

## Unit 1

### Our democratic rights

# Australia's legal system

Laws regulate most of the situations we find ourselves in every day. Laws are formal 'legal rules' that are designed to govern the way in which people behave and act so we can all live in a peaceful and united society.

In Australia, our laws are made and enforced by a range of different organisations – including the courts, tribunals, parliaments, police and prisons – collectively referred to as the **legal system**, or **justice system**. We have a legal system to make sure that laws are obeyed and the rights and responsibilities of all Australian citizens are respected.

For people to have confidence in the legal system, it is important that legal disputes are resolved in a fair and unbiased manner and that all people are treated equally before the law. Unfortunately, despite best efforts, this is not always the case.



# chapter 16

## 16A

What key principles support Australia's legal system?

- 1 Look at each of the different situations represented in Source 1. Do you think all of the people shown are committing crimes? Why or why not?
- 2 Have you (or any of your friends or family) ever been involved in similar situations where you may have broken the law? Did you do so knowingly and were you caught?

## 16B

How does Australia's court system work?

- 1 As a class, list the names of any Australian courts. Suggest what types of cases might be heard by these courts.
- 2 As a group, try to think of at least two famous Australian legal cases. When did each of these cases take place, what were the basic facts of each case and what were the outcomes?

**Source 1** Australia's legal system is designed to govern and regulate the ways in which all citizens behave. A range of formal 'legal rules' known as laws helps to achieve this. There are laws relating to almost every situation we encounter on a daily basis.



# 16.1 Understanding laws and why we need them

When you think about it, many aspects of our daily lives are regulated by rules. In fact, almost every group to which we belong – whether it is our family, school, local sporting club, church or community group – imposes rules. Often, if we want to stay part of these groups, we have to obey their rules. Likewise, as Australian citizens, we all have a responsibility to obey a more formal set of rules (known as **laws**). So what is the difference between a rule and a law?

## The difference between non-legal rules and legal rules (laws)

**Non-legal rules** and **legal rules (laws)** govern our daily lives. There are some key differences between these two types of rules.

### Non-legal rules

Non-legal rules are rules or regulations that are imposed upon the members of a specific group so they can work together in a peaceful manner. For example, schools, families and sporting clubs all enforce a range of non-legal rules to ensure the smooth operation of their group. For example:

- schools can require students to wear a uniform and not have obvious body piercings
- parents can require children to undertake specific tasks or chores
- sporting clubs can require regular attendance at training sessions.

Whatever the non-legal rules might be, they are generally imposed to help establish a code of behaviour that is acceptable to the majority of group members so they may work together in a cooperative manner. Any member who breaks a rule may incur a penalty imposed by the group. For example, a sporting club might suspend those who miss a training session from participating in a scheduled game.



Source 1 Sporting clubs have established non-legal rules.



Source 2 A school imposing a code of dress (or uniform) that restricts tattoos or body piercing is an example of a non-legal rule.

### Legal rules (laws)

Legal rules, or laws, are similar to non-legal rules in that they also exist to regulate our behaviour. However, legal rules are made by official law-making bodies – such as parliaments, local councils and the courts – and apply to all members of society. Laws are also enforced by the police and courts and any individual that breaks a law may receive a punishment (referred to in legal terms as a **sanction**). These are imposed by the courts, and may include paying a fine, or, for a serious breach, spending a period of time in prison.

## Reasons we have laws

There are many reasons why societies must be regulated by laws. Firstly, laws help establish boundaries of acceptable behaviour, so that all members of the community can be aware of the type of conduct that will and will not be tolerated by the majority of people. The goal is that individuals treat one another with respect and do not undertake actions that disturb or violate the rights of others or threaten a peaceful way of life. For example, in Australia we have anti-bullying and anti-discrimination laws, which make it unlawful to victimise, abuse or discriminate against another person on the basis of their race, religion or sex.

Laws also help maintain a unified society by preventing disputes from arising and protecting



Source 3 There are anti-bullying laws in place in Australia.



Source 4 Laws are made to protect specific groups within our community, including consumers, children and those at risk of being cyber-bullied.

individuals from harm. For example, many different laws exist in Australia to protect individuals and specific groups from danger and maltreatment, including consumer, workplace, family, environmental and child protection laws.

## Check your learning 16.1

### Remember and understand

- 1 Why would an organisation like a school or sporting club impose specific non-legal rules or regulations?
- 2 What, in legal terms, is a sanction?
- 3 Describe two sanctions that could be imposed by a court in Australia.

### Apply and analyse

- 4 Identify a club or group you, or someone you know, belongs to. It could be a sporting club, church group or volunteer society. Investigate and list five non-legal rules that are imposed by the group, and jot them down. Then:
  - a suggest reasons why each rule may have been created
  - b state any consequences associated with breaking each rule
  - c explain whether or not you agree with each rule.
- 5 List five legal rules or laws that, as an Australian citizen, you must obey. For each law suggest why the law was most likely made and the likely consequences of breaking the law.
- 6 Imagine you had the power to create or alter three laws.
  - a What laws would you introduce or change? Give reasons for your answer.
  - b Identify any groups who may oppose your suggested law changes. Give reasons for your response.

### Evaluate and create

- 7 Divide into small groups or pairs and prepare a short role-play that illustrates the difference between non-legal rules and laws. Record or perform your role-play before the class and have your classmates identify the different non-legal rules and laws.



## 16.2 How laws are made

In Australia, laws can be made by a number of different bodies or organisations. For example, Commonwealth, state and territory parliaments can make laws, as well as other bodies such as local councils and court judges.

### The role of parliament in law-making

Most laws in Australia are made by **parliaments**. A parliament is a group of people elected by the majority of society to make laws on their behalf. Laws made by parliament are referred to as **legislation**, **statutes**, or **Acts**. In Australia we have two levels of parliament – Commonwealth and state/territory. The Commonwealth Parliament, located in Canberra, makes laws that apply to the whole of Australia, while each state and territory also has its own elected parliament to make laws for that specific state or territory.



Source 1 State parliaments have the power to make laws related to driving.



Source 2 Local councils have the power to make laws in areas such as waste disposal and recycling.

For example, the Commonwealth Parliament has made the laws on marriage and divorce that apply to and must be followed by all Australians, regardless of the state in which they live. By contrast, the state parliaments are responsible for making driving and adoption laws, and so laws in these areas may vary from state to state. For example, the minimum age to apply for a probationary motor vehicle driver licence in Victoria is 18 years, whereas the minimum age in New South Wales is 17 years.

In addition to having the Commonwealth, state and territory parliaments making law, laws can also be made by other bodies (referred to as **statutory authorities**) such as local or municipal councils, Australia Post, and Country Fire Authorities. Statutory authorities are created by the parliaments to make minor laws on their behalf in a more timely and efficient manner. For example, the Victorian state parliament has given municipal councils the power to make a range of specialised laws that apply to local residents, such as laws relating to the use of parks and reserves; recyclable and garden waste; garage sales; and even barking dogs.

### The role of courts in law-making

Judges in higher courts, such as the state Supreme Courts and the High Court of Australia, can also make laws on occasion. In simple terms, sometimes when a judge makes a decision to resolve a dispute, the reasoning behind their decision creates a legal principle or law that must be followed by judges in other courts when a similar case arises. Law made by judges is known as **common law**, which will be examined in more detail later.

In Australia, all people and organisations – including those who make and enforce the laws, such as members of the parliaments, judges, and the police forces – must obey the law. Indeed, one of the key features of the Australian legal system is that it is based on the **rule of law** meaning that our laws apply equally to all individuals and organisations throughout Australia and must be upheld by all. The rule of law also means that the law can only be enforced and altered by those with the legal authority to do so. In Australia, the Commonwealth, state and territory parliaments, and courts have the main power to make and enforce the law.



Source 3 Judges in higher courts may, on occasion, make laws.

