

# Chapter 1

## Legal Foundations

- 1.1 Introduction to Legal Foundations
- 1.2 The role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- 1.3 The principles of justice: fairness, equality and access
- 1.4 Characteristics of an effective law
- 1.5 Sources of law
- 1.6 An overview of the relationship between parliament and the courts
- 1.7 Types of law such as criminal law and civil law
- 1.8 The distinction and relationship between criminal law and civil law
- 1.9 An overview of the Victorian court hierarchy
- 1.10 Reasons for the Victorian court hierarchy
- 1.11 Multiple choice review questions
- 1.12 Chapter crossword puzzle
- 1.13 Chapter summary

### 1.1 Introduction to Legal Foundations

While you may not be aware of it, you already know a great deal about the law. Legal Studies explores the nature, function and influence of law and the legal system. Whether you realise it or not, you are exposed to rules and laws every day.

#### Rules and laws

**Rules** are a feature of all societies. Non-legal rules regulate or govern behaviour and procedures in families, schools, sporting clubs, religious groups and other institutions. The private group, or the individuals within the group, will create the rules so that members of the group can work, live or function together. A rule is enforceable by the group or individual who made the rule.

For example, sporting clubs have rules about the game they are involved with. These rules will often be found in a rule book. There may also be rules for procedures about becoming a member of the club. Most families will have household rules. When you were younger, they probably applied to what constituted “good” and “bad” behaviour. The rules most likely now relate to who clears the table after dinner, what time you can stay out until at night and how much time will be spent on homework. Your parents usually make these rules and they are rarely written down. They apply only to members of your family. However, rules made by a family are usually binding on all members of the family and a parent will typically decide the consequence of breaking one of these rules.

A **law** is a legal rule. Like non-legal rules, laws regulate or govern behaviour and procedures. Laws are created by **law-making bodies**, such as **courts** and **parliament**, and are enforced by a court. They are usually referred to as laws and are recorded in written form. Unlike rules, they exist for the whole of society. For example, we have laws that make robbery an offence. This is an example of **criminal law**, which is an area of law concerned with behaviour that breaches existing laws and is harmful to the community’s welfare. According to criminal law, this type of behaviour requires the imposition of a **sanction**. Other offences that are prohibited under criminal law include minor assaults, traffic infringements, murder, rape and theft.

#### Study tip

*The term ‘right’ refers to a principle of freedom or entitlement. A right is irrevocable (it cannot be changed) and inherently held by all human beings. According to the Universal Declaration of Human Rights, rights are universal. This means that they apply to all people, no matter who they are or where they live. Examples of rights include civil and political rights, such as the right to life, freedom of speech, the right to a fair trial, the right to vote, and privacy. Examples of economic, social and cultural rights include the right not to be discriminated against and the right to fair wages, social security, health and education.*

Laws also protect the rights of individuals. For example, if a person does something that damages your reputation, then you can take legal action against that person. This is an example of **civil law**, which is an area of law dealing with the enforcement of individual’s rights, with the aim of returning the affected person back to their original position or compensating that person for their loss. Other infringements of people’s rights include breach of contract, negligence and trespass. The consequence of infringing another individual’s rights is a **remedy**. [Criminal and civil law will be explored in more detail later in Chapter 1.]



Laws also exist that outline how other laws will be made, introduced and changed. For example, the Australian Constitution establishes the legislative or law-making powers of the federal and state governments. There are many other areas of law including property law, family law, environmental law, consumer law, taxation law and industrial law.

The main differences between non-legal rules and legal rules (known as laws) are summarised in the table below:

	<b>Non-legal rules</b>	<b>Legal rules/laws</b>
<b>Who made it?</b>	Made by private groups or individuals, for example, parents or schools	Made by law-making bodies: parliaments, subordinate authorities, local councils and courts
<b>Who must obey it?</b>	Only binding on members of the group	Binding on the whole of society
<b>Who enforces it?</b>	Enforceable by the group or individual who made it – sometimes the group may set up its own decision-making body to resolve disputes	Enforceable by law enforcement agencies (for example, the police), the courts or tribunals
<b>Who interprets it?</b>	Can be interpreted by members of the group or people that the group invite to interpret the rules, for example umpires	The meaning of a law can be interpreted by a judge or magistrate in a court, or by a member of a tribunal
<b>What are the consequences if the rule is broken?</b>	If an individual breaks a rule, the group who made it may punish them, for example, by giving a free kick to the opposition or by expelling or ostracising them.	When a law is broken, a sanction (for example, a fine or imprisonment) will be imposed, or if an individual's rights are violated, the person causing the damage or loss may be required to pay damages or to undertake to behave in a certain manner (for example, to stop doing what they are doing).

## Review questions 1.1

1. Identify two non-legal rules.
2. Identify two legal rules/ laws.
3. Distinguish between non-legal rules and legal rules/ laws.
4. Explain what a law is.
5. Who do laws apply to?
6. Explain who makes laws.
7. Explain why laws are necessary.

## Application exercise 1a

1 In your workbooks, make a list of five non-legal rules and five legal rules/ laws that you have followed today.

2 Complete the table below by classifying each circumstance as a non-legal rule or legal rule:

<b>Circumstance</b>	<b>Non-legal rule</b>	<b>Legal rule</b>
School uniform must be worn correctly by students at all times		
The ball must be thrown, not kicked		
You must be aged 18 years or older to get married		
Your bedroom must be kept tidy		
Be kind to your neighbours		
Do not commit murder		
Clothing must be worn in public		
All bike and scooter riders must wear a bike helmet		
It is an offence to intentionally trespass in any place		
You must eat your meal with a knife and fork		

## 1.2 The role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals

Imagine that you were living on an island by yourself. It is unlikely that you would need rules and laws. However, if you happened to find yourself living on the island with other people, you might realise that things would need to change. It is only because we live in a society, consisting of many individuals, that we need laws. Laws make it possible for individuals to live together peacefully.

As we have already discussed in the previous section, laws are legal rules that apply to all individuals in society. Laws regulate or govern behaviour and procedures and protect **individual rights**. Despite the presence of laws in our society, there will always be conflicts between individuals. We rely on the **legal system** to help us to settle any disputes that arise. Our legal system allows us to interpret and enforce the laws of our society.



### The legal system

Our legal system is comprised of the institutions, people and processes that make, administer, enforce, adjudicate and interpret the laws of our country. Furthermore, there are institutions, people and processes in our legal system that provide legal advice and representation for those who need it. Our legal system might be represented by the information in the table below:

Institutions	People	Processes
Parliament	Members of the community	Law-making process
Courts	Members of parliament	Criminal justice system
Tribunals	Ministers	Civil justice system
Government departments	Attorney General	Jury system
Law reform bodies	Director of Public Prosecutions	Corrections system
Legal aid bodies and community legal centres	Local councillors	
Correctional facilities	Judges	
	Magistrates	
	Barristers	
	Solicitors	
	Police	
	Prison officers	

**Parliament** has the power to *make new laws* and to change or repeal existing laws. We refer to this responsibility as the legislature.

**Courts** are primarily responsible for *interpreting the law* and settling disputes. This is the judiciary.

Government ministers and their respective departments administer the laws, while the police *enforce the law* and seek to protect the public.

The corrections system ensures that the sanctions given to individuals who have broken criminal laws are carried out. It is the legal profession (barristers and solicitors) who provide legal advice and representation.

Our laws and the legal system are necessary for ensuring that our society functions in the way that we want it to. The individuals in our community and our legal system all contribute to achieving social cohesion and protecting our rights

Figure 1.1  
The legal system



## What is social cohesion?

**Social cohesion** refers to the belief or willingness of individuals in society to work together in a peaceful and orderly manner. This harmony will occur when a majority of citizens obey the law and respect the rights of other individuals. In this way, laws contribute to the attainment of social cohesion. For example, criminal laws prohibit actions such as assault, as well as other crimes. This protects the health and safety of individuals in the community so that they are better able to participate as a member of society. Individuals and the legal system also contribute to achieving social cohesion. The law clearly outlines what is responsible behaviour so that individuals do not harm other people. The law also recognises individual rights. Members of the community rely on the legal system when they need to settle disputes. The resolution of disputes leads to social cohesion.

There are a number of ways in which we can ensure that laws achieve social cohesion and protect the rights of individuals. We need to have laws that:



- set standards of acceptable conduct – laws establish boundaries for what people can and cannot do. For example, criminal laws regulate acts of violence and the use of property. In civil law, the law of negligence enables an individual who has been harmed by the careless or dangerous actions of another person to seek compensation. Our laws provide for sanctions or remedies if individuals breach set standards of acceptable behaviour. In this way, laws can express the disapproval that the community has for certain types of behaviour.
- establish mechanisms for resolving disputes – laws provide processes or methods for settling conflicts or disputes as they arise between individuals, or between the state and individuals. There would be no social cohesion if every individual attempted to resolve disputes themselves. It would also be difficult to protect individual rights. The law creates a range of institutions that resolve disputes, including courts and tribunals. Other organisations, such as the police or correctional facilities, may be involved if a dispute is a crime. Disputes in civil law, such as a breach of contract, also need to be settled. Civil disputes can be resolved through the courts, tribunals or by using different methods of dispute resolution such as mediation, conciliation or arbitration.
- acknowledge the need to meet the changing needs of society – the laws that have been created by our society reflect our values, but these attitudes and beliefs change over time. This is because the conditions under which we live are changing. For example, we live in a period of great technological and scientific change. Our laws have changed over time. Changing attitudes and beliefs towards drugs, abortion and divorce, for example, have contributed to laws being changed or updated in recent times. The law needs to be flexible to reflect the attitudes and beliefs of the majority of society, otherwise it is possible that individuals will defy the law because it does not reflect their views. Therefore, in order to maintain social cohesion and protect the rights of individuals, there needs to be a means of changing our laws when there is a change in society's attitudes and beliefs. Individuals can influence changes to the law through the use of petitions, demonstrations, formation of lobby groups, or the use of the courts.
- recognise and support the rights of individuals and groups, while at the same time protecting the community from harm – laws are necessary for protecting us from danger, injury and fear. Sanctions such as imprisonment can deter people from committing crimes or protect us by removing offenders from the community. However, laws also need to ensure that the rights and interests of all members of society are protected. Our laws and the legal system protect a range of rights including the right to a fair trial, the right not to be discriminated against, the right to vote, and the right to silence.

## Review questions 1.2

1. Define 'individual right'.
2. Using examples, explain what a legal system is.
3. Explain what is meant by social cohesion.
4. Outline the ways in which setting standards of acceptable conduct achieve social cohesion and protect individual rights.
5. Explain the role that establishing mechanisms for resolving disputes has in achieving social cohesion and protecting individual rights.
6. Explain why it is important to be able to change the law.
7. Explain how individuals and the legal system achieve social cohesion and protect individual rights.
8. Outline the ways in which the law achieves social cohesion.
9. Outline the ways in which the law protects the rights of individuals.

## Application exercise 1b

Laws exist to achieve social cohesion and protect the rights of individuals. They do this by setting standards of acceptable conduct, establishing mechanisms for resolving disputes, acknowledging the need to meet the changing needs of society, and recognising and supporting the rights of individuals and groups while protecting the community from harm.



Identify the need/s or reason/s for the following laws in the table below.

Law	Reason/s for the law
Road rules	
Laws relating to assault	
Workplace safety laws	
Racial discrimination laws	
Stalking laws	
Laws establishing the Magistrates' Court of Victoria	
Gambling laws	
Laws governing correctional facilities in Victoria	
Drink driving laws	
Gun laws	

## Application exercise 1c:

### Turnbull government's proposed changes to citizenship laws

In April 2017, the Turnbull government proposed changes to citizenship laws, including tougher tests that were designed to promote social cohesion and improve security. According to the proposals, applicants would need to be permanent residents for four years before being eligible to take the test, an increase from the then 12 months. Applicants would need to demonstrate a higher level of English than was required at the time, and would also need to demonstrate that they have integrated into the community.

Extra questions on the test would ask about "Australian values". For example, as well as asking applicants whether they have been working or if their children have been attending school, they may be asked whether they think female genital mutilation, family violence and arranged marriages are acceptable.

"Changes to citizenship will enable our migration program to contribute further to our social cohesion while enhancing our security," Prime Minister Mr Turnbull said during a speech to the Australian Chamber of Commerce and Industry. "Australia must continue to attract people who will embrace our values and positively contribute, regardless of nationality or religious belief. Citizenship must be valued and we're making changes so the practices and principles of those obtaining citizenship are consistent with our cultural values."

Opposition Leader Bill Shorten indicated that the Labor party was open to supporting some of the proposals, including the English language emphasis and increased waiting period. However, he questioned the necessity of some of the measures.

Joe Caputo, chairman of the Federation of Ethnic Communities' Councils of Australia, suggested that the government should avoid assuming that people from diverse backgrounds have values that contradict "Australian values". He said that values were not limited to specific ethnic groups.

### Questions/tasks

- After reading 'Turnbull government's proposed changes to citizenship laws', answer the following questions.
- Who is proposing the changes to citizenship laws?
- Explain what social cohesion is.
- Outline the reasons why the Turnbull government believes that changes to citizenship laws would promote social cohesion.
- Not everyone agreed that the proposed changes to citizenship laws would be necessary. Outline the arguments opposing the proposed changes to citizenship laws.

**CITIZENSHIP  
TEST**

### 1.3 The principles of justice: fairness, equality and access

Australia's legal system is based on the **rule of law** and the **principles of justice**. The rule of law is the idea that all members of society are subject to the law, and are equal before the law. The three main principles of justice are **fairness**, **equality** before the law and **access** to the legal system. Without these principles, individuals in our society would not be able to trust the legal system to promote or protect the welfare of the community or their rights.

There are some individuals and groups in our society who experience difficulties in being treated fairly or equally by the legal system, or accessing the legal system. For some people, these difficulties occur because they have little to no understanding of the law. Some individuals struggle to communicate their problem. For various reasons, some people are intimidated by the legal system or are not able to afford legal representation. These difficulties can result in people being unable to receive a just outcome. However, our **law-making bodies** recognise these problems and have introduced changes to deal with these problems. Nevertheless, there are always future changes that could be made to further improve access to the legal system.

#### Fairness

**Fairness** refers to individuals being treated with impartiality, and without favouritism. The legal system must deal with individuals fairly, free from bias or unfair preferential treatment. Every individual is entitled to a fair hearing – a legal system that is fair allows everyone the opportunity to present their side of a dispute and makes use of consistent procedures to reach an outcome. Decisions should also be made on the basis of laws that are known by people in the community.

Some individuals and groups are not treated equally or fairly by the legal system. Some people may have difficulties using the legal system because of a lack of knowledge of the legal system, a failure of the legal system to account for differences and cultural misunderstandings.

There are a number of ways in which the legal system upholds fairness, including:

- presumption of innocence – in criminal law, all accused individuals who appear before a court are presumed to be innocent until the prosecution proves that they are guilty. Furthermore, in our legal system, the accused can only be found guilty if the court is reasonably certain (beyond reasonable doubt) that he or she committed the crime. This ensures fairness because, to find the accused guilty, the prosecution must present a strong case. [Presumption of innocence will be examined in more detail in Chapter 2.]
- right to silence – in criminal law, an accused person has the right to either remain silent or answer a question or provide evidence. It is up to the prosecution to establish guilt and produce evidence that establishes that fact. In our legal system, it is considered unfair to force someone to answer a question or produce evidence that may incriminate him or her.
- use of an impartial, unbiased judge – in our legal system, the judge ensures that a trial is fair and impartial. The judge oversees the conduct of the case, decides on admissibility of evidence, decides questions of law and decides the case when there is no jury. Furthermore, the judge ensures that the burden of proof is satisfied. The judge is expected to be independent and free of bias, which is an important safeguard for fairness in the legal system.
- rules of evidence and procedure – a fair trial occurs when the court-based practices of rules of evidence and procedure are utilised. Rules of evidence determine the admissibility of evidence and, in our legal system, are very strict. Each party in a dispute will have the opportunity to test the validity of the evidence being presented at a trial. Some evidence, such as hearsay, is not allowed because it cannot be tested in court. Trials follow rules of procedure that, in our legal system, are also very strict. They are consistently applied to both parties to ensure a fair trial.
- use of an impartial, unbiased jury – in our legal system juries are used in serious criminal matters relating to indictable offences and certain types of civil proceedings. Juries represent a cross-section of the community and are therefore expected to be impartial. All members of a jury should be free of bias or preconceived notions that may influence their ability to consider evidence in a trial. This leads to a fair trial.

