

ACCESS &

JUSTICE

LEGAL STUDIES FOR VCE

UNITS 1 & 2

YEAR 11

LISA FILIPPIN
MARGARET BEAZER
JOSIE GRAY
PETER FARRAR
ANNIE WILSON

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford.

It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and in certain other countries.

Published in Australia by
Oxford University Press
253 Normanby Road, South Melbourne, Victoria 3205, Australia

© Lisa Filippin, Margaret Beazer, Josie Gray, Peter Farrar and Annie Wilson 2018
The moral rights of the authors have been asserted

First published 1994
This edition published 2018

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by licence, or under terms agreed with the appropriate reprographics rights organisation. Enquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form and you must impose this same condition on any acquirer.

National Library of Australia Cataloguing-in-Publication data

Filippin, Lisa, author

Access and justice : VCE legal studies units 1 & 2 student book + obook assess / Lisa Filippin, Margaret Beazer, Josie Gray, Peter Farrar, Annie Wilson.

9780190310325 (paperback)

For secondary school age.

Subjects: Law-Victoria-Textbooks.

Civil procedure-Victoria-Textbooks.

Justice, Administration of-Victoria-Textbooks.

Beazer, Margaret, author.

Gray, Josie, author.

Farrar, Peter, 1962- author.

Wilson, Annie, 1964- author.

Reproduction and communication for educational purposes

The Australian *Copyright Act 1968* (the Act) allows a maximum of one chapter or 10% of the pages of this work, whichever is the greater, to be reproduced and/or communicated by any educational institution for its educational purposes provided that the educational institution (or the body that administers it) has given a remuneration notice to Copyright Agency Limited (CAL) under the Act.

For details of the CAL licence for educational institutions contact:

Copyright Agency Limited
Level 15, 233 Castlereagh Street
Sydney NSW 2000
Telephone: (02) 9394 7600
Facsimile: (02) 9394 7601
Email: info@copyright.com.au

Edited and typeset by Trischa Mann

Text design by OUPANZ

Indexed by Neil Daly

Printed in Hong Kong by Sheck Wah Tong Printing Press Ltd

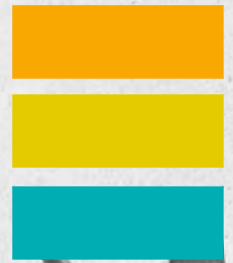
Disclaimer

Indigenous Australians and Torres Strait Islanders are advised that this publication may include images or names of people now deceased.

Links to third party websites are provided by Oxford in good faith and for information only. Oxford disclaims any responsibility for the materials contained in any third party website referenced in this work.



CONTENTS



USING ACCESS & JUSTICE LEGAL STUDIES FOR VCE UNITS 1 & 2 (13TH EDITION)	xiii
--	------

CHAPTER 1 LEGAL TOOLKIT 2

1.1 UNDERSTANDING THE VCE LEGAL STUDIES COURSE	4
1.2 SETTING YOURSELF UP FOR SUCCESS IN VCE LEGAL STUDIES	8
1.3 TIPS FOR SUCCESS ON ASSESSMENT TASKS	13
1.4 MASTERING LEGAL CITATION	17
1.5 CAREERS IN THE LAW	21

UNIT 1 GUILT AND LIABILITY 24

CHAPTER 2 INTRODUCTION TO UNIT 1 – GUILT AND LIABILITY 28

2.1 THE MEANING OF LAWS	30
2.2 HISTORY OF AUSTRALIA'S POLITICAL AND LEGAL STRUCTURES	32
2.3 PARLIAMENTS IN AUSTRALIA	33

CHAPTER 3 LEGAL FOUNDATIONS 36

3.1 SOCIAL COHESION AND THE RIGHTS OF INDIVIDUALS	38
3.2 THE PRINCIPLES OF JUSTICE	41
3.3 CHARACTERISTICS OF AN EFFECTIVE LAW	44
3.4 INTRODUCTION TO PARLIAMENT AND THE COURTS	47
3.5 SOURCES OF LAW	51
3.6 THE RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS	57
3.7 TYPES OF LAW	61
3.8 THE DISTINCTION AND RELATIONSHIP BETWEEN CRIMINAL LAW AND CIVIL LAW	65
3.9 THE VICTORIAN COURT HIERARCHY	68

CHAPTER 3 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK	70
---	----



CHAPTER 4 THE PRESUMPTION OF INNOCENCE..... 72

4.1	THE PURPOSES OF CRIMINAL LAW.....	74
4.2	THE PRESUMPTION OF INNOCENCE.....	78
4.3	KEY CONCEPTS OF CRIMINAL LAW.....	80
4.4	TYPES OF CRIME.....	86
4.5	THE DISTINCTION BETWEEN SUMMARY OFFENCES AND INDICTABLE OFFENCES.....	90
4.6	POSSIBLE PARTICIPANTS IN A CRIME.....	94

CHAPTER 4 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	96
--	----

CHAPTER 5 INDICTABLE OFFENCES..... 98

5.1	INTRODUCTION TO INDICTABLE OFFENCES.....	100
5.2	MURDER – ELEMENTS & DEFENCES.....	104
5.3	MURDER – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	112
5.4	CULPABLE DRIVING – ELEMENTS & DEFENCES.....	118
5.5	CULPABLE DRIVING – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	124
5.6	RAPE – ELEMENTS & DEFENCES.....	127
5.7	RAPE – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	134
5.8	THEFT – ELEMENTS & DEFENCES.....	138
5.9	THEFT – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	144

CHAPTER 5 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	148
--	-----

CHAPTER 6 SUMMARY OFFENCES..... 150

6.1	INTRODUCTION TO SUMMARY OFFENCES.....	152
6.2	ASSAULT – ELEMENTS & DEFENCES.....	156
6.3	ASSAULT – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	165
6.4	PUBLIC DRUNKENNESS – ELEMENTS & DEFENCES.....	169
6.5	PUBLIC DRUNKENNESS – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	173
6.6	OFFENSIVE BEHAVIOUR – ELEMENTS & DEFENCES.....	176
6.7	OFFENSIVE BEHAVIOUR – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	182
6.8	GRAFFITI – ELEMENTS & DEFENCES.....	186
6.9	GRAFFITI – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS.....	190

CHAPTER 6 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	194
--	-----

CHAPTER 7 CIVIL LIABILITY..... 196

7.1	PURPOSES AND TYPES OF CIVIL LAW.....	198
7.2	KEY CONCEPTS OF CIVIL LAW.....	202
7.3	POSSIBLE PARTIES TO A CIVIL DISPUTE.....	208

CHAPTER 7 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	214
--	-----

CHAPTER 8 TORT LAW..... 216

8.1	INTRODUCTION TO TORT LAW.....	218
8.2	NEGLIGENCE.....	220
8.3	DEFAMATION.....	228
8.4	NUISANCE.....	236

CHAPTER 8 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	244
--	-----

CHAPTER 9 OTHER AREAS OF CIVIL LAW... 246

9.1	INTRODUCTION TO OTHER AREAS OF CIVIL LAW.....	248
9.2	DISCRIMINATION.....	250
9.3	VOID MARRIAGES.....	260
9.4	ONLINE SHOPPING.....	268
9.5	WORKPLACE PAY AND CONDITIONS.....	278

CHAPTER 9 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	286
--	-----

UNIT 1 ASSESSMENT TASKS.....	290
------------------------------	-----

UNIT 2 SANCTIONS, REMEDIES

AND RIGHTS 294

CHAPTER 10 INTRODUCTION TO UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS 298

10.1	THE MEANING OF LAWS.....	300
10.2	FOUNDATIONS OF CRIMINAL LAW.....	304
10.3	FOUNDATIONS OF CIVIL LAW.....	307
10.4	THE RELATIONSHIP BETWEEN CRIMINAL CASES AND CIVIL DISPUTES.....	310

CHAPTER 11 SANCTIONS	312	CHAPTER 14 RECENT CIVIL CASES.....	446
11.1 INTRODUCTION TO SANCTIONS.....	314	14.1 RECENT CIVIL CASE 1 – REBEL WITH A CAUSE	448
11.2 THE PRINCIPLES OF JUSTICE IN CRIMINAL LAW.....	316	14.2 RECENT CIVIL CASE 2 – BATTLE OVER THE BENDIGO MOSQUE	456
11.3 INSTITUTIONS THAT ENFORCE CRIMINAL LAW	319	14.3 RECENT CIVIL CASE 3 – MANUS ISLAND DETENTION CENTRE CLASS ACTION.....	464
11.4 INSTITUTIONAL POWERS AND INDIVIDUAL RIGHTS	325	14.4 RECENT CIVIL CASE 4 – THE BIRD DETERRENT IN BAIRNSDALE.....	472
11.5 THE ROLE AND CRIMINAL JURISDICTIONS OF VICTORIAN COURTS	332	14.5 RECENT CIVIL CASE 5 – THE DISAPPEARANCE OF MALAYSIA AIRLINES FLIGHT 370	
11.6 THE ROLE OF THE JURY IN A CRIMINAL TRIAL.....	338		(QBOOK ASSESS TOPIC)
11.7 THE PURPOSES OF SANCTIONS.....	343	CHAPTER 14 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	478
11.8 TYPES OF SANCTIONS.....	347		
11.9 FACTORS CONSIDERED BY JUDGES IN SENTENCING.....	353	CHAPTER 15 RIGHTS	480
11.10 SENTENCING PRACTICES.....	356	15.1 INTRODUCTION TO RIGHTS.....	482
11.11 ALTERNATIVE APPROACHES TO SENTENCING	362	15.2 PROTECTION OF RIGHTS THROUGH STATUTE LAW AND THE VICTORIAN CHARTER.....	484
CHAPTER 11 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK	370	15.3 PROTECTION OF RIGHTS THROUGH COMMON LAW.....	488
CHAPTER 12 RECENT CRIMINAL CASES	372	15.4 PROTECTION OF RIGHTS THROUGH THE AUSTRALIAN CONSTITUTION.....	492
12.1 RECENT CRIMINAL CASE 1 – THE MAN WHO SHOT A CORPSE	374	15.5 DECLARATIONS AND TREATIES THAT PROTECT THE RIGHTS OF AUSTRALIAN CITIZENS.....	500
12.2 RECENT CRIMINAL CASE 2 – LEARNER DRIVER CAUSES DEATH.....	380	15.6 THE INFLUENCE OF DECLARATIONS AND TREATIES ON RIGHTS	505
12.3 RECENT CRIMINAL CASE 3 – HIGH COURT STEPS IN ON DOMESTIC VIOLENCE CASE.....	388	15.7 THE APPROACH ADOPTED BY THE UNITED STATES IN PROTECTING RIGHTS.....	510
12.4 RECENT CRIMINAL CASE 4 – VIOLENT ARMED ROBBERY BY YOUNG OFFENDER	396	15.8 POSSIBLE REFORMS TO THE PROTECTION OF RIGHTS IN AUSTRALIA.....	518
CHAPTER 12 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK	402	15.9 THE MABO CASE – THE PROTECTION OF RIGHTS IN AUSTRALIA.....	522
CHAPTER 13 REMEDIES.....	404	15.10 THE MABO CASE – IMPACT AND OUTCOME.....	526
13.1 INTRODUCTION TO REMEDIES	406	CHAPTER 15 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	532
13.2 THE PRINCIPLES OF JUSTICE IN CIVIL LAW	408	UNIT 2 ASSESSMENT TASKS	534
13.3 METHODS USED TO RESOLVE A DISPUTE	410	GLOSSARY.....	538
13.4 TRIBUNALS	415	INDEX.....	548
13.5 THE OMBUDSMAN.....	420	MEET OUR AUTHORS.....	561
13.6 COMPLAINTS BODIES.....	424	ACKNOWLEDGEMENTS.....	562
13.7 THE ROLE AND CIVIL JURISDICTIONS OF THE VICTORIAN COURTS	429		
13.8 THE ROLE OF THE JURY IN A CIVIL TRIAL.....	436		
13.9 THE PURPOSES AND TYPES OF REMEDIES	440		
CHAPTER 13 REVIEW CHAPTER SUMMARY, REVISION QUESTIONS AND PRACTICE ASSESSMENT TASK.....	444		

SUMMARY OF LEGAL CASES

CHAPTER 1 LEGAL TOOLKIT

No legal cases

UNIT 1 GUILT AND LIABILITY

CHAPTER 2 INTRODUCTION TO UNIT 1 – GUILT AND LIABILITY

no legal cases

CHAPTER 3 LEGAL FOUNDATIONS

<i>Mansfield v Kelly</i> [1972] VR 744	52
<i>Deing v Tarola</i> [1993] 2 VR 163	52
<i>Donoghue v Stevenson</i> [1932] All ER Rep 1	53
<i>Grant v Australian Knitting Mills Ltd</i> [1936] AC 85	55
<i>R v Bucic</i> [2016] NSWCCA 297 [14 December 2016]	57
<i>State Government Insurance Commission v Trigwell</i> [1979] 142 CLR 617	59
<i>DPP v Hughes</i> [2016] VCC 1762 [8 November 2016]	61
<i>Wyong Shire Council v Shirt</i> [1980] 146 CLR 40	62
<i>Wilson v Bauer Media Pty Ltd</i> [2017] VSC 521	63
<i>DPP v Hitchiner</i> [2016] VCC 1844 [1 December 2016]	67