### Check your learning 16.2

#### Remember and understand

- 1 Identify the main law-making bodies in Australia.
- 2 What is a statutory authority? Give two reasons why these bodies are given the power to make laws on behalf of the parliament.

#### Apply and analyse

- 3 Decide which level of parliament, Commonwealth or state, would most likely make laws with respect to the following areas:
 

a currency	e anti-terrorism	i border security
b education	f hospitals	j electricity
c Australian citizenship	g fire brigade	k asylum seekers
d water supply	h postal services	l police force.
- 4 Suggest one benefit of parliaments making law.
- 5 Research the name of your local or municipal council and list at least five laws made and enforced by this body.

#### Evaluate and create

- 6 Create a poster or collage that illustrates the main law-making bodies in Australia and provides examples of the types of laws made by each body.
- 7 Go to the Victorian Parliament website and take a virtual tour of the Victorian Parliament House.



## 16.3 Australia's legal system

Australia's legal system is made up of a range of courts and tribunals, laws, procedures and legal personnel. This includes judges, magistrates, legal representatives or lawyers, the police force and people working in the prison system.

### The principles of our legal system

Our legal system is also built on a number of key principles, or beliefs, that are designed to help protect the rights of all Australian citizens. For example, two main principles that underpin our legal system are the belief that all people should be treated equally under the law and that our courts and judges must be independent and impartial. These two principles aim to ensure that all people who come before the courts receive a fair and unbiased hearing or trial. Another key principle that strengthens our legal system is that individuals have a reasonable right to appeal decisions handed down by judges.

#### Key principles behind Australia's justice system

- All individuals are equal before the law.
- Individuals have the right to a fair hearing.
- The judiciary (i.e. the court system) is independent and impartial.
- Individuals have the right to a reasonable appeal.

Source 1 Key principles of Australia's legal system

### Equality before the law

One main principle that underpins the Australian legal system is that all people must be treated equally before the law. This means that all individuals regardless of their race, ethnic background, sex, income level

or mental capacity should be treated equally when dealing with the legal system. This includes being treated equally by the police, court personnel and other legal authorities. We should also all have an equal opportunity to access or use the court system to resolve our disputes.

### How is equality before the law achieved?

Various processes and procedures exist within our legal system to help make sure that all people who have dealings with the police, courts and other legal authorities, are treated equally regardless of their personal circumstances or background. For example, a range of laws aim to ensure people are treated equally and fairly when being questioned by the police, including an individual having the right to remain silent and not answer questions (other than giving their name and address); the right to be warned prior to questioning that 'anything they do or say may be used against them in a court of law'; the right to an interpreter if they do not understand English very well; and, for people aged under 18, the right to have a parent, guardian or independent adult present when being questioned.



Source 2 Lady Justice wears a blindfold to symbolise the legal system is objective and impartial.

Similarly, when being investigated by the police, all people have rights that must be observed including, under certain circumstances, the right to refuse to give forensic samples (such as hair or saliva samples) or participate in identification parades. All people charged with a serious crime (such as serious assault, selling illegal drugs and murder) also have the right to a **presumption of innocence**, meaning they must be treated as innocent until proven guilty, from the moment they are charged with a crime to their court hearing or trial. This includes having the right to be free to return home and live within the community (referred to as being granted **bail**) prior to their court appearance unless there is a genuine reason to deny this freedom. This refusal to grant bail could be that the court believes the accused person is a potential threat to the community and may harm other people if granted their freedom.

### Who might be disadvantaged by our legal system?

Unfortunately, some groups within Australian society, including Indigenous Australians, people from culturally and linguistically diverse communities – such as migrants, refugees and asylum seekers – and people

with mental health issues or intellectual disabilities, often experience difficulty when dealing with our legal system. Cultural differences and language or communication barriers can make it difficult for people within these groups to understand how our legal system operates and to interact or talk with legal authorities such as the police and court personnel. People with low incomes also often cannot afford to have a legal representative or lawyer to help them understand our legal system and prepare and present their case to the court.

Given that there are groups within our community that are at a disadvantage when dealing with our legal system, it is important that support services are provided to assist these groups and cater for their specific needs. One organisation that provides such support is Victoria Legal Aid – a government-funded but independent body that provides free or low-cost legal advice and lawyers to the most disadvantaged people throughout Victoria. These people may need assistance with a range of legal issues including crime-related, family, social security, immigration and discrimination matters. Unfortunately, however, this assistance is severely limited due to inadequate government funding.



Source 3 Asylum seekers, refugees and migrants can be at a disadvantage when dealing with our legal system and often need legal support and assistance.



## casestudy

### Do people with disabilities need more of a 'fair go'?

In 2014, a report by the Disability Discrimination Commissioner found that the Australian legal system does not provide adequate support services for people with disabilities who come into contact with the criminal legal system – for example, those who might be victims of crime, witnesses or offenders. As such, these people have a greater chance ending up in prison. Disturbingly, people with disabilities are also more likely than the general population to be victims of violence.

In order to improve this problem, the report recommended a range of reforms, including increasing the amount of assistance available for people with disabilities and their carers – such as early intervention services – and providing training for police and lawyers so they are better able to assist these people.



**Source 4** Ms Julia Haraksin won a legal action against a tour bus company that denied her service because it could not accommodate wheelchairs.

### An independent and unbiased judiciary

The Australian legal system is based on the key principle that our court system (known as the **judiciary**) is independent and impartial. Being independent means that the courts are separate from the elected parliament and government, and the judges and **magistrates** are therefore free to make decisions without these bodies trying to influence them. Having an independent judiciary is an important feature of our legal system, as it means that no one, even the government, is above the law. It also prevents the government from influencing court decisions and enables the courts to check that the Commonwealth, state and territory parliaments do not misuse or make any laws beyond their power.

Having an impartial judge sitting or presiding over a court case helps make sure that all trials that take place throughout Australia are conducted in a fair and unbiased manner. For example, the judge can ensure that both parties involved in a court case are treated consistently and have an equal opportunity to present their case to the court. This includes having an equal opportunity to present evidence and question witnesses. Judges remain independent and unbiased throughout the entire court case and do not assist either party with the preparation and presentation of their case. This is so that neither party has an unfair advantage over the other.



**Source 5** Judges must remain independent and impartial in order to ensure a fair hearing or trial.

The judge also makes sure that both parties have an equal opportunity to present their case by ensuring each follows the strict rules of evidence and procedures when presenting their case to the court. For example, parties can only present relevant and reliable evidence to the court, so the verdict is based on appropriate and accurate information. This means that parties cannot present hearsay or 'secondhand' evidence that may be untrustworthy to the court. Similarly, the past criminal record of the accused is usually not to be raised as evidence because it could potentially bias a verdict.

The independence of our judiciary is also maintained by having our courts open to the people. Generally all court cases are open to the public and the media so the proceedings are transparent or can be viewed by all.

### The right to appeal

In an attempt for cases to be resolved in a fair and unbiased manner, the Australian court system allows people who are dissatisfied with the outcome of their case to appeal or have their case reviewed by a higher court – providing reasonable grounds for appeal exist. For example, a person who has been found guilty of a crime may be able to lodge an appeal against the guilty verdict or the severity of the sentence if they can provide reasonable grounds. Similarly, a party may appeal if they can show that their trial may have been unfair – for example, the judge did not ensure that the strict rules of evidence or procedure were followed.



**Source 6** Courts are open to the public and media to make sure proceedings can be viewed by all.

## Check your learning 16.3

### Remember and understand

- 1 Explain two procedures that help ensure court cases are resolved in a fair and unbiased manner.
- 2 Suggest two rights of individuals that mean they are treated fairly by the police.
- 3 Describe how the Australian legal system maintains an independent judiciary or court system.
- 4 Name two aspects a judge should demonstrate to help ensure a fair and unbiased trial.
- 5 Explain how the use of legal representatives or lawyers can ensure a fair trial.