#### Study tip

*The term 'rule of law' means that all citizens must obey the law. Nobody is above the law. The law applies to the prime minister, judges and members of the armed forces. All citizens are equal before the law, so that the laws making it a criminal offence to steal applies to everyone. The rule of law also means that disputes should be resolved fairly and efficiently, and that no one should be permitted to wield power without checks and balances.*

#### Study tip

*Justice is not an easy term to define. In general, it refers to moral rightness or lawfulness. Lord Denning, one of England's greatest judges, pondered a definition for the term in his book, *The Road to Justice*. He asked, "How does man know what is justice?" He then answered his own question when he wrote, "It is not the product of his intellect but of his spirit. The nearest we can get to defining justice is to say that it is what the right-minded members of the community – those who have the right spirit within them – believe to be fair." In other words, the aim of the legal system is to encourage what is right in a given set of circumstances. Justice, in our legal system, therefore means that people should be treated fairly and equally before the law and have access to the legal system.*

- committal proceedings – the Magistrates’ Court holds committal proceedings for more serious cases to determine whether there is sufficient evidence to support a conviction in a higher court. Committal proceedings ensure that a fair trial will occur because they allow for an accused person to know the case that the prosecution is presenting against him or her. They also allow the accused person to gather their own evidence and test the prosecution’s evidence. [Committal proceedings will be explored in more detail later in Chapter 1.]

## Equality

**Equality** before the law is the principle under which all people are subject to the same laws. This does not mean that all individuals should be treated in the same way, but that people who come into contact with the legal system should believe that they are being treated equally and without discrimination. There are some individuals and groups in our society who do not experience equality in the legal system, for a variety of reasons. Some people may be discriminated against because of their gender, ethnicity, disability, sexual orientation, age, religious affiliation, socioeconomic background, size or nature of family, literacy level or other characteristic. If people believe that they are not being treated equally and fairly it is likely that confidence in the legal system will not be maintained.

It is important to note that equality before the law is a basic human right. Article 7 of the Universal Declaration of Human Rights states that, ‘all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’ In 1991, Australia signed the International Covenant on Civil and Political Rights which includes, ‘the right to equality before the law and non-discrimination.’



Some ways in which our legal system ensures that all individuals have the opportunity to be treated equally and without discrimination include:

- using interpreters – an interpreter may be employed in court when an individual involved in a case needs assistance in understanding English or has a hearing and/or speech impairment. For example, the Magistrates’ Court will, under some circumstances, arrange and pay for an interpreter. Being able to understand what is happening, and be understood, in one’s own hearing or trial is important for a person to feel that they are being treated equally.
- anti-discrimination laws – laws exist in Australia that relate to human rights, discrimination and the need to treat people equally. The Commonwealth Parliament has passed legislation that includes the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004*, and the *Australian Human Rights Commission Act 1986*. In Victoria, the *Equal Opportunity Act 2010 (Vic)* is the primary legislation that protects people from discrimination, sexual harassment, victimisation and vilification. The Victorian Parliament has also passed the *Racial and Religious Tolerance Act 2001 (Vic)*.
- legal aid – legal assistance can be provided to people who are involved in a dispute or criminal matter who are unable to afford legal advice and representation. Victoria Legal Aid provides specialised services for people who have to appear before the courts or who are involved in legal cases. In doing so, it can reduce some of the inequalities involved in accessing justice. As well as providing assistance to people in financial difficulties, legal aid allows individuals who may be intimidated by the legal system to obtain legal advice.
- court proceedings – the use of consistent proceedings in court ensures that individuals are able to put forward his or her case, receive a fair hearing and obtain an appropriate outcome. In some cases, proceedings may be adapted to suit a particular individual’s background and circumstances. For example, a different method of communication may be used for someone with a communication disability.
- specialist divisions – specialist divisions exist within courts and VCAT that deal with specialised types of law. For example, the Koori Court operates as a division of the Magistrates’ Court, and sentences Indigenous defendants who have pleaded guilty to committing an offence. The court was established to encourage greater participation by the Aboriginal community in the legal system.
- the use of an oath or affirmation – an oath is a spoken promise to tell the truth. They are often made in court while holding the Bible, the New Testament or the Old Testament, however, witnesses may choose to swear an oath on another relevant religious text. A religious text does not need to be used in taking an oath, and a witness may choose to make an affirmation rather than taking an oath. An affirmation is a spoken declaration, made in place of an oath, promising to tell the truth.
- police ending racial profiling – Victoria Police has introduced policies stating that racial profiling is not acceptable and implemented training that improves police awareness of conscious and unconscious bias. This reduces the likelihood that people dealing with the police will feel that they are being treated differently or discriminated against.

## Access

**Access** means that the legal system must be available and accessible to all members of the community. An effective legal system provides a range of institutions and processes that will allow all individuals and groups to have their disputes resolved. As well as having physical access, all citizens must be able to afford access to the legal system so that they can pursue their case. Avenues of dispute resolution must be provided so that individuals do not need to resort to methods outside the law to resolve their disputes. Access also refers to the notion that laws should be available to everyone and not so complex that they cannot be understood. To have access, citizens need knowledge of the legal system and their legal rights.

For a variety of reasons, there are some individuals and groups in our society who experience difficulties in gaining access to the legal system. Some people will have difficulties accessing the legal system because they have little to no knowledge or understanding of the law. For example, some individuals may not even know where or how to get in contact with a lawyer. Some people may feel intimidated by those who work in the legal profession or may not be able to pay the costs of a lawyer. Individuals with limited English may struggle to communicate their problem, thereby making it difficult to access legal support.

Some ways in which our legal system provides for access include:

- a greater use of alternative dispute resolution – our legal system provides for a range of methods for the resolution of civil disputes including mediation, conciliation and arbitration. These can be more time-effective and less expensive for individuals rather than taking a case to court. The Victorian courts refer cases to mediation, conciliation and arbitration. For example, civil claims being heard by the Magistrates’ Court of Victoria may proceed to arbitration (a method used to resolve disputes whereby the parties in dispute present their case to an independent third person) if the amount of the claim is less than \$10,000.
- the use of tribunals – civil disputes may be heard and determined by a tribunal, such as the Victorian Civil and Administrative Tribunal (VCAT). VCAT hears cases and resolves disputes through alternative dispute resolution methods in a timely, cost effective and efficient manner.
- the court hierarchy – the court hierarchy provides individuals with access to experts who are specialised in dealing with the specific case under dispute. For example, the Magistrates’ Court is specialised in hearing minor cases and is able to hear them relatively quickly, cheaply and conveniently. [The court hierarchy will be explored later in Chapter 1.]
- the right of appeal – under certain circumstances, the law will allow people to contest a decision made by a court. The provisions of the right to appeal allow individuals who are not satisfied with the outcome of their case, who would otherwise have no opportunity to have a decision reviewed, to ask a higher authority to review the decision made by a lower court. [Appeals are explored in more detail later in Chapter 1.]
- specialist divisions – specialist divisions exist within courts and VCAT that deal with specialised types of law. For example, the Children’s Court of Victoria provides access for children and young people under the age of 18, recognising that children need special treatment within the legal system. The Children’s Court also has a Children’s Koori Court that hears matters relating to criminal offending by Koori children and young persons. It was established to address the over-representation of young Koori people in the legal system.
- legal aid – legal assistance can be provided to people who are involved in a dispute or criminal matter who are unable to afford it. This is very important in providing access to justice, because without legal aid some people would not be able to obtain legal advice about their rights under the law or access legal representation.



### Study tip

*It is vital that you learn and understand the principles of justice (fairness, equality and access) as these underpin several Areas of Study in the VCE Legal Studies Study Design, including in Units 1 and 2. Later in the course you will need to be prepared to discuss, analyse and evaluate the ability of sanctions, remedies and the criminal and civil justice systems to achieve the principles of justice.*



## Review questions 1.3

1. Explain in your own words what is meant by the term 'justice'.
2. Define the following terms:
  - fairness
  - equality
  - access
3. Describe the reasons why certain individuals or groups may experience difficulties in being treated fairly or equally by the legal system, or accessing the legal system.
4. Identify the ways in which the legal system upholds fairness.
5. Choose two ways in which the legal system upholds fairness and explain how each achieves justice.
6. Explain why some people may not experience equality in our legal system.
7. In what ways is equality before the law protected as a human right?
8. Identify the ways in which the legal system ensures that all individuals have the opportunity to be treated equally and without discrimination.
9. Choose two ways in which the legal system ensures equality and explain how each achieves justice.
10. Identify the ways in which the legal system provides for access.
11. Choose two ways in which the legal system provides for access and explain how each achieves justice.

### Application exercise 1d

Discuss whether the following aspects of law meet the principles of justice: fairness, equality and/or access.

- the media publishing names and details of the accused, implying they are guilty, before a court hearing
- a fine for speeding
- appearing in court without legal representation
- a judge and jury hearing a murder trial
- a lack of child care arrangements at court
- appealing a decision made in the Magistrates' Court to a higher court



### Application exercise 1e

#### Fairness, equality and access win for self-represented litigants

Mother and daughter, Betty and Maria Matsoukatidou, were charged by Yarra Ranges Council with offences under the Building Act 1993 (Vic.) in relation to failing to secure and demolish their home after it was destroyed following an arsonist attack. Each woman was fined (Betty with a conviction) in the Magistrates' Court of Victoria. At the hearing of the charges, they both appeared self-represented. Maria had a learning disability. Betty was her daughter's carer and her first language was not English.

Maria and Betty appealed to the County Court but the appeals were struck out for non-attendance. They applied to the court for orders reinstating the appeals. At the ensuing hearing, Maria and Betty also appeared self-represented. They struggled to present their case and the judge gave them limited assistance. The County Court judge dismissed their applications without adequately explaining to them the relevant procedure that would be followed or the applicable legal test.

In the Supreme Court of Victoria, Maria and Betty sought judicial review of the orders of the County Court judge, on the grounds that, in the way that the hearing was conducted, the judge failed to ensure Maria's human rights to equality under section 8(3), and both Maria and Betty's rights to a fair hearing under section 24(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic.) (the Charter).

Betty and Maria were represented pro bono (legal representation without payment) in the Supreme Court hearing. Justice Bell was asked to consider whether a judge in the County Court is required to apply those Charter rights when hearing and determining legal proceedings.

Justice Bell identified that Maria's learning disability diminished her ability to participate effectively in the hearing, including her capacity to communicate with the judge. Section 8(3) of the Charter says, "Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination." Justice Bell found that the County Court judge should have made certain adjustments and accommodations to the procedures that were adopted. This had the effect of disadvantaging her and, consequently, her right to equality had been breached.

Justice Bell identified that self-represented parties are usually disadvantaged in legal proceedings. Consequently, a judge has a duty to ensure a fair trial by providing certain advice and assistance to ensure that they effectively participated in the hearing. Section 24(1) of the Charter says, "A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing." Justice Bell found



that Maria and Betty's hearing in the County Court was conducted too quickly for their comprehension, adding to the disadvantage they experienced. Maria and Betty should not have been prevented from explaining how the loss of their home to arson had affected their participation in the criminal legal process. The loss of their home would have been a traumatic event for them. As the County Court judge failed to give Maria and Betty advice and assistance to ensure their effective participation in the hearing and equality with the party that was legally represented, their rights to a fair hearing were breached.

Justice Bell found that Maria and Betty had established that the County Court judge hearing their applications did not correctly apply their right to equality and a fair hearing. The Supreme Court set aside the orders of the judge of the County Court dismissing Maria and Betty's applications, and their applications were remitted (sent or transferred to another court) so that a different judge would rehear and determine the matter (*Matsoukatidou v Yarra Ranges Council* [2017] VSC 61).

After reading 'Fairness, equality and access win for self-represented litigants', answer the following questions.

1. What were Betty and Maria Matsoukatidou charged with in the Magistrates' Court of Victoria?
2. Identify the sanctions that the two women received following their hearing.
3. Why did Betty and Maria apply to the County Court for orders reinstating their appeals?
4. Explain why Maria and Betty sought judicial review of the orders of the County Court judge in the Supreme Court of Victoria.
5. Explain how the County Court judge's orders breached Maria's right to equality.
6. Explain how the County Court judge's orders breached Maria and Betty's right to a fair hearing.
7. Outline the ways in which Maria and Betty were able to access the legal system.

## 1.4 Characteristics of an effective law

As we discussed in the previous section, circumstances are always changing and, to maintain social cohesion and individual rights, laws must acknowledge the need to meet the changing needs of society. Sometimes, a situation will arise where a law that has worked satisfactorily in the past does not seem to provide a fair or equitable outcome or prevents certain groups or individuals from accessing the law. An effective law is one that produces the right (or just) outcomes.

There are a number of characteristics that suggest whether a law is effective. An effective law:

- should reflect society's values
- is enforceable
- is known
- is clear and understood
- is stable

### Reflects society's values

In our legal system we believe that it is essential that laws reflect society's **values**. There are certain values (beliefs, principles and ideas about the way that we should live, behave and be treated by other people) that the majority of Australians accept and deem important. Laws regulate or govern behaviour and procedures in the community, so it is vital that our laws are acceptable to the community. There is a greater likelihood that members of the community will be inclined to disobey a law that goes against their values.

Our laws should identify and reinforce the social, moral, economic, religious, and political values of the community. For example, laws that relate to drink driving reflect society's belief that endangering other road users when driving while intoxicated is unacceptable. The *Competition and Consumer Act 2010* protects the rights of consumers and promotes fair trading and competition, reflecting the economic values of our society. The Australian Constitution established representative and responsible government, reflecting the political values of society. Values can change over time. For example, the creation of anti-discrimination laws has come about because of changing attitudes related to equality. These laws make sure that individuals are not discriminated against on the basis of a range of protected personal characteristics.



When making or changing the law, our law-makers need to ensure that the law reflects the values of a majority of the community, not the opinions or beliefs of loud minority groups of our society. The general population may not share these values. In such a case, the law is unlikely to be effective.



## Application exercise 1f

Using the table below, assess whether each example of a law is effective or not by ticking each characteristic. Briefly explain your response/s or your lack of response/s in the last column:



Example of a law	Reflects society's values	Enforceable	Known	Clear and understood	Stable	Explanation
It is illegal to download movies and music without paying						
Anti-bullying laws						
It is illegal to mark graffiti on property that can be seen by the public unless the owner has given permission to do so						
Anti-hoon laws						
It is illegal to behave in a way that causes offence to other people, such as racial vilification, swearing and using obscene language						
Setting off fireworks without a permit is illegal						
Littering laws						
Restricted-breed dog laws						
It is against the law to urinate in public						
Interfering with a homing pigeon is illegal						
All bike and scooter riders must wear a bike helmet						

## Application exercise 1g

### Drones invading privacy

Small business owner Mandy Lingard was sunbaking in the privacy of her own back yard when she noticed a drone hovering overhead. A real estate agent had enlisted the drone to take aerial photographs of a neighbouring property in Mount Martha, including an image of the nearby beach.

Ms Lingard thought nothing of the incident until a real estate advertising board appeared outside the neighbour's house a couple of weeks later. The aerial shot taken by the drone was on the board, featuring the house, Ms Lingard's backyard and herself – clearly sunbaking. The image also appeared on the Internet and in the real estate magazine. The board was later removed.