CHAPTER 4 THE PRESUMPTION OF INNOCENCE

<i>RP v The Queen</i> [2016] HCA 53 [21 December 2016]	83
<i>DPP (Cth) v Barbaro and Zirilli</i> [2012] VSC 47 [23 February 2012]	88

CHAPTER 5 INDICTABLE OFFENCES

<i>DPP v Perry; Perry v The Queen</i> [2016] VSCA 152 [1 July 2016]	106
<i>DPP v Woodhead</i> [2016] VSC 472 [26 April 2016]	108
<i>R v Cook</i> [2015] VSC 406 [19 August 2015]	110
<i>R v Falconer</i> [1990] 171 CLR 30	110
<i>Bayley v The Queen</i> [2013] VSCA 295 [21 October 2013]	115
<i>R v Zandipour</i> [2016] VSC 387 [12 July 2016]	115
<i>DPP v McDevitt</i> [2016] VCC 1668 [10 November 2016] ...	119
<i>Gill v The Queen</i> [2016] VSCA 261 [4 November 2016] ...	120
Christiaan Scholl, Supreme Court of Victoria [unreported, 2009]	121

<i>Jurj & Miftode v The Queen; DPP v Jurj & Miftode</i> [2016] VSCA 57 [4 April 2016]	128
<i>DPP v Guy</i> [2016] VCC 1497 [10 October 2016]	139
<i>R v O'Connor</i> [1980] 146 CLR 64	142

CHAPTER 6 SUMMARY OFFENCES

<i>Abdul-Rahim</i> , Broadmeadows Magistrates' Court [unreported, 6 April 2016]	157
<i>Sarah Finn</i> , Melbourne Magistrates' Court [unreported, 11 February 2016]	159
<i>Police v G, DM</i> [2016] SASC 39 [21 March 2016]	160
<i>Dean Bradley Anderson</i> , Melbourne Magistrates' Court [unreported, 9 October 2014]	161
<i>McKenzie v Stratton</i> [1971] VR 848	171
<i>Nathan Wilkie</i> , Warrnambool Magistrates' Court [unreported, 10 June 2010]	177
<i>Fraser v Walker</i> [2015] VCC 1911 [19 November 2015] ..	179

CHAPTER 7 CIVIL LIABILITY

<i>Clarke v Greater Shepparton City Council</i> [2016] VSC 542 [8 September 2016]	199
<i>State Rail Authority of New South Wales v Chu</i> [2008] NSWCA	14
[6 March 2008]	204

CHAPTER 8 TORT LAW

<i>Chester v Waverley Municipal Council</i> [1939] 62 CLR 1 ...	221
<i>Roman Catholic Church v Hadba</i> [2005] 221 CLR 161	222
<i>Guru v Coles Supermarkets Australia Pty Ltd</i> [2016] NSWDC 349 [14 December 2016]	224
<i>Mickle v Farley</i> [2013] NSWDC 295 [29 November 2013]	229
<i>Dank v Nationwide News Pty Ltd</i> [2016] NSWSC 295 [18 March 2016]	231
<i>Hardie v The Herald and Weekly Times Pty Ltd</i> [2016] VSCA 103 [13 May 2016]	231
<i>Hallett v City of Port Phillip</i> [2015] VSC 313 [30 June 2015]	237
<i>Gales Holdings Pty Ltd v Tweed SC</i> [2011] NSWSC 1128 Shine Council 21 September 2011	238
<i>Hollywood Silverfox Farm Ltd v Emmett</i> [1936] 2 KB 468	239
<i>Christie v Davey</i> [1893] 1 Ch D 316	241

CHAPTER 9 OTHER AREAS OF CIVIL LAW

<i>Wilson v Western Health (Human Rights)</i> [2014] VCAT 771 [1 July 2014]	252
<i>Maloney v The Queen</i> [2013] 252 CLR 168	258
<i>Choi & Figuera</i> [2017] FamCA 90 [24 February 2017]	261
<i>Breust & Devine</i> [2016] FamCA 892 [24 October 2016] ..	262
<i>Radtke & Pagano</i> [2016] FamCA 784 [16 September 2016]	264
<i>Attorney-General for the Commonwealth v Kevin and Jennifer</i> [2003] 172 FLR 300	266
<i>Joyner v Intrepid Travel Pty Ltd (Civil Claims)</i> [2017] VCAT 233 [17 February 2017]	271
<i>Carpenter v Fraser (Civil Claims)</i> [2016] VCAT 45 [18 January 2016]	272
<i>Carlill v Carbolic Smoke Ball Company</i> [1892] EWCA Civ 1	274
<i>Turley v The Laminex Group</i> [2015] VMC 28 [3 September 2015]	282

UNIT 2 SANCTIONS, REMEDIES

AND RIGHTS

CHAPTER 10 INTRODUCTION TO UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS

<i>Wright v McMurchy</i> [2011] 42 WAR 113 [5 August 2011]	302
<i>DPP v Trueman</i> [2017] VSCA 24 [23 February 2017]	306

CHAPTER 11 SANCTIONS

<i>Kingston City Council v Wong</i> [2013] VMC 6 [10 April 2013]	323
<i>Certain Children v Minister for Families and Children</i> [2016] VSC 796 [21 December 2016] and <i>Certain Children v Minister for Families and Children (No 2)</i> [2017] VSC 251 [11 May 2017]	330
<i>Bradley v The Queen</i> [2017] VSCA 69 [30 March 2017] ...	333
<i>DPP v Stewart</i> [2017] VCC 390 [3 April 2017]	334
<i>R v Skaf</i> (2004) 60 NSWLR 86	341
<i>DPP v Hornshaw</i> [2017] VSC 111 [15 March 2017]	344
<i>DPP v Edwards</i> [2017] VCC 354 [3 April 2017]	345
<i>R v Majok</i> [2017] VSC 72 [27 February 2017]	350

CHAPTER 12 RECENT CRIMINAL CASES

<i>DPP v Singh</i> [2016] VCC 1826 [25 November 2016]	384
---	-----

CHAPTER 13 REMEDIES

<i>Director of Consumer Affairs Victoria v Gibson</i> [2017] FCA 240 [15 March 2017]	424
<i>Clarke v Great Southern Finance Pty Ltd (in liquidation)</i> [2014] VSC 569 [14 November 2014]	431
<i>Obudho v Patty Malones Bar Pty Ltd</i> [2017] VSC 28 [9 February 2017]	433
<i>Humphris v Connecteast Nominee Company Pty Ltd (No 2)</i> [2016] VSC 419 [27 July 2016]	436
<i>Khodr v G4S Custodial Services Pty Ltd</i> [2016] VSC 800 [19 December 2016]	438
<i>Dupois v Galley Commodities Pty Ltd</i> [2016] QSC 167 [3 August 2016]	441
<i>Cunningham v Traynor</i> [2016] WADC 168 [9 December 2016]	441

CHAPTER 15 RIGHTS

<i>Dietrich v The Queen</i> (1992) 177 CLR 292	488
<i>Certain Children v Minister for Families and Children</i> [2016] VSC 796 [21 December 2016]	489
<i>Attorney-General for the Commonwealth v Kevin and Jennifer</i> [2003] 172 FLR 300	490
<i>Attorney-General (Vic); Ex Rel Black v Commonwealth</i> (1981) 146 CLR 559	494
<i>Williams v Commonwealth</i> [2012] 248 CLR 156	494
<i>Australian Capital Television Pty Ltd v Commonwealth</i> (1992) 177 CLR 106	495
<i>Roach v Electoral Commissioner</i> [2007] 233 CLR 162	497
<i>Brough v Australia</i> [2006] Communication No. 1184/2003	504
<i>McGarrigle v National Disability Insurance Agency</i> [2017] FCA 308 [28 March 2017]	507
<i>District of Columbia v. Heller</i> 5, 54 US 570 [2008]; <i>McDonald v Chicago</i> 561 US 742 [2010]	512
<i>Snyder v. Phelps</i> 562 US 443 [2011]	513
<i>Griswold v. Connecticut</i> 381 US 479 [1965]	515

USING ACCESS & JUSTICE

Legal Studies for VCE Units 1 & 2

Access & Justice Legal Studies for VCE Units 1 & 2 (13th edition) has been fully revised and updated to meet the requirements of the VCE Legal Studies Study Design 2018–2022. It offers complete support for teachers and students completing Units 1 & 2 of VCE Legal Studies.

Key features of the Student book

Legal toolkit

The legal toolkit at the front of the book is a stand-alone reference section for students that includes:

- tips for success assessment tasks
- advice on mastering legal citation
- information about careers in the law

Tip 2 – Understand task words

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

Task words range in level of difficulty. Some (such as **identify** or **define**) are simpler to understand and know. Others (such as **analyse** or **justify**) are more challenging to understand and will take practice. Source 2 lists a range of common task words and their definitions. It also provides examples to illustrate. Source 3 lists a range of common task words and their definitions. It also provides examples to illustrate. All of these questions have come from exam papers for past Study Designs. You should check with your teacher about this.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
Advise	to offer suggestions about the best course of action or make recommendations	Question 7 (2008) James and his friends were celebrating James's 25th birthday at a local restaurant. At the end of the night, James decided that he may have had too much to drink and called a taxi. On the way out, James tripped on some worn carpet and fell to the floor, causing him a serious injury. After consulting his lawyer, James decides to sue the restaurant for compensation. Advise James on the purpose of two pre-trial procedures which his lawyer might use in this case.
Analyse	to examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	Question 12 (2019) Using one successful referendum and one High Court case, analyse the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers.
Comment on	to express an opinion or reaction (in order to demonstrate your understanding of it)	Question 5 (2009) Pre-trial procedures are designed to speed up the resolution of civil disputes. Comment on this statement. In your answer, describe one civil pre-trial procedure.
Compare	to explain or discuss how concepts, definitions or features are similar and different by identifying the qualities or features they have in common as well as those they don't	Question 5 (2010) Jane and David have been involved in an ongoing dispute. They have been advised to use either mediation or arbitration as a dispute resolution method. Compare mediation and arbitration as methods of dispute resolution.
Examine	to consider in detail and establish the key facts and important issues related to a topic or issue	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically examine these two strengths of the doctrine of precedent.
Define	to state the exact nature, features, or meaning of a term, feature or concept	Question 1 (2015) A plaintiff is seeking an injunction and damages of \$1 million in the Supreme Court of Victoria. Define the term 'injunction'.
Describe	to give a detailed account of a system, process or feature	Question 9a (2014) Describe one reason why a law may not be followed.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
Discuss	give a reasoned argument for and against a particular issue (and provide strengths and weaknesses if applicable). You can also give your opinion, and should do so if the question asks you to give it.	Question 7c (2016) Provide one section that may be imposed if Sam is found guilty and discuss the ability of that section to achieve its purpose.
Distinguish	explain the differences and distinctive characteristics to identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the overall benefit or worth of what is being evaluated.	Question 1 (2011) Distinguish between exclusive and residual power. Question 10 (2013) Evaluate the effectiveness of two methods that are used by individuals or groups to influence a change in the law.
Evaluate	to identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the overall benefit or worth of what is being evaluated.	Question 5b (2015) Explain the role of the VLRC in recommending a change in the law. Question 3 (2010) Identify the two types of law-making powers of the state parliament. In your answer, provide an example of each.
Explain	to clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it.	Question 4 (2009) Use one example to explain and illustrate how the law-making powers of the Commonwealth Parliament and the state parliaments have been changed by High Court interpretation of the Commonwealth Constitution.
Identify	to state or recognise a feature or factor (and possibly provide some basic facts about it).	Question 3 (2014) A referendum proposal was voted on by the electors of Australia. Fifty-eight per cent of all voters in Australia voted in favour of the proposal, and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal. Was the referendum passed? Justify your answer.
Illustrate	to provide an example, in order to better describe or explain a feature or concept.	Question 1 (2014) Outline one effect of the interpretation of statute by judges.
Justify	to show (or prove) a statement, opinion or conclusion to be right or reasonable by providing evidence or examples.	Question 5 (2014) Audrey has commenced civil proceedings in the Supreme Court of Victoria (Trial Division). The Court will resolve the dispute at trial after mediation was unsuccessful. Provide one reason for the existence of a court hierarchy. Refer to Audrey's dispute in your answer.
Outline	to give a brief summary of the key features.	Question 12 (2019) The author of a journal article writes the following opinion. Juries should not decide matters of fact. It should all be left up to the judge! To what extent do you agree with this opinion? Justify your answer.
Provide	to give, supply or specify.	
To what extent	to describe the degree or level to which a statement, opinion or conclusion is (or is believed to be) correct or valid.	

Study tip

A student explaining the structure of Legal Studies exams to a peer.

TIP 3 – Understand the structure of exam questions

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

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

QUESTION COMPONENT	PURPOSE
Question number	This indicates the number of the question on the exam paper.
Mark allocation	This indicates the total number of marks available for the question. The total marks available gives you an idea of how long to spend answering the question.
Quote or extract	Exam questions often include statements (set in quotation marks) or extracts from key pieces of legislation.
Task word	Task words are words that tell you how to demonstrate the knowledge you have learned.
Quantifying words	Quantifying words state the specific numbers (i.e. quantities) of example or definitions you should provide in your answer. They are bolded for clarity. Follow quantifying words carefully and provide the number that is asked.
Content words	Content words provide specific details and facts for you to consider in your answer (i.e. the context).