### Apply and analyse

- 6 Explain two features of the Australian legal system that aim to see that all people are treated equally before the law.
- 7 Explain two ways in which the Australian legal system fails to treat all people equally.
- 8 Discuss whether or not a person who is charged with a serious crime – such as attempted murder or serious assault – should be able to refuse to answer police questions, other than providing their name and address.

- 9 Discuss whether a person who is on trial for a serious crime – such as rape or dangerous driving causing death – should have any of their previous crimes read out to the court prior to the verdict being given.
- 10 Examine Source 3. How has our legal system failed to support asylum seekers, refugees and migrants? Identify two other groups in Australian society who might be disadvantaged by our legal system.

### Evaluate and create

- 11 Visit the Australian Human Rights Commission website via the link in your [gbook](#). Locate the section of the website relating to 'disability rights'. Research the ways in which people with disabilities are not being treated equally before the law. Suggest two changes that could be made to improve this situation.
- 12 Visit the Victoria Legal Aid website via the link in your [gbook](#) and prepare a brochure that outlines some of the main services and assistance offered by this organisation.



## 16.4 Undermining justice

While our legal system is built on a number of key principles, or beliefs, that are designed to help protect the rights of all Australian citizens, our system is not perfect and sometimes injustices occur. Factors like coercion of suspects and witnesses, court delays, corruption and trial by media can undermine justice.

### Coercion of suspects and witnesses

The rights of suspects and witnesses are an important part of the legal system. However, injustices can occur if legal processes and procedures are not carefully followed. For example, all suspects have a right to silence (meaning they do not have to answer any questions from police other than giving their name and address) and a right to an interpreter if they cannot understand English. However, some suspects or witnesses may be coerced (persuaded through force or threats) to admit to something against their will.

Some suspects might answer police questions against their best interests – particularly if they are not familiar with English or have trouble communicating. For example, various groups of people like Aboriginal people or Torres Strait Islanders, those from a non-English speaking background, and those who have a mental disorder or other disability (for example, a hearing impairment) may be disadvantaged when dealing with the court system because they do not have adequate communication skills, confidence or knowledge to negotiate with the authorities. The police and lawyers have the potential to easily confuse or persuade these individuals to make untrue statements about a case or to make themselves look guilty.

### Trial by media

The media – both traditional and online media – can spread information quickly in a way that can create the impression of a person's guilt before they have even been to court.

Trial by media can undermine the basic principle that all individuals who have been accused of a crime have a presumption of innocence and must be treated as innocent until proven guilty. For example, members of a jury (who are responsible for determining the guilt

### casestudy

#### Victim's mother fights for justice

In October 2014, Gene Gibson, a 23-year-old Aboriginal man from a remote community in Western Australia, was sentenced by a Supreme Court judge to spend a minimum of five and a half years in prison after pleading guilty to unintentionally killing Josh Warneke by striking him with a pole in an unprovoked attack along a roadside in 2010. Surprisingly, however, the victim's mother, Ingrid Bishop, does not believe that Mr Gibson is her son's killer and is bravely fighting to have him released from prison and his name cleared. Ms Bishop believes the police investigation surrounding her son's death was not well conducted, that Mr Gibson did not understand the procedures and questioning that took place when police arrested him, and that he was coerced or pressured into confessing to a crime he did not commit. Interestingly, after the trial, the Western Australian Corruption and Crime Commission examined the case and found faults in the way it was investigated by the police. Changes to police procedures have been introduced to ensure all Indigenous people who are suspects and witnesses in a crime are provided with interpreters.



**Source 1** Ingrid Bishop is fighting for justice – she believes the wrong man is serving prison time for her son's death.

of an accused in a criminal trial) may be biased and think a suspect is guilty because of what they have seen and heard in the media before the trial has occurred. Potential jurors may also feel pressure to find a person guilty or not guilty based on public opinion, and find it difficult to remain impartial.

Over the years, intense and concentrated media coverage of high-profile court cases has jeopardised the ability of jurors to remain unbiased and led to unfair trials. Perhaps the most famous Australian case in which this occurred was in 1982 when a jury wrongly found Lindy Chamberlain guilty of murdering her baby at Uluru in the Northern Territory. The baby was actually taken by a dingo. Many commentators believe the extremely negative media campaign surrounding Mrs Chamberlain contributed to the jury's incorrect finding. It took Mrs Chamberlain more than six years to have her guilty verdict quashed (cancelled).



**Source 2** Lindy Chamberlain was a victim of trial by media.

### Corruption

Within any organisation corruption can exist and unfortunately our legal system is no exception. Corruption is any form of dishonest or unethical behaviour that causes people to break rules for their own gain. Corruption can include things like bribery, which in the court system might involve taking money from someone to alter the outcome of a court case. It is therefore essential that we have independent and unbiased anti-corruption agencies to investigate and punish those involved in the legal system (like police, lawyers, magistrates, judges and politicians) who may misuse their power and authority for their own benefit. We also rely on 'whistle blowers', or people who are willing to come forward and report corrupt behaviour to the anti-corruption agencies in order to investigate those cases.

### Court delays

Taking a case to court takes time and unfortunately will often involve delays. Delays in criminal cases can be caused by a variety of factors, including a lack of legal assistance for those who cannot afford a lawyer, complex and time-consuming court processes and procedures (like the requirement that most evidence

must be given verbally in court and the use of a jury in criminal cases), and the increasing number and complexity of cases being brought before the courts.

Delays can cause many problems for those involved in a court case, including increasing the cost associated with taking the case to court, causing emotional stress and hardship for the parties and reducing the ability of the witnesses to accurately recall their evidence. In some instances, a civil case can take so long that people have to withdraw their case because they cannot afford to pay the money that the legal system requires.

### Check your learning 16.4

#### Remember and understand

- 1 State three groups of people who may be particularly disadvantaged when dealing with the police and court system. Give reasons for your choice.
- 2 Explain three ways that court delays can lead to injustices for parties involved in a criminal or civil case.

#### Apply and analyse

- 3 Explain the concept of trial by media. Undertake some Internet research to find an Australian criminal case that has attracted a large amount of media interest.
  - a Outline the facts of the case and reasons why you think it received such intense media commentary.
  - b Explain how the media coverage could have influenced the ability of the accused to receive a fair trial.

#### Evaluate and create

- 4 Read the case study 'Victim's mother fights for justice' and undertake some Internet research into the Josh Warneke case to answer the following questions.
  - a Outline the basic facts of the case, including basic details of the incident, charges and sentence imposed upon Mr Gibson.
  - b Explain why Ms Bishop believes that Mr Gibson did not kill her son, despite Mr Gibson being sentenced by the court.
  - c Explain some of the factors that may have contributed to Mr Gibson not receiving a fair hearing or trial.
  - d Explain the outcome of any appeal case.

## 16A rich task

# Social media and the right to a fair trial

In a criminal trial, a jury of 12 randomly selected citizens determines the verdict as to whether or not the accused is innocent or guilty. One benefit of having a jury of 12 ordinary people determine the verdict, rather than a single judge, is that they will be able to reflect a range of different views and values in their discussions and deliberations. Similarly, it is argued that it is fairer for the accused to be judged by their peers or a group of independent 'everyday people', rather a legal authority.

People who oppose the use of a jury, however, argue that jury trials can be unfair because individual jurors cannot be prevented from conducting their own online research into the case they are hearing and finding information that may cause them to develop a bias against the accused. For example, in 2015 a Victorian judge had to abandon a trial that had been running for five weeks after it was discovered that two of the jurors had used the Internet to research information about the accused. Similarly, in 2015, former television star Robert Hughes, who had been found guilty of various sexual and indecent assault charges dating back to the 1980s, lodged an appeal because he believed the massive media coverage surrounding his trial (including a huge amount of false and vicious social media commentary) would have caused the jury to be unfairly biased against him. The problem with jurors conducting their own research into a case is that the Internet and social media are often flooded with false information or unproven opinions. A juror may be biased by what they read, believing it to be true, although there is no actual evidence provided.