Ms Lingard suggested that real estate agents who are using drones for aerial photography should have an obligation to advise householders nearby who may be affected that they will be in use.

This incident occurred in 2014. More recently, in early 2017, a Darwin resident having a late-night swim in her backyard pool had her own encounter with a drone. A drone flew into her backyard, hovered directly overhead for at least a minute, then left. The young woman, Karli Hyatt, is certain that the drone was watching her.

As drone ownership increases, there have been similar reports of drones invading private spaces across Australia. This recent advance in technology appears to suggest that we can no longer rely on fences or barriers around homes to protect privacy. Ms Hyatt said that she was initially shocked and called for changes in legislation to better protect individuals' privacy against new technology.

The Civil Aviation Safety Authority (CASA) has some restrictions on privately operated drones, however, unlike many countries, Australia does not have a tort of privacy. A tort is a civil wrong – a wrongful act or an infringement of a right that leads to legal liability. In general, torts result from laws made by courts. It is currently legal to view and make images of what people can see in or from a public place, including the sky or neighbouring premises. Many academics are calling for changes to the law and are recommending the introduction of a new tort of privacy.

There have been some indications by the courts that a tort of invasion of privacy may exist in Australia. In a case in 2001, the High



Court of Australia indicated that in the future, it might be open to arguments that a tort of invasion of privacy could be recognised. Only the dissenting judge, Justice Callinan, gave an indication that such a tort may be acceptable. Four of the six judges believed that, if a new action for the invasion of privacy was developed in Australian law, it should be limited to protection of the privacy of a natural person, rather than a company or similar body (*Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) HCA 63). Two lower court decisions have recognised the tort of invasion of privacy, but no higher courts have acknowledged its existence.

In 2014, the Australian Law Reform Commission (the ALRC) recommended a statutory cause of action for invasion of privacy – that privacy laws should be made by parliament. If this was to occur, the ALRC recommended that the Parliament of Australia should make the laws, and that the cause of action should be an action in tort. It is also worth noting that Australia is a signatory to the International Covenant on Civil and Political Rights. This treaty requires signatory countries to protect the privacy of its citizens.

#### Questions/tasks

1. In your opinion, how effective are privacy laws in Australia? Consider the characteristics of an effective law in your response.
2. Outline what could be done to make these laws more effective.
3. If the Parliament of Victoria introduced a law that said everyone owning a drone needed to register it before flying, would this law be effective for protecting privacy? Provide reasons for your response.

## 1.5 Sources of law

If you were asked to classify all living things, you would find that there are numerous ways to do so. For example, you might classify them by kingdom, class, family, genus or species. In a similar way, there are many ways to classify law. One way in which law can be classified is by exploring the ways in which it is made. According to this method of classification, there are two sources of law in Australia:

- common law
- statute law

Most people would be aware that parliament makes laws. However, in Australia, it is not only parliament that makes laws. Courts and subordinate authorities also make laws.

### Common law

**Common law** is law made by courts. It is made as judges interpret laws and make decisions in resolving the cases they are hearing. Common law can also be called judge made-law or case law. As outlined in Box 1.1, common law in Australia has its basis in the common law of England.

While the main purpose of courts is to settle disputes, they do apply existing and relevant laws to the facts of any case that they are hearing. They then reach a decision based on the application of those laws to the facts. However, sometimes a case will be heard by a court where there is no law regulating the case, or the existing legislation will be ambiguous or unclear. The judge will need to make a decision, because courts must settle the disputes that come before them. The judge will do this by determining a new legal rule so that a decision can be made. As the **precedent** is used to settle future cases where the facts are similar, the courts develop common law.

#### Box 1.1 English common law

Common law originated in England in the 11th century. Following William the Conqueror's victory in 1066, the Normans established the feudal system in England, with the king as head of government. The creation of the king's court led to the development of standardised rules, making use of localised customary laws. To strengthen royal power, King Henry II began to send judges around the country on regular circuits. As the judges travelled from village to village, they settled disputes; in doing so, they made decisions incorporating local traditions and customs. The judges would then meet to agree to apply certain customs and reject bad ones. This became the basis for later courts to make decisions using the facts of similar disputes. Over time, the local customs became laws that were applied to different parts of England. In this way, the judges began to apply the law commonly to all people across the country, rather than using the local customary law. The common law was the main body of law in England until the 17th century, when the Parliament of England passed the Bill of Rights. This legislation limited the powers of the monarch and increased the law-making power of the parliament.

Common law comes about because of the previous decisions made by courts (precedents). Because common law is recorded in the written decisions of courts it can be difficult to find laws that apply to a certain situation. Sometimes, different parts of common law may be set out in different decisions. Law reports summarising court decisions in cases are published to provide consistency in the development of common law. One of the most comprehensive Australian databases is the Australasian Legal Information Institute (AustLII), an online free-access legal resource, which can be accessed at [www.austlii.edu.au](http://www.austlii.edu.au). You can search through AustLII's databases for court cases or for laws made by any

Commonwealth or State parliament. In general, only the decisions made in higher courts for important cases are included in the law reports (such as decisions made by the High Court, the Federal Court and the Supreme Courts of the states and territories).

In many ways, a legal precedent is very similar to the ways that decisions will be made by your teachers at school. If you arrive late to class, you would expect to be given a consequence. If you later saw another student arrive late, but face no consequence, you most likely would consider this to be unfair. Common law, and the use of precedents, ensures that everyone in society is treated equally and fairly. Precedents establish principles of law that are used to settle similar types of disputes. Just as you might expect some certainty and consistency in consequences for coming late to class, a precedent made by a court makes it possible to predict the likely outcome of a case when a legal dispute arises where the facts are similar to a previous case.

### Study tip

*It is important to understand that law reports are not transcripts of everything that was said in court, but are summaries of the decision and important legal points.*

Common law relies on the **doctrine of precedent**. This principle governs the way that judges decide cases (and therefore make the law) by referring to previous court decisions. Essentially, it means that a lower court in a court hierarchy, in cases involving similar facts, must follow a decision made by a higher court. We refer to such decisions as being “binding” on courts lower in the court hierarchy. Binding precedent allows for the law to be decided and applied with consistency and fairness. [The court hierarchy will be explored in more detail later in Chapter 1.]

### Study tip

*The maxim or term ‘stare decisis’ – Latin for ‘to stand by things decided’ – is essential to the doctrine of precedent. In practice, it means that when a higher court has decided a legal principle, lower courts will stand by, or follow, the principle to resolve similar types of disputes.*

## The decision

In most cases that come before a court, the judge will need to decide in favour of one of the parties in dispute. This decision specifying the party that has won the case directly impacts on the parties involved in the dispute. However, the judge will also give reasons for the decision, and within these reasons is the **ratio decidendi**. This is a Latin term meaning reason for the decision, and is the legal principle behind the decision. The ratio decidendi is important for future cases with similar facts because courts that are lower in the court hierarchy must follow it. These reasons for the decision are different to the other statements that may be made by the judge in delivering the judgement, but are not directly relevant to the final outcome. Such comments are known as **obiter dictum** – a Latin term meaning ‘matters spoken by the way’ or ‘words said in passing’. While remarks or observations made in passing are not binding on lower courts, they may influence decisions in the future.

## Binding precedent

A **binding precedent** is one that must be followed by lower courts within the same court hierarchy in similar cases. For example, a decision made by the Supreme Court is binding on decisions in the County Court and Magistrates’ Court, because the Supreme Court is a higher court than the County Court and Magistrates’ Court. By contrast, the Court of Appeal and the High Court are not bound by a decision made in the Supreme Court because the Court of Appeal and the High Court are higher courts than the Supreme Court. It is the **ratio decidendi** of a legal principle that forms the binding part of a precedent.

## Persuasive precedent

A **persuasive precedent** is one that courts do not have to follow, but can be highly influential and therefore used as a guide or example when deciding a case.

A court may choose to use decisions made by courts in a different hierarchy in another state or country. For example, a decision made by a judge in the Supreme Court of New South Wales may influence a judge in the Supreme Court of Victoria, but it is not binding on the Victorian judge because the Supreme Court of New South Wales is not part of the Victorian court hierarchy. Higher courts are not bound to follow decisions made in lower courts in the same hierarchy, but may consider the decision made by a judge in a previous case as a persuasive precedent. Furthermore, comments made in *obiter* may also form persuasive precedent.

A precedent can be changed over time. As a result of later cases being decided by courts, the authority of the precedent may be reduced or it may no longer apply. Courts may change precedents through the use of four techniques:

- Reversing – a judge in a higher court hearing an appeal may disagree with the decision of the lower court and find in favour of a different party. This reverses or changes the decision and creates a new precedent.
- Overruling – if a judge hearing a later and separate case in a higher court disagrees with a precedent set in a

similar case in a lower court, they may decide to replace it with a different decision. This creates a new precedent. The decision in the original case still stands, but the original precedent is no longer binding.

- Distinguishing – a judge may find that there are some significant points of difference between the facts of an earlier case and the later and separate case that is currently before the court, and therefore may decide that an earlier precedent does not apply. The judge will then make a decision that creates a new precedent.
- Disapproving – a judge hearing a later case can express an opinion disagreeing with a precedent. While the court is still bound by the precedent, disapproval may send a message to a higher court that the judge believes that the precedent should be changed.

### Statutory interpretation

**Statutory interpretation** is the process by which courts interpret and apply the words in legislation made by parliament. When hearing a case, a judge may need to apply the words or terms in an Act to the facts of the case. Sometimes the legislation will have plain and clear meaning. However, the wording of legislation can at times be ambiguous or unclear. Sometimes the meaning of the words may have changed over time. Some amount of interpretation will be necessary in such cases. In his or her judgement, the judge would still reference the Act, but would give reasons for their interpretation of the legislation. The reasons for the interpretation of the legislation create a precedent in common law.

It is important to note that courts are only able to interpret the meaning of the words of an Act when cases come before them. They must wait for an individual or group to take a matter to a court to be able to interpret legislation.

### Statute law

**Statute law** is law made by state and Commonwealth parliaments through the legislative process of passing a Bill through both houses. It can also be referred to as legislation or Acts of Parliament. Parliament – named from the French term *parler* (which means to speak) – is an assembly of the representatives who have been elected by the people to make or change the laws of our country. In Australia, parliament is the supreme legislative authority. This means that, when it is acting within the powers given to it by the Australian Constitution, it has **sovereignty**; in general, courts cannot overrule the laws that it makes. In the case of a conflict between statute law and common law, statute law will always prevail.

Just as common law developed historically, so too did law made by parliaments. As outlined in Box 1.2, statute law and Australia's system of government were inherited from Great Britain.

#### Box 1.2 A brief history of parliament

Many ancient civilisations, such as Ancient Greece and Rome, held citizens' assemblies that were responsible for government and making laws. These assemblies involved elements of our modern parliament including majority vote, representation and elected officials.

In England, before parliaments existed, kings ruled by divine right. They had absolute power and made the final decisions on all aspects of government. In 1215, the barons became fed up with King John's demands to impose taxes on the people and his lack of consultation with them, and forced him to sign the Magna Carta. This was a charter that restricted the power of the king for the first time so that he was subject to the law, not above it. The Magna Carta also recognised that the barons had a right to be consulted and to advise the King in the Great Council. The first parliaments were simply irregular meetings where barons were able to discuss laws made by the king.

In 1264 Simon de Montfort, a baron, defeated King Henry III, the son of King John. During his rule as the de facto ruler of England, de Montfort called together knights and non-noble representatives from the cities and towns to attend a parliament. This was the first time that commoners had received representation. When Henry III's son, Edward I became king, he called for parliament to meet more regularly. His "Model Parliament" included members of the clergy and the aristocracy, as well as elected representatives from each county (knights of the shire) and city or town (citizens), making it more representative of the people. As indicated by its name, this parliament provided the model for future parliaments. The parliament's law-making authority was limited, and its primary role was levying taxes. However, it gradually became more powerful.

Early in the fourteenth century, the elected knights and citizens sat in Parliament permanently. They became the House of Commons (the lower house). Debates conducted between the barons and clergy in the other house became the House of Lords (the upper house). The English parliament also included the monarch. There was no formal meeting schedule and parliament continued to meet only when requested to do so by the king. However, over time, the House of Commons increased its law-making powers.

Conflict between kings and the parliament (more specifically the House of Commons) eventually led to civil war. In 1689, King William signed the Declaration of Rights that acknowledged Parliament's sovereignty, meaning that the monarch could no longer make or suspend laws without parliament's consent.

Today, Australia's system of parliament is based on the British parliamentary system (also known as the Westminster system). Under this system – so named because British Parliament meets at the Palace of Westminster in London – there are two houses of parliament (the upper house and the lower house) and the monarch is the head of state. The Queen of England is now also the Queen of our country. The Queen has very little power – her main role is to assent to the laws of parliament.



## Australia's parliamentary system

Australia became an independent nation when the Commonwealth of Australia came into being in 1901. The British Parliament passed the *Commonwealth of Australia Constitution Act 1900* which established a federal system of government. Under this system, powers are distributed between the Commonwealth parliament and the state and territory parliaments. At the federal level, the Parliament consists of the Queen (represented by the Governor-General) and two Houses – the upper house (the Senate) and the lower house (the House of Representatives). In Victoria, the Parliament consists of the Queen (represented by the Governor) and two houses – the upper house (the Legislative Council) and the lower house (the Legislative Assembly).

### Study tip

The chambers in a parliament are referred to as 'houses'. Britain's Westminster system makes use of two houses. This is called a bicameral system. Both the Commonwealth Parliament and the Victorian Parliament are bicameral. A legislature composed of only one house is referred to as unicameral. Queensland and Australia's territories have unicameral parliaments. There are also some rare examples of tricameral parliaments.

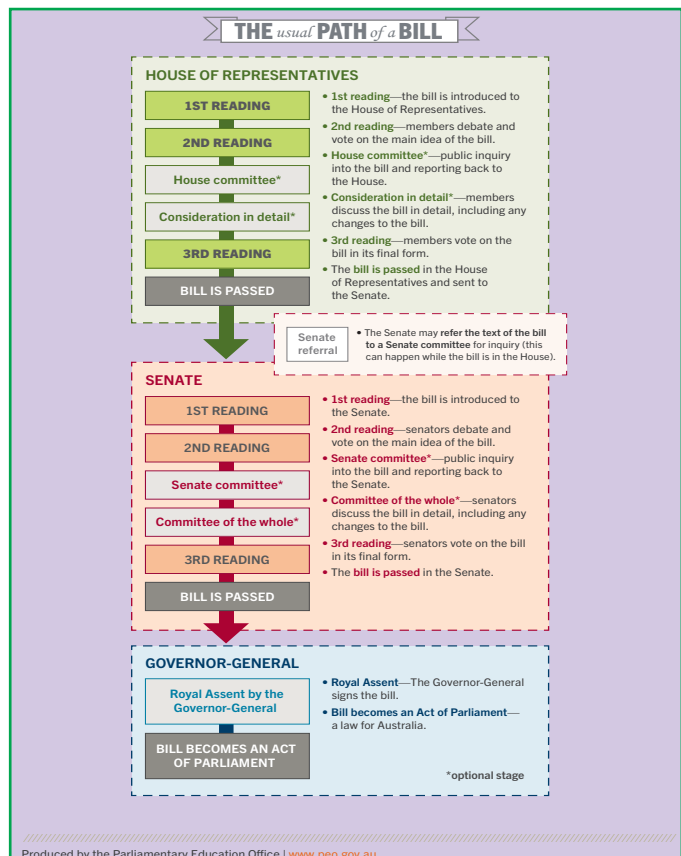
One of parliament's main roles is to make new laws and amend existing laws for their state, territory or the country. For both the Commonwealth Parliament and the Victorian Parliament, proposed laws must be agreed to by both houses of parliament to become legislation.

