present the case in the most effective manner.	It is the judge's responsibility to investigate and conduct the case before the court, so the parties are not in complete control of their case and there is less reliance on legal representatives (whose role is to assist the parties and the court in ascertaining the truth, rather than controlling the evidence presented to the court).
The burden of proof	The burden of proof rests with the party initiating the action and making the allegations.	While the burden of proof differs between different countries, generally the burden of proof is not exclusively on either party as it is the responsibility of the judge to seek the evidence, establish the facts and ascertain the truth.

study on

Unit: 4
AOS: 2
Topic: 2
Concept: 3

Do more Interactivity on the role of the judge

study on

Unit: 4
AOS: 2
Topic: 2
Concept: 4

Do more Interactivity on rules of evidence and procedure

study on

Unit: 4
AOS: 2
Topic: 2

Practice VCE exam questions

TEST your understanding

1 Explain the role of the judge (judges) in the inquisitorial system of trial and suggest one strength and one weakness associated with their role.
2 Explain three key differences between the ways in which evidence is presented in the inquisitorial system compared to the adversary system of trial.
3 Explain how the role of the legal representatives differs between the inquisitorial and adversary system of trial.

APPLY your understanding

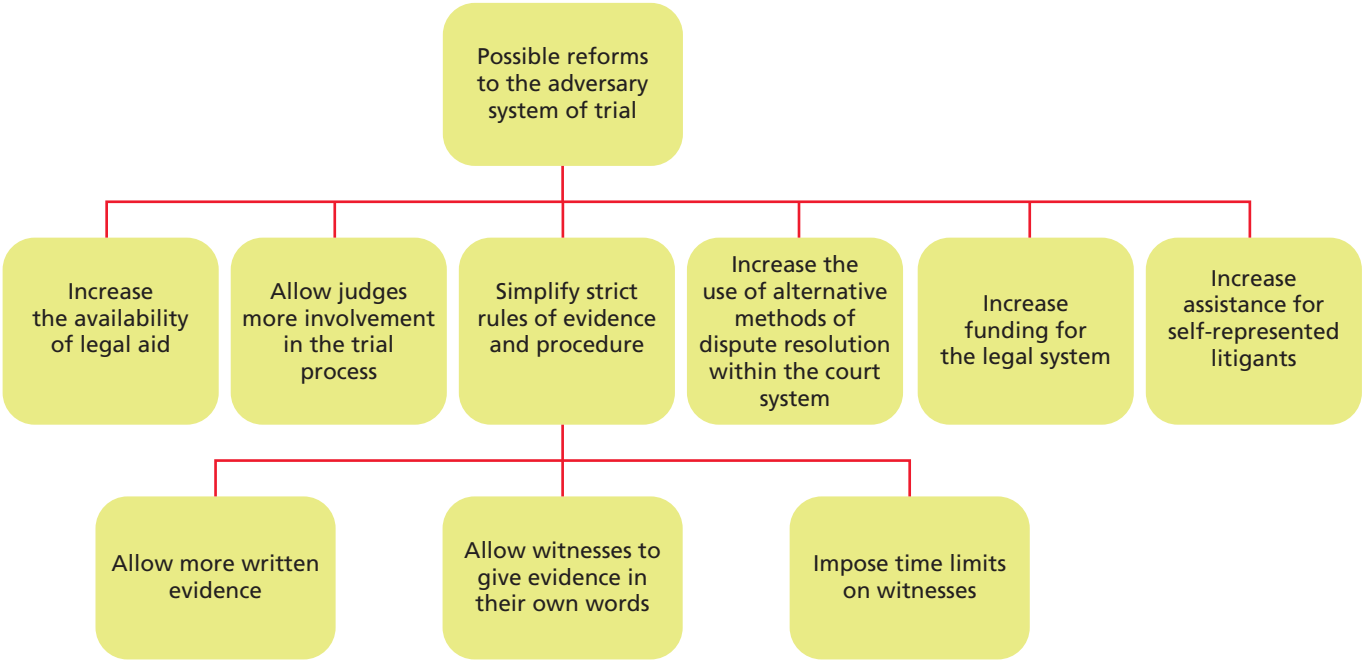
4 State whether the inquisitorial or adversary system of trial is most likely used in the following scenarios:
(a) the judge decides which witnesses to call
(b) strict rules of evidence and procedure must be followed in the trial
(c) in a criminal trial the prosecution is always responsible for proving the guilt of the accused
(d) the judge is involved in gathering evidence during the pre-trial period
(e) there is a heavy reliance on written, rather than verbal, evidence.
5 Explain two main differences between the adversary system of trial and the inquisitorial system.
6 A recent European visitor to Australia commented that, 'The inquisitorial system is far more likely to ascertain the truth than the adversary system of trial'. Explain to what extent you agree with the visitor.

7.6 Possible reforms to the adversary system

KEY CONCEPT Former Chief Justice of Australia, the Honourable Murray Gleeson, AC, once said, 'The law, like any other human creation, has defects, some of them serious. It is in constant need of improvement.' The adversary system has stood the test of time and there is a level of confidence in the system; however, reform is needed.

While the adversary system of trial has many strengths, it does have weaknesses and it is always possible to implement reforms designed to improve the effectiveness of our trial and justice system. One major criticism of the adversary system of trial is that it is costly and therefore does not provide effective access for all, which is an essential element of an effective legal system (see chapter 6, page 242). Another criticism is that it does not resolve cases in a timely manner, which is another element of an effective legal system (see chapter 6, page 243). The adversarial nature of our trial system and the strict and complex rules of evidence and procedure necessitate the use of costly legal representatives and contribute to delays throughout the legal process.

The following diagram outlines possible reforms that could be implemented to improve the adversary system of trial and enhance the effectiveness of our legal system.



Increase the availability of legal aid

For the adversary system to operate effectively it is essential that both parties to a case have equal legal representation because a party without adequate legal representation will be placed at a distinct disadvantage. Professional legal representation, however, is very costly and unaffordable for some parties. The high cost of legal representation can deter individuals from undertaking legal proceedings (particularly civil cases and appeals) and limit access to the legal system.

One reform that can be implemented to improve the operation of the adversary system is for the Commonwealth and state governments to continually increase funding for legal aid (that is, legal assistance including the provision of legal advice and grants to allow parties to obtain legal representation) so that individuals who cannot afford legal assistance have an opportunity to obtain free or low cost legal representation.

The major ongoing problem associated with the provision of legal aid is that government funding is limited and restricts the amount of assistance available. Legal aid bodies, such as Victoria Legal Aid (VLA), use strict criteria to determine who is eligible to receive grants of legal assistance (money that can be used to engage the services of a VLA or private legal representatives), including considering the applicant's financial situation (such as their income and assets), the purpose of the legal assistance and the likelihood of the legal action being successful.

Another problem associated with legal aid funding is that, as funding is limited, most is used for criminal or family matters (which take priority), meaning it is difficult to receive grants for legal assistance in civil cases, including immigration, social security or discrimination matters. Limited funding also means that, for some legal matters, cost ceilings or limits are imposed on the size of the grant made available. If a recipient uses all their grant before their case has concluded they may have to pay the remaining costs themselves.

In addition to increasing the funding available for legal aid, the state government has also recognised the ongoing need to provide support for those parties who choose to represent themselves in court. For example, the Supreme Court now provides a self-represented litigants coordinator to provide support for such parties. It would be useful for all courts to implement a similar scheme in an attempt to increase access to the courts.

DID YOU KNOW?

In 2009–10, approximately 44 100 grants of legal assistance were made by Victoria Legal Aid. Of these grants approx 28 400 were for criminal actions, 15 000 for family law matters and only 700 for civil law matters.

Allow judges to have more involvement in the trial process

Judges have immense legal knowledge, training and experience, so one possible reform to the adversary system of trial could be to allow the judge to play a more significant role in the trial process. For example, allowing judges to call and question witnesses in order to determine the facts of a case, as occurs in the inquisitorial system, could assist the achievement of a fair trial as the judge could help ascertain the truth, increase the likelihood of a correct verdict and assist a party that is under-represented or has inadvertently missed vital evidence or argument. Opponents of such a reform, however, argue that allowing judges to have more involvement in the questioning of witnesses would diminish their independence and could lead to the judge giving unfair advantage to one party.

DID YOU KNOW?

In 2009–10, Victoria Legal Aid assisted approximately 32 900 people through their criminal duty lawyer service, which provides free legal assistance and representation to those who plead guilty in the Magistrates' Court.

Increase the use of a range of dispute resolution within the court system

In an attempt to lower the costs and reduce delays associated with taking a case to court, all courts are now committed to resolving civil disputes in the most efficient manner possible, which includes using a range of dispute resolution methods including mediation, conciliation and arbitration, in addition to judicial determination. For example, with regard to civil cases, county and supreme court judges now regularly order parties to engage in mediation (generally conducted by private mediators or associate judges) in the hope they can resolve their dispute prior to trial. Ongoing government funding is aimed at increasing the use of alternative dispute resolution methods such as mediation and conciliation within these courts to increase effective access to the legal system.

Simplify rules of evidence and procedure

The strict rules of evidence and procedure that exist in the adversary system of trial could be modified in the following ways to reduce the cost, stress and delays associated with taking a case to court, which may improve access to the legal system, assist the achievement of a fair and unbiased trial, and assist a more timely resolution of disputes.

Allow a greater use of written evidence

Decreasing the heavy reliance on verbal evidence by allowing greater use of written evidence (particularly from expert witnesses) would reduce the cost and time involved in having witnesses attend court and give evidence. Opponents of this suggestion argue, however, that written evidence cannot be cross-examined and so it is more difficult to assess its reliability.

Allow witnesses to give evidence in their own words

Allowing witnesses to give evidence in their own words rather than responding to questions put to them by legal representatives could enable witnesses to give their evidence in a more relaxed manner, without fear of being confused by intimidating legal representatives. However, this may lead to an increase in the amount of irrelevant evidence presented to the court and increase delays.

Impose time limits on witnesses

Judges could be allowed to put time limits on how long witnesses are questioned in court in an attempt to reduce delays (the Victorian government is currently implementing this reform in civil cases).

Increase funding for the legal system

The adversary system of trial could be enhanced if Commonwealth and state governments increased their funding to allow the provision of more courts, more specialised jurisdictions and improved use of information technology within the court system because each reform would help reduce delays and costs associated with the adversary system of trial. For example, providing more courts in metropolitan and regional centres and specialised jurisdictions within existing courts (for example, expanding the provision of the Koori and drug courts) can increase the efficiency in dealing with certain types of cases, improve access to the legal system and help resolve disputes in a more timely manner.

Similarly, by continually embracing advancements in information technology, cases can be processed and dispensed with more quickly. Over recent years electronic filing of documents, improved video conferencing and online procedures in litigation, such as the transfer of documents from one party to another, have all enhanced court processes and helped reduce delays and costs.

Some Supreme Court of Victoria courtrooms allow evidence to be given at other court locations and relayed back to the Supreme Court via video link-up.

The adversary system of trial fails the mentally ill

It took 21 tortuous months through the courts before a Supreme Court jury declared in 2009 that Samuel Benjamin was not guilty of murder by reason of mental impairment (*DPP v. Samuel Benjamin* VSC 2008). Mr Benjamin had murdered Doctor Khulod Maarouf-Hassan at her Noble Park general practice in 2006. At the time of the murder, Mr Benjamin was psychotic and was suffering a delusion that there was a conspiracy by the medical profession to kill him. Prior to her murder, Doctor Khulod had fought for Mr Benjamin to gain access to specialist mental health services, but was unsuccessful.

At the commencement of the court process, six confusing committal hearings were held before the magistrate called for a psychiatric reassessment of Mr Benjamin, who represented himself in court. Mr Benjamin was diagnosed as psychotic and was transferred to a psychiatric hospital after having been denied bail and spending the previous seven months in prison without any medical treatment. When the case finally went to the Supreme Court, the trial was adjourned on three occasions pending further psychiatric assessments of the defendant. After being found not guilty on the grounds of mental impairment, Mr Benjamin remained in a psychiatric hospital.

Increase assistance for self-represented litigants

As we have seen, the strict rules of evidence and complex procedural rules that exist in the adversary system of trial necessitate the use of legal representatives and contribute to self-represented litigants (parties who do not engage legal representation) being placed at a significant disadvantage. One reform that has been implemented to address this problem has been the introduction of a self-represented litigants' coordinator in the Supreme Court to help assist those parties without legal representation and resolve matters in a more timely manner. In addition to having a self-represented litigants' coordinator in the Supreme Court, an Office of Self-represented Litigants could be created to improve support for self-represented parties at all courts by providing legal advice and assistance to those unable to afford legal representation.

TEST your understanding

1 Explain **two** major problems associated with the adversary system and suggest one reform that could be implemented to address each problem.
2 Alec has been charged with serious assault and cannot afford legal representation.
   (a) Suggest why Alec is at a distinct disadvantage.
   (b) Explain what legal assistance may be available to him in Victoria.
   (c) Explain one reform that could help minimise his disadvantage.

APPLY your understanding

3 Suggest how providing more funds for extra courts and personnel helps overcome problems in the adversary system.
4 Suggest how the use of technology can speed up the trial process.
5 Discuss two reforms that could be made to improve the strict rules of evidence or procedure as they operate in the adversary system of trial.
6 Read the case study 'The adversary system of trial fails the mentally ill' and answer the following questions.
   (a) Describe the events that led to the murder of Doctor Khulod.
   (b) Suggest how our adversary system of trial failed the mentally ill defendant, Mr Benjamin and discuss **two** reforms that could be implemented to address these problems.

SKILL DRILL

KEY SKILLS TO ACQUIRE:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- critically evaluate the adversary system of trial
- compare the operation and features of the adversary system with the inquisitorial system
- suggest and discuss possible reforms and alternatives to the adversary system.

SKILL DEFINITION

Define means to provide a precise meaning.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

Critically evaluate means to assess the relative merits of, in this case the adversary system. So you will be looking at its strengths and weaknesses.

Suggest means to put forward for consideration.

Pick the faults

1. Read the following scenarios relating to the adversary and inquisitorial systems of trial, then complete the following activities.
   (a) Identify the errors.
   (b) Explain the correct procedure for each error identified.

Scenario 1

Carrie, aged 48, was charged with murder and tried under the adversary system in the Victorian County Court. At the commencement of the trial, the judge, who was largely responsible for the gathering of evidence and questioning witnesses, informed Carrie that she held the burden of proving, beyond reasonable doubt, that she was innocent of the charges.

During the trial, the prosecution presented evidence to illustrate that Carrie had a general disregard for legal authority, including making reference to the fact that Carrie had two previous convictions for minor traffic offences and refused to give evidence (and hence be cross-examined) during the trial.

After both the parties had presented their cases to the court, the judge explained the relevant law to the jury and voiced his opinion that he considered Carrie was guilty. The jury then retired to consider their verdict. After 6 hours of deliberations, the jury gave a majority verdict (with 8 out of 12 members in agreement) finding Carrie guilty of murder and sentenced her to 15 years imprisonment with a non-parole period of 12 years.

Scenario 2

Gabriel, aged 27, was charged with importing illegal drugs (5 kilograms of cannabis) into Indonesia and subsequently stood trial under the inquisitorial system. Prior to the trial, Gabriel's legal representatives explained to him that, as the judges were largely responsible for gathering evidence and establishing the facts of the case, their role was limited to ensuring Gabriel understood the trial proceedings. Gabriel was also informed that the strict rules of evidence and procedure meant that most evidence would be presented verbally and all witnesses were only permitted to give evidence by responding to questions put to them by the judges and legal representatives.

At the completion of the trial the judges carefully considered all the evidence and found Gabriel guilty. While he could have faced the death penalty, the jury sentenced him to 20 years imprisonment.

Evaluate the adversary system

1. Read the list of strengths and weaknesses of the adversary system of trial and complete the following tasks.
   (a) Draw up a table, as shown below, and place each strength and weakness in the appropriate column.

Strengths of the adversary system	Weaknesses of the adversary system
1	1
2	2
3	3
4	4
5	5
6	6
7	7

   (b) Select four weaknesses of the adversary system of trial and discuss one reform that could be implemented to address each weakness.
   (c) Using your completed table as a guide, evaluate three strengths of the adversary system of trial.

Strengths and weaknesses of the adversary system of trial

(i) A party with no, or less experienced, legal representation will be disadvantaged in the preparation and presentation of their case.
(ii) An independent and impartial judge uses their legal expertise to ensure the strict rules of evidence and procedure are followed.
(iii) Being engaged in an adversarial 'battle' or contest can increase animosity between the parties.
(iv) The high costs involved in preparing and presenting a case, including legal fees, may discourage individuals from pursuing legal action.
(v) The judge remains independent, not assisting either party with the preparation and presentation of their case.
(vi) Complex rules of evidence and procedure necessitate the use of costly legal representatives, increase the length of trials and may intimidate witnesses.
(vii) In an attempt to win their case, each party will seek to present the strongest evidence and argument, so the truth should emerge.
(viii) The heavy reliance upon verbal evidence can disadvantage anxious witnesses or those with poor English skills.
(ix) The burden of proof assists in achieving a fair trial because the party initiating the action and making the allegations is responsible for proving their case.
(x) The judge's expertise and experience is wasted because they cannot actively participate in the trial to extract the truth or assist a disadvantaged party.
(xi) Having parties in control of preparing and presenting their case should increase party satisfaction and is cost effective for the legal system.
(xii) In an attempt to win their case, parties may deliberately omit, or inadvertently miss evidence, which may impede the discovery of the truth.
(xiii) Strict rules of evidence and procedure ensure a fair trial as each party has an equal opportunity to present their case, and only relevant and reliable evidence is presented.
(xiv) The heavy reliance upon verbal evidence and the ability of parties to cross-examine witnesses allows the authenticity of evidence to be tested.

2. Various features and procedures that exist under the adversary system of trial assist and detract from the achievement of an effective legal system. Consider the procedures that exist under the adversary system of trial and complete the following tasks.
   (a) Draw up a table, as shown below, and place each feature and procedure in the appropriate column. Write features and procedures that *assist* the achievement of an effective legal system in *black*, and the features and procedures that *detract* from the achievement of an effective legal system in *red*.

   Please note: a feature may be placed in more than one column. The first two have been completed for you as an example.
   (b) Select four features or procedures that exist under the adversary system of trial, from the list below, and explain how each assists and/or detracts from the achievement of an effective legal system.

	Features that assist or detract from the entitlement to a fair and unbiased hearing	Features that assist or detract from effective access to the legal system	Features that assist or detract from a timely resolution of disputes
1	*1 The judge cannot call and question witnesses to ascertain the facts or truth of the case.*		
2	2 Strict procedural rules govern the trial process.		2 Strict procedural rules govern the trial process.
3			
4			
5			
6			
7			
8			
9			
10			

Features and procedures that exist under the adversary system of trial

(i) The judge cannot call and question witnesses to ascertain the facts or truth of the case.
(ii) Strict procedural rules govern the trial process (for example, each party has the opportunity to cross-examine the opposing party's witnesses).
(iii) An independent judge ensures each party has an equal opportunity to present their case.
(iv) Parties unable to afford legal representation may be eligible to receive free or low-cost legal aid.
(v) The trial is conducted in a continuous and uninterrupted manner.
(vi) There is a heavy reliance on verbal, rather than written, evidence.
(vii) A party may choose to represent themselves in court.
(viii) Hearsay evidence and the previous convictions of an accused (in a criminal trial) are generally inadmissible.
(ix) Parties who are not satisfied with the outcome of their trial may appeal to a higher court if grounds exist.
(x) The high costs involved in preparing and presenting a case may discourage individuals from pursuing legal action.

Assessment task — outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, evaluate their operation and application, and evaluate the effectiveness of the legal system.

Please note: Outcome 2 contributes 60 marks out of the 100 marks allocated to school-assessed coursework for Unit 4. Outcome 2 may be assessed by one or more assessment tasks.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- critically evaluate the adversary system of trial
- compare the operation and features of the adversary system with the inquisitorial system
- suggest and discuss reforms to the adversary system.

A report in written or multimedia format

Create a report that critically examines and discusses possible reforms to the adversary system of trial. Your report may be in written or multimedia format (for example, using PowerPoint or Publisher).

To successfully complete this report you must:

- identify and explain the major features of the adversary system of trial
- critically evaluate three major features of the adversary system of trial
- compare three features (or aspects) of the adversary trial with the inquisitorial trial
- discuss three possible reforms that could be implemented to improve the adversary system of trial. **(2 + 6 + 6 + 6 = 20 marks)**

Tips for creating your report in multimedia format

Use this checklist to make sure you write the best report you possibly can.

Tips for creating your report

Use this checklist to make sure you write the best report that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You should at least define the adversary system and inquisitorial system.		
Discuss, interpret and analyse legal information.		
When discussing the reforms to the adversary system of trial you should explain the reform, and talk about the advantages and disadvantages associated with implementing the reform.		
Critically evaluate three features of the adversary system of trial.		
To critically evaluate a feature of the adversary system of trial you must examine its strengths and weaknesses. This would be best achieved by examining one feature at a time. For example, explain the first feature of the adversary system that you wish to examine and discuss its strengths and weaknesses. Repeat for the remaining two features you select.		

(continued)

Performance area	Yes	No
Compare three features (or aspects) of the adversary system with the inquisitorial system.		
Compare means to contrast or examine the similarities and differences between two or more things. When answering the second point in this report you should refer to table 7.1 on pages 278–9.		
Suggest and discuss three possible reforms of the adversary system of trial.		
A reform is an alteration (change) that would improve the adversary system. You might consider how implementing some features of the inquisitorial system could improve the adversary system, or discuss some reforms that could reduce the high costs and delays associated with the adversary system.		
Ensure your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Diagrams or images assist understanding.		

Chapter summary

• Explain the major features of the adversary system of trial.

- **The adversary system defined**
  - The adversary system of trial refers to a system where two opposing parties prepare and present their case, in accordance with strict rules of evidence and procedure, before an independent and impartial adjudicator.
- **Major features of the adversary system of trial**
  - The role of the parties — two opposing parties control the preparation and presentation of their own case.
  - The role of the judge — the judge is an independent and impartial adjudicator (or judge) who ensures the trial is fair and conducted in accordance with the strict rules of evidence and procedure.
  - The need for the rules of evidence and procedure — strict rules of evidence and procedure exist throughout the court process to ensure that parties are treated consistently and each has an equal opportunity to present their case.
  - The need for legal representation — ensures parties are equally represented in court, and prepare and present their case in the most effective manner.
  - The existence of the burden and standard of proof — the burden of proof refers to the party who has the responsibility of proving the case and rests with the party who initiates the proceedings. The standard of proof refers to the level (or amount) of evidence required to substantiate or prove a case.

• Strengths and weaknesses of the adversary system of trial

- **Strengths of the adversary system**
  - As each party is in control and responsible for presenting their own case, the truth should emerge because each party will aim to present the strongest evidence and argument to win their case.
  - Having parties in control of preparing and presenting their case should increase party satisfaction and is cost effective for the legal system.
  - An independent and impartial judge ensures the trial is fair by using their legal expertise to ensure the strict rules of evidence and procedure are followed, determine questions of law, and by remaining independent and not assisting either party with their case.

– Strict rules of evidence and procedure ensure a fair trial as each party has an equal opportunity to present their case, and only relevant and reliable evidence is presented to the court.
  - The heavy reliance upon verbal evidence and the ability of parties to cross-examine witnesses allows the authenticity of evidence to be tested.
  - Each party has the right to be represented in court by experienced legal professionals who ensure their case is prepared and presented in the most effective manner.
  - The burden of proof assists in achieving a fair trial, as the party initiating the action and making the allegations is responsible for proving their case.

- **Weaknesses of the adversary system**
  – In an attempt to win their case, parties may deliberately omit, or inadvertently miss evidence, which may impede the discovery of the truth.
  – A party with no or less experienced legal representation will be disadvantaged and the high costs involved in preparing and presenting a case may discourage individuals from pursuing legal action.
  – Being engaged in an adversarial 'battle' or contest can increase animosity between the parties.
  – The judge's expertise and experience is wasted, as they cannot actively participate in the trial to extract the truth or assist a disadvantaged party.
  – Complex rules of evidence and procedure necessitate the use of costly legal representatives, increase the length of trials and may intimidate witnesses.
  – The heavy reliance upon verbal evidence can disadvantage witnesses who may be anxious or have poor English skills.

- **The inquisitorial system defined**
  – The inquisitorial system is a method of trial where the judge plays an active role in investigating and examining the case in an attempt to find the truth. For example, the judge may take an active role in defining the issues to be resolved, gathering evidence and even calling and questioning witnesses.

- **Major features of the inquisitorial system**
  – The role of the judge — the judge controls the court proceedings, assists in finding facts and ascertaining the truth in the case, and determines the outcome. As such the judge is able to be involved in gathering evidence and calling and questioning witnesses.
  – The rules of evidence and procedure — the rules of evidence and procedure are less formal than under the adversary system, allowing a greater dependence upon written statements, witnesses telling their story uninterrupted and a greater range of evidence (for example, hearsay evidence and previous convictions are permitted, with the judge determining their relevance and weight).
  – The role of the parties and legal representatives — it is the judge's role to ensure that all relevant evidence is brought before the court and to ascertain the truth, so the parties have less control over their case. Legal representatives assist the parties, as well as assisting the court in discovering the truth (rather than controlling the evidence presented to the court).
  – The burden of proof — while the burden of proof may vary between countries, generally it is not specifically set on either party, as the main objective of the judge and the trial is to ascertain the truth.

- **Increase the availability of legal aid**
  – Commonwealth and state governments could increase funding for legal aid so that individuals who cannot afford legal assistance have an opportunity to obtain free or low cost legal representation and a greater range of services can be provided. This would improve access to the legal system.

• **Major features of the inquisitorial system of trial**

• **Suggest and discuss possible reforms to the adversary system of trial.**

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Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10214

- **Allow judges to have more involvement in the trial process**
  - Allow the judge to play a more significant role in the trial process, including calling and questioning witnesses in order to establish the facts of a case and assisting self-represented parties or those that may be disadvantaged. This would improve the opportunity for individuals to receive a fair and unbiased hearing.
  - Increase the use of alternative methods of dispute resolution within the court system — continuing to expand the use of mediation, conciliation and arbitration (both within the court system and at tribunals) to settle civil disputes can assist in decreasing the costs, delays, formality and stress associated with taking a civil matter to court. This would improve access to the legal system and assist a timely resolution of disputes.
  - Simplify rules of evidence and procedure — to reduce the cost, stress and delays associated with taking a case to court. This can be achieved by:
    - allowing a greater use of written evidence
    - allowing witnesses to give evidence in their own words (rather than responding to questions posed by legal representatives)
    - imposing time limits on witnesses.
  - This would help reduce costs and in turn improve access to the legal system and assist a timely resolution of disputes.
- **Increasing funding for the legal system**
  - The Commonwealth and state governments could increase funding to allow the provision of more courts, more specialised jurisdictions and improved use of information technology within the court system to reduce delays and costs associated with the adversary system of trial. This would help reduce costs, improve access to the legal system and assist a timely resolution of disputes.

Examination technique tip

Write a plan using dot points before you write your final response to each question. This way you will be sure to include all relevant information.

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

Distinguish between the adversary system of trial and the inquisitorial system. **(4 marks)**

Question 2

Evaluate **three** strengths associated with the adversary system of trial. **(6 marks)**

Question 3

Describe **two** features of the inquisitorial system of trial and compare them with the adversary system of trial. **(6 marks)**

Question 4

An advocate of the adversary system recently commented that, 'The use of the adversary system of trial in Victoria ensures that trials are conducted in a fair and effective manner'. To what extent do your agree with this statement? Justify your response. **(8 marks)**

Question 5

Explain **two** features of the adversary system of trial and suggest how these features might be improved by adopting a more inquisitorial approach. **(6 marks)**

(Total 30 marks)

CHAPTER 8

Criminal procedure

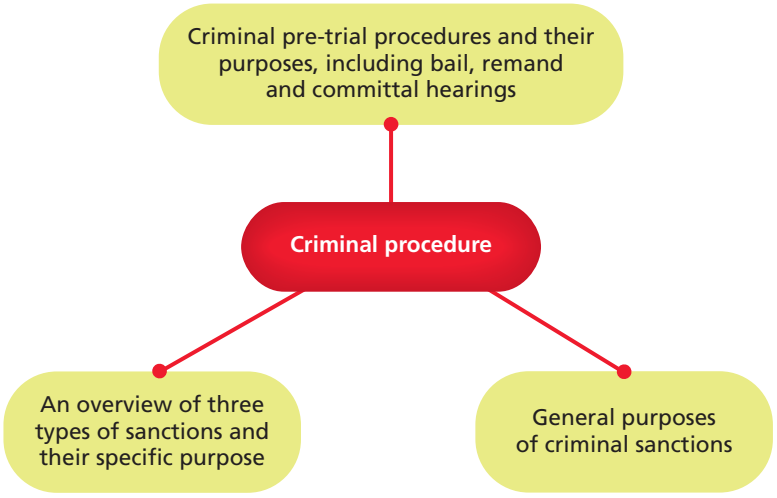
WHY IT IS IMPORTANT

'Serial killer arrested.' 'Three charged with rape.' The papers are often filled with sensationalist headlines about criminal behaviour. What happens, though, when a person who breaks the criminal law is caught and charged? Criminal pre-trial procedure provides a mechanism for dealing with criminal suspects while ensuring the community is kept safe. If the matter proceeds to court and the defendant is found guilty, then it is up to the courts to select an appropriate sanction.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes
- discuss the ability of criminal sanctions and civil remedies to achieve their purposes.

Can you demonstrate these skills?

At the risk of becoming a 'dimwit', make sure you swear!

In October 2011, it was revealed that senior police had, for decades, not been swearing important legal documents (known as affidavits) containing evidence against people who had been charged with very serious offences. When police swear a document they are asked to sign it, then take the Bible and repeat words indicating the content in the document is true. The absence of a sworn signature by police was ruled by courts to possibly eliminate that evidence because proper pre-trial procedure had not been followed. As noted by a judge hearing one of these matters, it takes about 20 seconds to swear an affidavit and police who failed to do so were 'absolute dimwits'.

In one case where this lack of sworn evidence was raised, a detective senior sergeant told Judge Montgomery in pre-trial evidence he had never sworn an affidavit in his 25-year career and he doesn't appear to be the only officer not performing this task. This failure of simple pre-trial police procedure was highlighted in November 2011 when accused drug trafficker Tony Mokbel was granted permission to change his guilty pleas on offences where the affidavits used by police were found to have not been properly sworn. Mokbel instructed his lawyers to apply to enter pleas of not guilty on the basis that vital police evidence would now be eliminated from any trial because it had not been sworn.

The Mokbel case in particular highlights the importance of pre-trial criminal procedure, which is designed to ensure consistency and certainty for all parties involved. The simple act of swearing an oath that the contents of a statement are true and correct is a part of this protection.

In a further blow to prosecutors at that time, a major case against three suspected drug traffickers, which was due to be heard in court, was withdrawn by the Director of Public Prosecutions on the grounds that unsworn police evidence was now invalid. The men walked free.

8.1 An introduction to criminal pre-trial procedures

KEY CONCEPT Once a crime has taken place proper procedures must be adhered to in bringing that suspect to court. The underlying principle behind criminal pre-trial procedures is the presumption that the accused person is innocent until proven guilty.

What is a crime?

A **crime** is behaviour that is considered by the state to be unacceptable, deserving of prosecution, conviction and punishment.

The **Office of Public Prosecutions (OPP)** is an independent statutory authority responsible for preparing and conducting criminal prosecutions in Victoria on behalf of the Director of Public Prosecutions (DPP).

A **conviction** is a record of guilt made against a person found to have committed an offence.

In simple terms, a **crime** involves behaviour that is considered unacceptable because it is against an existing law and is deserving of punishment (referred to as a sanction). When a crime occurs, it is not only the victims who have suffered (for example, in a murder or rape case), but the whole *community* (sometimes referred to as the state). The community is affected by criminal activity because it means that our very safety and ability to move about freely in the community is threatened.

In Victoria, those who commit crimes can be expected to be prosecuted — that is, be formally charged with a criminal offence and taken to court. The prosecution of an offender is undertaken by police and the **Office of Public Prosecutions (OPP)** on behalf of the community. From the age of ten years, a person can be prosecuted for committing a criminal offence. This is considered the 'age of reason', when the offender knows the difference between right and wrong. In serious cases, a **conviction** is recorded against an offender, which means that that person will have a criminal record.

Childhood is supposed to be a time of innocence. The statutory minimum age of criminal responsibility is 10 years.

Types of criminal offences

As mentioned in chapter five, there are three broad categories of criminal offences: summary offences, indictable offences heard summarily, and indictable offences which are tried in the county and supreme courts. Indictable offences are the most serious types of offences and often lead to lengthy terms of imprisonment if a defendant is found guilty.

The presumption of innocence

The underlying principle in criminal pre-trial and trial procedures is the **presumption of innocence**. This means that suspects are considered innocent until they:

- plead guilty
- are found guilty by a jury in the county or supreme courts (indictable offences)
- are found guilty by a magistrate (summary offences, indictable offences tried summarily).

According to the **presumption of innocence**, in criminal procedure the accused person is considered innocent until their guilt is established in a court of law.

The right to silence

The right to silence is one of the legal principles upheld in our legal system and is based on the premise that a person is innocent until proven guilty. It means that, although police and prosecutors in court have the right to ask questions of accused people, there is, in most circumstances, no compulsion to answer other than the person providing his or her name and address in certain circumstances. It is interesting to note that when a person speaks to police, there is no such thing as speaking 'off the record'. Anything that is said by a person to police, no matter when or where it is said, may be used later as evidence if matters proceed to court. Also, it is interesting to note that the right to silence extends throughout the entire pre-trial and trial processes.

DID YOU KNOW?

There are very few cases where a child is murdered by another child. A famous case in England occurred in 1993 when three-year-old James Bulger was murdered by two ten-year-old boys. He was beaten and stoned and his body was left on a train track to make it look like a train hit him. The two boys were found guilty of James Bulger's murder and served eight years in prison. Both were released in 2001 but one of the boys has returned to prison already for a violation of the terms of his licence of release.

The right to silence in our legal system

As we learned in chapter 3, in Australia, there is no constitutional protection for the right to silence. However, this right is broadly recognised in legislation and is regarded by the courts as being important under the common law. In general, criminal suspects in Australia have the right to refuse to answer questions posed to them by police before trial and to refuse to give evidence at trial. As a general rule, as laid down in the leading High Court case of *Petty v. R* (1991) 173 CLR 95, the right to silence was said to be a 'fundamental rule of the common law' and judges cannot instruct juries to draw any inferences of guilt from the defendant choosing to remain silent.

There are numerous situations where the right to silence is removed, particularly in the area of bankruptcy. It is also not available to witnesses testifying before a Royal Commission, which is a body established by government to investigate a particular area such as the 2009 Victorian bushfires. There has been a gradual removal of the right to silence with some legislation, especially in the area of anti-terrorism and organised crime, imposing coercive questioning on suspects. In such cases, the right to silence has been removed. Other legislative provisions remove the privilege against self-incrimination, such as the requirement to undertake a breathalyser test when driving a motor vehicle and the requirement that suspects submit to being fingerprinted.

In most circumstances the accused has the right to refuse to answer questions before and during the trial.

Double jeopardy laws

Until recently, all Victorians had the right to go free from an acquittal in the knowledge that changes relating to that offence cannot be brought against them in the future. This is known as double jeopardy. In November 2011, the Victorian Parliament amended those laws, which saw the abolition of double jeopardy in

limited circumstances. The changes allow a new trial to be ordered where new and compelling evidence becomes available that shows a person who has been acquitted of a serious crime may in fact be guilty.

Any decision to order a new trial could only be made by submitting an application to the Director of Public Prosecutions. The matter would then proceed to the Court of Appeal which would only order a new trial where it is satisfied that this would be in the interests of justice.

This legislation was agreed to by the Council of Australian Governments (COAG) in 2007. By 2011, New South Wales, Queensland, South Australia and Tasmania had already introduced this law, as had England and New Zealand.

It is believed police are preparing material for the Office of Public Prosecutions in relation to the Walsh Street murders. The men cleared of killing constables Steven Tynan and Damian Eyre 23 years ago may be retried.

The **burden of proof** is the obligation on a party to prove matters that it alleges during a court trial. The general burden of proof rests on the party that began the proceedings — that is, the prosecution in a criminal case, or the plaintiff (or applicant) in a civil dispute.

The **standard of proof** is the extent to which a party must prove a case or an assertion during a trial. The criminal standard (beyond reasonable doubt) is a much higher standard than the civil standard (balance of probabilities).

Parties in criminal proceedings

It is worth highlighting at this stage that if a criminal matter proceeds to trial, two parties are involved. The prosecution is the party that represents the interests of the state and the other party is, of course, the accused person who is referred to as the defendant. The prosecution is responsible for proving the guilt of the accused and this is referred to as the **burden of proof**. The accused's guilt must be proven according to a strict **standard of proof**, which is beyond reasonable doubt. Let us first examine the pre-trial procedures that take place before a trial commences.

TEST your understanding

1 What is a crime?
2 What is the difference between an indictable offence and a summary offence?
3 Explain why there is a general rule that the accused has a right to remain silent.
4 Which party has the burden of proof in a criminal trial and what is the standard of proof that must be reached if the accused is to be found guilty?

APPLY your understanding

5 Describe two arguments in favour and two arguments against the use of coercive powers to compel individuals to give evidence.
6 'Many people argue that the principle of double jeopardy should remain as law in Victoria.'
(a) Explain what the term 'double jeopardy' means.
(b) Outline the changes in the law proposed by the Victorian Government.

8.2 An overview of criminal pre-trial procedures and their purpose

KEY CONCEPT Newspapers have many examples of the crimes of murder, rape and theft. When a crime occurs, it is up to the police to investigate. Criminal pre-trial procedures refer to the initial arrest of the suspect, the granting of bail and the committal hearing before trial commences.

Criminal pre-trial procedures refer to those stages that take place before a person goes to trial. They include the first stages of contact that a suspect has with police: being **arrested**, being formally **charged**, being granted **bail** (where the accused is free to remain in the community while awaiting trial) or **remanded in custody** (the accused remains in jail while awaiting trial). Criminal pre-trial procedures also include the **committal hearing** that takes place in the Magistrates' Court (see page 303).

These procedures are summarised in the following diagram.

Police have significant powers of arrest under the criminal law. When police need to arrest a suspect, they usually choose a safe location where the public will not be at risk of harm.

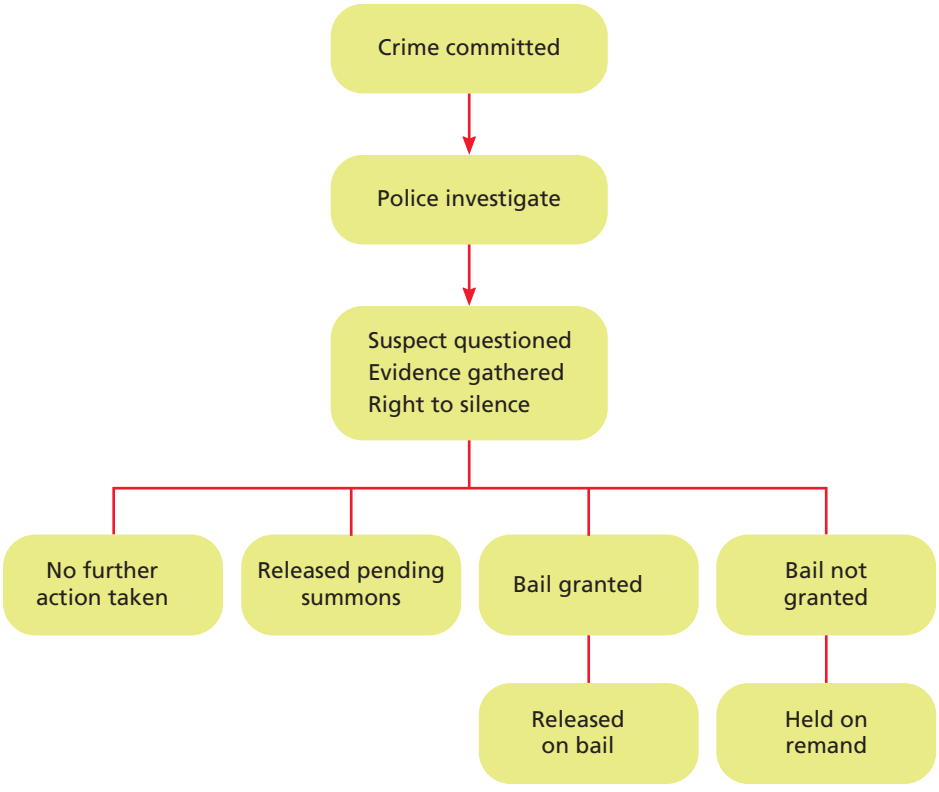
To be placed under **arrest** means to be taken into custody by a person who has lawful permission.

A person is said to have been **charged** with an offence when he or she has been accused of committing a criminal offence and has been formally advised that particular offences will be alleged in court at a later date

Bail involves an agreement to release a person accused of an offence and held in custody. Bail may be with or without conditions, such as a guarantee to pay a sum of money for failing to appear. There is generally a presumption in favour of bail being granted for an accused person. If the accused person appears in court on the nominated date, any amount of money stipulated under the bail conditions will not be payable to the court.

To be **remanded in custody** is to be held by police or prison authorities in detention during a pre-trial criminal procedure or during the trial.

A **committal hearing** or committal proceeding is the preliminary hearing (in criminal law) of an indictable offence in the Magistrates' Court to determine whether a *prima facie* case has been established — that is, whether the prosecution has sufficient evidence for the case to proceed to trial and gain a conviction in a higher court.



Criminal pre-trial procedures before a Magistrates' Court hearing or committal hearing

Arresting and charging a suspect

When a crime first takes place, the police will be called upon to investigate the matter. Police may make an arrest and take the suspect to the police station for questioning and a formal charge may be made.

A **warrant** is an order issued by a court that allows the arrest of a person named in the order, the search of premises or the seizure of property.

A **bail justice** is a person who is not a judge or magistrate, who decides whether people should be eligible for bail or remanded in custody.

DID YOU KNOW?

Each year, fingerprints help the Victoria Police to identify more than 5000 people. Not all of these people are later found to be guilty of committing an offence. The taking of fingerprints can also eliminate a person as a suspect, therefore saving police time and stress for someone who is an innocent party. Since fingerprinting was introduced more than 200 years ago, there have been no reported cases of two people having the same finger or foot prints. The introduction of a national database has made the identification of offenders more efficient, protecting the community in the process.

The police can only arrest a person when they think that the criminal law has been broken or they have a **warrant** to make the arrest. A warrant is a court order that gives police authority to take a person into custody. When making an arrest, police must inform the person of the charges that will be laid when they arrive at the police station. In turn, the person must give his or her name and address. If a person resists arrest, police can use reasonable force to bring the person into custody. If the force used is excessive, the police may be prosecuted.

After arrival at the police station, the following steps take place:

- the person may be questioned although police can only keep the suspect in custody for a reasonable time, after which he or she must be released or formally charged with an offence. The law does not define the duration of a reasonable time. The length of time depends on the seriousness of the offence, how long it takes for police to bring the person into custody and whether or not the suspect requires medical treatment or psychiatric assessment. Remember, the suspect does have the right to remain silent and must be informed of that right by the police.
- The suspect will be fingerprinted by police and reasonable force may be used if the person resists. Bodily specimens like blood and saliva may also be taken, although a court order may be required.
- Once questioning has been completed, the suspect may be charged by police, after which he or she will be taken to a **bail justice**, or a court, to make a bail application. A bail justice is someone who can give or refuse to give bail outside of court operating hours. Police may also grant bail.

The purpose of criminal pre-trial procedures

There are numerous purposes behind pre-trial procedures in criminal cases that we will note here, and also remind you about throughout this chapter. The purpose of criminal pre-trial procedure is to:

- allow police to gather evidence that can be used to accurately identify the offender
- establish clear expectations of behaviour between the police and the suspect
- uphold the presumption of innocence such that the burden of proof remains on the person bringing the allegation (the police) rather than the suspects themselves
- maintain public confidence in the legal system that suspects will be dealt with appropriately with a view to protecting the community against further crime being committed by the suspect
- ensure that the essential human rights of suspects are not infringed through excessive or cruel treatment.

TEST your understanding

1. Outline three purposes of criminal pre-trial procedures.
2. In what ways is the burden of proof upheld in criminal pre-trial procedures with regard to initial questioning of the accused person at the police station?
3. Outline the steps that occur after a person is arrested and taken to a police station.

APPLY your understanding

4. Read the case study below and answer the questions.

James (aged 16 years) and Julia (aged 15 years) are school friends who meet one day at Flinders Street Station in Melbourne. They decide to steal enough money for a taxi fare to Bendigo, where they can spend the week with Julia's sister, Mim. James pretends to purchase food from a street vendor, while Julia steals the small locked safe that was hidden at the back of the stall. They later find $300 in the safe and hail a cab to Bendigo. Later that week, they are arrested in Bendigo; and in the struggle with the arresting police officer, James sustains a broken nose. James and Julia are brought back to Melbourne for questioning and charged with property offences.

(a) Explain the law regarding the right to silence. What details might James and Julia be required to give to police?

(b) James and Julia can only be questioned 'for a reasonable time'. What factors might be relevant in this case that would affect the length of time that police would have to question James and Julia?

(c) Evaluate the right to silence as a feature of criminal pre-trial procedure. Suggest arguments for and against its use in this case.

8.3 Criminal pre-trial procedures: bail and remand

KEY CONCEPT When a suspect has been charged with an offence, the first decision that needs to be made is whether the person is released on bail or held in prison. The decision to grant or refuse bail is important because detaining a person is a potential violation of essential human rights, especially if they are later found not guilty at trial.

Bail

When people are charged with committing a crime, the suspect may either be kept in custody (jail) or released on bail. In general terms, bail allows the release from custody of a person who has been charged with a criminal offence, with an undertaking that the person will appear in court at a later date. Failing to attend court on the designated date is an offence and usually leads to additional charges. Reform of bail and **surety** laws has been considered (see chapter 11, page 430).

A **surety** is a payment or promise made by a person in criminal cases to guarantee the appearance of another person in court who has applied for bail. A surety also may seek to ensure certain bail conditions are met.

Granting bail

Police officers, magistrates, judges or bail justices can decide whether or not to grant bail, with police making the decisions in over 90 per cent of cases. If police decide to remand an accused person (that is, deny bail and detain the accused in custody), a bail justice or court must review the decision. Only judges can decide bail for murder charges, but magistrates, bail justices and police can decide bail for other offences which carry the same punishment as murder.

A person granted bail has usually just been charged with an offence; although, a bail application can be made while on remand or following a guilty verdict while the judge decides sentence. In some instances, police may oppose bail and the suspect may apply to court to have the decision overturned.

Other situations where an application for bail may occur are:

- while a hearing has been postponed or adjourned
- when a person has been found guilty in the Magistrates' Court, receives a custodial sentence and lodges an appeal
- when a person receives a custodial sentence in the county or supreme courts, pending an appeal to the Court of Appeal.

Conditions attached to the granting of bail

When a person is granted bail, conditions may be attached to the order. These conditions are designed to reduce the likelihood of the suspect absconding (not returning for the court hearing) and to provide boundaries of behaviour. Typical conditions are for the suspect to:

- forfeit their passport and not go near an airport or other point of international departure
- not visit hotels or other places such as schools, kindergartens and childcare centres
- not communicate with witnesses or others involved in the case
- report regularly to police.

Refusal of bail

Although the granting of bail reflects the presumption of innocence, there are circumstances in which the release of a suspect would be inappropriate. The person responsible for this decision will take into account the character of the person (including prior convictions), and the seriousness of the offence. These factors

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relate to whether or not the alleged offender may be considered an 'unacceptable risk' due to the reasonable belief that he or she may:

- fail to appear in court
- commit a further offence if released
- endanger the community
- interfere with witnesses or pervert the course of justice.
- In most cases, bail is also refused if:
- the charge is murder, treason, trafficking or cultivation of a drug of dependence and related importation offences. If exceptional circumstances exist, bail may be granted, especially where there are major delays in the trial, such as in the Mokbel case.
- the offender is already serving a sentence for another offence
- the accused has failed to attend court while on bail in the past
- the charge relates to trafficking or cultivation of a drug of dependence or importation offences under the *Customs Act 1901* (Cwlth). Furthermore, the law provides that, in cases involving the importation of commercial quantities of a narcotic drug, exceptional circumstances must exist before bail is granted.

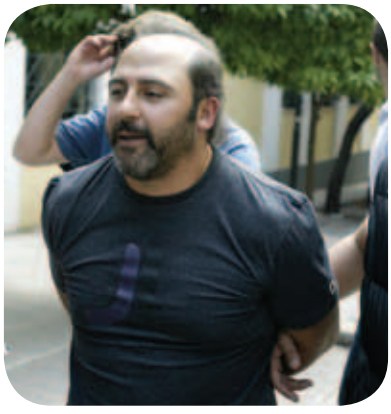
Surety

When people are released on bail, they are usually 'bailed on their own undertaking' — no money is actually paid in order to be released. Payment is sometimes required in an effort to guarantee attendance of the person in court. A failure to attend will result in money being forfeited.

A surety is a person who is given the responsibility of ensuring an accused will attend court on a later date by providing financial guarantees and agrees to ensure the attendance of a suspect at court hearings. The surety also takes steps to ensure that bail conditions are upheld. Where the offence is significant and there is concern over attendance of the accused in court, a surety is required.

When assessing what needs to be guaranteed by a surety, the police and courts examine the person's financial status and whether or not that person is of good character. A person granted bail must enter into a bail bond, which stipulates the place and date of the court hearing and the specific conditions to be attached to the grant of bail.

The following case study highlights how important it is to assess correctly whether bail should be granted.



Tony Mokbel was facing trial in the Supreme Court and, prior to sentencing, he fled Australia in breach of his bail order. Mokbel was later arrested in Greece and brought back to Melbourne under heavy police guard. The people who assisted him to escape were later charged with serious offences.

The Renate Mokbel case

In 2006, Renate Mokbel was ordered to serve two years in jail in the Victorian Supreme Court for failing to pay the $1 million bail surety she posted for her brother-in-law, Tony Mokbel, who notoriously left Australia during his drug trial and was eventually recaptured in Greece. In this case, the judge also ordered Renate Mokbel to pay the substantial legal fees of the Crown, and described her as a witness with no credibility. She received a further six months jail for lying about her family's wealth.

In the case, which centred on whether Renate Mokbel had the financial means to pay the surety, Mrs Mokbel told the court that she earned $700 per week and yet her monthly expenses totalled nearly $6000. It was revealed that during investigations, large sums of cash were found at her home. Mrs Mokbel explained to police that her husband was a 'good gambler', a suggestion Justice Gillard said was laughable and a deliberate lie.

The judge also said the fact Mrs Mokbel came to court on the last day of Tony Mokbel's drug trial before he disappeared was suspicious. Justice Gillard was the same judge who heard Mokbel's cocaine trial and allowed Mokbel to remain on bail on the weekend he disappeared. The judge said that Renate Mokbel's loyalty to her brother-in-law and his family outweighed any obligation she felt to the court.

Remand

If the accused is denied bail, or bail was granted but they could not make the necessary payments or locate a surety, they are held in custody in the remand section of a prison.