**Source 1** People who oppose the jury system in criminal trials argue that social media platforms like Twitter, Facebook, Snapchat and Instagram are threatening the right to a fair trial because information on court cases is now so freely available to members of the jury.

### skilldrill

## Preparing a written critical evaluation of information and ideas

Being able to critically evaluate information and ideas is a key skill. Critically evaluating something involves the following steps:

- Step 1** Examine evidence from a wide range of sources about an issue.
- Step 2** Review evidence that should come from sources that both agree with and contradict an argument on the issue.
- Step 3** Decide to what extent a statement or findings within a piece of research are true, or to what extent you agree with them.
- Step 4** Finally, reach a conclusion or verdict based on what you judge to be the most important factors, and justify how you have made your choice.

Critical evaluation enables us to gain an understanding of views and opinions that may be different from our own, and develop empathy for people who hold and express different beliefs and values. Having the ability to consider different perspectives also enables us to expand our perceptions and make more informed judgements.

When preparing a written critical evaluation you must provide more than an explanation of the information or ideas, you must identify the key features of the material and issues, and assess their relative merits by explaining the associated strengths and weaknesses. You should also provide a concluding statement, which can include your own opinion.

The table in Source 2 outlines the steps involved in preparing a written analysis or critical evaluation of a controversial issue.



	What you need to do	How to do it
<b>Step 1</b> Gather relevant information	Gather a range of relevant information from a variety of sources that will enable you to examine the arguments <i>in support of</i> and <i>against</i> the proposition or issue.	The Internet is a great place to commence researching a controversial issue and gathering relevant information, although you always need to check the authenticity of the material you have gathered. Ask yourself 'Where did this information come from?', 'Is it a reliable source?', and 'Why was the information created?'.
<b>Step 2</b> Write an introduction	Examine your information and prepare a written introduction that outlines the issue you are examining.	Your introduction should state and explain the issue and provide any relevant background information, such as why the issue has become controversial.
<b>Step 3</b> Prepare the body of your response	The body of your response should include an examination of the key strengths and weaknesses associated with the issue.	It is best to examine one strength at a time, providing a corresponding weakness (as appropriate), rather than presenting separate lists of strengths and weaknesses. Also provide any relevant information, such as case studies, statistics or quotes, to support each viewpoint.
<b>Step 4</b> Write a conclusion	After considering the different views and perspectives surrounding the issue, provide a conclusion.	Your conclusion should summarise the key points and include your own view based on the supporting evidence you have provided.

**Source 2** Steps to write a critical evaluation

### Apply the skill

- 1 Prepare a written report (of around 500 words) that critically evaluates the following contention: 'The increasing use of the Internet and social media

threatens the ability of jurors to remain impartial or unbiased. As such, juries should be abolished in all criminal trials.' Prepare your written response by following the steps in the table.

### Extend your understanding

- 1 Conduct an Internet search using key terms and phrases like 'Does social media influence the jury (or a fair trial)?' and 'strengths and weaknesses of the jury system'. Gather information about varying opinions on the issue, and come to your own conclusions by making a critical evaluation. You could research a high profile criminal trial, such as Brett Cowen or Robert Hughes, to justify your evaluation.



**Source 3** High profile court cases, such as the trial of Brett Cowen, who was found guilty of murdering Queensland schoolboy Daniel Morcombe, attract great attention both in the mainstream media and on social media.



## 16.5 Types of legal disputes

The Australian legal system includes a range of bodies or institutions, known as courts, to resolve legal disputes that may arise between individuals and the government. These courts are overseen or presided over by independent magistrates and judges who are able to listen to both sides of a dispute and make a fair and unbiased decision.

The main two types of legal disputes heard in Australian courts are criminal and civil cases. **Criminal cases** are those that involve an individual who has behaved in an unacceptable way being charged by the police and often receiving a sanction. Criminal cases include murder, assault and sexual offences. **Civil cases**, by contrast, involve private people or organisations fighting over an alleged breach of individual rights, such as an individual seeking money to make up for injuries they have suffered due to another person's careless action.

It is important to understand the difference between criminal and civil cases because different legal processes and procedures are used when resolving each type of case.

Criminal cases	Examples
<b>Summary offences</b> (minor crimes heard by a magistrate)	Minor theft and minor traffic offences – e.g. exceeding the speed limit, driving an unregistered car.
<b>Indictable offences</b> (serious crimes that require trial by a judge and jury)	Murder, arson, dangerous driving causing death, serious violent assault, rape, and drug-trafficking.
Civil cases	Examples
Matters involving disputes between individuals over an alleged breach of rights	<ul style="list-style-type: none"> <li>• Negligence</li> <li>• Defamation</li> <li>• Contract law</li> </ul>

Source 2 Examples of criminal and civil cases



Source 1 If you are found guilty of committing a crime such as drink-driving, you may receive a punishment or penalty called a sanction.



Source 3 Theft is a summary offence, and would generally be heard in the Magistrates' Court.

### Criminal cases

Criminal cases are those in which an individual (referred to as the **accused**), who has committed an illegal act that inflicts harm on another individual and/or society, is taken to court (or **prosecuted**) by the state or government. If an accused is found or pleads guilty to committing a crime, they may receive a punishment or penalty. Types of criminal sanctions include monetary fines or imprisonment.

#### Types of criminal cases

Criminal offences – known commonly as crimes – are generally classified as being **summary offences** or **indictable offences**.

Summary offences are minor crimes that are generally heard in the Magistrates' Court (called a local



Source 4 Indictable offences such as armed robbery are crimes heard in higher courts.

court in New South Wales). Common types of summary offences include theft, minor traffic offences such as exceeding the speed limit, and minor unlawful assault.

Indictable offences are serious crimes that are generally heard in higher courts, such as the County Court in Victoria (or District Court in other states) and the Supreme Court. Indictable offences include armed robbery (stealing or attempting to steal property using force such as a gun), drug trafficking, serious sexual offences, dangerous driving causing death, and murder. Cases in which an accused pleads not guilty to an indictable offence are generally heard before a judge and jury of twelve persons. The jury determines the verdict as to whether or not the accused is guilty and the judge determines the sanction (or punishment).



## Civil cases

Civil cases involve disputes between individuals (or groups) over an alleged breach of individual rights. In a civil case, the party who believes their rights have been infringed (referred to as the **plaintiff**) takes the case to court in the hope of receiving a **remedy** that will restore them, as far as possible, to the position they were in prior to the wrongdoing. The most common type of civil remedy is a plaintiff being awarded a sum of money to compensate for their loss (referred to as **damages**).

## Types of civil cases

While there are many different types of civil cases, perhaps the most common is a **negligence** action. This is where an individual claims they have suffered injury due to another person's failure to take reasonable care when there is a responsibility to do so. Other types of civil cases include disputes over a **breach of contract**, where one individual believes another has failed to carry out the terms of a legally binding contract, and **defamation** cases, where a person believes they have suffered harm (for example, a loss of reputation) due to another person making false statements publicly.



**Source 5** It is often necessary to engage a barrister to plead on your behalf if a civil case needs to proceed to the courts.

## casestudy

### Can using social media be a crime?

In 2013, Andrew Farley – a former school student – was ordered by a NSW District Court judge to pay \$105 000 in damages to a music teacher after making false and defamatory comments about her on Twitter. Despite being warned against it, Mr Farley posted the damaging statements on Twitter because he incorrectly believed the teacher involved was responsible for his father, also a music teacher at the school, losing his job. The case was the first in Australia involving defamation via Twitter, and made it clear that it is unacceptable to use Twitter, Facebook and other forms of social media to make false and defamatory statements about others.