### Legislative process — passage of a bill through parliament

Parliament makes or amends **legislation** to meet the current and changing needs of society and any omissions, inconsistencies and inadequacies contained in present law. There are a variety of sources from which new legislation may originate. Ideas for laws may come from a member of parliament, a government official, a pressure group's petition to parliament, recommendations from interest groups or pressure from an opposition party.

Cabinet (a group within the government consisting of the Prime Minister and top-level ministers) will then discuss a proposed new law or change to the law. If the government considers that the suggestion is worthwhile then it will arrange for a minister to draft a Bill. A **Bill** is a draft copy of a proposed Act of Parliament.

Any member of parliament can introduce a Bill to parliament, but government ministers will introduce most of them. The minister responsible for initiating a Bill will seek permission from parliament to introduce the Bill in the next sitting of parliament. Bills may be introduced in either house, but the majority are initiated in the lower house. The diagram below outlines the legislative process assuming that a Bill is introduced to the lower house. It outlines the process for Commonwealth Parliament; Victorian Parliament uses a similar process.



Once a proposed new law has been passed with a majority vote by both houses of parliament and has received royal assent, it becomes legislation. It will come into operation on the date specified in the Government Gazette. Remember, it will also be known as a statute, or an Act of Parliament. While statute law has become the main source of law in Australia, common law remains a very important and evolving part of our legal system.

### Study tip

While parliament consists of the Queen (represented by the Governor-General or Governor) and the two houses, it is important to remember that it is also made up of all the members of parliament who have been elected by the people of Australia or Victoria to represent the people. The government is the party that wins the most votes at an election, the opposition is the main political party other than the government and other political parties and independent members. The upper house is typically considered to be a house of review and, in general, the lower house is where the government usually initiates legislation. The Commonwealth Parliament introduces approximately 200 bills each year and, of those, approximately 160 are passed.



## Delegated legislation

In modern times, parliament is required to make laws in a wide range of areas of administration such as road traffic, building construction, taxation, occupational health and safety and education. Members of parliament could not possibly create the detailed legislation required for each area. For this reason, both the federal and state parliaments can delegate the power to make laws to other bodies. These bodies are called **subordinate authorities** (also known as delegated authorities). The term 'subordinate' refers to something that is lower in rank or position. In Australia subordinate authorities include local councils, government departments, statutory authorities (for example, VicRoads) and state and federal cabinet. These bodies are able to make laws in specialised areas.

Parliament creates and empowers subordinate authorities by passing an enabling Act (sometimes known as a 'parent Act' or 'originating Act'). The laws made by these bodies are called **delegated legislation**. The delegated legislation made by subordinate authorities is usually published in the form of 'regulations', 'orders-in-council' or 'local laws'. As the sovereign law-making power, the parliament can amend or override any delegated legislation made by a subordinate authority. In general, when parliament delegates the power to make laws to subordinate authorities, it also gives them the authority to enforce the regulations that they make.

Parliament delegates the power to make laws to subordinate authorities to ease the workload of parliament. Parliament does not always have the time or the resources to make all laws. Furthermore, members of a subordinate authority have experience and expertise in a specific area and are able to carefully monitor the facts and conditions of a situation to make appropriate laws.

## Review questions 1.5

1. Define 'common law'.
2. Outline your understanding of the historical development of common law.
3. Explain how courts develop common law.
4. What is the meaning of *ratio decidendi*?
5. What is *obiter dictum*? How can *obiter dictum* influence other cases?
6. Under what circumstances is a judge bound to follow a decision made by a judge in an earlier case?
7. Distinguish between a binding precedent and a persuasive precedent.
8. Define 'statutory interpretation'.
9. Explain why statutory interpretation is sometimes necessary.
10. Explain how the interpretation of an Act can become a precedent.
11. Define 'statute law'.
12. Outline your understanding of the historical development of statute law.
13. Briefly outline Australia's system of parliament.
14. What is parliament's main role?
15. Write a paragraph explaining how a Bill (a proposed law) can become an Act (a law).
16. Using examples, explain what a subordinate authority is.
17. Outline why parliament delegates the power to make laws to other bodies.
18. Explain what delegated legislation is.
19. Identify the types of delegated legislation that is made by subordinate authorities.
20. Explain the difference between common law and statute law.

## Application exercise 1h

Using the table below, classify each of the following examples of law according to its source (common law or statute law)

Example of law	Common law	Statute law
Age Discrimination Act 2004		
The Access to Medicinal Cannabis Bill was passed by the Victorian Parliament in 2016		
A judge decides that a threat made over a phone constitutes assault		
Bendigo Council made Local Law No. 4 - "Streets and Roads".		
Water Act 2007		
A golf club is found liable for the damage and nuisance caused by golf balls entering a neighbouring property		
Dietrich v R (1992) 177 CLR 292 established the right to have legal representation when charged with a serious offence		

## Application exercise 1i

### A snail and itchy underpants

A very famous precedent set in common law is the case of *Donoghue v Stevenson*, often referred to as the 'snail in the bottle' case. One evening in August 1928, May Donoghue and a friend visited a café in Paisley, Renfrewshire (a county in Scotland). The friend purchased a ginger beer ice cream float for Donoghue. The owner of the café supplied a tumbler containing ice cream, and poured some of the ginger beer on it from a dark opaque glass bottle. Donoghue then drank some of the ice cream float. Her friend picked up the ginger beer bottle and poured out the remaining contents into the tumbler. As the rest of the drink was poured, the decomposed remains of a snail floated out of the bottle. The sight of the snail, and the thought of consuming snail tainted ginger beer, resulted in Mrs Donoghue suffering from shock and severe gastroenteritis.



Instead of suing the man who had sold the bottle of ginger beer, Mrs Donoghue sued the man who had manufactured it (Mr Stevenson). Her lawyers argued that the manufacturer owed Mrs Donoghue, and anyone else to whom he sold his product, a duty of care to ensure that the product did not contain contents such as decomposed snails. On appeal in the House of Lords, the final court of appeal for all cases in England, it was established that Stevenson did owe Donoghue a duty of care. The court determined that a manufacturer could be liable for damage caused to the ultimate purchaser or consumer of its products. Stevenson was negligent because the contents of the bottle were hidden and unknown to Donoghue.

The ratio decidendi of the snail in the bottle case can be seen in Lord Atkin's judgement, where he said, "... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with knowledge that the absence of reasonable care in the preparation or putting up of products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care" (*Donoghue v Stevenson* [1932] AC 562).

The ratio decidendi in *Donoghue v Stevenson* became very influential on other cases. A similar case was heard in Australia a few years later. In 1931, Dr Richard Grant purchased two pairs of woollen underpants and two singlets that had been manufactured by the Australian Knitting Mills Ltd. Sometime later, he wore a singlet and one of the underpants. Dr Grant developed itchy skin on both his shins. The irritation was eventually diagnosed as acute dermatitis and, after the condition worsened, he was confined to bed for 17 weeks. It was later revealed that a chemical residue remaining in the finished garment from the manufacturing process (a hidden defect) had caused the rash.

Dr Grant took action in the Supreme Court of South Australia, alleging that he had contracted dermatitis because of the improper condition of the underwear. The Supreme Court found in favour of Dr Grant. After the High Court reversed the decision, Dr Grant appealed to an English court called the Privy Council (which at the time was still the highest court in Australia). The legal principle established in *Donoghue v Stevenson* was used as a persuasive precedent by the court. The finding of the court was that the manufacturer owed a duty of care to the consumers of its garments (*Grant v Australian Knitting Mills* [1936] AC 85). This decision established the legal principle of negligence in Australia. The ratio decidendi of the case became a binding precedent for lower courts in the Australian court hierarchy.

#### Questions/tasks

1. Outline the harm caused to May Donoghue.
2. Explain the precedent in negligence that *Donoghue v. Stevenson* created.
3. Outline the harm caused to Dr Grant.
4. Explain how *Donoghue v. Stevenson* was a persuasive precedent for *Grant v. Australian Knitting Mills*.
5. Explain why *Grant v. Australian Knitting Mills* became a binding precedent for lower courts in the Australian court hierarchy.
6. Explain how the courts developed common law in the area of negligence.

## Application exercise 1j

### The studded belt case [Deing v. Tarola (1993) 2 VR 163]

While purchasing food at a McDonalds store, the police approached Chanta Deing, a 20-year-old man. He was wearing a black leather belt with raised silver studs to hold up his trousers. Just before committing the alleged offence, Mr Deing had purchased the belt at the Dandenong Market. Mr Deing was subsequently apprehended by the police and charged with an offence under section 6 of the *Control of Weapons Act 1990* (Vic.).

In 1992, Section 6 of the Control of Weapons Act read as follows:

- (1) A person must not possess, carry or use any regulated weapon without lawful excuse.

Penalty: 60 penalty units or imprisonment for 6 months.

- (2) A person must not carry a regulated weapon unless it is carried in a safe and secure manner consistent with the lawful excuse for which it is possessed or is carried or is to be used for.

Penalty: 10 penalty units.

- (3) In this section 'lawful excuse' includes:

- (a) the pursuit of any lawful employment, duty or activity; and
- (b) participation in any lawful sport, recreation or entertainment; and
- (c) the legitimate collection, display or exhibition of weapons, but does not include for the purpose of self-defence.



The Magistrates' Court was asked to interpret the meaning of the words 'regulated weapon' as found in the Control of Weapons Act and the Control of Weapons Regulations 1990. Under an enabling Act, the Governor-in-Council (a body comprising the Governor and members of the Executive Council – the premier and government ministers) listed weapons under the term 'regulated'. These include daggers, crossbows and batons. Section 5(s) included: 'any article fitted with raised pointed studs which is designed to be worn as an article of clothing.' The Magistrates' Court found Mr Deing guilty under s. 6 of the Control of Weapons Act of possessing a regulated weapon. Mr Deing's studded belt was to be forfeited and destroyed.

Mr Deing appealed the Magistrates' Court's decision on a point of law (Deing v. Tarola [1993] 2 VR 163). Justice Beach of the Supreme Court of Victoria heard the case. The appeal also examined s. 6 of the Control of Weapons Act and the Control of Weapons Regulations. The following questions were posed by Justice Beach:

- is a studded belt considered a regulated weapon?
- is wearing the belt a lawful excuse for possessing the studded belt?

Looking at the purpose of the Act, which was 'to regulate weapons other than firearms', Justice Beach determined that the word "weapon" was not defined in the Act. He then looked at dictionary definitions and previous cases to determine the meaning of the word. Justice Beach concluded that the word "weapon" should be defined as "including anything that is not in common use for any other purpose but that of a weapon". He decided that a studded belt is not a weapon, though it was possible that it could be used as such. Justice Beach found that Mr Deing had a lawful excuse for possessing the studded belt as it was used to be worn as an item of clothing to hold up his trousers. He did not intend to use the belt as a weapon. The decision of the Magistrate that Mr Deing's studded belt be forfeited and destroyed was quashed (made void or invalid). The ratio decidendi for this case can be seen in further detail in the extracts from the Law Report for Deing v. Tarola, which is available online ([www.legalgroundup.com.au/chapter 1](http://www.legalgroundup.com.au/chapter 1)).

In this way, the Supreme Court set a new precedent. It clarified the meaning of the word "weapon" in the Control of Weapons Act. Following the decision, both the Control of Weapons Regulations and the Control of Weapons Act were amended. Now, neither refers to studded belts. In the Act, the terms "regulated weapon" and "prescribed weapon" were changed to "controlled weapon" and "prohibited weapon". The wording in the Control of Weapons Act can be seen in further detail in extracts from the Act, which is also available online.

#### Questions/tasks

1. Identify the offence that Chanta Deing was charged with.
2. Outline the decision of the Magistrates' Court in this case.
3. What questions did Justice Beach have to decide?
4. Explain how Justice Beach reached a decision in this case.
5. Outline how law was made through statutory interpretation in this case.
6. How did the decision in this case lead to changes in the Control of Weapons Act and Control of Weapons Regulations?
7. Closely examine the law made in the 'Extracts from Deing v. Tarola Law Report'. Identify the source of law and justify your response.
8. Closely examine the law in the 'Extracts from the Control of Weapons Act'. Identify the source of law and justify your response.
9. Briefly outline the process that the Parliament of Victoria would have used to make the Control of Weapons Act.



## 1.6 An overview of the relationship between parliament and the courts

It is important that parliament and the courts work together to ensure that our laws work effectively and meet the needs of society. In particular, they must complement each other to ensure that laws are flexible and can apply to any situation so that justice will be provided in all cases. The relationship between parliament and the courts provides safeguards for our country, ensuring that neither body has all the law-making power.

Remember that, in Australia, parliament is the ultimate/ supreme law-making body. This means that it has sovereignty or supremacy over other law-makers. Parliament is able to make laws on any issue, at any time, provided that it is acting within the powers given to it by the Australian Constitution. Sovereignty means that it can override any legal principles established by courts or subordinate authorities. Nevertheless, parliament relies on the courts to apply and interpret legislation to resolve disputes. Common law plays an important role in changes to the law.

It is worth noting that, at times, the three law-makers may come together. The relationship between parliament and subordinate authorities can sometimes be tested in the courts. The courts will have the final decision in regard to the jurisdiction of each body. Courts can declare a law made by parliament, or a subordinate authority, to be **ultra vires**. This is a Latin term meaning beyond the powers. Ultra vires means that the law is outside parliament's constitutional power so it is not able to legislate in that area. Parliament cannot override the High Court's interpretations of the Australian Constitution.

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

- Parliament passes legislation that creates courts
- Courts apply and interpret legislation created by parliament
- Parliament can change or confirm laws created by courts
- Court decisions can lead to parliament changing the law.



### Parliament passes legislation that creates courts

For a court to exist, there must be legislation made by parliament that establishes the court and its jurisdiction. For example, the *Supreme Court Act 1986* (Vic.) established the Supreme Court of Victoria, including the Trial Division and the Court of Appeal, and the types of cases that it is able to hear. The *County Court Act 1958* (Vic.) established the County Court of Victoria. The *Magistrates' Court Act 1989* (Vic.) established the Magistrates' Court of Victoria consisting of the magistrates, the judicial registrars and the registrars of the court. The Victorian Parliament passed all of these Acts. Parliament may amend any legislation creating courts, at any time. Both the *County Court Act* and the *Magistrates' Court Act*, for example, have been amended to establish Koori Courts as divisions of the County Court and the Magistrates' Court.

### Courts apply and interpret legislation created by parliament

As we have already seen, courts often need to apply relevant legislation made by parliament or delegated legislation to the cases that come before them. When they do this, it is sometimes necessary to interpret the meaning of words and phrases in the legislation. Sometimes the wording of the legislation may be unclear or ambiguous. It can also be difficult for parliament to anticipate all future possibilities and future events, so the meaning of the words in the legislation may have changed over time.

When courts make decisions about the interpretation of legislation, a precedent is created that becomes part of the law. The precedent created by the court's interpretation, as well as the legislation made by parliament, must be read in combination to form the law. At times, a court's interpretation of legislation may lead to an amendment by parliament of the relevant Act. For example, in the *Studded Belt* case (*Deing v. Tarola* [1993] 2 VR 163), the court was required to interpret the meaning of the word "weapon". In the Supreme Court, Justice Beach set a new precedent when he decided that a studded belt is not a weapon, defining the word "weapon" to mean "including anything that is not in common use for any other purpose but that of a weapon". Following Justice Beach's decision, both the *Control of Weapons Regulations* and the *Control of Weapons Act* were amended.

It is important to remember that courts can only interpret legislation when cases come before them. The Commonwealth Parliament passed the *Acts Interpretation Act 1901* (Cth.), establishing rules for how Australian Acts and other legislation should be interpreted. Each state and territory also has its own legislation.