There have been calls for the reform of remand conditions. The major concern is that these people have not been to trial and, although presumed innocent, they can be subjected to inhumane conditions. The Victorian Government tackled this issue with the construction of a 300-bed correctional programs centre next to Barwon Prison.

If a person on remand is found guilty and receives a custodial sentence, the period already spent in prison is deducted from the sentence. Unfortunately, for those found not guilty, or who receive a non-custodial sentence, time on remand does not entitle them to compensation.

DID YOU KNOW?

When a person is held in prison awaiting trial, usually that person will not receive compensation if later found not guilty at trial. Boris Beljajev was held in custody for over seven years between 1990 and 2007, during which time he successfully contested charges of murder and drug trafficking. He is not eligible for compensation because the charges are not regarded as malicious or laid as a result of corruption. (*R v. Beljajev* [2007] VSC 308).

TEST your understanding

1. What is the difference between bail and surety?
2. Under what circumstances might a surety also be required?
3. At what stage of proceedings might an accused person apply for bail?
4. Note four reasons why bail may be refused.

APPLY your understanding

5. What is the purpose of bail? Explain the ways in which the granting of bail reflects the presumption of innocence.
6. Examine the two cases below and, for each case, explain the following:
   (a) the factors that may have been taken into account when considering whether or not bail should be granted
   (b) whether holding the suspect on remand would have been unreasonable in the circumstances
   (c) your decision in this case had you been the magistrate.

   Case 1

   A former childcare centre owner, charged with possessing child pornography, was allowed by a magistrate to spend Christmas interstate. He faced charges of knowingly possessing child pornography and making or producing child pornography. Police told the magistrate that the defendant had about 1000 catalogued images of child pornography stored on his computer.

   The magistrate agreed to a request from the defence barrister to vary his client's bail conditions to allow him to travel within Australia over the Christmas–New Year period. The defendant was ordered not to attend any international terminals, although he could access domestic airline terminals for the purposes of domestic air travel only.

   Case 2

   In 2007, a Supreme Court jury found Robert Farquharson guilty of the murders of his three sons by driving them into a dam near Winchelsea on Father's Day 2005. Farquharson was sentenced to life imprisonment. In December 2009, the Court of Appeal overturned the convictions and ordered a retrial. Farquharson immediately applied for bail (*R v. Farquharson* [2008] VSCA 307).

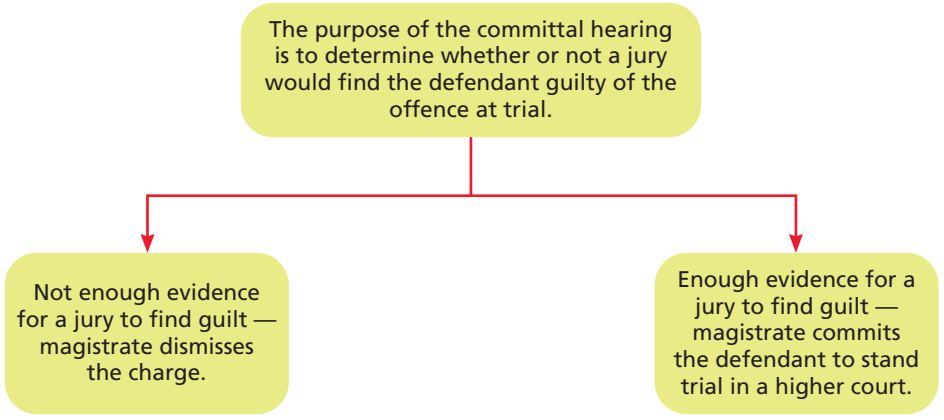
   Chief Justice Marilyn Warren said there were exceptional circumstances warranting Farquharson's release and granted him bail on a $200 000 surety. As part of his bail conditions, Farquharson was required to live at a nominated address, report to police every Monday and Friday, give 24 hours notice of any address change and not contact any Crown witnesses except for his sister and her husband. He was also required to surrender his passport and not attend any points of international departure.
7. Read the Renate Mokbel case and answer the following questions.
   (a) Outline the key facts of the case against Renate Mokbel.
   (b) Outline two reasons why the law may have considered it necessary to imprison her for these offences.

8.4 Criminal pre-trial procedures: committal hearings

KEY CONCEPT Cases involving indictable offences first proceed to the Magistrates' Court for a committal hearing. This is the first test of the prosecution case to determine whether or not the evidence is strong enough for a jury to return a guilty verdict in a higher court.

Once a person has been formally charged with committing an indictable offence and either released on bail or remanded in custody, a committal hearing occurs in the Magistrates' Court. It is important to note that a committal hearing will not be held if the defendant pleads guilty to the offence. Sometimes the defendant may wish also to face trial without a committal hearing.

At a committal hearing the magistrate must decide whether there is sufficient evidence for a jury to find the defendant guilty of an offence at trial in a higher court.



Committal hearings are designed to discontinue cases where the evidence is not considered strong enough to support a guilty verdict by a jury in a higher court. The prosecution must present all of its evidence while the accused person is not required to respond, although the defence is allowed to cross-examine prosecution witnesses. The magistrate has the authority to discontinue the case and release the defendant, who may later be re-charged if further evidence comes to light. Committal hearings provide for greater efficiency in the operation of the county and supreme courts because time is not taken hearing cases where the prosecution evidence is insufficient to support a conviction.

In most cases, people accused of committing a criminal offence will appear before the Magistrates' Court for a committal hearing. The **Director of Public Prosecutions (DPP)** does have the right to proceed directly to trial, but this decision can be

The **Director of Public Prosecutions (DPP)** has responsibility for prosecuting on behalf of the Crown in the High Court, the Supreme Court and the County Court, all indictable offences under the laws of the State of Victoria.

challenged by the accused person in the Supreme Court. In 2004, when Carl Williams (now deceased) was charged with multiple offences including conspiracy to murder, the Victorian DPP directly presented Williams for trial in the Supreme Court without a committal hearing. The decision to bypass the committal stage was challenged and overturned, and Williams and his co-accused were given the benefit of a committal hearing. Williams was later convicted of the offences in the Supreme Court. The purpose of committal hearings is to determine whether or not there is enough evidence for the prosecution to support a conviction if the case proceeds to the county or supreme courts.

Different types of committal hearings

There are two types of committal hearings:

- the traditional method, which relies on oral evidence being given under oath by prosecution witnesses
- the **hand-up brief** method, where evidence is given through the delivery of sworn written statements.

Most committal hearings now use the hand-up brief process. This is particularly important in sexual assault matters, where the victim should not be exposed to rigorous questioning by **defence counsel** at such an early stage of the case. In contrast to the traditional committal process, the hand-up brief uses written documents to present evidence. The prosecution serves documents on the defendant at least 14 days prior to the date of the hearing, including sworn statements of all Crown witnesses and photographic evidence. At least five days prior to the committal date, the defendant must notify the prosecution of any Crown witnesses whom it wishes to question by way of cross-examination at the hearing. If the defence does not intend undertaking cross-examination, the committal will proceed by way of **depositions** (sworn written statements) being presented to the magistrate, who will then decide whether or not the defendant should be committed for trial in a higher court.

A **hand-up brief** is a version of a committal hearing conducted using an exchange of documents.

The **defence counsel** is the lawyer representing the defendant in either a criminal or civil case.

Depositions are statements made under oath and taken down in writing, which may be used in court as evidence at a later date.

A **committal mention hearing** is conducted prior to the committal hearing where a date is set for the committal hearing, and the number of witnesses and the anticipated length of the hearing are identified.

A **presentment** is a document, prepared by the Office of Public Prosecutions, which formally charges a person with a criminal offence. The details of the charges are read in court at the arraignment.

Committal mention hearings

Regardless of the type of committal process being used, a **committal mention hearing** is conducted at the very start of proceedings, where the magistrate is informed of the number of witnesses to be called and the anticipated length of the hearing. The defence also may be required to justify why particular witnesses are important to the case. A date is then set for the committal hearing that is suitable for all parties.

At this stage the defendant may wish to plead guilty to some or all of the charges, in which case he or she is directed to stand trial for sentencing in the appropriate court. In some cases, where the accused pleads guilty, depending on the nature of the charges, the Magistrates' Court can hear submissions and pass sentence at that stage of proceedings.

The outcomes of a committal hearing

If the defendant is committed to stand trial in the county or supreme courts, at the conclusion of the committal hearing, all evidence is forwarded to the OPP, which refers the case to a Crown prosecutor for the preparation of a **presentment**. The presentment is the official written charge against the accused, which sets out the alleged offences considered at the committal hearing. If evidence is insufficient to support a guilty verdict by a jury in a higher court, the magistrate will release the defendant. It is important to remember that the person can once again be charged at a later date and face another committal hearing. A committal is not a trial but a *hearing* to test the strength of evidence. The fact that a person has been presented for a committal hearing does not prevent identical charges being laid in the future. Table 8.1 outlines the strengths and weaknesses of committal hearings.

TABLE 8.1 Strengths and weaknesses of committal hearings

Strengths	Weaknesses
Hand-up brief procedure allows flexibility to suit the needs of the parties involved. For example, sexual assault matters conducted by way of hand-up brief offers protection to the victim from unnecessary cross-examination at this early stage. It also saves time and the possible trauma associated with a criminal hearing.	Even with hand-up brief processes, a victim may still be required at the committal stage to testify under cross-examination, possibly resulting in added trauma for that person.
Committal hearings allow for early and full disclosure of Crown evidence. This encourages an early plea of guilty from a defendant where the Crown case is considered to be strong. Where the accused does change their plea before the trial, this may result in a reduction in the eventual sentence at the trial.	The use of committal hearings leads to delays in the eventual trial, causing increased stress for remand prisoners who may be found not guilty at trial. In such instances, the suspect's essential rights are at risk if he or she is held in custody for an unnecessarily lengthy period.
Where the magistrate dismisses the case at the committal stage, this saves the time and expense of having such cases proceed to the county or supreme courts, where the outcome of the case would most likely have been a finding of not guilty.	In spite of committal hearings occurring, there is still a significant incidence of defendants being found not guilty at the trial where it was clear that the prosecution case was weak. In these instances, the value of having a committal hearing is questionable.

Theo Theophanous Case

In July 2009, rape charges against former Labor MP Mr Theo Theophanous were dismissed in the Melbourne Magistrates' Court. The magistrate was critical of the police investigation, saying that the woman who accused Mr Theophanous was an entirely unreliable witness in many aspects of her evidence. He also said that the police investigation was not objective. The magistrate further found that the evidence of two witnesses who supported the woman's claims appeared to have been concocted.

Civil liberties groups expressed concern that, although Mr Theophanous had been cleared of any wrongdoing, his political career was at serious risk because the media had reported intimate details of the allegations. Although the Office of Public Prosecutions could elect to directly present Mr Theophanous to trial in the County Court in spite of the outcome of the committal hearing, no further action was taken in this case.

TEST your understanding

1. Outline the purpose of a committal hearing. In what ways is it designed to make the legal system more efficient?
2. What is the hand-up brief procedure? What advantages does it have over the traditional form of a committal hearing?
3. What part is played by committal mention hearings in the overall management of pre-trial criminal procedure?
4. What are the possible outcomes of a committal hearing?

APPLY your understanding

5. With reference to the *Theo Theophanous Case*, critically evaluate committal hearings as a key component of pre-trial criminal procedure.
6. Do you think that committal hearings should be closed to the public? Give reasons for and against this suggestion.

8.5 The general purposes of criminal sanctions

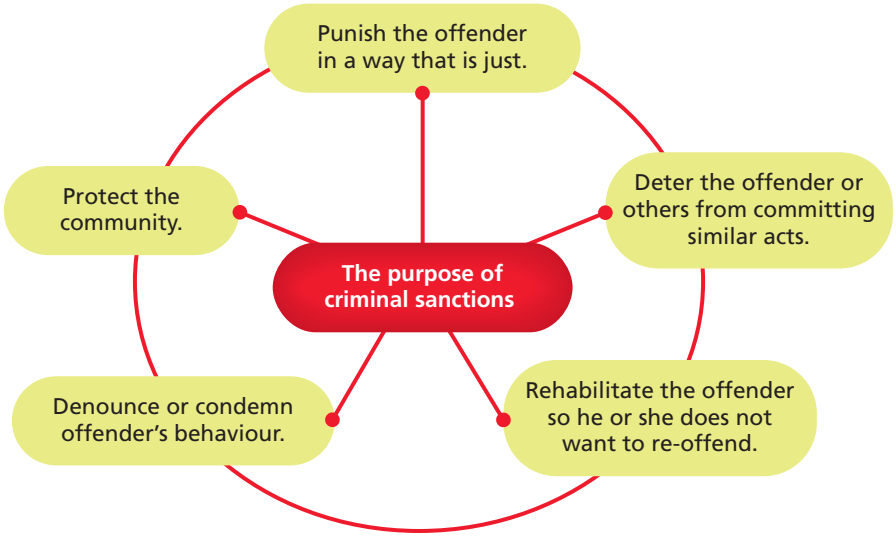
KEY CONCEPT Have you heard of the saying 'the punishment must fit the crime'? Providing an appropriate sanction for the crime committed is important, as are other factors, such as rehabilitating the offender.

The purpose of imposing sanctions

A **sanction** is a legal punishment given to a person found guilty of a criminal offence.

A **sanction** is an outcome available to the courts in a criminal case, such as imposing a term of imprisonment, a fine or a community-based order. The parliament provides guidelines to the courts in terms of maximum penalties to be imposed for each particular sanction. A sentence is the actual outcome that was imposed to suit the factual issues of that particular case. For example, legislation may stipulate that the sanction for an offence is imprisonment for a maximum of 20 years. Taking all circumstances into account, the court might impose a sentence of seven years imprisonment.

The *Sentencing Act 1991* provides the five purposes of sentencing adult offenders in Victoria. These five purposes are summarised in the diagram below and also will be described in more detail.



Just punishment

The sentence imposed must be fair and reasonable and based purely on evidence presented at trial. Outside influences such as media coverage and public opinion should not be considered. This is particularly important in high-profile cases such as those involving prominent sportspersons, politicians and actors.

Deterrence

Punishment is often inflicted with the intention of setting an example to others. This has a twofold effect — it attempts to deter others in society from committing similar crimes (referred to as general deterrence) and it discourages the offender from continuing with a life of crime (referred to as specific deterrence). If this is the case, the sanction may be selected for its severity rather than its appropriateness. Some professional groups in the community are especially targeted to attain this objective of deterrence. This is seen with school teachers who engage in sexual conduct with students and business people who rort the tax system.

DID YOU KNOW?

There has been a tendency in recent years to establish specialist courts that meet the particular needs of offenders. For example, the Koori Court and the Drug Court employ processes that are designed to focus on understanding the particular needs of the offender, with the sanction hopefully leading to rehabilitation.

Rehabilitation

All offenders must be given the opportunity to change their behaviour so that they become valuable members of society. Drug and alcohol programs are targeted at some offenders, who often require treatment to prevent further criminal conduct. Also, given the relatively poor literacy rates of many prisoners, education is a crucial element in reforming offenders. The Marngoneet Correction Centre, which was built adjacent to Barwon Prison, focuses on programs to assist prisoners who have particular needs around violence and sexual abuse. Psychologists also attempt to skill the prisoners for re-entry into the community.

Governments also have introduced a range of measures designed to keep offenders living in the community rather than sending them to prison. A drug user, for example, may be required to undergo counselling and enter a drug rehabilitation program so that the offender can be given skills to control his or her problems. Home detention is also available as a means of allowing people to resume their normal life, especially those with children who may also operate a business from home.

Denunciation of offender's conduct

Sanctions are imposed to express to offenders that society believes that their conduct was inappropriate and deserving of punishment. People who criticise the criminal justice system often point out that some sanctions are not severe enough — that the punishment does not 'fit the crime'. In this regard, our courts have the opportunity to express the community's abhorrence of certain offences. The Victorian Government's Sentencing Advisory Council plays the role of informing our political leaders of the community's views and values on the maximum penalties that should be available to courts for particular offences.

Protection

Protection of the community is only guaranteed by the removal of an offender from society through imprisonment. For the duration of the sentence, the individual is not in a position to be a threat to the community. Serious crimes such as murder and rape receive longer sentences than less serious crimes. An indefinite sentence can be imposed on someone who has previously been convicted of a similar crime and who has served time in prison, because the court believes the offender is a serious threat to the community. Notorious murderer Peter Dupas is serving an indefinite sentence for a variety of sexual offences and murders that he committed over more than three decades.

Factors to consider in sentencing

If the accused is found guilty, it is the task of the judge or magistrate to determine a sentence. Various factors affect the sentence a person will receive. The court then hears further information to assist the judge in this regard.

Prior convictions

Prior convictions are previous offences committed by the defendant for which a conviction was recorded. Before sentencing, the judge's associate reads any prior convictions to the defendant who is asked whether or not he or she wishes to challenge the accuracy of the record of offences. If there are concerns over the accuracy of the record, the matter is referred to the Department of Justice. Prior convictions are read out in court in order to give the judge information regarding the accused. If the person has prior convictions, the eventual sentence is likely to be more severe than if the person has a 'clean record'. It is interesting to note that

prior convictions generally are not revealed during the trial so as not to prejudice the jury against the defendant.

Plea in mitigation

The defence counsel usually will call on character evidence to the effect that the defendant is a reliable and honest person who should not receive a harsh sentence. Employers, school teachers and leaders of community organisations usually provide character references. If a defendant has convincing character referees, this may reduce the sentence.

The remorse shown by the offender

If the offender shows no remorse for the offence committed (and we can assume that the offender pleaded not guilty at the trial) then this may affect the eventual outcome, resulting in the person receiving a more severe penalty.

The offender's circumstances

When sentencing an offender the court often considers the offender's personal circumstances that may, to some extent, shed light on the offender's behaviour. The court considers factors such as age, cultural or family background, mental health and any addictions such as drug and alcohol addiction that might indicate the offender's level of 'responsibility' for the crime.

Early guilty pleas

In 2010 it was announced that the 'sentence indication scheme' would become a permanent feature of the criminal justice system. The scheme allows the judge to indicate before trial whether or not a custodial sentence is likely and this provides defendants with another opportunity to plead guilty and accept the responsibility of their crimes. The Sentencing Advisory Council found that 85 per cent of cases that received an indication resulted in defendants entering guilty pleas.

Section 6AAA of the Sentencing Act provides for a sentence discount in return for a guilty plea. 'Sentence discount' refers to the reduction in sentence that an offender would receive if he or she pleaded guilty. The discount provides an incentive for defendants to plead guilty, avoiding the necessity of a trial.

Victim impact statements

A further consideration in sentencing is the suffering of victims (those either directly concerned with the incident, or a dependant or carer of a person who was killed or disabled). Courts can hear a statement detailing the loss, injury or damage sustained at the hands of the offender. Victims can lodge documents with the court such as medical and psychological reports detailing treatment for injuries sustained as a result of the crime. These reports may also assist in determining compensation orders with regard to pain and suffering sustained by victims.

Either the prosecution or defence can request that the victim (and the witnesses) be called to give evidence and be cross-examined and re-examined. It is important to note that, although **victim impact statements** allow personal aspects of suffering to be considered in the trial process, the court environment overwhelms some victims and this reduces the effectiveness of their presentation.

As we have discussed, there are many factors to consider when sentencing an offender. In the following case the offender's personal circumstances were taken into consideration when deciding the appropriate sanction.

A **victim impact statement** is a statement made to the court by a victim or their next of kin in which the suffering of victims as a result of crime is outlined to the sentencing judge. The contents of the victim impact statement may affect the ultimate sentence imposed.

A **home detention order (HDO)** is when an offender is detained in his or her home, subject to conditions. Offenders are subject to an electronic monitoring system, must observe a strict curfew, and submit to random breath and urine tests.

There is a big difference between home detention and imprisonment. Do you agree with the government that home detention places too much pressure on family members to control the behaviour of an offender? It is interesting to note that overall recidivism rates are lower for people who have served home detention compared to imprisonment.

The Hinch case

In July 2011, broadcaster Derry Hinch was ordered by the Melbourne Magistrates' Court to serve five months of a **home detention order** for publicly naming two serial sex offenders. This action was illegal. Hinch was found guilty of five breaches of s. 42 of the *Serious Sexual Offenders Monitoring Act (2005)* Vic. The offences were committed between May and July 2008 when Hinch posted information on his website and publicly named the offenders at a rally outside the Victorian Parliament.

Magistrate Charlie Rozencwajg told Hinch that he had previously broken the law in this area and he was fortunate not to be imprisoned for these new offences. It was on the basis of his poor health that Hinch received the home detention order. Hinch had received a liver transplant in the weeks before the sentencing.

In sentencing Hinch, the magistrate imposed a number of conditions on Hinch's home detention order that meant he could not communicate with his radio and internet audience. During the period of the order, Hinch was barred from engaging in gainful employment and he could not use Facebook or Twitter to communicate with the public. Hinch was also ordered not to give media interviews or encourage others to pass on his views on his behalf.

With the *Sentencing Legislation Amendment (Abolition of Home Detention) Act* (2011) the Victorian Government abolished home detention as a sentencing option from mid-2012, although offenders already sentenced to home detention continued to serve that sanction. The main reasons given were that home detention was regarded as a soft punishment and it placed unreasonable pressure on family members of those being detained to ensure that the offender fulfilled the terms of the court order. From 2012, offenders who would once have been sentenced to home detention are now usually imprisoned.

TEST your understanding

1. Explain the following factors that judges take into consideration when sentencing an offender:
   (a) the degree of remorse of the offender
   (b) the seriousness of the offence
   (c) the plea in mitigation.
2. Outline the five purposes of imposing sanctions in criminal cases.
3. With regard to the five purposes of imposing sanctions in criminal cases, rank them in order of importance from the most significant to the least significant. Give reasons for your ranking of each.

APPLY your understanding

4. Examine the facts of the case against Derryn Hinch.
   (a) What offences were committed by Hinch?
   (b) Outline two reasons why this law was introduced.
   (c) In a 300-word response, discuss the ways in which the sentencing of Hinch in this case satisfies the objectives of criminal punishment.
   (d) Following his release, Hinch told the media that he couldn't guarantee that he won't commit a similar offence in the future if he sees the need to protest against 'stupid laws'. To what extent does this suggest that the Victorian Government was right to pass the Sentencing Legislation Amendment (Abolition of Home Detention) Act because home detention was not a deterrent?

8.6 An overview of sanctions: imprisonment

KEY CONCEPT Imprisonment is the most severe punishment available to the courts in Australia and is reserved for those who, it is considered, have lost the right to live in the community for a period of time.

Taking away a person's liberty is indeed one of the most severe punishments that can be given to an offender (besides capital punishment or the death penalty, which is no longer used in Australia). It means that the offender is detained in jail for a certain period of time, away from family and friends.

There are 14 prisons in Victoria, all with differing security levels and programs to meet the needs of prisoners. All prisoners are, however, required to work, unless they are medically unfit. The emphasis on work is to help the prisoner to develop work habits and skills that will help him or her gain employment once released from prison. Although the rate of **recidivism** (the rate at which people re-offend after serving a sentence for a crime) remains high, it has fallen over the past decade for some offences. This is largely due to the focus on rehabilitation rather than only punishment.

Recidivism refers to situations where a person convicted of a criminal offence commits further offences after serving their initial punishment.

Prisoners, unless medically unfit, are required to work. The types of work offered varies, but agricultural and horticultural programs are common.

DID YOU KNOW?

From 2006 to 2010, there was a significant increase in the number of people imprisoned in Victoria. At 30 June 2010, 4224 males were being held in 12 prisons, an increase of 15.4 per cent over the four year period. The percentage increase in female prisoners was 27.8 per cent, with 313 females being held in two Victorian prisons at 30 June 2010.

Jail sentences

Although the maximum term for each offence is stated in legislation, the sentence given may vary depending upon the court in which the case is heard. As mentioned in chapter 5, some indictable offences may be heard summarily, in which case the magistrate can only impose a maximum sentence of two years' imprisonment for any individual offence. When the sentence imposed is at least two years' imprisonment, a minimum term must (in almost all cases) be set. The only exception occurs where the crime is particularly serious and the court considers that the defendant should not return to the community.

It is also worth mentioning here that when sentencing an offender, a judge usually will specify a period of imprisonment and set a minimum (non-parole) period to be served, after which the offender is reviewed and assessed in terms of his or her suitability for **parole**. Being released on parole means the offender is

Parole involves supervised, conditional release from jail.

released from prison on certain conditions. One such condition is that the offender regularly meets with his or her parole officer.

Victorian law allows for indefinite sentences to be given for sex crimes, murder and manslaughter. When ordered by the trial judge, at the conclusion of the initial sentence, a court will assess whether or not the prisoner is fit to return to the community. If deemed unfit, the person remains imprisoned for a further three years, with another review to follow.

Indefinite sentences: Kevin John Carr

Kevin John Carr received what was Victoria's first indefinite sentence in 1995 after he was convicted of raping a 77-year-old woman at Southern Cross train station in 1994. At the time, the trial judge referred to the offence as a violent and horrifying attack. Carr had accumulated 57 prior convictions for offences spanning more than 18 years, including jail terms for five separate incidents of sexual assault or rape, between 1979 and 1990.

In 2009, County Court Chief Judge Michael Rozenes conducted a review of the indefinite sentence given to Carr. He ruled that Carr remained a risk to the community of committing a serious sexual or violent offence if released. Chief Justice Rozenes refused to discharge the order of an indefinite sentence which had been imposed on the offender in 1995.

A senior clinician with the major offenders unit of Corrections Victoria found that Carr had not shown the intention to change his behaviour and his interest in seeking treatment was inconsistent. Psychologist Ian Joblin also reported that Carr was resistant to any treatment available to sex offenders.

Concurrent and cumulative sentencing

A **concurrent sentence** is a sentence that requires two or more terms of imprisonment to be served together, so that the total period served in prison is the longest individual term given for any one offence by the court in that case.

A **cumulative sentence** involves two or more prison terms added together in the one case.

An offender sentenced to more than one term of imprisonment for committing more than one crime may be given a **concurrent sentence**, meaning that he or she serves the terms at the same time. For example, a person given five years' imprisonment for aggravated burglary and two years for assault will be required to serve only the five-year term.

Cumulative sentences involve an offender serving a total term of imprisonment, where two or more sentences are added together. Under legislation, defendants imprisoned for offences committed while either on bail or parole will usually serve these sentences in addition to any other term of imprisonment. The law also provides that, unless in exceptional circumstances, multiple sex offenders must serve two or more jail terms consecutively. These offences include rape and sexual penetration of a child under 16 years of age. Cumulative sentences are also imposed for:

- crimes involving default in fine payments
- offences committed while in prison
- crimes involving escape from custody
- crimes where the offender has been sentenced as a 'serious offender'.

It is also worth noting here that if the accused is held in remand prior to sentencing, this time served is considered part of the total sentence to be served.

The specific purpose of imprisonment

Under s. 5(1) of the Sentencing Act, deterrence is one of the purposes of sentencing an offender, together with punishment, denunciation, rehabilitation and community protection (incapacitation). General deterrence is aimed at reducing crime by directing the threat of that sanction at potential offenders. Specific deterrence is aimed at reducing crime by applying a criminal sanction to a specific offender, in order to dissuade that person from reoffending.

The courts have acknowledged that sentencing is a complex business. In the case of *Veen v. The Queen* [No 2] (1988) 164 CLR 465 the High Court stressed the importance of deterrence, but found that the purposes of sentencing can be in conflict: 'The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.' To highlight this complexity, according to an April 2011 report of the Sentencing Advisory Council, the threat of imprisonment has a small *general* deterrent effect, while increasing the length of terms of imprisonment does not increase deterrence.

Does imprisonment achieve its purpose?

In its April 2011 report, the Sentencing Advisory Council found that harsher prison conditions do not discourage future offending and the experience of imprisonment may have a crime-producing effect by providing a 'criminal learning environment'. Section 5(1) of the Sentencing Act provides that one of the purposes for which an offender may be sentenced is 'to protect the community from the offender'. However, if prison itself can produce higher levels of criminal behaviour, with other inmates as victims, then this could have a negative impact on the community once that person is released. The report quoted a study which found that prisoners released from maximum security prisons had a greater chance of committing violent offences upon release compared to those with a similar criminal history who had been in a medium security prison.

According to the Australian Bureau of Statistics, 49 per cent of all adult inmates in Victorian prisons at 30 June 2010 had previously received a sentence of adult imprisonment. The 2011 report of the Sentencing Advisory Council quoted research that identified four key reasons why prison as a sanction may not achieve its purpose of rehabilitation and deterrence.

- Prisons can act as a *criminal learning environment* which works in opposition to the rehabilitation programs offered by authorities.
- Imprisonment can lead to the labelling of the person as a 'criminal', hindering future opportunities for work, housing and training once they are released.
- Prison may be an inappropriate response to criminal behaviour because it fails to treat its underlying causes. Research from the 1990s to the present suggests that incarceration is appropriate for high-risk offenders, but can be devastating for low-risk inmates who present little threat to the community.
- Offenders may commit further crimes during a prison term or after release as a way of lashing out against what they see as an unjust system.

Immates are held for up to 16 hours a day in their prison cells. For many, the loss of freedom is the most difficult aspect of prison life.

TEST your understanding

1. Explain two main purposes of imprisoning an offender.
2. Explain the impact that recidivism has on the quality of life that we share as a community.
3. What are two differences between a cumulative and a concurrent prison term? Why would a judge choose to impose a cumulative rather than a concurrent term?
4. Explain two circumstances where indefinite sentences are imposed by a judge. Give two reasons why such sentences have been considered necessary.

APPLY your understanding

5. How effective are prison sentences in achieving the objectives of deterrence, rehabilitation and community protection? Provide evidence where possible to support your conclusions.

EXTEND AND APPLY YOUR KNOWLEDGE:
Youth residential centre orders and youth justice centre orders

DID YOU KNOW?

In the 12 months ending 30 June 2010, there was an overall increase of 6.5 per cent in juvenile crime in Victoria. Of some concern, the number of rapes had increased by 91.3 per cent compared to the previous year (2008–09).

Crime and young people

In 2010, former Chief Commissioner of Victoria Police, Simon Overland, expressed growing concern over the crime rate involving young people abusing drugs and alcohol, and the violence that results. Research now shows that the younger a child starts offending the higher the likelihood that that behaviour will continue into adulthood.

The Victorian Government devotes significant resources to supporting young offenders on the long road back to society. Two specific orders are available to courts when dealing with young people: a youth residential centre order and a youth justice centre order.

Specific sanctions that are more suited to young people are available in our criminal justice system. Since the mid-1990s, there has been an explosion in the use of drugs in Victoria. While police target nightclubs and hotels to catch drug offenders, there is also evidence of drug deals being made on trams and at train stations in broad daylight.

Youth residential centre orders

A **youth residential centre (YRC) order** is a court order sentencing a young person aged between 10 and 14 years to a period in custody not exceeding two years in a youth residential centre.

A magistrate or judge uses a **youth residential centre (YRC) order** to sentence a young person to a period in custody in a youth residential centre. The order cannot be for longer than two years.

YRC orders are given to young people, aged between 10 and 14 years, who have been found guilty of very serious offences or who are repeat offenders. Most young people who receive a YRC order will have had a number of sentences imposed on previous occasions, most notably community-based orders. After sentencing, the young person is escorted to Parkville Youth Residential Centre, where the terms of the order will be explained. These include the following:

- attending school
- attending programs to address issues like drugs and alcohol abuse, or anger management, which contributed to the offending
- taking part in sporting activities.

Breaching a YRC order

If the rules of a YRC order are breached, the usual response is to lose privileges, such as leave and outings, and parole may also be delayed. If the breach has been severe, the young person could face the Youth Residential Board, which might:

- give the young person a warning
- transfer the YRC order to a youth justice centre (YJC) order, which means moving the young person to another centre where the other inmates are older.

The specific purpose of YRC orders

The primary purpose of imposing YRC orders is to rehabilitate the offenders so that they are encouraged to attend school and advance their lives through education. The health needs of the young people are met through specialist treatment programs for drug use and any related psychological conditions. YRC orders also impose severe penalties for a breach, which deter offenders and others from committing such offences.

Youth justice centre orders

A **youth justice centre (YJC) order** sentences a young person to a period of time in custody at a youth justice centre for a maximum of three years. YJC orders are given to young people, aged between 15 and 17 years, at the time the alleged offence took place and under 19 years of age when court proceedings begin. YJC orders are given to those who have been found guilty of very serious offences or who are repeat offenders. Most young people who receive YJC sentences will usually have had a number of community-based orders for earlier offences, as well as probation, a youth supervision order or a youth attendance order. Females will serve their order at Parkville Youth Residential Centre, while males will be sent to the Melbourne Youth Justice Centre (if aged 15 to 17 years) or Malmsbury (if aged between 18 and 20 years).

While at the centre, the young people are expected to engage in programs to deal with their offending behaviour, such as drug and alcohol treatment or anger management counselling. They can also undertake TAFE courses, sporting activities and have outings away from the centre.

A **youth justice centre (YJC) order** is a court order requiring a young person aged between 15 and 20 years to remain in custody at a youth justice centre for a specified period not exceeding three years.

Breaching a YJC order

If a young person breaks a YJC order, at the very least he or she can lose privileges and may also be fined. In extreme circumstances, he or she will be brought before the Youth Parole Board which has the authority to direct that the young person be removed from that centre and placed in an adult prison. This is, however, a last resort, given the youth and inexperience of the offender and the potential dangers of being exposed to older inmates.

The specific purpose of YJC orders

The main purpose of a YJC order is to keep a young person out of the adult corrections system, thereby improving his or her chance of rehabilitation. It is considered that the adult sector would expose a young offender to influences and violence that would be very negative. These orders involve incarceration, so there is a strong deterrent factor, both for the young person and others in the community, and while the offender is in custody, the community is protected.

DID YOU KNOW?

There are three juvenile justice centres in Victoria for young people aged between 10 and 20 years: Malmsbury Youth Justice Centre, Melbourne Youth Justice Centre and Parkville Youth Residential Centre.

Do YRC orders and YJC orders achieve their purpose?

In late 2011, the Victorian Government announced that it would draft new laws aimed at addressing 'gross violence' by young people aged 16 and 17 years. Under the proposals, offenders would be jailed for a statutory minimum of two years and adults jailed for a minimum of four years. At this time, the Court of Appeal delivered a judgement in a case involving a 15-year-old boy who had been found guilty by a Supreme Court jury of aggravated burglary, kidnapping, recklessly causing serious

injury and reckless conduct endangering a person. He was originally sentenced to three years in a youth justice centre, which was reduced on appeal to 194 days detention and an 18-month supervision order on release. The boy was one of six offenders involved in a plot to kill a woman by drowning her in the Maribyrnong River in December 2008. At his trial, the boy was acquitted of attempted murder.

In deciding on this case, Justices Chris Maxwell, David Harper and Lex Lasry of the Court of Appeal ruled that under the *Children and Young Persons Act 1989* (Vic.) general deterrence played no part in deciding what an appropriate sentence should be. Therefore, when a judge sentences a young offender, they consider principles that emphasise allowing the child to live at home, continuing with education or employment, preserving family relationships and minimising stigma. The judges found that the legislation only provides for specific deterrence, which means focusing on the individual offender and attempting to deter that person from reoffending, rather than considering the public response to the sentence imposed. In the opinion of the Court of Appeal, to treat a child as a vehicle for general deterrence would mean making an example of the child for the purpose of deterring others. This may mean that sentences would not necessarily be in the interests of the child, which the judges argued was contrary to Victorian law.

The law is quite clear that youth justice centre orders and youth residential centre orders have as their major focus the rehabilitation of the young person and protection of society from those who are deemed to present a danger to the community. Where a serious penalty is imposed, this provides for just punishment of the young offender and shows denunciation for the illegal acts committed.

QUESTIONS

1. At what age can young people be sentenced to a:
   (a) youth residential centre
   (b) youth justice centre?
2. Outline the key features of a youth residential centre order. In what ways is this order designed to assist the young person in his or her rehabilitation?
3. In what ways do youth residential centre orders and youth justice centre orders meet the objectives of criminal punishment?
4. In your own words, explain the attitude of the judges of the Court of Appeal to whether general deterrence should be considered when sentencing a young person.
5. Do you agree that it is appropriate for the parliament to impose a statutory minimum of two years detention for an act of gross violence, or should the courts have discretion in all cases involving young people? Explain your opinion with reference to the purposes of imposing criminal sanctions.

8.7 An overview of sanctions: suspended sentences

KEY CONCEPT A suspended sentence is a sanction designed to indicate to the offender and the community that the crime that has been committed is very serious. If a person breaks the conditions imposed on a suspended sentence, that person will most likely serve a jail term.

Suspended sentences are given in cases where people are convicted of serious offences but the court considers it more appropriate that they remain in the community. A term of imprisonment is imposed but the offender may serve this time in the community. The term of imprisonment may be either partially or wholly suspended.

A **suspended sentence** is the suspension of a term of imprisonment, either wholly or partly, for a specified period during which time the offender is required to be of good behaviour.

Courts may suspend a prison term of up to 24 months. This may be either *partially suspended* (offenders spend a portion of their sentence in prison, but then are released for the remainder) or *wholly suspended* (they go free from the court on the day of sentencing). The purpose of these sentences is to provide offenders with the opportunity to demonstrate that they are capable of lawful behaviour and to allow for minimum disruption to their lives.

This is important in the case of self-employed people and people with dependants. Victorian law states that defendants who breach a suspended sentence by further offending are to serve any subsequent term of imprisonment cumulatively with the original sentence.

Data released in 2009 showed that almost one-third of people found guilty of offences received suspended sentences in some of Victoria's courts. The Sentencing Advisory Council released a report stating that 653 offenders convicted in the state's supreme and county courts received wholly or partially suspended sentences in 2008. With the passage of the *Sentencing Further Amendment Act (2011)* Vic., suspended sentences were scrapped for convictions in the Supreme Court and County Court for offences including murder, manslaughter, rape and other serious sexual offences, armed robbery, intentionally or recklessly causing serious injury, aggravated burglary, arson and commercial drug trafficking. Although suspended sentences were abolished for these offences, this does not mean that judges must send offenders to prison. The legislation still allows the courts to order community-based sentences in such cases.

In April 2011, Mary Pyrczak, 51, was sentenced to a three-year jail term, which was wholly suspended for three years. The offender has a diagnosed obsessive compulsive disorder. She pleaded guilty to manslaughter by criminal negligence after leaving her elderly mother to die because both mother and daughter shared a phobia of doctors. Evidence was given in the case that both women viewed medical practitioners and hospitals 'as a last resort'.

According to Mr Clark, the abolition of suspended sentences for these offences was the first stage in implementing the Baillieu Government's commitment to more severe sentencing for serious offences. Some people claimed that removing this sentencing discretion from judges interfered with the separation of powers. Another problem for the government was where to actually house the expected increase in the number of prisoners coming through the criminal justice system. To accommodate these inmates, the government promised 500 extra prison beds, including 300 places at the minimum security facilities of Beechworth, Dhurringile and Langi Kal Kal.

DID YOU KNOW?

In 2008–09, the Victorian county and supreme courts imposed a greater percentage of fully suspended sentences (25.8 per cent) than any other mainland state. Figures released by the Australian Bureau of Statistics showed that of 1963 offenders convicted in the county and supreme courts, judges freed 506 on wholly suspended terms.

Specific purposes of suspended sentences

As already mentioned, the purpose of a suspended sentence is to give the offender 'one last chance' to prove that he or she is capable of lawful behaviour, otherwise the offender will be sent to jail. In effect, it a specific deterrent to the offender who knows that jail will follow if he or she re-offends.

Section 27 of the Sentencing Act states, among other things, that the court must take into consideration a number of factors when granting a suspended sentence — factors such as the nature of the offence and the degree of risk of the offender committing another offence punishable by imprisonment. Protection of the community, punishing the offender and denouncing or condemning the offender's behaviour are not considered to be the main aims of suspended sentences. The main aim of suspended sentences is specific deterrence and, perhaps, rehabilitation.

There is much controversy surrounding suspended sentences.

Do suspended sentences achieve their purpose?

Research by the Sentencing Advisory Council spanning back to 2000 indicates that suspended sentences are less likely to be breached when they are given in the county and supreme courts for serious offences, than when they are imposed by the Magistrates' Court. One of the reasons for this could be that an offender who receives a suspended sentence in the Magistrates' Court may consider that the jail term to be served for a breach of the order is insignificant so the deterrent effect is reduced.

During the debate that saw the change in the law in 2011, the Young People's Legal Rights Centre (Youthlaw) argued that suspended sentences are a serious sanction and this is why they were effective for the more serious offences, where the prospect of an extended prison term was very real. Youthlaw pointed to the report entitled *Sentencing snapshot: breach of suspended sentences*, which indicated that approximately 70 per cent of suspended sentences imposed in Victoria were not breached and this presented a strong case for the retention of suspended sentences.

Youthlaw argued that with regard to young offenders, some suspended sentences have been ordered in inappropriate cases, but in the vast majority of cases, a suspended sentence has worked for young offenders as well as the community. The organisation argued that a broad range of sentencing orders should be available to the courts, to take into account the individual factors for young, mentally impaired and intellectually disabled offenders. For young offenders, the guiding principle should be rehabilitation.

Under the changes that came into effect in 2011, suspended sentences are given for less serious offences. Youthlaw argues that to remove the option for the courts of giving a suspended sentence for a serious offence limits the effectiveness of judges to fully satisfy the purpose of imposing criminal sanctions.

TEST your understanding

1 What is a suspended sentence?
2 When are suspended sentences given?
3 What changes to the law relating to suspended sentences were made in 2011?

APPLY your understanding

4 'Judges need to be able to show discretion when sentencing offenders, even for serious cases such as assaults and robberies. The changes to the law in 2011 interfere with judicial discretion in an inappropriate way.'

Discuss the above statement in a 300-word response. In your response, refer to the objectives of criminal punishment.

5 What is the specific purpose of giving a suspended sentence?
6 Do suspended sentences fulfil their specific purpose?

8.8 An overview of sanctions: community correction orders

KEY CONCEPT Community correction orders were introduced in 2012. Community correction orders cater for offenders whose offences are not deemed serious enough to warrant a term of imprisonment. These orders emphasise the rehabilitation of the offender and encourage an active contribution to community life.

Community correction orders

From 16 January 2012, a single **community correction order** (CCO) was introduced, which replaced a range of previous orders including community-based orders, combined custody and treatment orders, and intensive correction orders. Under the *Sentencing Amendment (Community Correction Reform) Act 2011*, orders given prior to 16 January 2012 continued until expiry.

A CCO sits between imprisonment and fines in the sentencing hierarchy and is available for any offence punishable by more than five **penalty units**. As explained by Attorney-General Robert Clark, 'The CCO will also provide an alternative sentencing option for offenders who are at risk of being sent to jail. These offenders may not yet deserve a jail sentence but should be subject to significant restrictions and supervision if they are going to live with the rest of the community. The broad range of new powers under the CCO will allow courts wide flexibility to tailor their response to address the needs of offenders and set appropriate punishments.'

Community correction orders are non-custodial sanctions that have conditions attached, based on the circumstances of the offence and the offender's needs. CCOs are available for any offence punishable by more than five penalty units and may be combined with a fine and/or jail for up to three months. Strict penalties are imposed for breaches of orders.

Penalty units are used in Victoria's Acts and regulations to describe the amount of a fine or a fee. In 2011–12, one penalty unit was $122.14. The rate for penalty units is indexed annually and is raised in line with inflation.

Community correction orders focus on both punishment and rehabilitation. Young offenders are often at particular risk and courts are able to tailor the conditions attached to orders to meet the individual needs of the young person and address the nature of the offence committed. There is also the need to deter others from offending.

DID YOU KNOW?

In early 2012 Rowan Kirk, aged 20 was sentenced to a community correction order. Kirk smashed car windscreens across Ballarat (a Victorian country town) in a drunken rampage, causing $2500 in damage. The magistrate said the offence was too severe to be dealt with by just a fine. Kirk's CCO included 125 hours of unpaid community work and an order to undergo treatment for drug and alcohol abuse.

Conditions attached to community correction orders

A CCO can have different conditions applied based on the circumstances of the offence, the offender's needs and situation, and the direction of the court. All offenders placed on a CCO will be required to comply with basic requirements such as not reoffending, not leaving Victoria without permission, and reporting to and complying with directions given by community correction officers.

In granting a CCO, courts can draw on a range of powers to help offenders re-establish their lives, develop responsibility for their conduct and avoid reoffending. Offenders are required to comply with strict conditions and complete authentic work to repay the community. The courts use an intensive case management model for high-risk offenders and rely on detailed pre-sentence assessment reports about the offender to ensure that the order given is appropriate.

Optional conditions that may be attached to a community correction order

In addition to the basic requirements such as not re-offending, courts are required to attach at least one optional condition to each CCO, and can tailor the order to the crime committed and the circumstances of the offender. Some of these optional conditions are as follows.

- Offenders can be ordered to pay a bond that is forfeited if the offender fails to comply with their order.
- Courts may impose up to 600 hours of community work, curfews and no-go zones, conditions on where an offender may live and prohibitions on contact with specified persons such as associates of the offender, victims, witnesses or their families. A curfew imposed on an offender cannot exceed 12 hours per day.
- As part of a CCO, courts may order that an offender not enter a particular site or an area such as the Melbourne CBD or a regional centre.
- Under an alcohol exclusion condition, courts have the power to ban offenders from entering or consuming alcohol in licensed premises. Offenders may be banned from entering nightclubs, pubs, bars, restaurants, cafés and function centres.
- Judges and magistrates are empowered to actively monitor an offender's compliance with their order through a judicial monitoring condition. This allows courts to watch over offenders' progress and can request updates from the offender, Corrections Victoria and prosecuting agencies.
- Courts can order supervision of the offender by Corrections Victoria, and treatment and rehabilitation such as drug or alcohol programs. A CCO can also involve assessment and treatment for mental health issues in a hospital or residential facility to address factors relating to offending behaviour.
- Section 89 of the Sentencing Act 1991 allows for mandatory cancellation and disqualification of the driver licence of offenders who commit serious criminal offences involving driving. Courts also have a broad discretion to impose licence penalties on any offender for any offence where the court considers it appropriate. For example, an offender who assaults someone after a road rage incident may have their licence suspended or cancelled and be disqualified from driving. In some circumstances, courts may also order that an **alcohol interlock device** be fitted to the vehicle of an offender.

Alcohol interlock devices are breath test machines that are wired onto the ignition of a vehicle. This will not allow the vehicle to start unless a 0.00 per cent blood alcohol concentration breath sample is provided.

The Attorney-General, Robert Clark, explained to the Victorian Parliament in 2011 that in the next stage of reform of criminal sentencing, courts will be given power to impose electronic monitoring conditions on offenders who are subject to a curfew, place or area exclusion or non-association condition. In 2012, the Victorian Government also introduced GPS technology to boost electronic monitoring. To assist the government, Corrections Victoria completed a trial of various available GPS technologies to determine which was the most suitable for their needs.

A CCO can last for up to two years when given by the Magistrates' Court. In the higher courts, a maximum duration is not specified for an order. Instead, the duration of the order is determined by the maximum term of imprisonment for the relevant offence. Importantly, a CCO may be combined with a fine and/or jail for up to three months.

Community correction orders relating to the payment of fines

In past years, people who defaulted in the payment of fines were imprisoned. This came to be regarded as adding another burden on the justice system. The new model involves the offender having to contribute meaningfully to society to 'work off' the debt they owe through their failure to pay a fine.

Under the Sentencing Amendment (Community Correction Reform) Act, there are three types of community orders relating to the non-payment of fines:

- community work permits (CWP)
- fine default unpaid community work only orders
- fine conversion orders, which would typically be given for speeding fines.

These orders have only one condition: to perform unpaid community work, which reflects the amount of the fine that has not been paid. The bigger the fine, the greater the amount of work that is ordered. Also, offenders are required to report to a Community Corrections Officer to ensure that the conditions of the order are fulfilled.

Compliance and enforcement of CCOs

Offenders who fail to comply with the terms of their order face tough penalties, including a contravention offence carrying a maximum penalty of 30 penalty units or three months imprisonment. Less serious compliance issues are dealt with quickly by senior Corrections Victoria staff, while repeat and serious breaches of CCOs will result in the offender being returned to court for resentencing. The courts have power to confirm or vary the existing order, or resentence the offender, including sending them to jail.

The legislation also enables Corrections Victoria to impose sanctions including an additional 16 hours of unpaid community work, extend curfews for up to an additional two hours a day or impose an on-the-spot fine. If an offender is dissatisfied with the ruling from Corrections Victoria, they may apply to the court to review the decision.

The specific purpose of community correction orders

When introducing the *Sentencing Amendment (Community Correction Reform) Bill* in the Legislative Assembly in October 2011, Attorney-General Robert Clark said that this reform would provide courts with new sentencing options 'that give real teeth to community-based sentences'.

Community correction orders are designed to provide general and specific deterrence because they require offenders to meet key demands such as curfews, undertaking work and completion of rehabilitation programs. The penalties for breach of these conditions are strict and can include being sent to jail.

The flexibility of the conditions that can be attached to a CCO also means that orders can be tailor-made to suit the needs of the offender. This maximises the opportunities for rehabilitation, which in the long term assists the offender on their path back to a productive life in the community. CCOs are particularly effective for offenders who have drug and alcohol abuse, and mental health and violence issues, because they include a case management program that tracks the rehabilitation of the person.

Case study: the Wulgunggo Ngalu Learning Place

The Wulgunggo Ngalu Learning Place is an initiative of the Victorian Aboriginal Justice Agreement and was established in response to the findings of the Royal Commission into Aboriginal deaths in custody. A key recommendation of the Commission was to establish an Aboriginal diversion program to reduce the over-representation of Aboriginal people in prison.

Community correction orders can involve conditions that have a particular cultural component. The Wulgunggo Ngalu Learning Place is located in central Gippsland and was established in 2008 to cater for the needs of Koori males. In the Gunai/Kurnai language, Wulgunggo means 'which way' and Ngalu means 'together'.

In order to be eligible for the programs on offer at the Wulgunggo Ngalu Learning Place, the offender must be:

- male
- aged 18 years and over
- Aboriginal or Torres Strait Islander
- serving a community correction order.

The program has the following features.

- Participants live on site for between three and six months.
- Weekend leave is available although participants must live on site for the first 21 days, including the first three weekends. From that time, participants are able to return home every third weekend.
- Family members can stay at Wulgunggo Ngalu on weekends by prior arrangement.
- Programs combine cultural healing with the development of skills to promote a positive and healthy lifestyle.
- Offenders live in a drug- and alcohol-free environment.
- Koori elders or respected persons regularly visit Wulgunggo Ngalu, communicating traditional cultural values and acting as role models and mentors for the participants.
- Wulgunggo Ngalu Learning Place offers a range of community work programs that participants undertake as part of their community correction order. The community work programs complement the life skills programs and cultural learning experienced in the program.
- There is transition planning for each participant at Wulgunggo Ngalu Learning Place which assists participants back into community life upon release. Arrangements for support of the offender are made by Community Corrections and Wulgunggo Ngalu staff.

In a 2011 review of the Wulgunggo Ngalu Learning Place, it was found that Koori men participating in the program had become more involved in local activities including the football club and have hosted local groups visiting Wulgunggo Ngalu for community activities.

TEST your understanding

1. Outline two consequences of a breach of a community correction order.
2. Outline two reasons why a court might impose a community correction order that involves placement at the Wulgunggo Ngalu Learning Place.
3. Explain two program conditions that may be imposed for an offender sent to Wulgunggo Ngalu.