**Source 6** Private individuals in Australia are subject to defamation law on social media, which includes defaming someone on Twitter.

## casestudy

### Are sentences too lenient?

In August 2015, Jamie McPherson, aged 70 years, was charged with two counts of culpable driving causing death. He started and continued a dangerous car chase, which led to two brothers in another vehicle being killed, when their car crashed into a tree. When imposing the sentence, the judge said that McPherson had started the dangerous car chase to deliberately terrorise another person

and had shown no remorse for his actions. He then sentenced McPherson to eight years' imprisonment, with a minimum of five years to be spent in prison before being eligible to be released.

In Western Australia, a person who is guilty of culpable driving causing death (e.g. causing the death of a person by driving in a very careless or reckless manner or while under the influence of drugs or alcohol) can be imprisoned.



**Source 7** Culpable driving causing death is a serious indictable offence.

## Check your learning 16.5

### Remember and understand

- 1 In your own words, explain the difference between criminal and civil cases.
- 2 Define the two main types of criminal cases.
- 3 Explain two types of civil cases.
- 4 Explain the key difference between a sanction and a remedy. Provide one example of each to support your response.

### Apply and analyse

- 5 Read the two case studies and complete the following tasks for each:

- a Decide whether the case is criminal or civil, giving reasons for your choice.
- b Discuss whether or not you believe the sanction handed down by the judge was appropriate.

### Evaluate and create

- 6 Create a poster or collage that illustrates at least five different types of criminal offences and civil actions. You may wish to use software such as Picasa or Photovisi to create your poster.
- 7 Collect three articles that relate to recent criminal or civil court cases. Include at least one civil case. Summarise the facts of each case and state the key terms that indicate whether it is criminal or civil



# 16.6 Court jurisdictions

The Australian legal system provides a large range of courts and informal tribunals to resolve all types of legal disputes. Each state and territory within Australia has its own system of courts and tribunals that can hear matters arising within that state or territory. We also have federal courts, including the Family Court, High Court of Australia, Federal Court and Federal Circuit Court of Australia, to resolve a range of disputes concerning laws made by the Commonwealth Parliament.

## The court hierarchy

The courts in each Australian state and territory are arranged in a **hierarchy**, meaning they are ranked in order of importance from lowest to highest according to the seriousness of the cases they can hear. For example, the lowest court in each state and territory court hierarchy is the Magistrates' Court (or Local Court in NSW). These courts hear all minor criminal and civil cases. The highest court in each state and territory court hierarchy is the Supreme Court, which hears the most serious cases, such as murder. The High Court of Australia is the highest federal court and can hear a range of important cases including appeals from Supreme Courts in each state and territory.

The courts in each state and territory are arranged in a court hierarchy to enable the Australian court system to operate more effectively. For example, having courts ranked from lowest to highest allows each court to specialise in hearing certain types of cases. This enables the court personnel – including judges, magistrates and administrative officers – to develop their expertise in hearing certain types of cases. It also allows streamlining of court procedures.

Having the courts arranged in a hierarchy also allows for an appeals process to exist, where higher courts can review the decisions of lower courts. It also helps make sure that court decisions are consistent and predictable because magistrates and judges in lower courts can follow the decisions of judges in higher courts.

## State and territory courts

Each Australian state and territory has its own system of courts and tribunals. These hear cases involving a breach of state and territory laws, as well as some specified federal matters. Each state in Australia has three levels of courts – superior, intermediate and lower – with the exception of Tasmania, the Northern Territory and the Australia Capital Territory, which only have a lower and superior level of court.

FEDERAL COURTS (all Australian states and territories)								
High Court								
Federal Court								
Family Court								
Federal Circuit Court								
STATE COURTS						TERRITORY COURTS		
	WA	VIC	NSW	QLD	SA	TAS	ACT	NT
Superior courts	Supreme Court	Supreme Court	Supreme Court	Supreme Court	Supreme Court	Supreme Court	Supreme Court	Supreme Court
Intermediate courts	District Court	District Court	County Court	District Court	District Court			
Lower courts	Magistrates' Court	Local Court	Magistrates' Court	Magistrates' Court	Magistrates' Court	Magistrates' Court	Magistrates' Court	Magistrates' Court

Source 1 The Australian Court hierarchy

## Superior courts

Each state and territory in Australia has a Supreme Court, which generally specialises in hearing the most serious criminal matters, such as murder. They also hear the most complex civil matters, or those involving very large amounts of money. Each Supreme Court also has an appeal division – a Supreme Court of Appeal – which hears appeals from the District or County and Supreme Courts. Three judges generally hear cases in the Supreme Courts of Appeal. The High Court of Australia has the power, or **jurisdiction**, to hear appeals from the state and territory Supreme Courts of Appeal.

## Intermediate courts

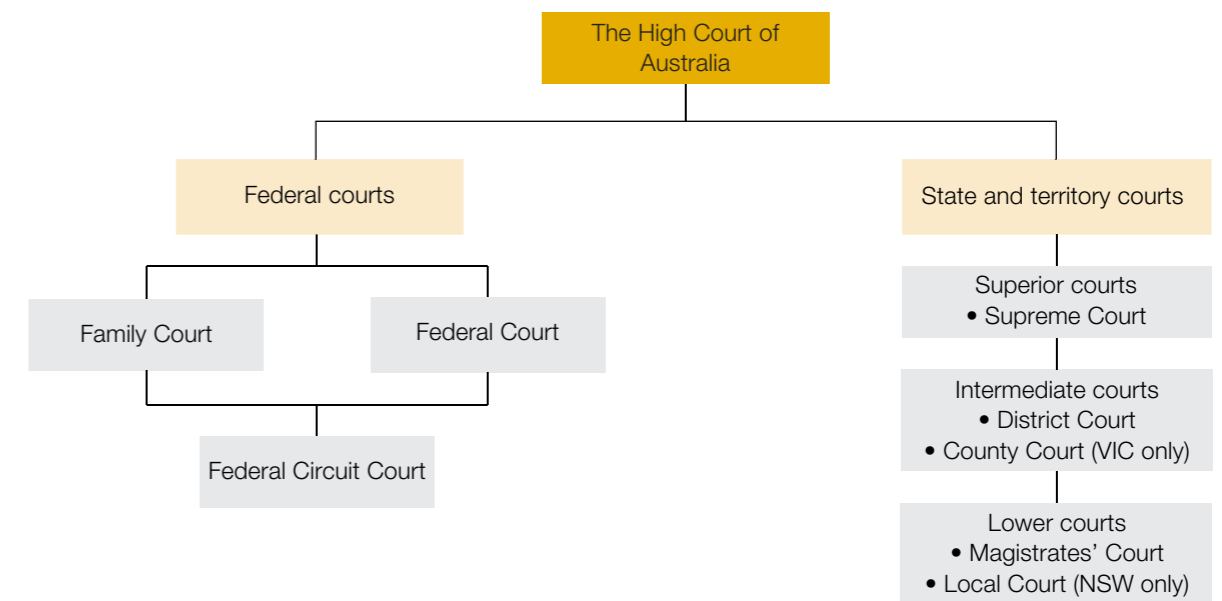
Intermediate courts, referred to as County (or District) courts, generally hear all serious criminal cases except murder and attempted murder, and serious civil cases involving amounts over \$100 000. They also have the power to hear certain types of appeals from the Magistrates' (or Local Courts), such as appeals against the severity or leniency of a sentence imposed. In serious criminal trials where the accused pleads not guilty, a jury of twelve will usually be used to determine the **verdict** while the judge determines the sanction.