## Application exercise 1I

### Interpreting legislation - can a transsexual person legally marry?

*Re Kevin* was a case dealing with the question of whether a transsexual person could marry according to their new gender under Australian law. Kevin was born a girl in 1965, but grew up believing that he was a boy. As an adult he embarked on hormone treatment and, in 1997 and 1998, had gender reassignment surgery. The surgery was successful, with the result that Kevin's body was no longer able to function as that of a female.

Kevin and Jennifer met in October 1996. He told her about his transsexual predicament and she considered that he looked, sounded and acted like a man. They became a defacto couple and then married in August 1999. Through an IVF program, Jennifer became pregnant. Later, the couple became mother and father to two children.

In October 1999, Kevin and Jennifer filed an application to the Family Court of Australia, seeking a declaration of the validity of their marriage. The Attorney-General questioned whether Kevin was a man at the time of the wedding and suggested that the application for a declaration should be dismissed. The Family Court concluded that Kevin was a man and declared that Kevin and Jennifer's marriage was valid.

The Attorney-General appealed the decision to the Full Court of the Family Court of Australia. The court was called upon to interpret the meaning of the word 'man' for the purpose of the law of marriage as well as the meaning of the word 'marriage'. Section 5 of the Marriage Act 1961 (Cth.) defines marriage as "the union between a man and a woman to the exclusion of all others, voluntarily entered into for life." Section 43 of the Family Law Act 1975 (Cth.) defines marriage in a similar manner. In reaching its decision, the Full Court stated, "One of the functions of the judiciary is to interpret the meaning of legislation and we see ourselves as doing no more or no less than this ... Parliament did not choose to define marriage in the Marriage Act, nor did it define what is meant by the words 'man' and 'woman'. These issues being raised in this case, we feel that it is not only the right but the duty of courts to determine them."

The Full Court dismissed the appeal and upheld the original decision. The court interpreted the word 'man' to be a person who was a man at the time of marriage. The court also stated that the words 'marriage' and 'man' should be interpreted according to contemporary attitudes. The marriage of Kevin and Jennifer was therefore declared valid. (The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission [2003] FamCA 94)

#### Questions/tasks

1. Outline why the Family Court initially declared that Kevin and Jennifer's marriage was valid.
2. Why did the Attorney-General appeal the decision of the Family Court of Australia?
3. Explain how the Full Court of the Family Court interpreted the meaning of the word 'man' and the meaning of the word 'marriage'.
4. Outline the consequence of the Full Court of the Family Court's interpretation of the meaning of words in the *Marriage Act* and the *Family Law Act*.



## Parliament can change or confirm laws created by courts

Courts make law through statutory interpretation. They also create laws in areas where there is no existing common law or statute law through the creation of precedent. However, parliament can change these laws. As parliament is the supreme law-making body in Australia, it can override common law through the legislative process. This is known as **abrogation**. Parliament will abrogate a decision made by a court if it believes that the court has interpreted the meaning of the words in an Act in a way that was not intended by parliament or does not reflect the meaning of the Act.

For example, a County Court judge in 1985 followed a seventeenth-century common law principle that said when a couple married, the woman became the possession of the man who could therefore expect all marital obligations, including sex. In the case before the court, the victim had suffered physical abuse at the hands of her husband and was preparing to leave. The husband attacked her. He was charged, and pleaded guilty to assault, but not guilty to rape. The judge used the legal principle to find that rape within a marriage was lawful. This decision did not reflect the prevailing values of the community and the ensuing outrage led to Victorian Parliament changing the law. The *Crimes Act 1958* (Vic.) was amended to say that the "existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration with another person or to touching that is sexual (with or without aggravating circumstances) by another person."

Parliament can also make laws that confirm common law. This process is known as codifying the law or **codification**. Parliament can pass legislation incorporating common law principles, thereby clearly and comprehensively stating what the law is, as well as strengthening the law. This may involve parliament including all precedents established by courts on a particular matter in one piece of legislation, making it simpler to understand the law on that matter. The *Goods Act 1958* (Vic.) is an example of legislation that codified the law relating to the buying and selling of goods. In 1993, the Federal Parliament passed the *Native Title Act 1993* (Cth.), codifying the High Court's decision in the historic Mabo case in 1992, recognising the existence of native title in Australia (*Mabo & Ors v Queensland (No. 2)* [1992] HCA 23).



## Application exercise 1m

### The Trigwell case

A woman was driving along a highway in South Australia at night when she collided with two sheep that had strayed onto the road. In doing so, she veered onto the other side of the highway and hit another car being driven in the opposite direction. The woman was killed while members of the Trigwell family, who were travelling in the second car, suffered serious injuries. The sheep, which were owned by the Kerins, had escaped from a paddock adjoining the highway because of the poor condition of fencing at two places.

The Trigwells sued the State Government Insurance Commission, the insurer of the woman driving the first car, in the Supreme Court of South Australia, alleging negligent driving. They also claimed damages against the Kerins for negligently allowing the sheep onto the road. The court was presented with evidence that suggested that the woman had failed to exercise reasonable care as a driver. In regard to the presence of the sheep on the highway, the trial judge applied legal principles established in *Searle v Wallbank* [1947] 1 All ER 12, an English case that found that an owner of property adjoining a highway has no legal obligation to maintain fences and gates to prevent their animals from straying onto the road.

The Supreme Court found for the Kerins and against the State Government Insurance Commission, which was required to pay damages to the Trigwells as a result of the negligent actions of the woman driving the first car. The State Government Insurance Commission then appealed against the decision to the High Court.

The High Court rejected the plaintiff's appeal, determining that the legal principles in *Searle v Wallbank* still applied in Australia. In making their decision, the High Court justices noted that, unless the parliaments of the various states legislated to override the common law in relation to stray animals, the precedent would be binding on the courts (*State Government Insurance Commission v Trigwell* [1979] HCA 40; (1979) 142 CLR 617).

Following the decision in the Trigwell case, many state governments (including Victoria) passed legislation in this area so that the same decision could not be made again. The Parliament of Victoria passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic.), making owners of property liable for their animals straying onto highways.

### Questions/tasks

1. Who did the Trigwells sue in the Supreme Court of South Australia?
2. Why did the State Government Insurance Commission appeal against the decision of the Supreme Court?
3. Explain why the High Court rejected the State Government Insurance Commission's appeal.
4. Explain how the Parliament of Victoria abrogated the High Court's decision in *State Government Insurance Commission v Trigwell*.
5. What does this case reveal about the relationship between parliament and the courts?



## Court decisions can lead to parliament changing the law

The decisions made by courts can have an influence on parliament. A progressive or creative decision by the courts, such as the High Court's decision in the Mabo case, can alert parliament to the need for major law reform. Court decisions may sometimes inadvertently highlight problems with the law. For example, the Parliament of Victoria passed the *Justice Legislation Amendment Act 2007* (Vic.) preventing prisoners from writing letters to their victims. The new laws followed outrage in the community after the Supreme Court of Victoria in August 2007 granted leave to Julian Knight, also known as the Hoddle street killer, to pursue legal action against jail authorities that could allow him to send an apology letter to one of his victims (*Knight v Anderson* [2007] VSC 278). Sometimes, as part of their judgement, judges will recommend that parliament should change the law. In the Trigwell case, the judges hearing the State Government Insurance Commission's appeal suggested that parliament should legislate to override the common law that related to stray animals. These recommendations can be seen in box 1.3.

### Box 1.3 Trigwell – the reasons for the decision

The statements made by judges when giving reasons for their decisions or the precedents that they create may influence parliament to change the law. Courts can be conservative and often demonstrate reluctance to act as law-makers. For example, in the Trigwell case, the reluctance of the High Court to change the law was clearly expressed by Justice Mason (representing the majority view) when he stated, “The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court’s facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the Court call for and examine submissions from groups or individuals who may be vitally interested in the making of changes of the law. In short, the Court cannot and does not engage in the wide-ranging inquiries and assessments that are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.”

In the Trigwell case, the High Court also stated that the law should be changed by parliament. The dissenting judge, Justice Murphy, said that, “The virtue of the common law is that it can be adapted day by day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that Parliament has to intervene. The extreme case is where the judiciary recognises that a rule adopted by its predecessors was either unjust or has become so and yet still maintains it, suggesting that the legislature should correct it. This is the nadir of the judicial process. The results of legislative intervention often produce difficulties ... because legislation does not fit easily with “the seamless fabric of the common law”” (State Government Insurance Commission v Trigwell [1979] HCA 40; (1979) 142 CLR 617).

## Review questions 1.6

1. What does it mean to say that parliament is the ultimate/supreme law-making body?
2. Explain what is meant by the term ‘ultra vires’.
3. Identify the four main features to the relationship between parliament and the courts.
4. Identify two examples of legislation that creates courts.
5. Using an example, explain how courts apply and interpret legislation created by parliament.
6. Briefly outline how courts make laws.
7. Using examples, explain the difference between abrogation and codification.
8. Explain how the decisions made by courts can influence parliament.

### 1.7 Types of law such as criminal law and civil law

There are many different areas of law, such as criminal law, civil law, constitutional law, property law, family law, environmental law, consumer law, taxation law and industrial law. Because of what we read, hear and see in the news and on television shows, there is often a great deal of interest in criminal and civil law. Furthermore, as you continue to study VCE Legal Studies, these are the two main areas of law that you will explore.

#### Criminal law

**Criminal law** relates to behaviour that breaches existing laws against society and is harmful to the community’s welfare as a whole. A crime is an action or omission (a failure to act) that represents an offence and is punishable by law. Crimes such as murder, rape and robbery have a negative effect on many people in the community. Besides the impact on the victim, the carrying out of a crime can lead to feelings of fear in wider society and weakens the notion that we can live safely and harmoniously. The main aims of criminal law are to protect the community, to discourage and deter people from committing crimes and to punish those who do break the law. Other examples of crimes include manslaughter, assault, theft, property damage, dangerous driving, parking illegally and fraud.

In criminal law, the police will be involved as they investigate a crime, collect evidence, interview witnesses, and put together a case against the **accused** (the person being charged with the crime). This person, who is believed to have broken the law, is also referred to as the **defendant**. The prosecution of the accused is carried out by the state on behalf of society.





The police or **Director of Public Prosecutions**, representing the **Crown** or the state, will prosecute the offender in court.

The outcome of a criminal case is a verdict that the accused is either 'guilty' or 'not guilty'. The accused cannot be found guilty unless the **prosecution** have proven a case **beyond reasonable doubt**. This means that if the magistrate, judge or jury believes that there is any reasonable doubt as to the accused's guilt then the

defendant should be found not guilty. If the accused is found guilty, they are said to be convicted of a criminal offence. In this case, the court is likely to sentence that person by imposing a **sanction** (or penalty). The most common sanctions in criminal law include paying a fine, serving a community corrections order or imprisonment.

### Study tip

*In Legal Studies, the term 'the state' is used to refer to a country's system of government or even a state or territory's system of government. The parliament, the judiciary and the police represent the state.*

## Civil law

**Civil law** relates to the infringement of an individual's rights. A civil dispute will always be about a disagreement between parties in relation to their dealings with each other. The parties involved in a civil dispute can be people, companies or even governments. This area of law includes breach of contract, defamation, nuisance, negligence and trespass. The main aims of civil law are to, as best as possible, return an affected person back to their original position, and/or to compensate the person for their loss.

If an individual believes that another party has infringed their rights, then that person may sue and receive some type of **remedy**. The party making a claim in a civil matter is referred to as the **plaintiff**. In civil law, the police will not be involved, unless a crime has occurred. Rather, it is the plaintiff who decides whether or not to take a civil matter to court. The party that the plaintiff is making the claim against is called the respondent or defendant. If legal action is taken, the plaintiff commences proceedings by informing the defendant that the action is taking place and the remedy that is being sought. Civil disputes can be heard in the courts or in tribunals. An example of a tribunal that deals with civil cases is Victorian Civil and Administrative Tribunal (VCAT).

In civil law, it is up to the plaintiff to prove that the defendant was responsible for infringing their rights. This is decided on the **balance of probabilities**, meaning that the court will decide whether the plaintiff's case or the defendant's case is more probable. The magistrate, judge, or jury (if one is used), will then determine the remedy. A typical remedy might be damages (a monetary payment that a plaintiff might receive reflecting the loss or harm that they suffered) or an injunction (a court order stating that an individual must do or refrain from doing something).

### Study tip

*In order for exact identification and easy retrieval of law reports, cases are named according to the parties involved. A criminal case will be cited as, for example, R v Bui [2016] VCC 37. The 'R' refers to the Crown (it is an abbreviation of 'Regina' or 'Rex' – Latin for the Queen or King). This is the prosecution – the Director of Public Prosecutions, acting on behalf of the Crown. Bui is the accused, and was represented by a defence lawyer. The 'v' between the names of the parties is referred to as 'against' in a criminal matter in Australia (or 'and' in a civil action). The abbreviation 'VCC' identifies the case as a decision made by the County Court of Victoria. A civil case will be cited as, for example, Gao v Zhu [2017] VSC 105. Gao is the plaintiff and Zhu is the defendant. The case was heard in the Supreme Court of Victoria, as indicated through the abbreviation, 'VSC'.*

### Study tip

*In general, the term 'illegal' refers to behaviour that breaches criminal law, whereas behaviour breaching civil law is labelled as 'unlawful'.*

## Review questions 1.7

- Besides criminal and civil law, identify five different types of law.
- Define the term 'criminal law'.
- Explain what a crime is.
- Identify three examples of crimes.
- Explain the difference between the accused and the prosecution.
- Outline what is meant by the term 'beyond reasonable doubt'.
- Identify three common sanctions in criminal law.
- Define the term 'civil law'.
- Outline the main aims of civil law.
- Identify three examples of civil law.
- Distinguish between a plaintiff and a defendant.
- Outline what is meant by the term 'balance of probabilities'.
- Identify two types of remedies in civil law.

## Application exercise 1n

Below is a series of fictitious cases. Classify each case as criminal law, civil law or both by placing a tick, or ticks, in the appropriate box(es). Briefly outline the reason for your response in the last box.

Example of a law	Criminal	Civil	Reason
Darcy bought a second-hand vehicle from a car dealer. The car broke down less than a week later and the dealer promised that repairs would be made when Darcy returned the car. Two weeks later when the car broke down again, Darcy's own mechanic found that the previous repairs had not been carried out correctly.			
Zachariah is 13 years old and stole a Mars Bar from Kmart after telling his friends that the store doesn't care about shoplifting.			
Darren was driving a truck around a corner at a speed of 130 kilometres per hour. As he drifted off to sleep, he drove into the back of a parked car, instantly killing the driver.			
Anish was caught on a train without a valid Myki ticket.			
Jordan was drunk and had a fight with his girlfriend outside a restaurant. He kicked and punched an Audi parked nearby, causing damage to the car.			
Daina is a plastic surgeon who claims that comments written about her by a former patient on an online plastic surgery forum have harmed her reputation and have caused her to feel physically ill.			
Anthony snatched a handbag from an elderly woman's hands and ran away with it.			
Craig pointed a gun at Juliana, terrifying her. He then explained to her that the gun was a replica, and he was only playing a joke.			
Ama was teasing his flatmate, Marco. Marco reacted by hitting him over the head with a heavy frying pan. Ama died later that night in hospital.			
Freya was injured when a flight attendant spilt a tray of drinks on a passenger sitting next to her while flying from Melbourne to Auckland. As the passenger reacted to the spillage, his left hand accidentally contacted Freya's face, causing eye damage.			
Deepa used a fake ID to get into a nightclub.			
Errin transported \$750 000 cash into Victoria, then wired it out of Australia to China on behalf of a crime syndicate.			



## 1.8 The distinction and relationship between criminal law and civil law

Criminal and civil law are two distinct areas of law, with many differences. It is important to understand these differences. Criminal law and civil law are dealt with using different procedures, have different aims and have different consequences for the individuals involved. The terminology used in criminal law also differs to that used in civil law. These differences can be summarised by the following table.