APPLY your understanding

4. Phil Pearson, a Torres Strait Islander from Mt Isa, who has served a considerable amount of time in jail, attended Wulgunggo Ngalu Learning Place. In 2008 he said, 'A place like this is a lot better than being inside. There are more opportunities for courses going back to your culture instead of the same old thing in the prison system.'
   (a) In comparison to non-indigenous people, what particular needs might indigenous people have in terms of developing appropriate and effective sanctions?
   (b) Explain the ways in which Wulgunggo Ngalu Learning Place is more likely to fulfil its purpose of rehabilitating the offender compared to a prison sentence.

SKILL DRILL

KEY SKILLS TO ACQUIRE:

- describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes
- discuss the ability of criminal sanctions and civil remedies to achieve their purposes.

Read the case study below, then answer the questions that follow. Use the sample answer provided as a guide to help you with this task.

Changes to sentencing: people who break bail conditions

Under legislation introduced into the Victorian Parliament in 2011, offenders who commit crimes while on bail will be given additional jail time. The Police Minister, Peter Ryan, said that the legislation would enable judges to impose an extra three months onto the sentences of offenders found to have committed an indictable offence while on bail.

In May 2011, the Victorian Attorney-General, Robert Clark, explained the need for this law: 'The statistics show that a very significant proportion of those on bail commit further offences while on bail and that a significant proportion of the total number of offences committed in Victoria are committed by persons who are on bail.'

In discussing the change in the law, Mr Ryan referred to a report that found that 884 suspects on bail in 2010 went on to commit an alleged 4117 new offences before being handed arrest warrants for failing to appear in court. Some of those offences committed while on bail included murder, rape and armed robbery. Mr Ryan said that being granted bail is a privilege and if that privilege is abused, then the offender should be punished accordingly.

Questions

Andrew was charged with armed robbery and released on bail, to appear at the Melbourne Magistrates' Court for a committal hearing. While on bail, he assaulted a witness to the offence for which he has been charged. He has been arrested and is being held on remand.

(a) Explain the terms *bail* and *remand* and explain the purpose of each.
(b) Refer to the case study 'Changes to sentencing: people who break bail conditions'. Given the statistics on those who break their bail conditions, discuss whether bail achieves its purpose. Comment on whether you agree with the proposed solution to sanction those who commit offences while on bail.
(c) Describe two purposes of a committal hearing.
(d) If found guilty, Andrew faces a lengthy term of imprisonment. Outline two of the purposes of imprisonment as a sentence that can be imposed by a court.
(e) Discuss the value of committal hearings as a feature of criminal procedure for indictable offences in Victoria.

Addressing the questions

It is very important when confronted with case study materials and structured questions to ensure that you read closely. From the above, you should have noted the data quoted and the reference to bail being a 'privilege'. With regard to the questions, note the hierarchy of task words that is presented, from the simple

SKILL DEFINITION

Describe means to accurately depict or outline in a logical sequence.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

`The purpose of bail is to allow the accused to remain in the community while awaiting trial. The accused may still work and fulfil commitments such as family. Offenders considered a risk to the community are not granted bail; however, statistics reveal a large number of offenders commit offences while on bail.

'explain', 'describe' and 'outline', to the more complex 'discuss', which involves an analysis of the strengths and weaknesses of committal hearings as a part of criminal pre-trial processes.

Sample answers have been provided for questions (a) and (c). For question (c) it is important that students refer to the case study material and note that Andrew would receive a significant term of imprisonment, not just for the offence committed, but also for the fact that these offences were committed while on bail. The purposes of imprisonment, especially general deterrence and just punishment, should be explained here.

Sample answer

(a) Bail is a criminal pre-trial procedure that upholds the traditional right to presumption of innocence. When granted bail, an accused person is released from custody, usually under strict conditions such as surrendering passport and restriction of movement, while awaiting hearing or trial. This gives the accused time to prepare their case and allows life to proceed as normal, especially involving work and family life.

Remand is a criminal pre-trial procedure that involves holding an accused in custody while awaiting their trial, during their trial or when awaiting sentence after being found guilty. A person is placed on remand when bail is denied or when bail is granted, but the accused cannot meet the designated payment themselves or locate a surety. The purpose of remand is to protect the community while the person awaits trial or sentence.

(c) One purpose of a committal hearing is to determine whether there is sufficient evidence against the accused to support a conviction at trial in the County Court or Supreme Court. In this way, committal hearings are designed to ensure that the trial is not a waste of court resources. Also, committals can encourage an early plea of guilty from an accused person when the extent of the prosecution case has been revealed.

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit, the student should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate their operation and application; and evaluate the effectiveness of the legal system.

Please note: Outcome 2 contributes 60 marks out of a total of 100 marks allocated to school-assessed coursework for unit 4. Outcome 2 may be assessed by one or more assessment tasks.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- discuss the ability of criminal sanctions and civil remedies to achieve their purposes.

Case study

Read the case study below and answer the questions that follow.

Teen avoids jail in drink driving case

In November 2008, nineteen-year-old Jessica Langford was driving a car while naked when she crashed, killing her boyfriend, Daniel. Evidence was presented in court that Langford was driving at more than 100 km/h in a 90 km/h zone and her blood alcohol concentration was 0.098 two hours after the crash.

It was argued in the County Court that Langford should not be imprisoned because she was exceptionally remorseful, had pleaded guilty to the charge of dangerous driving causing death (*Crimes Act 1958* (Vic.), s. 319) and she suffered from mental illness. In her victim impact statement, Daniel's mother argued strongly that Langford should not be imprisoned. In response, prosecutor Anne Hassan urged Judge Howie to impose a sentence in a youth justice centre, arguing that Langford's mental health had no relevance to her decision to drive while drunk and to speed. Ms Hassan emphasised the need for a custodial sentence to be imposed on Langford so that general deterrence could be achieved.

Langford was eventually sentenced to a two-year community based order (now known as a community correction order), with Judge Howie advising the court that he took into account Langford's mental health and the need for ongoing treatment, which had been an issue for her prior to the accident, and the forgiving attitude of Daniel's mother. The judge said that a person suffering a serious psychiatric illness is not an appropriate target for general deterrence.

Drink driving causes death. In the Jessica Langford case she escaped a jail sentence due to mitigating circumstances.

Questions

1 Outline **two** reasons why a court might grant a CCO to an offender. **(2 marks)**
2 Explain **two** program conditions that can be attached to a CCO. **(2 marks)**
3 Outline **two** consequences of the breach of a CCO. **(2 marks)**
4 Refer to the case study 'Teen avoids jail in drink driving case'.
   a Explain **two** pre-trial stages that are undertaken in indictable offence cases such as this. **(4 marks)**
   b It was suggested by the prosecutor in this case that the offender receive a youth justice centre order. Give **two** reasons why such an order would be granted in a criminal case. **(2 marks)**
   c With reference to the general purposes of criminal sanctions and the factors considered by courts in sentencing, discuss whether you think Judge Howie chose the appropriate sentence in this case. **(8 marks)**

(Total 20 marks)

Tips for responding to the case study

Use this checklist to make sure you write the best responses to the question that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
Questions 1 and 2 require you to show a good knowledge of community correction orders in terms of their key elements and the reasons why such orders are granted. Question 3 also requires you to show an understanding of the consequences for a breach of a CCO.		
Discuss, interpret and analyse legal information. Apply legal principles to relevant cases and issues.		
Questions 4 (a) and (b) require that you refer specifically to the case study 'Teen avoids jail in drink driving case'. The general features of pre-trial criminal processes and sentencing orders would need to be addressed in responding to these questions.		
Discuss the ability of criminal sanctions and civil remedies to achieve their purposes.		
When answering question 4 (c) students would be expected to refer to the general purpose of criminal punishment. Answers would focus on principles such as specific and general deterrence, denunciation and rehabilitation. The key factors considered in sentencing, most notably plea in mitigation, remorse and the offender's circumstances, should also be addressed.		
Your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- **Criminal pre-trial procedures and their purposes, including bail and remand and committal hearings**
- **Describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes. *(Note, a comparison of pre-trial criminal and civil procedure is covered in chapter 9.)***

- **Criminal pre-trial procedures and their purpose**
  - The purpose of pre-trial criminal procedures is to give police all reasonable opportunity to gather evidence while also protecting the rights of individual suspects against self-incrimination.
- **Right to silence**
  - A person is not required to answer any questions asked by police, apart from the obligation to provide his or her name and address in certain circumstances.
- **Arrest**
  - Police may arrest a person with or without a warrant, after which he or she is taken to a police station and questioned and, if appropriate, formally charged. While at the police station, the suspect may also be fingerprinted, and biological specimens may be taken.
- **Bail and remand**
  - Being granted bail means that the accused person is free to return to the community while awaiting a hearing or trial.
  - Bail may be applied for when a person has committed an offence for which he or she has been summoned to appear in court on a particular date.

- Bail applications also are received in other circumstances — for example, when a person who has been found guilty in the Magistrates' Court appeals against his or her custodial sentence to the County Court.
- Bail will be refused if the accused person is deemed to be an unacceptable risk. This means that the person hearing the bail application would consider that the person may re-offend if released, interfere with witnesses, tamper with evidence or abscond.
- Accused people who are denied bail or who are granted bail but cannot meet the requirements are held in custody (on remand) while awaiting trial or sentence.

- **Committal hearing**
  - A committal hearing is conducted in the Magistrates' Court and is designed as a test of the strength of the prosecution case against the accused. If the magistrate thinks there is insufficient evidence to return a guilty verdict at trial, then the case will be dismissed. If there is enough evidence, the defendant will be committed to stand trial.
  - There are two types of committal hearings: the traditional method, which relies on oral evidence given under oath; and the hand-up brief procedure, where evidence is given to the magistrate through sworn written statements.

- **Purposes of criminal sanctions**
  - The five main purposes of imposing a sanction may be to provide a just punishment, to deter the offender or others from committing similar acts, to rehabilitate the offender, to denounce or condemn the behaviour of the offender and to protect the community.

- **Imprisonment**
  - Imprisonment is a sanction that involves sending a person to prison as lawful punishment for a crime committed.
  - Providing a just punishment and, perhaps, denouncing the offender's behaviour are the purpose of imposing a prison sentence. While prisons do aim to rehabilitate and deter offenders from committing further crime, recidivism rates remain high.

- **Suspended sentence**
  - A suspended sentence allows the offender to remain in the community, without interference to the person's usual life.
  - The aim of a suspended sentence is to assist with deterrence and rehabilitation because if the person re-offends during the period in which the sentence has been suspended, then he or she will be punished for the new offence, as well as serving the sentence that has been suspended.

- **Community correction orders**
  - From 16 January 2012, community-based orders, combined custody and treatment orders and intensive correction orders were replaced by a single sanction known as a community correction order (CCO). Under the Sentencing Amendment (Community Correction Reform) Act, CCOs are non-custodial sanctions that have conditions attached, based on the circumstances of the offence and the offender's needs. CCOs are available for any offence punishable by more than five penalty units and may be combined with a fine and/or jail for up to three months. Strict penalties are imposed for breaches of orders.
  - The overall purpose of community correction orders is to rehabilitate the offender and address the particular cause of the offending, such as drug and alcohol abuse.
  - Strict penalties exist for the breach of a community correction order.

- **General purposes of criminal sanctions**
- **Discuss the ability of criminal sanctions to achieve their purposes.**

- **an overview of three types of sanctions and their specific purpose**

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Digital doc:

Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

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Examination technique tip

Your answers to exam questions must not only demonstrate that you know the key knowledge from the VCE study design but that you also have mastered the key skills such as defining legal terminology and analysing legal information.

study on

Unit:	4
AOS:	2
Topic:	2

Practice VCE exam questions

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

Jason is charged with rape and the magistrate hears his application for bail.
Explain **two** possible reasons why Jason may not be granted bail. **(2 marks)**

Question 2

Danny is charged with murder. At a committal hearing he is committed to stand trial in the Supreme Court. He was denied bail.

a Explain the purpose of conducting a committal hearing.
b Provide one reason why bail can be refused.
c If Danny is found guilty at trial he will be given a prison sentence. Outline **two** purposes of imposing a prison sentence. **(2 + 1 + 2 = 5 marks)**

Question 3

Comment on how **two** criminal pre-trial procedures attempt to protect people from being treated unjustly. **(4 marks)**

Question 4

Describe **one** purpose behind imposing **one** sanction and whether its purpose has been achieved. **(2 + 2 = 4 marks)**

Question 5

Explain **two** purposes or functions of bail as a pre-trial procedure. **(2 marks)**

(Total 17 marks)

CHAPTER 9

Civil procedure

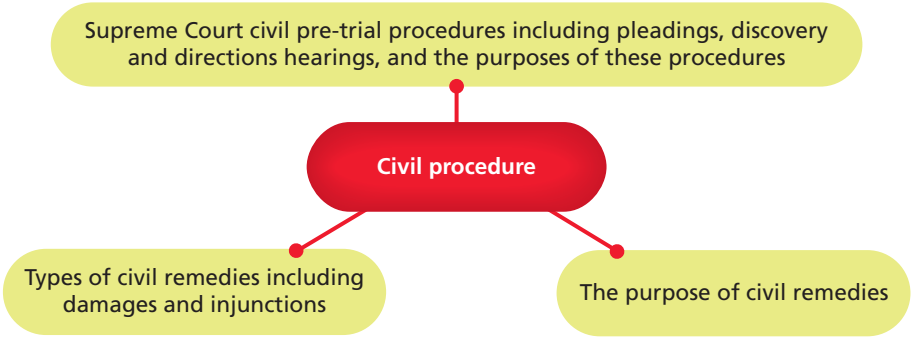
WHY IT IS IMPORTANT

Sometimes, when an individual believes their rights have been breached, it may be necessary to take civil action. For example, their reputation may have been damaged by defamatory statements, a contract may have been broken or an accident may have occurred through someone's carelessness. While many matters such as these can be solved through negotiation between the parties themselves, in some cases, it may be necessary to take the matter to court. Prior to taking a civil dispute to court, both parties must follow various pre-trial procedures to clarify the details and facts of the dispute and perhaps reach an out-of-court settlement. If the dispute proceeds to trial and the plaintiff is successful, a civil remedy will be awarded, such as the payment of damages (money).

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes
- discuss the ability of criminal sanctions and civil remedies to achieve their purposes
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Can you demonstrate these skills?

A serving of civil action — restaurant critic sued for defamation

Restaurant critic Matthew Evans wrote a review of a Sydney restaurant in 2003 and was sued for defamation. Evans gave the restaurant nine out of 20, declaring among other things that 'more than half the dishes' he tried were 'unpalatable'. The restaurant has since closed down. At the trial it was revealed that the food critic in fact believed that most restaurants in Australia served 'crap' food.

A jury in the New South Wales Supreme Court found that statements made against the restaurant were defamatory.

The defendants appealed against the verdict and a legal battle continued in the courts for many years until, in 2009, Justice Ian Harrison, in the case *Gacic v. John Fairfax Publications Pty Ltd* [2009] NSWSC 1403, delivered a verdict in favour of the publisher (Fairfax who published the review) and the restaurant critic Evans. The defence of 'fair comment' had been established as Evans had made it clear the review of the restaurant was his own personal opinion.

While Fairfax won its case and had its legal costs paid, the time involved in fighting this legal battle was immense. These days, resolving a dispute without the need to go to trial is an outcome worth pursuing due to time constraints and costs.

eBook*plus*

Use the **Gacic v. John Fairfax** weblink in your eBookPLUS if you are interested in reading more about the reasoning behind the decision in this case and even reading the original restaurant review!

9.1 Taking civil action

KEY CONCEPT When one party believes their private rights have been infringed, they may pursue a civil action to rectify the situation.

Types of civil disputes

The **law of torts** refers to a range of civil disputes where one party alleges another party has in some way breached their rights. Examples of civil wrongs included in the area of torts are negligence, nuisance, defamation and trespass.

Contract law is a type of civil action involving a dispute where one party alleges another party has breached their rights by failing to carry out the terms of a legally binding agreement.

Civil disputes typically involve an individual, or group, taking action against another individual, or group, who has allegedly breached or infringed their private rights. The aim of undertaking a civil action is to seek a remedy that will restore the party who has suffered the breach of rights, as far as possible, to their original position prior to the breach and compensate for any loss suffered. For example, an individual who has had their rights infringed may seek damages (a sum of money) to compensate for their loss.

Civil disputes may involve many different types of claims including those arising under the **law of torts** or **contract**.

Table 9.1 summarises civil wrongs that can occur under the area of torts.

TABLE 9.1 The law of torts

Tort	Explanation
Negligence	Negligence refers to a party causing harm by failing to take reasonable care where there is a responsibility or duty to do so. For example, doctors may be sued for negligence if it can be proved they did not take reasonable care of a patient, who suffered injury or death while under their care.
Nuisance	Private nuisance involves an action by one party that stops or interferes with another person's enjoyment of their land — for example, a neighbour who continually uses a chainsaw that is unbearably loud. Public nuisance involves an action that endangers the comfort and safety of a group of people; for example, a truck carrying logs that are not securely fastened. The logs roll onto the highway and cause delays in peak-hour traffic, creating a public nuisance.
Defamation	Defamation is communication (written or verbal) from one person to at least one other person that results in damaging the reputation of a third person. The communicator does however have some defences; the communicator may claim honest opinion or that the communication was substantially true.
Trespass	There are many forms of trespass, including trespass to land, person or goods. Examples of trespass to land include entering someone's property without permission, staying on property after being asked to leave or placing something unwanted on someone's land. Trespass to the person includes battery, assault and false imprisonment. Trespass to goods may involve taking goods from someone or damaging goods not owned by you.

A claim may arise under contract law if a person or business fails to carry out the terms of a legally binding agreement. It could be as simple as one party failing to pay another for services provided, or not fulfilling all or part of the conditions promised in a contract. When a contract has been broken, a party's civil rights have been infringed. The law seeks to rectify the situation by having the party who breached the contract undertake action to restore the aggrieved party, as far as possible, to the position they were in prior to the breach of the contract.

Parties involved in civil disputes

A **plaintiff** is the party who alleges their rights have been breached and is responsible for initiating civil proceedings. A party who alleges their rights have been breached and specifically initiates proceedings in the Magistrates' Court is referred to as a **complainant**.

Civil disputes may arise between private individuals, governments and corporations. In the Magistrates' Court, the party who initiates civil action is called the **complainant**. In the county and supreme courts, the party who initiates civil proceedings is called the **plaintiff**. The defendant is the party who allegedly has committed the civil wrong and is the subject of the legal proceedings.

To succeed in a civil action the plaintiff must prove the defendant most likely, on the *balance of probabilities*, breached their rights. The following text figure summarises the key participants and features of a civil action.

TABLE 9.2 Key participants and features of civil disputes

Definition	A dispute between individuals (or groups) over an alleged breach of rights undertaken with the aim of seeking a remedy
Party who initiates the court action	The plaintiff in the county and supreme courts (or complainant in the Magistrates' Court)
Burden and standard of proof required	The plaintiff has the responsibility (burden) of proving the defendant most likely, on the balance of probabilities, breached their rights (standard of proof).
Verdict	The defendant is found liable or not liable.
Use of jury	In civil proceedings held in the county or supreme courts, the use of a jury (of six) to determine the verdict (and damages if being sought) is optional. If either party does not request a jury, a judge alone will determine the verdict and remedy.
Remedy	The aim of a remedy is to restore the plaintiff, as far as possible, to their original position prior to the breach of rights and compensate for any loss suffered. For example, a defendant may be required to pay damages or undertake action to resolve the dispute.
Examples	Negligence, breach of contract, defamation, nuisance and trespass

Girl sues state school

In 2009, Ms Paige Schuback, aged 8, was injured in the Pakenham Hills Primary School playground, when a ride-on lawnmower caused a stone to fly up and strike her in the right eye, causing loss of vision. Ms Schuback was a minor (aged under 18 years), so her father Mr Mark Schuback undertook civil proceedings on her behalf. In 2011, Mr Schuback lodged a County Court civil action against the defendants, the Victorian State Government (which is responsible for state schools in Victoria) and the mowing contractor, claiming both were negligent by undertaking mowing during a school lunchtime when it is reasonable to expect that stones may fly up from mowers and injure children. Mr Schuback sought damages for medical expenses, pain and suffering caused by the injury and loss of his daughter's future earning capacity, because the injury would limit her future career options.

DID YOU KNOW?

Vicarious liability refers to a situation where one party is legally responsible for the actions of another; for example, an employer is often legally responsible for the actions of their employees. This means if a teacher acts in a negligent manner and causes injury to a student, the school may be held liable and sued.

TEST your understanding

1. What is a civil dispute?
2. State the names given to both parties to a civil dispute in the magistrates', county and supreme courts.
3. Explain the main aim of a civil remedy, and suggest what remedy might be sought to compensate a plaintiff in a defamation case.

APPLY your understanding

4. What type of civil dispute has occurred in the following situations?
   (a) Jenny, a dissatisfied parent, sends an email to about 30 parents on her email distribution list saying the principal of the school her children attend is incompetent and needs to stand down from her position.
   (b) Joseph enters into an agreement to build a boat for his clients within six months. At the end of the six months the boat is only half finished and his clients are unable to embark on their holiday around Australia.
   (c) Jessica finds that she is no longer able to enjoy living in her family home because she fears that she may be hit by a golf ball from the nearby golf course. Nothing has been done to stop the incessant golf balls landing in her property.
5. Refer to the food critic case on page 329. Why is the food critic being sued and do you think this is justified?
6. Refer to the 'Girl sues state school' case and complete the following questions.
   (a) State the name of the plaintiff and the defendants in this case. In your answer explain why Mr Mark Schuback initiated the action rather than the injured party.
   (b) Explain the type of civil dispute involved in this case and suggest one possible defence that could be used by the defendants.
   (c) Explain the remedy being sought in this case.

9.2 Deciding whether or not to take civil action

KEY CONCEPT Before hastily entering into civil court action, it is best to take into consideration not only the financial costs (for example, the cost of legal representation), but also the non-financial costs of a court case (for example, the possible publicity and the effects such a case might have on family and the health of the individuals involved). Before initiating legal proceedings in court it is advisable to have your lawyer send a letter of demand.

Litigation refers to a civil action or proceeding.

Before initiating legal proceedings the plaintiffs should weigh up the costs — both emotionally and financially — of taking civil action, and decide if it is worthwhile to proceed with **litigation**.

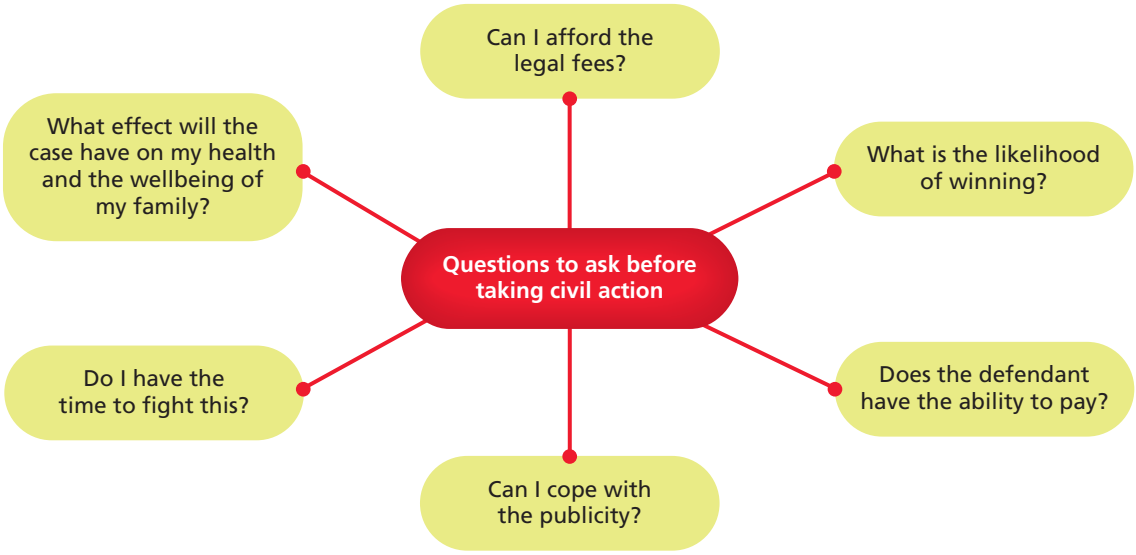
Factors to consider when initiating civil proceedings

The following factors should be taken into consideration when deciding whether or not to commence civil proceedings.

- *Costs involved.* The costs involved in employing legal representatives can be expensive and, in some cases, the damages a plaintiff receives will not cover the costs of legal fees. Often it is at the discretion of the magistrate or judge to 'award costs', which means the court will decide if the winner is entitled to have costs paid by the loser. It is, however, usual for the loser to pay the winner's costs; but the amount of costs awarded may not necessarily cover all the costs incurred in employing legal representation.
- *Probability of winning.* Obviously plaintiffs must consider whether they are likely to win or lose the case and whether or not they are prepared to take the risk of losing valuable time and money if they are unsuccessful.
- *Defendant's ability to pay.* Another matter to consider if the plaintiff wishes to sue the defendant for damages is whether or not the defendant will be able to pay the damages. If the defendant has no money, then taking him or her to court would be more a matter of principle rather than seeking monetary compensation.
- *Complexity of the case*. Along with the complexity of the case, another consideration is whether or not there have been any similar cases in court that have been successful. Sometimes a particular type of case might not have been heard by the court before, which means that the court will be making a decision for the first time. These types of cases are sometimes called 'test cases', and mean a greater risk to a plaintiff because the likelihood of success is not known.
- *Publicity*. Another matter to consider is the publicity the case may generate. If a plaintiff is well known, it might be better not to proceed because other matters about his or her personal life may be aired in court, providing further content for the media.
- *Personal circumstances.* Parties taking civil action should take into consideration the effects a trial may have on their health and their family life. In late 2009, Western Bulldogs director Susan Alberti commenced legal proceedings against Channel Nine for comments made by Sam Newman on the *Footy Show*. Alberti was one of the five female AFL club directors described as 'liars and hypocrites' on the show. A Supreme Court jury was about to be empanelled when the out-of-court settlement was struck with Channel Nine agreeing to pay $220 000 in damages and the plaintiff's legal fees, estimated to be about half a million dollars. Alberti decided to accept the offer because her husband was ill and she felt she needed to provide him with support rather than pursue a court action.

DID YOU KNOW?

In 2008, Olympic swimming champion Ian Thorpe dropped a defamation case against the publisher of a French newspaper and a journalist. The newspaper claimed that Thorpe's urine samples contained abnormal levels of testosterone. When the defendants failed to appear in the New South Wales Supreme Court, the swimmer decided to drop the case, feeling there was little point in obtaining a verdict in the absence of the defendant.



Methods that can be used to resolve a civil dispute

Once a party decides to undertake civil proceedings they must consider what methods of dispute resolution would be the best to resolve their dispute in the most effective and efficient manner. As we have already seen in chapter 5, there are many different ways to resolve a civil dispute. It is often most efficient for parties to aim to resolve a civil dispute between themselves in an informal manner before taking their action to court, which can be very costly, time-consuming and stressful.

Parties might aim to resolve their dispute between themselves by using direct negotiation, or through mediation or conciliation (where an independent third party assists the parties with their discussions). Parties who are unable, or prefer not to resolve their civil dispute using mediation and conciliation may need to have their dispute resolved through arbitration or judicial determination, where an independent third party listens to their case and imposes a legally binding outcome.

It is often more efficient and effective to resolve civil disputes using dispute resolution methods such as mediation, conciliation and arbitration (often referred to as alternative or appropriate methods of dispute resolution) rather than judicial determination (as used in court trials). These methods are less formal and less costly than court proceedings because no strict rules of evidence and procedure are followed and there is less need for legal representatives, and matters can generally be resolved in a more timely manner. Parties who resolve their disputes using mediation and conciliation may also feel more satisfaction with the outcome because they have directly participated in the decision-making process. For more information on methods of dispute resolution (mediation, conciliation, arbitration and judicial determination) see chapter 5, pages 215–18.

Avenues of civil dispute settlement

As we have seen in chapter 5, various courts and tribunals in Victoria provide assistance with and settle civil disputes. The Victorian Civil and Administrative Tribunal (VCAT) has the jurisdiction to hear a wide range of civil disputes, such as disputes between consumers and traders, borrowers and financial institutions,

and tenants and landlords, and disputes involving discrimination, taxation and business regulations issues, using a range of dispute resolution methods. For more information on the jurisdiction of VCAT see chapter 5, page 210. Table 9.3 summarises the civil jurisdiction of the Victorian courts.

TABLE 9.3 The civil jurisdiction of Victorian Courts

Court	Original civil jurisdiction	Appellate civil jurisdiction
Magistrates'	Cases up to $100 000	None
County	Cases involving unlimited amounts	None
Supreme (Trial Division)	Cases involving unlimited amounts	Appeals from the Magistrates' Court (and VCAT) on an error in law only
Supreme Court of Appeal	None	All civil appeals from the county and supreme (trial division) courts (and VCAT if presided over by president or vice-presidents)

Aiming to reach an out-of-court settlement

An **out-of-court settlement** refers to the resolution of a civil dispute prior to attending court or litigation. It may also be referred to as an early settlement.

One of the main aims of the parties to a civil dispute must be to reach an **out-of-court settlement** or resolve their dispute without the need to go to court. This might be achieved if the defendant offers an acceptable amount of money to compensate the plaintiff for the breach of rights, or if the plaintiff decides to abandon the civil action. Similarly, in many cases, parties are able to reach an agreement and resolve the dispute using negotiation or other methods of dispute settlement including mediation, conciliation and arbitration.

The parties to a civil action must also follow various pre-trial procedures in an attempt to resolve their case prior to attending court. For example, prior to attending court both parties must exchange various written documents and information to ensure each party is fully aware of the details and facts of the case. It is hoped that this knowledge may assist the parties to reach an early settlement. If this is not possible, at the least, the exchange of this information should help minimise the length of the trial as the details and facts of the case are clarified before the trial.

Letter of demand

A **letter of demand** is a letter sent by the plaintiff (or their legal practitioner) to the defendant that outlines the alleged breach of rights and the remedy being sought by the plaintiff. It informs the defendant of the plaintiff's intention to commence legal proceedings against them.

Before commencing legal action in the courts, the first step involved in a civil dispute is for the plaintiff (or their legal practitioner) to send the defendant a **letter of demand** which outlines the alleged breach of rights (or civil wrongdoing) and declares what action the defendant needs to take to avoid legal action (that is, the remedy being sought by the plaintiff). For example, if the breach of rights occurred due to the defendant making defamatory statements about the plaintiff, a simple retraction of the statement and an apology may be enough to avoid court proceedings.

In addition to stating the nature of the plaintiff's claims and the remedy sought, a letter of demand also provides a time frame in which the defendant must respond and makes it clear that if no response if forthcoming from the defendant legal proceedings will commence. In the sample letter of demand (see example), the legal practitioner (solicitor) for the plaintiff clearly sets out the alleged breach of rights that has occurred, the remedy sought and time frame for the defendant's response.

Rojo and Canterbury Solicitors

101 LINE STREET HAWTHORN, 3124, VICTORIA

21 June 2014

Mr B Waters
21 Poolside Place
Waterway 3128

Dear Mr Waters

I write on behalf of my client Mr Santos who entered into a contract with you on 1 May 2013 for the supply and installation of a swimming pool by 4 January 2014.

My client advises that the sum of $100 000 was agreed to be paid to you in two instalments of $50 000 on 8 September 2013 and 10 December 2013. The first instalment was paid to you on 8 September 2013 for work commenced on the swimming pool but further work has not been completed in accordance with the contract, which states the swimming pool would be completed by 4 January 2014. Further to this, my client also seeks compensation for damage to the house that took place when earthmoving equipment was driven into my client's dining room.

The estimated costs to my client are

(i) Loss of earnings $2000
(ii) Damage to property $100 000

On behalf of my client, I seek $102 000 in compensation and that the pool be completed by 10 October 2014, or the instalment of $50 000 already paid to you by my client be refunded in total.

If full settlement of $102 000 is not received in 14 days, legal action will be taken against you.

Please advise within seven days of your intentions, otherwise litigation will commence against you.

Yours faithfully

Robin Canterbury
Solicitor for Rojo and Canterbury

Before legal proceedings begin, a letter of demand is sent to the defendant in an effort to solve the dispute without litigation.

study on

Summary

Unit 4:
Resolution and justice

Area of study 2:
Court processes, procedures, and engaging in justice

Topic 4:
Resolving civil disputes

Letter of demand sent to Krispy Kreme

Legal firm Mallesons Stephen Jaques sent a letter of demand to US-based doughnut company Krispy Kreme on behalf of their client, Arnott's. Krispy Kreme was selling a 'limited edition' doughnut called 'Iced Dough-Vo'. Arnott's has a biscuit called a Iced VoVo and claimed the doughnut company was using its brand. The letter read: 'Arnott's is extremely concerned by this blatant infringement of its Iced VoVo trademarks and is prepared to take all steps necessary in order to protect its Australian trademark rights and its extensive reputation in its Iced Iced VoVo and Vo brands.'

The letter also stated that the company had until 24 April 2009 to cease selling the product or legal action could be taken. Both parties settled the dispute with no court action and the 'Iced Dough-Vo' was renamed.

TEST your understanding

1 Explain what is meant by an out-of-court settlement and suggest two ways it might be achieved.
2 What is litigation?
3 Explain the nature and purpose of a letter of demand.
4 List the factors that should be taken into consideration before commencing legal action.
5 Explain two methods that can be used to resolve a civil dispute.

APPLY your understanding

6 Read the Krispy Kreme case and answer the following questions.
   (a) Explain why Arnott's sought to stop Krispy Kreme from selling the doughnut named 'Iced Dough-Vo'.
   (b) Explain why the letter of demand sent by the legal firm was an effective way to resolve the dispute.
7 Research a case on the internet where a plaintiff has sued for civil damages but the case has not gone to trial because there has been an out-of-court settlement (key words for your search could be 'out-of-court settlement' or 'damages payout'). Outline the main facts of the case and suggest reasons why the case may have been settled early.

9.3 Pre-trial procedure: pleadings

KEY CONCEPT If attempts to resolve a civil dispute by direct discussion or a letter of demand fail, the plaintiff may commence legal proceedings against the defendant. Prior to taking a civil action to the Supreme Court, various pre-trial stages take place including the pleadings stage which involves both parties stating their case in written form through an exchange of documents.

Pleadings is the stage in the civil pre-trial process where both parties exchange written documents stating the details of the case, including the claims, defences, remedy sought and counterclaims.

A **writ** is a document served on the defendant, and lodged at the court, that informs the defendant civil proceedings are being taken against them.

An **originating motion** is a written document that may be used instead of a writ in cases where it is unlikely the facts of the case will be disputed.

Pleadings

As the name implies, the **pleadings** stage of the civil pre-trial process involves both parties exchanging written documents stating and clarifying the details of the case, including the claims being made by the plaintiff, the defences and the remedy being sought. The steps involved in the pleadings stage include the exchange of the following documents:

- writ including statement of claim
- notice of appearance
- defence
- counterclaim (if made)
- reply.

Writ

Legal proceedings against a defendant *usually* begin with the completion, lodgement and serving of a **writ** (see form 5A, page 337). A writ is a document prepared by the plaintiff's legal practioner that informs defendants that legal proceedings are being taken against them. Legal proceedings in the Supreme Court also may begin by lodging what is called an **originating motion**. An originating motion is *required* when there is no defendant to the proceeding and may be used instead of a writ where there is unlikely to be any dispute of the facts in the case.

Once a writ is produced, it must be filed at the court (so the court is aware of the pending legal action) and 'served' (usually hand-delivered, or if the defendant is a company, posted) on the defendant. The Supreme Court (General Civil Procedure) Rules 2005 set out quite specifically how the defendant is to be made aware of the writ. This is extremely important because defendants need the opportunity to defend themselves and avoid a judgement being made against them in default.

A writ may contain what is known as an indorsement of claim which is either a statement of claim that sets out the precise nature of what is being claimed against the defendant and the remedy sought *or* there must be a statement that is sufficient to give the defendant information about the nature of the claim and remedy sought.

A writ being personally handed to the defendant. The writ informs the defendant that legal action is being taken.

Form 5A

Rule 5.02

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

No of

DIVISION

BETWEEN

Plaintiff

— and —

Defendant

WRIT

Date of document:
Filed on behalf of: The Plaintiff
Prepared by: Tel:
Fax:
Address:

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearances stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

(a) filing a "Notice of Appearance" in the prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and

(b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows—

(a) where you are served with the writ in Victoria, within 10 days after service;

(b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

(c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;

(d) where you are served with the writ in any other place, within 42 days after service.

FILED:

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

No. of

DIVISION

BETWEEN

Plaintiff

— and —

Defendant

STATEMENT OF CLAIM

Date of document:
Filed on behalf of: The Plaintiff
Prepared by: Tel:
Fax:
Address:

1.
2.
3.

Dated the ..... day of 20

.....
Plaintiff

1. Place of trial –
2. Mode of trial –
3. This writ was filed by –
4. The address of the plaintiff is –
5. The address for service of the plaintiff is –
6. The address of the defendant is –

SCHEDULE OF PARTIES

BETWEEN

No of
First Named Plaintiff
Second Named Plaintiff
Third Named Plaintiff

and

First Named Defendant
Second Named Defendant
Third Named Defendant

Dated:

Form 5A is the standard form used for a writ in the Supreme Court of Victoria.

Statement of claim

A statement of claim outlines the claims made by the defendant and the remedy sought.

Particulars are simply the facts of the case. Further and better particulars may be called for if particulars are too vague or non-existent at the pleadings stage.

A **statement of claim** is usually filed at court at the same time as the writ and is often stapled to the writ. It clearly states the claims made by the plaintiff against the defendant and the remedy sought. The statement of claim summarises the material facts of the case (including providing further details known as **particulars**) and not the evidence that will be used to prove those facts. The remedy that is being sought by the plaintiff against the defendant must also be included on the statement of claim.

Notice of appearance

A **notice of appearance** is filed by the defendant to acknowledge the receipt of a writ, and notify the court and the plaintiff of the defendant's intention to defend the claims being made against them.

If a writ is served on a defendant in Victoria, he or she has ten days in which to respond by filing a **notice of appearance** (see form 8A below) with the court either personally or through a legal practioner. A notice of appearance simply acknowledges the writ has been received and the defendant is aware that legal proceedings have begun and the defendant intends to defend the claims made against him or her. It is important that the defendant returns the notice of appearance on time, otherwise the plaintiff can obtain a judgement against the defendant without informing the defendant further.

Form 8A

Rule 8.05(1)

NOTICE OF APPEARANCE

[*heading as in originating process*]

FILE an appearance for [*full name of defendant*] the above named defendant.
Dated [*e.g.* 15 June, 20]

[*Signed*]

The address of the defendant is

[*where the defendant appears in person and the address of the defendant is outside Victoria* The address of the defendant within Victoria for service is

].

[*where the defendant appears by a solicitor* The name or firm and the business address within Victoria of the solicitor for the defendant is

].

[*where the solicitor is agent of another as agent for [name or firm and business address of principal]*.]

DID YOU KNOW?

The word 'writ' originated from England and was a letter from the king written in Latin and sealed with the king's special seal. A writ was necessary in England to have a case heard in the royal courts.

Defence

A **defence** summarises which claims the defendant admits, does not admit, or denies. The defendant may lodge a counterclaim to claim the plaintiff in fact committed a civil wrong against him or her.

Once a notice of appearance is filed in court, the defendant files a statement of **defence** (now referred to simply as 'defence'). A defence is issued by the defendant to the plaintiff and provides further information about defences to the plaintiff's claims. A defence must be in summary form and deal with the material facts of the case. Specifically, it either denies the claims made by the defendant or admits the claims but provides an explanation for actions taken that should be brought into consideration when assessing the defendant's behaviour. For example, the defendant may admit to breaking the terms of the contract but might provide valid reasons why it was impossible to fulfil the terms of the contract, for example, a medical condition making it difficult for the defendant to supply the services contracted. Also, it is worth noting that the defence may include a response that states the defendant does 'not admit' to the claim. If a defendant chooses to 'not admit' (or deny) a claim, it is up to the plaintiff to prove the truth of the claim.

Counterclaim

A **counterclaim** is generally is made in the same document as the defence and refers to claims made against the plaintiff by the defence.

During the pleadings stage, defendants can make a claim (a **counterclaim**) against a plaintiff who has brought a civil action against them. This means that the party who

initiated civil proceedings is actually having a claim (or claims) made against them that must be answered. For example, the case of *McFadzean v. Construction, Forestry, Mining & Energy Union* [2004] VSC 289 involved both claims made by the plaintiffs and a counterclaim made by the defendants. The plaintiffs were anti-logging protestors, and the defendants were logging workers and their union. The dispute occurred in the Otways rainforest near Apollo Bay in 1999, where the protestors said they were imprisoned for five days as the loggers set up a picket across a road that gave access to the area of trees the plaintiffs were trying to protect. The plaintiffs were awarded damages of $130 000. The defendants, however, had lodged a counterclaim, declaring they lost more than $1 million in income as a result of the protestors. This counterclaim was settled by the Wilderness Society, which paid $45 000 as compensation.

Reply

After a plaintiff receives the statement of defence, they may be required to make a reply or written response indicating if they wish to agree with the defendant regarding a particular issue or confirm facts.

It is worthwhile noting that if a counterclaim has been made by the defendant, the plaintiff will usually lodge a defence (generally, done with the reply). There are consequences for the plaintiff if they do not include a defence to the counterclaim; for example, the defendant could be given a default judgement on the counterclaim.

The purpose of pleadings

As we have seen, the exchange of documents at the pleading stage provides the parties and the court with important information about the precise nature of the claims, helps to clarify the details and main issues in the case, and provides a written record of the proceedings to date. Pleadings can also increase the possibility of both parties settling out of court and if this is not possible at least ensures each party has been given some knowledge of the opposing party's case so they can prepare for the court case.

Further and better particulars

The particulars or set of facts each party has outlined during the pleadings stage in either the statement of claim, defence or counterclaim, may not be enough to clarify the facts of the case, so further and better particulars may be requested by either party. For example, in a dispute over a contract it may be argued in the statement of claim that the defendant broke the contract. If the contract was an oral agreement, further and better particulars might include additional details of conversations that took place and the dates they occurred, as well as the terms that were allegedly agreed upon.

TEST your understanding

1 Name the **two** documents that may be used to commence legal proceedings in the Supreme Court.
2 What is the statement of claim and why is it important?
3 Describe the pleadings stage of civil pre-trial procedure.

APPLY your understanding

4 Explain the purpose of the pleadings stage.
5 What is a counterclaim and what counterclaim was made by the defendants in the case *McFadzean v. Construction, Forestry, Mining & Energy Union* [2004] VSC 289?
6 State which pleadings stage each of the following scenarios refers to:
(a) The defendant states that he refutes the claims made by the plaintiff.
(b) The defendant makes a claim against the plaintiff.
(c) The plaintiff summarises the claims she is making against the defendant in a writ.
(d) The defendant's solicitor asks for further details regarding specific injuries the plaintiff suffered.

9.4 Pre-trial procedure: discovery and directions hearings

KEY CONCEPT After the pleadings stage, it may be necessary for each party to 'discover' what documents the other has that may shed further light on the case. Directions hearings will also take place where the parties may be given orders or instructions by the court to assist them in preparing for trial. At all stages of the pre-trial process an out-of-court settlement may be struck and a civil trial avoided.

Discovery

Discovery is a stage in civil pre-trial procedure where both parties have the opportunity to inspect and exchange any of the opposing party's documents and additional information, and ask questions of the opposing party to establish the facts of the case.

Discovery may involve each party looking through a mountain of documentation to find facts that may help settle the dispute or at least help in the preparation for trial.

As the name implies, **discovery** is a stage of the civil pre-trial process where each party has the opportunity to request documents and additional information that the opposing party has in their possession that are relevant to the facts of the case. According to the Supreme Court (General Civil Procedure) Rules 2005, discovery includes 'discovery and inspection of documents and discovery by written interrogatories or oral examination'. A written interrogatory is a list of questions that the opposing party is asked to answer.

During discovery either party can ask to see the following items:

- electronic information stored on a computer
- videotape, audiotape, discs
- photographs
- contracts
- maps
- plans
- letters
- receipts.

The purpose of discovery is to:

- assist parties to prepare for trial
- facilitate the settlement of the dispute
- reduce time and expense associated with the trial and settlement of the dispute as documentary evidence has already been seen
- narrow down the issues in dispute
- prevent either party from being taken by surprise by evidence at the trial and help ensure the case is determined on merit rather than tactics.

Lord Donaldson described civil discovery in the English case *Davies v. Eli Lilly & Co.* (1987) 1 All ER 80:

> The right to [discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object.

While there are many benefits to be gained from the discovery process, unlimited discovery can unnecessarily delay and add to the cost of civil proceedings. To avoid such consequences the court may order that discovery is not required or place a time limit and restriction on what type of documents can be discovered. The use of technology for electronic storage of and access (via the internet) to documents can also improve the efficiency of the discovery process. More active case management by the courts, including the provision of specialised personnel to assist in resolving discovery issues, and the imposition of more severe sanctions or penalties for discovery abuse could also encourage parties not to deliberately delay discovery.

eBookplus

Use the **McCabe case** weblink in your eBookPLUS to find out more about this famous case. In this well-known Australian case, Rolah McCabe successfully sued a tobacco company because the company was unable to supply documents in the discovery stage. However, the ruling was overturned on appeal.

Directions hearings

Another pre-trial process designed to encourage parties to reach an out-of-court settlement or, failing this, at least speed up the trial process, is the use of **directions hearings**. A directions hearing is a hearing, usually presided over by a judge, in which the parties to a civil proceeding are given instructions or orders by the court to undertake certain actions that are necessary to prepare the parties for trial. For example, parties may be given time restraints and dates by which they must complete specific pre-trial tasks, including filing and serving defences and witness statements. Similarly, it is also standard practice for the Supreme Court to order parties to attend compulsory mediation prior to trial in an attempt to achieve an early settlement. The court may also order one party to make certain information, such as electronic documents, available to the other, or order parties to engage in discussion to clarify legal issues prior to trial. The Supreme Court (General Civil Procedure) Rules 2005 sum up the purpose of directions hearings by stating, 'at any stage of a proceeding the court may give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination'.

A **directions hearing** is a pre-trial hearing in which the presiding judge gives instructions and orders the parties to undertake certain actions, such as attend compulsory mediation, deemed necessary to prepare the parties for trial and prompt an efficient settlement of the dispute.

A **notice of trial** informs all parties that the proceeding is ready for trial. The court may order a **pre-trial conference** to encourage an out-of-court settlement or to simply ensure both parties are ready for trial.

Notice of trial and pre-trial conference

The final step before the trial is a **notice of trial** that informs all parties that the proceeding is ready for trial. Once the matter has been put on a list for trial, the court may direct the parties to attend a pre-trial conference. The **pre-trial conference** is then used as another opportunity to settle the matter prior to trial, and, if the matter is not settled, ensure the parties are ready for trial.

DID YOU KNOW?

Discovery of documents can greatly increase the cost of litigation especially in complex commercial cases. Peter Gordon, from Slater and Gordon, noted that the cost of discovery in one complex civil case was estimated at $25 million.

A lawyer's perspective on discovery, directions hearings and mediation

The following is an excerpt from a transcript of an interview with Patricia Matthews, a solicitor from a Melbourne law firm. Patricia talks about civil pre-trial procedure from a lawyer's perspective.

Can you describe the type of documents that are revealed in discovery for a particular type of civil dispute?

Discovery is the process where each party provides a list of documents which are relevant to the issues in dispute. The other party can then inspect the documents and obtain copies. It is important to remember that each party is obliged to discover all documents which are relevant, even those that may be harmful to their case. 'Document' is defined very broadly, and as well as paper documents, includes items such as electronic documents (for example, computer records, emails, spreadsheets), diaries, videos or audiotapes. In one breach of contract case that I worked on there were about 95 000 documents discovered by the two parties. These included letters, drafts of agreements, emails, spreadsheets, invoices and videos.

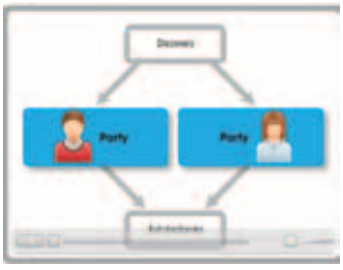
Discovery in large commercial disputes has become increasingly complex to manage since the proliferation of electronic documents. In one case, we had over 10 000 emails to review before preparing the discovery list. Items that were included on the computer tapes sent to us by our client for review included one person's shopping list and another person's email to their child's school, complaining about his grade on an assignment. Fortunately, we weeded these out before providing the discovery to the other party!

Melbourne solicitor Patricia Matthews

study on

Unit:	4
AOS:	2
Topic:	4
Concept:	2

See more
PowerPoint on discovery



What are directions hearings?

At directions hearings, the court (usually a judge) makes directions for the conduct of the proceeding. These directions differ from case to case, but typically involve orders that the parties complete certain pre-trial steps and the dates by when those steps must be concluded — for example, filing and serving defences and other pleadings, requests for and provision of particulars of a pleading, interrogatories and answers to interrogatories, mediation, filing and serving of witness statements, preparation of court books (a compilation of documents which each party plans to rely on at the trial). Directions hearings are a good way for the court to make sure that the parties are expeditiously getting a case ready for trial.

Describe the opportunities both parties have to settle disputes during the pre-trial period for civil cases.

There are a number of opportunities for the parties to settle disputes before the trial, but a lot depends on how willing the parties are to negotiate and to compromise. It is standard now for the court to order the parties to attend a mediation before the trial is due to start. This is a great opportunity to try and settle a case: the parties get to 'eye-ball' each other and express their respective positions, and the mediator's job is to facilitate the parties reaching a settlement, if possible. In addition, each significant step before a trial (for example, when discovery is due) can provide a chance to reach a settlement — these steps are costly in terms of legal fees, and parties often have a re-think about whether or not it would be better to try and reach agreement rather than continue with the litigation. Most cases settle before trial — only a small proportion of cases that are started end up going through to judgement. A lot settle just before trial, when each side has had a chance to assess the strengths and weaknesses of their own and the other party's cases, and both parties decide they'd rather reach an agreement that suited both than have a judgement imposed that might end up suiting neither of them.

TEST your understanding

1 Explain the nature and purpose of the discovery stage of a civil pre-trial action.
2 Identify four items that a party might seek in discovery.
3 Outline one problem with the discovery stage and explain how the court has, or might, try to rectify this problem.
4 (a) What is a directions hearing and when is it held?
(b) Explain the purpose of the court ordering parties to attend directions hearings.