## Lower courts

The lowest court in each state and territory hierarchy is called the Magistrates' Court (called the Local Court in New South Wales). These courts mainly hear minor criminal offences and civil cases involving amounts under \$100 000. The Magistrates' or Local Courts are the busiest courts in Australia, because most legal cases involve minor criminal offences, such as minor theft and traffic offences. For example, the Magistrates' Court of Victoria, which operates in over 50 locations throughout the state, hears approximately 90 per cent of all criminal matters in the state. In 2015, this amounted to the court hearing over 275 000 criminal matters.



Source 3 The High Court of Australia in Canberra is Australia's highest federal court (see Source 2).



Source 2 Australia's federal and state/territory court hierarchy



## Federal courts

In addition to the state and territory courts, Australia has four federal courts to hear and determine matters involving laws made by the Commonwealth Parliament – the High Court, the Family Court of Australia, the Federal Court of Australia, and the Federal Circuit Court of Australia.

### The High Court of Australia

The High Court of Australia is probably the most well known federal court, sitting on top of each of the state and territory court hierarchies (see Source 2). The High Court, which first sat in 1903, has the power to hear many cases. This includes appeals from any state or territory Supreme Court of Appeal and the High Court itself. It can also hear cases involving disputes over interpretations of the Australian Constitution, and any case of significant legal importance.

### The Family Court of Australia

The Family Court was created in 1975 to specialise in hearing cases relating to marriage and divorce disputes. For example, the court hears cases relating to disputes over parenting and property settlement and cases involving whether or not a marriage is valid under Australian law.

### The Federal Court

The Federal Court was created in 1976 to hear most civil disputes involving Commonwealth law. These include matters involving industrial relations or the workplace, native title claims (disputes over the granting of land rights to Aboriginal and Torres Strait Islanders), copyright, trade practices and immigration issues. It can also hear appeals from various courts and tribunals throughout Australia.

### The Federal Circuit Court of Australia

The Federal Circuit Court of Australia (formally called the Federal Magistrates' Court) was created in 1999 to ease the workload of the Federal and Family Courts and provide a simple and more assessable alternative to the Federal Court. It hears a range of disputes including those involving family law and child support, human rights, copyright and privacy matters.



**Source 4** The Family Court of Australia (Lionel Bowen Building), Sydney

## casestudy

### Coles fined for misleading consumers

In 2014, a Federal Court judge ruled that Coles Supermarkets had broken Australian consumer laws that prevent businesses from misleading or deceiving the public. This was done by promoting their bread as

being 'freshly baked' and 'baked today, sold today' when the bread had actually been partly baked by the supplier and 'finished off' in Coles stores on the day of sale. Coles was ordered to pay a fine of \$2.5 million.

## casestudy

### Norrie's Case – does a person have to declare their gender?

In 2010, 'Norrie' – a 52 year-old Sydney person who does not identify as being either male or female – became the first person to be formally registered with the New South Wales Registry of Births, Deaths and Marriages as 'sex not specified'. A few months after the registration, however, Norrie received notification that it had been 'issued in error' and was not legally valid.

After unsuccessful attempts to have the registry's original acceptance of Norrie's registration status reinstated, Norrie lodged a successful appeal at the NSW Supreme Court of Appeal. Three judges unanimously agreed that people should be able to have a 'gender neutral status', meaning they not be required to identify themselves as either male or female.

The NSW Registry of Births, Deaths and Marriages, however, refused to accept this decision and lodged a final appeal to the High Court of Australia. In 2014, the High Court dismissed the appeal, and upheld the decision of the NSW Supreme Court of Appeal, ruling that the sex of an individual is generally irrelevant to most legal relations, with the exception of the current marriage laws that prohibit same-sex marriage.



**Source 5** Norrie won a High Court case and became the first person not required to specify a gender with the NSW Registry of Births, Deaths and Marriages.

## Check your learning 16.6

### Remember and understand

- 1 Define the term 'court hierarchy'.
- 2 Explain two reasons that courts in Australia are ranked in a hierarchy.
- 3 Briefly outline the role of the Family Court of Australia.

### Apply and analyse

- 4 Read the case study 'Norrie's Case' and complete the following tasks.
  - a Decide whether the case is criminal or civil. Give reasons for your choice.
  - b Identify the name of the courts involved and explain what type of cases they generally hear.
  - c Explain why Norrie took this case to court and comment on the final decision.

### Evaluate and create

- 5 Using the Internet, conduct research into your state or territory's courts system.
  - a Create a flowchart that illustrates the court hierarchy.
  - b State the name of three courts that exist in your state or territory and briefly explain the role and types of cases that can be heard in each court.
- 6 Collect one article that refers to a case or matter being heard in each of the courts in your hierarchy and summarise the facts of each case. Where possible, comment on whether or not you think the outcome of the case was fair.



## 16.7 The Western Australian court hierarchy

The Western Australian court hierarchy is made up of a number of courts, each of which has the power to hear certain types of cases. For example, the Magistrates' Court, which is the lowest ranked court in the hierarchy, mainly hears and resolves minor disputes such as minor theft and traffic offences. By contrast, the Supreme Court of Western Australia, divided into the General Division and the Court of Appeal, is the most superior Western Australian state court, and hears and resolves the most serious cases, such as murder and attempted murder cases.

Western Australia is also the only state in Australia to have its own state-based family court, which hears matters such as divorce, child custody and adoption.

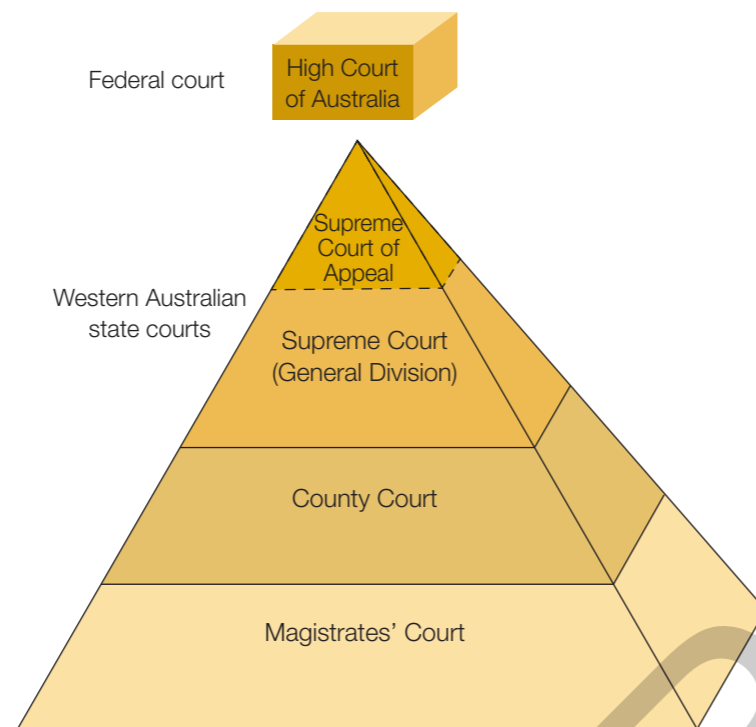
### The Magistrates' Court

While the Magistrates' Court is the lowest court in the state court hierarchy it is also the busiest, due to the large range of cases it can hear, and the fact that the majority of legal disputes are relatively minor. For example, the Magistrates' Court deals with approximately 95 per cent of the state's criminal cases, or around 100 000 criminal cases per year.

The Magistrates' Court has the power, or jurisdiction, to hear and determine a wide range of cases including:

- all minor criminal matters, referred to as 'simple offences', (for example minor theft, property damage and assault; traffic offences like driving a vehicle whilst being disqualified and driving over the speed limit; and
- civil disputes where the amount of money involved does not exceed \$75 000.

All cases in the Magistrates' Court are held before, or presided over by, a single magistrate (there is no jury). Also, being the lowest court in the Western Australian court hierarchy, the Magistrates' Court cannot hear appeals – that is, review decisions from any lower courts.