Source 3 Legal studies exam questions are typically made up of tasks based on these items.

Question 1a (10 marks)	Discuss the ability of parliament to change the law. In your answer, provide one recent example of an individual or group influencing legislative change.
Question 1b (7 marks)	Justify common law proceedings in the Magistrates' Court against the employer and is seeking \$5000 in damages.
2. (10 marks)	Describe one purpose of damages.

From VICCAA Legal Studies Exam, 2016

Study tip

It's important to keep an eye on the clock during trials or exams to make sure you have enough time to answer every question.

Source 4 It is important to keep an eye on the clock during trials or exams.



Check your book for these additional resources and more:

• Student book questions XX (This TIC)

• Worksheet XX (This TIC)

• Workshop XX (This TIC)

• Writing XX (This TIC)

• Assessment XX (This TIC)

• This year's skills with its auto-correcting multiple-choice quiz.

1.4

MASTERING LEGAL CITATION

As you work your way through the VCE Legal Studies course, you will be learning about many different laws and legal cases. To be able to recognise laws and legal cases, and to reference them in your notes and assessment tasks, you should master the basics of legal citation.

What is legal citation?

Legal citation is the system used to refer to legal documents and sources such as cases and Acts of Parliament in a consistent and accurate way. The most commonly cited legal documents are:

- **Acts of Parliament** (also known as statutes and legislation)
 - legal cases (also known as court decisions)
- The following information will help you in reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.

Citing Acts of Parliament

Acts of Parliament (often called just Acts) are laws made by the various parliaments in Australia (i.e. state and territory parliaments and the Commonwealth Parliament) and in other countries around the world.

Acts of Parliament generally feature the following pieces of information in this order:

- **The Name of the Act or statute** – This is the title that has been given to the statute. It is always written in italics.
- **The year that it was made by Parliament** – This is also written in italics.
- **The Parliament that passed it** – This will be either a state or territory parliament, or the Commonwealth Parliament. The name of the parliament is written in full, not an abbreviation, for each parliament are used (e.g. Vic or Cth).

Example 1 – an Act made by the Victorian Parliament

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

Crimes Act 1958 (Vic)

Example 2 – an Act made by the Commonwealth Parliament

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

Competition and Consumer Act 2010 (Cth)

Each chapter begins with a chapter opener that includes:

CHAPTER 13

REMEDIES

ix

9.5 WORK: PAY AND CONDITIONS

Workplaces have an essential role in the employment of workers. They provide the rights of employees in the workplace. Many legal issues can arise from employment conditions and can involve complex issues such as:

- employment of workers
- workplace safety
- bullying
- discrimination and harassment.

The employer is governed by various federal and state laws, which are designed to ensure the safety of employees, and to provide fair and equitable employment conditions. Many of these laws are made by the Fair Work Commission, which can make a decision on an employee's pay and conditions.

Figure 1 Working hours often need greater protection. The Fair Work Act 2009 (FWA) sets out the minimum standards for working hours and conditions. This act is designed to ensure that workers are not overworked and that their rights are protected.

Figure 2 The three main types of agreements that a person's pay is set by:

- **Enterprise agreement**: An agreement between an employer and a group of employees.
- **Individual contract**: An agreement between an employer and an individual employee.
- **Agreement**: An agreement between an employer and an individual employee.

Pay and conditions in Australia

Award

An award is a document which sets out the minimum conditions of employment for a particular occupation or industry. It is made by the Fair Work Commission. It sets out the minimum conditions of employment for a particular occupation or industry. It is made by the Fair Work Commission. It sets out the minimum conditions of employment for a particular occupation or industry.

Fast food award

Fast-food workers in Australia are paid a minimum wage of \$15.50 per hour. This is the minimum wage for all workers in the fast-food industry. It is set by the Fair Work Commission. It is set by the Fair Work Commission. It is set by the Fair Work Commission.

Example

Hypothetical situations that raise legal points for discussion are provided to stimulate discussion and illustrate how laws work in different contexts.

Extract

Extracts from relevant legislation, acts, reports, speeches and websites support learning.

Case study

Recent examples and scenarios show how key legal concepts are applied in real life situations.

13.1 INTRODUCTION TO REMEDIES

In society, disputes are common. The interaction between different people, groups and organisations can often result in **disputes** being brought, or rights being infringed. These disputes often arise from a variety of causes, and can be resolved in a number of ways. The Fair Work Commission (FWC) is responsible for resolving disputes in the workplace. It is a government body that is responsible for resolving disputes in the workplace. It is a government body that is responsible for resolving disputes in the workplace.

Case study

King Kong features in Supreme Court claim

In March 2017, the Herald Sun reported that film and television star Jason Momoa had filed a claim in the Supreme Court of Victoria against the Creative Technology Company. The claim was for the right to be named in the film 'King Kong'. The claim was for the right to be named in the film 'King Kong'. The claim was for the right to be named in the film 'King Kong'.

Did you know?

Interesting, quirky or fun facts about the law are provided to engage students and bring content to life.

Check your learning

Structured questions and tasks appear at the end of every topic. These provide opportunities for students to consolidate and extend their understanding. They are levelled under the following headings to allow for differentiation:

- Define and explain
- Synthesise and apply
- Analyse and evaluate.

Links to supporting digital resources on obook assess

Links to a range of supporting digital resources appear at the end of every topic. These include links to videos, worksheets, interactive quizzes, revision notes and weblinks.

Chapter and unit review

Each chapter and unit wraps up with opportunities for review and revisions.

Unit review

Unit assessment tasks appear at the end of Unit 3 and Unit 4. These cover the key knowledge dot points for the whole Area of Study and are structured in line with a range of suggested assessment tasks covered in the *VCE Legal Studies Study Design*.

CHAPTER 15 REMEDIES

CHAPTER SUMMARY

The purpose of this chapter is to provide students with a comprehensive overview of the legal system in Australia. It covers the various branches of the legal system, including the judiciary, the executive, and the legislature. It also discusses the role of the legal system in protecting the rights of citizens and maintaining the rule of law.

PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcomes, key knowledge and skills before attempting this assessment task. The task is designed to assess your understanding of the key concepts and principles covered in the chapter. It is a practical task that requires you to apply your knowledge to a real-world scenario.

Unit 2 Area of Study 1

Crime and punishment

Unit 2 Area of Study 1 covers the legal system in Australia. It includes the following topics:

- Crime and punishment
- Tort law
- Contract law
- Property law
- Family law
- Administrative law
- Constitutional law
- International law
- Environmental law
- Health law
- Consumer law
- Financial law
- Labour law
- Tax law
- Insurance law
- Intellectual property law
- Sports law
- Maritime law
- Space law
- Cyber law
- Biotechnology law
- Environmental law
- Health law
- Consumer law
- Financial law
- Labour law
- Tax law
- Insurance law
- Intellectual property law
- Sports law
- Maritime law
- Space law
- Cyber law
- Biotechnology law

Chapter review

A chapter review appears at the end of every chapter and includes a chapter summary, revision questions and a practice assessment task.

Key features of digital support

Access & Justice Legal Studies for VCE Units 1 & 2 is supported by a range of engaging and relevant digital resources provided via obook assess.

obook assess

Students receive:

- a complete digital version of the Student book with notetaking and bookmarking functionality
- case study videos (with supporting worksheets) from some of Australia's finest news and current affairs outlets (including ABC and SBS)
- targeted instructional videos by some of Victoria's most experienced Legal Studies teachers, designed to help students prepare for exams and assessment tasks
- a range of engaging worksheets for every chapter, designed to consolidate and extend understanding on key points from the study design
- additional case studies and examples for extension
- access to interactive auto-correcting multiple-choice quizzes.



TEACHER obook assess

Teachers receive:

- access to all student resources
- detailed course planners, teaching programs and lesson plans
- answers to every question in the Student book
- chapter summary PowerPoint presentations ideal for whole-class revision
- practice exams and SACs with answers.



A golden statue of Lady Justice, blindfolded and holding scales and a sword. The statue is the central focus of the page, with its right arm raised holding scales and its left arm holding a sword. The background is a blurred image of a courtroom or courthouse interior.

CHAPTER 3

LEGAL

FOUNDATIONS

Source 1 Lady Justice (shown here) is a common sight in courthouses around Australia. She represents the law and is commonly shown with a blindfold (to indicate impartiality), scales (to indicate the weighing of evidence) and a sword (to indicate that justice is swift and final). In Chapter 3, you will explore what justice means and the principles of justice: fairness, equality and access.

OUTCOME

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

KEY KNOWLEDGE

In this chapter, you will learn about:

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

KEY SKILLS

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

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

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

binding precedent the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

civil law an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

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

criminal law an area of law that defines a range of behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

equality one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

government the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

House of Representatives the lower house of the Commonwealth Parliament

Legislative Assembly the lower house of the Victorian Parliament

Legislative Council the upper house of the Victorian Parliament

persuasive precedent the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

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

ratio decidendi a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. Ratio decidendi forms the binding part of a precedent

Senate the upper house of the Commonwealth Parliament

social cohesion a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

statute a law passed by parliament, also known as an act of parliament or legislation

KEY LEGAL CASES

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

Extracts from the VCE Legal Studies Study Design (2018–2022) reproduced by permission, © VCAA.

3.1

SOCIAL COHESION AND THE RIGHTS OF INDIVIDUALS

social cohesion

a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

Did you know?

The Scanlon-Monash Index of Social Cohesion provides an overview of the state of social cohesion in Australia every year. It considers five core areas of social cohesion:

- belonging
- worth
- social justice
- participation
- acceptance and rejection.

In 2016, Australia scored well in all of those areas but one: acceptance and rejection.

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

The Scanlon Foundation is an organisation that was established in 2001 to undertake research and make financial grants that would help to unite Australian society. It describes social cohesion as **the willingness of members of a society to cooperate with each other in order to survive and prosper**. This means individuals are free to make choices in society, and are keen to cooperate with other members of society so that they may live in harmony.

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



Source 1 Social cohesion is about individuals working together and living in harmony.

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

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

The role of laws

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

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

Laws also protect the rights of individuals. A number of laws establish individual rights, and say what happens if those rights are infringed. For example, a number of laws in Australia state that people must

rule of law

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

not discriminate against others based on a personal attribute such as age, race, religion, gender identity or pregnancy. Consequences can occur if a person acts contrary to (inconsistent with) those laws.

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

The role of individuals

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

While no one person will know about every law in Australia, or the source of those laws, it is the responsibility of every person to obey the law. Before taking any important action, they need to find out what the law is, particularly if it impacts on them. For example, a person who decides to open up a business is expected to familiarise themselves with laws about businesses, such as registering a business name, and obligations imposed on them to keep books and records for a certain period of time.

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

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



Source 2 Laws set out rules on how disputes are resolved to ensure they are resolved in a peaceful and consistent way.



Source 3 Laws aim to ensure social cohesion. For example, traffic rules help to ensure a society in which people cooperate with each other on the roads.

The role of the legal system

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

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

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

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

3.1

CHECK YOUR LEARNING

Define and explain

- 1 Explain what is meant by social cohesion. Provide two benefits of a society which is socially cohesive.
- 2 What role do you play in ensuring a socially cohesive society?
- 3 Do courts have a role to play in protecting individual rights? Explain your answer.

Synthesise and apply

- 4 Look at Source 3 on page 39.
 - a Make a list of the laws that could apply to the picture (try to think beyond road laws).
 - b Explain how each of the laws help to achieve social cohesion. What individual rights is each one protecting?
 - c Do you think that each of those laws would be accepted in the community? Explain your answer.
 - d Explain one possible consequence of a breach of each of those laws, and justify why you have chosen that consequence.
- 5 The TV series *The Walking Dead* is based on a comic book series in which the world has been overrun by zombies. There is no government, no law and no legal system.
 - a Make a list of the five most critical laws that you think need to be established by the survivors. They can be new laws, or old laws.
 - b How would you seek to establish those new laws?

- c If each of the laws were infringed what would be the consequences?

Analyse and evaluate

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

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

Check your obook assess for these additional resources and more:

» **Student book questions**
3.1 Check your learning

» **Video tutorial**
Introduction to Chapter 3

» **Weblink**
Scanlon-Monash Index of Social Cohesion

3.2

THE PRINCIPLES OF JUSTICE

fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

equality

one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

access

one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

Study tip

In Unit 2, you will look at these principles more closely; however, you should have an understanding of what these principles are, and what they mean, in Unit 1. Start to refer to the principles of justice in your answers to questions in your assessment tasks when you are looking at different cases.

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

Justice is a difficult concept to define, and its definition can vary from person to person, and from society to society. For example, if a person who has a substance addiction steals money to buy illegal drugs, some people might think a just penalty is imprisonment. Others, however, might see justice achieved through a focus on the deeper social issues. That could mean a penalty that recognises that the reasons for the theft are related to substance abuse, considers the needs and circumstances of the offender, and aims to address the underlying reasons for the crime. This may be a penalty which requires the offender to seek assistance, like counselling and professional support, to overcome their substance addiction.