APPLY your understanding

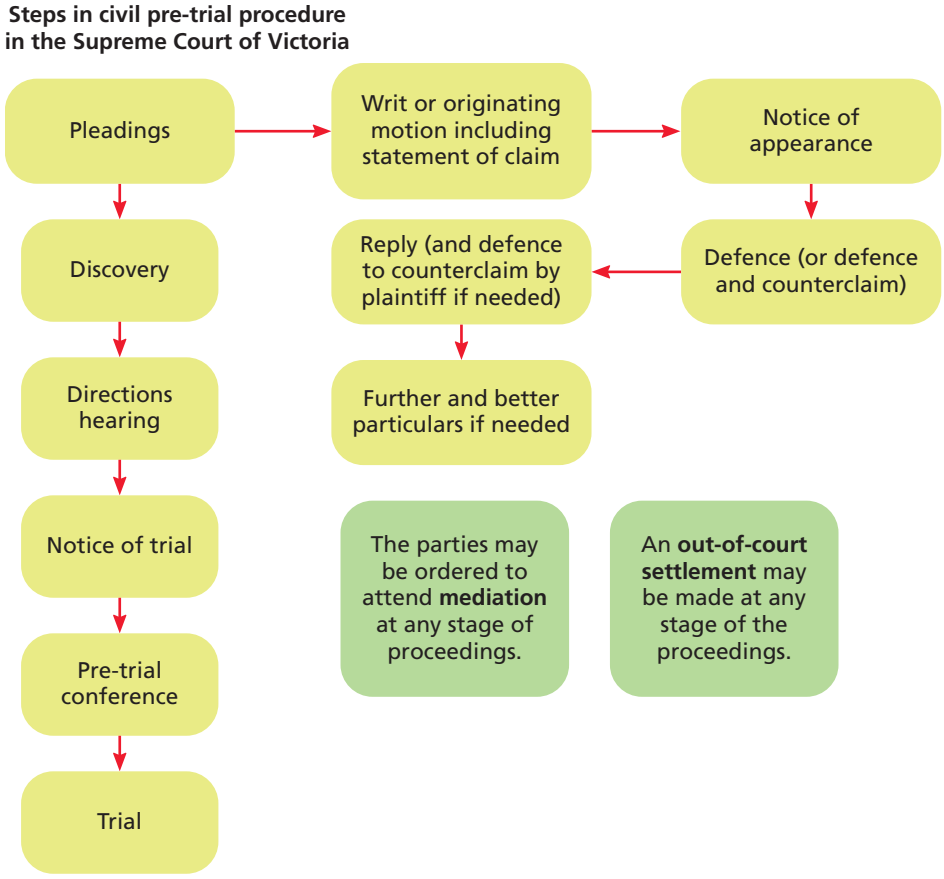
5 A civil dispute regarding a broken contract arose between Jansen Pty Ltd and Veil Advertising. Veil Advertising had failed to deliver an advertising campaign for Jansen Pty Ltd on time. Which of the following documents might be relevant to look at during the discovery stage for this dispute? Why?
(a) Emails between Jansen Pty Ltd and Veil Advertising confirming discussions that took place at meetings.
(b) A letter accompanied by the contract between the two parties.
(c) Video clips of past advertisements made by Veil Advertising.
(d) A Christmas card sent by the advertising firm to the contracting party.
6 Refer to the lawyer's perspective case study.
(a) What type of documents may be inspected in the discovery process?
(b) How many documents might be discovered in a large commercial case?
(c) List the reasons directions hearings may be called.
(d) What role does mediation play in the civil pre-trial process in the Supreme Court?

9.5 Pre-trial procedure: a summary

KEY CONCEPT As we have seen, after a party decides to take a civil dispute to court, a variety of pre-trial procedures, including pleadings, discovery and directions hearings, take place to encourage the parties to settle the dispute prior to trial or, if this is not possible, assist an efficient and timely trial. Various pre-trial procedures also take place prior to a criminal trial.

A summary of the pre-trial stages involved in a civil proceeding (in the Supreme Court)

The following diagram is a summary of the pre-trial stages involved in a civil proceeding in the Supreme Court of Victoria.



Civil pre-trial procedure in the Supreme Court of Victoria

The major difference civil and criminal pre-trial procedures

As we have seen in chapters 8 and 9, various pre-trial stages take place prior to the holding of both criminal and civil trials. For example, some of the main pre-trial stages that take place prior to a criminal trial (which take place for all serious or indictable offences) include the police investigation, a bail hearing and a committal hearing. Prior to a civil trial, parties engage in pleadings and discovery and can be ordered to attend directions hearings.

The main purpose of criminal and civil pre-trial proceedings also differs. For example, one of the main purposes of criminal pre-trial procedures is to ensure

the accused is given a fair and unbiased hearing and treated in a way that upholds the basic right of the accused to be presumed to be innocent until proven guilty, by the prosecution, of the alleged crime. The general right of an accused to remain silent (other than provide their name and address in most circumstances) and the general right to bail (unless specific reasons exist for its denial) also aim to uphold this presumption of innocence.

By contrast, one of the main aims of civil pre-trial procedures is to encourage the parties to reach an out-of-court settlement prior to the trial. For example, parties are generally directed by the court to attend compulsory mediation in an attempt to resolve their dispute prior to trial. As we have seen in chapter 8, an accused cannot resolve their criminal dispute using mediation or conciliation and avoid trial, although they may enter an early guilty plea in an attempt to receive a lesser sentence. If an accused enters an early guilty plea prior to trial, a sentencing trial will take place. An accused may also avoid trial if a magistrate (at a committal hearing) or the Director of Public Prosecutions believes the prosecution does not have sufficient evidence against the accused to support a conviction at trial.

Table 9.4 outlines some of the differences between the purposes of criminal and civil pre-trial procedures.

TABLE 9.4 A comparison of purposes of criminal and civil pre-trial procedures

Area of law	Pre-trial procedure	Purpose
Criminal	Bail hearing	The granting of bail aims to uphold the basic individual legal right to the presumption of innocence and treat an accused as innocent until proven guilty. It also allows the accused time to prepare for hearing or trial.
	Committal hearing	A committal hearing assists in upholding the presumption of innocence by helping to ensure a trial is held only if the prosecution has sufficient evidence against an accused to secure a conviction and aims to save the cost, time and stress associated with taking to trial a case that is unlikely to succeed. Committal hearings, like civil directions hearings, also assist with the clarification of legal issues and points of law prior to trial.
Civil	Pleadings	The pleadings stage aims to ensure that parties to the civil proceedings are fully aware of the details of the case, including the nature of the claim, defences and remedy sought. This may assist an early settlement and ensure parties are fully aware of the other's case. In a criminal case, the prosecution must disclose the evidence against the accused; however, to prevent self-incrimination and uphold the presumption of innocence, the accused has the right to remain silent throughout the pre-trial and trial process.
	Discovery	Discovery allows the parties the opportunity to access information held by the opposing party relevant to the case to help facilitate an early settlement. Failing this, the discovery stage may help minimise the time and cost associated with the trial as no 'surprise' evidence should be presented at trial. Again, while the prosecution must disclose their evidence throughout the criminal pre-trial process, the accused has the right to remain silent.
	Directions hearing	Civil directions hearings aim to assist an early settlement (for example, through the ordering of compulsory mediation) and, failing this, may assist a more efficient, cost effective and timely trial by assisting the parties to clarify legal issues and points of law. Directions hearings are also held prior to criminal trials with the aim of assisting a more efficient trial by clarifying legal issues and points of law, and giving the trial judge the opportunity to instruct the parties on how the case will proceed. [The VCE Legal Studies Study Design 2011–15 does not specifically require an examination of criminal directions hearings.]

TEST your understanding

1 (a) Describe two civil pre-trial procedures and two criminal pre-trial procedures.
(b) Explain the purposes of each of the civil and criminal pre-trial procedures outlined above.

APPLY your understanding

2 Explain two main differences between the purpose of civil and criminal pre-trial procedures.
3 Explain one way in which the purpose of civil and criminal pre-trial procedures are similar.

EXTEND AND APPLY YOUR KNOWLEDGE:
Civil proceedings

Case study one: Storm over defamatory comments

In 2008, Judge Greg Wood, the chairman of the NRL (National Rugby League) judiciary (which is responsible for determining disciplinary action within the NRL), and two other members, commenced civil proceedings against the then coach of the NRL rugby league team Melbourne Storm, Craig Bellamy, and the club's former chief executive, Brian Waldron, alleging they made defamatory comments in a post-match press conference held after the Melbourne Storm won the 2008 preliminary final. In the pre-trial documents, the plaintiffs claimed that Mr Bellamy and Mr Waldron made false statements implying the plaintiffs did not perform their duties as members of the NRL judiciary in an independent and impartial manner, and hence damaged their reputation.

In 2010, the parties reached an out-of-court settlement in which Mr Bellamy and Mr Waldron agreed to pay the plaintiffs approximately $105 000 damages to cover their legal costs (which were estimated to be over $100 000) and make an apology. Weeks after the defamatory comments were made, the NRL conducted their own investigations and imposed their own $50 000 fine on the Melbourne Storm.

Melbourne Storm coach Mr Craig Bellamy

QUESTIONS

1. Identify the plaintiff and the defendants in this case. Explain why the plaintiffs initiated civil proceedings. In your answer you must explain the type of civil dispute involved in the case.
2. If this case were pursued in the Victorian court hierarchy, which court would most likely hear the case? Justify your response.
3. Suggest three factors the plaintiffs may have considered when determining whether to initiate civil proceedings against Mr Bellamy and Mr Waldron.
4. State and identify the purpose of the legal document the plaintiffs would have most likely served on Mr Bellamy and Mr Waldron to commence litigation.
5. Suggest two reasons why this case may have been settled before trial and state the terms of the settlement.

Case study two: Kerang crash causes criminal and civil proceedings

In June 2007, Mr Christiaan Scholl, aged 48, was charged with 25 offences, including 11 counts of culpable driving (causing death), and various other charges, after his semi-trailer truck collided with a train near Kerang in regional Victoria, killing 11 people. Mr Scholl was released on bail prior to his committal hearing where Magistrate Bruce Cottrill found there was sufficient evidence against Mr Scholl to support a conviction in a higher court.

A deeply remorseful Mr Scholl pleaded not guilty to all charges, claiming the incident was a tragic accident. Mr Scholl was not driving under the influence of alcohol or drugs at the time of the accident and was not speeding. Witnesses gave evidence at the committal hearing and trial that trees blocked the view of the railway crossing and sun glare could make it difficult to view the railway warning lights. In June 2009, a Supreme Court jury found Mr Scholl not guilty of all charges (*R v. Scholl* [2009] VSC237).

Despite Mr Scholl being acquitted of all charges, after the criminal case, Mr Rodney McMonnies (the brother of Geoffrey McMonnies, aged 50, and uncle of Rosanne McMonnies, aged 17, who were train passengers killed in the Kerang crash) commenced civil proceedings against the Transport Accident Commission (TAC), which provided vehicle insurance to Mr Scholl, for pain and suffering, including anxiety and nervous shock, and loss of earnings caused by the loss of his brother and niece.

The case was settled through mediation in July 2010, weeks prior to the scheduled commencement of the trial. Although the terms of the settlement were confidential, it is estimated TAC settled the case with a six-figure payout. It was estimated that this case was one of approximately 20 civil actions likely to proceed against Mr Scholl's insurer, the TAC.

In 2007 a V/Line passenger train collided with a semi-trailer truck. The driver, Mr Christiaan Scholl, was involved in both criminal and civil proceedings over the matter.

QUESTIONS

1. Briefly explain the criminal case against Mr Scholl.
2. Describe, and explain the purpose of, two criminal pre-trial procedures that occurred prior to Mr Scholl's criminal trial.
3. Explain the outcome of Mr Scholl's trial.
4. Briefly explain why Mr McMonnies undertook civil proceedings against Mr Scholl's insurance company, the TAC. In your answer explain the remedy being sought by Mr McMonnies.
5. Describe, and explain the purpose of, two civil pre-trial procedures that would have occurred prior to Mr Scholl's civil trial.
6. Explain the meaning of the statement, 'The civil action initiated by Mr McMonnies was resolved prior to trial through mediation'.

9.6 Civil remedies: damages and their purpose

KEY CONCEPT The aim of a plaintiff undertaking a civil action is to seek a remedy. A common type of civil remedy is damages, where the plaintiff seeks a monetary payment to compensate for loss. Types of damages include compensatory, exemplary, aggravated, nominal and contemptuous.

The aim of undertaking a civil action is for the plaintiff to seek a remedy that will restore them, as far as possible, to their original position prior to the breach of rights and compensate for losses suffered. Compensation for losses suffered is often the only remedy available to plaintiffs who cannot be returned to their original position prior to the civil wrong occurring; for example, in cases where negligence has caused severe or irreversible injuries, or the plaintiff's reputation has been damaged beyond repair by defamatory remarks.

The most common type of civil remedy is damages or the awarding of a sum of money to reimburse the plaintiff and compensate for losses suffered, but other types of remedies are available, depending on the nature of the civil wrong. For example, in a defamation case a formal apology might be sought in addition to damages. In a case involving breach of contract, the remedy may involve the court (or tribunal) making an order to ensure the defendant carries out the terms of the contract. Let us look more specifically at damages as a remedy.

Cancelled lottery ticket wins $2 million

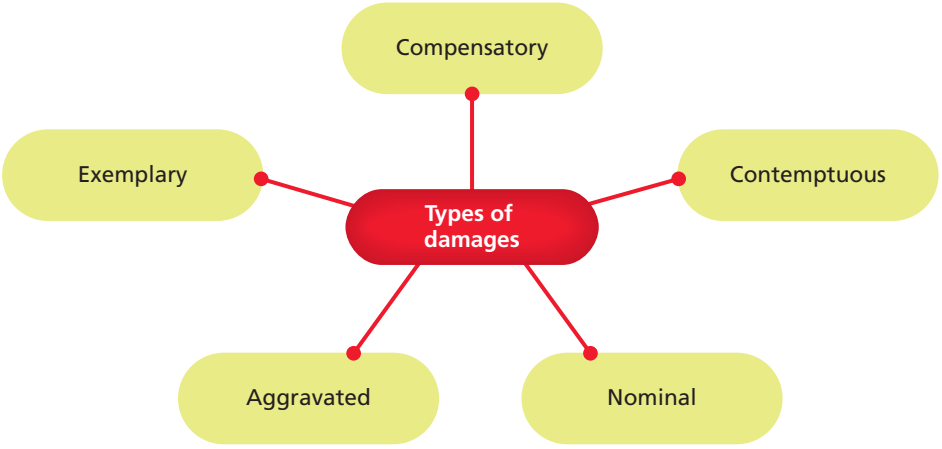
In 2008, the New South Wales Supreme Court awarded Mr Werner Reinhold, aged 73 years, $2 million in damages after he successfully sued a Sydney newsagency for negligence (*Reinhold v. New South Wales Lotteries Commission* [2008] NSWSC5). Mr Reinhold proved the newsagency acted negligently when they failed to correctly issue an Oz Lotto 'quick pick' lottery ticket purchased by Mr Reinhold in September 2005.

When Mr Reinhold purchased his lottery ticket it did not print correctly and so the newsagency cancelled the original ticket and issued him another. The second ticket subsequently won the $2 million first prize. However, when Mr Reinhold went to claim his prize, it was discovered that the newsagency cancelled the second 'winning' ticket in error, rather than cancelling the original ticket. Mr Reinhold was not able to claim the prize from Oz Lotto, but was able to successfully sue the newsagency for breach of contract and negligence.

In the case *Reinhold v. New South Wales Lotteries Commission* [2008] NSWSC5, a 73-year-old pensioner won a $2 million lottery jackpot, only to find his ticket was cancelled in error by the newsagency outlet who sold the ticket.

Damages

When plaintiffs are awarded damages in a civil case, they receive a sum of money from the defendant to compensate them for the breach of civil rights inflicted by the defendant. The actual dollar amount of damages will depend on the circumstances of the particular case, including how badly the plaintiff was affected as a result of the defendant's actions. There are also restrictions in some cases on the situation in which a person can sue for damages and the amount for which they can sue (see page 349). The following explains common types of damages.



Types of damages

Compensatory damages

Compensatory damages are a sum of money paid by the defendant to the plaintiff to recompense and reimburse for losses suffered.

Specific damages are for items that can be accurately measured in monetary terms, such as medical costs.

General damages are for items that cannot be accurately measured in monetary terms, such as pain and suffering.

As the name suggests, **compensatory damages** are a sum of money paid by the defendant to the plaintiff to compensate or reimburse for losses suffered. Compensatory damages can be either specific or general. **Specific damages** are awarded for items that can be accurately measured in monetary terms, such as medical costs, or loss of income incurred by the plaintiff as a result of the defendant's actions. **General damages** are awarded for items that cannot be accurately measured in monetary terms and often require a value judgement, such as the pain and suffering the plaintiff incurred as a result of the defendant's actions, and the loss of enjoyment of life and career and future income earning potential.

In some circumstances where the plaintiff has suffered a severe and debilitating impairment, such as the loss of the ability to walk or total loss of vision, the awarding of a monetary amount may assist in providing the plaintiff with an improved quality of life and an income to compensate for some loss suffered, but can never restore the plaintiff to the position they were in prior to the breach of rights.

Ms Lynette Rowe is seeking compensation for losses suffered at birth caused by thalidomide.

Pharmaceutical negligence causes 50 years of pain

In 2011, a civil proceeding was commenced in the Victorian Supreme Court against Grunenthal, a German pharmaceutical company which manufactured and sold thalidomide, a drug that caused thousands of babies to be born with birth defects and die since it was first made available in the 1950s and 1960s. The negligence action is being pursued by Melbourne lawyer Peter Gordon and other leading legal firms, on behalf of a group of plaintiffs who have suffered as a result of the drug. One of the plaintiffs is Ms Lynette Rowe, aged 49, who was born with no arms or legs as a direct result of her mother taking thalidomide to cure morning sickness while she was pregnant with Lynette in the early 1960s.

Ms Rowe is seeking compensatory damages to reimburse the cost of full-time care for 49 years (since her birth) and for the remainder of her life and loss of earnings. She is also seeking exemplary (punitive) damages. If Ms Rowe's case is successful she may be awarded the largest damages payout ever in Australia.

Exemplary damages

Exemplary damages (sometimes referred to as punitive damages) are awarded to a plaintiff in cicumstances where the court wishes to 'make an example' of the defendant and deter others from committing the same civil wrong.

Aggravated damages

Aggravated damages are awarded to a plaintiff in a situation where the court feels a defendant's conduct showed a reckless disregard for the plaintiff's welfare. The distinction between 'aggravated' and 'exemplary' damages is not always clear. Justice Windeyer, in the case of *Uren v. John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, explained the difference this way:

> . . . aggravated damages are given to compensate the plaintiff when the harm to him by a wrongful act was aggravated by the manner in which the act was done; exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment — moral, retribution or deterrence.

In some cases, both aggravated and exemplary damages have been awarded to a plaintiff — the aggravated damages compensates the plaintiff for the harm done in a reckless and angry manner by the defendant, and the exemplary damages may be awarded to make an example of the defendant and deter him or her and others from violating someone's civil rights again.

Nominal damages

Nominal damages is where the plaintiff is awarded a very small sum of money and are usually awarded in cases where the plaintiff pursued a civil action to prove that the defendant's actions were legally wrong. The plaintiff is more interested in the principle of the matter rather than aiming to receive a large sum of money from the defendant by way of compensation.

Contemptuous damages also involve the plaintiff being awarded a very small amount of money and are awarded in cases where, despite the plaintiff being legally 'in the right', the court disapproves of the plaintiff's decision to undertake the action in the first place and considers the plaintiff made the claim in 'contempt'.

Interest paid on damages

In addition to receiving damages, a plaintiff is also entitled to interest on damages. The reasoning behind this is that the plaintiff could have suffered monetary loss as a result of a defendant's actions, and could have used those funds to earn interest instead of paying bills — such as medical expenses, for example. In a case where the plaintiff is suing the defendant because of the money owed, interest is charged from the date the defendant should have paid the plaintiff. In other civil cases, such as negligence, interest is paid from the date when the writ was first issued.

Restrictions on damages

Legislation sets limitation periods for a person to commence court proceedings for damages for personal injuries — that is, there are expiry dates, where, after a certain time, you cannot bring legal action. The *Limitations of Actions Act 1958* (Vic.) (incorporating amendments up to 2007) states that an action for damages in respect of personal injuries for breach of contract or tort by an adult 'must not be brought after the expiration of three years from the date on which the cause of action accrued'. Work injury claims and transport accident injuries are subject to different time limits.

Exemplary damages are awarded if the court wishes to punish the defendant for the civil wrong, deterring them and others from committing similar acts again.

Aggravated damages are awarded if a defendant shows reckless disregard for a plaintiff's feelings. The court looks not only at the civil wrong but also at the manner in which the defendant infringed the plaintiff's civil rights.

DID YOU KNOW?

A grandmother from Epping in Victoria lost her sight after being injected with a blood-clot drug after her car accident. It was a rare side effect of the drug that left her blind. Under Transport Accident Commission rules there is a cap of $436 000 that can be sued for damages.

Nominal damages are a very small sum of money and are usually awarded in cases where the plaintiff pursued a civil action to prove that the defendant's actions were legally wrong, rather than to receive to large payout.

Contemptuous damages involve small amounts of money. The court acknowledges the plaintiff's rights have been infringed but has little sympathy for the plaintiff for taking legal action over the matter.

DID YOU KNOW?

In 2008, Aaron and Christine Boring, of Pennsylvania (USA) sued Google for trespass when its employees intruded onto the couple's property to take photographs for its online directory service Street View. Google acknowledged the breach and agreed to pay US$1 nominal damages.

The Wrongs Act 1958 (Vic.) also limits the amount of damages that can be sought for personal injury awards. As at 1 July 2008 a maximum amount of $450 460 can be claimed for general damages as a result of personal injury (transport accident injuries, work injuries and intentional sexual assault or misconduct cases are subject to different rules) and a cap is also placed on compensation for loss of earnings to be calculated at three times average weekly earnings (this avoids exorbitant payouts that would occur if the plaintiff was on an extremely high weekly wage).

In the case *Strong v. Woolworths Ltd*, Ms Strong sued Woolworths after slipping on a hot chip in one of their supermarkets.

Hot chip slip costs Woolworths

In March 2012 the High Court of Australia ordered Woolworths to pay Ms Kathryn Strong $580 000 in damages after Ms Strong, an amputee who walked with crutches, sustained serious back injuries when she slipped on a supermarket floor where a greasy hot potato chip had been dropped (*Strong v. Woolworths Ltd* [2012] HCA 5). The High Court found that Woolworths acted negligently by failing to reasonably check and remove hazards from their supermarket floors and surrounding sales areas for spillage (the floor where Ms Strong slipped had not been inspected and cleaned for more than four hours prior to the incident). The High Court ruled that, given the supermarket was located opposite a food court and the incident happened during lunchtime, it would be reasonable to expect that the supermarket checked their floors and removed any hazards every 20 minutes.

TEST your understanding

1. Explain the most common form of remedy in a civil action.
2. Give an example of a situation where it may not be possible to restore a plaintiff back to the original position prior to the breach of their rights.

APPLY your understanding

3. State which type of damages is being referred to in the following situations:
   (a) Damages considered to involve small amounts of money because the money received is less important than the enforcement of one's legal rights.
   (b) Damages awarded by the court to deter and perhaps punish the defendant for infringing the plaintiff's civil rights.
   (c) Damages awarded by the court because the behaviour of the defendant was found to be reckless, with no regard for a plaintiff's welfare.
   (d) Damages to make amends for the specific costs incurred as a result of the civil wrong as well as the general damages, which represent a dollar value for loss of enjoyment of life and pain and suffering.
   (e) Damages that have an insignificant dollar value reflecting the disapproval the court has for a plaintiff's claim.
4. There are different reasons for awarding damages. Why do you think it is important that the court distinguishes between the types of damages given in particular cases?
5. Read the case study 'Cancelled lottery ticket wins $2 million' on page 347 and answer the following questions:
   (a) Explain why Mr Reinhold sued the newsagency and not the company who operates Oz Lotto lotteries.
   (b) Explain the remedy awarded to Mr Reinhold.
   (c) Do you think Mr Reinhold should have been awarded interest on the damages and reimbursed for his legal costs? Give reasons for your answer.
6. Read the case study 'Pharmaceutical negligence causes 50 years of pain' on page 348 and answer the following questions:
   (a) Explain why Melbourne lawyer Peter Gordon is undertaking a legal action against the pharmaceutical company Grunenthal.
   (b) State in which court this legal action has been lodged and suggest why.
   (c) Explain the two main types of damages being sought by Ms Rowe.

9.7 Non-financial civil remedies and their purpose

KEY CONCEPT Other civil remedies are available to the court, besides damages. For example, the court may grant an injunction, requiring the defendant to undertake (or refrain from undertaking) a certain action, and make orders of specific performance and rescission orders to resolve contract disputes. Restitution orders can also be made to have property returned to its rightful owner.

Injunctions

An **injunction** is a non-financial remedy that may be sought by a plaintiff in a civil action. An injunction is a court order requiring the defendant to either undertake, or refrain from undertaking, actions to rectify or prevent a breach of rights. An injunction can be either **mandatory** (compelling a party to undertake an action) or **restrictive** (restraining a party from undertaking an action). An example of a mandatory injunction may be the court ordering the defendant to remove a car that was dumped on another person's property. An example of a restrictive injunction might be an order from the court to stop a potentially defamatory article being published about a plaintiff, or an order to stop a current affairs program broadcasting a particular story.

Injunctions may also be **perpetual** and this means the order is permanent. **Interim injunctions** (also referred to as interlocutory injunctions) provide a temporary remedy until a case can be heard.

An **injunction** is a court order requiring the defendant to either undertake, or refrain from undertaking, actions to rectify or prevent a breach of rights.

A **mandatory injunction** compels a party to undertake a specific action.

A **restrictive injunction** restrains a party from undertaking an action.

Perpetual injunctions are permanent or ongoing injunctions.

Interim injunctions compel or restrain the defendant's behaviour for a limited period.

Underbelly airing delayed by injunction

In 2008, the then Director of Public Prosecutions, Mr Jeremy Rapke, undertook civil proceedings against General Television Corporation Limited to seek a court injunction preventing the Nine Network from broadcasting the first series of *Underbelly*. Mr Rapke believed that the mini-series, which focused on the Melbourne gangland drug wars in the 1990s and early 2000s, could potentially influence the jury in Mr Evangelos Goussis's pending trial for the murder of Mr Lewis Moran (a key figure in the gangland drug wars and first *Underbelly* miniseries).

Victorian Supreme Court Justice Betty King granted an injunction to Mr Rapke ordering that the Nine Network could not broadcast the miniseries in Victoria until after Mr Goussis's trial was concluded. The miniseries was subsequently broadcast in Victoria many months after it had aired in other states and was subject to strict editing.

Order of specific performance

An order of **specific performance** may be made by the court when a contract has been breached. It compels a defendant to carry out the specific terms of the contract. In this case, the plaintiff asks for the defendant to actually carry out what was promised in the contract rather than be compensated by damages. For example, if a buyer has purchased land but has not been given ownership of it, an order of specific performance will compel the seller to sign transfer of land documents.

An order of **specific performance** compels a defendant to carry out the terms of the contract.

If it is proved that an employee has been unfairly dismissed the court may order specific performance of the contract and the employee may be reinstated. It is more usual, however, for damages to be sought.

A **rescission** order terminates a contract.

An order for **restitution** is an order to return property to the plaintiff.

Rescission

A **rescission** order may be made if one of the conditions of the contract is not satisfied — the court can actually terminate or cancel the contract. Rescission orders generally are only made when the parties can be returned to the original positions they occupied before the contract. For example, if a contract was made to provide for the construction of a building and work was not commenced on the site, a rescission order would be an appropriate remedy.

Restitution

An order for **restitution** might be made in cases where a defendant has property belonging to a plaintiff. The defendant is compelled to return the property to the plaintiff. For example, the defendant may have borrowed a lawnmower and never returned it, so the order of restitution compels the defendant to return the lawnmower to the plaintiff (its rightful owner).

Legal costs

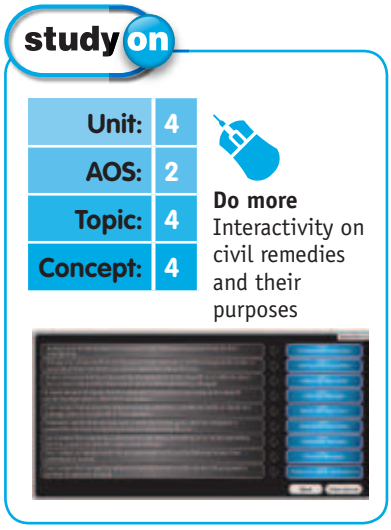
The purpose of taking civil action is to seek a remedy or some form of compensation for civil rights that have been infringed. It is, however, a most serious commitment to take civil action, from both an emotional and financial perspective. From a financial perspective, the plaintiff must weigh up the risk of losing the case and having to pay his or her own legal costs as well as the opposing party's legal costs. If the defendant loses the case, the defendant will pay both parties' legal costs.

It is worth noting, however, that even the winning party will have to pay some costs. There is a distinction between legal practioner–client costs and party–party costs. *Legal practioner costs* are the costs associated with a legal practioner the case and providing legal advice. *Party–party costs* are those legal fees charged as a result of direct communication between both parties to the case. Legal practioner–client costs are not paid by the losing party and, in many cases, they form the bulk of expenses at the conclusion of the trial.

Olympic cyclist awarded damages and costs for defamation

In April 2011, Victorian Supreme Court Justice David Beach ordered the Herald and Weekly Times (HWT) to pay Mr Mark French, an Olympic cyclist aged 25 years, $175 000 in damages, plus costs after Mr French sued HWT for publishing two articles that falsely referred to him as a drug cheat (*French v. The Herald and Weekly Times Pty Ltd* [2010] VSC155).

In 2004, Mr French had been suspended from Olympic competition for using banned drugs, but on appeal was cleared of all charges and vindicated of any wrongdoing. The 2011 ruling was the second time Mr French had successfully sued for defamation, having been awarded $350 000 in damages, plus costs, in 2008 after suing Melbourne radio station Triple M in 2008 for making similar defamatory remarks.



It is standard at the end of most civil matters for the winning party to obtain an order that the loser pay its costs — that is, the party–party costs. This is a court scale. Usually, the winner presents the loser with a 'bill of costs in taxable form', which is the costs calculated on a party–party basis. If the loser does not agree with the bill, it goes before the taxing master who literally goes through each item, hearing arguments regarding its validity, before ordering a particular amount to be paid. It is most unusual for this amount to cover the winner's actual costs — depending on the lawyer the winner has used, the recovery can be as low as 50 per cent.

Sometimes the trial judge might order costs to be paid on a higher scale. Legal practioner–client costs is a higher scale, so the winner will recover more but is still unlikely to get the actual costs. The best costs order for the winning party to receive from a judge is indemnity costs. This means that the loser has to pay actual costs. Indemnity costs are hard to get — it is completely up to the judge's discretion and may be granted after poor conduct by the loser, such as withholding critical documents during discovery or running the case in such a way that it is an abuse of process.

TEST your understanding

1 What is the purpose of obtaining:
   (a) an injunction?
   (b) an order of specific performance?
   (c) an order of restitution?
   (d) a rescission order?
2 Who is generally responsible for paying costs in civil proceedings? Is this fair? Do parties ever regain the full cost of legal proceedings?
3 Distinguish between legal practioner–client costs and party–party costs.

APPLY your understanding

4 State the type of remedy offered to the plaintiff in the following statements.
   (a) An order that stops people doing something or compels them to do something
   (b) An order to terminate a contract
   (c) An order that compels a defendant to return property that belongs to the plaintiff
   (d) An order that requires the terms of a contract to be carried out
5 Read the case study 'Underbelly airing delayed by injunction' and explain why a court injunction was taken out by the Director of Public Prosecutions against the Nine Network.
6 Read the case study 'Olympic cyclist awarded damages and costs for defamation' above and answer the following questions:
   (a) Explain why Mr French sued the Herald and Weekly Times and Triple M.
   (b) Explain the remedy awarded to Mr French in both legal actions and suggest what costs may have been incurred by Mr French and reimbursed by the defendants.

SKILL DRILL

KEY SKILLS TO ACQUIRE:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- describe the pre-trial procedures for the resolution of civil disputes
- discuss the ability of civil remedies to achieve their purposes
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

SKILL DEFINITION

Define means to provide a precise meaning.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

Describe means to accurately depict or outline in a logical sequence.

Evaluate means to explain the strengths and weaknesses.

Definitions task

(a) Match the following key terms with their correct definitions in the table below.

Aggravated	Mandatory
Civil	Mediation
Damages	Nominal
Defendant	Perpetual
Directions hearing	Plaintiff
Discovery	Pleadings
Exemplary	Restrictive
General	Specific
Magistrates'	Writ

Number	Definitions	Legal terminology
1	The civil pre-trial process where parties exchange written documents informing them of the details of the case	
2	A type of damages where the defendant must pay a very small amount of money to the plaintiff because the main aim of the civil action was to prove the defendant's actions were legally wrong rather than secure a large payout	
3	A type of legal proceeding involving individuals or groups in dispute over a breach of rights	
4	A civil remedy where the court orders the defendant to pay a sum of money to the plaintiff	
5	The party to a civil action who has allegedly infringed the plaintiff's rights	
6	The court that can hear and determine civil cases up to $100 000	
7	A type of injunction that prohibits a defendant from undertaking the action that resulted in the breach of the plaintiff's rights	
8	A written document informing the defendant that a civil proceeding is being taken against them	
9	A type of damages awarded to punish the defendant for breaching the plaintiff's rights and deter others from making similar breaches	

Number	Definitions	Legal terminology
10	A civil pre-trial process where parties are given the opportunity to request additional information regarding the facts of the other party's case	
11	A type of damages awarded by the court to a plaintiff to reimburse for items that can be precisely calculated, such as medical costs and loss of wages	
12	An injunction that is ongoing or permanent	
13	A method of dispute settlement where an impartial third party assists the parties to discuss their dispute and determine a mutually acceptable resolution between themselves	
14	The party that initiates a civil action and holds the burden of proof	
15	A type of damages awarded in cases where the defendant's action showed reckless disregard for the plaintiff's feelings	
16	A type of damages awarded by the court to reimburse the plaintiff for unspecified amounts, such as for pain and suffering	
17	A type of injunction awarded by the court order that requires the defendant to undertake action to stop the breach of rights	
18	A pre-trial process where a judge can give instructions to the parties regarding how the trial will proceed, and legal issues and points of law can be clarified	

(b) Identify the civil pre-trial procedures from the key terminology list.
  (i) Explain the purpose of each civil pre-trial procedure you have identified.
  (ii) Discuss the extent to which these civil pre-trial procedures provide access to the civil justice system and assist in the resolution of a timely dispute.

(c) (i) Identify the civil remedies from the key terminology list.
  (ii) Explain the purpose of civil remedies and discuss the extent to which this purpose can be achieved.

(d) Prepare a paragraph about civil processes and procedures that uses at least 12 of the legal terms listed above in their correct context. Your paragraph must be no more than 250 words in length.

(e) Suggest and define six additional terms (that is, terms that are not provided in the legal terminology list provided above) or concepts that relate to civil processes or procedures.

(f) Prepare a flow chart that illustrates the civil pre-trial process that takes place in the Supreme Court of Victoria.

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate the effectiveness of the legal system.

Please note: Outcome 2 contributes 60 marks out of the 100 marks allocated to school-assessed coursework for Unit 4. Outcome 2 may be assessed by one or more assessment tasks.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes
- discuss the ability of criminal sanctions and civil remedies to achieve their purposes
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Case study

Read the case study below and answer the questions that follow.

Assault victim sues

In *Craig Woodhouse v. Stephen Brian Clinton* [2000] VCC 38, the plaintiff, Mr Woodhouse, sued the defendant, Mr Clinton, for damages for personal injury. A writ was served on the defendant on 15 April 1999, but the defendant did not file a notice of appearance. A default judgement was made, which means the case was decided in the plaintiff's favour 'by default' rather than on the facts of the case. The default judgement resulted in the plaintiff winning the case, but the amount of damages still needed to be determined by Judge Wodak in the County Court of Victoria. This case study summarises the facts of the case and details the reasoning behind the final judgement on damages awarded to the plaintiff.

Damages sought by the plaintiff

The plaintiff alleged he was assaulted and battered by the defendant at his house in 1998. The plaintiff suffered physical injury to his right thigh as well as mental injury (depression and anxiety) as a result of the incident. He sought compensatory, aggravated and exemplary damages from the defendant.

The facts of the case

On the night of 7 December 1998, the plaintiff had been at a social function with his partner and arrived home at about 1.15 a.m. The plaintiff's family were asleep when the defendant banged on the door. When the plaintiff opened the door, the defendant screamed at him, accusing him of having an affair with his wife. The altercation between the plaintiff and defendant woke the household. In an effort to protect his family from distress, the plaintiff escorted the defendant outside, where the defendant allegedly manoeuvred the plaintiff to the ground and, in the plaintiff's words, did a 'knee drop' onto the plaintiff's right thigh. The plaintiff stated he was in

physical pain. He was also upset by the attitude of his partner who was concerned the allegations made by the defendant were true. The plaintiff drove himself to the hospital where he fell out of the car and was subsequently found and escorted by a security guard into the hospital in a wheelchair.

The plaintiff remained in hospital for about a day and a half, and walked with the aid of two crutches for about 3–4 weeks. He suffered a limp for about nine months, and returned to work at the end of January 1999. Quite apart from the physical injury, the plaintiff said he was paranoid, had lost confidence and suffered from nightmares.

The plaintiff underwent a psychological assessment in November 1999 and was found to have suffered from a chronic adjustment disorder with anxiety, which called for the plaintiff to undergo treatment. A follow-up meeting in March 2000 by the same psychologist had seen the plaintiff no longer apprehensive about the assault and less anxious on the street. The plaintiff's unhappiness at the time was linked to the breakdown in his long-term relationship with his partner.

The plaintiff underwent a medical and legal assessment in May 2000. The consultant surgeon confirmed that the plaintiff's injury to the thigh was likely to have caused muscle bruising and tearing, which had 'caused a degree of retraction of muscle ends and a gap where the residual scarring [had] contracted. There was a major bleeding . . . and some painful local scar tissue that continues to trouble him'.

The judgement

Judge Wodak accepted the evidence that the assault had taken place and that mere compensatory damages would be insufficient due to the unexpected and unprovoked invasion at the plaintiff's home and the humiliation caused to the plaintiff in front of his partner and children.

The claim for exemplary damages was not successful, however, and Judge Wodak referred to criminal proceedings taken against the defendant in the Magistrates' Court. There, the defendant had pleaded guilty to an indictable offence of recklessly causing injury and was fined $1000. Judge Wodak said: 'A fine for that amount is, in my view, of sufficient order to amount to substantial punishment. For that reason, I do not consider that an award of exemplary damages ought to be made against the defendant in this proceeding.'

Judge Wodak did, however, acknowledge that the plaintiff was humiliated at the time of the attack by the defendant and awarded aggravated damages of $5000. Compensatory damages of $30 000 were awarded for pain and suffering and loss of enjoyment of life both in the past and the present.

Questions

1 In this case study, civil and criminal proceedings were taken against Mr Clinton. Explain the difference between a civil dispute and a criminal case. **(2 marks)**

2 **a** If the civil case had been heard in the Supreme Court of Victoria, explain two pre-trial procedures that would have taken place.

b Compare the purpose of civil pre-trial procedures with the purpose of criminal pre-trial procedures. **(4 + 4 = 8 marks)**

3 **a** In the civil action Mr Woodhouse sought different types of damages. Identify and describe two different types of damages sought by Mr Woodhouse.

b Explain the nature and purpose of one other type of civil remedy, other than damages. **(4 + 4 = 8 marks)**

4 State the actual sanction imposed on Mr Clinton and remedy awarded to Mr Woodhouse. Discuss the degree to which the sanction imposed and remedy awarded might achieve their purposes. **(6 marks)**

5 Identify two civil pre-trial processes and procedures and one feature of a civil trial. Discuss the extent to which each contributes to an effective legal system. **(6 marks)**

(Total 30 marks)

Tips for responding to the case study

Use this checklist to make sure you write the best response to the questions that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
In question 1 you should define a criminal case and a civil dispute. In questions 2 and 3, you should at least define two of the following pre-trial procedures: pleadings, discovery and directions hearings; and two of the following types of damages: compensatory, exemplary and aggravated damages.		
Discuss, interpret and analyse legal information. Apply legal principles to relevant cases and issues.		
Refer to the case *Craig Woodhouse v. Stephen Brian Clinton* when relevant.		
Describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes.		
In question 2 you should explain two of the following pre-trial procedures: pleadings, discovery and directions hearings (as they are the main civil pre-trial procedures). When comparing the purpose of civil and criminal pre-trial procedures you should refer to at least one of the main criminal pre-trial procedures (for example, police investigation, the granting of bail and committal hearings), and explain some differences and similarities between civil and criminal pre-trial procedures. For example, one difference is that civil pre-trial procedures aim to assist parties to achieve an out-of-court settlement, whereas all indictable criminal matters proceed to court if the prosecution can establish sufficient evidence exists for a jury to convict the accused.		
Discuss the ability of criminal sanctions and civil remedies to achieve their purposes.		
Question 4 asks you to specifically look at the dispute between Craig Woodhouse and Stephen Brian Clinton. Criminal and civil action was taken against Clinton. In the criminal case a fine was imposed and in the civil case damages were awarded. Look at the purpose behind imposing the criminal sanction and civil remedy and evaluate whether the purpose of each was achieved.		
Evaluate the extent to which court processes and procedures contribute to an effective legal system.		
In question 5 your evaluation should consider the three elements of an effective legal system (explained in chapter 6); that is, you should explain the ability of two civil and two criminal pre-trial procedures to provide a fair and unbiased hearing, access to the legal system and a timely resolution of disputes. When selecting two civil trial processes and procedures that assist in the achievement of an effective legal system, you should consider the main features of the adversary system of trial (examined in chapter 7). For example, you could consider the following features in a civil trial: • the role of the judge • the ability of the parties to control their case • the existence of strict rules of evidence and procedure • the need for legal representation • the burden and standard of proof in a civil case.		

Performance area	Yes	No
Your responses are easy to read because: • Spelling is correct. • Correct punctuation is used. • Correct grammar is used. • Paragraphs are used. *Tip: as a general rule a new paragraph should be used for each new point made. Introduce your **P**OINT, then **E**XPLAIN, then give an **E**XAMPLE if appropriate.*		

Chapter summary

- **Factors to consider when initiating a civil action:**
  - costs involved
  - probability of winning
  - defendant' ability to pay
  - complexity of the case
  - publicity
  - personal circumstances.
- **Letter of demand**
  - A letter sent by the plaintiff (or their legal practitioner) to the defendant informing the defendant of the plaintiff's intention to commence legal proceedings against them. It outlines the alleged breach of rights and the remedy being sought by the plaintiff.
- **Pleadings**
  - The exchange of written documents between the plaintiff and defendant (and filed at the court) specifying the details of the action; that is the claims, defences and suggested remedies. Documents include the:
    - writ (or originating motion)
    - statement of claim (including remedy sought)
    - defence
    - counterclaim
    - reply
    - further and better particulars.
- **Discovery**
  - The stage where both parties have the opportunity to request documents and other information relevant to the facts of the case, including:
    - electronic information stored on a computer
    - photographs
    - maps and plans
    - contracts
    - interrogatories.
- **Directions hearings**
  - A hearing, usually presided over by a judge, in which the parties to a civil proceeding are given instructions or orders, by the court, to undertake certain actions that are necessary to prepare the parties for trial.
- **Notice of trial and pre-trial conference**
  - The final step in the pre-trial process that informs all parties the proceeding is ready for trial. The court may direct parties to attend a pre-trial conference in an attempt to resolve the matter out-of-court.

- **Supreme Court civil pre-trial procedures, including pleadings, discovery and directions hearings, and the purposes of these procedures**

- **The purpose of civil pre-trial procedures**
  - To encourage parties to carefully consider and discuss their case (and use mediation and conciliation as appropriate) to reach an out-of-court settlement or resolve their dispute without the need to go to court.
  - To exchange written documents and information to ensure both parties are fully aware of all the details of the case and the other parties' facts in an attempt to prompt an early settlement and, failing this, ensure an efficient trial (for example, minimise delays and costs) because legal issues are clarified prior to trial and no surprise evidence is presented in court.

- **A comparison of the purposes of criminal and civil pre-trial procedures**
  - Main civil pre-trial procedures:
    - pleadings
    - discovery
    - directions hearings.

- **The main purpose of civil pre-trial procedures**
  - To encourage parties to carefully consider and discuss their case (and use mediation and conciliation as appropriate or directed by the court) to reach an out-of-court settlement or resolve their dispute without the need to go to court.
  - To ensure that both parties are fully aware of the details of the case including the nature of the claim, defences and remedy sought, and the other parties' evidence.
  - To assist with the clarification of legal issues and points of law prior to trial.

- **Main criminal pre-trial procedures:**
  - Police investigation
  - Bail hearing
  - Committal hearing.

- **The main purpose of criminal pre-trial procedures:**
  - To ensure the accused is given a fair and unbiased hearing and treated in a way that upholds the basic right of the accused to be presumed to be innocent until proven guilty by the prosecution of the alleged crime.
  - To ensure the accused is aware of the prosecution's case against them, as the prosecution must disclose the evidence against the accused. However, to prevent self-incrimination and uphold the presumption of innocence, the accused has the right to remain silent throughout the pre-trial and trial process.
  - To assist with the clarification of legal issues and points of law prior to trial.

- **The purpose of civil remedies**

- **The purpose of civil remedies**
  - For the plaintiff to seek a remedy that will restore them, as far as possible, to their original position prior to the breach of rights and compensate for losses suffered.

- **The ability of civil remedies to achieve their purposes**
  - Compensation for losses suffered is often the only remedy available to plaintiffs who cannot be returned to their original position prior to the civil wrong occurring; for example, in cases where negligence has caused severe or irreversible injuries.

- **Types of civil remedies, including damages and injunctions**

- **Damages**
  - A sum of money paid by the defendant to the plaintiff to reimburse the plaintiff and compensate for losses suffered.

- Compensatory damages — includes specific damages that can be precisely calculated, such as medical expenses and loss of wages; or general damages for unspecified amounts, such as for pain and suffering.
- Exemplary damages
- Aggravated damages
- Nominal damages
- Contemptuous damages.

- **Injunctions**
  - An injunction is a court order requiring the defendant to either undertake, or refrain from undertaking, actions to rectify or prevent a breach of rights.
    - Mandatory — compelling a party to undertake an action
    - Restrictive — restraining a party from undertaking an action
    - Perpetual
    - Interim.
- **Order of specific performance**
  - Compels a defendant to carry out the terms of the contract.
- **Rescission order**
  - Terminates a contract.
- **Restitution order**
  - Orders the return of property to the plaintiff.

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Digital doc:

Access a list of key terms for this chapter.

Searchlight ID: doc-10217

eBookplus

Digital doc:

Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

Searchlight ID: doc-10218

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

Janette and her friends were celebrating Janette's fortieth birthday party at a restaurant. When Janette returned home, she began to feel ill and soon knew she had contracted food poisoning. Janette had to be hospitalised and it took two weeks for her to fully recover. Janette contacted her friends who dined at the restaurant with her but they had not been ill. Janette was the only person who dined at the restaurant that night who had consumed shellfish. Investigation found that the shellfish was handled incorrectly and was the source of Janette's food poisoning.

Provide Janette with advice on the purpose of **two** pre-trial procedures that her lawyers may use in this case. **(4 marks)**

Question 2

Explain **two** Supreme Court civil pre-trial procedures and their purpose. **(4 marks)**

Question 3

Jack and Georgia own a large construction firm and are involved in a dispute with one of their suppliers. Solicitors have advised them that legal action may have to be taken in the Supreme Court.

If this case goes to court and the plaintiffs are successful, outline **one** civil remedy which could be ordered and explain its purpose. **(2 marks)**

Question 4

Describe two civil pre-trial procedures and consider how each of these procedures can promote or limit the effective operation of the legal system. **(8 marks)**

Question 5

Compare the purpose of **two** pre-trial procedures for the resolution of criminal cases and civil disputes. **(8 marks)**

Examination technique tip

You have two hours to complete the exam. Before you start writing, make a rough note of how long you are going to spend on each question and try to keep to this plan. This will help you avoid writing an excellent answer to one question and providing no answer to another question because time ran out.

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Unit:	4
AOS:	2
Topic:	4

Practice VCE exam questions

Question 6

The following extract is from a media article. It contains errors.

> Ms Bradshaw today lodged a writ at the County Court to commence civil proceedings against Mr Preston for breach of contract. Ms Bradshaw is seeking $10 000 in damages claiming Mr Preston, the plaintiff, failed to complete building renovations to her city apartment. To succeed at trial, Ms Bradshaw will have to prove, before a judge, her case beyond reasonable doubt.

Identify three errors in the above article and provide the correct definition, process or procedure. **(3 marks)**

Question 7

In a recent practice exam, a Year 12 Legal Studies student wrote 'pre-trial procedures serve the same purpose in both the civil and criminal legal process'.

To what extent do you agree with this statement? Give reasons for your answer. **(4 marks)**

Question 8

Distinguish between the pleadings and discovery stage of the civil pre-trial process and discuss the extent to which these procedures assist a timely resolution of disputes. **(6 marks)**

Question 9

Explain the benefits associated with holding a directions hearing prior to a civil trial. **(4 marks)**

Question 10

Fabulous Photos was recently ordered by the court to pay Monica and Chandler $25 000 in damages after the couple successfully sued the company for negligence after they deleted the couple's professional wedding photos and DVD from their computer storage system.

a In which court is it most likely that this case would have been heard?

b Explain the remedy imposed by the court and explain one other type of remedy that can be awarded in a civil action.

c Describe one other method of dispute resolution that Monica and Chandler could have used to resolve this case and explain two benefits associated with using this method.

(1 + 2 + 3 = 6 marks)

(Total 49 marks)

CHAPTER 10

The jury system

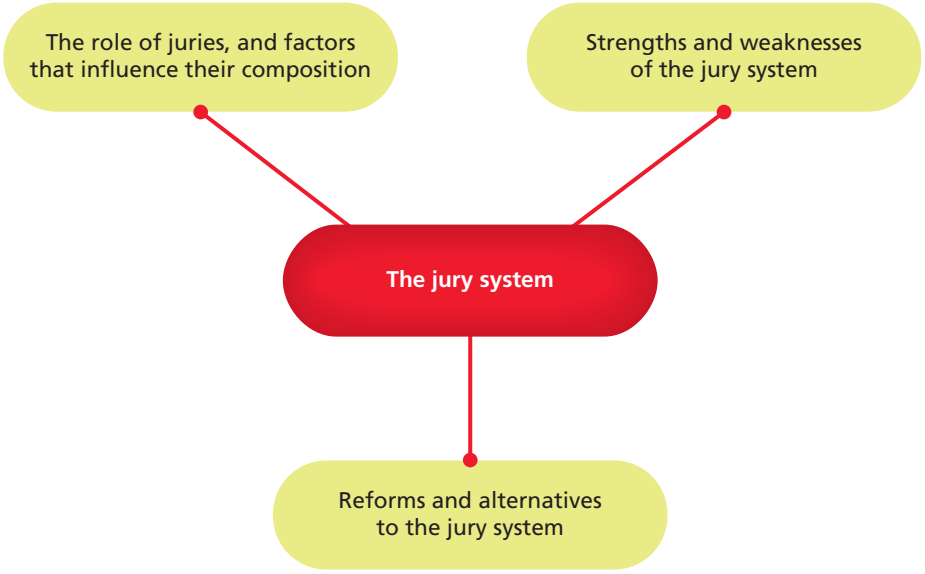
WHY IT IS IMPORTANT

In a movie or on television, you have probably seen a jury listening to evidence in court. Although juries are used in less than 5 per cent of all legal cases, they are often what people find most intriguing about the law. The role of a jury is to listen to and consider all the evidence presented by both parties in court. After the judge has explained the relevant law, the jury must then deliver a verdict that applies that law to the facts that have been presented in evidence.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- critically evaluate the effectiveness of juries
- suggest and discuss reforms and alternatives to the jury system.