Source 1 The Victorian court hierarchy



Source 2 The Perth Magistrates' Court



Source 3 The Perth District Court

### The District Court

The District Court of Western Australia is the intermediate tier in the Western Australian court hierarchy and hears approximately 7500 criminal and civil cases each year. The District Court has the power to hear:

- all indictable or serious criminal offences except those where the maximum term of imprisonment that can be imposed is life (such as murder and murder-related offences). This means the District Court can hear a wide range of criminal cases, including serious theft, armed robbery (theft using a weapon), illicit drug offences (for example, trafficking or selling illegal drugs), sexual assault, fraud, and culpable driving causing death (where a person has caused the death of another due to driving in a very careless or reckless manner, or while under the influence of drugs or alcohol); and
- a range of civil disputes. For example, the District Court can hear civil disputes for an unlimited amount of money in cases where the claim relates to personal injuries and injury sustained in motor vehicle accidents. This may include negligence cases where an individual has suffered injuries as a result of another's careless behaviour, and claims made for workplace injuries. The court can also hear civil matters involving commercial or business dealings and debt recovery, but only for amounts up to \$750 000.

The District Court also has the power to hear civil appeals from the Magistrates' Court.

### The Supreme Court

The Supreme Court of Western Australia is the highest court in the Western Australian court hierarchy, and consists of two divisions: the General Division and the Court of Appeal.

#### Supreme Court (General Division)

The Supreme Court (General Division) has the power to hear:

- all indictable or serious criminal offences but generally hears the most serious cases, such as murder; armed robbery; and serious drug offences (for example, major illicit drug trafficking cases); and
- civil disputes involving an unlimited amount of money (for example, the court generally hears cases over involving amounts over \$750 000 or serious and complex legal issues).

#### Supreme Court of Appeal

The Supreme Court of Appeal has the power to hear all appeals (review decisions) from decisions made by single judges in the Supreme Court (General Division) and lower courts – although an appeal can only be lodged if a party has a good reason or 'reasonable grounds'.



If a party wishes to appeal a decision made by the Supreme Court of Appeal they can apply to have the case heard and reviewed by the High Court of Australia, which has the power to hear all appeals from each state's and territory's Supreme Courts of Appeal. The High Court, however, does not hear many appeals and so a party must provide very strong grounds or exceptional reasons for lodging the appeal.

### Who makes the decisions in the District and Supreme courts?

In general all criminal cases heard in the District Court and Supreme Court (General Division) – referred to as **trials** – where the accused **pleads not guilty**, are heard before a **judge and jury**. The jury is comprised of twelve randomly selected citizens, and determines the verdict (the guilt or innocence of the accused), while the judge determines the sanction (or punishment) to be imposed upon the accused if they are found guilty.

On occasion a criminal matter may be heard in the District or Supreme Court (General Division) without a jury. Such cases are referred to as 'judge alone' trials and only occur in rare cases, for example, where the accused might have a very good reason to believe a jury may be biased against them or in cases where the court believes the complexity or length of a trial may place too much pressure and stress on a potential jury.

In cases where the accused pleads guilty there is no need for a jury and the judge simply listens to the facts of the case and determines the sanction to be imposed – for example, the amount of the fine or length of the term of imprisonment.

All civil trials heard in the District Court and the Supreme Court (General Division) are heard and determined by a single judge.

A single judge hears and determines all appeals in the Supreme Court (General Division) and usually three judges hear and determine all appeals in the Supreme Court of Appeal, although some matters can be heard by a single judge or two judges.

## The Family Court

Western Australia is the only Australian state to have its own Family Court to deal specifically with family law-related matters – in all other states, family law disputes are generally heard by the Family Court of Australia (a federal court set up by the Commonwealth parliament in 1975).

One benefit of having a state-based Family Court is that it can deal with a broader range of family matters. For example, the Family Court of Western Australia can hear:

- all matters usually heard by the Family Court of Australia, such as those relating to marriage and divorce – including property disputes arising from a divorce and parenting disputes arising from a divorce or separation of de facto (unmarried) couples; as well as
- other family matters not heard by the Family Court of Australia, for example, disputes between separated and de facto (unmarried) couples over property and matters involving adoption and surrogacy arrangements.

This means that all family matters can be heard by the one state court and all parties can have access to the same counselling and support services (like interpreters and child minding) provided by the court.



Source 4 The Supreme Court of Western Australia

### Check your learning 16.7

#### Remember and understand

- 1 Prepare a table (similar to the one provided below) that describes the jurisdiction (i.e. types of cases heard) by the following Western Australian state courts: the Magistrates', District Court and Supreme Court (General Division) and the Supreme Court of Appeal.
- 2 Outline who determines the verdict and who determines the sanction in a criminal trial heard in the District or Supreme (General Division) courts.
- 3
  - a State three examples of crimes that can be heard in the Magistrates' Court.
  - b Suggest one reason why a person may wish to lodge an appeal against a decision of a Magistrate.
- 4 What role does the Family Court have in Western Australia?

#### Apply and analyse

- 5 Decide whether each of the following cases is a criminal or civil case and identify which court would hear the following cases.
  - a Jack is charged with using offensive language in a public place and intends to plead guilty.
  - b Gemma has pleaded guilty to receiving stolen goods valued at \$60 000.
  - c Grant has pleaded not guilty to murder, claiming he stabbed an armed intruder in self-defence.
  - d Joshua has pleaded guilty to selling a large amount of illegal drugs.
  - e Ashley has pleaded guilty to a speeding offence after driving at 80 km per hour in a 40 km per hour school zone.

- f Petra is suing a hospital, claiming a surgeon carelessly performed a knee operation that left her unable to play professional tennis.
- g Ross has pleaded guilty to culpable driving causing death, after colliding with and killing a pedestrian while driving a vehicle under the influence of alcohol. Shortly after the crash he registered a blood alcohol concentration (BAC reading) of 0.13.
- h Veda is suing her local café for \$80 000 to make up for the severe stomach injuries she suffered as a result of swallowing a broken toothpick left in a sandwich.

#### Evaluate and create

- 6 Research one court in the Western Australian state court hierarchy and prepare a PowerPoint presentation that outlines some of the main features or roles of that court. For example, you may wish to outline what types of cases the court can hear, who determines the outcome in each case, some of the key personnel who work at the court, and where the court is located. Remember to use some visuals for interest in your PowerPoint.
- 7 Use either print or online media to find one article about a case being heard in two of the courts in the Western Australian state hierarchy. Prepare a summary of the facts of each case and, where possible, comment upon whether or not you think the outcome of the case was fair. In the event the case has not concluded yet, suggest what the likely outcome may be.

Jurisdiction (or types of cases heard)	Magistrates' Court	District Court	Supreme Court (General Division)	Supreme Court of Appeal
Criminal				
Civil				
Appeals				



## 16.8 The role of the courts

In Australia, most laws are made by parliament. In fact the main role of the state and federal parliaments is to make laws (called **legislation** or **statutes**) on behalf of society. By contrast, the main role of the courts is to apply and interpret the meaning of any existing law to resolve disputes that are brought before them. Courts can, however, also make law in certain situations.

### Courts making law by setting precedent

Courts or judges can make law when they are called upon to resolve a dispute in which there is no existing law – that is, no existing parliamentary legislation or court made law – that can be applied to resolve the dispute at hand. In such cases, the judge must come to their own decision regarding the outcome and their decision may then become judge-made law or a **precedent**.

In simple terms, a precedent is a decision or **legal principle** made by a judge. It must be followed by all lower courts, within the same court hierarchy, in cases where the underlying facts are similar. For example, judges and magistrates in the lower courts in each state or territory must follow decisions or legal principles made by judges in the higher courts (such as the Supreme Court and High Court). This ensures that the laws made by courts are consistent and predictable.