When considering whether there is justice when a law has been broken or when a case needs to be resolved, rather than trying to apply a single definition, you should consider the following three principles:

- **fairness**
- **equality**
- **access.**

These three principles are known as the **principles of justice**, and should be used as a way to determine whether justice has been achieved in a particular case.

Fairness

Fairness is the first principle of justice. A dictionary definition is 'impartial and just treatment or behaviour without favouritism or discrimination'. But like justice, fairness can mean different things depending on a person's values and perspectives.

Laws must be fair. A law which allows big businesses to threaten small businesses when entering into contracts would be considered unfair, as it would mean that one group with power in society is getting an unfair advantage over. Similarly, a law that makes imprisonment the penalty for jaywalking would generally be considered unfair, as the penalty would not fit the crime.

When disputes arise, fairness means there are fair legal processes in place, and all parties receive a fair hearing. People should be able to understand court processes and have an opportunity to present their case and rebut (challenge) the other side's case, and the processes involved in determining a case should be fair and impartial.



Source 1 Lady Justice, blindfolded and holding scales and a sword, is shown on the County Court of Victoria building in Melbourne.

The right to a fair trial or hearing is a right protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Human Rights Charter), a law which aims to promote and protect human rights in Victoria. The right is also protected by the courts through a series of cases, which recognises that a fair trial is a fundamental part of our legal system.

However, fairness doesn't just apply to the final trial or hearing – it applies to all aspects of our legal system, including our interaction with the police and our right to understand allegations made against us.

Fairness does not necessarily mean that people are treated the same – but if they are treated differently, it should be because of the laws that have been applied, and because of the circumstances of the case, and not because the person has been discriminated against because of a personal attribute or characteristic.

Equality

Equality is the second principle of justice. A dictionary definition is 'the state of being equal, especially in status, rights or opportunities'. It means all people should be treated equally before the law regardless of their characteristics or attributes, such as status, race, religion, marital status, or culture.

Laws should not be discriminatory (they should apply to everyone, and not single out one group), and there should be laws which prohibit discrimination against a person or group because of some particular characteristic.

Equality in the legal system means that all people should be treated equally before the law. No person or group should be treated advantageously, or disadvantageously, and people should be given an equal opportunity to present their case. The processes should be free from bias or prejudice, and those who make the decision should be impartial when that decision is being made. This includes judges, who must act impartially, and **jury** members, who must be unbiased and have no links with the parties.

Equality and fairness, while overlapping, are two different concepts. The best way to contrast the two is by considering the following example.

jury

an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

EXAMPLE

Fire at shopping centre

Late last year there was a major fire outbreak in a local shopping centre, and 40 people were injured. The injuries ranged from severe to minor.

A paramedic officer handed out gauze and bandages and had exactly 40 of each. He wanted to treat everybody equally, and so decided to hand out one gauze and one bandage to each of the 40.

A second paramedic officer disagreed with this and thought that this was **unfair** even though it was **equal** treatment. The second officer believed that to be fair, they should hand out the gauze and bandages according to need, depending on the severity of a person's injuries. The first paramedic officer didn't like this. He thought that this would create inequality.

Fairness and equality may need to be balanced. Sometimes it can be impossible to be perfectly fair and equal at the same time. For example, if you were handing out treats, everyone should get the same. That would be fair and equal. But in the above example, providing gauze and bandages based on the person's injuries would be fairer. People are not being treated equally (in the number of bandages) but other kinds of equality are also important. If the distribution was decided based on something other than injuries (say, the age or attractiveness of the injured people) it would mean some people would miss out simply because of some personal characteristic. Then there would be both inequality and unfairness.

Access

Access is the third principle of justice. A dictionary definition is 'the ability to approach or make use of something'. It is generally accepted that all members of society should have access to education, health, food and shelter.

Access means that the laws and the legal system should make it possible for people to use the procedures, methods and institutions that help to resolve a civil dispute or determine a criminal case. This not only includes being able to access the institutions that will make a final decision in a case, but also being able to have contact with bodies and institutions that provide legal advice, education, information and assistance, and have the ability to be informed about cases. It also means that people should have access to information about their legal rights so they can understand when they may have been infringed.

Access to justice is an essential principle of the rule of law. People need to be able to access the law and the legal system to be able to enforce their rights, and people who have been harmed because of someone else's actions should be able to seek compensation.



Source 2 Former Chief Justice Marilyn Warren of the Supreme Court of Victoria. The use of unbiased and impartial judges is one of the ways in which the legal system tries to achieve justice.

3.2

CHECK YOUR LEARNING

Define and explain

- 1 Identify and explain the three principles of justice.
- 2 Identify five possible attributes that a person may suffer discrimination over.
- 3 Describe what is meant by the term 'access'.
- 4 Is fairness limited to a fair hearing? Explain your answer.

Synthesise and apply

- 5 List three different categories of people who might be affected by a sentence imposed on someone found guilty of an offence. How might people in those categories define what is meant by a 'fair sentence'? Would their ideas of fairness differ?

- 6 Read the example 'Fire at shopping centre'. Identify another scenario where the law has been broken and provide a solution which is both fair and upholds equality.
- 7 Conduct some research on 'Lady Justice'. Who is Lady Justice, and what do the three symbols that she is sometimes associated with mean?

Analyse and evaluate

- 8 Judges often take into account individual circumstances when sentencing. Do you think that this achieves both fairness and equality? Be prepared to share your opinions with the class.

Check your obook assess for these additional resources and more:

» **Student book questions**

3.2 Check your learning

» **Weblink**

Charter of Human Rights and Responsibilities Act 2006 (Vic)

» **Weblink**

What is justice? Speech by Former Chief Justice Marilyn Warren

» **Worksheet**

The principles of justice

Study tip

In this Area of Study you are expected to assess the effectiveness of laws. Address each of the five characteristics when you are asked about whether a particular law is effective.

Did you know?

In South Australia, a person who intentionally disturbs a wedding is guilty of an offence. The maximum penalty is \$10 000 or imprisonment for 2 years.

sue

to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

public place

an area or location considered open to the public (i.e. anyone in the community has a right to go there)

For society to function properly and for there to be social cohesion, laws must be effective. To be effective, laws must have the following five characteristics:

- reflect society's values
- be enforceable
- be known
- be clear and understood
- be stable.

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

Laws must reflect society's values

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

For example, in late 2016, changes were made to adoption laws in Victoria to allow couples to adopt children regardless of their sex or gender identity. This means that any two people who are living together as a couple, on a genuine domestic basis, are now able to adopt a child. Society's views and values about de facto relationships and same-sex couples have changed over time, and the law has also changed to recognise this.

Laws must be enforceable

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

Imagine if there was a law which stated that it is an offence to dream of going on a holiday. Such a law would be ineffective, because the police could never find out whether people are breaking the law.

On the other hand, it is an offence in Victoria to behave in a disorderly manner in a **public place** while drunk. This type of law is more likely to be effective because it requires the behaviour to occur in public; therefore, the behaviour is more likely to be visible to police officers and members of society, and the police will be able to enforce the law.

Laws must be known

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

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

However, law-makers also need to keep the public informed of any new laws that are passed. Major changes in the law, or new laws, are usually reported in the media, and many are debated in the media and in society before they are introduced. For example, in 2015 a Victorian law was passed which requires every childcare facility to ensure that children who go to that facility have been immunised. The law,

known as the ‘no jab, no play’ law, is aimed at increasing immunisation rates for young children in the community after there was concern raised about Victoria’s immunisation rates. It was widely discussed before and after its introduction, largely because there are strong ‘anti-vaccination’ feelings in a small section of the community.

Laws must be clear and understood

It is important for a law to be written in a way that means that people can understand it, and it is **clear what its intent is**. If a law is ambiguous, unclear, or written in language or in jargon that people don’t understand, it is possible people won’t follow it and the law will be ineffective.

For example, in some states of Australia, including Queensland, there have been calls for changes to be made to abortion laws which are considered unclear, outdated and ambiguous. Even though women in Queensland can receive an abortion, anybody who assists (such as a doctor) can be prosecuted under the Queensland *Criminal Code Act 1899* (Qld).



Source 1 Road laws in Australia are generally known because of visible signage on roads.

Decriminalising abortion laws

In some states abortion is a crime. Recent parliamentary debates in Queensland and New South Wales have called for abortion law reform. In these states, medical practitioners who provide, or assist with, an abortion, can be prosecuted under criminal law. This includes the woman accessing the procedure herself, unless it could be proven the pregnancy poses danger to the woman’s physical or mental health.

The *Medical Journal of Australia* published an article in October 2016 pressing for reform. Authors, Heather Douglas and Caroline de Costa said ‘Most Australian states have introduced significant legislative modifications since 2000; however, in NSW and Queensland, the legislation, and specifically the offences, are more than 100 years old and well overdue for reform’. They also argued that these laws created fear and uncertainty about when an abortion might be considered legal or illegal.

Abortion laws are different in every state and territory. Douglas and de Costa argue for the **decriminalisation** of abortion everywhere, and for abortion to be treated as a health issue, not a criminal matter.

CASE

STUDY

decriminalisation
the process of
legalising an act or
behaviour which was
previously considered
a crime

Laws must be stable

For a law to be effective, it must be stable. If the law were constantly changing, no one would be certain what the law was, and it may not be as effective as a law that has remained constant for some time.

For example, there have been very few changes to the law relating to theft in Australia. It has always been a crime, and so there is certainty that stealing is against the law.

AN EFFECTIVE LAW MUST				
reflect society's values	be enforceable	be known to the public	be clear and understood	be stable

Source 2 Characteristics of an effective law

3.3

CHECK YOUR LEARNING

Define and explain

- 1 Identify and describe three characteristics of an effective law.
- 2 Explain why the 'no jab, no play' law would generally be known by:
 - a people who send their children to childcare
 - b the general public.
- 3 Identify one law in Victoria that you think reflects society's current values. Give reasons for your answer.

Synthesise and apply

- 4 Identify one law in Australia that you consider to be unclear or ambiguous (or that you don't understand). What it is about the law that you don't understand, or that you think is unclear or ambiguous?
- 5 Do you think a law making it an offence to smoke in private homes would be easy to enforce? Justify your answer.
- 6 Access the news article 'Abortion laws 'ambiguous, outdated' in Qld and NSW, doctors argue'. A link is provided on your [obook assess](#).
 - a What is it about the laws that Professor de Costa says is unclear?
 - b Why does this make doctors cautious when providing abortions?
 - c When would an abortion be legal in New South Wales and in Queensland?
 - d Conduct some additional research. Since this article was published, have there been any changes to

abortion laws in New South Wales or in Queensland, or are there any changes on the horizon?

Analyse and evaluate

- 7 Access the webpage Legislation & Bills from the Victorian Parliament website. A link is provided on your [obook assess](#). Find a law that has been passed this year. Prepare a short report or PowerPoint presentation on why you think this law will be effective, addressing each of the five characteristics of an effective law.
- 8 Look at each of the statements below and write down whether you think each one is fact or fiction. Then access the *Summary Offences Act 1966* (Vic). A link is provided on your [obook assess](#). See whether you are correct (hint: use the search button to find particular words in the Act).
 - a It is illegal to sing an obscene song within earshot of someone.
 - b It is illegal to roll a drum in a public place in all circumstances.
 - c It is an offence to drive a dog or goat harnessed to a vehicle in a public place.
 - d It is illegal to burn rubbish shavings in a private house.
 - e It is illegal to fly a kite in a public place to the annoyance of another person.

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



Check your [obook assess](#) for these additional resources and more:

- | | | | |
|--|---|--|---|
| » Student book questions
3.3 Check your learning | » Video tutorial
How to assess whether a law is effective | » Weblink
Abortion Laws 'ambiguous and outdated' in Qld and NSW, doctors argue | » Weblink
Legislation and Bills, Victorian Parliament |
|--|---|--|---|

INTRODUCTION TO PARLIAMENT AND THE COURTS

parliament

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

government

the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

opposition

the next-largest political party after the government. The opposition questions the government about policy matters and is responsible for holding them to account

bicameral parliament

a parliament with two houses (also called chambers)

Governor-General

the Queen's representative at the Commonwealth level

Senate

the upper house of the Commonwealth Parliament

House of Representatives

the lower house of the Commonwealth Parliament

bill

a proposed law that has not yet been passed by parliament

political party

an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament

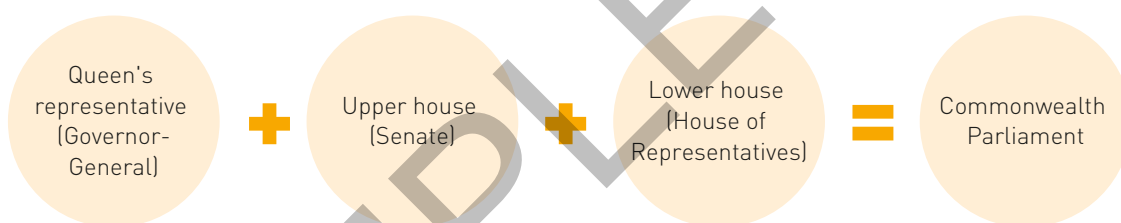
The next few topics in this chapter require an understanding of **parliament** and the courts. This topic provides you with an overview of the Commonwealth Parliament, the Victorian Parliament, **government** and **opposition**, and the courts.