Can you demonstrate these skills?

Psychological counselling for Freeman jury members

In March 2011, the jurors in the Freeman murder trial were offered a debriefing and counselling sessions with a psychologist after returning a guilty verdict. The jury of seven women and five men were required to decide on the guilt of Arthur Phillip Freeman, who was charged with murdering his daughter in January 2009.

Freeman had been charged with murder after he threw his four-year old daughter Darcey off the West Gate Bridge. The defence claimed he was mentally impaired at the time and so was not responsible for his actions. The prosecution rejected this defence and argued that Freeman was fully aware of his actions. The jury had to decide, on the evidence presented to them, whether or not Freeman knew what he was doing at the time of the offence.

It took five days before the jury eventually returned a verdict, finding Freeman guilty of murder.

Justice Coghlan thanked the jurors for their dedication and ordered that they be excused from jury duty for the next ten years. Several of the jurors cried, after what had been a very distressing case. They had been required to examine evidence relating to the injuries sustained by the four-year-old victim, as well as the impact on other members of her family.

All jurors are able to access counselling with a psychologist after a trial such as this. Any jurors who find the experience of jury service difficult to handle can contact the Juries Commissioner, who will ensure that a trained psychologist is available to provide a debriefing and ongoing counselling as necessary.

The jury has an important task and what they decide will have a great impact on the life of the accused and their freedom.

projectsplus

The jury system on trial

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Scenario

This chapter contains two assessment tasks. This assessment task is a report in multi-media format and all the resources to help students are contained in eBookPLUS. Alternatively you may choose the case study on page 399 as the assessment task.

The Department of Justice has ordered an urgent review into the state of the jury system in Victoria. The Attorney-General has asked the Victorian Law Reform Commission to undertake the review and report back to him with its key findings. Read this chapter first, then complete the task.

Your task

As head of the review, you must write a consultation paper that includes an in-depth investigation into the many elements of the jury system.

Your consultation paper (a report) should clearly identify:

- the role of juries in Victoria
- the selection of jurors and whether or not they are representative of a cross-section of the community

- an analysis of the strengths and weaknesses of the jury system
- key reforms and alternatives to the jury system which could be applied in Victoria.

The use of relevant case studies and research as well as the inclusion of visual supports (graphs, tables, diagrams) is vital to support your findings within the report. As this is an official document for the Department of Justice, you must remember to define key legal terminology and use it appropriately throughout the report.

Process

- **Open the ProjectsPLUS application** for this chapter in your eBookPLUS. Watch the introductory video lesson on the jury system, click the 'Start Project' button and then set up your project group. You can complete this project individually or invite other members of your class to form a group. Save your settings and the project will be launched.
- **Use the report template** which is already set up with headings and sub-headings for your report. To find the report template, navigate to your Media Centre and click on 'Templates' and then choose 'Sample report template'. Alternatively, you may wish to use the **Research Forum** tab to complete each section of your report. If you complete this project as a group you can see and comment on each member's work.
- **Check the assessment rubric** to help you achieve the best mark you possibly can for this assessment. It tells you what you need to do to achieve a certain grade. This assessment rubric can be found in the Media Centre under 'Documents'.
- **Read the four case studies on the jury system.** Think of how you can use each case study to illustrate a point when writing your report. These case studies can be found in the Media Centre under 'Support Files'.
- **Undertake research of your own.** In the Media Centre you will find useful 'Weblinks' on the jury system. You may also like to survey those who have served on a jury before. In the Media Centre under 'Templates', you will find a 'Juror interview questionnaire template'. Also check the Media Centre under 'Documents' to access 'Juror interview transcripts' to learn more about what it is like to serve on a jury.
- **Print your report and submit it by the due date.**

Your ProjectsPLUS application is available in this chapter's Student Resources tab inside your eBookPLUS. Visit www.jacplus.com.au to locate your digital resources.

MEDIA CENTRE

Your Media Centre contains:

- **Statistics and cases important to the role of juries**
- **Weblinks to research sites**
- **Interviews and testimonials**
- **A document containing hints on writing reports**
- **A guide to creating graphs using Microsoft Excel**
- **An assessment rubric.**

SUGGESTED SOFTWARE

- ProjectsPLUS
- Microsoft Word
- Microsoft Excel (for creating graphs)

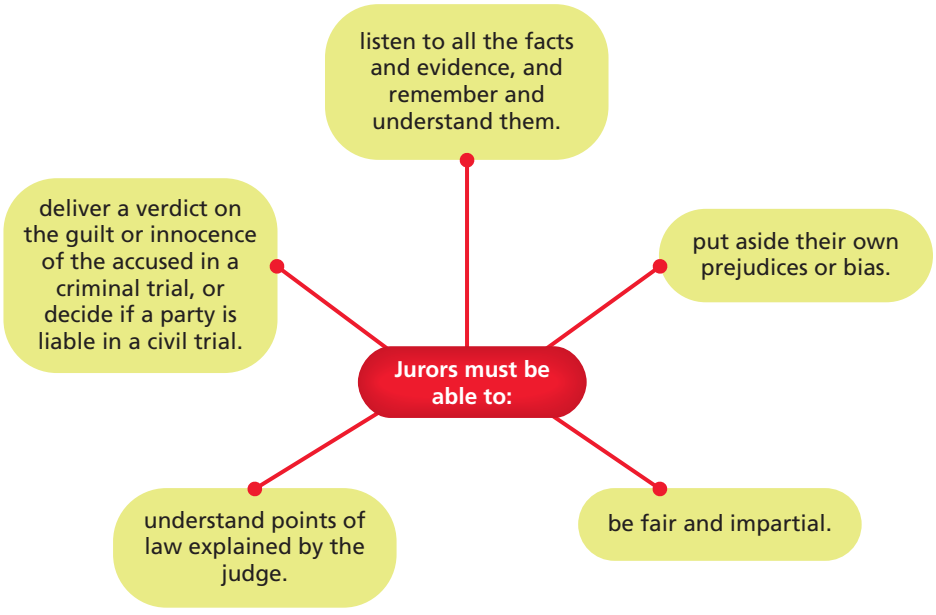
10.1 Role of juries

KEY CONCEPT The jury system dates back to medieval times in England. It was common practice for a person accused of a crime to be tried by a group of his peers and other disputes were often settled in a similar way. Today jurors are chosen at random from the electoral roll. The jurors' role is to listen to the evidence and return a verdict based on the facts of the case as presented in evidence.

A **jury** is a body of 12 (criminal matters) or 6 (civil matters) people who decide all questions of fact at a trial, apply the law as outlined by the judge and deliver a verdict according to the application of that law to the facts.

The jury's role is to be independent and decide on the facts of the case in both criminal and civil trials. Jurors must decide what they believe actually happened according to the evidence they have heard. The **jury** is made up of ordinary people (members of the general public) who are given the very important job of deciding whether or not a crime has been committed or a person's rights have been infringed.

In Victoria, the *Juries Act 2000* (Vic.) provides for the operation and administration of trial by jury. While the right to trial by jury is enshrined in s. 80 of the Australian Constitution, this right only applies to a 'trial on indictment of any offence against any law of the Commonwealth'. As most indictable offences are part of state-based criminal law and take place in state courts, this constitutional right has very limited application. While trial by jury is considered to be an important *civil right*, it is also a *responsibility*, in that ordinary people must be available to serve on a jury if able to do so.



The role of the modern jury

Standard of proof is the extent to which a party must prove a case or an assertion during a trial. The criminal standard (beyond reasonable doubt) is a much higher standard than the civil standard (balance of probabilities).

The **accused** is a person charged with a criminal offence in the magistrates', county or supreme courts of Victoria.

Beyond reasonable doubt is the standard of proof in a criminal trial. It means that if there is a reasonable doubt of the defendant's guilt in a criminal case, then the defendant must be acquitted (set free).

Juries in criminal trials

In criminal trials it is the role of the jury to apply the **standard of proof** required for a guilty verdict. This means that the jurors must believe the **accused** to be guilty **beyond reasonable doubt**. As evidence is presented by both the prosecution and the defence, some evidence presented as fact by one side may be disputed by the other side. A jury must be satisfied beyond reasonable doubt that the evidence as presented by the prosecution is a true representation of the facts. If any evidence or argument presented by the defence raises any reasonable doubt in relation to the prosecution's case, a not guilty verdict must be returned. Of course, juries have

to be careful not to acquit too lightly, as the law relating to double jeopardy will prevent the accused being tried again (see chapter 8, page 295).

Following are key features describing the operation of a jury in a criminal trial.

- Juries are compulsory in all criminal cases involving indictable offences in the county or supreme courts when the accused has pleaded not guilty to committing a crime. Neither the prosecution nor the defence has any choice about the jury being present.
- A jury is not required if the accused pleads guilty to the offence. In this situation, the judge will impose a sentence, following submissions from the prosecution and defence. These can include evidence of prior convictions and character evidence.
- Juries are not used in the Magistrates' Court because they are not required for summary offences, or for indictable offences heard summarily.
- The Supreme Court and County Court use juries only in their original jurisdiction, not in their appellate jurisdiction. Only judges will hear appeals in these courts. There is no provision for the use of juries in appeals to the Victorian Court of Appeal or the High Court of Australia.
- A criminal jury consists of 12 members, unless the case is expected to be a lengthy one (over three months), in which case 15 jurors are selected to hear the case. This is to cover possible illness or other events that may prevent a juror from hearing the whole trial.
- When a jury of 15 is selected, only 12 deliberate on the final verdict. All names will be placed in a box and the first three drawn out will be excused. The **foreperson** cannot be included amongst the three excused.
- If a jury of only 12 has been selected, and one or more becomes ill, the jury may still be able to hear the trial. The minimum number required to return a verdict is 10 jurors, so if three or more become unavailable, a retrial will occur.
- Juries are expected to return a **unanimous verdict** and are generally expected to do so within six hours.
- If a unanimous verdict cannot be arrived at within six hours, a **majority verdict** (11 out of 12) is acceptable, except in cases of murder, treason and some federal drug-related offences.
- Judges frequently grant extensions of time to juries to arrive at a verdict, because of the time already taken in the trial and the cost involved.
- If a jury cannot arrive at a verdict, a **hung jury** may be declared, the jury dismissed and a new trial ordered. In some cases a new trial may not be necessary (see McMaster's case, below).
- Once the jury has delivered a verdict of either guilty or not guilty, its role is complete and it is discharged. It is not present for the sentencing of an accused found guilty.
- A jury's deliberations are confidential and it is not required to give reasons for its decisions. Even the judge is not able to ask the jury for an explanation of its verdict.

If a hung jury is declared, it may not always be necessary to order a retrial, as the following case illustrates.

R v. McMaster [2007] VSC 133

Stuart McMaster was charged with the murder of his five-year-old stepson, Cody Hutchings. He was found to have beaten the boy severely on the day of his death, causing injuries that had ultimately been fatal. A Supreme Court jury could not agree on a unanimous verdict for the murder charge, with the result that the trial ended with a hung jury. McMaster had agreed to plead guilty to the lesser charge of manslaughter in a plea bargaining arrangement with the DPP. This meant that instead of a retrial, he could be found guilty of this charge without a jury verdict. He was sentenced to 13 years imprisonment, with a minimum of 10 years.

study on

Summary

Unit 4:
Resolution and justice

Area of study 2:
Court processes, procedures, and engaging in justice

Topic 5:
The jury system

A **foreperson** is a person nominated to be the spokesperson for a jury; this person delivers the verdict.

A **unanimous verdict** is reached when all jurors reach the same decision or verdict.

A **majority verdict** is reached when one less than a unanimous vote is accepted by the court.

A **hung jury** is a jury that cannot decide on a verdict, resulting in the need for a retrial.

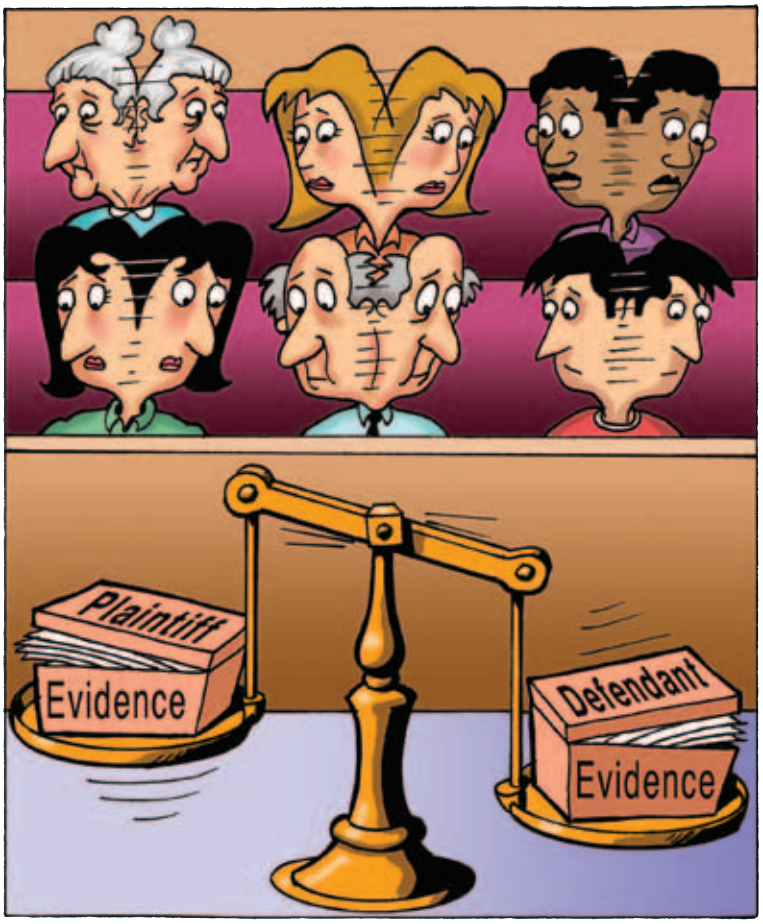
DID YOU KNOW?

The majority of criminal cases are not heard before a jury. Approximately 80 per cent of criminal cases are heard in the Magistrates' Court, where no jury is required. In the remaining 20 per cent of cases heard in the county or supreme courts, more than three-quarters of defendants plead guilty, so no jury is required. This means that less than five per cent of all criminal cases actually involve a jury.

Juries in civil trials

In civil trials, a jury is optional in the county or supreme courts. It is up to either party (plaintiff or defendant) to request a jury, but they must be prepared to pay for it.This means that juries are used only rarely in civil cases. Following are key features describing the operation of a jury in a civil trial.

- A civil jury usually has only six members, although eight may be empanelled in a lengthy case. In this situation, two will eventually be balloted out, so that only six make the final decision.
- If a civil jury of six is empanelled and one becomes ill, the jury may still hear the case. A minimum of five jurors is required to return a verdict.
- Civil juries do not determine a verdict of guilty or not guilty. They are required to establish whether a defendant is liable or not liable for the harm claimed by the plaintiff.
- The standard of proof is 'on the balance of probabilities', rather than 'beyond reasonable doubt'. This means the jurors will weigh up both sides of the dispute and decide which set of events is the most likely to have occurred.
- A civil jury is usually expected to return a unanimous verdict in favour of the plaintiff or the defendant.
- As with criminal juries, a time limit is usually imposed. In this case it is three hours rather than six.
- In more complex cases, the judge may grant extensions of time to the jury to avoid a hung jury and the need for a retrial.
- If a unanimous verdict cannot be reached, majority verdicts of five out of six jurors are acceptable.



Jurors in civil proceedings must weigh up the evidence on both sides and decide on the balance of probabilities whether the defendant is liable or not liable.

- Civil juries have a role in determining the level of compensation awarded to a successful plaintiff (except in defamation cases, where the judge retains this role).
- The jury will consider evidence led by both sides to come to a decision on the level of monetary **damages** that a successful plaintiff may be entitled to receive.
- A jury may have to consider whether the defendant was completely or partly responsible for any loss suffered by the plaintiff, because compensation can be awarded on a contributory scale. This means that damages will be reduced if they believe the plaintiff contributed to his or her own loss.
- Damages awarded by juries can often be controversial, as they have been known to award excessive damages in some cases, while under-compensating successful plaintiffs on other occasions.
- As in criminal cases, civil juries are not required to give reasons for their decisions, so the public may never know how they arrived at a level of compensation.

A jury may not always be the best body to award damages because jurors have very little experience in determining an appropriate level of compensation.

Damages are a payment of money awarded to the plaintiff as compensation for the civil wrong that has occurred.

Origins of the jury

The origins of the modern jury can be found in ninth and tenth century England, when the practice arose of citizens being empowered to investigate and punish any crimes committed in their district. Unlike modern juries, juries did not deliver verdicts based on evidence presented in a court, but were required to gather the evidence themselves. More often than not the jury would then order that the accused undergo trial by ordeal to determine their guilt or innocence (see chapter 4, page 144). In the twelfth century juries were formalised to a standard 12 members. They still had a primary role of gathering evidence and so were often chosen because they already had knowledge of the case. As well as assisting to decide a case, jurors were effectively also witnesses in that case.

The Magna Carta, signed by King John in 1215, is said to have guaranteed that 'no free man shall be captured, and or imprisoned, . . . but by the lawful judgment of his peers, and or by the law of the land'. In practice, this right was frequently ignored. Courts such as the Court of the Star Chamber could try people without juries and frequently ordered torture to extract confessions. It was not until the sixteenth century that the roles of witnesses and jurors became separated, with the appointment of independent jurors. Until 1670, jurors who did not return a verdict favoured by the judge could be punished. The modern guaranteed right to trial by jury as we know it was reinforced in the English Bill of Rights of 1689.

DID YOU KNOW?

When the British settled Australia in 1788, jury trials were not permitted because it was not felt that an independent jury could be found in a penal colony. Jury trials were introduced in New South Wales in 1833, as an option for criminal cases, but did not become the norm until 1839, more than 50 years after the establishment of the colony.

TEST your understanding

1. Why are juries not used in the large majority of cases?
2. Under what circumstances will more than the required number of jurors be empanelled?
3. Why might a judge grant extra time for a jury to reach a verdict?
4. Explain the difference between a unanimous verdict and a majority verdict.
5. What is a hung jury and what effect does it have on a trial?
6. When is a jury used in a civil trial and what two roles are performed by civil juries?

APPLY your understanding

7. Refer to the diagram on page 368. Do you think that juries today are able to fulfil all the roles stated in the diagram? Give reasons for your opinion.
8. Draw up a table, comparing the similarities and differences between criminal juries and civil juries, ensuring that you include all the main features of each type of jury.
9. Do you think that majority verdicts should be introduced for all murder and treason trials in Victoria? Give reasons for your answer.
10. Should the power to award damages remain with juries, or should it be in the hands of the judge? Justify your response.

10.2 Factors that influence the composition of juries

KEY CONCEPT Jury service is considered a civic responsibility. It is a chance for ordinary men and women to participate in the legal system. But how are juries selected? Can people 'get out' of jury service? Who is disqualified or ineligible to serve on a jury? Who can be excused? What happens if you are summoned to court for jury service but do not attend? There are procedures in place for the selection of the required number of jurors for both criminal and civil trials.

Selection and composition of juries

The *Juries Act 2000* (Vic.) replaced the *Juries Act 1967* (Vic.) and outlines the stages and procedures to be followed when selecting and empanelling a jury. The new Act increased the eligibility of people for jury service by reducing the opportunities for people to use excuses to avoid jury service. Justice John Harber Phillips said the aim of the Act 'is to ensure that jury duty is spread equitably among the community, and to make juries more representative of the community'.

The process of selecting jurors commences with the Juries Commissioner of Victoria advising the Victorian Electoral Commission (VEC) of the number of people needed for a **jury pool** in any particular jury district. The VEC prepares a list by randomly selecting names from the electoral roll. Therefore, when you register your name on the electoral roll, you also become eligible for jury service. As soon as you are old enough to vote (18 years of age), you are old enough to serve on a jury. A jury district is the same as an electoral district for the Legislative Assembly — that is, geographical areas that, although varying in size, incorporate approximately 90 000 people.

A **jury pool** is a large group of people from which a jury will be chosen.

The Juries Commissioner then sends out a questionnaire (which must be returned within 14 days) to all citizens randomly selected. It is an offence not to complete the questionnaire or to provide false or misleading information to the Juries Commissioner. A person's responses to the questions will determine his or her eligibility to serve on a jury.

Once questionnaires are returned, each person on that particular jury roll is classified into categories of disqualified, ineligible, excused (they may be excused temporarily or permanently), granted a temporary exemption, deferred or eligible. The categories are discussed below.

DID YOU KNOW?

In any given year approximately 60 000 jurors are summoned for jury service throughout Victoria. Of these, around 7000 are actually empanelled to serve in a trial. This means that slightly less than 12 per cent of people summoned actually become members of a jury. Around 600 jury trials are conducted in the county or supreme courts each year.

Disqualified

People who fall within this category are not allowed to serve on a jury because they did something in their past, making them unsuitable to carry out the task of jury duty. People who are disqualified from jury duty include anyone:

- convicted of an offence in the past two years and currently on a bond or probation
- convicted of one or more indictable offences and sentenced to prison for a term of at least three years, at any time in one's life
- imprisoned for less than three months, or served a specific order (intensive correction, youth training centre or community-based) within the past five years
- on parole or imprisoned for at least three months (excluding imprisonment for fine defaulters) within the past ten years
- on bail for charges relating to an indictable offence
- who is an undischarged bankrupt.

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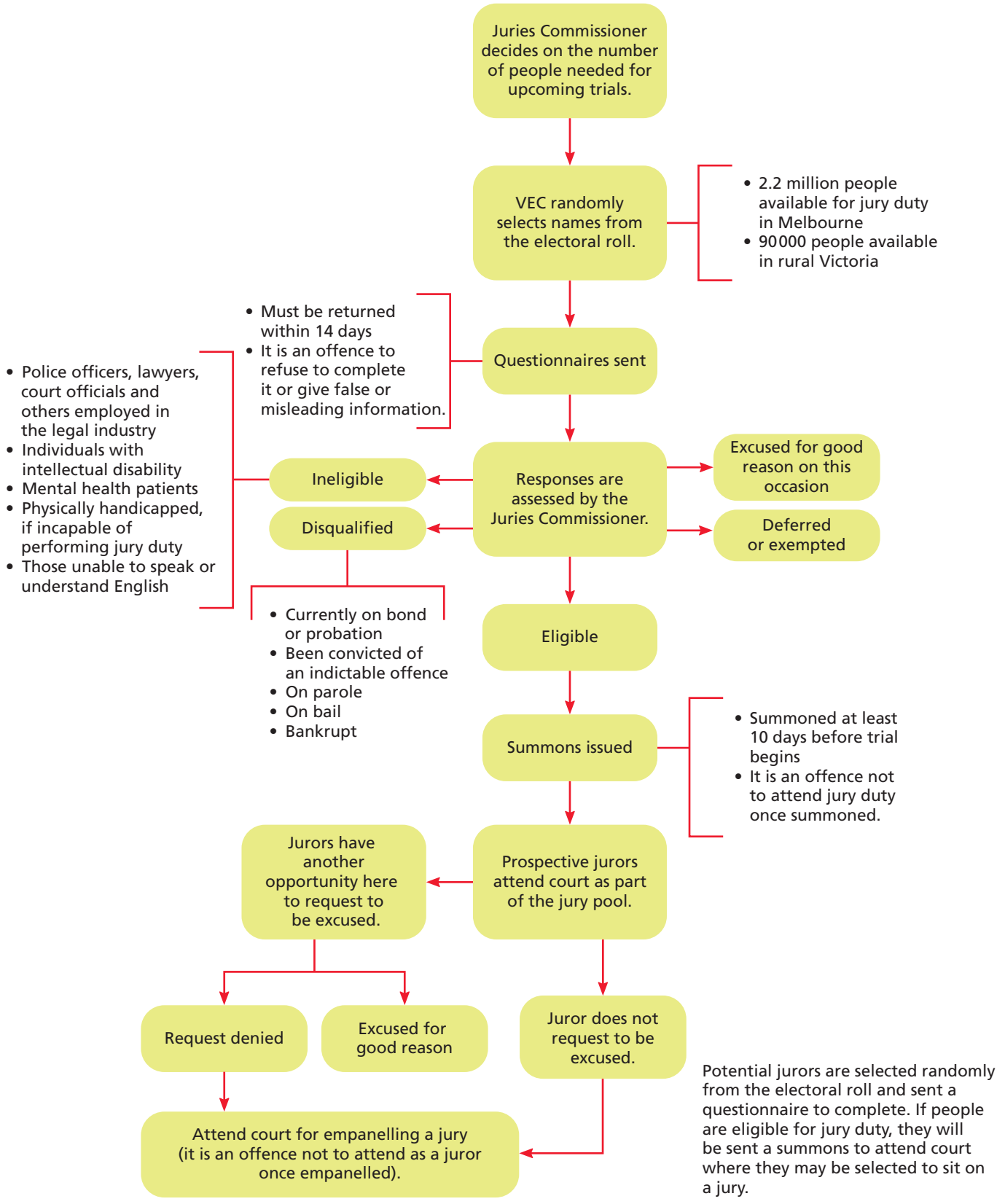
Use the **jury selection** weblink in your eBookPLUS to access the questionnaire potential jurors must complete.

The jury selection process



Potential jurors are selected randomly from the electoral roll and sent a questionnaire to complete. If people are eligible for jury duty, they will be sent a summons to attend court where they may be selected to sit on a jury.

Ineligible

Some people are excluded from participating in jury service due to employment in the legal industry — for example, people who currently work or, in the past ten years, have worked as police officers, court officials, judges, lawyers or bail justices.

People in the following categories are also considered ineligible for jury service because of their perceived lack of suitability to undertake the tasks required of a juror:

- individuals with an intellectual disability
- patients who are subject to the provisions of the *Mental Health Act 1986* (Vic.)
- individuals who are physically handicapped, rendering them incapable of performing jury duty
- individuals who cannot speak or understand English adequately.

It would be difficult for a vision-impaired person to judge what is taking place in the courtroom and witnesses' demeanour and body language.

Excused

People who are neither disqualified nor ineligible for jury service but wish to be excused, may apply to be either temporarily or permanently excused 'for good reason', with the final decision being made by the Juries Commissioner. If the application to be excused from jury service is refused, a right of appeal against the Juries Commissioner's decision can be heard in the County or Supreme court. Good reasons for seeking to be excused include:

- illness, poor health, disability or incapacity
- advanced age
- substantial inconvenience to the individual or to the public if that individual was required to attend jury service
- substantial financial hardship would result from attending jury service (for example, people who are self-employed)
- primary carers to dependants and no alternative care can be arranged
- living an excessive distance from the court house — distance too far to travel
- the person is a practising member of a religious order with beliefs or principles that are incompatible with jury service.

Deferrals and exemptions

A person can apply to the Juries Commissioner for jury service to be deferred to a more convenient time, but a good reason is required. It can be deferred for 12 months. For example, a teacher selected for jury service during November could have jury service deferred to another time that is more convenient since the teacher could be busy preparing Year 12 students for their VCE exams.

Exemptions from jury service may be granted in certain circumstances, such as:

- people selected randomly from the electoral roll for jury service, but do not actually serve as a juror on a trial, are exempt from further jury selection for a period not exceeding three years

- a person who has attended jury service and served on a trial is entitled to exemption from further jury service for a period not exceeding three years
- jurors who have served during lengthy trials may be exempted by the court.

Summons to jurors

Once a person is assessed as eligible for jury service, a summons is sent by mail at least ten days before the date on which the juror is required to attend court.

It is an offence under the Juries Act not to attend for jury duty on the date specified. Failure to attend without reasonable excuse may result in a fine of up to 30 **penalty units**, or three months imprisonment. If a person empanelled on a jury fails to attend as a juror until discharged by the court, the penalty can be as high as 60 penalty units, or six months imprisonment. Jurors are paid a fee of $39 per day for the first six days, and $78 for every day thereafter. A juror's employer is required to make up the difference between the jury fee and the regular income that would have been earned.

All people who have received a summons must attend court on the day specified and make themselves available for three days to be part of a jury pool. When cases are listed, smaller groups are selected from the pool to form **jury panels**. Each panel then attends a courtroom to begin the process of empanelling the actual jury members to be used in the trial. It is still possible at this time to apply to be excused from jury service if personal circumstances have changed since completing the questionnaire. Reasons must be given publicly under oath to the presiding judge, who has the discretion to excuse that person from jury duty.

A **penalty unit** is a monetary unit used to express a fine and adjusted on July 1 each year to reflect changes in the cost of living. On 1 July 2011 one penalty unit was set at $122.14 for the 2011–12 financial year.

A **jury panel** is a small group of people selected to attend a courtroom and undergo the empanelling process to be placed on a jury for a specific trial.

Police to investigate no-show juror

Victoria Police are to investigate the actions of a juror empanelled in a criminal trial who failed to show up in court when required and who wrote comments about the trial on Facebook. He may be charged for breaching several provisions of the Juries Act.

Charges may also be brought against his employer, for apparently telling the juror that he could not afford to pay him while he was undertaking jury duty. Both the Juries Act and industrial relations legislation restrict employers from taking such action.

The juror had telephoned the County Court the previous day to inform court officials that he was going to work and that he would not be attending for jury duty.

That evening he had posted comments about the case on Facebook, suggesting that he had already decided that the accused was guilty, as well as other comments described by the judge as 'just appalling'. The judge described the juror's actions as 'extremely stupid'.

The juror was summoned by the judge to explain his actions to the court. The juror informed the court that he was concerned about losing pay, as his employer had indicated he could not pay him if he was to be absent for a prolonged period.

The judge pointed out that the juror had been told of his rights in relation to employment before the empanelling process had begun and had never raised concerns with any court official about the length of time he might be required.

Clearly unimpressed by the juror's actions, the judge informed the man, 'I am going to have to discharge this jury, I am going to discharge you, but I am going to recommend that you be charged in respect of this. Your boss, I will equally recommend he be charged. You can't just do this. He can't do this . . . I am going to direct that this be investigated by the Victoria Police.'

A new jury will now be empanelled to replace the discharged jury and the trial will recommence.

DID YOU KNOW?

An employer must not refuse to allow an employee to attend the courts for jury duty. If an employer in any way attempts to punish an employee, threaten to terminate their employment, or in any other way prejudice an employee who may be required to be absent from work to attend jury duty, they are guilty of contempt of court. The *Juries Act 2000* (Vic.) provides heavy penalties, including the possibility of imprisonment for any employer, manager or supervisor in the workplace found guilty of such an offence.

Jury duty is a huge responsibility and a juror must be available for the length of the trial to listen to evidence before making a decision.

TEST your understanding

1. How does the Juries Commissioner identify people who may be eligible for jury service?
2. Explain the difference between a jury pool and a jury panel.
3. What is the difference between being disqualified from and being ineligible for jury service? Give **three** examples of each to support your answer.
4. Why would people who are 'sight, hearing or speech impaired' be ineligible to serve as jurors?
5. What 'good reasons' allow for a person to be temporarily or permanently excused from attending jury service?
6. Use the **Legal Aid** weblink in your eBookPLUS to find out the current value of one penalty unit. Calculate the level of fines that could be imposed on a person for:
   (a) failing to attend for participation in a jury pool
   (b) failing to attend for jury duty after having been empanelled.

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APPLY your understanding

7. Why do you think some individuals try to avoid jury duty if selected? Justify your opinion with reasons.
8. Imagine you are the Juries Commissioner of Victoria. The following people are seeking to have their jury service deferred for the next 12 months. Choose whose applications you would approve (that is, those you would excuse) and explain your reason.
   (a) A VCE teacher with Year 12 end-of-year exams imminent
   (b) An accountant who claims it is the end of the financial year and a very busy time at work
   (c) A doctor who has many patients booked in for the next month
   (d) An elderly woman who has arthritis and cannot move freely
   (e) A retired company director who has a bowls tournament coming up

10.3 Empanelling a jury

KEY CONCEPT Empanelling a jury simply means the process of selecting jurors from a pool to form a jury. Procedures exist to ensure empanelment of jurors for criminal and civil trials is undertaken fairly and there is no favouritism towards one party over another.

Procedure for jury empanelment

Once the jury panel is in the courtroom, the **empanelment** begins. This process gives both sides the opportunity to have a say in who they want or do not want on the jury. Therefore, not all people summoned for jury service will actually be empanelled on a jury. When the jury panel has assembled in the assigned courtroom, the jurors are provided with the following information:

- the type of case to be heard, in this trial in this courtroom
- the names of the parties involved if it is a civil case, or the name of the accused in a criminal matter
- the names of key witnesses for both sides
- the anticipated length of time the trial is expected to take
- any additional information that the court believes to be relevant.

This provides the potential jurors with a further chance for requesting to be excused if, for example, they know anyone involved in the case, or the length of time will cause excessive hardship. Any person who is excused at this stage or is not selected in the empanelling process returns to the jury pool to become available for another trial.

Empanelment is the selection and swearing in of a jury in court for jury duty.

study on

Unit:	4
AOS:	2
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Do more
Who's on the jury?

Parties involved in a trial have a right to challenge jurors. This means that the prospective juror is not selected to sit on that particular jury. Challenges may be made based on a person's age, gender or type of occupation.

Potential jurors must walk past the accused and his or her legal counsel. This is so counsel can look at potential jurors and decide whether or not they are the type of people they want on the jury. They have from the time each juror stands until he or she reaches the jury box to make a challenge.

Criminal jury

A key principle of our jury system is the importance of the jury reaching its verdict based only on the evidence presented in court. To support this principle, the empanelment process contains safeguards that can prevent a person from sitting on a particular jury on the basis that they may already have particular knowledge or opinions relevant to that case. For example, it may be inappropriate to have a person of the same occupation as the accused on the jury, particularly if the offence was committed in the course of that person's occupation. A bank employee therefore may not be an appropriate person to serve on a jury dealing with a bank robbery case. Both the prosecution and the defence have the right to challenge prospective jurors during the empanelment process.

The process of empanelment

1. The jury panel attends the nominated courtroom, where the judge's associate randomly draws a card containing a prospective juror's name and occupation from a ballot box. Under s. 31(3) of the Juries Act, the judge may rule that the jurors only be identified by a number instead of their name. Although this is up to individual judges to decide, it appears that the practice of identifying potential jurors by number rather than name is becoming increasingly common, especially since many jurors may be concerned about being identified by an accused or his associates. Cases involving recent gang-related murders in Melbourne would be the type of case in which the anonymity of jurors would be considered important. However, each potential juror's occupation is still read out in court as this may be the basis for a challenge.
2. When called, by either name or number and occupation, the prospective juror must stand and walk past the accused (who is in the dock), towards the jury box. At this point, the potential juror can be challenged by the defence, or asked to stand aside by counsel for the prosecution. The instructing solicitor will usually stand with the accused in the dock and assist with this process. A challenge means there is some objection to that person serving on the jury in that particular case.
3. Challenges to potential jurors are of two types.
   (a) **Peremptory challenges** are challenges for which no reason needs to be given. These are usually limited to six per side, although in cases where more than one defendant is facing related charges, the total number of peremptory challenges is increased, although the number per defendant decreases (see table 10.1). Because no reason is required, these challenges can be used if either side believes the age or gender of the prospective juror may make them less sympathetic to their case.
   (b) **For cause challenges** are challenges in which a valid reason must be given to the court. If either side wishes to use a for cause challenge, the barrister concerned will state the reasons to the judge as to why he or she considers that person unsuitable to serve as a juror on that case. A person's occupation may be a valid reason for such a challenge. For example, if the defendant was a medical practitioner accused of an offence involving professional misconduct, counsel for

A **peremptory challenge** is a challenge being made to a potential juror, or request for a potential juror to stand aside, with no reason being given.

A **for cause challenge** is a challenge to a potential juror by counsel for either party, in which a reason must be given for the person's unsuitability for that particular case.

either side would be likely to challenge the inclusion of a doctor on the jury. There is no limit to the number of for cause challenges that can be used by either side. If the judge does not accept the reasons given for the challenge, the individual in question will become part of the jury.

TABLE 10.1 Peremptory challenges in criminal trials

Number of people arraigned	Defence 'challenges'	Crown 'stand aside'
1 person	6	6
2 people	5	10
3 people or more	4 per defendant	4 per defendant

4. If a potential juror is successfully challenged, he or she must return to his or her seat. Once the jury has been empanelled, those not called and those who have been successfully challenged return to the jury pool and may be called to the jury panel for another trial on the same day. As potential jurors are usually required to attend for three days, that person could be called to join a jury panel the following day.
5. Once the jury has been empanelled, the jurors must swear an **oath**, or make an **affirmation**, that they will carry out their task faithfully and impartially, and decide on a verdict based on the evidence. An oath involves swearing on the Bible, or in accordance with some other religious convention. An affirmation is a promise made by the juror, but without the use of any religious book or custom.
6. Following the swearing in of the jury, the jurors retire to the jury room to elect a foreperson before the trial commences. This person sits in the jury box closest to the judge and is spokesperson for the jury. It is the role of the foreperson to speak or ask questions on behalf of the jurors, in order to clarify issues during the trial. The foreperson delivers the verdict on behalf of the jury at the conclusion of the trial.

The jury empanelment process can be long and complex, as the following case demonstrates.

Guilty verdicts in terrorist case

On 3 February 2009, Abdul Nacer Benbrika and six other men were convicted on terrorism charges in the Supreme Court in Melbourne. Justice Bernard Bongiorno handed down a 15 year sentence to Benbrika, and sentences varying from 4.5 to 7.5 years for the other men.

The trial had begun 12 months earlier, in February 2008, when 12 men charged with being part of a terrorist cell were brought before the Supreme Court. Around 1200 potential jurors came before Justice Bongiorno as part of the jury empanelment process. He pointed out that anyone serving on the jury must put all prejudice aside and excuse themselves if they thought they could not do so.

Justice Bongiorno empanelled 15 jurors for the trial, instead of the customary 12. The trial lasted seven months, one of the longest criminal trials in Victoria's history. The jury deliberated for four weeks before reaching its verdict. The jury found seven of the twelve men guilty and four not guilty. They failed to reach a verdict in relation to the twelfth man, so he was ordered to face a retrial. Almost five months later, Justice Bongiorno passed sentence on the seven guilty men.

DID YOU KNOW?

Jurors are not allowed to be photographed, filmed or interviewed by the media. Their names are not allowed to be published and information about the jurors is not allowed to be given to the accused in a criminal case, or to the parties in a civil case, or their lawyers. Jurors cannot be interviewed by the media for their opinions or any other information.

An **oath** is a promise made by swearing on the Bible, or in accordance with any other religious custom.

An **affirmation** is a promise made in court without the use of any religious references.

Civil jury

As discussed previously, in civil trials juries are used only at the request of either party (plaintiff or defendant), and they are most often found in cases involving negligence, where legal counsel for the plaintiff anticipates that a jury would grant an appropriate level of damages. There are six people on a civil jury; however, eight jurors will be empanelled for lengthy cases.

Empanelment of a civil jury

A **judge's associate** is a qualified lawyer who sits below the judge and assists in court proceedings.

1. The jury panel attends the appropriate courtroom, as in a criminal case. There the **judge's associate** draws out 12 names, and as each name is called the potential juror stands and indicates his or her presence in the court. The associate then writes a list of the names and occupations and hands it to the plaintiff's solicitor.
2. The plaintiff's counsel has the opportunity to cross out up to three names on the list. This is the method of carrying out peremptory challenges in a civil case and no reasons have to be given.
3. The list is then passed to the defendant's counsel, who also has the right of peremptory challenge by crossing out up to three names. In most cases, this will leave six jurors available for the trial.
4. Both parties also have the right of for cause challenge and can make an unlimited number of these. If a for cause challenge is agreed to by the judge, the potential juror is required to return to the jury pool. If the combined peremptory and for cause challenges results in a jury of less than six members, the judge's associate will draw out additional names to make up the required number.
5. Once the jury has been selected, members take an oath or affirmation in the same manner as in a criminal trial. They also retire to elect a foreperson, who has the same duties as in a criminal trial.

TEST your understanding

1. Describe three possible circumstances in which a potential juror might be excused after he or she has joined a jury panel for a criminal case in a courtroom.
2. How does the court ensure that jurors are chosen at random from the available members of the jury panel?
3. Why is it becoming more common for potential jurors to be identified by number rather than by name?
4. What is the significance of announcing the occupation of prospective jurors during the empanelment process?
5. Explain the difference between a peremptory challenge and a for cause challenge.
6. What role does the accused have in the empanelment of a jury in a criminal trial?
7. What is the difference between an oath and an affirmation?
8. Explain **two** ways in which the empanelment procedure for a civil trial is different from that in a criminal trial.
9. What is the role of the jury foreperson?

APPLY your understanding

10. Read the case study 'Guilty verdicts in terrorist case' and answer the following questions:
    (a) In what way did Justice Bongiorno provide a much greater opportunity than usual for potential jurors to excuse themselves from this trial?
    (b) With 12 defendants in this case, what would be the **total** number of peremptory challenges allowed to the defence and the **total** number of stand asides allowed to the prosecution?
    (c) What might have been some possible grounds for potential jurors to be challenged by either the prosecution or the defence in this case?
    (d) Why would Justice Bongiorno have empanelled 15 jurors for this trial?
    (e) In what way was this jury an example of a hung jury?

10.4 Role of the judge in a jury trial

KEY CONCEPT While the jury in a trial is required to deliver a verdict based on the evidence presented in the case, it is the responsibility of the judge to rule on matters of law. This means that he or she must ensure that the appropriate legal principles are applied to the case and to ensure the jury is informed about those areas of law that are relevant to the trial.

A jury is required to deliver a verdict based on the facts of a case as presented by both parties. The judge has to rule on issues of law and ensure the jury is aware of the relevant legal principles to apply to the facts. In a murder trial, for example, the judge may make the following points to the jury.

- If the jury is satisfied beyond reasonable doubt that the accused was responsible for the death of the victim and that there was an intent to kill, the accused should be found guilty of murder.
- If the jury is satisfied beyond reasonable doubt that the accused was responsible for the death of the victim, but not satisfied beyond reasonable doubt that the killing was intentional, the accused should be found guilty of manslaughter.
- If the jury is not satisfied beyond reasonable doubt that the accused was responsible for the death of the victim, the accused should be found not guilty.

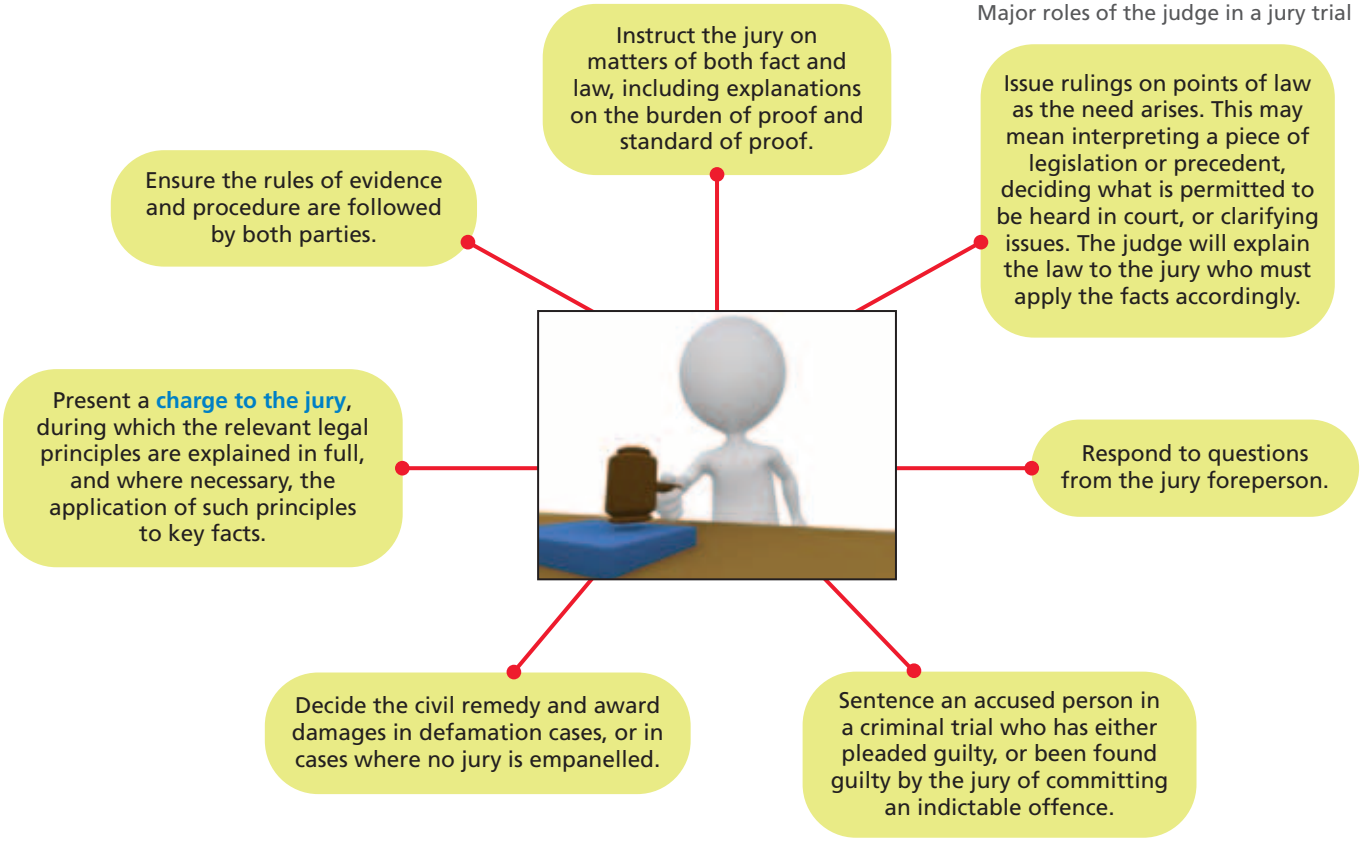
In this way, the judge has explained the relevant law and left it up to the jury to decide which of these alternatives best matches the evidence presented in court.

In many cases, complex legal issues are argued between counsel at directions hearings. The judge makes use of these hearings to rule on these issues, so that by the time a case comes before a jury, a decision has been reached on many of the legal matters and only those in dispute need to be heard in the trial.

The following diagram summarises the role of the judge in a jury trial.

A **charge to the jury** is a final summary made by a judge to a jury at the end of closing addresses from counsel. Key issues of law and evidence are explained.

Major roles of the judge in a jury trial



DID YOU KNOW?

If a juror researches information about a case from outside sources, he or she faces severe penalties. Under s. 7 of the *Courts Legislation Amendment (Juries and Other Matters) Act 2008* (Vic.) a fine of up to 120 penalty units may be imposed. (At the time of writing a penalty unit is $122.14 so the fine could total well over $14 000!)

From time to time in a jury trial the judge may require the jury to retire from the courtroom for a period of time. Examples of when this can occur include when:

- the progress of the trial reveals an issue of legal principle that has not been raised at a directions hearing and counsel may wish to present arguments about the application of that principle. The judge may instruct the jury to retire to the jury room to avoid the possibility of jurors becoming confused by complex legal argument.
- one party or the other wishes to make submissions on the admissibility of a particular piece of evidence. The judge has to ensure that the jury only hears evidence that is admissible under the rules of evidence (see chapter 7, page 265). Usually there has been agreement at a directions hearing as to what evidence is to be led in a trial, to ensure the rules are followed, but occasionally a witness may accidentally reveal information that is not normally admissible. In this situation the judge may ask the jury to retire while the matter is resolved.

The judge also has the power to suppress the names of parties to a trial, as well as the names of witnesses, to ensure they are not identified in the media. Any publication of this information can bring charges of contempt of court.

Judges can also ban other information from being made public if they believe it may prejudice a jury (see case study below). A judge will want to be sure that the jury has reached a verdict based solely on the evidence presented in court and not any other information they have seen or read elsewhere.

Could *Underbelly* influence jurors?

In 2008, Victorian Supreme Court Justice Betty King banned the screening of the television gangland crime series *Underbelly* in Victoria to prevent potential jurors being influenced or prejudiced prior to a 'gangland' murder trial (see chapter 9, page 351).

The Nine Network appealed this decision to the Victorian Court of Appeal, which rejected the appeal. The ban applied only to Victoria; the series was still shown in other states. The widespread use of technology meant that the series could have been accessed via the internet, and people with friends or relatives in other states were able to obtain DVD copies.

Following the *Underbelly* television series ban, new laws were introduced to prevent jurors sourcing information on the internet prior to a case. It is now an offence for jurors to undertake their own investigation regarding a trial because this information may unduly influence their ability to be impartial.

Jurors are only allowed to decide their verdict based on facts and evidence presented during the trial in court. The legislation was created to protect the integrity of the jury system and the right of an accused person to receive a fair and unbiased trial.

TEST your understanding

1. Outline the key difference between the role of the judge and the role of the jury in a trial.
2. In what circumstances is it necessary for the judge to explain legal principles to a jury?
3. Explain the role of the judge in enforcing the rules of evidence in a courtroom.
4. In what circumstances might a judge wish to have the jury removed from the court during a trial?
5. Identify and explain the powers of a judge in relation to:
   (a) the identities of persons involved in a trial
   (b) information available to the jury in a trial.

APPLY your understanding

6. If a juror was unsure about the background to a case, would he or she be able to access the internet to find out more? Explain your answer.
7. Explain why Justice Betty King banned the *Underbelly* television series in Victoria.
8. What might have happened if a juror was found to have borrowed a copy of *Underbelly* from a friend in New South Wales, or downloaded a copy?
9. Do you agree or disagree with Justice King's decision to ban people watching *Underbelly* in Victoria? Justify your answer.
10. What new laws were introduced into Victoria in 2008 in relation to jurors using outside sources to find information? Why were these laws introduced?

10.5 Strengths and weaknesses of the jury system

KEY CONCEPT The jury system is considered by some to be the fairest way of deciding guilt or innocence in a criminal case or liability in a civil case. A jury's decision is thought to be reflective of community values and may be more acceptable given that it is a decision arrived at collectively. Others believe that jurors cannot possibly put aside their prejudices, are easily influenced by eloquent barristers and are unable to fully understand the rules of evidence. Arguments are strong for both sides. What is your view?

Evaluation of the jury system

Many strengths and weaknesses are associated with the jury system.