Table 1.3 Criminal vs Civil law		
	Non-legal rules	Legal rules/laws
<b>Definition</b>	The area of law concerning behaviour that breaches existing laws against society and is harmful to the community's welfare as a whole	The area of law dealing with the infringement of an individual's rights
<b>Aim</b>	To keep the community safe and to punish those who break the law	To restore the affected person to their original position or to compensate that person for their loss
<b>Pre-trial procedures</b>	Police investigation, bail and remand, committal hearing, directions hearing	Letter of demand, writ, pleadings, discovery and directions hearing
<b>Parties involved</b>	The prosecution and the accused (or defendant)	The plaintiff and the defendant
<b>Party bringing action</b>	The police or Director of Public Prosecutions (representing the state, or the Crown)	The plaintiff
<b>Standard of Proof</b>	Beyond reasonable doubt	Balance of probabilities
<b>Burden of Proof</b>	The prosecution must prove that the defendant is guilty	The plaintiff must prove that the defendant was most probably in the wrong
<b>Decision</b>	The accused (or defendant) will be convicted if found guilty or acquitted if found not guilty	The defendant will be found liable or not liable
<b>Outcome</b>	A sanction, such as imprisonment, a community corrections order or a fine	Typically a remedy, such as damages or an injunction
<b>Examples</b>	Breach of contract, nuisance, negligence, trespass and defamation	Theft, assault, robbery, drug trafficking, dangerous driving, murder and manslaughter

**Standard of Proof** refers to the level of certainty or amount of evidence that must be presented to the court to win a case. In criminal law, the court must be convinced that there is no reasonable doubt that the defendant did commit an offence. In civil law, the court will consider whether the facts are more probable than not. **Burden of Proof** refers to the responsibility placed on a party to prove a disputed fact. In a criminal matter, the prosecution must prove the case against the accused. In civil law, the plaintiff must prove that the defendant breached his or her rights.

While criminal and civil law do have very different aims and outcomes, most behaviour or conduct can possibly lead to consequences that will be subject to both criminal and civil law. For example, a person hitting another person is likely to be charged and tried for assault. This is a criminal offence. The victim of the assault may also take the offender to court in a civil case in an attempt to force them to pay damages as compensation for the pain and suffering arising from the assault.

A typical example to explain this relationship is that of a car accident as outlined in Box 1.4 on the next page. In this case, criminal law and civil law operate together to protect the community in general and to protect our individual rights.

### Study tip

*When classifying a case as either criminal or civil, it is important to consider the aim of bringing an action to court, as well as the consequence of that action. The main aims of civil law are to restore the plaintiff to their original position, or to compensate them for their loss, while the main aims of criminal law are to punish the offender and protect society. The consequence of a civil case is a remedy, while the consequence of a criminal action is a sanction.*

### Box 1.4 The car accident

Michael is driving his car without due caution or attention to the traffic in front of him. He crashes into the back of Simone's car. Later, the police find that Michael had been drinking at an RSL before attempting to drive home. He recorded a blood alcohol reading of 0.212 – more than four times the legal limit. Michael's licence was immediately suspended after the crash, and he was charged with driving under the influence of alcohol and driving with a prescribed concentration of alcohol of 0.05 or above. He was summonsed to appear at the Magistrates' Court.



Michael has broken the law and the case is therefore a criminal matter. He is considered to be somewhat of a risk to the welfare of the community. Charges have been laid by the police and, further to losing his licence for a period of time, he may receive a more serious sanction. However, these criminal proceedings do not settle all the possible disputes that may result from the car accident.

Simone injured her legs in the car crash. Not satisfied with the compensation that she has already received, she is now suing Michael for almost \$1 million in the Supreme Court. The damages sought include medical expenses, compensation for the pain and suffering she has endured, and the loss of past and future income.

Michael is being sued for his negligence. The action initiated by Simone relates to her rights as an individual, meaning that the case is also a civil matter. This case serves to illustrate the overlap between criminal and civil law.

## Review questions 1.8

1. Explain the difference between the aims of criminal and civil law.
2. Distinguish between the standard of proof and burden of proof in criminal and civil law.
3. Explain the difference between the decision and the outcome (or consequence) of a case in criminal and civil law.
4. Explain why it is important to distinguish between criminal and civil law.
5. Using an example, explain why there can sometimes be overlap between criminal and civil law.

## Application exercise 1q

### Former police officer sues, while colleagues are charged

On January 14, 2015, Yvonne Berry was arrested for being drunk in a public place. A Ballarat resident had found the drunk and incoherent woman on the street late at night and invited her into her home, then called the police. After Ms Berry attempted to run away, the police arrested her, taking her into custody at Ballarat Police Station. Ms Berry was then allegedly stripped, kicked and stomped-on by police officers while she was held in a cell for 16 hours. Unfortunately, the police officers were not aware that Ms Berry was a serving police officer on extended leave.

Victoria's Independent Broad-based Anti-Corruption Commission (IBAC) released a report in November 2016 that recommended that the police should consider laying assault charges in relation to the incident. During IBAC's investigation, the police officers defended their actions, despite CCTV capturing many of the assaults. A female leading senior constable has since been charged with one count of assault and a male senior constable has been charged with two counts of assault.

Ms Berry is now suing the state for damages over her treatment. In a writ filed with the County Court she claims that several police officers assaulted her and that one officer improperly pursued charges against her.



### Questions/tasks

1. Identify the words or phrases in the case study that relate to criminal law.
2. Identify the words or phrases in the case study that relate to civil law.
3. What crimes have the accused police officers been charged with?
4. What remedy is the plaintiff seeking?
5. Explain, using examples from the case study, the difference between criminal and civil law.
6. Explain why there can sometimes be overlap between criminal and civil law.

## 1.9 An overview of the Victorian court hierarchy

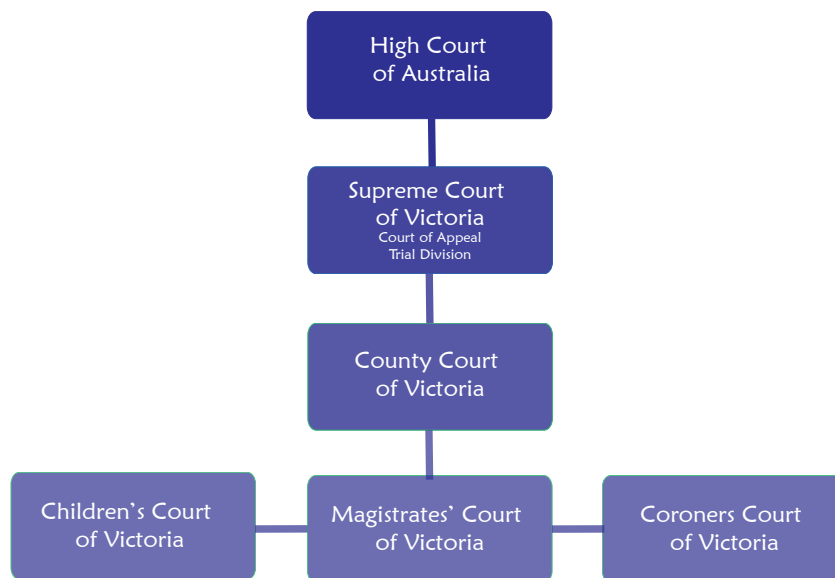
A hierarchy is a structure whereby different people, bodies or things are ranked or graded in a particular order of importance. A **court hierarchy** is a way of organising different courts into the level that they are on, their **jurisdiction**, and area of responsibility.

Most courts in Victoria’s court hierarchy have the jurisdiction to deal with civil and criminal cases. Our courts also have what is referred to as original and appellate jurisdiction. **Original jurisdiction** is the power given to a court to hear a case for the first time. Some of our courts can hear appeals from cases that were first held in the lower courts. These courts have **appellate jurisdiction**. An appeal occurs when a person involved in a court case, who is not satisfied with the outcome of the case, asks a higher court to review the decision. An appeal court might, for example, completely rehear a case or examine a point of law. The court may decide that the court hearing the case in its original jurisdiction was correct. However, the appeal court might find that the lower court’s decision was mistaken, in which case it will usually overturn the decision and replace it with its own.

Keeping in mind that courts were originally established to settle legal disputes, a hierarchy of courts is a vital part of our legal system. Without a court hierarchy, our courts would struggle to operate quickly, effectively and efficiently. The court hierarchy also provides structure and clarity that ensures that the principles of justice (fairness, equality and access) are met. Lower courts, such as the Magistrates’ Court hear minor or less serious cases, while higher courts, such as the Supreme Court and the High Court of Australia deal with more serious and complicated cases. Having a hierarchy with higher courts also allows for appeals to be heard.

In Australia, each state and territory has its own court hierarchy. There is also a Federal court hierarchy. In VCE Legal Studies, we will examine the Victorian court hierarchy. This consists of the Magistrates’ Court, the County Court and the Supreme Court (Trial Division and Court of Appeal). While the High Court is a Federal court with jurisdiction over matters that relate to the whole of Australia, it can be considered part of the Victorian court hierarchy because appeals can be made to it from the Supreme Court. The Victorian court hierarchy also includes courts that deal with specialist cases, such as the Children’s Court and the Coroner’s Court.

**Figure 1.2**  
**Victorian court hierarchy**



### Magistrates’ Court of Victoria

The **Magistrates’ Court** is the lowest court in the Victorian court hierarchy and the first point of contact for most criminal cases. It is the busiest court in Victoria, sitting at 53 different locations in Victoria and dealing with approximately 250,000 criminal and civil cases a year. The Magistrates’ Court hears roughly 90 per cent of all cases in Victoria each year. A single magistrate determines each case at the Magistrates’ Court and there are no juries. It has original jurisdiction in criminal and civil matters.

The Magistrates’ Court has original jurisdiction over civil matters where the plaintiff is claiming up to \$100,000, for example, negligence claims, contract disputes and damage to property or for injury. In general, claims lower than \$10,000 will proceed to arbitration (a method used to resolve disputes whereby the parties in dispute present their

case to an independent third person). However, if a dispute is complex or involves fraud, or if the parties agree that the complaint should not be referred to arbitration, then the court may order that it will be dealt with as a normal court hearing and determination.

As outlined in further detail in the table below, the Magistrates' Court has original jurisdiction in criminal law to hear summary offences (that is, minor or less serious offences), some **indictable offences** (more serious offences) and committal hearings in relation to indictable offences that must be finally determined in the County or Supreme Courts. It also issues warrants and hears bail applications. A **warrant** is a court order authorising the police to make an arrest, search premises or seize a person's property. **Bail** is the release from custody of a person accused of an offence and will include conditions such as attending court when required. [Summary offences and indictable offences will be examined in more detail in Chapter 2.]



The Magistrates' Court original criminal jurisdiction covers the following matters:

Criminal matters	Explanation
Summary offences	Summary offences are crimes of a minor or less serious nature. They include traffic offences, such as drink driving and speeding, minor assaults, minor drug offences, property damage and offensive behaviour.
Indictable offences heard summarily	Indictable offences are crimes of a more serious nature and are heard by a judge and jury of the County or Supreme Courts. Certain indictable offences can be heard summarily with the accused's consent. In other words, these cases will be heard and determined by a magistrate. Indictable offences that can be heard summarily include drug trafficking, theft and burglary. Regardless of the wishes of the accused, a higher court must hear some indictable offences, for example, murder and rape.
Committal proceedings	Committal proceedings are held in the Magistrates' Court for indictable offences to determine whether there is evidence of sufficient weight to support a conviction for the offence in the County Court or the Supreme Court. After examining the evidence, the magistrate will determine if there is sufficient evidence to justify the accused being committed for trial in a higher court. If there is insufficient evidence, the magistrate may release the accused until the prosecution is able to find additional evidence.

Because the Magistrates' Court is the lowest court in the hierarchy it does not have an appellate jurisdiction. However, it does have a number of Specialist Courts, each with their own specialist jurisdiction. These courts are generally less formal and more flexible than the traditional Magistrates' Court, and are an attempt to address the issues associated with offending and anti-social behaviour. Examples of these Specialist Courts include:

- Assessment and Referral Court (ARC) List
- Drug Court
- Family Violence Court Division
- Koori Court
- Neighbourhood Justice Centre Court
- Municipal Electoral Tribunal
- Sexual Offences List

## Children's Court of Victoria

The **Children's Court** is a specialist court on the same level of the Victorian court hierarchy as the Magistrates' Court. It deals with cases involving children and young people under the age of 18. It has two divisions: the Family Division and the Criminal Division. The Children's Court of Victoria also has a Children's Koori Court (Criminal Division) that hears matters relating to criminal offending by Koori children and young persons, other than sexual offences.

The Family Division hears and determines matters relating to the care and protection of children and young people at risk, as well as applications for intervention orders. The Criminal Division hears and determines matters relating to children and young people accused of committing crime. The Criminal Division deals with all charges other than

murder, attempted murder, manslaughter, child homicide, arson causing death, and culpable driving causing death. The Criminal Division also conducts committal proceedings in relation to young people who have been charged with indictable offences.

## Coroners Court of Victoria

The **Coroners Court** is a specialist court that investigates the cause and circumstances of certain types of deaths and fires. A coroner presides over the Coroner's Court. The Victorian State Coroner must be a judge of the County Court and the Deputy State Coroner must be a magistrate. Other coroners are usually magistrates or Australian lawyers who have been practising for at least five years.

The coroner will not investigate every death. In Victoria, "reportable deaths" must be reported to the court – these are deaths which are unexpected, violent or unusual or which resulted from accident or injury. Coroners must also investigate "reviewable deaths". A reviewable death is when the death of a second or subsequent child of a parent occurs. While a coroner cannot make findings as to guilt, innocence or criminal liability, he or she will make recommendations with the aim of helping to prevent similar deaths or fires in the future.



## County Court of Victoria

The **County Court** is the intermediate court in the Victorian court hierarchy and is the main trial court in the state. It hears all serious indictable offences under its original criminal jurisdiction except treason, murder and murder-related offences. The County Court deals with a broad range of criminal offences that includes serious theft, armed robbery, drug trafficking, sexual offences, fraud offences, culpable driving and serious assault. The original civil jurisdiction of the County Court is for unlimited monetary amounts. The types of civil claims that the County Court can hear include commercial matters, building disputes, medical negligence, serious injury and defamation. The Court is also able to hear Workcover matters. A judge presides over the County Court and hears the matters brought before it. A jury is used in all criminal trials and is occasionally used in civil cases.

In its appellate jurisdiction, the County Court can hear criminal appeals from the Magistrates' Court against a conviction or severity of a sentence. The prosecution also has the right to appeal against a magistrate's decision. The prosecution may, for example, appeal against a sentence, arguing that it is too lenient. Criminal appeals take place before a single judge with no jury.

### Study tip

*The County Court hears cases at its location in central Melbourne. It also presently sits at 12 regional locations across Victoria.*

## Supreme Court of Victoria

The **Supreme Court** is the highest court in Victoria and hears the most serious criminal and complex civil cases. It can also hear appeals from the other Victorian courts and tribunals. The Supreme Court is divided into two divisions: the **Trial Division** and the **Court of Appeal** and is led by the Chief Justice.

### The Trial Division

The Trial Division hears cases in their original criminal jurisdiction including treason, murder, manslaughter, attempted murder and other serious indictable offences matters. It also hears cases in their original civil jurisdiction for unlimited amounts of money. These cases would normally involve complex legal issues. Unless the accused pleads guilty, all criminal cases are heard before a judge and jury. Some civil cases will be heard before a judge and jury. In its appellate jurisdiction, the Trial Division can hear criminal and civil appeals from the Magistrates' Court based on a point of law and appeals from the Victorian Civil and Administrative Tribunal (VCAT). A person may appeal on a point of law if they believe that the Magistrate has made an error in law. For example, a person may claim that a magistrate incorrectly applied laws to admit, or deny the admission of, certain evidence in a case that proved to be crucial to the outcome of a trial. A single judge of the Supreme Court hears appeals.