Commonwealth Parliament

The Parliament of Australia, otherwise called the Australian Parliament or the Federal Parliament, is a **bicameral parliament**. It consists of:

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

The role of the Commonwealth Parliament is to pass laws for the good government of Australia in its area of law-making powers.



Source 1 The structure of the Commonwealth Parliament

House of Representatives

The main roles of the House of Representatives are to represent the people, introduce and pass proposed laws (**bills**), review bills passed by the Senate and form government. The **political party** that has the majority of members in the lower house will form government for the whole of Australia. You will learn more about how bills are passed in the next topic.

At the federal level, each state is divided into geographical areas known as electoral divisions. Each division has approximately the same number of electors. The voters in each division elect their representative, who takes a seat in the House of Representatives. There are 150 electoral divisions in Australia, and therefore 150 members of the House of Representatives. All members of the House of Representatives are elected for a period of up to three years.

Senate

The main roles of the Senate are to represent the interests of the states and territories of Australia, introduce and pass bills, and review bills passed by the House of Representatives.

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

The Senate is often called the **house of review** (because most bills are introduced in the House of Representatives and reviewed by the Senate) and the **states' house** (because each state has equal representation).

Did you know?

A parliament where there is no political party holding a majority of seats in the lower house is called a hung parliament.



Source 2 Left: The Senate, which is the upper house. Right: The House of Representatives, which is the lower house. Members of government sit on one side of the house and the opposition sits on the other side.

Victorian Parliament

The Victorian Parliament consists of:

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

The role of the Victorian Parliament is to pass laws for the good government of Victoria in areas of its law-making powers.

governor

the Queen's representative at the state level

Legislative Council

the upper house of the Victorian Parliament

Legislative Assembly

the lower house of the Victorian Parliament



Study tip

Students often confuse the names of the lower house and the upper house of the Victorian Parliament. One aid you can use is to remember that "C" is above "A" in the alphabet, so Legislative Council is the **upper** house, and Legislative Assembly is the **lower** house.

Source 3 The structure of the Victorian Parliament

Legislative Assembly

The main role of the Legislative Assembly is to introduce and pass bills and to form the Victorian Government. The government consists of the members of the political party that have the majority of members in the lower house. The Legislative Assembly can also review bills passed by the Legislative Council.

Each member of the Legislative Assembly represents one electoral district. There are 88 electoral districts in Victoria, and therefore 88 members of the Legislative Assembly. Each member of the Legislative Assembly holds his or her seat in parliament for a fixed term of four years.

Legislative Council

The role of the Legislative Council is to introduce bills and review bills passed by the Legislative Assembly. Bills passed by the Legislative Assembly can be rejected or amended by the Legislative Council.

For the purposes of appointing members to the Legislative Council, the state of Victoria is divided into eight large regions, and five representatives are elected from each region. There are therefore 40 members of the Legislative Council. Members of the Legislative Council hold their seats for four years.

Did you know?

Decorating the lower house, or the house of government, in green is a tradition adopted from the United Kingdom.

Government and opposition

The political party with the majority of members elected to seats in the lower house of each parliament will form government. Sometimes, a political party will join forces with another political party to form government. This is known as a **coalition**. Historically at a federal level, political parties which have included the Liberal Party and the National Party have joined together to form government. The Prime Minister is the leader of the Federal Government (also known as the Commonwealth Government), and the Premier of Victoria is the leader of the Victorian Government.

coalition

an alliance of two or more political parties that join to form government

The Premier of Victoria and the Prime Minister will choose senior members of his or her party who have been elected to parliament (referred to as **ministers**) to be responsible for different areas of government, such as education and health. The **Cabinet** is made up of the Prime Minister and senior ministers (at federal level) and the Premier of Victoria and senior ministers (at state level), and decides the government's policy program and what proposed laws should be put to the parliament.

minister

a member of parliament who is a member of the party in government and is in charge of a government department

Cabinet

the policy-making body made up of the Prime Minister (or premier at a state level) and a range of senior government ministers in charge of a range of government departments. Cabinet decides which laws should be introduced into parliament be introduced into parliament

The next largest political party will form the opposition, whose role it is to challenge and question the government on policy matters. The opposition will also appoint some of its parliamentarians as 'shadow ministers' in various areas such as health and defence. These shadow ministers will hold the government ministers accountable for decisions they make in their relevant portfolios.



Source 4 Left: The Legislative Council, which is the upper house. Right: The Legislative Assembly, which is the lower house. Members of government sit on one side of the house and the opposition sits on the other side.

Parliament and government are not the same thing. The government is the political party (or coalition of parties) that has the majority of seats in the lower house, whereas the parliament consists of all elected members of both the upper house and lower house of parliament and the Queen's representative. The main role of the parliament is to make the law, whereas the main role of the government is to administer or implement the laws made by the parliament.

The courts

The main role of the courts is to resolve the disputes and cases brought before them. There are many different courts in Australia, some of which are federal courts and some of which are state courts. Federal courts generally deal with issues that arise under federal law, and state courts generally deal with issues that arise under state law.

The four federal courts are the High Court, the Federal Court, the Family Court and the Federal



Source 5 The High Court of Australia in Canberra

Australian Constitution, the

a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

court hierarchy

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

Circuit Court. The High Court was established by the **Australian Constitution** and is the highest court in Australia.

The three main Victorian courts are the Supreme Court, the County Court and the Magistrates' Court. There are also two specialist courts: the Children's Court and the Coroners Court.

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

The courts are independent of the parliament. That means judges and magistrates are free to interpret and apply the law, and resolve cases, independently and without interference or influence from parliament or government.

Keeping judges and magistrates independent of parliament and government upholds the rule of law, and also ensures fairness in deciding cases (the people who make the law aren't deciding whether the law has been broken).

3.4

CHECK YOUR LEARNING

Define and explain

- 1 Explain what is meant by a bicameral system of parliament.
- 2 What is the difference between parliament and government?
- 3 Create a visual diagram or table which shows the members in each of the houses of the Commonwealth Parliament and the Victorian Parliament, the names of each house, and the name of the Queen's representative for each of the parliaments.

Synthesise and apply

- 4 Access the Commonwealth Parliament website. A link is provided on your [obook assess](#).
 - a Which political party is currently in government at a federal level, and which political party is in opposition?
 - b Who is Australia's current Prime Minister?
 - c Who is Australia's current Governor-General?
 - d Identify four political parties who currently have senators in the Senate.
 - e When will the next federal election be?

- 5 Access the Victorian Parliament website. A link is provided on your [obook assess](#).
 - a Which political party is currently in government, and which political party is in opposition?
 - b Who is Victoria's current Premier?
 - c Who is Victoria's current Governor?
 - d Identify four political parties who currently have members in the Legislative Council.
 - e When will the next state election be?
- 6 Create a quiz or crossword for another person in your class about the courts, the Commonwealth Parliament and the Victorian Parliament.

Analyse and evaluate

- 7 'Parliament should be able to interfere with the way that courts resolve disputes. This is particularly so because courts these days are giving lenient sentences.' Do you agree with this statement? Share your thoughts with the rest of your class members.



Check your [obook assess](#) for these additional resources and more:

» Student book questions

3.4 Check your learning

» Weblink

Commonwealth Parliament

» Weblink

Victorian Parliament

SOURCES OF LAW

statute law

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

common law

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

Act of Parliament

a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

supremacy of parliament

the concept that the final law-making power rests with parliament, which can repeal and amend its own statutes and pass legislation to override common law. Also referred to as sovereignty of parliament

royal assent

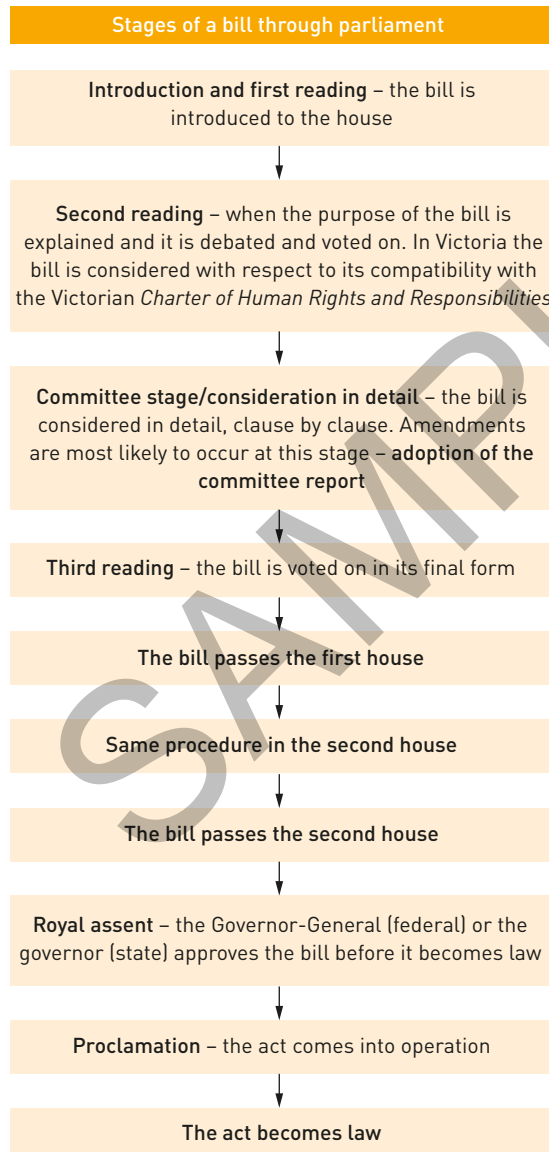
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

private member's bill

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

There are many laws in Australia. They can be classified or grouped in different ways, including:

- **the source of law** – (i.e. who made the law). In this topic you will consider two main sources of law: **statute law** (i.e. laws made by the parliament) and **common law** (i.e. laws made by the courts).
- **the type of law** – (i.e. what area the law covers). In particular, this means the behaviour the law is trying to regulate and the possible consequences if the law is broken. In topic 3.7 you will consider two types of law: criminal law and civil law.



Source 1 Stages of the legislative (law-making) process

that do not have the support of the government) will pass both houses because the government has the majority of votes in the lower house. A bill introduced by a member of parliament who is not a party of the government is referred to as a **private member's bill**.

Statute law

The main role of parliament is to make laws. Laws made by parliaments are referred to as statutes. Statutes are also called **Acts of Parliament** or legislation. Our parliamentary system is based on the concept of **supremacy of parliament** – this means that parliaments are able to override laws made by other bodies, including the courts, and the final law-making power rests with the parliament.

The government generally decides what laws should be made, but the whole of the parliament is responsible for passing the law. If the government decides a law is needed, a bill is drawn up and presented to parliament.

Before a bill can become law it must pass through both houses of parliament. It will go through a number of stages through each of the houses, and must receive a majority vote from the members of each house.

Most bills are introduced into the lower house first. Bills (other than bills raising taxes or allocating funds) can also be introduced into the upper house and then proceed to the lower house.

Once a bill has been passed by both houses, it must be presented to the Queen's representative to receive **royal assent**. Following a certain period of time after royal assent, the bill will become law.

Individual members of parliament, who are not a member of the political party which forms government, may also introduce proposed laws (or bills) in the hope that they will be passed by the parliament and become law, although it is unlikely that non-government proposals (or bills

Study tip

One of the key skills you are expected to demonstrate in this Area of Study is your ability to classify a law according to its source and type. This topic and topic 3.7 will help you to develop this skill.

statutory interpretation

the process undertaken by judges when they are required to give meaning to words or phrases in an Act of Parliament so it can be applied to resolve a case before the court

Common law

A court's primary responsibility is to apply existing laws to the facts in cases that are brought before them and make a determination (decision) on the case based on those laws. In this way, it is often said that the main role of courts is to apply the law to resolve the dispute at hand.

As a secondary role, and as part of their determination of cases, courts also occasionally make laws. Court-made law is known as common law, case law or judge-made law.

Courts can make law in two situations or circumstances:

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

In each type of situation, because the court must still resolve the dispute, the judge will make a decision and provide reasons for the decision. Common law is created through the reasons for decisions of courts, which are then followed by courts in future cases where the facts are similar.

Interpreting statutes

An Act of Parliament is often written in general terms to apply to all types of situations. Sometimes an unusual situation arises and the courts have to interpret words within the act. This process, where a judge clarifies or interprets the laws written by parliament, is known as statutory interpretation.

Sometimes the interpretation supports the prosecutor's case. At other times, the interpretation helps the defendant, as in *Deing v Tarola* [1993] 2 VR 163.

LEGAL

CASE

Is a studded belt a weapon?

Deing v Tarola [1993] 2 VR 163

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

The Supreme Court, hearing the appeal, had to decide what a regulated weapon was, in the context of the Act and the regulations made under the Act, to determine whether a studded belt used to hold up trousers was in fact a regulated weapon.

The regulations contained a list of regulated weapons which included 'any article fitted with raised pointed studs which is designed to be worn as an article of clothing'. Justice

Beach, however, decided that the studded belt was not a regulated weapon, as a regulated weapon should be defined as 'anything that is not in common use for any other purpose but that of a weapon'.

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

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



Source 2 In *Deing v Tarola* the Supreme Court was required to decide on appeal whether wearing a studded belt could be interpreted as carrying a weapon.