Strengths	Weaknesses
Trial by one's peers is reflective of community values A decision is more likely to be accepted by the community as the right decision because impartial 'ordinary people' decide the outcome (as opposed to one person such as a judge deciding the outcome). Also, juries made up of the 'average person' supposedly reflect current values and attitudes, allowing for a range of views to be brought into deliberations on sensitive issues, such as spousal abuse, rights of women in regard to domestic violence and sexual assault cases.	**Biased jurors** Jurors could be biased and may be influenced by their own personal prejudices, particularly if they have heard about the case in the media.
Representative of a cross-section of the community The jury is made up of members of the community from different occupations, education, age, gender, cultural and social backgrounds. This diversity will lead to broader discussion when the jury retires to deliberate their verdict and guards against possible bias that may result if only one person is deciding the case.	**Unrepresentative of a cross-section of the community** The jury may not be a true cross-section of the community due to the number of people disqualified, ineligible, excused for a good reason and challenged by lawyers, leaving a smaller percentage of people actually available to sit on a jury. There is the concern that a jury will not be a truly impartial cross-section of the community, but rather a jury hand-picked by lawyers.
Reducing possibility of corruption or bias There is an increased chance of bribery or corruption occurring if only one person is to decide the outcome of the case (the judge), compared to a number of jurors deciding the outcome. Juries returning a majority verdict as opposed to a unanimous verdict may reduce the possibility of bribery or corruption. This is because in criminal cases that require a unanimous verdict, only one juror needs to be bribed or blackmailed to return a not guilty verdict and a hung jury would have to be declared.	**Majority verdicts threaten standard of proof** Majority verdicts are acceptable for some crimes, whereas unanimous verdicts are required for more serious indictable offences. In criminal trials, the requirement of a unanimous verdict leads to an unacceptable number of hung juries, increasing costs and delays. On the other hand, allowing majority verdicts in criminal trials means that one juror can disagree, showing that one juror had a reasonable doubt, which goes against the criminal standard of proof (beyond reasonable doubt).
Decision making is shared Decision making is shared among jurors who are randomly selected from the community, rather than one judge deciding the outcome. The public may be more likely to accept a jury decision, rather than a verdict from only one judge. If a judge alone presides over a case, the pressure from police, media and the public could be intense, and one person should not have to carry such a burden.	**No reasons for verdict** A jury does not give a reason for its verdict, so neither party really understands how the case was decided and the reasons behind the jury decision. Critics of the jury system argue parties should be informed of the reasons for the verdict delivered, especially as this may indicate the need for an appeal in the future.
Stood the test of time Juries have been used without major problems for more than 800 years. It is a system that our community has come to rely upon. If there were any fundamental problems with the jury system, plenty of time has elapsed for numerous governments to have abolished the jury system or made changes if needed.	**Inconsistent damages awarded in civil trials** Juries can be inconsistent in the amount of money they award in civil cases. Jurors may need greater guidance in awarding damages as well as knowledge of awards given in previous cases where the facts were similar.

(continued)

(continued)

Strengths	Weaknesses
Ordinary people become involved in the legal process Being a member of a jury is a chance for the ordinary person to become involved in our legal system. The jury selection process gives suitable individuals the opportunity to participate directly in the administration of justice and play a role in the hearing and determination of cases. This leads to a greater respect for the courts and an increased knowledge of the law.	**Complex legal proceedings may be too difficult for jurors** Jurors may not understand complex and technical evidence or could be distracted by irrelevancies, such as the physical appearance of witnesses rather than the content of their responses. In trials involving highly technical evidence (such as forensic material), the judiciary possesses legal knowledge and experience to easily grasp key issues and may be more likely to arrive at a 'correct' verdict. Judges can also use their experience to assess reliability of witnesses in court.
Protection against the misuse of power Jurors need not worry about the political implications of their decisions. Having said this, it is important to note that judges are also independent and free from political influence from the government of the day.	**Adds to the cost of a trial** Lengthy trials are very costly. County and supreme court juries add approximately $9000 per day to the cost of court proceedings. The use of a jury may add to trial costs because the judge will need to explain points of law to the jury and give directions — the longer the trial runs, the higher the costs will be. Civil litigants may find the cost of having a jury prohibitive and may, therefore, feel they are denied access to a just and fair process.
The jury system fosters greater openness and transparency of the criminal justice system Jurors who are ordinary members of the public experience firsthand how our criminal justice system operates. Trials are not conducted 'behind closed doors' (corruption is more likely to survive in a system that is not open and transparent to the public). The prosecution, acting on behalf of the state, is not given preferential treatment as jurors are required to listen to the evidence presented by both parties and return a verdict that is impartial and beyond reasonable doubt.	**Adds to the length of a trial** Juries do not ensure timely resolution of disputes, which is one element of an effective legal system. Lengthy trials may result because of the selection process, lawyers who spend long periods of time explaining facts and evidence, jurors whose presence is affected by illness or personal circumstances, lengthy jury deliberations and retrials if a hung jury results.
Simplification of procedures The presence of a jury may result in the trial being conducted in a manner that is more easily understood by the parties (for example, the accused in a criminal trial or the plaintiff and defendant in a civil trial). Barristers may need to simplify their technical language and refrain from speaking 'legal jargon' due to the fact that a jury is present. This may mean that parties to the proceedings themselves gain a better understanding and, perhaps, even acceptance of the legal process and final outcome in the case.	**Jurors may be easily influenced** Some jurors may not possess the capacity to remain objective in their assessment of evidence, and personal bias or emotions may prevail rather than logic. There is also the fear that some jurors are too easily influenced by well-spoken lawyers whose verbal skills may tend to be more persuasive.

TEST your understanding

1. Explain three strengths and three weaknesses of the jury system.
2. Explain how the jury system can foster a greater openness and transparency of the criminal justice system.

APPLY your understanding

3. In what ways can a jury better represent community values than a judge, who may have had many years of legal education and experience?
4. In his final directions to a jury, Justice McGarvie once said, 'In a typical jury there is a total of something like 500 years of human experience from different backgrounds and circumstances . . . (juries) are highly qualified to make these important decisions.'
   Comment on Justice McGarvie's view of the jury, indicating the extent to which you agree or disagree with his comments.

10.6 Juries and an effective legal system

KEY CONCEPT To what extent does the jury system contribute to the effectiveness of the legal system? In order to answer this question, we need to examine the ways in which the jury system supports the entitlement to a fair and unbiased hearing; the degree to which it enhances effective access to the legal system; and whether or not it assists in the timely resolution of disputes.

Entitlement to a fair and unbiased hearing

Many features of the jury system ensure a fair and unbiased hearing, but no system is perfect. Let us first turn our attention to how the jury system attempts to ensure a fair and unbiased hearing.

Factors contributing to the entitlement to a fair and unbiased hearing

- **Eligibility for jury service:** the only qualification required for jury service is to be on the electoral roll. This links jury service to the basic democratic principles of our society and ensures that the widest possible population is available to serve on juries. This, in turn, increases the likelihood of an unbiased jury, with no preconceived views on the parties to the case.
- **Ineligibility and disqualification rules:** these automatically remove people such as police officers and convicted criminals from jury service, and the particular prejudices they may bring with them.
- **The balloting process:** jury panels are made up by drawing names at random from those present in a jury pool on any given day. Once in the courtroom, names are once again drawn at random from a ballot box to select the actual jury. These processes make it more likely that an unbiased cross-section of the community will be selected.
- **Self-excusing from a particular trial:** the opportunity for prospective jurors to excuse themselves from duty if they personally know any person associated with the trial is another means by which an unbiased jury can be selected.
- **The challenge process:** both sides have an opportunity to challenge any prospective jurors they believe may bring any bias or preconceived opinions to the case.
- **The rules of evidence:** rules relating to the admissibility of evidence ensure that only material of direct relevance to the case at hand can be aired in court. Evidence relating to a defendant's character or previous record cannot be introduced to unfairly influence a jury.
- **The role of the judge:** judges have consistently shown that they place a high value on the impartiality of juries. By banning material from public circulation, as in the *Underbelly* case, and maintaining tight control over the actions of counsel in a trial, judges consistently seek to ensure that juries are able to concentrate on relevant facts only.
- **Unanimous verdicts:** the principle of the unanimous verdict ensures that all members of a jury have to be convinced by one side or the other. A verdict cannot be reached if a significant minority has not been persuaded. Even majority verdicts allow for only one dissenter, so that level of certainty would be expected to produce a fair result.
- **Democratic and human rights:** judges are appointed by the state and while an independent judiciary is a strong feature of our legal system, this is not the case in all societies. While we have a jury system where ordinary people make the decisions, there can be no suspicion of a legal system that seeks to unfairly victimise specific groups or individuals.

study on

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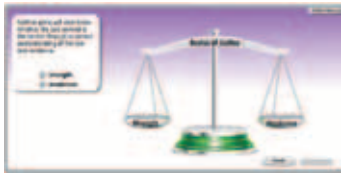
Do more
Strengths and weaknesses of the jury system



DID YOU KNOW?

According to a report undertaken by the Australian Law Reform Commission, there is no conclusive evidence that juries are influenced by media reports.

Factors that weaken the entitlement to a fair and unbiased hearing

- **Ineligibility requirements:** some people, such as those who have worked within the legal system, are automatically excluded. Some of these people may be able to serve on juries without necessarily undermining fairness and an unbiased hearing.
- **Bias can be hidden:** not all prejudices are obvious to those who may be in a position to challenge prospective jurors. There is no guarantee that someone with strong opinions on issues raised in a trial cannot slip through unnoticed and therefore unduly influence other jurors.
- **No guarantee of a cross-section of society:** while the randomness of the selection process supports the likelihood of broad cross-section of the community, that very randomness could accidentally lead to a jury of very similar people.
- **Who are one's peers?:** Should a person from a particular ethnic group be tried by people of the same group? How often is an Aboriginal accused tried by an all-white jury? The original concept of trial by 'one's peers' is not easy to interpret and may not always be adhered to.
- **Media influence:** despite the efforts of the judge, it may be impossible to prevent jurors from having knowledge gained through the media. Many high-profile cases are given an enormous amount of media coverage in the lead-up to the trial, making it difficult to guarantee that all jurors will come with a completely open mind.

Information circulated in the media makes it difficult to guarantee that jurors will have no prior knowledge about a case before it comes to trial.

- **Legal complexity:** particularly complex cases can leave juries at the mercy of the persuasive talents of barristers. If the issues are hard to understand, there is greater likelihood that factors other than an objective weighing of the evidence will influence some jurors, making a fair result less likely.

The Lindy Chamberlain case

One of the highest profile cases in Australia's legal history was the Chamberlain case. In August 1980, Lindy Chamberlain reported that her baby daughter Azaria had been taken from the family's tent by a dingo, while they were camping at Uluru. Azaria's body was never found and suspicion fell on her mother, Lindy. A coroner's inquest held in 1981 found that it was most likely that a dingo had taken the baby. A second inquest in 1982 came to the conclusion that the mother may have been responsible. In 1982 Lindy Chamberlain was convicted of the murder of Azaria and sentenced to life imprisonment. This case had such a high profile, and was reported so extensively in the media, that it is difficult to imagine any jurors being empanelled who were unfamiliar with the case, and the judge made reference to this in his initial comments to prospective jurors. In 1986 new evidence emerged that threw doubt on the prosecution case and Lindy Chamberlain was released from prison. A Royal Commission found the conviction to be unsafe in 1988 and the conviction was quashed. A third coroner's inquest in 1995 returned an open finding. In 2012, a fourth inquest ruled that a dingo was responsible for the baby's death.

In February 1986 an item of Azaria's clothing was found partially buried near Uluru adjacent to a dingo lair. Five days later Lindy Chamberlain was released from jail. The huge publicity surrounding the case may have made it impossible to achieve a fair and unbiased hearing.

Effective access to the legal system

Eighty per cent of criminal matters heard in Victoria are heard in the Magistrates' Court, so do not involve a jury. The jury system only affects the less than five per cent of those involved in criminal trials before the county or supreme courts who plead not guilty. In the same way, the cost of a jury in a civil case means that juries are only empanelled in a minority of civil trials. The jury system does not directly influence the right of a citizen to gain effective access to the legal system because it is a feature of the system that comes into play after legal proceedings have been commenced.

Timely resolution of disputes

It is generally agreed that a trial by jury will take longer than one without a jury. This means that the jury system probably hinders rather than helps the timely resolution of disputes. It is this fact, as well as the additional costs, that may deter many litigants from choosing to have a civil case heard by a jury.

How does the jury system hinder the timely resolution of disputes?

- **The empanelment process:** the process of carrying out ballots of jury pools, the challenge process, the need for some jurors to be excused, and the need for some of these matters to be argued before the judge, all add to the time taken. In high profile criminal cases with multiple defendants, such as the Benbrika terrorism case (see page 379), the empanelment process can take days to complete.

- **The need for explanation:** with no legal training and no courtroom experience, most juries need to have every step in the process explained to them, either by counsel, or by the judge. Examination and cross-examination of witnesses often takes longer because of the lack of specialist knowledge on the part of jurors. Counsel will take longer in their summing up to make sure every point is emphasised to the jury.
- **The rules of evidence:** matters can arise in the course of a trial that may require discussion of material that the jury should not hear under the rules of evidence. In these situations, the jury has to be removed from the courtroom while counsel engage in legal argument. This adds to the time taken to complete the trial.
- **Judges' misdirection of juries:** a recent study found that almost two-thirds of retrials in Victoria in 2010 resulted from mistakes made by judges in instructing juries in child sex cases (see report below). In each of these cases, timely resolution was not achieved and was a direct consequence of the operation of the jury system.
- **Deliberation time:** while there are supposed to be time limits on the time taken to reach a verdict, these are rarely adhered to. It is considered preferable to allow extra time for the jury to reach a verdict, than to force a retrial. In the case of a hung jury, timely resolution is further impeded.

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eLesson

Jurors' conduct leads to convictions quashed

The conduct of two jurors in the Bilal Skaf case led to a retrial. The rape victim, who had already given evidence, was unable to go through the ordeal again.

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Judges' mistakes leading to retrials

An analysis of retrials in Victoria has found that of eleven retrials involving child sex offences ordered by the Court of Appeal in 2010, seven came about because the judge in the original case had made mistakes in directing the jury. In each of these seven cases, there had been a miscarriage of justice. The additional costs of retrials was tens of thousands of dollars. In most cases the accused was remanded in custody for a year or more while the appeal took place and the retrial was organised. A Victorian Law Reform Commission report in 2009 called for a single law on jury directions and better training for both judges and lawyers.

An evaluation of how well the jury system contributes to the effective operation of the legal system ultimately comes down to a question of whether the benefits of a fair and unbiased hearing outweigh the possible disadvantages of delays, inherent in the jury system, that may impede a timely resolution of the dispute.

TEST your understanding

1. Identify and explain three features of the jury system that support the entitlement to a fair and unbiased hearing.
2. Identify and explain three features of the jury system that weaken the entitlement to a fair and unbiased hearing.
3. What impact does the jury system have on the right of effective access to the legal system? Explain your answer.
4. Identify and explain three features of the jury system that hinder the timely resolution of disputes.

APPLY your understanding

5. To what extent do you think it is possible for an accused to receive a fair and unbiased hearing in a high profile case such as the Chamberlain case? Explain your answer.
6. Do the cases of mistaken directions to juries by judges constitute a strong argument for dispensing with juries? Justify your opinion.
7. 'The jury system makes a strong contribution to the effectiveness of the legal system in Victoria.' Discuss this statement with reference to **two** of the elements of an effective legal system.

10.7 Suggested reforms of the jury system

KEY CONCEPT Like any other aspect of our legal processes, the jury system has many positive features, but can always be improved. We experience constant changes in society, the introduction of new technologies, and developments in community values and expectations. In addition, there are some weaknesses inherent in the jury system as it currently operates. All of these factors make it important to explore possible reforms to the jury system.

The following table identifies some of the major suggestions for reform of the jury system, along with the potential strengths and weaknesses of each possible reform.

Reforms	Strengths	Weaknesses
Train jurors Provide more thorough training of jurors before a case regarding the application of the burden and standard of proof. Civil jurors may even benefit from being provided with a range of damages awards that had previously been given in similar cases.	Jurors may be better prepared for the task they need to perform.	Could add to the cost of trials and result in further delays as time and money is needed to 'train' jurors.
Appoint a specialist foreperson Employing a specialist foreperson as a court official to represent the jury and to act as a spokesperson for the entire jury group.	A specialist foreperson could advise the jury on court procedure, rules of evidence and assist in jury deliberations.	Jurors may rely too heavily on the foreperson for advice during the trial and when undertaking jury deliberations, resulting in an outcome that was obtained by one person alone, rather than through discussion and ongoing debates with all jury members.
Limit avenues for not participating in jury duty Decreasing number of people excused, exempt or ineligible from jury service would ensure more people serve on juries.	Juries would be a more representative cross-section of the community.	Limiting avenues for not participating in jury duty may result in unsuitable jurors being chosen.
Provide better pay and more education to jurors Increase pay and further educate people (especially those who do not want to do jury duty), that jury service is a vital part of our legal system, as well as a privilege for citizens to participate in court processes and justice.	Increasing jury duty payment may result in more people wanting to participate in jury service if randomly selected.	Increasing jury payments would add to costs for the legal system.
Reduce or eliminate the number of peremptory challenges allowed The use of peremptory challenges has the potential to reduce the representative nature of juries. It is said that professional people are more likely to be challenged from jury panels for no other reason than the risk that they may understand all the evidence!	In criminal trials each party has the right to challenge six prospective jurors without giving a reason. This allows lawyers to select a jury with individuals who, it is hoped, will be sympathetic to their case.	Challenging jurors without providing a reason gives lawyers of both parties the opportunity to stack the jury in their favour, which could be seen as a jury hand-picked by lawyers.
Reduce jury size Quicker delivery of verdicts, fewer delays and less costs could result from reducing jury size. There is no real reason to empanel 12 people on criminal juries, so why not have the same number as civil juries, that is, six jurors, which seems to currently work well.	Less people on a jury would decrease costs since there would be fewer jurors to pay and allow juries to reach a verdict more quickly as less people would be involved in deciding the verdict.	There is no proof indicating a jury with fewer people would result in a jury being more effective and quicker in deciding cases. The strength of the jury is that the verdict is arrived at through a number of jurors offering their insights into the case. If the number of people serving on a jury is reduced, there is less likelihood of effective decision making.

(continued)

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Reforms	Strengths	Weaknesses
Introduce a 'not proven' verdict A 'not proven' verdict as a third alternative to guilty and not guilty would give juries another option when unsure about the guilt or innocence of the accused. In criminal trials a not guilty verdict does not necessarily mean the accused is innocent. It simply means the Crown did not produce the evidence 'beyond reasonable doubt' to find the accused guilty.	Providing a third option of returning a 'not proven' verdict could reduce jurors agreeing to a verdict just because they feel one needs to be reached to complete their task as jurors. A 'not proven' verdict could avoid a situation where a jury cannot decide (a hung jury) resulting in a costly re-trial. A 'not proven' verdict is used in the Scottish legal system. It has traditionally been used when a jury believed the accused was guilty, but did not feel the prosecution had adequately proved it. It has provided a means by which a jury can avoid being seen to declare an accused completely innocent, as is implied in a not guilty verdict.	Giving juries more options could be more confusing to them. The 'third verdict' is frequently criticised in Scotland and there have been suggestions it should be abolished. There is a misconception that not proven allows the avoidance of the double jeopardy rule, but this is not the case in its country of origin. Its legal impact is effectively the same as a not guilty verdict.
Abolish civil juries Civil juries should be abolished in Victoria to be consistent with the rest of Australia as they are hardly ever used for civil cases, and when they are used they award inconsistent damages.	Victoria is the only Australian state to still have civil juries, suggesting they are not needed as other states have already abolished them. Instead, judges are more qualified to resolve civil cases and award appropriate amounts of damages for civil matters that can be very complex.	Abolishing civil juries would mean trial by ones' peers did not take place.
Simplify jury directions Judges should provide clear, simple and brief directions to juries in criminal trials, as recommended by VLRC. This would improve and simplify directions to juries, while maintaining the overall aims of the criminal justice system, including the right to a fair trial and right to appeal against conviction.	Clearer directions would foster better understanding. Providing trial judges with guidance about instructions that must be given to juries about the law and how they should deal with the evidence would ensure judges know when to give directions and what to include in them. This could limit re-trials because of errors in jury directions.	Judges needing to summarise evidence for the jury at the end of a trial and refer to defences that may not have been raised by legal counsel, may result in longer trials.
Provide reasons for jury verdict A jury should provide a reason for its verdict so parties know how the case was decided and the reason behind the final decision.	A jury's reason for a decision would quickly indicate whether their decision was sound and an appeal could be made if a verdict was returned based on an incorrect assumption or unsound argument.	May create significant burden on jurors who need to document reasons on usually complex and technical matters. The reasons provided by jurors might provide many more grounds for appeal, as jurors usually lack the legal knowledge to express their reasons in appropriate legal language. The system would quickly become bogged down with these additional appeals.

Anyone who has been on a jury will tell you that it is impossible to summarise what 12 people decide over a number of hours or even days. Every person may have reached his or her decision for a different reason.

Sometimes there is a risk in bringing a case to trial before all the relevant information has been gathered. A jury can only make a decision on the evidence presented to it in court.

The Jaidyn Leskie case

In June 1997, 14-month-old Jaidyn Leskie disappeared from his mother Bilynda Williams's house in Moe, Victoria. Ms Williams's boyfriend, Greg Domaszewicz, was babysitting Jaidyn, but he left the toddler alone while he went out to collect Ms Williams from her evening out in Traralgon. When they returned they found the front windows of the house had been smashed, a pig's head had been thrown into the front garden and Jaidyn had disappeared. The case gained a great deal of media publicity at the time. Suspicion fell on Domaszewicz and in July 1997 he was charged with Jaidyn's murder. In January 1998, Jaidyn's body was found in a dam in the Latrobe Valley, and in March 1998, Greg Domaszewicz was committed to stand trial for the murder. The evidence against Domaszewicz was largely circumstantial and in December 1998 there was sufficient reasonable doubt for a jury to find him not guilty. Ms Williams campaigned for a coroner's inquest into Jaidyn's death and eventually in October 2006, the coroner found that Domaszewicz had contributed to Jaidyn's death and had thrown his body into the dam. The not guilty verdict in 1998 meant that Domaszewicz could not be charged a second time, because of the law relating to double jeopardy.

DID YOU KNOW?

Under the terms of the *Juries Act 2000*, people who have worked as judges, magistrates, bail justices, police officers or lawyers within the last ten years were ineligible for jury service. This meant that people in these professions did not become eligible until 10 years after resigning or retiring from these positions. In 2010, the previous Victorian government introduced the Juries Amendment Reform Bill, which set out to reduce this time from ten years to five. The aim was to broaden the categories of people available for jury service. The Bill was not passed before the change of government in November 2010.

Victorian Law Reform Commission recommends changes to jury directions

In May 2009 the VLRC presented its final report into the process of judges providing directions to juries. It found that the process of providing directions to juries was inconsistent, with judges varying enormously in the amount of assistance they provided for jurors. It recommended a legislated standard for judges to adhere to when providing directions to juries and increased provision of documents for jury use. These could include an *outline of charge* to be given to the jury before the trial, to cover the issues in dispute. It could also include a *jury guide*, to be given to jurors at the time of summing up. This could include a series of questions to guide the jury to its verdict and be prepared by the judge in consultation with counsel. Improved training should be provided to judges and lawyers to assist them in the preparation of these documents.

TEST your understanding

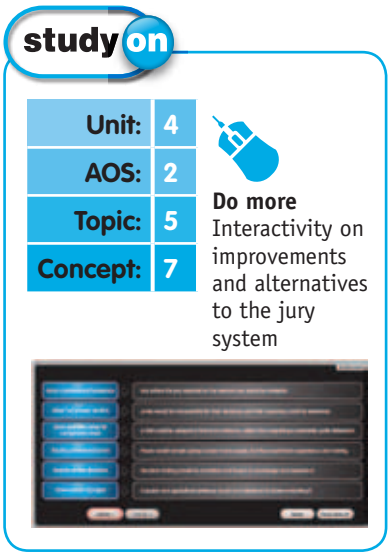
1. Explain how the training of jurors before a trial would be advantageous.
2. How could the operation of the jury system be improved by the proposal to reduce the time for eligibility of former police or legal officers for jury service from ten years to five years?
3. Did the jury have enough information on which to base their verdict in the Jaidyn Leskie case? Explain your answer and outline how the justice system might have improved its handling of this case.
4. Outline the key recommendations of the VLRC to improve the provision of directions to jurors.

APPLY your understanding

5. Assess the strengths and weaknesses of each of the proposed reforms to the jury system. On the basis of these strengths and weaknesses:
   (a) identify the **three** suggested reforms that you believe are likely to be the **most** effective.
   (b) indentify the **three** suggested reforms that you believe are likely to be the **least** effective.
   Provide reasons for your selections.
6. Victoria is now the only Australian state that retains juries in civil trials. Do you think civil juries should be abolished in Victoria? Give reasons for your answer.

10.8 Suggested alternatives to the jury system

KEY CONCEPT Some legal commentators believe that the weaknesses of the current jury system are so significant that the system should be abolished and replaced with an entirely different process for deciding the outcome of a case.



An alternative to the jury system involves abolishing the existing jury system and replacing it with a new type of fact-finding body. Some commentators believe the traditional jury system should be abolished in favour of alternative modes of trial. Suggested alternatives to the jury system often put forward are trial by judge alone or a bench of judges, using a panel of professional jurors, using specialist jurors engaged for a specific type of case, or trained assessors.

Trial by judge alone or a bench of judges

A judge alone, with extensive legal training, education, experience and expertise, would certainly be able to apply his or her knowledge and understanding of the law and legal proceedings, and decide the facts to reach a verdict.

Advantages

1. Trial by judge may overcome problems with jury trials, including the difficulties jurors may face understanding the law, technical evidence and lack of knowledge of court processes and the rules of evidence.
2. Furthermore, trial by judge alone may reduce both costs and delays as there would be no empanelling of jurors.
3. The prospect of hung juries would cease to exist and the time needed for the jury to deliberate and reach a verdict would not be required.

Disadvantages

1. This alternative would lead to the loss of community involvement in the legal system as there would be no trial by one's peers, just one judge performing this fact-finding role.
2. With constant media and public scrutiny of the legal system, one judge or bench of judges deciding all questions of fact and law may lead to dissatisfaction with the operation of courts.
3. The historical principle of trial by one's peers would be absent if a judge or bench of judges replaces the jury system.
4. Another problem with having a trial by a bench of judges would be the high costs associated with having to pay more than one judge, and also having to appoint more judges to sit on each trial.

Professional jurors

An alternative to the current jury system would be to create a new position within the ranks of public servants — that of a professional juror. As a jury is not skilled in listening to, understanding and evaluating complex evidence and arguments, a permanent panel of people employed as professional jurors could overcome this.

Advantages

Such people would carry out exactly the same role as current jurors, but in a permanent capacity — their job would be that of a juror. The difference would be that those who decide questions of fact at trial would be familiar with the rules

of evidence and court procedure and would be less likely to be influenced by barristers' arguments and 'performance' in the courtroom.

Disadvantages

1. The disadvantage of introducing professional juries is that these jurors may be more likely to be blackmailed given that their frequent presence in the court may cause them to become more easily identifiable.
2. Experience in the legal system after some years may also affect their view and the ability to act impartially, compared to jurors who are not professional and only decide on the case they have been called up for.
3. Given the number of cases to be decided, and the fact that many of these cases run concurrently, a large number of professional jurors would need to be employed. This would significantly increase the cost of jury trials.

Specialist jurors

Given the complex nature of evidence in many cases, it could be that a trial judge needs to empanel a specialist jury with expert knowledge in a particular area of law, when it is clear that a non-professional person would have little grasp of the key issues in the case.

Advantages

For example, in a medical malpractice case involving expert testimony on appropriate surgical procedures, a jury of doctors would be more likely to understand the specific terminology used in the case, as well as the facts presented in the trial and, therefore, be able to reach a verdict based on a strong grasp of the evidence.

Disadvantages

1. However, a disadvantage of using specialist jurors is that an expert panel (whether doctors, engineers or tax agents) would be expensive, especially where such individuals are paid their standard fee for appearance in court.
2. It could be said that specialist jurors may lack the objectivity required to perform their task and decide the outcome of a case.

A panel of specialist jurors may be able to better understand the complex facts and terminology of a case.

Trained assessors

Assessors with relevant education, training, experience and expertise in civil law could perform the task of determining the most appropriate damages to be awarded in complex cases.

Advantages

1. A consistent scale for awarding the appropriate level of damages could be used, as well as individually considering each case on its own merits.
2. This would ensure a fair, consistent process when awarding compensation to successful plaintiffs.

Disadvantages

1. However, a disadvantage of using professionally trained assessors as an alternative to the jury system is that the outcome of the case would no longer be decided by 'ordinary people' chosen at random from the electoral roll to perform their civic duty.
2. Trained assessors also may begin to lack the objectivity required given the fact that they would continually deal with civil cases.

Defensive homicide a minefield for jurors

In 2006, the defence of provocation in murder cases was abolished after recommendations from the Victorian Law Reform Commission. This defence had been used widely by male defendants as a defence for killing a spouse in response to revelations of the spouse having had an affair with another man. This defence had arisen through the common law from an era when a wife was considered to be her husband's possession. It had also been used occasionally by women who had suffered severe violence at the hands of an abusive husband. The VLRC recommended that the defence of provocation be abolished, but that a new offence of defensive homicide be introduced to deal with battered wife cases. In 13 murder cases heard in the Supreme Court between 2006 and 2011, counsel representing twelve men and only one woman successfully argued in court that the lesser charge of defensive homicide should be applied. In a number of these cases, the facts were very similar to those that had previously been used to support a defence of provocation. Some commentators have suggested that juries are not sufficiently aware of the legal implications of the differences between murder and defensive homicide.

TEST your understanding

1. Explain the difference between professional jurors and specialist jurors.
2. What would be the role of trained assessors in civil cases?
3. What is the key problem that has been identified in the use of defensive homicide as a lesser offence in some murder cases?

APPLY your understanding

4. Explain how the use of professional jurors or specialist jurors could overcome the problem identified with juries returning verdicts of guilty of defensive homicide in some murder cases.
5. Critically evaluate **two** alternatives to the use of trial by jury.

EXTEND AND APPLY YOUR KNOWLEDGE:
Role of jurors

The following case highlights some of the complexities and the amount of time that can be taken to reach a final resolution in a criminal trial before a jury.

Triple child murderer

Robert Farquharson, aged 39 years, drove his car into a dam near Winchelsea on Father's Day 2005. His three sons aged between two and 10 years, who were passengers in the car, all drowned. However, Farquharson escaped. He was arrested and charged with three counts of murder in December 2005, and then released on bail with conditions set by the court.

In August 2006, Farquharson appeared in the Melbourne Magistrates' Court for a committal hearing. The magistrate found that there was sufficient prosecution evidence to gain a conviction on three murder charges. Consequently, Farquharson was committed to stand trial in the Supreme Court of Victoria for murdering his three sons.

The six-week murder trial, which took place from 21 August to 5 October 2007, was presided over by Supreme Court Justice Philip Cummins (*DPP v. Farquharson* [2007] VSC 469). The court heard evidence from prosecution witnesses, including police officers, doctors and one of Farquharson's friends. The court was told that the accused drowned his sons to punish Cindy Gambino, his ex-wife. Mr Farquharson pleaded not guilty to the murder charges, insisting he was innocent and that it was an accident caused by a coughing fit which caused him to black out.

The Supreme Court jury deliberated for three days, finding Farquharson guilty of murdering his three sons. On 16 November 2007, Justice Cummins sentenced Farquharson to three terms of life imprisonment, without parole, for killing his three sons.

In December 2008, Cindy Gambino, the mother of the three boys, commenced civil action against Farquharson, suing him for damages for the pain and suffering he had caused her through the loss of her three sons (*DPP v. Farquharson, ex parte Gambino* [2009] VSCA 307). In May 2009, Justice Cummins ordered Farquharson pay $225 000 in damages as compensation to Ms Gambino.

Farquharson then lodged an appeal with the Victorian Court of Appeal against his conviction and life sentence in prison without parole. The appeal commenced on 1 June 2009 (*R v. Farquharson* [2009] VSCA 307). Farquharson's defence lawyer argued that, in Justice Cummins' final address to the jury, he did not present the defence case sufficiently and that some evidence presented by prosecution witnesses should not have been admissible in court. The defence counsel believed Farquharson was wrongfully convicted and that his sentence was too severe.

In December 2009, Farquharson's murder conviction was quashed (overturned) by the Victorian Court of Appeal. The Court of Appeal ruled there had been a miscarriage of justice. It was found that the trial judge (Justice Philip Cummins) failed to give the jury adequate directions about how to consider some evidence presented in the trial, and the jury was not told crucial information about a key prosecution witness.

Chief Justice Marilyn Warren and Justices Geoffrey Nettle and Robert Redlich refused to acquit Farquharson because there was sufficient evidence to justify a retrial.

Farquharson's retrial commenced on 4 May 2010 before Justice Lex Lasry. The trial took 11 weeks before the jury finally retired to consider their verdict on 19 July 2010. After three days of deliberation the jury returned a verdict of guilty of murder. On 15 October 2010, Justice Lasry sentenced Farquharson to life imprisonment, with a minimum of 33 years to be served before he was eligible for parole.

QUESTIONS

1. Describe the process by which juries would have been empanelled in both the original trial and the retrial of Robert Farquharson.
2. Why might the empanelment process have taken longer in the retrial than in the original trial?
3. Explain the role of the jury in cases such as this.
4. How many jurors would have been required to be empanelled in each trial?
5. How many jurors would have been required to return a verdict in each trial?
6. What were the grounds for the appeal against the finding of guilty in the first case?
7. Identify and explain one reform of the jury system that could have prevented this appeal from being mounted.
8. What role might a jury have had in the appeal before the Victorian Court of Appeal in 2009? Explain your answer.
9. Identify **two** strengths and **two** weaknesses of the jury system that have been highlighted by this case.

SKILL DRILL

KEY SKILL TO ACQUIRE:

- critically evaluate the effectiveness of juries.

Critically evaluating the effectiveness of juries

SKILL DEFINITION

Critically evaluate means to consider the strengths and weaknesses of an issue, and make a judgement supported by evidence.

Almost every year in the November examination, students are required to critically evaluate an issue. The strengths and weaknesses of the jury system has frequently been the subject of such a critical evaluation. In most cases this has required an extended response, worth anywhere between six and ten marks. Knowing how to tackle this task is essential in preparing for the exam.

Frequently you will be asked to respond to a quotation that either supports or criticises the jury system. Remember that a critical evaluation requires you to make a judgement or opinion, so there is an expectation that you will either agree or disagree with the quotation. We will use the following example to illustrate this skill:

> **'The jury system has outlived its usefulness and should be abolished.'**
>
> **Indicate whether or not you agree with this opinion, by critically evaluating some of the strengths and weaknesses of the jury system.**

How should you attempt a task such as this? The following is provided as a guide.

Structuring and presenting your answer

As is often the case, this task requires you to provide a critical evaluation of the jury system in an extended response. This will consist of a series of paragraphs, each examining a particular strength or weakness of the jury system. The following points are worth noting.

1. You should begin by making it clear whether or not you agree with any quote provided. This can be absolute agreement or disagreement, or can involve partial agreement, but with some exceptions or reservations.
2. Each strength or weakness should be included in a distinct paragraph. To critically evaluate a strength or weakness means to make a judgement about whether or not you believe that strength or weakness has some validity or relevance.
3. Keep paragraphs short — three or four sentences are usually adequate. The first sentence is a topic sentence that introduces the point you are making. The next sentence is an elaboration or explanation of that point. Make sure you always include evidence or an example to support your opinion.
4. Leave a clear line between paragraphs to make it visually clear to the examiner where each paragraph begins and ends. This practice makes it unnecessary to remember to indent at the start of each paragraph. The examiner will appreciate being able to easily recognise a clear structure to your answer and find it easier to mark.

Some sample paragraphs

Agreement or disagreement

I do not agree that the jury system has outlived its usefulness. It has some weaknesses, but still serves a useful purpose, so it should be retained and reformed where possible.

Paragraph evaluating a strength

One of the major strengths of the jury system is the sharing of decision-making. In a criminal trial this usually means that 12 people selected at random have to agree on a verdict after hearing all the evidence. If this number can agree on the guilt of an accused, there is a strong likelihood that the case has been proved beyond reasonable doubt. Despite this strength, problems can occur if a significant number of jurors bring prejudices or biases with them, or if a dominant personality is able to persuade others too easily.

Paragraph evaluating a weakness

One of the weaknesses of the jury system is that complex legal proceedings may be too difficult for jurors. As randomly selected members of the public, jurors are not trained to deal with court processes and judging the reliability of witnesses. This problem can be overstated, as skilled barristers will do everything they can to keep issues simple for jurors and a brief education program for prospective jurors can overcome most potential problems.

Developing your skills

1. Using the above paragraphs as models, complete an evaluation of **four** strengths and **four** weaknesses of the jury system.
2. Apply the above model to the two following essay questions, both of which are similar to exam questions that have appeared in recent years:
   - 'The jury system provides a valuable contribution to the effectiveness of the legal system.' Critically evaluate this statement, with reference to **two** elements of an effective legal system.
   - 'The jury system needs to be reformed to ensure it is relevant in the twenty-first century.' Discuss this statement, providing a critical evaluation of three possible reforms to the jury system.

CHAPTER 10 REVIEW

Assessment task — Outcome 2

The following assessment task contributes to this outcome.

On completion of this unit the student should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, evaluate their operation and application, and evaluate the effectiveness of the legal system.

Please note: Outcome 2 contributes 60 marks out of the 100 marks allocated to school-assessed coursework for Unit 4. Outcome 2 may be assessed by one or more assessment tasks.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- critically evaluate the effectiveness of juries
- suggest and discuss reforms and alternatives to the jury system.

Case study

Read the case study below and answer the questions that follow.

Dangerous driver causes teenage deaths

In the case *DPP v. Towle* [2008] VSC 101, a Victorian Supreme Court jury found Thomas Towle, aged 36 years, not guilty of six counts of culpable driving causing the deaths of six teenagers in a car accident near Mildura. He was found not guilty of four counts of driving negligently causing serious injury and not guilty of two counts of reckless conduct causing serious injury. However, he was found guilty of the lesser charges — six counts of dangerous driving causing death and four counts of dangerous driving causing serious injury. The maximum jail sentence for both dangerous driving causing death and dangerous driving causing serious injury is only five years. The maximum sentence for culpable driving is 20 years imprisonment. Justice Philip Cummins, Victorian Supreme Court, sentenced Towle to a maximum of 10 years jail with a minimum of seven years jail. His licence was cancelled for 10 years.

The Supreme Court heard that Towle crashed into the group of teenagers as they left a sixteenth birthday party on 18 February 2006. Six teenagers were killed in the horrific car accident, while four other teenagers were seriously injured. The jury heard that Towle, who had his four-year-old son on his lap, was speeding when he lost control of the car that crashed into the teenagers.

The devastated families of the victims were shocked, very upset and angry with the verdict delivered by the jury. Also, the fact that Towle had a shocking driving record and was known to be a dangerous driver, made the families even angrier.

Between 1991 and 2003, Towle had prior convictions relating to driving offences, having been found guilty of drink-driving, driving while disqualified, driving an unregistered vehicle, displaying false number plates, providing a false name and address and driving a vehicle with ineffective headlights. He was sentenced to two months imprisonment for these driving offences. He has also been convicted of other criminal offences in his past, including burglary, theft, assault and possession of amphetamines. However, prior convictions cannot be revealed to the jury in most cases because this may influence the jury's verdict. The judge can only hear prior convictions before sentencing an accused person found guilty.

Justice Philip Cummins exempted the jurors from further jury service for 10 years due to the case being very lengthy and jury deliberations taking three days.

Questions

1 Explain the difference between disqualification from jury duty and ineligibility for jury duty, and give an example of each. **(2 + 1 + 1 = 4 marks)**
2 Explain the process by which a jury pool would have been summoned for this case. **(2 marks)**
3 How would the jury panel have been selected to attend the courtroom for this case? **(2 marks)**
4 Identify **two** reasons that could be given by prospective jurors to be excused from this case. **(1 mark)**
5 What might be suitable grounds for challenging a prospective juror in this case? **(1 mark)**
6 How many jurors would have been empanelled in this case? Justify your answer. **(1 + 2 = 3 marks)**
7 Identify and explain **two** roles carried out by the judge during this trial. **(1 + 1 = 2 marks)**
8 Thomas Towle was charged with six counts of culpable driving, but the jury found him guilty of a number of lesser charges. Explain how this was possible in our jury system. **(2 marks)**
9 Why was the jury not made aware of Towle's prior convictions? **(1 mark)**
10 Do you think the jury should have been informed of these prior convictions? Justify your opinion with reasons. **(2 marks)**
11 Critically analyse **two** strengths and **two** weaknesses in having a jury decide the outcome of this case. **(2 + 2 = 4 marks)**
12 Explain **two** reforms to the jury system that may have resulted in the families of the victims being more accepting of the result of the trial. **(2 + 2 = 4 marks)**
13 Critically evaluate **one** alternative to the jury system and explain whether you believe it would have made any difference to the outcome of this case. **(2 marks)**

(Total 30 marks)

Tips for responding to the case study

Use this checklist to ensure your answers are as complete as possible.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You will need to know the difference between a jury pool and a jury panel, as well as understanding what it means to be disqualified, ineligible or excused from jury duty. Terminology associated with the role of a judge in a jury trial; the different types of challenge to prospective jurors; and the strengths, weaknesses, possible reforms, and alternatives to the jury system should also be used as appropriate.		

Performance area	Yes	No
Discuss, interpret and analyse legal information.		
An understanding of court procedures as they apply to jury trials should be demonstrated. This includes rules of evidence, and the different roles of both judge and jury.		
Apply legal principles to relevant cases and issues.		
The application of the jury process to the given case study should be evident in your answers.		
Critically evaluate the effectiveness of juries.		
You should be able to discuss the strengths and weaknesses of the jury system in a way that demonstrates your understanding of the significance of the jury system as a contributing factor to the effectiveness of the legal system.		
Suggest and discuss reforms and alternatives to the jury system.		
You should be able to differentiate between a reform of, and an alternative to the jury system, explain examples of each and apply these to the given case study.		

Chapter summary

The role of juries and factors that influence their composition

- **Definition of a jury**
  - The jury is a trial by one's peers. Juries are independent and decide questions of fact.
- **Criminal juries**
  - In criminal trials, the standard of proof on which the evidence is assessed by the jury is beyond reasonable doubt.
  - Juries are used in the county and supreme courts for criminal trials involving serious and most serious indictable offences when the accused pleads not guilty.
  - Criminal juries comprise 12 to 15 jurors, depending on the length of a case. If a unanimous verdict is not possible after six hours deliberation, then in cases other than those involving murder, treason or certain federal drug-related offences, a jury may reach a majority verdict (11 out of 12 jurors).
- **Civil juries**
  - Juries are optional in civil trials. If used, they comprise six to eight jurors, depending on the length of a case.
  - The standard of proof required in a civil case is on the balance of probabilities.
  - In civil trials where monetary compensation (damages) is sought, the jury will determine the amount of damages to be awarded except in defamation cases where the judge will determine damages.
- **Jury service**
  - Potential jurors are randomly selected from the electoral roll and must be at least 18 years of age and an Australian citizen.
  - The initial jury questionnaire indicates who is eligible and who is disqualified, ineligible or excused from serving on a jury.

- People who are either disqualified or ineligible are not allowed to serve on a jury.
- People can be excused from participating in jury service for a good reason. It may mean they do not have to serve on a jury this time, but may be called again at a later date, unless permanently excused.
- It is an offence not to attend for jury service.
- The jury pool is the total number of people summoned who are available to be selected for any of the trials that are occurring at the time.
- The jury panel is a smaller number of jurors selected from the jury pool to attend a courtroom. They will undergo the empanelling process to be placed on a jury for a specific trial.

- **Empanelment**
  - Empanelment is the process whereby legal counsel, the prosecution and defence decide which jurors will be selected for trial.
  - Employers are required to grant leave to employees to attend jury duty, and must make up the difference between the jury fee and the regular income that would have been earned.
  - A jury of 12 people is required for criminal trials, although 15 people are empanelled if it is likely to be a long trial.
  - Protecting the privacy and anonymity of jurors is safeguarded in the jury empanelment process because each juror is now commonly allocated a number and only identified by that number, rather than their name, if the court decides that names of potential jurors should not be read out in court.
  - Challenges must be made before the juror is seated in the jury box.
  - The prosecution has the right to stand aside jurors in criminal trials, while the defence has the right to challenge potential jurors.
  - Peremptory challenges are limited and do not require a reason justifying the challenge.
  - For cause challenges are unlimited but do require a valid reason.
  - The number of peremptory challenges permitted depends on the number of people being arraigned.
  - Once the required number of jurors is assembled, the jury takes an oath or affirmation swearing that they will faithfully and impartially perform their role as jurors.
  - Juries in civil trials are optional. If used, a jury of six to eight people is required, depending upon the length of the trial.
  - Twelve names are selected and each side eliminates three names, leaving the required number of six jurors.

- **Judge's role**
  - In criminal trials, the judge decides the sentence by imposing an appropriate sanction.
  - In civil trials, the jury decides the verdict and remedy, including how much money to award, except in defamation cases.
  - The judge is required to explain the relevant law to the jury, to allow them to apply that law to the facts of the case and arrive at a verdict.
  - The judge has the power to suppress the names of parties to a trial, as well as those of witnesses, and can ban other information from being made public if it is believed such information could prejudice the jury.

Strengths and weaknesses of the jury system
Critically evaluate the effectiveness of juries.

- **Strengths and weaknesses**
  - Strengths of the jury include:
    - trial by one's peers is reflective of community values
    - juries are representative of a cross-section of the community
    - juries reduce the possibility of corruption or bias
    - decision making is shared

- ordinary people become involved in the legal process
- juries provide protection against the misuse of power
- juries have stood the test of time and the use of juries often simplifies procedures.

– Weaknesses of the jury include:
- jurors may be biased
- unrepresentative cross-section of the community
- majority verdicts threaten standard of proof
- no reasons given for verdict
- too difficult for ordinary people
- adds to the cost of a trial
- adds to the length of a trial
- inconsistent awards in civil trials
- jurors may be easily influenced.

- **Contribution of the jury system to an effective legal system**
  – Contribution of the jury system to a fair and unbiased hearing:
    - Eligibility for jury duty, the balloting process, the right to self-excuse and the rights of parties to challenge all help provide a jury likely to be unbiased.
    - Application of the rules of evidence, the role of the judge and the requirement for a unanimous or majority verdict all contribute to the fairness of the jury system.
    - The possibility of hidden bias, the influence of the media, and legal complexity can all undermine the likelihood of a fair and unbiased hearing.
  – The contribution of the jury system to effective access to the legal system is minimal, because juries are voluntary in civil cases and only used for indictable offences in criminal trials.
  – The jury system can hinder the timely resolution of disputes as it is a time consuming process, both in the empanelling of juries and because of the court procedures necessary in a jury trial.

• Evaluate the extent to which court processes and procedures contribute to an effective legal system.

- **Reforms**
  – Reforms to the jury system could include the following:
    - the training of jurors
    - appointing a specialist foreperson
    - limiting avenues for not participating in a jury trial
    - providing better pay and more education to jurors
    - reducing or eliminating the number of peremptory challenges allowed
    - reducing jury size
    - introducing a 'not proven' verdict
    - abolishing civil juries
    - simplifying jury directions
    - providing reasons for jury verdicts.

• Reforms and alternatives to the jury system
— Suggest and discuss reforms and alternatives to the jury system.

- **Alternatives**
  – Victoria's current jury system could be replaced by possible alternatives to the jury system:
    - a judge could hear the case alone without a jury, and decide verdict and sentence
    - a permanent panel of professional people could be used as jurors on numerous cases
    - specialist jurors could attend cases that involve their area of expertise
    - trained assessors could calculate damages awarded to plaintiffs by using a consistent scale.

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Examination technique tip

Good examination technique involves answering all questions in full sentences. Do not write in point form.

study on

Unit:	4
AOS:	2
Topic:	5

Practice VCE exam questions

Examination questions

Now that you have completed your revision it is time to test your own knowledge.

Question 1

'The use of the jury system in Victorian criminal trials does not contribute to an effective legal system.' Discuss this statement, indicating the extent to which you agree with it, providing reasons for your answer. In your answer refer to at least two elements of an effective legal system. **(10 marks)**

Question 2

Identify three errors in the following scenario, explaining the correct processes and procedures that should have occurred.

John aged 25 years was charged with murder. Four of the six-member jury returned a 'guilty' verdict and sentenced John to a 25-year jail term. John was upset with the decision, especially since he knew one of the jurors quite well. **(6 marks)**

Question 3

'The jury system ensures Australia has an effective legal system. There are, however, those who would disagree.'

Critically evaluate the extent to which the jury system contributes to an effective legal system and provide justification for your conclusion. **(10 marks)**

Question 4

'The jury system has many weaknesses but it also has many strengths and must be retained to ensure our legal system remains effective.' Identify and evaluate two strengths and two weaknesses of the jury system. **(8 marks)**

Question 5

'The jury system is a thing of the past and must be abolished.' Identify and evaluate two alternatives to the jury system. **(8 marks)**

Question 6

Critically evaluate **one** strength and **one** weakness of our jury system. **(6 marks)**

(Total 48 marks)

CHAPTER 11

Evaluating the effectiveness of the legal system

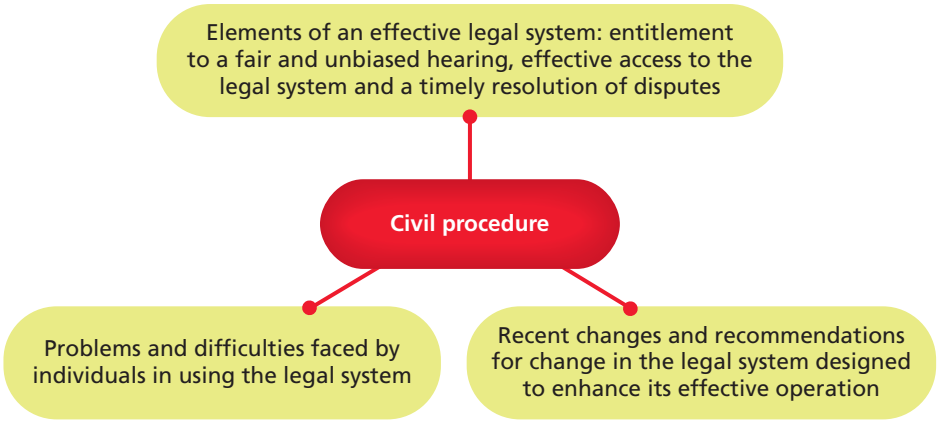
WHY IT IS IMPORTANT

An effective legal system must ensure all individuals, regardless of their ethnicity, wealth, gender or religion, are able to access the court system, and receive a fair and unbiased hearing. It must also resolve disputes in a timely manner. While our legal system has many processes and procedures in place to ensure its effective operation, it is not perfect and sometimes the scales of justice may not be evenly balanced. For example, people on very low incomes, indigenous Australians and those with mental health issues may experience difficulties using the legal system and be disadvantaged in legal proceedings. It is therefore essential that we constantly evaluate our legal system and implement reforms to improve its effectiveness.

WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

KEY KNOWLEDGE



KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Can you demonstrate these skills?

Indigenous man Tasered 13 times while in custody

In October 2008, Kevin Spratt, an indigenous Australian, was Tasered (given a temporary electric shock) by Western Australian police 41 times within one week while being detained in custody. Mr Spratt was charged with and pleaded guilty to obstructing the police.

In 2010, however, Spratt's conviction was quashed after it was established that Mr Spratt did not remember the incident where he had supposedly obstructed police (even though he pleaded guilty to it). This memory loss may have been due to being repeatedly Tasered. There had been a miscarriage of justice and the two police officers involved were subsequently subjected to police disciplinary hearings and fined $1950 for using undue and unnecessary force.

The Chief Executive Officer of the Aboriginal Legal Service of Western Australia, Mr Dennis Eggington, in 2011 highlighted findings from a Corruption and Crime Commission inquiry saying that Aboriginal people were far more likely to be the victims of police Tasering than other members of the community.