Allowing the courts to make law by setting precedent also allows the law to develop over time. For example, the law of negligence has largely developed through judges making decisions in cases where there was no existing legislation that could be applied to resolve a dispute at hand. In fact, Australian negligence law was first established in the mid 1930s, in the famous case of *Grant v Australian Knitting Mills*. In the absence of any parliamentary legislation, a judge ruled that the manufacturers (in this case, the Australian Knitting Mills) owed consumers a reasonable duty of care not to produce faulty and harmful products. This ruling was made after a consumer (Grant) developed a severe skin rash from wearing some faulty and carelessly produced underwear, similar to a 'onesie'. Since this case, many more cases involving negligence claims have been taken to Australian courts and the law of negligence has continued to develop.



**Source 1** Could your sleepwear be involved in a negligence case?

### Courts making law through statutory interpretation

Judges also are able to make law through the process of **statutory interpretation**. Statutory interpretation is when a judge is called to resolve a dispute in which there is existing legislation (or parliamentary law) but the wording of the legislation is unclear, and needs to be interpreted or given meaning by the judge before it can be applied to resolve the case at hand. For example, in *Kevin and Jennifer's Case* (2003), three Family Court judges were required to interpret the meaning of the word 'man' when a dispute arose over whether a marriage between a woman who had undergone a sex change (to become a man) and another woman was valid under Australian law (which states that a legally valid marriage can only take place between a man and a woman). The court interpreted that a post-operative female-to-male transsexual was a 'man' and declared the marriage valid. The court's interpretation clarified the meaning of a 'man' for the purposes of Australia's marriage laws and enabled the legislation to be applied to resolve the case and also set a precedent.

### casestudy

#### Can a slippery chip earn you \$500 000?

In 2012, the High Court of Australia set a precedent when it resolved an eight-year dispute between Kathryn Strong and Woolworths supermarket chain over injuries Ms Strong incurred when she slipped on a greasy patch on the floor outside a Woolworths supermarket. The court had to determine whether or not Woolworths had most likely been careless and breached their duty of reasonable care by failing to adequately inspect the floor and remove a greasy spot left from a hot chip dropped in a sales area directly outside their supermarket entrance. Ms Strong, who was walking on crutches at the time, slipped on the greasy spot and severely injured her spine.

The High Court judges agreed with the judge in the original District Court by ruling that Woolworths was responsible for Ms Strong's injury and awarded her over \$580 000 in damages to compensate for her losses. In making the decision the High Court set a broad precedent that it was reasonable for supermarkets and other stores to inspect and clean floors located near food courts and in high traffic areas every 20 minutes.



**Source 2** Kathryn Strong was awarded over \$580 000 after slipping on a greasy hot chip patch at the entrance of her local supermarket.

### Check your learning 16.8

#### Remember and understand

- 1 Distinguish between the main role of parliament and the main role of the courts.
- 2 Explain two situations in which courts or judges can make law.
- 3 What is a precedent? Explain how judges make law by setting precedents.
- 4 Suggest two reasons why legislation or laws made by parliament may need interpreting by the court before they can be applied to resolve a case.

#### Apply and analyse

- 5 Read the case study, *Strong v Woolworths Limited* 2012, and complete the following tasks:

- a Explain whether the case is a criminal or civil case.

- b Outline the basic facts of the case and comment on whether or not you agree with the precedent set by the High Court.

#### Evaluate and create

- 6 Research one of the following Australian court cases and prepare a summary that outlines the facts of the case and the decision or law made by the court.
  - *Davies v Waldron* (1989) VR 449
  - *Deing v Tarola* (1993) 2 VR 163
  - *Rosenberg v Percival* (2001) 205 CLR 434
  - *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) HCA 29



## 16B rich task

# Marriage equality and the law

In October 2013 the Australian Capital Territory parliament passed legislation, the *Marriage Equality (Same Sex) Act 2013*, to legalise same-sex marriage in the ACT. However, only a few days after it came into effect, the law was declared invalid by the High Court on the grounds that it conflicted with existing Commonwealth marriage laws that require marriages in Australia to be between a man and a woman.



**Source 1** Same-sex couples were able to legally marry in the ACT for five days in 2013 before the High Court of Australia declared the newly implemented law invalid.

The passing of the ACT legislation, demonstrated the growing support within Australia to follow other countries and legalise same-sex marriage. In 2015, the United States of America became one of 20 other nations to legalise same-sex marriage, joining countries such as the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark,

Uruguay, New Zealand, France and Britain. Similarly, various national surveys have indicated that between 65–70 per cent of Australians support same-sex marriage, with approximately 75–80 per cent believing that legal change is inevitable.

One of the main reasons why many individuals and groups support the legalisation of same-sex marriage in Australia is that it is consistent with the basic principle that underpins our legal system, that 'all people should be treated equally before the law'. This would give same-sex couples the same legal rights that derive from being married, including having the same access to adoption, as heterosexual married couples receive. Many people also believe that allowing same-sex marriage might help reduce unacceptable negative stigma associated with being gay and promote tolerance and understanding within the community.

Conversely, those who oppose same-sex marriage on a range of social, religious, political and legal grounds, often argue they act to support the rights of children. They argue a child has a right to have a mother and a father, believing that marriage should remain a cultural institution based upon the basic biological principle that a man and a woman are the 'natural' creators of life and reproduction. Similarly, some argue that legalising same-sex marriage may make it more difficult to deny other groups, such as polygamists – who support being legally able to be married to more than one person at a time – the right to marry.



**Source 2** Various protests have taken place in support for and against legalising same-sex marriage.

## skilldrill

### Analysing different points of view

Being able to gather, analyse, and interpret information is a key skill that enables us to gain an understanding of views and opinions that may be different from our own. It helps us to develop empathy for people who hold and express different beliefs and values. Having the ability to consider different perspectives also enables us to expand our perceptions and make more informed judgements.

When you are required to analyse a controversial issue, you need to consider a range of different viewpoints related to the issue. You also need to attempt to understand the values, morals, motivations and contexts that underpin these different opinions and perspectives.

To analyse different viewpoints in relation to a controversial issue – such as whether or not the Australian marriage laws should be altered to legally recognise same-sex marriage – follow these steps.

**Step 1** Identify the issue you are going to examine.

**Step 2** Gather sources from a range of different places. For example, articles from different websites or a range of newspapers. Make sure they are not all written by the same person.

**Step 3** Identify each author's viewpoint. For example, do they support or are they against the legal recognition of same-sex marriages?

**Step 4** Identify each author's motivation for their viewpoint. Ask yourself what their motivation might be for taking this position. For example, are they writing on behalf of a specific group or political party that have a particular stance on the issue? Do they belong to a group affected by the issue?

### Extend your understanding

1 Identify another controversial issue in the media, such as lowering the speed limit, or raising the legal drinking age to 21. In pairs, research your topic and make an analysis of different sources. Have each member of

**Step 5** Question the context in which the article was written. Consider when it was written and the predominant values and morals that existed at the time. Ask yourself, has any of the information provided changed over time? Also consider the background of the author and whether or not their views might have been biased by their culture, heritage or religious beliefs.

**Step 6** Decide whether each author has sufficiently justified their opinion, and form your own, based on your readings.

### Apply the skill

1 Using the Internet and other forms of media, collect information from two different sources that support the legalisation of same-sex marriage in Australia. You might use newspaper or journal articles, media broadcasts and transcripts, the websites of political parties or other religious and social organisations. Also collect information from two different sources that oppose the introduction of same-sex marriage.

For each source of information and provide:

- a a summary of the author's viewpoint on the issue
- b a short statement (100 words) that discusses any values, morals, motivations and context that underpin each source of information.

2 After you have examined your four sources of information, prepare a summary of main reasons for and against the legalisation of same-sex marriage. Provide a concluding statement that outlines your personal view on the topic.

the pair present the 'pros' and 'cons' of the issue to the class, explaining the justification for why different people have a range of opinions about it.