Precedent

When a court makes a decision in a case that is the first of its kind, and in doing so establishes or creates a legal principle, the court is said to be setting a **precedent**. A precedent may be followed in similar cases that come before the courts in the future. These precedents then form part of the law.

For example, imagine you were leaning back on your chair and your class teacher decided to punish you because your deliberate behaviour was unsafe and unacceptable. The teacher should, in an effort to remain consistent, also punish other students who do the same thing in the future.

However, if in a future case, another student accidentally trips another student in class, rather than deliberately, the teacher may decide the two cases are different, and may choose not to punish the student in the second scenario in the same way as the others. In such a case, the teacher is distinguishing between the facts of the case at hand and the facts of the earlier case, in which the behaviour was deliberately unsafe. The most important aspect of the teacher's decision is the **reason** given for the decision – that deliberate unsafe behaviour is unacceptable. The precedent created in the past should be a guide to teachers in similar situations.

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

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

precedent

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

ratio decidendi

a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

stare decisis

a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

Snail in the bottle

Donoghue v Stevenson [1932] All ER Rep 1

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

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

Donoghue did not have a contract with the café or the manufacturer because she did not buy the bottle of ginger beer herself. This meant she could not sue for breach of contract. Instead, Donoghue claimed the manufacturer of the ginger beer, David Stevenson, had been negligent in the washing of the bottles before filling them with ginger beer. She sued Stevenson, alleging he had failed in two ways:

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



Source 3 A decomposed snail was found in the bottom of a ginger beer bottle manufactured by Stevenson.

LEGAL

CASE

neighbour principle

in relation to negligence, the common law rule that a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours' (i.e. people who would be closely and directly affected by their acts or omissions)

Donoghue's initial case failed, however she was granted leave to appeal to the House of Lords, where it was found that the manufacturer had been negligent. Because the bottle was opaque, Donoghue did not have any opportunity to check the bottle's contents before drinking it.

The Court ruled that Stevenson failed to take reasonable care in supplying a product which he knew would be consumed with no reasonable opportunity for the distributor, retailer or consumer to inspect the goods before consumption.

In this case, the Court established the **neighbour principle** as a way of explaining a person's duty of care. In the eyes of the law, a neighbour is someone you ought to have had in contemplation when carrying out an action. In his judgment, Lord Atkin said:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.

binding precedent

the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

persuasive precedent

the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

obiter dictum

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

distinguishing a previous precedent

the process by which a lower court decides that the material facts of a case are sufficiently different to that of a case in which a precedent was established by a superior court so that they are not bound to follow it

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

Binding precedent

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

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

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

Persuasive precedent

A precedent can be **persuasive** (that is, the court is not bound by it, but can choose to follow it or can be persuaded by it) on a Victorian court in the following circumstances:

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

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

The case below is an example of an Australian court following a British precedent.

Dr Grant's underpants

Grant v Australian Knitting Mills Ltd [1936] AC 85

A man (Dr Grant) purchased a pair of long underpants. When he wore them, he got a rash. He had the underwear tested and discovered that the chemical residue from the manufacturing process was still in the finished garment.

At this time, the 'buyer beware' principle applied to the purchase of all goods. It was the purchaser's responsibility to look for defects in goods before buying them. However, in this case the purchaser could not have detected the fault even if he inspected the goods. The Court followed the precedent set in *Donoghue v Stevenson* and ruled that the actions or omissions of the manufacturer directly caused Grant an injury and that the 'manufacturer owed a duty of care to the ultimate consumer'.



Source 4 Grant was affected by dermatitis from wearing a pair of long woollen underpants.

LEGAL

CASE

Developing or avoiding earlier precedents

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

- If the material facts of a case are sufficiently different from the material facts in a binding precedent, a lower court may not have to follow the precedent. Instead they may **distinguish** the material facts in the present case from those in the previous case and make a different decision. For example, a person found in the front seat of a car, over the legal alcohol limit, with his keys in his hands was found guilty of being in control of a car while over the legal alcohol limit. The accused appeared to be about to drive the car. This case was distinguished from a previous case, where the accused was found asleep in the car with the engine running, trying to keep warm. He did not appear to be about to drive the car.
- A precedent can be **overruled** by a higher court in a **different case**. For example, the High Court may overrule a decision of an earlier case decided in the Court of Appeal (which is lower than the High Court). When a precedent is overruled, it no longer applies.
- A precedent can be **reversed** when the **same case** is taken to a higher court on appeal. For example, a case may have been decided in the Supreme Court (Trial Division) and then appealed to the Court of Appeal (which is higher than the Trial Division), where the decision is changed. When a precedent is reversed, it no longer applies.
- In some instances a court is bound by a precedent but expresses its disapproval of or disagreement with the precedent. This is known as **disapproving**. This does not change a precedent, but a higher court, when deciding a later case, may choose to agree with the court that disapproved of the precedent and decide to overrule it.

overruling a previous precedent

when a superior court changes a previous precedent, established by a lower court, in a different and later case thereby creating a new precedent which overrules the earlier precedent

reversing a previous precedent

when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

disapproving a previous precedent

when a court expresses dissatisfaction of an existing precedent but is still bound to follow it

Define and explain

- 1 Define the term 'common law' and give two other names for common law.
- 2 Explain what is meant by the term 'statute law' and give two other names for a statute.
- 3 Explain what is meant by the term 'statutory interpretation'.
- 4 What is a precedent?
- 5 What is meant by the term 'royal assent' and at what stage of the legislative process does this occur?

Synthesise and apply

- 6 Read the legal case *Donoghue v Stevenson*.
 - a What incident occurred in this case and where did it occur?
 - b Why could Donoghue not sue the café or the manufacturer at that time?
 - c What was the *ratio decidendi* in this case and why is it still important today?
 - d Devise a modern-day scenario where something like this might happen, and which might give rise to you being able to sue a manufacturer.
- 7 Read the legal case *Grant v Australian Knitting Mills Ltd.*
 - a What facts are similar in this case to that of *Donoghue v Stevenson*?
 - b Do you think this case is still considered important today? Why?
 - c Do the precedents in this case and in *Donoghue v Stevenson* apply in the following situations? Justify your answer.
 - i Emma bit into a hazelnut cream chocolate that contained a piece of metal which was not visible. She broke her tooth and suffered severe pain as a result.
 - ii A hospital gave Taylor the wrong drug. As a direct result, he suffered a stroke which left him paralysed on one side.

- iii Jarrod bought some fried chicken from a local takeaway shop. He noticed a mouse tail that was hanging out of part of his chicken. He thought it would be pretty cool to try a fried mouse tail, so he ate it anyway. He felt sick later that night.

- 8 Read the legal case *Deing v Tarola*.
 - a Outline the key facts of the case.
 - b What was the issue that needed to be decided in this case?
 - c Identify the statute that needed to be interpreted, and the word or phrase in that statute that needed to be interpreted.
 - d What was the decision of the Magistrates' Court?
 - e Why was the case heard again in the Supreme Court and who heard the case?
 - f What was the Supreme Court's ruling on the issue, and what reasons did it give for the decision?
- 9 Classify each of the laws below based on their source. For the laws that you have classified as statute law, identify the parliament that passed them.
 - a The *Migration Legislation Amendment (Cessation of Visa Labels) Act 2016* (Cth).
 - b The maximum term of imprisonment for committing the common law offence of kidnapping is 25 years.
 - c The Family Violence Reform Implementation Monitor Bill 2016 (Vic) has just become law.
 - d The *Public Health Act 2016* (WA) aims to promote and improve public health and wellbeing.

Analyse and evaluate

- 10 Identify and examine two strengths and two weaknesses of statutory interpretation (i.e. the process undertaken by judges when they are required to interpret the meaning of statutes in cases). If required, conduct some internet research to help you.



Check your ebook assess for these additional resources and more:

» **Student book questions**

3.5 Check your learning

» **Going further**

Withholding royal assent

» **Worksheet**

How a law is made

THE RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS

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

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

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

Each of these is explored below.

secondary legislation

rules and regulations made by secondary authorities (such as local councils, government departments and secondary authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

Statutory interpretation

One of the main features of the relationship between parliament and courts is that parliament creates statutes, and courts interpret them.

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

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

LEGAL

CASE

What does it mean to 'manufacture drugs'?

R v Bucic [2016] NSWCCA 297 (14 December 2016)

In *R v Bucic*, Bucic was charged with knowingly taking part in manufacturing cocaine, which is an offence under the *Drug Misuse and Trafficking Act 1985* (NSW). The case against Bucic was that he and a co-accused were in possession of a number of sheets of A4 paper impregnated with cocaine, and that he and his co-accused took a number of steps to separate the cocaine from the paper. One of the issues that the Court had to decide was what was meant by the term 'manufacture', to determine whether Bucic was involved in manufacturing cocaine.

Manufacture was defined in the Act as including 'the process of extracting or refining the prohibited drug'. A further section in the Act states that a person takes part in the manufacture of a prohibited drug if the person takes part in any step, or causes any step to be taken, in the process of that manufacture.

The New South Wales Court of Appeal was required to determine what was meant by the word 'manufacture', and found that the process of separating the cocaine from the paper was a process of extraction, and therefore the accused took part in the manufacture of the drug. Justice Campbell said, as part of his interpretation of the word:

It is interesting to note that none of the range of meanings attributed to the word 'manufacture' in either the *Macquarie Dictionary* or the *Oxford Dictionary online* editions

includes 'to make something from something different'. The Oxford Dictionary in one sense speaks of making something from raw materials, and in another of 'converting' something, which are, I suppose, broadly similar to the meaning ascribed to 'manufacture' by the learned judge. But reference to the dictionaries demonstrates a wide range of possible meanings including, in the Macquarie Dictionary, to work up (material) into a form for use. This would, in my view, include the type of activity the Crown say the respondent engaged in here.

Codification of common law

Because parliament is the supreme law-making body, it can make law that confirms a precedent set in a court by passing an Act of Parliament that reinforces the principles established by the court. This is known as codification of common law, because the common law is now '**codified**' or put together in one or more statutes.

The case study below further explains the codification of common law in relation to complicity.

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

CASE

STUDY

Codification of common law principles of complicity

'Complicity' is being involved in a crime that was committed by another person, knowing it is wrong. For example, where a person assists or encourages another person to commit an offence, they can be charged as well. Previously, common law set down the principles as to when someone might be complicit in a crime.

In 2014 the Victorian Parliament passed laws that amended the *Crimes Act 1958* (Vic). The amendments codified most of the common law principles in relation to complicity.

Abrogation of common law

Parliament, as the supreme law-making body, is able to change or override (**abrogate**) common law. It does this by passing a law which specifically abrogates or abolishes the common law principle.

Parliament may decide to do this for a number of reasons. On occasion, the courts may interpret the meaning of the words in a statute in a way that was not the intention of parliament, or in a way that does not reflect the current meaning of the act. Courts may also develop precedent in a way that the parliament does not agree with. If this occurs, parliament can pass a statute which overrides the common law principles. The following case study further explains the abrogation of common law in relation to wilful exposure.

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament



Source 1 An individual who is complicit is said to be a partner in crime – an accomplice.

Abrogation of common law wilful exposure

Wilful exposure was an offence created over the years through the courts. Wilful exposure makes it an offence for a person to unlawfully, wilfully and publicly expose his naked person. It was a limited offence, in that it was limited to exposure by a man of his penis, and did not make any sexually suggestive acts beyond exposure a crime.

A review by the Department of Justice in 2013 of sexual offences recommended that the offence be abrogated, as the offence would no longer be necessary if a proposed new sexual offence law was created.

In 2016 the Victorian Parliament passed a law which amended the *Crimes Act*. A new Section 54C was inserted into the *Crimes Act*, which states that 'the offence of wilful exposure at common law is abolished'. In addition, new sexual offences were created as part of the amendments, including a new offence prohibiting sexual exposure.

CASE

STUDY

Ability of courts to influence parliament

Courts can also influence changes in the law by parliament through their comments made during court cases. That is, they can make the need for a change in the law known to parliament through their decisions.

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

This occurred in the case of *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

High Court reluctant to change old common law

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

Mr and Mrs Trigwell were injured when a vehicle collided with their car after hitting two sheep. They sued the driver of the other car and the owner of the sheep for damages.

The High Court decided to follow the old common law that a landowner did not owe a duty of care for their stock straying from their land onto the highway. This followed an old common law principle inherited from Britain that allowed animals to roam free.

Justice Mason said:

Even though there have been changes in conditions and circumstances, there are powerful reasons for the court to be reluctant to engage in changing the rule; such law-making should be left to parliament.

The Victorian Parliament subsequently passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic), which abolished the common law immunity and made owners of land liable for damage negligently caused by their animals straying on highways.

LEGAL

CASE

Define and explain

- 1 Describe two ways that courts and parliament work together in law-making.
- 2 How might courts fill in the gaps left by parliament?
- 3 Copy the following table in your notes and fill in the blanks.

RELATIONSHIP BETWEEN PARLIAMENT AND COURTS

FEATURE	DESCRIPTION	WHEN MIGHT THIS HAPPEN?	EXAMPLE
Statutory interpretation			
		If parliament agrees with the common law.	
			The common law offence of wilful exposure was abolished in 2016.
	Courts can highlight the need for parliament to change the law.		