Other recent statistics indicate indigenous Australians were three times more likely to be imprisoned for a minor offence and 14 times more likely to be imprisoned compared to non-indigenous people. Indigenous women were 23 times more likely to be imprisoned than non-indigenous women and indigenous young people were significantly overrepresented in the juvenile criminal justice system. These statistics highlight inequities between the way indigenous people are treated by the legal system compared to non-indigenous people.

In 2008, an indigenous Australian man was Tasered by the police 13 times in one incident. A judge in the Western Australian Supreme Court later found the Tasering and subsequent legal proceedings taken against the man amounted to a gross miscarriage of justice.

11.1 Problems with the legal system: high legal costs can limit effectiveness

KEY CONCEPT One main problem that limits the ability of individuals to access or use the legal system to resolve their disputes is the high cost associated with having a case resolved at court because, under the adversary system of trial, each party is responsible for the cost of preparing and presenting their case. The cost of legal representation is just one of many costs associated with litigation and, while legal aid is available to people on very low incomes, its funding is limited and hence services restricted.

Types of legal costs

The main costs associated with undertaking a legal action include legal fees (for legal practitioners and barristers), costs associated with gathering evidence (including forensic testing and expert witnesses), court fees and disbursements.

Few people are aware of the costs of undertaking legal action until they are either charged with a criminal offence or involved in a family dispute or some other kind of civil action that is to be resolved by the courts. One of the main costs associated with taking a case to court is the cost of *legal representation*. As we have seen in chapters 6 and 7, complex pre-trial procedures and the strict rules of evidence and procedure that exist within the court system necessitate the use of legal representation and can place self-represented parties at a distinct disadvantage. Legal representation, however, is very expensive. While legal fees vary depending on the nature of the case, as well as the experience and location of legal representatives, parties can expect to pay in excess of $2800 per day for legal representation in the Magistrates' Court.

Depending on the nature of the case and whether or not the matter proceeds to court, parties may need to engage the services of both a legal practitioner (solicitor) and a barrister. Legal practitioners generally give legal advice to clients and coordinate the presentation of a case (if it proceeds to court), whereas barristers are skilled in presenting a case to the court including presenting legal arguments, examining witnesses and discussing points of law and admissibility of evidence.

In addition to the cost of legal representation (*legal fees*), parties who undertake court action will incur the cost of *court fees* and *disbursements* (including costs relating to administrative tasks such as telephone calls and the photocopying and filing of documents) and *any costs involved with the gathering of evidence* (including charges for independent forensic testing and expert witnesses). Parties involved in legal actions may also suffer a loss of income while absent from paid employment. Defendants who are found not guilty in criminal cases are usually not compensated for legal costs.

Reducing legal costs through the provision of legal aid

DID YOU KNOW?

It costs approximately $520 to lodge a writ and initiate a civil action in the Victorian Supreme Court.

As explained in chapters 6 and 7, both the Commonwealth and state governments provide funding for legal aid so people who cannot afford to seek private legal representation have an opportunity to gain free or low cost legal advice, assistance and representation. The provision of government-funded legal aid is limited, however, so services are generally restricted to those on very low incomes and are mainly granted in criminal and family matters (which take priority over other civil disputes). Legal aid services are also limited in regional areas and grants provided are usually subject

to cost ceilings, meaning that if the monetary amount allocated to the case is used up prior to the conclusion of the case, the individual may have to pay the remaining costs. The provision of legal aid is examined in greater depth in chapter 7.

Recent changes and recommendations

Over recent years changes have been implemented to help lower the costs associated with undertaking legal action, including increasing the funding to legal aid services, the use of alternative methods of dispute resolution and improving the use of technology to provide more effective case management.

Increase state and Commonwealth funding for legal aid services

Increasing state and Commonwealth funding for legal aid services would allow bodies, including Victoria Legal Aid (VLA), to provide greater legal advice and assistance to individuals unable to afford legal representation and assistance, and in turn improve access to the legal system and assist the achievement of a fair hearing (because self-represented clients are generally disadvantaged in court). In 2010, a PricewaterhouseCoopers report into legal aid funding indicated that the legal aid system was struggling to recover from the considerable reduction in Commonwealth funding that it experienced in the late 1990s and, as such, bodies including VLA were not able to provide adequate services, especially in regional areas where individuals find it particularly difficult to access legal advice and assistance.

In 2011, the VLA released a strategic plan outlining their priorities for 2011–14. Throughout this period, the VLA are specifically committed to improving the provision of their services by increasing the range of free or low cost legal aid services to Victorians who live in regional areas and by expanding their services to provide greater assistance to those involved in civil actions. The VLA is also specifically committed to providing early intervention and prevention of legal actions by assisting the government to improve the way it administers social security benefits and by expanding their services to disadvantaged groups, including children and young people, women and children experiencing family violence, culturally and linguistically diverse (CALD) communities, indigenous Australians, individuals in state custody, and those who experience mental health and disability issues.

Increase the use of alternative (or appropriate) methods of dispute resolution

Over recent years the state government has allocated funds to the court system, in particular the Victorian county and supreme courts, to increase the use of alternative (or appropriate) methods of dispute resolution (including mediation, conciliation and arbitration) in all Victorian courts in an attempt to assist the early resolution of disputes and reduce the costs associated with undertaking a civil action.

The use of mediation, conciliation and arbitration to resolve disputes within these courts prior to trial can reduce legal and court fees for the parties involved, and reduce the need for trials and subsequent costs incurred by the legal system. The increased use of mediation in the court system also increases access for individuals who otherwise might be deterred from taking a case to court due to the high cost of litigation. In the 2009–10 financial year, following the appointment of experienced litigators as associate judges to hear both trials and mediations, and the increased use of judge-led mediation, the use of mediation significantly increased in the Victorian Supreme Court, with the Court of Appeal making orders for mediation in 61 civil appeals.

DID YOU KNOW?

From 1996–97 to 2008–09 the Commonwealth Government's expenditure on legal aid decreased from $176 million to $155 million (a decrease of 12 per cent in real terms) and from 0.5 per cent to 0.04 per cent of GDP.

DID YOU KNOW?

In 2011, approximately 68 per cent of Victoria Legal Aid's total expenditure was used to provide legal representation, 15 per cent was used to provide legal advice and minor work, and 12 per cent was used to provide duty lawyers to give advice and represent defendants who plead guilty in the Magistrates' Court.

Legal representation costs money. Legal aid cuts were so significant in 2008 that a group of lawyers held a meeting outside the County Court to discuss the situation. Since this time many of those involved in the court system and legal profession (including county and supreme court judges) have pressured the Victorian Government to increase funding to Victoria Legal Aid and other community legal services.

study on

Summary

Unit 4:
Resolution and justice

Area of study 2:
Court processes, procedures, and engaging in justice

Topic 6:
Effectiveness of the legal system

Expanding 'no win, no pay' legal services

As explained in chapter 6, the expansion of legal firms offering 'no win, no pay' services for civil cases (a scheme where the legal firm deducts their fee from any damages awarded to a successful client) can lower the costs associated with undertaking civil litigation and improve access to the legal system. Under the system, if the client loses the case, most of their legal fees do not have to be paid, although some fees must be paid regardless of win or loss. The court can order the losing party to pay the opposing party's legal fees (which can be substantial). This feature may assist some people who genuinely believe they have a case, but are unable to afford the cost of initiating proceedings. Parties must ensure they clearly understand the conditions and precise nature of any 'no-win, no pay' agreements they undertake, however.

More efficient use of technology and more effective case management

More efficient use of technology and more effective case management can assist in resolving cases in a more timely manner and hence reduce costs. Over recent years Victorian courts and tribunals have made more efficient use of technology by providing for the electronic filing, storage and exchange of documents between parties and the courts and tribunals. For example, in 2009–10 the Victorian Supreme Court was the first court in Australia to introduce the integrated court management system, known as CourtView, which aims to reduce delays by providing electronic filing for legal counsel and a recording system for court data. Eventually, all Victorian courts and VCAT are expected to implement the system over the coming years. Similarly, in 2009–10 the Victorian Supreme Court of Appeal introduced a new management system that aimed to reduce waiting times for, and costs associated with, criminal appeals by identifying the grounds of appeal more quickly.

Sentencing indication for criminal offences

In 2010 the Victorian Government passed legislation (the *Criminal Procedure Act 2009*) to permanently implement the sentence indication scheme. The new laws allow judges to specify to defendants what sentence they would most likely receive should they be convicted of their charges in an effort to promote defendants to enter an early guilty plea, and subsequently reduce the amount of criminal cases going to trial and the associated costs of trial. Magistrates and judges must consider an early guilty plea when determining a sentence, which may result in the defendant receiving a lesser sentence.

TEST your understanding

1 Explain three types of legal costs incurred by individuals involved in legal proceedings.
2 Explain why individuals often engage the services of both a legal practitioner and a barrister when undertaking legal action.
3 (a) Explain how the VLA can assist parties who are unable to afford legal services.
(b) Explain two ways the VLA could improve its services.

APPLY your understanding

4 Explain how high legal costs can limit access to the legal system and detract from the achievement of a fair hearing.
5 Explain three changes that could be made to the legal system to reduce the cost of undertaking a legal action, other than the government increasing legal aid funding.

11.2 Problems with the legal system: disadvantaged groups have limited access

KEY CONCEPT An effective legal system must be accessible; that is, it must provide mechanisms, processes and procedures to ensure that all individuals are able to use the legal system to gain legal advice and resolve their disputes. Unfortunately, certain groups within our community can often experience difficulties accessing the legal system, which can place them at a disadvantage and limit their ability to receive a fair hearing. One challenge for our legal system is to implement changes to improve the range of, and access to, legal services for these groups.

Difficulties facing disadvantaged groups in using the legal system

Gaining access to the legal system can be particularly difficult for those people who are unaware of their legal rights and the range of courts, tribunals and support services available to help resolve legal disputes. Similarly, many people have their access to the legal system limited because they cannot afford to pursue legal action (for example, they cannot afford to obtain legal advice or representation), or are unfamiliar with legal processes and procedures, and lack the confidence to initiate legal proceedings and pursue their legal rights.

Table 11.1 lists various groups within our community (referred to as disadvantaged or marginalised groups) that face specific barriers that limit their access to the legal system.

TABLE 11.1 Disadvantaged groups that may face difficulties using the legal system

Disadvantaged group	Difficulties faced when using the legal system
Culturally and linguistically diverse (CALD) communities (including immigrants and refugees)	• Lack an understanding of how the Australian legal system operates because the legal system in their country may have been vastly different, reflecting different values. For example, in Australia marriage is monogamous, while polygamy is still allowed in some African and Islamic societies. • Experience language barriers that can contribute to a lack of awareness and understanding of our legal processes and procedures, and detract from a person's ability to communicate effectively in court. • May be fearful of our legal system. For example, refugees from war-torn countries, where laws to protect citizens were not enforced or people lived in fear of military aggression and torture, may be suspicious and fearful of our legal system (including the police, court officials and legal processes).
Indigenous Australians	• Standard Australian English is quite different to Aboriginal English, so language barriers may prevent indigenous Australians from seeking police assistance, make it more difficult for them to engage with police when approached, and limit their understanding of legal processes, procedures and support services. • May experience a range of social problems including physical and mental health, family violence and substance abuse issues, and a lack of appropriate specifically targeted social services (including education, health and legal assistance services), particularly in remote and regional areas. (Indigenous Australians having limited access to the legal system is examined in more detail on page 418.)

(continued)

DID YOU KNOW?

In 2007, a survey of Victorian prisoners estimated that 52 per cent of prisoners could be classified in two or more of the following categories of disadvantage: had an intellectual disability, drug or alcohol problem, had previously been admitted to a psychiatric institution, were unemployed, homeless, or of Aboriginal or Torres Strait Islander descent.

TABLE 11.1 *(continued)*

Disadvantaged group	Difficulties faced when using the legal system
People with mental health issues and intellectual disabilities and their carers	• May be more likely to unknowingly behave in a manner that attracts police attention and less likely to have a positive interaction with police when approached. • Experience difficulty understanding police procedures and court processes. • Encounter police who are not adequately trained to deal with offenders experiencing mental health issues or with intellectual disabilities in an appropriate manner. • May not be aware of available support services and agencies. • May be more likely to be victims of crime and lack support to take action in situations where a carer has committed a crime against them.
Women and children experiencing family violence	• May be reluctant to report the abuse to the police because the perpetrator of the violence is a family member (and can be the sole income provider for the family), or the victim feels ashamed and to blame for the violence. • Often do not have a support network of family and friends (particularly those from CALD communities and indigenous Australians). • May lack confidence in the ability of the police and the legal system to effectively handle and resolve their dispute, and fear they will not be adequately protected and the perpetrator appropriately punished. • May be unaware of and lack confidence in available support services.
People with substance (drug and alcohol) abuse issues	• May be more likely to behave in a manner that attracts police attention and less likely to engage with police in a positive manner when approached. • May be unaware of legal processes and procedures, and lack the knowledge to access legal assistance and support services when necessary. • May participate in crime to support their addiction, thus creating a vicious cycle.

In 2009, Victorian Government research indicated that family violence affects one in five Victorian women and is the main contributing factor towards death, disability and illness in Victorian women aged 15–44 years. Over the years various campaigns such as the ENOUGH campaign and White Ribbon Day have been launched to raise awareness of Victoria's family violence laws and violence against women. It is hoped these campaigns will encourage people experiencing violence to seek legal assistance and support.

Recent changes and recommendations

Over recent years various reforms have been implemented to reduce the barriers that face particular disadvantaged groups when using the legal system and improve their access. Below is an explanation of some recent changes, as well as recommendations for change that have improved, or could improve, the ability of particular disadvantaged groups to access the legal system.

Improve police procedures, court processes and increase training

Providing greater education and training to legal personnel who deal with disadvantaged groups (including police, judges and magistrates, prosecutors, counsellors and those who provide legal aid and support services) would allow these parties to more readily recognise offenders who belong to particular disadvantaged groups and deal with them in a more appropriate manner. For example, police and prosecutors could be trained to consider a range of different factors (including social, cultural, economic, emotional and physical factors) that are relevant to an offender's circumstance so they can be treated in a more sensitive manner.

Improving court processes and procedures can also help improve the ability of disadvantaged groups to access the legal system. For example, in 2011 the Magistrates' Court suggested the state government increase the availability of court advocates and support personnel for people with intellectual disabilities who

come before the Magistrates' Court because very few currently have an advocate. Similarly, in 2011 Autism Victoria and Brain Injury Australia suggested a register be implemented that would allow people with intellectual disabilities and their carers to record their status so they could more readily access legal assistance and support services should they have dealings with the criminal justice system.

Providing greater training to police so they can communicate more effectively with offenders who have limited English skills, including those from CALD communities, indigenous Australians and individuals with intellectual disabilities, would help improve the ability of these individuals to access the legal system.

Establishment and expansion of specialised courts and lists

Over recent years the provision of specialised courts and lists within the traditional Victorian court system has been expanded to improve access to the courts for those who may belong to a disadvantaged group or have special needs by allowing specific matters to be dealt with in an informal and more efficient manner. For example, as we have seen in chapter 5 (page 197), the Magistrates' Court has a number of specialist courts and lists (including the Koori Court, the Drug Court and the Family Violence Court Division) to deal with matters where the individuals involved may belong to a particular disadvantaged group.

In 2010, the Assessment and Referral Court List (ARC) was created as a specialist court within the jurisdiction of the Magistrates' Court, to assist defendants who have a mental illness or a cognitive impairment or both who come before the court (other than offenders who are involved in serious violence or sexual assault). The court aims to assist defendants by explaining in a simplified manner their legal rights and court procedures, and by applying *therapeutic justice*, which aims to address the underlying causes of crime and rehabilitate the offender, rather than simply imposing a punishment. For example, offender's can be required to attend counselling and seek assistance from psychologists, social workers and nurses. It is, however, difficult to address many of the underlying problems faced by offenders with intellectual disabilities, such as lack of adequate housing, employment and education, without the state government providing greater funding and support in these areas.

Like other specialist courts, the ACL is also less adversarial and less formal in its approach compared to the mainstream Magistrates' Court, which helps defendants understand court proceedings and feel less intimidated. The rules of evidence and procedure are also less formal and police prosecutors wear suits rather than uniforms in an attempt to make the defendant feel more at ease.

Increase the provision of legal aid and support services

The state and federal governments currently provide funding for the provision of legal advice and assistance bodies (including Victoria Legal Aid and community legal advice centres) and specialised support services (including Beyondblue and various indigenous organisations) to disadvantaged groups. These services, however, are limited, particularly in remote and regional areas, and are generally only available to people who meet strict criteria, such as those on very low incomes. For example, in addition to the ALR, the Magistrates' Court also operates the Court Integrated Services Program (CISP) to assess the needs and provide support for those defendants with intellectual or physical disabilities and acquired brain injury. Despite the state government committing $22 million in funding to the CISP in the Melbourne, Sunshine and La Trobe Valley magistrates' courts in the 2011–12 state budget, support for the program is still lacking in regional areas.

Increase the provision of interpreters

The state government could increase funding to provide more interpreters and legal support services within Victoria Police and the court system to assist CALD communities and indigenous Australians in using the legal system.

Implement incentives to encourage those from disadvantaged groups to pursue legal careers

The state government could offer incentive schemes to educational institutions (including secondary schools and universities) and specialised organisations (such as indigenous organisations) to encourage those from disadvantaged groups (including those from CALD communities, indigenous Australians and marginalised youth) to pursue careers within the legal system (including becoming legal representatives, police officers, court officials, interpreters, magistrates and judges) to encourage greater diversity within legal personnel, and increase empathy and understanding within the legal system.

TEST your understanding

1. Explain two reasons why the following disadvantaged groups may experience difficulties in using our legal system and suggest one reform that might improve the ability of each group to access the legal system:
   (a) CALD communities
   (b) women and children experiencing family violence.
2. Explain one way court processes and procedures could be altered to improve the ability of CALD communities and indigenous Australians to access the court system.

APPLY your understanding

3. Explain two recent changes that have been implemented to improve the ability of intellectually disabled offenders and their families and carers to use the legal system.
4. Suggest two reforms that could be implemented to improve access to the legal system for one specific disadvantaged group.

11.3 Problems with the legal system: indigenous Australians have limited access

KEY CONCEPT Indigenous Australians and their communities face a range of problems and difficulties in using the legal system. Language barriers, cultural differences, and economic and social factors can limit the ability of indigenous Australians to access legal services and the court system, and reduce their likelihood of a fair hearing. While recent reforms, including the establishment of the County Koori Court, aim to improve access for indigenous Australians, more reform needs to occur.

Problems and difficulties facing indigenous Australians in using the legal system

Indigenous Australians are an example of a particular group within our society who experience specific difficulties dealing with and gaining access to the legal system, largely due the inability of the legal system to adequately recognise and respond to the cultural and language barriers that face indigenous people when using the legal system. Table 11.2 lists some of the problems limiting the ability of indigenous people to use the legal system.

TABLE 11.2 Problems limiting the ability of indigenous people to use the legal system and recommendations for change

Problems	Recommendations
Lack of culturally sensitive legal services Legal services (including legal aid and assistance services and support services, both within and outside the court system) must be more culturally sensitive; for example, taking into account family structure, traditional and spiritual practices, and relevant social circumstances (including issues relating to alcohol and drug abuse, gambling, unemployment and poor health, education and housing).	Provide education and training to legal personnel who deal with the indigenous community (including police, judges and magistrates, prosecutors, legal advice, and support services and counsellors) so they are aware of the social and cultural factors that impact upon indigenous communities and offenders and are more sensitive to their needs. Specialised training of legal personnel can improve the relationships between these bodies and indigenous people, enhance the quality of services provided and encourage indigenous people to use the legal system to resolve their disputes.
Lack of legal service in regional and isolated areas for indigenous people This lack of services can increase costs and difficulties associated with gaining transport to support services and courts and diminish access.	The state and federal governments could increase funding to legal advice and assistance bodies (such as Victoria Legal Aid and specific indigenous organisations) so more support services can be provided, especially in remote and regional areas.
Language differences In addition to cultural barriers, language difficulties can make it difficult for indigenous people to communicate with the police, government agencies and the courts, which can cause anxiety and confusion, and limit an indigenous offender's ability to access the legal system and receive a fair and unbiased hearing. For example, an indigenous person may answer 'I don't know' or 'I don't remember' in response to a question if they feel that the interviewer (who may be a police officer or prosecutor) is behaving inappropriately, despite knowing the answer to the question. Similarly, some Aboriginal speakers have a tendency to respond to various questions using *gratuitous concurrence*, meaning they will agree with a questioner in situations where they do not understand the question or do not agree with the question, but wish to establish a positive relationship with the questioner, or in cases where the questioner is viewed as a person of authority.	• Increase the availability of specialised indigenous liaison officers, translators and interpreters throughout all stages of the legal process to assist indigenous offenders and their families. For example, liaison officers could be provided at courts to help explain and familiarise indigenous offenders with court procedures, including verbal examination. • The state government could offer incentive schemes to indigenous Australians and educational institutions to encourage indigenous Australians to pursue legal careers and promote diversity in the recruitment of legal personnel (including police and court officials). • Judges and magistrates could be given the option to allow indigenous offenders and witnesses to give pre-recorded or written evidence to help minimise the chance of confusion during verbal examination and cross-examination.

(continued)

TABLE 11.2 *(continued)*

Problems	Recommendations
Reluctance to give evidence in open and public courts Language and cultural factors may combine to cause indigenous offenders to be reluctant to give evidence because they fear being judged or shamed.	Offer indigenous offenders the option of having hearings and trials conducted in closed courts.
High costs of legal services As with many disadvantaged groups, the high costs involved in seeking legal advice, assistance and representation can impede the ability of indigenous offenders to access the legal system.	Increase the provision of legal aid, assistance and support that is specifically available for indigenous offenders and make such assistance more readily available within indigenous communities (especially in remote and regional areas).

Recent changes

Improving the ability of indigenous Australians to access legal services and the court system is a difficult task. Recent reforms, including the establishment of the County Koori Court and improving the provision of legal service in remote areas, have assisted in this area, but more reform is needed.

Koori County Court

As explained in chapter 5, the first Koori Court was established as a specialised division of the Magistrates' Court in 2002 to hear and sentence indigenous Australian defendants who pleaded guilty to committing offences, other than family violence and sexual offences, that fell within the jurisdiction of the Magistrates' Court. The Koori Court was primarily introduced to increase the participation of Aboriginal (Koori) offenders, their families and community in the legal process, reduce the incidence of reoffending and reduce the overrepresentation of indigenous offenders in the prison system. The Koori Court also improves the ability of the indigenous community to access the legal system by allowing Koori elders or respected persons and a specialised Koori Court officer to participate in the court process (including offering advice to magistrates on cultural issues and the sentence being considered), as well as the defendant and their family.

By 2009–10, the Koori Court program had been expanded with the introduction of specialised Koori Court divisions at seven Magistrates' Courts throughout Victoria, including Shepparton, Broadmeadows, Warrnambool (on circuit to Portland and Hamilton), La Trobe Valley, Bairnsdale, Mildura and Swan Hill; two Children's Courts (in Melbourne and Mildura); and the Victorian County Court. The Koori County Court was established in 2008–09, on a four-year pilot program at the La Trobe Valley Courts in Gippsland, Victoria. The court, which was the first Koori Court in Australia to operate at an intermediate level, has the jurisdiction to sentence Aboriginal persons who have committed indictable offences. As with all Koori courts in Victoria it aims to offer more culturally sensitive justice to indigenous Australians and improve the ability of Aboriginal people to participate in and access the legal system, and gain a fair and unbiased hearing.

While there has been widespread support for the introduction of the Koori courts from numerous groups (including judges and magistrates, legal professionals, indigenous support services and the Law Institute of Victoria), the scheme has had it critics, with some legal commentators and professionals arguing that all offenders should be treated equally and therefore be subject to the same court processes and procedures, irrespective of their cultural, economic or social circumstances. In 2011, while praising the achievements of specialised courts such as the Koori courts (and Neighbourhood Justice Centre), the Victorian Attorney-General, Mr Robert Clarke, stated that he might like to see the key features of these specialised courts incorporated into the traditional court system rather than having specialised courts that operate only in certain areas for specific groups. His comments do raise

DID YOU KNOW?

Indigenous Aboriginal people are 14 times more likely to be imprisoned than other members of the community and, despite representing less than 3 per cent of the total population in Australia, represent nearly 30 per cent of Australia's prison population.

the question as to whether it is fair that residents in Gippsland, for example, have access to the Koori County Court when residents in other indigenous communities do not. The expansion of specialised courts, however, may help improve access for disadvantaged groups more effectively than trying to incorporate the key features of specialised courts within the traditional court system. In 2012 County Court judge John Smallwood, who has worked extensively in the Koori County Court, praised its success and called for an expansion of the program into Shepparton and Mildura.

The Robyn Bella Kina case

After a trial that took less than one day, a Queensland Supreme Court jury convicted Robyn Bella Kina of the 1987 murder of her de facto partner, Anthony Black. Ms Kina refused to testify during her trial and was sentenced to life imprisonment. Unfortunately, Ms Kina's defence team had limited experience and competence in dealing with bicultural matters and did not make any effort to effectively communicate with her at pre-trial stages. As a result, the court never heard significant evidence of Ms Kina's long-term, severe abuse at the hands of the deceased. Quoted in the *Aboriginal Law Bulletin* (1994), Ms Kina said:

My own reasons for not wanting to give evidence were that I was scared, shy and embarrassed. I found it hard to talk and I was unable to speak out about the threat to [Ms Kina's niece] and what I had said seemed to be irrelevant to my legal representatives so I just did what they suggested.

At the appeal hearing, Dr Eades (a linguistics expert) gave evidence and stated that:

> . . . the manner in which information has emerged in Robyn's story is totally consistent with her Aboriginality . . . even though this may seem extraordinary to a non-Aboriginal person . . . given her limited 'bicultural competence' at the time of the killing and her trial, the appellant would have been unlikely to reveal sensitive or significant information unless a person communicated with her in the Aboriginal way, which does not involve direct questions . . . the extent of the information which she would have been willing to provide would have been affected by the degree of trust which she felt in the person with whom she was speaking; her sense of family responsibility would have obstructed her ability or willingness to involve her niece.

Ms Kina was eventually pardoned for the murder. The evidence given by Dr Eades in this case has been significant in shifting attitudes towards the questioning of indigenous people, which has involved cross-cultural training for all people involved in the legal system.

TEST your understanding

1 Outline the key facts in the case of Robyn Bella Kina. In your response outline:
   (a) the charges she faced
   (b) the outcome of the trial
   (c) the nature of the expert evidence given at the appeal hearing regarding Aboriginal English and cultural traits, and the role that it played in her eventual release.

2 Read the case study 'Indigenous man Tasered 13 times while in custody' (page 407) and complete the following questions.
   (a) Explain why Mr Kevin Spratt was Tasered by the police while being detained in custody.
   (b) Despite believing he was innocent, why may have Mr Spratt pleaded guilty to the charge of obstructing the police?
   (c) Suggest two reasons why indigenous Australians are more likely to be imprisoned compared to non-indigenous people.
   (d) Explain three problems facing indigenous Australians that limit their ability to access the legal system or receive a fair hearing. Suggest one recommendation for change to the legal system that may help alleviate each problem.

APPLY your understanding

3 Explain why the County Koori Court has been established and discuss whether or not specialist courts, such as the Koori Court, should be incorporated into the traditional court system.

EXTEND AND APPLY YOUR KNOWLEDGE: Problems faced by indigenous Australians in using the legal system

While the legal system aims to ensure all individuals are able to access the system and receive a fair and unbiased hearing, particular groups, including indigenous Australians, face specific problems when trying to access the legal system. Read the case studies below and apply your knowledge to evaluate the extent to which legal processes and procedures contribute to an effective legal system.

Case study one: the *Ryder Case*

In July 2009, Kwementyaye Ryder, a 33-year-old indigenous man, died after being viciously attacked by five non-indigenous men and left on the side of a road without assistance. Prior to the attack, the five men, who had been drinking for 12 hours, had recklessly driven their utility through two Aboriginal camps, narrowly missing an elderly man and harassing members of the Aboriginal community. Later the men pursued and severely bashed Mr Ryder after he threw a bottle at their passing vehicle. The attack appeared to be racially motivated and the case caused great division in the local Alice Springs community.

An indigenous man died after being viciously attacked by five white men and left alone on a roadside. A Supreme Court Chief Justice found the assault to be in part racially motivated and sentenced each of the five men to imprisonment, although some members of the community felt their sentences were too lenient.

In April 2010, all five men were sentenced to terms of imprisonment after pleading guilty to manslaughter, but there was much controversy surrounding their sentences, which many perceived as being too lenient. Anton Kloeden (the driver), Timothy Hird and Joshua Spears were each sentenced to six years imprisonment with a non-parole period of four years, while Glen Swain received a slightly lesser sentence of five and a half years imprisonment with a minimum of three and a half years to be served before being eligible for release. Scott Doody received four years imprisonment to be suspended after serving 12 months.

When sentencing the five men, Chief Justice Martin acknowledged that the Ryder Case had caused serious friction within the Alice Springs community because many suspected the attack on Mr Ryder was a direct result of racism. In fact Chief Justice Martin agreed Mr Ryder's death was partially racially motivated — a factor he considered when sentencing. Other factors Chief Justice Martin considered when determining appropriate sentences for the offenders included their guilty plea, general lack of previous convictions and apparent remorse. He also considered the victim impact statement given by Mr Ryder's mother and the fact that prior to the assault the offenders had driven through the Aboriginal community living in the Todd River bed with reckless intent.

In an unusual step, Chief Justice Martin allowed cameras into the courtroom to record his sentencing statement in an attempt to ensure transparency in the sentencing process and a fair hearing.

While awaiting their sentence the five men were held in protective custody in prison to protect their safety. The Alice Springs prison is comprised of approximately 80 per cent indigenous people and revenge attacks were feared.

Three months after Chief Justice Martin sentenced the five offenders, Ms Bev Manton, Chairwoman of the New South Wales Aboriginal Land Council, demanded the Northern Territory Director of Public Prosecutions appeal against the leniency of the sentences. In a statement to the media Ms Manton expressed her dissatisfaction with the outcome. She suggested that most Australians would be appalled by the 'grossly inadequate' sentences and would understand Mr Ryder's death was an act of 'racism, pure and simple'.

eBookplus

Use the ***Ryder Case*** weblink in your eBookPLUS and read the program transcript of Liz Jackson's report about the murder of Kwementyaye Ryder, 'A dog act', first broadcast 29 July 2010 on *Four Corners*.

Case study two: the *Condren Case*

In spite of significant defence evidence, Kelvin Condren was found guilty of murdering a woman at Mt Isa in 1983 (*The Queen v. Condren* 28 ACrimR). Another man had confessed to the killing and there was compelling evidence that Condren was sitting, drunk, in a police cell when the murder occurred. Condren spent seven years in prison before being cleared of the murder and offered $400 000 in compensation. Condren argued that he was *verballed* by police, which means that they themselves wrote the confession and, under duress, Condren was forced to sign it. The focus of Condren's appeal was expert evidence from Dr Diana Eades, who examined the record of interview that Condren allegedly gave to police.

Reforms to improve indigenous access not implemented

In 2011, 20 years after the Federal government set up a royal commission into Aboriginal deaths in custody to investigate the causes of deaths of indigenous Aboriginals held in Australian prisons, Ms Bev Manton (the chairperson of the New South Wales Aboriginal Land Council) expressed disappointment that the majority of the 330 recommendations made by the royal commission to improve the way in which the Australian legal system dealt with Aboriginal offenders had not been implemented. Ms Manton called for state and federal governments to introduce legal reforms, including implementing and expanding the use of diversion, education, training, health and rehabilitation programs, and provision of culturally appropriate counselling and support services for indigenous people to improve their access to the legal system and ensure they receive a fair and unbiased hearing when dealing with the criminal justice system.

eBook*plus*

eLesson:

Audio:
Coroner's report into Aboriginal deaths in custody

The recommendations made in the 1991 royal commission into Aboriginal deaths in custody come under investigation and we look at how many of these have been actually carried out more than 20 years later.

Searchlight ID: aud-0009

QUESTIONS

Read the case study '*The Ryder Case*' and answer the following questions.

1. Explain the main difference between the charge of murder and manslaughter. Suggest reasons why the five offenders pleaded guilty to manslaughter.
2. (a) What step did Chief Justice Martin take when sentencing to try to ensure a fair and transparent hearing?
   (b) Suggest five factors the judge may have considered when determining the sentences of the five offenders and discuss whether you believe the sentences imposed were too lenient.
3. Read the case study 'The *Condren Case*' and answer the following questions.
   (a) Explain the facts of the *Condren Case*.
   (b) Explain how language barriers experienced by indigenous Australians can reduce their ability to receive a fair and unbiased hearing when engaging with the police and during trial.
4. Explain one recent change and one recommendation for change designed to improve the effectiveness of the legal system in regard to the way it deals with Aboriginal offenders and the indigenous community.
5. Use your eBook plus to listen to the audio *Coroner's report into Aboriginal deaths in custody* and complete the accompanying eLesson worksheet.

11.4 Problems with the legal system: delays

KEY CONCEPT An effective legal system must aim to resolve disputes within a reasonable time frame because excessive delays can increase the cost of legal proceedings and impose hardship on parties and witnesses. Improving court processes and procedures and increasing resources may reduce delays in the legal system.

Delays in civil cases sometimes impact heavily on family members and can be even worse if illness is involved. Rolah McCabe died of cancer after suing a tobacco company; her children had to attend appeal hearings after their mother's death (*McCabe v. British American Tobacco* [2002] VSC 73). In cases where the plaintiff has a terminal illness, matters must be expedited in the interests of justice.

An effective legal system must resolve disputes in a timely manner so that the parties involved do not incur the unnecessary cost and anxiety caused by delays, and individuals are not deterred from using the court system to resolve their legal disputes and pursue their rights. Indeed, the Victorian Charter of Human Rights and Responsibilities, which formally recognises and protects the freedoms, rights and responsibilities of all Victorians, specifically states that Victorians who are charged with a criminal offence must be tried without reasonable delay. Despite this guarantee, research undertaken by the Productivity Commission in 2010 suggested that the Victorian legal system was the slowest in Australia, with criminal trials often experiencing delays of up to two years.

Causes of delays

While some cases may be delayed due to unavoidable circumstances such as the illness or disability of the parties, key witnesses or a member of the jury, or due to the complexity of the evidence or severity of the dispute, many cases experience delays due to overly complex legal processes and procedures (which exist at the pre-trial and trial stages of both criminal and civil proceedings), and a lack of resources (including a lack of forensic testing facilities, police, court resources and infrastructure).

Causes of delays in civil cases

Let's now look at the causes of delay in civil cases.

The nature of civil claims

Some civil cases experience delays due to the nature of the claim and the type of evidence required by a plaintiff to succeed in the action. For example, in some negligence cases, plaintiffs must wait many months or years until the full extent of their injury or loss has become apparent before they can establish sufficient evidence to prove their claim. This problem occurred in the mid-2000s when hundreds of potential plaintiffs who wished to sue James Hardie Industries after contracting a brutal disease from exposure to asbestos had to wait several years for their illnesses to reach its most severe before being able to sue the company for negligence.

Complex civil pre-trial procedures

Complex civil pre-trial procedures, including *pleadings* and *discovery,* can increase the time it takes to resolve a legal dispute and cause delays. For example, discovery may take many months or even years in complex cases because parties may exchange thousands of documents in an attempt to ascertain vital evidence. Some parties might even use discovery to deliberately stall proceedings in an attempt to frustrate the opposing party and place them under financial pressure. Reforms have been implemented in recent years, however, to place time limits on and restrict the type of discovery that can be requested (see page 423).

The adversarial nature of civil trials

While various reforms have been implemented over recent years to encourage parties to resolve their civil disputes prior to trial (see page 423), many civil cases

are still resolved at trial using the adversarial approach, where strict and complex rules of evidence and procedure govern proceedings and may contribute to delays. For example, the heavy reliance on verbal evidence and the inability of witnesses to give evidence in their own words can increase the time it takes for witnesses to give their testimony and cause delays. Similarly, the inability of the judge to call for evidence and call and question witnesses under the adversary system of trial, might also increase the length of both civil and criminal trials.

A lack of resources

Despite various reforms being introduced to deal with civil disputes in a more timely manner — including a more efficient use of technology to assist case management (see page 424) — a lack of government funding for judicial appointments, legal aid and court infrastructure upgrades continue to contribute to delays in Victoria's civil justice system. In 2012 Chief Justice Marilyn Warren commented that some courts were so run down they were not only inefficient but compromised safety. For example, the fragmented location of Supreme Court services, including judges' chambers being located in different areas and associate judges being accommodated outside the main court complex, caused delays and contributed to inefficiencies.

Causes of delays in criminal cases

Let's now look at the causes of delays in criminal cases.

Criminal pre-trial processes

Some criminal pre-trial processes can increase the time it takes to resolve a criminal case and cause delays. For example, while *committal hearings* aim to assist a timely resolution of disputes by ensuring cases with little chance of success do not proceed to trial, and allowing full disclosure of the prosecution's case, which may prompt an early guilty plea, it can be argued that they are a costly and time consuming process that unnecessarily increases the workload of the Magistrates' Court. Indeed, in 2008 the former Victorian Director of Public Prosecutions (DPP), Mr Jeremy Rapke QC, suggested that committal hearings be abolished because they no longer served their purpose. Very few cases are dismissed at the committal stage and even if cases are dismissed, the DPP can override the magistrate's decision and send the case to trial. In addition, a substantial amount of defendants who are committed to stand trial are ultimately acquitted due to insufficient evidence. Committal hearings not only commonly add six to twelve months delay to the commencement of a trial, but also increase the defendant's legal costs.

Criminal cases can also be delayed if police encounter problems when conducting their criminal investigations. For example, investigations can be time consuming if suspects and witnesses are reluctant to assist the police with their investigations, or if victims are slow to report crime allowing crime scenes to become contaminated and potential evidence to be lost. Limited forensic testing facilities can also cause delays.

DID YOU KNOW?

Committal hearings significantly add to the workload of the Magistrates' Court of Victoria. For example in 2009–10, 2800 committal proceedings were finalised in this court.

Criminal trial procedures

As explained earlier, the adversarial nature of trials, including the existence of strict rules of evidence and procedure, can cause delays. For example, as with civil trials, the heavy reliance on verbal evidence, including the thorough examination of witnesses, can increase the length of a criminal trial. Similarly, the inability of the judge to call for evidence, call and question witnesses, and assist a self-represented accused with the presentation of their case can increase the length of a trial.

The use of a jury to determine the verdict in criminal trials can also increase the length of a trial and cause delays. For example, the empanelment process, in which the accused and the prosecution are able to challenge and stand aside prospective jurors

respectively, and the need for the judge to explain points of law to the jury, increases the length of a trial. The requirement of a unanimous verdict for the most serious indictable offences, including murder and attempted murder, may also cause delays.

Increasing caseloads and complexity of cases

DID YOU KNOW?

In 2009–10, 30 506 matters were waiting to be heard in the Magistrates' Court, an increase from 26 633 in 2003. Of these, 8.4 per cent of cases had been waiting more than 12 months.

Increasing caseloads remains a significant problem facing the court system, causing delays and placing pressure on court resources. For example, between 2006–07 and 2009–10 the Magistrates' Court of Victoria saw a significant increase in its criminal caseload, including a 22 per cent increase in family violence matters and a 35 per cent increase in the total amount of criminal cases finalised in the court. Similarly, the number of criminal appeal cases being heard by the courts continues to rise. For example, in 2009–10 the number of criminal appeal finalisations in the Victorian Supreme Court of Appeal increased by 12 per cent on the previous year, with 506 cases being finalised in 2009–10 compared to 452 the previous year. This increase was in part due to reforms of sexual offences laws, which have increased the workload of the County Court with a subsequent flow-on of appeals to the Supreme Court of Appeal. On average an appeal in the Supreme Court of Appeal takes approximately 10.5 months to resolve.

In addition to increasing caseloads, there has been an increase in the complexity of matters coming before the courts (especially the Magistrates' Court), which has increased the time it takes to resolve a case.

A lack of resources

A lack of resources remains a significant problem facing the criminal justice system as rising caseloads place pressure on already overcrowded and understaffed courts, particularly in regional courts, and increase delays. For example, while the number of intervention orders heard by the Dandenong Magistrates' Court (which hears the most intervention orders in the state) increased by one third between 2007 and 2011, the court still does not have family violence specialist services. In 2012, county and supreme courts repeated their call for the provision of more judges and infrastructure upgrades to help reduce delays.

The impact of delays

As mentioned in chapter 6 (see page 249), delays in the hearing of cases can impact upon all those involved in the legal process and limit the effectiveness of the legal system. For example, delays can:

- increase the cost associated with taking a case to court, and deter individuals from accessing the court system and pursuing their rights.
- cause emotional stress and hardship for parties. For example, defendants who have been denied bail who are subsequently acquitted suffer the loss of their freedom and can endure great economic and emotional hardship.
- reduce the reliability of witness testimonies if they are unable to accurately recall past events while under examination by legal counsel.

TEST your understanding

1 Explain **two** circumstances in which delays may actually be necessary in the hearing of criminal cases and civil disputes.
2 Outline **two** factors that cause delays in both civil disputes and criminal cases.

APPLY your understanding

3 Suggest reasons why it is essential that both civil and criminal disputes be resolved in a timely manner.
4 Suggest two changes to criminal processes that might lead to the timely resolution of disputes.

11.5 Recent changes and recommendations to reduce delays

KEY CONCEPT Over recent years various reforms have been implemented to try to reduce delays associated with court processes and procedures and assist a more timely resolution of disputes, including making more efficient use of technology, expanding the use of alternative (or appropriate) methods of dispute resolution within the court system and offering greater assistance to self-represented litigants. Despite these reforms, delays are still experienced in many cases and further reform is needed.

Recent changes to reduce delays

Let's now examine recent changes to reduce delays in our legal system.

Increased use of ADR within the court system

Over recent years changes have been implemented to encourage greater use of alternative (or appropriate) methods of dispute resolution (ADR) in the Victorian county, supreme and magistrates' courts in an attempt to resolve civil cases prior to trial and reduce delays. Indeed, the Victorian Government committed to spending $17.8 million between 2008–09 to 2012–13 to enhance the use of ADR in the Victorian court system. By 2010 funding had been used to provide judge-led mediation, ADR coordinators and increase the use of case conferences to resolve disputes prior to trial in the county and supreme courts. Similarly, by 2011 the Supreme Court expanded the role of associate judges to include conducting trial work and mediations.

The use of mediation in the Magistrates' Court has also been expanded since the introduction of a court-annexed mediation pilot in Broadmeadows Magistrates' Court in 2007. Under this scheme all civil disputes at the court of less than $40 000 were referred to the Dispute Settlement Centre of Victoria (DSCV) for mediation. The scheme was a success, assisting the court to reduce its civil waiting times from four to two months, and from 2009 to 2011 the program was expanded to the La Trobe Valley, Sunshine, Werribee and Ballarat magistrates' courts.

DID YOU KNOW?

In its 2010–11 annual report, the Magistrates' Court of Victoria claimed the introduction of the court-annexed mediation scheme had been outstandingly successful, with approximately 84 per cent of the disputes referred to mediation at the Broadmeadows Magistrates' Court being successfully resolved.

Improved court processes and procedures

Over recent years, various changes have been made to civil and criminal court procedures in an attempt to minimise delays.

For example, in 2011, after the commencement of the *Civil Procedure Act 2010* (Vic.) significant changes were made to modernise and simplify civil processes and procedures in Victorian courts and tribunals, and provide a degree of uniformity in an attempt to reduce delays and improve access to the civil justice system. Changes included increasing the role of the courts in case management, allowing the courts to impose stricter time limits on discovery and greater penalties for those who deliberately stalled discovery, and increasing the role of the court in facilitating the resolution of disputes prior to trial through the greater use of ADR (including mediation).

The Civil Procedure Act also imposed new pre-litigation requirements on parties in an attempt to resolve civil disputes prior to court proceedings being initiated. For example, parties must now undertake reasonable action, including exchanging appropriate pre-litigation information and documents, and genuinely attempt to resolve their dispute through negotiation or ADR prior to litigation commencing.

DID YOU KNOW?

In 2010–11, the Magistrates' Court of Victoria finalised 6563 defended civil claims. Of these, 2189 were finalised at a pre-hearing conference or mediation, 2100 at a court hearing and 2274 at arbitration.

Similarly, from 2009–10, the Supreme Court introduced a new case management system that has reduced waiting times for criminal appeals by identifying the grounds of appeal more quickly. The court has also increased the use of two-judge sentence appeals and now allows judgements to be verbally conveyed, rather than in written form, to help speed up the appeal process. The introduction of a self-represented litigants' coordinator to help assist self-represented parties has also aimed to help resolve disputes more quickly in this court.

In 2009 the Victorian Government passed the Criminal Procedure Act to simplify and modernise criminal procedures. One change that was implemented was the imposition of time restraints on various criminal pre-trial processes. For example, trials must generally be held within three months of an accused being committed to stand trial.

More efficient use of technology

As explained on page 410, over recent years courts and tribunals have made more efficient use of technology to provide for the electronic filing, storage and exchange of documents between parties and the courts and tribunals. For example, the Integrated Court Management System was introduced in the Supreme Court in 2009–10 to help reduce delays be providing electronic filing for legal counsel and a recording system for court data.

Manual filing systems such as this one are inefficient. In 2011, the Victorian Magistrates' Court commenced using the Electronic Filing Appearance System to assist in the management of court lists and save time by allowing legal practitioners to electronically file an appearance, rather than physically attending a counter.

Introduction of the sentence indication scheme

In 2010 the sentence indication scheme was permanently introduced to allow judges in criminal cases to indicate to defendants the likely sentence they would receive if convicted in an attempt to encourage defendants to enter an early guilty plea and in turn receive a sentencing discount or reduction in their sentence. The scheme aims to reduce the number of cases going to trial and allows other cases to proceed more quickly.

Increase types of offences to receive infringement notices

In 2011, the Victorian Government passed the *Justice Legislation Amendment (Infringement Offences) Act 2011* (Vic.) to increase the use of infringement notices

(fines) in an attempt to reduce the number of hearings for summary offences in the Magistrates' Court and reduce pressure on court resources. Allowing police to issue fines deals with matters in a more efficient manner.

Infringement notices can now be issued by police for a range of more complex summary offences, including offensive behaviour, wilful damage of up to $500, shop theft of up to $600 and a range of alcohol-related offences such as consuming, supplying or possessing liquor on unlicensed premises.

Recommendations to reduce delays

Over recent years a range of recommendations have been made to help minimise delays associated with undertaking court action, including allowing judges to impose time limits on the questioning of witnesses in court, providing more courts (particularly in regional areas) with increased sitting hours, increasing judicial appointments, and making more efficient use of technology for the storage and transfer of legal documents and case management.

Adapt the strict rules of evidence and procedure

As examined in chapter 7 (page 265), the strict rules of evidence and procedure in the adversary system of trial could be modified in the following ways in an attempt to reduce delays associated with taking a case to court, improve access to the legal system by reducing the cost and stress of litigation, and assist the achievement of a fair and unbiased trial:

- allow a greater use of written evidence (particularly from expert witnesses) to reduce the time and cost involved in having witnesses attend court and give evidence. It is difficult to assess the reliability of written evidence, however, because it cannot be cross-examined.
- allow judges to impose time limits on the questioning of witnesses in court (the Victorian government is currently implementing this reform in civil cases).
- expand the role of the judge to allow them to call and question witnesses and assist self-represented parties with the presentation of their case, which may decrease delays and assist a fair hearing.

Further increase judicial appointments and infrastructure spending

Despite recent improvements in infrastructure spending, the court system remains underfunded and could be improved with the appointment of more judges and court personnel. For example, the County Court needs more judges to reduce the growing backlog of cases caused by the increasing complexity of cases and increase in sexual offence trials. Increased court infrastructure could also allow the provision of more court sittings in regional areas and allow courts to hear cases outside traditional operating hours; for example, on Saturday mornings.

Abolish committal hearings

As mentioned on page 421, an argument can be made to support the abolition of committal hearings. Abolishing committal hearings and sending an accused directly to trial would decrease the time it takes for criminal cases to proceed to trial and reduce the workload of the Magistrates' Court and legal counsel who prepare for such hearings. Committal hearings allow for full disclosure of the prosecution's case, however, which may prompt an early guilty plea and help ensure the prosecution has sufficient evidence against an accused to proceed to trial.

A lack of forensic testing facilities has contributed to many cases being delayed in the magistrates' and county courts, particularly in drug-related cases where it can take up to 12 months for evidence to be tested.

Increase police and forensic testing facilities

Increasing the number of police available for criminal investigations and the amount of forensic testing facilities would reduce delays currently experienced in these areas.

Reform the jury system

Victoria is the only state in Australia that allows the optional use of juries in civil trials. The empanelment process and jury directions all take time during trial, so abolishing the use of a jury in civil trials could reduce the length of trials. Similarly, the compulsory use of a jury of 12 to determine the verdict in criminal trials may cause delays, so the abolition of the jury or the introduction of majority verdicts (11 jurors in agreement with the verdict) in all criminal cases may reduce delays, although these reforms are controversial. See chapter 10 (page 389) for a detailed explanation of these reforms.

Appointment of special masters to assist the civil pre-trial stage

The Victorian Law Reform Commission's (VLRC) 2008 *Civil justice review* recommended that judicial officers or senior legal practitioners be appointed by the court to act as 'special masters' to provide assistance and support to parties involved in complex cases during the discovery stage. The special masters would have expert legal knowledge to assist with case management by helping resolve any issues that arise between the parties during the discovery stage, and investigate and report to the court on any issue in relation to discovery. This reform may help to speed up the discovery stage in complex cases; however, the cost of engaging special masters would most likely be borne by the parties.

Introduce an Office of Self-represented Litigants

In addition to having a self-represented litigants' coordinator in the Supreme Court, an Office of Self-represented Litigants could be created to improve support for self-represented parties at all courts by providing legal advice and assistance to those unable to afford legal representation.

TEST your understanding

1. Explain how using mediation to resolve civil disputes can assist a more timely resolution of disputes. In your answer explain two recent changes in the legal system designed to increase the use of mediation in the Victorian court system.
2. Explain two recent changes to civil or criminal procedures that minimised delays in the court system.

APPLY your understanding

3. Suggest and explain two changes that could be made to the adversary system to help resolve trials in a more timely manner.
4. Upon leaving the courtroom after sitting on a criminal jury for six weeks, a juror commented that 'juries were a waste of time'. Discuss whether or not criminal juries should be abolished in preference to having a single judge determine the verdict in a criminal case. An evaluation of the jury system is provided in chapter 10 (pages 383–4)

11.6 Recent changes and recommendations to the civil justice system

KEY CONCEPT While civil procedures aim to assist a fair and unbiased hearing and prompt early settlement of disputes, resolving a civil dispute through the court system can be confusing, expensive and time consuming. Over recent years reforms have been introduced, and recommendations made, to enhance the effective operation of the civil justice system, including the increased use of mediation to resolve disputes, the implementation of more effective and simplified civil procedures, and the more effective use of technology in case management.

Recent changes to improve the effectiveness of the civil justice system

Table 11.3 summarises some of the major recent changes implemented to help increase an individual's access to the civil justice system and ensure civil disputes are resolved in a more cost-effective and timely manner.