### Study tip

*The Supreme Court normally hears cases in Melbourne. However, it does occasionally sit in other locations across Victoria including Ballarat, Bendigo, Geelong, Hamilton, Horsham, Morwell, Mildura, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga.*





## Application exercise 1r

Below is a series of fictitious cases. Indicate which court would most likely hear each of the following matters by placing a tick, or ticks, in the appropriate box(es).

Case	Magistrates' Court	County Court	Supreme Court (Trial Division)	Supreme Court (Court of Appeal)	High Court
Darcy is seeking \$95 000 in damages from the car dealer which he claims sold him a faulty car and carried out defective repairs.					
Darren was convicted of culpable driving causing death but is appealing his conviction.					
Jordan was charged with criminal damage.					
Daina is seeking general damages and loss of income of \$650 000 from a former patient whose comments written about her on an online plastic surgery forum she claims have harmed her reputation and have caused her to feel physically ill.					
Anthony is pleading guilty to charges of robbery after snatching a handbag.					
Craig was found guilty of aggravated assault in the Magistrates' Court and is appealing on a point of law.					
Marco has been charged with manslaughter.					
The Court of Appeal found that ANZ Airlines was liable for the injuries suffered by Freya on one of its flights. The airline wants to appeal this finding.					

## Application exercise 1s

### Man bailed in Magistrates' Court after alleged 120km/h car chase

On Thursday the 12th of January 2016, police spotted 40-year-old Kevin Angwin driving at high speeds in Ballarat at noon. They attempted to pull his car over. Later, claiming that his passenger (a male) told him to drive away, Mr Angwin sped off.

The police later alleged that Mr Angwin reached speeds of 100km/h in a local street and became airborne after driving over a speed hump. Following Mr Angwin, the police observed the car weaving in and out of traffic at 120km/h in a 50km/h zone. At one stage the vehicle crossed to the wrong side of the road and a cyclist was forced to take evasive action to avoid a collision. At this point the police pursuit was called off. The police eventually caught up with Mr Angwin by the Western Freeway, when the car had run out of petrol.

A few days later, Mr Angwin appeared in a bail hearing at Geelong Magistrates' Court, facing charges including dangerous driving and failing to stop his vehicle. Senior Constable Anthony Wiking told the court that Mr Angwin appeared to be quite scared in custody and was co-operative with police. The police noted that he had conceded that his actions were dangerous and he was remorseful.

Magistrate Michael Coghlan granted Mr Angwin bail, with the condition that he was not allowed to drive. He was released under the supervision of his mother.

#### Questions/tasks

1. What type of law is the magistrate hearing?
2. Outline the types of cases that can be heard by the Magistrates' Court.
3. Outline whether the case represents an example of a summary or indictable offence.
4. Define bail and explain why bail is likely to have been granted in this case.



## Application exercise 1t

### Council issued improvement notices overturned

Jackart, a private company directed by Arthur Hallett, owned property in Glen Eira Road, Ripponlea. Neighbours complained that tenants in one of the units were continuously organising all-night parties, live music and late-night skateboarding on a ramp in the backyard.

One neighbour told the City of Port Phillip (the council) that, "There's extremely loud drumming. Full amplified guitars, usually more than one, two or three. Screaming that's over a microphone that I assume is supposed to be singing. ... Large amounts of people, yahooing, screaming, shouting, swearing, throwing bottles, abuse..." Another neighbour said her backyard was destroyed by the music, which included banging and loud heavy metal music. Yet another neighbour claimed that he was forced to sleep in his lounge room on a number of occasions with earplugs in because of the noise.

After completing a lengthy investigation, the council issued improvement notices to both Jackart and Mr Hallett in November 2013. The improvement notices requested that the company and the director stop the nuisance and take whatever steps necessary to ensure that the tenants did not make any noise likely to cause a nuisance to neighbours.

Mr Hallett was not made aware of the notices for some time. He appealed against the issue of the improvement notices to the Magistrates' Court in April 2014. The residents of the unit were also evicted from the premises in early 2014, promising to dismantle the skateboard ramp. Unfortunately for Mr Hallett, the magistrate upheld the noise abatement notices.

Mr Hallett appealed on a number of questions of law to the Supreme Court (*Hallett v City of Port Phillip* [2015] VSC 313). Justice Tim Ginnane noted that Mr Hallett claimed the noise had not affected him as he was hardly ever at the property, spending six months a year overseas and most of the rest of the time at a country property. He agreed with the Magistrate that the behaviour of the people creating the noise and nuisance was 'appalling'. However, the judge found that both the magistrate and council had erred in law.

In his final conclusion, His Honour explained that he upheld the appeal because the council did not make a serious attempt to speak to Mr Hallett, inform him about the noise complaint or give him the opportunity to respond before issuing the notices. Referring to the Public Health and Wellbeing Act 2008, he said that Mr Hallett and his company "have established that the Magistrate erred in law by finding that the Act did not oblige the Council to inform them of the nuisance allegations and give them an opportunity to respond to them before issuing the improvement notices. The Magistrate also erred in deciding that the appeal created by s 208 did not entitle the Magistrates' Court to take into account matters occurring after the issue of the improvement notices, such as the VCAT orders."

#### Questions/tasks

1. Outline whether the case is an example of a criminal or civil matter, providing two facts from the case study that support your contention.
2. Outline the grounds on which the Trial Division heard Mr Hallett's appeal.
3. Explain why Justice Ginnane upheld Mr Hallett's appeal.
4. Outline the types of cases that can be heard by the Trial Division.



## Application exercise 1u

### Murderer's trials and appeals

Serial killer and rapist, Peter Dupas has been convicted of three murders, three rapes and false imprisonment. He is currently serving three consecutive life sentences for murder. At least three other murders committed in Melbourne during the 1980s and 1990s are also believed to be connected to Dupas.

At the time of his arrest for the murder of 40-year-old Margaret Maher, Dupas was already serving a life sentence for the murder of Nicole Patterson. A magistrate discharged Dupas following a committal hearing in the Melbourne Magistrates' Court in 2003, finding that there was insufficient evidence to put to a jury that Dupas had caused the death of Ms Maher. However, the Director of Public Prosecutions (DPP) decided to take Dupas to trial.

Dupas's trial in 2004 in the Supreme Court of Victoria lasted three weeks. The jury took less than a day to convict him of the murder of Ms Maher. Dupas was sentenced to a second term of life imprisonment, with no parole (*R v Dupas* [2004] VSC 281). One year later, Dupas appealed his conviction in the Court of Appeal; the appeal was dismissed.

In 2006, the DPP again bypassed committal proceedings when it sent Dupas directly to trial in the Supreme Court, charged with the murder of 25-year-old Mersina Halvaxis. This time, the Supreme Court ruled that a committal hearing was not needed at all. A jury found Dupas guilty in August 2007. He was sentenced to a third term of life imprisonment, with no parole (*DPP v Dupas* [2007] VSC 305).

One month later, Dupas lodged an application for leave to appeal at the Court of Appeal on the grounds that his sentence was unsafe and unsatisfactory. In 2009, the Court of Appeal overturned Dupas's 2007 conviction on the grounds that the judge made an error. The finding was made by means of a two to one majority. This means that two judges believed that the trial judge's directions were inadequate, whereas one judge considered the original verdict to be correct (*R v Dupas* [2009] VSCA 202). Dupas faced a retrial in 2010 and was found guilty of the murder of Mersina Halvaxis for a second time. Again, he was sentenced to life imprisonment, without parole (*R v Dupas* [2010] VSC 540).

#### Questions/tasks

1. What type of law is referred to in this case study?
2. Which court heard Peter Dupas' appeals?
3. Outline the types of cases that can be heard by the Court of Appeal.
4. What were the grounds for Mr Dupas' appeals and what decision did each court arrive at?

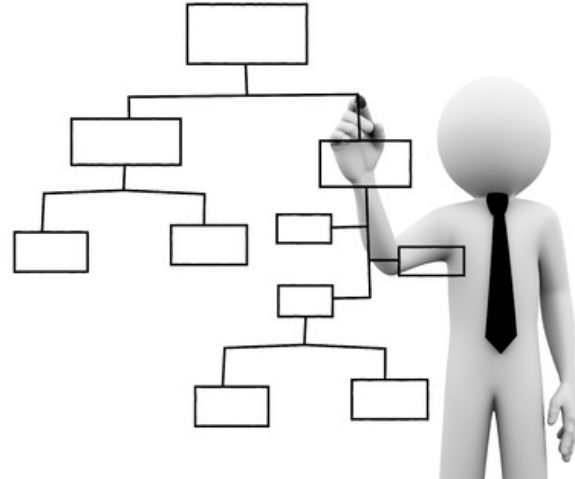


## 1.10 Reasons for the Victorian court hierarchy

While the court hierarchy might seem complicated and confusing, it is simply a way of ranking the courts with higher courts hearing more serious and complex cases, and lower courts hearing less serious matters. If Victoria had only one court that heard all cases, it is very likely that there would be delays and there would be nowhere to appeal a decision. Furthermore, the development of precedents would simply not be possible in such a system. There are some very important reasons why we have a court hierarchy, as outlined below.

### Appeals

A court hierarchy allows for the decision of a lower court to be reviewed on appeal by a higher court. A defendant, plaintiff or prosecutor who is dissatisfied with the outcome of the case he or she was involved in has the right to appeal the decision, if there are sufficient grounds for appeal. However, it is important to note that there are some restrictions on who can appeal and under what conditions he or she can appeal. In many cases, leave to appeal must be sought from a higher court before an appeal can occur. For example, an appeal to the High Court must be given “special leave” to proceed. Not all decisions made by a court are appealable. Generally, appeals occur in the following situations:



- dissatisfaction with a court’s decision on the grounds of a question of fact
- disagreement with a court’s decision on a point of law
- contention over whether a sentence or remedy imposed by a court is too severe or too lenient

It can also be expensive to mount an appeal; it becomes more expensive moving up the hierarchy. Nevertheless, the right of appeal is still an important part of our legal system and the court hierarchy. The system of appeals promotes fairness and protects us from injustice. Our court hierarchy also allows for predictability and consistency in appeals. Without a court hierarchy, reviews of court decisions would have to occur in specialist appellate courts. When appeals remain in our hierarchy, everyone is aware of where the appeals will be heard and the courts develop the knowledge and expertise to deal with appeals of a particular type.

### Doctrine of precedent

A court hierarchy also allows for the doctrine of precedent to function effectively. This is the principle whereby judges decide cases (and therefore make the law) by referring to previous judicial decisions. A precedent made by a higher court is binding and therefore must be followed by a lower court in the same hierarchy hearing a case involving similar facts. Binding precedent allows for the law to be decided and applied with consistency and fairness. The doctrine of precedent is reliant on the existence of a court hierarchy. Without a court hierarchy, the principle would be unworkable; if there were only one level of courts there would be no higher courts to make decisions that are binding on lower courts.

### Specialisation

The court hierarchy allows for specialisation, with the courts developing expertise in their jurisdiction. Because the position of each court in the hierarchy determines the types of cases it hears, courts can develop proficiency when dealing with these cases on a daily basis. The courts will become familiar with the legislation and legal principles that apply to these cases, meaning that there will often be less need for research and consideration. This can result in less time and cost to resolve disputes. The courts that are lower in the hierarchy, such as the Magistrates’ Court, are specialised in hearing minor cases that need to be dealt with efficiently. The higher courts, such as the Supreme Court, have specialisation in hearing more serious and complex cases. Furthermore, the court hierarchy allows for the creation of specialist courts such as the Children’s Court, the Drug Court and the Koori Court for dealing with children, drug offences and Koori offenders.

## Administrative convenience

The court hierarchy allows for matters to be allocated to an appropriate court according to the seriousness and complexity of each case. This increases efficiency and reduces the chances that there will be delays in determining cases. The lower courts can hear the majority of minor cases relatively quickly, cheaply and conveniently. More complicated cases that generally take longer to hear can be dealt with in higher courts by judges who have the experience and skills to deal with them.

As each court has been granted its own specific jurisdiction, more experienced personnel (such as judges and barristers) will be used in the higher courts. It is important that the community has a high degree of confidence in the legal system; this will occur when people with the most experience, skills and a sound understanding of the law are working in the correct courts. In general, extensive legal experience and skills are formed by working in different areas of law and progressing up the hierarchy.

## Review questions 1.10

1. Define the term 'doctrine of precedent'.
2. Explain the key features of a court hierarchy.
3. Explain why a court hierarchy is important for a system of appeals to function efficiently.
4. Outline the restrictions or limitations on appeals to the higher courts.
5. Explain the relationship between the court hierarchy and the doctrine of precedent.
6. Outline why specialisation is an important feature of the court hierarchy.
7. Outline how a court hierarchy can provide for administrative convenience.
8. Is a court hierarchy the best way to organise the cases heard in our courts? Justify your opinion.
9. Explain the importance of the court hierarchy in our legal system.

## Application exercise 1v

### Problems with a single level court system

Imagine that you live in a country that has a single level court system. You have been accused (falsely in your opinion) of murdering your next-door neighbour. Unfortunately, while you are being held in custody, you have discovered that the court is so clogged up with driving offences, minor drug-related offences, minor assaults and offensive behaviour that it will not be able to hear your case for another two years.

#### Questions/tasks

1. Identify the problems that would occur in a single level court system.
2. Identify the advantages of a single level court system.
3. Justify the existence of Victoria's court hierarchy.



## Application exercise 1w

Fill the gaps in the paragraph below:

The court hierarchy is a way of organising courts into levels, with \_\_\_\_\_ courts hearing more serious and complex cases, and \_\_\_\_\_ courts hearing less serious matters. A court hierarchy allows for the decision of a lower court to be reviewed on \_\_\_\_\_ by a higher court. Any person who is involved in the case, and who is \_\_\_\_\_ with the \_\_\_\_\_, has the right to appeal the decision, if there are sufficient grounds for appeal. A court hierarchy also allows for the \_\_\_\_\_ of \_\_\_\_\_ to function effectively. A precedent made by a higher court is \_\_\_\_\_ and must be followed by a lower court in the same hierarchy hearing a case involving similar facts. The court hierarchy allows for \_\_\_\_\_, with the courts developing expertise in their jurisdiction. In addition, the court hierarchy allows for \_\_\_\_\_; matters can be allocated to an appropriate court according to the seriousness and complexity of each case. This increases \_\_\_\_\_ and reduces the chances that there will be \_\_\_\_\_ in determining cases.