Synthesise and apply

- 4 'The main role of the courts is to make laws.' Is this statement correct? Justify your answer.
- 5 Create a mind map starting with the word 'courts' as the central word. In your mind map, cover each of the four features of the relationship between courts and parliament in law-making.
- 6 Read the legal case *R v Bucic*.
 - a What was the charge in this case?
 - b What was the relevant statute that was in question?
 - c What was the critical issue that needed to be determined by the Court?
 - d How does this case show the relationship between parliament and the courts?
 - e Is parliament restricted from changing the relevant statute so that the word 'manufacture' is defined in a different way? Justify your answer.

- 7 Read the legal case *State Government Insurance Commission v Trigwell*.

- a What was the common law before the parliament changed the law?
- b Do you think this is an appropriate law for 100 years ago? What about now?
- c What was the outcome of the case, and why do you think it might be seen to be unfair?
- d What is the law now that parliament has passed a statute?

Analyse and evaluate

- 8 Conduct some research on the common law offence of embezzlement.
 - a What is the nature of this offence?
 - b Do you think that this offence should be codified or abrogated? Justify your answer.

Check your ebook assess for these additional resources and more:

» Student book questions

3.6 Check your learning

» Video tutorial

How to respond to a 'justify' question

» Going further

The baseline sentencing regime

3.7

TYPES OF LAW

criminal law

an area of law that defines a range of behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

crime

an act or omission that is (1) against an existing law, (2) harmful to an individual or society as a whole, and (3) punishable by law

sanction

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

Other than classifying laws by their source, laws can also be classified based on the behaviour they are trying to regulate and the possible consequences involved if the law is broken.

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

Criminal law

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

One of the distinct features of criminal law is the consequence that can flow if a crime is committed. If a crime is committed, and a person is guilty of that offence, a **sanction** may be imposed on that person. The sanction could be minor, such as paying a small fine, or could be more serious, such as imprisonment.

In a case involving criminal law, there are two parties: the state, which brings the action against the person alleged to have committed the crime (represented by the prosecution), and the accused.

An example of a criminal case is *DPP v Hughes* [2016] VCC 1762 (8 November 2016), in which the County Court of Victoria handed down a sentence for a crime involving a mother and a daughter.

LEGAL

CASE

Sad case of violence

DPP v Hughes [2016] VCC 1762 (8 November 2016)

On 28 November 2015, in a drug-induced psychosis, Michelle Hughes for over an hour subjected her 79-year-old mother to a terrifying and violent attack in their home.

Hughes followed her mother into her bedroom and held her down to prevent escape. Hughes brandished a knife at her mother, repeatedly trying to stab her in the chest and neck. Hughes told her mother that she didn't want to kill her, but the voices were telling her that she had to do it, and that if she didn't, 'they' would burn the house down.

After about an hour, Hughes' mother managed to escape. Hughes followed her and again attacked her as she ran into the driveway. A neighbour managed to disarm Hughes.

Hughes pleaded guilty to four charges: false imprisonment, intentionally causing injury, making threats to kill, and reckless conduct endangering life.

Hughes was sentenced in the County Court of Victoria on 8 November 2016, at which time Her Honour Judge Hampel stated that this was 'one of the saddest cases of violence within a family that I have had to deal with'. Hughes was sentenced to a term of 18 months in prison. Hughes had already been in custody for 346 days, which Judge Hampel reckoned to be a period of imprisonment already served and which was to be deducted from the sentence. In addition, Hughes was required to serve a community corrections order (a type of sanction served in the community) for a period of 30 months. Several conditions were imposed as part of the community correction order, including a requirement that Hughes undergo assessment and treatment including testing for drug abuse or dependency as directed, and a requirement that she must not commit another offence while the order is in force.

civil law

an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

plaintiff

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

defendant

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

remedy

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

damages

the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

Examples of crimes

- **crimes against person** – assault, rape, manslaughter, murder
- **crimes against property** – theft, property damage, robbery, deception
- **crimes against morality** – prostitution, illegal use of drugs
- **crimes against the legal system** – perjury, contempt of court
- **crimes against the state** – treason

Words commonly used in criminal cases

- **prosecution**, the **Crown**, the **state** – the party bringing the case on behalf of the state
- **accused** – the person who has been charged with an offence
- **suspect** – the person who is suspected of having committed a crime
- **guilty/not guilty** – the person can be found guilty or not guilty
- **charge** – when the police formally allege that a person has committed a crime
- **sanction** – the penalty handed down by the court on the offender
- **conviction** – when an offender has been found guilty, the court records a conviction (the guilty verdict), although in some instances a court decides not to record a conviction so the offender does not have a criminal record

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

Civil law

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

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

The legal case below is a famous High Court case where the plaintiff sued for negligence.

LEGAL

CASE

Water-skiing accident results in serious injury

Wyong Shire Council v Shirt (1980) 146 CLR 40

In January 1967, Brian Kenneth Shirt was water-skiing at Tuggerah Lakes in New South Wales. The lake was regularly used by water-skiers.

Shirt fell and struck his head on the bed of the lake. He suffered quadriplegic paralysis as a result of the fall. It was found that the water where he fell was shallow. Shirt thought it was safe to ski in that particular spot because there were signs that said 'deep water'.

He sued Wyong Shire Council and the case went all the way to the High Court.

The Council argued that 'deep water' meant before the signs, not around the signs. The High Court found that the Council breached its duty of care to Shirt, because it should have foreseen that this sort of harm could occur in the lake, and that the harm was very serious.

The legal case below provides an example of a Hollywood actor, Rebel Wilson, making a defamation claim against a publisher of magazines. A defamation claim involves an allegation that a person's reputation has been damaged because of statements made about them.

Jury finds Rebel Wilson defamed

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

Rebel Wilson, an Australian actor who has starred in films such as *Bridesmaids* and *Pitch Perfect*, had a legal victory in the Supreme Court of Victoria in June 2017. In 2015, Bauer Media, which publishes well-known magazines such as *Woman's Day*, *The Australian Women's Weekly* and *Harper's Bazaar*, published articles about Rebel Wilson, which she claimed contained false statements about her. In particular, the articles claimed that Rebel Wilson had lied about her age and many parts of her upbringing.

Rebel Wilson sued the publisher for defamation, a type of civil law which aims to protect people's reputation and character from false statements. She claimed that as a result of the articles she had lost the opportunity to earn income by acting in feature films during a period after the publication of the articles. Bauer Media denied the claim and the case went to trial before a jury, which lasted three weeks.

In June 2017 a jury found in favour of Rebel Wilson, deciding that she had been defamed in the articles. In September 2017, Justice Dixon awarded over \$4.5 million in damages to Wilson, who had earlier suggested she would donate the money to charity or scholarships.

Wilson and many parts of the film industry have considered the claim a victory over publishers which they believe often publish false stories about celebrities.



Source 2 Rebel Wilson successfully sued Bauer Media after it published articles about her which ruined her reputation. She was awarded a record payment of over \$4.5 million in damages.

LEGAL

CASE

Examples of civil law

- **tort law** – negligence, trespass, nuisance, defamation
- **family law** – marriage, divorce, adoption, de facto relationships
- **industrial and workplace laws** – occupational health and safety, working conditions, work contracts, workplace agreements, union disputes
- **consumer law** – tenancy agreements, sale of goods, advertising laws
- **property law** – wills, planning laws, real estate purchases

Words commonly used in civil cases

- **plaintiff** – the person bringing the case
- **defendant** – the person defending the case
- **sue** – taking civil action against another
- **compensation** – what the plaintiff seeks
- **damages** – a civil remedy
- **civil wrong** – a tort
- **defamation** – a civil law, under which a person can claim their reputation has been damaged
- **negligence** – a civil law (also a criminal law) under which a person can claim that they have been injured as a result of someone acting negligently towards them

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

3.7

CHECK YOUR LEARNING

Define and explain

- 1 Explain what is meant by criminal law.
- 2 Which area of law deals with private disputes between individuals?
- 3 Provide two examples of crimes, and two examples of civil law.

Synthesise and apply

- 4 Read the legal case *DPP v Hughes*.
 - a Identify all of the key words that indicate that this is a criminal case.
 - b Describe the key facts of the case, including the charges that Hughes pleaded guilty to.
 - c Do you agree with the outcome of the case? Give reasons for your answer.
- 5 Read the legal case *Wilson v Bauer Media Pty Ltd*.
 - a Who was the plaintiff in this case, and who was the defendant?
 - b What was the main issue in dispute in this case?
 - c How was this dispute resolved?
 - d What was the outcome in this case, and who decided the outcome?

- e Conduct some research to find out why the jury did not award damages in this case.
 - f Do you agree with the outcome of the case? Give reasons.
- 6 Collect four articles on a criminal case or a civil dispute. For each article, highlight the key terminology which identifies whether it is a criminal case or a civil dispute, and prepare a short summary of the article.

Analyse and evaluate

- 7 Access a criminal judgment from this year from the County Court of Victoria published on the AustLII website. A link is provided on your [obook assess](#).
 - a How do you know this is a criminal case?
 - b Who are the parties in this case?
 - c What were the charges, and did the offender plead guilty?
 - d Describe the facts that gave rise to the charges.
 - e What factors were taken into account in sentencing?
 - f What was the sentence that was imposed?
 - g Do you agree with the sentence? If not, why not, and what sentence would you have imposed?



Check your [obook assess](#) for these additional resources and more:

- | | | |
|---------------------------------|--|------------------|
| » Student book questions | » Weblink | » Weblink |
| 3.7 Check your learning | Australasian Legal Information Institute (AustLII) | Types of law |

3.8

THE DISTINCTION AND RELATIONSHIP BETWEEN CRIMINAL LAW AND CIVIL LAW

Study tip

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

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

The main differences are the aim of each area of law, and the consequences if the law is not followed. The aim of criminal law is to protect society and sanction offenders who have committed a crime, whereas the main aim of civil law is to regulate conduct between the parties and remedy a wrong that has occurred.

If an accused is found guilty, or pleads guilty, to committing a crime, then the consequence in a criminal case is a sanction – a penalty imposed by the court on the person, such as a fine or imprisonment. If a defendant is found liable in a civil case, then the possible consequence is a remedy such as damages.

Source 1 below sets out the other main differences between a criminal case and a civil dispute. You will learn more about these concepts in Units 1 and 2.

	CRIMINAL LAW	CIVIL LAW
Aim of the law	To protect society and sanction offenders	To regulate conduct between parties and to remedy a wrong that has occurred
Examples of crimes/laws	<ul style="list-style-type: none"> Crimes against the person: homicide offences, assault, sexual offences Crimes against property: theft, arson, fraud Crimes against the state: treason, sedition Crimes against the legal system: perjury, contempt 	<ul style="list-style-type: none"> Tort law: negligence, defamation, nuisance, trespass Contract law Family law Consumer law
Possible consequences	Sanction	Remedy
Person bringing an action under the law	Prosecution, on behalf of the state	Plaintiff
Person who has the responsibility (burden) of proving the case	Prosecution	Plaintiff
Person defending the action	Accused	Defendant
Police involvement in an action	Yes	No
Common words used in cases	Accused, prosecution, crime, victim, arrest, police, bail, remand, guilty, innocent, sentence, punishment	Sue, plaintiff, compensation, damages, dispute, negligence, remedy, litigation

Source 1 The main differences between criminal law and civil law

The relationship between criminal law and civil law

The same behaviour can give rise to a civil dispute and a criminal case. For example, a person who hits another person can be charged with assault, and if it goes before a court, that person may be found guilty and sanctioned. The victim of the assault may also sue the offender for assault (trespass to the person). If the victim is successful, the offender may have to pay damages to the victim to compensate the victim for any injury suffered as a result of the assault.

In other circumstances, a victim may sue someone else who they believe is responsible for a crime. The article below provides an example where a mother has sued the State of Victoria in relation to a crime committed against her daughter.

IN THE NEWS

Mother sues Victoria after teenage daughter allowed to work as sex predator's cleaner

Tom Cowie and Nino Bucci, *The Age*, 15 June 2016

A convicted paedophile was moved from a sex-offender facility into the same crisis housing as a 15-year-old girl, who the man then preyed on after he hired her as a cleaner.

The girl's mother is suing the State of Victoria after the paedophile had regular access to her daughter, despite the offender himself believing he did not have 'the ability to cope' outside custody.

The man had been convicted of having sex with two 14-year-old girls.

The legal action forms part of an explosive series of lawsuits launched by the families of victims of sex offenders, rapists and murderers, including five people killed by offenders released on parole.

The family of one homicide victim is also taking Telstra to court, alleging that the company's triple-0 operators failed to put the desperate calls of a mother through to police on the day she was murdered.

The state's beleaguered parole system is set to come under increased scrutiny as part of the proceedings, which could cost taxpayers millions of dollars if the plaintiffs are successful.

The County Court civil action brings together the victims of five parolee killers – Joanne Wicking, Evan Rudd, Raechel Betts, Sarah Cafferkey and Douglas Phillips – as well as two victims of sex offenders, including the 15-year-old girl.

The recently released paedophile, who had been angry to leave sex-offender facility Corella Place because he believed he wasn't ready, was moved to a block of flats in regional Victoria in 2013.