TABLE 11.3 Major recent changes to improve the effectiveness of the civil justice system

Recent change	Explanation of recent change	Elements of an effective legal system that this recent change seeks to redress
Increased use of ADR (particularly mediation) within the court system	As explained on page 423, changes to increase the use of ADR, particularly mediation, to resolve civil disputes in the courts include an: • increased use of judge-led mediation, court ADR coordinators and case conferences to resolve disputes prior to trial in the county and supreme courts • expansion of the court-annexed mediation pilot program in the Magistrates' Court, allowing civil disputes under $40 000 to be resolved by mediation.	• Effective access to the legal system • Timely resolution of disputes • Entitlement to a fair and unbiased hearing
Improved court processes and procedures	As explained on page 423, changes implemented under the Civil Procedure Act include: • increasing the role of the courts in case management • imposing strict time limits on discovery and greater penalties for those who breach these limits • increasing the role of the court in facilitating the resolution of disputes prior to trial through the greater use of ADR methods and the imposition of pre-litigation requirements on parties.	• Effective access to the legal system • Timely resolution of disputes • Entitlement to a fair and unbiased hearing
More efficient use of technology	As explained on page 410, over recent years VCAT and the courts have made more efficient use of technology to provide for the electronic filing, storage and exchange of documents between parties and the courts and tribunals. For example, the Integrated Court Management System (ICMS) that provides electronic filing for legal counsel and a recording system for court data is being introduced in all Victorian courts and VCAT.	• Timely resolution of disputes • Effective access to the legal system
The expansion of VCAT and the introduction of the Neighbourhood Justice Centre (NJC)	VCAT constantly introduces reforms to deal more effectively with civil disputes. The introduction of community courts like the NJC allows minor civil and criminal matters to be resolved in an informal manner and supportive environment, and offers a variety of support services (including mediation) to residents and businesses within its local community. See chapter 5 (page 199) for a detailed explanation.	• Effective access to the legal system • Timely resolution of disputes • Entitlement to a fair and unbiased hearing

Lengthy legal battles can mean huge legal costs. The lengthy legal battles of One.Tel founder Jodee Rich highlighted the need to streamline cases (*ASIC v. Rich* [2004] NSWSC 467). Legal representation for Rich, his co-accused and government agencies throughout ongoing civil disputes is estimated to have cost over $5 million.

DID YOU KNOW?

The Department of Justice has set up a website about dispute resolution, designed to provide information about ADR and how disputes can be resolved without going to court.

Recommendations to improve the effectiveness of the civil justice system

Table 11.4 summarises some of the main recommendations for change in the civil justice system to improve access and resolve civil disputes in a more cost-effective and timely manner.

TABLE 11.4 Main recommendations for change in the civil justice system

Recommendation for change	Explanation of recommendation	Elements of an effective legal system this recommendation seeks to redress
Increase state and federal government funding to legal aid and assistance agencies.	As mentioned on page 409, Victoria Legal Aid wants increased funding to provide greater assistance and representation to individuals involved in civil actions, particularly those who live in regional areas and disadvantaged groups.	• Effective access to the legal system • Entitlement to a fair and unbiased hearing • Timely resolution of disputes
Expand the use of mediation and other types of dispute settlement within the court system.	As explained on page 423, civil disputes could be resolved more effectively by expanding the use of mediation and other types of dispute settlement, including conciliation, arbitration and collaborative law (where parties and their legal representatives discuss and resolve their civil disputes rather than going to court).	• Effective access to the legal system • Timely resolution of disputes
Create a Civil Justice Council.	As recommended by the VLRC in their *Civil justice review (2008)*, a Civil Justice Council could be created to monitor the performance of the civil courts. This body would have ongoing statutory responsibility for review and reform of the civil justice system, including measuring the impact of reforms. It would also report to parliament on issues needing to be addressed.	• Entitlement to a fair and unbiased hearing • Effective access to the legal system • Timely resolution of disputes
Create an Office of Self-represented Litigants.	As recommended in the VLRC's *Civil justice review* 2008 and outlined on page 426, an Office of Self-represented Litigants could provide information and assistance to litigants in all Victorian courts who are unable to afford legal representation.	• Effective access to the legal system • Timely resolution of disputes • Entitlement to a fair and unbiased hearing

Recommendation for change	Explanation of recommendation	Elements of an effective legal system this recommendation seeks to redress
Appointment of special masters to assist the civil pre-trial stage	As explained on page 426, the VLRC's *Civil justice review* recommended judicial officers or senior legal practitioners be appointed by the court to act as special masters to provide assistance and support to parties involved in complex cases during the discovery stage.	• Timely resolution of disputes • Entitlement to a fair and unbiased hearing
Improved court processes and procedures	As recommended in the VLRC's *Civil justice review*, civil court procedures could be further enhanced by: • requiring parties to seek directions from the court before called expert evidence • restricting evidence to that which is reasonably necessary and avoiding unnecessary costs associated with expert witnesses; for example, allowing only one expert to give evidence where appropriate rather than several • requiring the duties of expert witnesses to be declared.	Timely resolution of disputes

eBookplus

Use the **Department of Justice dispute resolution** weblink in your eBookPLUS to learn more about ADR.

TEST your understanding

1 Explain the benefits to the parties and the legal system of using mediation to resolve serious civil disputes.

2 Explain two recommendations made by the VLRC in its *Civil justice review* to improve civil processes and procedures and explain how each might increase the effectiveness of the legal system.

APPLY your understanding

3 'It is clear that the adversary system is not the ideal means of settling significant civil disputes that would have traditionally proceeded to the county and supreme courts. Recent history shows that even appeal cases might best be settled through mediation. In many ways, the adversary system is a dinosaur; it is too complex and does not allow for efficient justice.'

Evaluate this statement with reference to the use of alternative dispute resolution in all Victorian courts.

4 Draw up the following table in your book and fill it out.

Problem	Reform or recommendation	Elements of an effective legal system this reform or recommendation seeks to address
1		
2		
3		
4		

11.7 Recent changes and recommendations to enhance the criminal justice system

KEY CONCEPT Over recent years the Victorian Government has introduced various reforms to enhance the effective operation of the criminal justice system, including simplifying and modernising criminal processes and procedures, expanding the use of specialised courts and amending sentencing laws. Various law reform bodies, legal agencies and community groups have also suggested recommendations for change in an attempt to improve criminal processes and procedures.

Recent changes to improve the effectiveness of the criminal justice system

Table 11.5 summarises some of the major recent changes that have been implemented to improve the effectiveness of the criminal justice system and help ensure individuals involved in criminal cases have access to legal advice and representation, receive a fair and unbiased hearing, and have their case resolved at the earliest possible stage.

TABLE 11.5 Major recent changes to improve the effectiveness of the criminal justice system

Recent change	Explanation of recent change	Elements of an effective legal system this recent change seeks to redress
The expansion of specialised courts to deal with particular types of offences and offenders with specific needs	As explained on page 413, in recent years the provision of specialised courts and lists within the traditional Victorian court system has been expanded to improve access to the courts for those who may belong to a disadvantaged group or have special needs. For example, Koori Court programs now exist at several Magistrates' Courts and the County Court. In 2010, the Assessment and Referral Court List was created as a specialist Magistrates' Court to assist defendant's who have a mental illness or a cognitive impairment, or both, by applying therapeutic justice.	• Effective access to the legal system • Timely resolution of disputes • Entitlement to a fair and unbiased hearing
Expansion of the infringement notice system	As explained on page 425, in 2011 the Victorian Government increased the use of infringement notices in an attempt to reduce the number of hearings for summary offences in the Magistrates' Court and reduce pressure on court resources.	Timely resolution of disputes
Introduction of the Sentencing Indication Scheme for criminal offences	As explained on page 424, in 2010 the Victorian Government permanently implemented the *sentence indication scheme* to allow judges to specify to defendants what sentence they would most likely receive should they be convicted of their charges in an effort to promote defendants to enter an early guilty plea.	• Timely resolution of disputes • Entitlement to a fair and unbiased hearing
Introduction of new bail processes and procedures	In 2010, the Victorian Parliament passed *The Bail Amendment Act 2010* to reform Victoria's bail system. The main aim of the act, which came into operation in 2011, was to make the bail system more fair by simplifying processes and implementing a range of new procedures, including new provisions for indigenous Australians seeking bail, imposing bail conditions, administering surety conditions and applications for the variation of bail conditions. One significant change that has been introduced is that any relevant cultural issues must now be considered when determining bail for indigenous Australians. For example, those who determine bail applications (such as magistrates and bail justices) for indigenous Australians must now take into account the applicant's cultural background and relationship with extended family or places when deciding issues such as whether or not to grant or extend bail and whether or not an Aboriginal person has a reasonable excuse for breaching their bail conditions or failing to attend a bail hearing. Written reasons for the refusal of bail must also now be given to the accused and prosecution in every case.	• Entitlement to a fair and unbiased hearing • Effective access to the legal system

Recent change	Explanation of recent change	Elements of an effective legal system this recent change seeks to redress
Suspended sentences abolished	In 2011, with the passing of the *Sentencing Further Amendment Act 2011* (Vic.) the Victorian Government abolished the use of suspended sentences in the county and supreme courts for serious offences including murder, armed robbery and commercial drug trafficking in an attempt to ensure victims and their families and the community feel those convicted of such crimes receive a fair and adequate sentence.	Entitlement to a fair and unbiased hearing
More efficient use of technology	As explained on page 424, both civil and criminal courts have made more efficient use of technology by implementing the ICMS to provide for the electronic filing and storage of documents and more effective case management. Criminal trials have also been enhanced with the improved use of closed-circuit televisions for witness evidence and improved video conferencing facilities.	• Effective access to the legal system • Timely resolution of disputes
Expansion of the Youth Justice Group Conferencing program	In 2012 the Victorian Government began expanding the Youth Justice Group Conferencing program (introduced in 2001) after announcing a $5.1 million funding boost to enable an additional 650 young offenders to enter the program between 2012–16. The YJGC program encourages youth to make amends to their victims and the community for their crime by meeting with their victims, families, police and members of community support services to discuss their punishment. The program encourages young offenders to take responsibility for the their actions and reduce their likelihood of reoffending.	• Entitlement to a fair and unbiased hearing • Effective access to the legal system

Recommendations to improve the effectiveness of the criminal justice system

For many years, various Victorian governments have engaged the services of law reform bodies to advise on reform of the criminal justice system. Table 11.6 summarises some of the main recommendations for change from the VLRC and other law reform bodies and community groups to improve the effectiveness of the criminal justice system.

Victoria Police have established a Multicultural Advisory Unit. It works to advise police on multicultural issues, provides cross-cultural training for police members, and provides information on the role of police when responding to Victorians from culturally and linguistically diverse backgrounds.

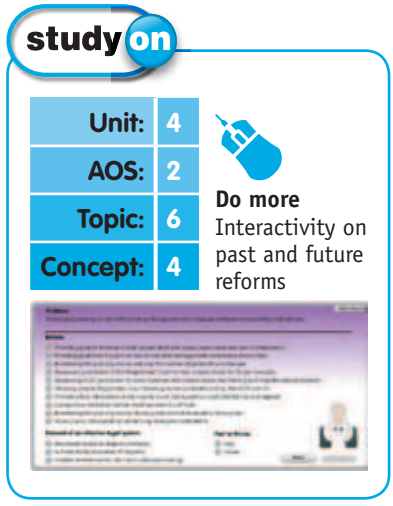


TABLE 11.6 Main recommendations to improve the effectiveness of the criminal justice system

Recommendation for change	Explanation of recommendation	Elements of an effective legal system that this recommendation seeks to redress
Increase state and federal government funding to allow for greater provision of legal aid and assistance.	Victoria Legal Aid (VLA) desires increased funding to provide greater assistance and representation to individuals involved in both civil and criminal matters. VLA particularly requires resources to expand their services to disadvantaged groups, including women and children experiencing family violence, indigenous Australians and those living in regional areas. For detailed explanation of this recommendation see page 409.	• Effective access to the legal system • Entitlement to a fair and unbiased hearing • Assist more timely resolution
Create a single criminal list (SCL).	The creation of a SCL could help ensure that cases are allocated according to seriousness and complexity. An expansion of the County Court criminal jurisdiction, where the most serious cases could be heard in either the county or supreme courts, would mean that cases could be allocated immediately a court and judge were available.	• Entitlement to a fair and unbiased hearing • Timely resolution of disputes
Provide greater education and training to personnel involved in the criminal justice system.	Providing greater education and training to legal personnel, particularly those who deal with the marginalised groups (including police, judges and magistrates, prosecutors, legal advice, and support services and counsellors) would allow these personnel to more readily recognise offenders who belong to particular disadvantaged groups and deal with them in a more appropriate manner. For a detailed explanation of this recommendation see page 412.	• Effective access to the legal system • Timely resolution of disputes
Increase the provision of funding for interpreters and legal support services.	As explained on page 414, providing more interpreters, translators and legal support services (for example, indigenous liaison officers) within Victoria Police and the court system to assist at all stages of the criminal process could help assist disadvantaged groups, including CALD communities and indigenous Australians, in using the legal system.	• Effective access to the legal system • Entitlement to a fair and unbiased hearing
Establish new courts and increase the amount of judges and court personnel.	Establishing new courts in the outer Melbourne growth corridors and in regional centres where existing courthouses are outdated and unable to keep pace with rising demand, and expanding the provision of judges and court support personnel (including providing self-represented litigants officers to provide information and assistance to litigants in all Victorian courts) would improve the effectiveness of the court system. See page 413 for further explanation.	• Effective access to the legal system • Assist more timely resolution
Modify the laws relating to double jeopardy.	In 2011, the Victorian Government changed the laws relating to double jeopardy to allow the prosecution to pursue a retrial against a previously acquitted person in most serious cases where new and compelling evidence can establish the guilt of the accused, or in cases where it can be shown that false evidence was presented or there was interference with the jury. To protect the rights of the accused, the prosecution is required to submit their case for retrial to the Victorian Court of Appeal so the court can determine whether a retrial is justified. The study skill on page 434 examines changes to the principle of double jeopardy.	Entitlement to a fair and unbiased hearing
Examine the development of peer justice panels, with young people involved in the justice process.	Peer justice panels are a diversionary option for 10 to 15-year-old offenders charged with minor offences. The model uses young people as advocates, prosecutors and jurors, or as a panel of judges. Victorian peer justice panels would not take an adversarial, punitive approach, but focus on problem solving, addressing the needs of the offender and any victims. The programs are popular in the United States, where there are more than 1200 *teen courts*. They were piloted in the United Kingdom in 2009. This model may reduce the incidence of teenage crime because young people are more aware of the impact of crime on others. It may also reduce the rate of recidivism because it has a diversionary focus. Keeping young people away from custody assists in their rehabilitation, which reduces future pressure, costs and delays in the legal system.	• Effective access to the legal system • Entitlement to a fair and unbiased hearing • Assist more timely resolution
Other recommendations	Other recommendations to improve the criminal justice system examined throughout chapter 11 include: • abolishing committal hearings • implementing incentives to encourage people from disadvantaged groups to pursue legal careers.	

TEST your understanding

1. In your own words, explain the philosophy of the Victorian Parliament in its reforms to criminal justice processes. In your answer, refer to the Koori Court or the Drug Court.
2. Explain two recent changes that have been implemented to improve the effectiveness of the criminal justice system.
3. Explain two recommendations for change designed to improve the effectiveness of the criminal justice system. Suggest one strength and one weakness associated with each recommendation.

APPLY your understanding

4. Use the **Victorian Government justice weblink** in your eBookPLUS and read some of the fact sheets and information about the *Bail Amendment Act 2010*. Identify and explain one other change made under this Act to improve the effectiveness of the bail system.

SKILL DRILL

KEY SKILLS TO ACQUIRE:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

SKILL DEFINITION

Define means to provide a precise meaning.

Discuss means to examine, deliberate and provide strengths and weaknesses (if applicable). You can also provide your opinion and/or a concluding statement.

Apply means to make a connection or association between information or knowledge and a specific circumstance. For example, you must be able to explain the connection or relationship between existing legal principles and particular legal cases or issues.

Evaluate means to explain the strengths and weaknesses.

In 2011, the Victorian Government passed the *Criminal Procedure Amendment (Double Jeopardy and other matters) Bill* to change the criminal law by modifying the double jeopardy law and also announced a proposal to introduce mandatory minimum sentencing for young people. These changes and recommendations created much discussion within the legal system and wider community. Read the case studies below and answer the questions to practice your key skills. Remember that illustrating your answers with recent or proposed changes to the law can enhance your response.

Case study one: modifying the double jeopardy law

The principle of double jeopardy, which has existed in the Victorian criminal justice system for decades, guarantees that a person who has been acquitted of a criminal offence cannot be retried for that same offence (or for a similar offence relating to the same action), even if new evidence is later found that establishes their guilt.

The double jeopardy principle protects the rights of the accused by assuring finality to a case, because once a person has been acquitted the prosecution cannot pursue a retrial in the hope that a different jury might convict. However, double jeopardy is controversial because it has the potential to protect wrongly acquitted persons by not allowing a retrial in cases where vital new and compelling evidence is discovered that can prove their guilt. Similarly, acquitted persons cannot be retried even if it can be established that evidence presented during the trial was false (including witnesses giving false testimony). It can be argued that by not allowing retrials in cases where these circumstances may have existed, the legal system fails the victims of crime, their families and the community.

In 2011, the Victorian Government modified the laws relating to double jeopardy to allow the prosecution to pursue a retrial against a previously acquitted person in most serious cases where new and compelling evidence can establish the guilt of the accused, or in cases where it can be shown that false evidence was presented or there was interference with the jury. To protect the rights of the accused, the prosecution must submit their case for retrial to the Victorian Court of Appeal so the court can determine whether a retrial is justified.

While modifying the double jeopardy laws may lead to justice being achieved in a small number of cases where a guilty person has been wrongly acquitted, many legal experts suggest it should only be used in very exceptional circumstances because it is important to retain finality after the trial process has concluded. Some commentators have also expressed concern that allowing the prosecution the ability to retry acquitted persons may serve as a disincentive for the prosecution to thoroughly prepare for the original trial.

Case study two: mandatory sentencing for youth

In 2011 the Victorian Attorney-General Robert Clark proposed the introduction of mandatory minimum sentencing for young offenders. Under the proposal, offenders aged 16 and 17 who are guilty of intentionally or recklessly causing serious injury during actions of gross violence would incur a minimum two-year term of imprisonment (with adult offenders incurring a four-year term).

The proposal has caused significant controversy, as many believe mandatory sentencing of young offenders is unfair and counterproductive to rehabilitation, which is a main consideration when sentencing youth. County Court Judge Michael Bourke, chairman of the state's Youth Parole Board and the Law Institute of Victoria, is among many who are concerned the proposal would remove the flexibility of judges to consider individual circumstances from the sentencing process, which would be particularly unfair given the high percentage of young offenders who come from disadvantaged groups, including being affected by mental illness, intellectual disability or child abuse. Minimum mandatory sentencing may also detract from a timely resolution of disputes by discouraging offenders from entering an early guilty plea.

Questions

Read the case study 'Modifying the double jeopardy law' and answer the following questions. The first answer has been done for you.

1 Explain the principle of double jeopardy and discuss how it can assist and detract from the achievement of a fair hearing.

Sample answer

Answer defines key term

The principle of double jeopardy states that a person who has been acquitted of a criminal offence cannot be retried for that same offence or a similar offence (relating to the same action) despite new evidence that later comes to light establishing their guilt.

Student starts to evaluate the proposed change to the law in light of one of the elements of an effective legal system — *entitlement to a fair hearing*. It is clear to the examiner that the second part of the question is being answered.

The principle of double jeopardy protects innocent citizens from repeated prosecutions. For some, it is the cornerstone of what our legal system endeavours to achieve — an entitlement to a fair hearing. Fairness is achieved by offering finality in a case where the accused has been found not guilty, allowing them to have the freedom to live life with the knowledge that the case is closed. Others, however, would argue that if new evidence comes to light a fair hearing had not taken place in the first instance because all the facts were not known. Many say that the double jeopardy rule can protect a guilty person who has been acquitted in cases where new evidence of their guilt arises.

Student looks at both sides of the issue and that's crucial in evaluation.

2 Explain the changes to the double jeopardy laws introduced in 2012 and discuss the extent to which you believe these changes will improve the effectiveness of the criminal justice system.

Read the case study 'Mandatory sentencing for youth' and answer the following questions.

3 Explain the Victorian Government's 'mandatory minimum sentencing for young offenders' proposal.

4 Discuss the strengths and weaknesses associated with mandatory minimum sentencing.

Assessment task — Outcome 2

The following assessment task contributes to this outcome:

On completion of this unit the student should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, evaluate their operation and application, and evaluate the effectiveness of the legal system.

Please note: Outcome 2 contributes 60 marks of the 100 marks allocated to school-assessed coursework for Unit 4. Outcome 2 may be assessed by one or more assessment tasks.

Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Structured questions

Instructions to students

Select and complete three of the following four questions. Each question is worth 10 marks. You must complete three questions (for a total of 30 marks).

Question 1

'The legal system has many problems. One of the main issues confronting law-makers is to eliminate delays in the hearing of cases. These delays place at risk the essential rights of people, especially in criminal cases.'

a Outline **two** reasons for delays in the resolution of cases.

b Suggest some possible problems that may arise for the parties involved in criminal cases and civil disputes when delays occur.

c Critically evaluate **two** recent changes to the legal system that have been designed to reduce delays in the hearing of cases. **(2 + 2 + 6 marks = 10 marks)**

Question 2

a With reference to a case or issue, explain the extent to which the chosen case study or issue highlights particular problems in the operation of the legal system. In particular, refer to the problems caused by:
- the lack of availability of legal aid
- social and cultural differences in the community.

b Discuss **two** recommendations for change that are designed to address the problems outlined in your response to part (a) above. **(4 + 6 marks = 10 marks)**

Question 3

'The best way for parties to resolve a civil dispute is between themselves rather than taking a case to court.' To what extent do you agree with this statement? In your answer evaluate the strengths associated with parties resolving a dispute through mediation, or other relevant alternative methods of dispute settlement, compared to having a dispute resolved by the courts. **(10 marks)**

Question 4

'It is clear that indigenous Australians suffer significant disadvantage when appearing before the courts. Various problems exist including language and cultural barriers that may reduce their ability to access the legal system and receive a fair and unbiased hearing.

While changes have been made to ensure that indigenous people enjoy full access to their essential rights in the legal system, more needs to be done.'

Discuss this statement. In your discussion you should:

- explain at least three main problems that limit the ability of indigenous Australians to access the legal system and receive a fair hearing
- refer to at least one of the following cases: Robyn Bella Kina, Kelvin Condren, Kwementyaye Ryder or Kevin Spratt.
- explain two recent changes that have increased the ability of indigenous Australians to access the legal system and receive a fair hearing (for example, the nature and purpose of the Koori Court and the recognition of indigenous culture in the consideration of bail applications)
- explain two recommendations for legal change that could increase the ability of indigenous Australians to access the legal system and receive a fair hearing.

(10 marks)

Tips for responding to the case study

Use this checklist to make sure you write the best responses to the question that you possibly can.

Performance area	Yes	No
Define key legal terminology and use it appropriately.		
You should at least define the three elements that are used to assess the effectiveness of a legal system.		
Discuss, interpret and analyse legal information. Apply legal principles to relevant cases and issues.		
Question 2 requires you to refer to a case or issue highlighting lack of legal aid funding and social and cultural differences in the community. You might like to discuss the issue of being unrepresented. A landmark case in this regard is the *Dietrich Case (Dietrich v. R* [1992] HCA 57) where the accused represented himself. Use the **Dietrich Case** weblink in your eBookPLUS to read more about this case. When referring to a case or issue that highlights the problems of social and cultural differences you might want to refer to one of the disadvantaged groups mentioned on pages 411–12. You could undertake an internet search on any one of these disadvantaged groups. For example, the search 'migrant and courts' (limit your search to Australia) might provide some worthwhile cases or issues to explore. Question 4 also refers to cases and issues in reference to indigenous Australians and the legal system. The cases and issues are specifically stated and explained throughout chapter 11. You should try to relate each case back to one of the three elements of an effective legal system.		
Evaluate the extent to which court processes and procedures contribute to an effective legal system.		
Question 3 asks you to what extent you agree with the statement. You may agree with the statement, partially agree with the statement, or totally disagree with the statement.		
Ensure your responses are easy to read because:		
• Spelling is correct. • Correct punctuation is used. • Correct grammar is used.		

Chapter summary

- Problems and difficulties faced by individuals in using the legal system
  - evaluate the extent to which court processes and procedures contribute to an effective legal system.

- **High legal costs can limit effectiveness.**
  - Main costs associated with taking a case to court
    - legal representation
    - court fees and disbursements
    - costs involved with the gathering of evidence (including independent forensic testing and expert witnesses).

- **Disadvantaged groups have limited access.**
  - Disadvantaged groups, who often experience difficulties accessing the legal system (including legal advice, representation and support services) and hence receiving a fair hearing, include people:
    - on very low incomes
    - with mental health and disability issues
    - with substance (drug and alcohol) abuse issues
    - from culturally and linguistically diverse (CALD) communities (including immigrants and refugees)
    - indigenous Australians
    - women and children experiencing family violence.
  - Problems and barriers faced by disadvantaged groups include:
    - economic barriers including not being able to afford to pursue legal action
    - awareness factors including lack of understanding of legal rights, legal processes and procedures, avenues for legal assistance and available support services
    - cultural barriers including the inability of the legal system to consider family structure and traditional and spiritual practices of culturally diverse groups, and a lack of familiarity with the Australian legal system
    - language barriers that may make it difficult to engage with police, understand legal processes and procedures, seek legal assistance and support services, and present evidence in court
    - social barriers including physical and mental health issues, family violence and substance abuse issues, and a lack of appropriate specifically targeted social services (including education, health and legal assistance services).

- **Delays can limit effectiveness.**
  - Causes of delays
    - *unavoidable circumstances* including illness or disability of participants, complex evidence or severity of the dispute
    - *overly complex legal processes and procedures* at the pre-trial and trial stages of both criminal and civil proceedings
    - *lack of resources* including a lack of court resources, infrastructure, legal assistance and support services, police and forensic testing facilities
    - *increasing caseloads and complexity of cases*
    - *the adversarial nature of trials* including imposition of strict rules of evidence and procedure, heavy reliance on verbal evidence, and the inability of the judge to assist a disadvantaged or self-represented litigant, or call and question witnesses
    - *the use of a jury* including the empanelment process, jury directions and the requirement of a unanimous verdict for the most serious indictable offences.

- **The impact of delays**
  - Increase the cost associated with taking a case to court, and deter individuals from accessing the court system and pursuing their rights
  - Cause emotional stress and hardship for parties
  - Reduce the reliability of witness testimonies.

- **Recent changes**
  - Establishment and expansion of specialised courts and lists within the traditional Victorian court system; for example, the expansion of the Koori Court within the magistrates' and county courts, and the establishment of the Assessment and Referral Court List (ARC) within the jurisdiction of the Magistrates' Court
  - Increased use of ADR (particularly mediation) within the court system aiming to resolve civil disputes prior to trial and the pre-initiation stage
  - Improved court processes and procedures
  - Simplification and modernisation of civil and criminal court procedures, particularly those made in the Civil Procedure Act and Criminal Procedure Act
  - More efficient use of technology to provide for the electronic filing, storage and exchange of documents between parties and the courts and tribunals
  - Introduction and simplification of new bail processes and procedures including new provisions for Aboriginal and Torres Strait Islander Australians, imposing bail conditions, administering surety conditions and applications for the variation of bail conditions
  - Introduction of the sentence indication scheme and increasing the types of offences to receive infringement notices to deal with matters in a more timely manner.
  - Modification of the double jeopardy laws to assist a fair hearing.

- **Recommendations**
  - Increase government funding to legal aid services (including Victoria Legal Aid) for the provision of greater legal advice and assistance, especially in regional areas, for civil actions and for disadvantaged groups
  - Provide greater education and training to legal personnel, particularly those who deal with disadvantaged groups (including police, judges and magistrates, prosecutors, legal advice and support services and counsellors) so they can deal with participants in a more appropriate and sensitive manner
  - Increase court personnel including providing more judges, associate judges, duty lawyers, counsellors, court advocates, support personnel and special masters to assist the civil pre-trial stage
  - Create a Civil Justice Council to monitor the performance of the civil courts and an Office of Self-represented Litigants for all courts
  - Create a Single Criminal List to ensure that cases are allocated according to seriousness and complexity
  - Provide more interpreters, translators and legal support services (for example, indigenous liaison officers) within Victoria Police and the court system
  - Implement incentives to encourage those from disadvantaged groups to pursue legal careers
  - Introduce mandatory minimum sentencing for youth (and other offenders)
  - Examine the development of peer justice panels with young people involved in the justice process
  - Abolish committal hearings.

• Recent changes and recommendations for change in the legal system designed to enhance its effective operation

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Access a list of key terms for this chapter.

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Test your knowledge of key terms by completing the chapter crossword in your eBookPLUS.

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Examination questions

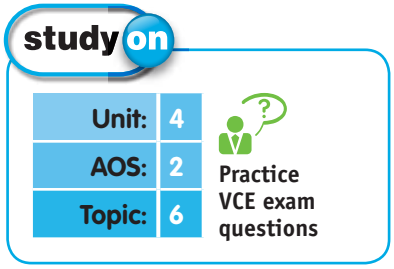
Now that you have completed your revision it is time to test your own knowledge.

Question 1

Discuss **one** recommendation for change to our legal system that is aimed at assisting the achievement of a fair and unbiased hearing. **(3 marks)**

Examination technique tip

Remember that the use of relevant cases can help to provide a better answer to a question. If the case is relevant, it shows the examiner that you are able to apply the theory learnt in Legal Studies to practical examples.



Question 2

Explain **one** recent change in the legal system designed to improve its operation.
(3 marks)

Question 3

Identify and explain **two** problems faced by individuals in using the legal system.
(4 marks)

Question 4

Evaluate the extent to **two** court processes or procedures contribute to an effective legal system. **(6 marks)**

Question 5

Explain **two** features of the adversary system and critically examine the extent to which each contributes to an effective legal system. **(8 marks)**

Question 6

Explain how the high costs associated with taking a case to court and delays can impede an individual's access to the legal system. Explain **one** recent change or recommendation for change designed to address each of these problems. **(8 marks)**

Question 7

Explain the elements of an effective legal system and discuss **three** recent changes or recommendations for change that aim to improve the effectiveness of the legal system.
(8 marks)

Question 8

'Our legal system achieves the elements of an effective legal system to some extent, but changes are needed.' Discuss this statement. In your discussion, explain how **two** recent changes or recommendations for change have attempted to achieve an effective legal system.
(10 marks)
(Total 50 marks)

Glossary

accused a person charged with a criminal offence in the magistrates', county or supreme courts of Victoria

adversary system a system where two opposing parties prepare and present their case, in accordance with strict rules of evidence and procedure, before an independent and impartial adjudicator (judge or magistrate)

affirmation a promise made in court without the use of any religious references

aggravated damages awarded if a defendant shows reckless disregard for a plaintiff's feelings. The court looks not only at the civil wrong but also at the manner in which the defendant infringed the plaintiff's civil rights.

alcohol interlock devices breath test machines that are wired onto the ignition of a vehicle. This will not allow the vehicle to start unless a 0.00 per cent blood alcohol concentration breath sample is provided.

appellate court a court able to hear appeals by litigants from lower courts

appellate jurisdiction the power to review a decision on appeal from a lower court

arbitration an independent third party (arbitrator) making suggestions to help parties resolve their dispute. If they cannot reach a mutually acceptable agreement, the arbitrator imposes a legally binding decision on the parties.

arrest to be taken into custody by a person who has lawful permission

bail an agreement to release a person accused of an offence and held in custody. Bail may be with or without conditions, such as a guarantee to pay a sum of money for failing to appear. There is generally a presumption in favour of bail being granted for an accused person. If the accused person appears in court on the nominated date, any amount of money stipulated under the bail conditions will not be payable to the court.

bail justice a person who is not a judge or magistrate, who decides whether people should be eligible for bail or remanded in custody

balance of probabilities the standard (level) of proof required by the plaintiff to prove the defendant breached their rights in a civil case

barristers legal representatives who specialise in presenting legal cases to the court in the most effective manner

beyond reasonable doubt the standard of proof in a criminal trial. It means that if there is a reasonable doubt of the defendant's guilt in a criminal case, then the defendant must be acquitted (set free).

bicameral parliament has two houses, traditionally known as an upper house and a lower house

Bill a proposed law or change to an existing law to be debated by parliament

burden of proof the obligation on a party to prove matters that it alleges during a court trial. The general burden of proof rests on the party that began the proceedings — that is, the prosecution in a criminal case, or the plaintiff (or applicant) in a civil dispute.

cabinet the body of people with responsibility for the implementation of government policies, and includes the prime minister and senior ministers

caucus the total membership of all Labor members in the parliament, both senators and members of the House of Representatives

charged when a person has been accused of committing a criminal offence and formally advised that particular offences will be alleged in court at a later date

charge to the jury final summary made by a judge to a jury at the end of closing addresses from counsel. Key issues of law and evidence are explained.

civil disputes an individual, or group, taking action against another individual, or group, who has allegedly breached their rights with the aim of seeking a remedy

coalition a group of two or more political parties

colony a group of people who leave their homeland to form a new country or region ruled by a parent state

committal hearing or committal proceeding is the preliminary hearing (in criminal law) of an indictable offence in the Magistrates' Court to determine whether a *prima facie* case has been established — that is, whether the prosecution has sufficient evidence for the case to proceed to trial and gain a conviction in a higher court.

committal mention hearing conducted prior to the committal hearing where a date is set for the committal hearing, and the number of witnesses and the anticipated length of the hearing are identified

common law a system of law based on judge-made law or case law, as opposed to legislation or statute law

Commonwealth Government the political party or coalition of parties that has won a majority of the seats in the House of Representatives

community correction orders non-custodial sanctions that have conditions attached, based on the circumstances of the offence and the offender's needs. CCOs are available for any offence punishable by more than five penalty units and may be combined with a fine and/or jail for up to three months. Strict penalties are imposed for breaches of orders.

compensatory damages a sum of money paid by the defendant to the plaintiff to recompense and reimburse for losses suffered

complainant party who alleges their rights have been breached and specifically initiates proceedings in the Magistrates' Court

conciliation an impartial third party (conciliator) assisting the parties to discuss their dispute, and offering suggestions and advice to help the parties determine a mutually acceptable resolution between themselves

concurrent powers law-making powers shared by federal and state governments — more specifically, the power of the Commonwealth Parliament to make law on a particular subject (for example, marriage and taxation) upon which the states may also make laws provided they do not conflict with Commonwealth laws

concurrent sentence a sentence that requires two or more terms of imprisonment to be served together, so that the total period served in prison is the longest individual term given for any one offence by the court in that case

constitutional monarchy a form of government in which the monarch's powers are limited and the main law-making power resides with a parliament or similar democratically elected body

constitution a set of rules that determines the structure of government and the law-making powers within a sovereign state

contemptuous damages small amounts of money paid in damages. The court acknowledges the plaintiff's rights have been infringed but has little sympathy for the plaintiff for taking legal action over the matter.

contract law a type of civil action involving a dispute where one party alleges another party has breached their rights by failing to carry out the terms of a legally binding agreement

conviction a record of guilt made against a person found to have committed an offence

counterclaim generally made in the same document as the defence and refers to claims made against the plaintiff by the defence

County Court an intermediate court and the largest and busiest trial court in Victoria, having original jurisdiction to hear all indictable criminal offences (except murder and murder-related offences), civil claims for an unlimited amount, and criminal appeals from the Magistrates' Court on conviction and sentence

crime behaviour that is considered by the state to be unacceptable, deserving of prosecution, conviction and punishment

criminal cases an individual, or individuals, behave in a manner that is considered to be harmful to society, in breach of the law and deserving of a punishment

cross-examination witnesses, who have been called to give evidence during the trial, questioned by the opposing party to assess the reliability of their testimony and expose any inconsistencies in their evidence

cumulative sentence two or more prison terms added together in the one case

damages a monetary amount paid in a civil action by the defendant to the plaintiff to compensate for losses suffered

defence counsel the lawyer representing the defendant in either a criminal or civil case

defence summarises which claims the defendant admits, does not admit, or denies. The defendant may lodge a counterclaim to claim the plaintiff in fact committed a civil wrong against him or her.

defendant the party who has allegedly infringed the plaintiff's rights in a civil case (or the party being prosecuted in a criminal case)

depositions statements made under oath and taken down in writing, which may be used in court as evidence at a later date

directions hearing a pre-trial hearing in which the presiding judge gives instructions and orders the parties to undertake certain actions, such as attend compulsory mediation, deemed necessary to prepare the parties for trial and prompt an efficient settlement of the dispute

Director of Public Prosecutions (DPP) has responsibility for prosecuting on behalf of the Crown in the High Court, the Supreme Court and the County Court, all indictable offences under the laws of the State of Victoria

discovery a stage in civil pre-trial procedure where both parties have the opportunity to inspect and exchange any of the opposing party's documents and additional information, and ask questions of the opposing party to establish the facts of the case

doctrine of separation of powers the separation of the executive, legislature and judiciary

double dissolution both houses of the Commonwealth Parliament are dissolved and all members are required to face an election, unlike a scheduled election when only half the senators are up for re-election

double jeopardy rule once acquitted (found not guilty) of a charge, an accused cannot be retried for the same (or a similar) offence. This rule has now been modified. The prosecution may pursue a retrial against a previously acquitted person in most serious cases where new and compelling evidence can establish the guilt of the accused, or in cases where it can be shown that false evidence was presented or there was interference with the jury.

double majority required for a referendum to succeed. To obtain this double majority a majority of voters must say yes to the referendum proposal in a majority of states across Australia *and* a majority of voters in the whole of Australia must also vote yes to the proposed change.

Drug Court responsible for sentencing and supervising the treatment of offenders who have pleaded guilty to committing offences that fall within the jurisdiction of the Magistrates' Court, other than assault causing bodily harm or sexual offences, while under the influence of drugs or alcohol, or to support a drug or alcohol addiction

drug treatment order (DTO) a criminal sanction where an offender is sentenced to a period of imprisonment not greater than two years, but is not required to serve the time in prison provided they comply with certain conditions such as undertaking treatment for their substance dependency and supervision

due process the state must respect the legal rights that are owed to a person

empanelment the process of selecting a jury in the courtroom and involves each party being given the opportunity to challenge potential jury members

evidence statements, testimonies (evidence given under oath or affirmation), objects (for example, a weapon or photos) or records that assist in establishing the facts of the case

exclusive powers powers that under the Commonwealth Constitution can be exercised only by federal parliament and not by a state parliament, such as the power to impose customs and excise duties, currency and defence

exemplary damages awarded if the court wishes to punish the defendant for the civil wrong, deterring them and others from committing similar acts again

express rights rights that are clearly stated in the Constitution

external affairs the interactions with another country, including foreign policy and international treaties

extinguished destroyed forever and cannot be revived

Family Violence Court Division specialises in dealing with family violence cases. The court aims to protect victims from violence and harassment by a family member.

federation the formation of a political union with a central government from a number of separate states or colonies, with control of its own internal affairs

for cause challenge a challenge to a potential juror by counsel for either party, in which a reason must be given for the person's unsuitability for that particular case

foreperson a person nominated to be the spokesperson for a jury; this person delivers the verdict

freemen men in medieval times who were not bound to the land as serfs

general damages items that cannot be accurately measured in monetary terms, such as pain and suffering

Governor-General the Queen's representative at the federal level

hand-up brief a version of a committal hearing conducted using an exchange of documents

hearsay evidence evidence that is given by a witness who did not experience an actual event firsthand, but is relying on another person's account of the event

hierarchy a ranking of courts in order from lowest to highest according to the seriousness and complexity of the types of cases and disputes they can hear

home detention order (HDO) an offender is detained in his or her home, subject to conditions. Offenders are subject to an electronic monitoring system, must observe a strict curfew, and submit to random breath and urine tests.

House of Representatives the lower house of the federal parliament, with approximately twice as many members as the Senate. Its members represent electorates, which are geographical units with approximately equal numbers of electors. Most Bills originate in this house. By convention, the prime minister must be a member of this house.
hung jury a jury that cannot decide on a verdict, resulting in the need for a retrial
illegally obtained evidence evidence that has not been legally acquired, and is generally regarded as inadmissible under the strict rules of evidence
implied right a right not expressly stated, but inferred from a broad interpretation of the Constitution
indictable offence a serious offence, such as drug trafficking and dangerous driving causing death
indictable offence heard summarily a serious offence, which could be heard at a County Court trial, being heard by a magistrate in the Magistrates' Court, with the consent of the accused
indictment written accusation or charge made against the defendant, filed in court before the trial commences
in futuro cater for circumstances likely to occur in the future
injunction a court order requiring the defendant to either undertake, or refrain from undertaking, actions to rectify or prevent a breach of rights
inquisitorial system a system of trial where an impartial adjudicator (judge or judges) plays a significant role in gathering the evidence for the trial, finding the facts in dispute, ascertaining the truth and determining the outcome of the case
interim injunctions compel or restrain the defendant's behaviour for a limited period
irrelevant evidence extraneous evidence that is not directly related to the facts of the case and is not admissible in court
judge's associate a qualified lawyer who sits below the judge and assists in court proceedings
judicial determination parties presenting their case, generally according to rules of evidence and procedure, before an independent judicial officer (judge, magistrate or VCAT member) who makes a legally binding decision
jurisdiction the power, or authority, of a court to hear and determine specific types of disputes and cases
jury a body of 12 (criminal matters) or 6 (civil matters) people who decide all questions of fact at a trial, apply the law as outlined by the judge and deliver a verdict according to the application of that law to the facts
jury panel a small group of people selected to attend a courtroom and undergo the empanelling process to be placed on a jury for a specific trial
jury pool a large group of people from which a jury will be chosen
Koori Court specialises in hearing and sentencing Australian indigenous defendants who plead guilty to committing offences other than family violence and sexual offences that fall within the jurisdiction of the Magistrates' Court
law of torts a range of civil disputes where one party alleges another party has in some way breached their rights. Examples of civil wrongs included in the area of torts are negligence, nuisance, defamation and trespass
legal aid legal assistance provided by government-funded agencies, such as Victoria Legal Aid, including the provision of legal advice and financial grants to allow parties to obtain legal representation to prepare and present a case to the court
legal conventions legal principles and practices that have been accepted as part the legal framework through continuous use over a substantial period of time
legal practitioners (solicitors) people largely responsible for the preparation of a legal case, including gathering evidence and researching common law that may be applicable to their client's case
legal right entitlement enforceable by law
letter of demand a letter sent by the plaintiff (or their legal practitioner) to the defendant that outlines the alleged breach of rights and the remedy being sought by the plaintiff. It informs the defendant of the plaintiff's intention to commence legal proceedings against them.
litigation a civil action or proceeding
Magistrates' Court the power to deal with a wide range of less serious criminal matters and minor civil disputes
majority verdict one less than a unanimous vote is accepted by the court
mandatory injunction compels a party to undertake a specific action

mediation a method of dispute settlement where an independent third party (mediator) assists the parties to discuss their dispute and reach a mutually acceptable resolution between them

minister a member of parliament who has responsibility for a particular area of government activity, known as a portfolio

Neighbourhood Justice Centre (NJC) a community court and neighbourhood centre that offers a range of support services, including providing legal advice, housing and employment support, mental health and mediation services to residents and businesses within its local community

nominal damages very small sums of money usually awarded in cases where the plaintiff pursued a civil action to prove that the defendant's actions were legally wrong, rather than to receive a large payout

notice of appearance filed by the defendant to acknowledge the receipt of a writ, and notify the court and the plaintiff of the defendant's intention to defend the claims being made against them

notice of trial informs all parties that the proceeding is ready for trial

oath a promise made by swearing on the Bible, or in accordance with any other religious custom

obiter dictum that part of a judge's decision that is not binding because it is not directly part of the matter the judge has been asked to consider

Office of Public Prosecutions (OPP) an independent statutory authority responsible for preparing and conducting criminal prosecutions in Victoria on behalf of the Director of Public Prosecutions (DPP)

opinion evidence evidence based on what a witness thinks, believes or infers to be the facts, rather than the witness's actual knowledge of the facts of the case

original jurisdiction the power to hear and determine a case for the first time

originating motion a written document that may be used instead of a writ in cases where it is unlikely the facts of the case will be disputed

out-of-court settlement the resolution of a civil dispute prior to attending court or litigation. It may also be referred to as an early settlement.

Parliament a law-making body or legislature elected by the people

parole supervised, conditional release from jail

particulars the facts of the case. Further and better particulars may be called for if particulars are too vague or non-existent at the pleadings stage.

penalty unit a monetary unit used to express a fine and adjusted on 1 July each year to reflect changes in the cost of living. On 1 July 2011 one penalty unit was set at $122.14 for the 2011–12 financial year.

peremptory challenge a challenge being made to a potential juror, or request for a potential juror to stand aside, with no reason being given

perpetual injunctions permanent or ongoing injunctions.

persuasive precedent a precedent originating in a lower or equal court in the same hierarchy, or an interstate or overseas court, which may be adopted in a similar case, even though it is not binding

plaintiff the party who alleges their rights have been breached and is responsible for initiating civil proceedings

pleadings the stage in the civil pre-trial process where both parties exchange written documents stating the details of the case, including the claims, defences, remedy sought and counterclaims

presentment a document, prepared by the Office of Public Prosecutions, which formally charges a person with a criminal offence. The details of the charges are read in court at the arraignment.

presumption of innocence a fundamental right that exists within the criminal justice system, that an accused is presumed and treated as innocent until proven guilty by the prosecution

pre-trial conference ordered by the court to encourage an out-of-court settlement or to simply ensure both parties are ready for trial

previous convictions the prior criminal record of the accused, generally not admissible as evidence in a trial conducted under the adversary system because they may prejudice the jury (when present)

privileged information evidence obtained in communications between a client and their legal representative, or a priest and confessor, generally inadmissible to protect confidentiality between these parties

prorogue bring a parliamentary session to an end, without dissolving parliament or calling an election. It terminates all business currently before both houses until the next scheduled session

purposive the interpretation of legislation to give effect to the purpose for which it was passed

ratify the process by which the government of a country accepts an international treaty and agrees to be bound by it under international law

ratio decidendi the reason for the decision in a court judgement. As the legal reasoning that is binding, *the ratio decidendi* must be followed by lower courts in the hierarchy.

recidivism situations where a person convicted of a criminal offence commits further offences after serving their initial punishment

referendum the process through which changes can be made to the Commonwealth Constitution. Electors vote for or against a particular change. For the change to take effect, it must be supported by a majority of voters and a majority of states.

remand an accused being denied bail and held in custody until their committal hearing, trial or sentencing

remanded in custody to be held by police or prison authorities in detention during a pre-trial criminal procedure or during the trial

remedy an action undertaken by the party deemed at fault in a civil dispute to restore the plaintiff, as far as possible, to their original position prior to the breach of rights

rescission order that terminates a contract

reserved powers doctrine a restrictive approach to the interpretation of the specific powers of the federal parliament is taken in order to preserve the residual powers of the states. This doctrine has since been abandoned by the High Court.

residual powers those powers to make laws that were not specifically granted to the Commonwealth Parliament and thus remain with the states; for example, road rules, criminal law and school education

restitution an order to return property to the plaintiff

restrictive injunction restrains a party from undertaking an action

royal assent the formal signing of a Bill by the monarch's representative to indicate approval of the Bill, and is the final step necessary before a Bill becomes law

royal commission a public judicial inquiry into an important issue, with powers to make recommendations to government

sanction a punishment, determined by a magistrate or judge, and imposed upon an offender who pleads or is found guilty of a criminal offence

Senate the upper house of the federal parliament, consisting of 76 senators — twelve from each of the six states, two from the Northern Territory and two from the Australian Capital Territory. The Senate's intended functions are to represent the interests of the states and to review laws passed in the House of Representatives. The Senate has powers almost identical to those of the House of Representatives except for restrictions in dealing with taxation and appropriation Bills.

Sexual Offences List specialises in hearing summary offences and committal hearings relating to a charge for a sexual offence

shadow minister a member of the Opposition's leadership group who has responsibility for the policy area of a particular minister. He or she would be likely to become minister if the Opposition won government.

specific damages items that can be accurately measured in monetary terms, such as medical costs

specific performance compels a defendant to carry out the terms of the contract

specific powers all powers given to the Commonwealth Parliament under the Constitution at Federation; for example, immigration, railway construction and quarantine

standard of proof the extent to which a party must prove a case or an assertion during a trial. The criminal standard (beyond reasonable doubt) is a much higher standard than the civil standard (balance of probabilities).

stare decisis to stand by what has been decided and is the basis of the doctrine of precedent

statement of claim outlines the claims made by the defendant and the remedy sought

stay of proceedings a ruling by a court that halts the continuation of a trial

suffrage the right to vote

summary offence a less serious offence, such as minor traffic offences and shop stealing, heard in the Magistrates' Court

sunset clause a provision in a statute that is designed to terminate on a specific date unless legislative action is taken

superior court of record a court that reports and publishes decisions in law reports

Supreme Court the superior court in the Victorian court hierarchy and is divided into two divisions: the Trial Division and the Court of Appeal

Supreme Court of Appeal hears all appeals from criminal and civil trials heard in the County Court and the Supreme Court (Trial Division)

Supreme Court (Trial Division) has jurisdiction to hear all indictable criminal offences (but hears mainly murder and attempted murder) and civil cases for unlimited amounts, as well as appeals from the Magistrates' Court on a point of law

surety a payment or promise made by a person in criminal cases to guarantee the appearance of another person in court who has applied for bail. A surety also may seek to ensure certain bail conditions are met.

suspended sentence the suspension of a term of imprisonment, either wholly or partly, for a specified period during which time the offender is required to be of good behaviour

treaty an agreement between two or more sovereign states to undertake a particular course of action. The international agreement may involve such subjects as human rights, the environment or trade.

trial by ordeal a medieval method of determining the guilt or innocence of an accused by subjecting them to a painful test. If they were unharmed, they were considered to be innocent.

tribunals legal bodies that specialise in resolving specific types of disputes in an informal, relatively quick and cost-effective manner

ultra vires beyond the power of that particular law-maker. It usually refers to situations where a parliament passes a law outside its area of authority.

unanimous verdict the requirement in a criminal trial that all 12 jurors must agree the accused is either guilty or not guilty

unicameral a parliament with only one house

VCAT a 'super tribunal' with jurisdiction to deal with a wide range of minor civil disputes, including those involving discrimination, racial and religious vilification, guardianship issues, consumer complaints, rental disputes and reviewing decisions of government authorities such as local councils

victim impact statement a statement made to the court by a victim or their next of kin in which the suffering of victims as a result of crime is outlined to the sentencing judge. The contents of the victim impact statement may affect the ultimate sentence imposed.

warrant an order issued by a court that allows the arrest of a person named in the order, the search of premises or the seizure of property

Westminster system the parliamentary system of Great Britain, which has been copied and adapted by other countries around the world. It is so-called because the British Parliament meets in a building known as the Palace of Westminster.

writ a document served on the defendant, and lodged at the court, that informs the defendant civil proceedings are being taken against them

youth justice centre (YJC) order a court order requiring a young person aged between 15 and 20 years to remain in custody at a youth justice centre for a specified period not exceeding three years

youth residential centre (YRC) order a court order sentencing a young person aged between 10 and 14 years to a period in custody not exceeding two years in a youth residential centre

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