Soon after, he offered a 15-year-old girl who lived with her mother in the same block of flats \$10 an hour to clean his flat.

The girl was soon attending the flat regularly, once visiting when the man and another convicted sex offender were present.

Over three months, from February to April 2013, the man gave the girl a key to his flat, touched her leg, tried to hug her and touch her hair and encouraged her to come over to play Xbox.

He was jailed for eight months in November 2014 for 13 charges of breaching his supervision order.

The girl's mother is suing the State of Victoria, claiming that the registered sex offender had not been properly monitored, despite being on a supervision order.

compensation order

an order issued by the court for the offender to pay money to a person who has suffered loss or damage as a result of the offence

A court that is hearing a criminal matter is also able to order an offender, on having been found guilty or convicted of an offence, to pay compensation to a victim. This is known as a **compensation order**. The case of *DPP v Hitchiner* [2016] VCC 1844 (1 December 2016) provides an example of where a court has made a compensation order.

Guilty plea for theft

LEGAL

CASE

DPP v Hitchiner [2016] VCC 1844 (1 December 2016)

Stuart Hitchiner was employed by Red Hill Motors for approximately 31 years until November 2015. Between 2009 and 2015, he processed 1985 false refund transactions, each of which were paid into his personal bank account. A total of \$619 338.40 was taken from the business.

Hitchiner was arrested on 16 November 2015 after his offending was detected by his employer and reported to police. Hitchiner pleaded guilty to seven charges of theft.

On 1 December 2016, Judge Grant of the County Court of Victoria convicted Hitchiner and sentenced him to a sentence of imprisonment of three years and six months. Hitchiner will need to serve a minimum sentence of 21 months before he is eligible for release on parole.

The County Court also ordered that Hitchiner pay compensation of \$619 338.40 to the owner of Red Hill Motors.

3.8

CHECK YOUR LEARNING

Define and explain

- 1 Describe two differences between criminal law and civil law.
- 2 Would the police be involved in a civil dispute? Explain your answer.
- 3 What is a compensation order and what is its purpose?

Synthesise and apply

- 4 Read the article 'Mother sues Victoria after teenage daughter allowed to work as sex predator's cleaner'.
 - a Is this article describing a criminal case, or a civil case, or both? Give reasons.
 - b Who are the parties in this case?
 - c Why is the offender not the defendant?
 - d What are the allegations against the State of Victoria?
 - e The article refers to a series of lawsuits launched by the families of other victims. Conduct some research and identify at least one of those other cases. Describe the facts of the case.
- 5 Read the legal case *DPP v Hitchiner*.

- a Is this a criminal case or a civil case? Justify your answer.
 - b What are the critical facts of this case, and what was the sanction that was imposed?
 - c How does this case show the relationship between criminal law and civil law?
- 6 Create two other scenarios which might give rise to both a criminal case and a civil dispute.

Analyse and evaluate

- 7 Conduct some research on the case of Sarah Cafferkey.
 - a What are the allegations that Ms Cafferkey's mother is making?
 - b Explain how the tragic circumstances of Ms Cafferkey's murder is an example of the relationship between criminal law and civil law.
 - c What is the current status of Ms Cafferkey's mother's case?
 - d Do you think that Sarah and her family were let down by the parole system? Discuss.



Check your **obook** assess for these additional resources and more:

» **Student book questions**

3.8 Check your learning

» **Going further**

Other cases in civil and criminal law

THE VICTORIAN COURT HIERARCHY

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

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

As you have learnt, the main Victorian courts are as follows:

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

There are also two specialist courts: the Coroners Court (which investigates suspicious deaths and fires) and the Children's Court (which deals with criminal and family matters involving children).

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

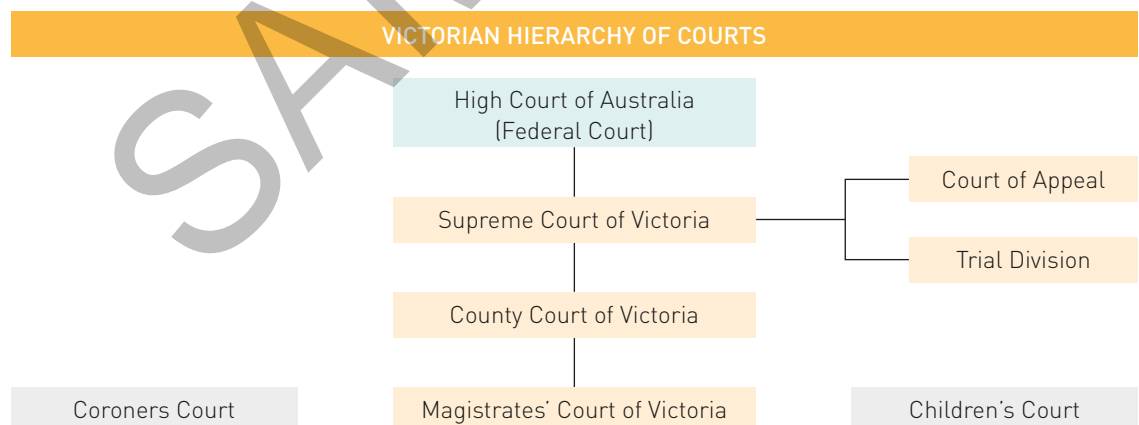
Each of the courts has its own **jurisdiction**, which is the right or power of a court to hear or deal with particular cases. Most of the courts in Victoria have the jurisdiction to hear both civil and criminal cases, and some courts have the power to hear appeals. For example, the Magistrates' Court can hear minor criminal offences, and the Supreme Court can hear serious offences such as murder. You will learn more about the jurisdiction of courts in Unit 2.

jurisdiction

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

Study tip

A practice assessment task for Unit 1 – Area of Study 1 can be found on the Unit 1 Assessment tasks topic on page 290.



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

Reasons for a court hierarchy

There are four main reasons for a court hierarchy:

- The court hierarchy allows for **specialisation** or **expertise**, with the courts developing expertise in dealing with the types of cases that come before them. For example, the Magistrates' Court hears minor offences, and so will be specialised in offences such as drink driving. The Supreme Court hears serious offences such as murder, and so will have developed expertise around the principles relating to murder.

- The court hierarchy enables the parties to a court case to **appeal** to a higher court if they are not satisfied with the decision in a lower court. This means that a person who believes that an error has been made in the lower court can appeal the case to a higher court for the higher court to review that decision.
- The court hierarchy is a necessary part of the **doctrine of precedent** (law-making through courts) because the process of law-making through courts depends on a decision being made in a higher court which is binding on lower courts. This enables individuals and lawyers to predict the likely outcome of a case. Judges and magistrates can be guided by the wisdom of the more experienced judges in the higher courts.
- Finally, a court hierarchy allows for **administrative convenience**. Because the courts have different jurisdictions to hear different matters, it allows smaller and minor cases (of which there are more) to be heard in the Magistrates' Court (of which there are a number in the state), and more complex and larger cases to be heard in the County Court and the Supreme Court. This allows for some efficiency or convenience with the way that cases are heard.



Source 2 The Melbourne Magistrates' Court in William Street, Melbourne

appeal

an application to have a higher court review a ruling (i.e. decision) made by a lower court

doctrine of precedent

the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

3.9

CHECK YOUR LEARNING

Define and explain

- 1 Explain what is meant by a court hierarchy.
- 2 Identify and explain two reasons for a court hierarchy.
- 3 What is the highest court in Victoria? What is the lowest court?

Synthesise and apply

- 4 For each of the scenarios below, write down why you think the court hierarchy is important.
 - a Samantha's civil dispute was heard in the Magistrates' Court, and she was found liable for \$60 000. She does not agree with the magistrate's decision.
 - b Hanna has been charged with murder. She is concerned about getting a judge that knows what she or he is doing.

- c Anil is suing Jessica for \$20 000. He knows it's a small claim and doesn't want to wait for years to have his case heard.
 - d Harriet is suing her employer. She has been told by her lawyers that her case is strong because of past decisions that are similar to her case.
- 5 Conduct some research on the Magistrates' Court of Victoria. Identify the closest Magistrates' Court to where you live. Explain the benefits of this.

Analyse and evaluate

- 6 'The court hierarchy system is just way too confusing. There are courts everywhere, and nobody knows where their case should be heard. They should just create one court for all cases.' Discuss the extent to which you agree with this statement.



Check your **obook** **assess** for these additional resources and more:

» **Student book questions**

3.9 Check your learning

» **Weblink**

Court Services Victoria

» **Weblink**

High Court of Australia

CHAPTER SUMMARY

Social cohesion and the rights of individuals

- > Social cohesion is the willingness of members of society to cooperate with each other in order to survive and prosper.
- > The law, individuals and the legal system all have a role to play in achieving social cohesion and protecting the rights of individuals.

Principles of justice

- > Fairness
- > Equality
- > Access

Characteristics of an effective law

- > Reflects society's values
- > Enforceable
- > Known
- > Clear and understood
- > Stable

Parliament and courts

- > The Commonwealth Parliament consists of the Governor-General, the House of Representatives and the Senate.
- > The Victorian Parliament consists of the Governor of Victoria, the Legislative Assembly and the Legislative Council.
- > Government consists of members of the political party that has the majority in the lower house. Parliament consists of all members of both houses of parliament and the Queen's representative.
- > There are federal courts and state courts.

Sources of law

- > Statute law – made by parliament
- > Common law – made by courts

The relationship between parliament and the courts

- > Courts can interpret statutes made by parliament.
- > Parliament can codify common law principles.
- > Parliament can abrogate or abolish common law.
- > Courts can also influence parliament through its judgments.

Types of law

- > Criminal law
- > Civil law

Distinction and relationship between criminal law and civil law

- > The main difference between criminal law and civil law is the consequence of the action.
- > The same behaviour can give rise to a civil dispute and a criminal case.

Victorian court hierarchy

- > The Victorian courts are set up in a court hierarchy. The highest court is the Supreme Court, followed by the County Court, then the Magistrates' Court.
- > There are four reasons for a court hierarchy: appeals, specialisation, administrative convenience and doctrine of precedent.

REVISION QUESTIONS

- Using an example, define the term 'statute law'. (2 marks)
- Would the Supreme Court of Victoria be bound by a decision in the Magistrates' Court? Justify your answer. (2 marks)
- What is meant by the word 'appeals'? Why is a court hierarchy needed for appeals? (3 marks)
- Classify each of the following laws according to their source and type: (4 marks)
 - The *Crimes Act 1958* (Vic) makes rape an offence.
 - The sanction for common law kidnapping is set out in the *Crimes Act 1958* (Vic).

**Check your
obook assess for
these additional
resources and
more:**

» **Student book
questions**

Ch 3 Review

» **Revision notes**

Ch 3

» **assess quiz**

Ch 3

Test your skills
with an auto-
correcting
multiple-
choice quiz

- c Vince is required to pay \$50 000 after being found liable under the common law tort of negligence.
 - d In Victoria, intentional murder is not defined in the *Crimes Act 1958* (Vic) but by various case law.
- 5 Using examples, describe two features of the relationship between parliament and the courts. (5 marks)
 - 6 Describe two principles of justice. (4 marks)
 - 7 How is it that one act or omission can relate to both criminal law and civil law? Use an example to demonstrate your answer. (4 marks)
 - 8 'The Victorian court hierarchy is critical to ensuring that courts are decided efficiently'. Do you agree with this statement? Give reasons for your answer. (6 marks)
 - 9 In your view, what are the two most important characteristics of an effective law? Justify your answer. (8 marks)
 - 10 Describe the role and structure of the Victorian Parliament and the Commonwealth Parliament. Is one parliament more powerful than another? Give reasons. (10 marks)

PRACTICE ASSESSMENT TASK

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

Practice assessment task questions

Part 1

(20 marks)

- 1 Collect two newspaper articles. One of the articles must relate to a criminal case, and one of the articles must relate to a civil dispute.
- 2 For each of the articles:
 - a Identify and define the legal terminology that is used in the newspaper article. (6 marks)
 - b Identify the crime that is alleged to have been committed, or the area of civil law that is alleged to have been breached. Explain how making that act or omission a crime, or how that area of civil law, aims to achieve social cohesion. (10 marks)
 - c For the criminal law article, explain how the committing of the crime could give rise to a civil dispute. (4 marks)

Part 2

(30 marks)

- 3 You have been asked to write an article which is to be published in a newsletter for Year 6 students.

The purpose of the article is to explain parliament and the courts, and their relationship. Prepare the newspaper article. You can use a variety of multimedia tools if you wish. You will need to address in that article, in appropriate language for Year 6 students:

- a The role of parliament and the courts. (5 marks)
- b The main sources of law, being statute law and common law, and how to distinguish between the two. (5 marks)
- c An overview of the Victorian court hierarchy, and two reasons for a hierarchy of courts. (6 marks)
- d Two features of the relationship between parliament and courts, using examples. (6 marks)
- e How a person could assess whether a law is effective. At least two examples must be included for the students. (8 marks)

Total: 50 marks

SAMPLE

OXFORD
UNIVERSITY PRESS
AUSTRALIA & NEW ZEALAND

ISBN 978-0-19-031032-5



9 780190 310325

visit us at: oup.com.au or
contact customer service: cs.au@oup.com