## 1.11 Multiple choice review questions

**1. Which of the following statements is not true?**

- a) The law in our society regulates human behaviour, and in doing so, promotes social cohesion
- b) The legal system is comprised of the institutions, people and processes that make, administer, enforce, adjudicate and interpret the laws of our country
- c) The rights of individuals in society are protected by families
- d) Individuals can achieve social cohesion by working together in a peaceful and orderly manner

**2. The principles of justice include:**

- a) fines, imprisonment and community correction orders
- b) fairness, equality and access
- c) persuasive and binding precedents
- d) is binding on the Supreme Court

**3. Which of the following is not a characteristic of an effective law?**

- a) reflects society's values
- b) enforceable
- c) clear and understood
- d) peace

**4. In 2018, Justice Ima Fair, a judge in the Supreme Court of Victoria, is deciding a case that has similar material facts to one decided by the High Court of Australia in 1987. The decision by the High Court:**

- a) cannot bind him
- b) was taken so long ago that it is no longer of any relevance
- c) is persuasive on the Supreme Court
- d) is binding on the Supreme Court

**5. The two main sources of law in Australia are:**

- a) courts and government
- b) criminal law and civil law
- c) common law and statute law
- d) law established by a country's constitution

**6. Statute law is:**

- a) law made by the legislature
- b) law made by judges
- c) law found in textbooks
- d) law established by a country's constitution

**7. Which of the following is incorrect in regards to the relationship between parliament and the courts?**

- a) Parliament makes laws through the legislative process
- b) Parliament passes legislation that creates courts
- c) Courts have the ability to influence parliament to change the law
- d) Courts apply and interpret statutes

**8. Criminal law is best defined as the area of law**

- a) that enforces individual rights, with the aim of returning an affected person to their original position or compensating that person for their loss
- b) concerned with behaviour that breaches existing laws and is harmful to the community's welfare as a whole
- c) made by courts according to the doctrine of precedent
- d) passed by parliament at the state or federal level

**9. Civil law is:**

- a) the area of law that relates to behaviour breaching existing laws and harming the community's welfare as a whole
- b) set of rules that bind relations between states and nations
- c) the obligation of government to act in a certain way or to refrain from acting in a certain way
- d) an area of law dealing with the enforcement of individual's rights, with the aim of returning the affected person to their original position or compensating that person for their loss

**10. Which of the following cases will only be heard by the Supreme Court of Victoria?**

- a) speeding
- b) murder
- c) armed robbery
- d) drug trafficking

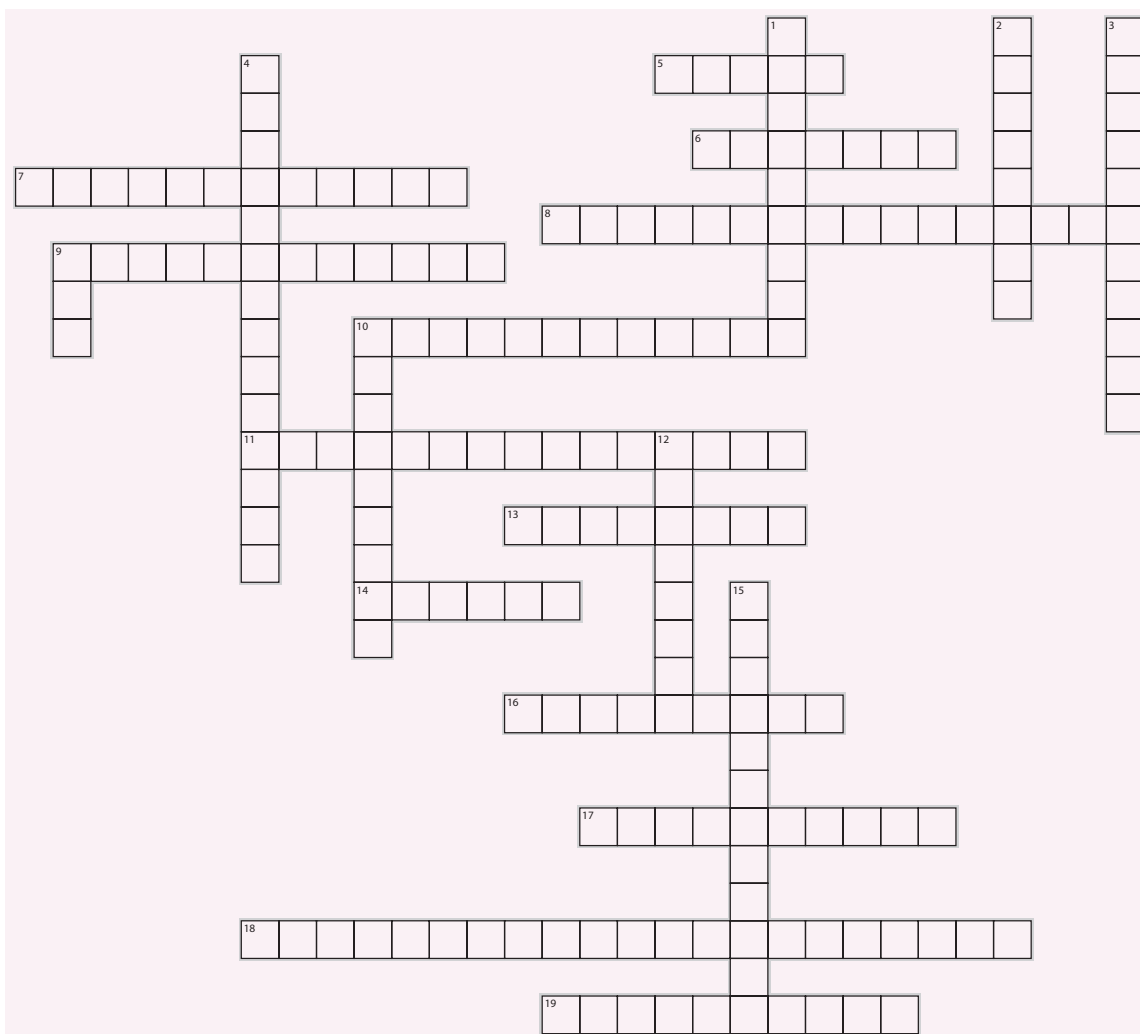
## 1.12 Chapter crossword puzzle

### Across

5. A formal body presided over by a judge, judges, or magistrate, that acts to settle legal disputes according to its jurisdiction
6. A person who is charged with a criminal offence and is on trial.
7. An area of law that is concerned with behaviour breaching existing laws and is harmful to the community's welfare as a whole.
8. The freedom, or the entitlement, for an individual to pursue his or her life without interference from other individuals or the government.
9. A system for making, administering, enforcing, adjudicating and interpreting the laws of our country.
10. The intermediate court in the Victorian court hierarchy dealing with a broad range of serious criminal offences, civil cases for unlimited monetary amounts and criminal appeals from the Magistrates' Court against a conviction or severity of a sentence.
11. The belief or willingness of individuals in society to work together in a peaceful, harmonious and orderly manner.
13. The principle by which individuals are treated with impartiality, without favouritism, bias or unfair preferential treatment.
14. The principle whereby the legal system must be available and accessible to all members of the community.
16. The party bringing an action in civil law to court.
17. The body of elected representatives who are responsible for making and changing laws.
18. Law-making powers given by parliament to subordinate bodies.
19. Law made by courts according to the doctrine of precedent

### Down

1. A legal decision established in the process of resolving a dispute in a previous court case.
2. The principle under which all people are subject to the same laws and treated in a manner where they believe that they are being treated equally and without discrimination.
3. A written law passed by parliament at the state or federal level.
4. The division of the Supreme Court that hears the most serious and complex cases in their original criminal and civil jurisdiction, and hears criminal and civil appeals from the Magistrates' Court on a point of law.
9. A legal rule made by law-making bodies (courts and parliament) applying to the whole of society.
10. An area of law dealing with the enforcement of individual's rights, with the aim of returning the affected person to their original position or compensating that person for their loss.
12. A penalty imposed by a court under criminal law; for example, a fine or imprisonment.
15. The power of a court to hear and determine a dispute.



## 1.13 Chapter summary

1. A law is a legal-rule. Like non-legal rules, laws regulate or govern behaviour and procedures. Unlike non-legal rules, laws are created by law-making bodies, such as courts and parliament, and are enforced by a court. They exist for the whole of society and also protect the rights of all individuals.
2. There are many areas of law including criminal law, civil law, constitutional law, property law, family law, environmental law, consumer law, taxation law and industrial law.
3. Despite the presence of laws in our society, there will always be conflicts between individuals. We need a legal system to settle these disputes. The legal system is the way in which the laws of our country are made, administered, enforced, adjudicated and interpreted.
4. Social cohesion refers to the belief or willingness of individuals in society to work together in a peaceful and orderly manner. Laws contribute to the attainment of social cohesion as harmony will occur when a majority of citizens obey the law and respect the rights of other individuals.
5. Laws achieve social cohesion and protect the rights of individuals by setting standards of acceptable conduct, establishing mechanisms for resolving disputes acknowledging the need to meet the changing needs of society and recognising and supporting the rights of individuals and groups (while at the same time protecting the community from harm).
6. The three main principles of justice are fairness, equality before the law and access to the legal system. These principles ensure that individuals in our society can trust the legal system to promote or protect the welfare of the community and their rights. There are some individuals and groups in our society who, for various reasons, experience difficulties in being treated fairly or equally by the legal system, or accessing the legal system. Our legal system recognises these problems and has introduced changes, features or methods to deal with them.
7. Fairness is the principle by which individuals are treated with impartiality, without favouritism, bias or unfair preferential treatment. To uphold fairness, our legal system values the presumption of innocence, the right to silence, the use of an impartial and unbiased judge, the use of an impartial and unbiased jury and makes use of processes such as rules of evidence and procedure and committal proceedings.
8. Equality is the principle under which all people are subject to the same laws and treated in a manner where they believe that they are being treated equally and without discrimination. Some ways in which our legal system ensures that all individuals have the opportunity to be treated equally and without discrimination include using interpreters, anti-discrimination laws, legal aid, consistent court proceedings, specialist divisions, the use of an oath or affirmation for witnesses and police ending racial profiling.
9. Access is the principle whereby the legal system must be available and accessible to all members of the community. Some ways in which our legal system provides for access include a greater use of alternative dispute resolution methods, the use of tribunals, the court hierarchy, the right of appeal, specialist divisions and legal aid.
10. An effective law reflects society's values; is enforceable; is known; is clear and understood; and is stable. An enforceable law is one that allows individuals to be apprehended and punished, made to follow the law or made to pay for damage if the law is broken. Laws must be known, because if members of society are not aware of a law, it is unlikely to be followed. A law that is clear and easy to understand is also much more likely to be followed by the community. While laws should change to meet the changing needs of society, it is important for laws to be stable. Laws that are constantly changing can lead to confusion.
11. Courts make common law as judges interpret laws and make decisions in resolving the cases they are hearing. Common law can also be called judge made-law or case law. State and Commonwealth parliaments make statute law through the legislative process of passing a Bill through both houses. It can also be referred to as legislation or Acts of Parliament. Parliaments can also delegate their law-making powers to subordinate bodies; this is referred to as delegated legislation.
12. Common law relies on the doctrine of precedent. This is the principle that governs the way that judges decide cases (and therefore make the law) by referring to previous court decisions. A lower court in a court hierarchy, in cases involving similar facts, must follow a decision made by a higher court. Such decisions are binding on courts lower in the court hierarchy. Binding precedent allows for the law to be decided and applied with consistency and fairness. It is the judge's reason for their decision in a case (the *ratio decidendi*) that is binding on lower courts. Judges will often make other statements, remarks or observations (*obiter dictum*) when delivering a judgement. These comments may be persuasive on other courts. Persuasive precedents are decisions made by another court that do not have to be followed, but can be very influential when a court is determining a case. A decision made by a court in a different hierarchy in another state or country may also be persuasive. Decisions made by a lower court in the same hierarchy may be persuasive.
13. Courts interpret and apply the words in legislation made by parliament. This process is referred to as statutory interpretation. Sometimes the wording in legislation may be unclear, ambiguous or may the meaning may have

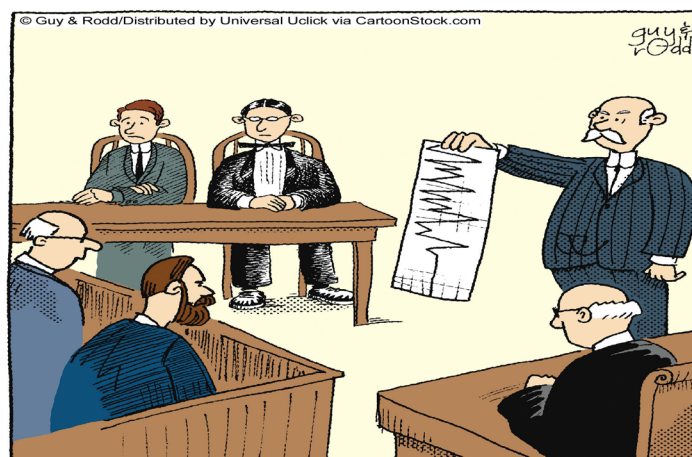


changed over time. The reasons for the interpretation of the legislation create a precedent in common law. Courts are only able to interpret the meaning of the words of an Act when cases come before them.

14. Most parliaments in Australia are bicameral (they have two houses). Federal Parliament consists of the House of Representatives (the lower house), the Senate (the upper house) and the Queen (represented by the Governor-General). In Victoria, the Parliament consists of the Legislative Assembly (the lower house), the Legislative Council (the upper house) and the Queen (represented by the Governor).
15. Parliaments make laws through the legislative process. Once a proposed new law or change to the law is drafted as a Bill, it is introduced to one of the houses (generally the lower house). The Bill goes through reading and committee stages. If it is passed, it goes through similar reading and committee stages in the second house. Once both houses pass the Bill, it receives royal assent and becomes legislation.
16. Parliament and the courts work together to ensure that laws work well and meet the needs of society. Parliament is the ultimate law-making body. It can override common law. Parliament can make laws on any issue, at any time, provided that it is acting within its constitutional powers. Courts can declare a law made by a parliament ultra vires, but can only do this when interpreting the Australian Constitution.
17. There are four main features to the relationship between parliament and the courts: parliament passes legislation that creates courts, courts apply and interpret legislation created by parliament, parliament can change or confirm laws created by courts, court decisions can lead to parliament changing the law.
18. Criminal law is concerned with behaviour that breaches existing laws against society and is harmful to the community's welfare as a whole. The main aims of criminal law are to protect the community, to discourage people from committing crimes and to punish those who do break the law. Examples of crimes include murder, manslaughter, assault, theft, property damage, dangerous driving, parking illegally and fraud. The police will be involved in criminal law, as they investigate a crime, collect evidence, interview witnesses, and put together a case against the accused (the person being charged). The prosecution of the accused is carried out by the state on behalf of society.
19. Civil law is concerned with the infringement of an individual's rights. This area of law includes breach of contract, defamation, nuisance, negligence and trespass. The main aims of civil law are to return an affected person back to their original position, or to compensate the person for their loss. The party making a claim in a civil matter is referred to as the plaintiff. The party that the plaintiff is making the claim against is called the respondent or defendant.
20. The main difference between criminal law and civil law relates to the aims of each, however, there are also differences between the consequences and procedures that are used by each type of law. The aim of criminal law is to keep the community safe and to punish those who break the law whereas the aim of civil law is to restore the affected person to their original position or to compensate that person for their loss. In criminal law, the consequence will be a sanction, such as imprisonment, a community correction order or a fine, whereas in civil law, a consequence will typically be a remedy, such as damages or an injunction. Procedures such as police investigations and committal hearings are used in criminal law, whereas civil law makes use of procedure such as letters of demand, writs and discovery. In criminal law, the burden of proof is on the prosecution to prove that the defendant is guilty beyond reasonable doubt, whereas in civil law, the burden of proof is on the plaintiff to prove that the defendant was most probably in the wrong.
21. It is possible that behaviour will result in consequences that will be subject to both criminal and civil law. An individual committing an offence may be charged by the police under criminal law, but may also be taken to court by the victim of the crime seeking restoration in a civil case.
22. A court hierarchy is a way of organising different courts into the level that they are on, their jurisdiction, and area of responsibility. Courts may have a civil and criminal jurisdiction. They may also have original jurisdiction (the power given to a court to hear a case for the first time) and appellate jurisdiction (the power to hear appeals from cases that were first held in the lower courts)
23. The Victorian court hierarchy consists of the Magistrates' Court, the County Court and the Supreme Court (Trial Division and Court of Appeal). While the High Court is a Federal court with jurisdiction over matters that relate to the whole of Australia, it can be considered part of the Victorian court hierarchy because appeals can be made to it from the Supreme Court. The Victorian court hierarchy also includes courts that deal with specialist cases, such as the Children's Court and the Coroner's Court.
24. The Magistrates' Court has original jurisdiction over civil matters where the plaintiff is claiming up to \$100,000. In general, claims lower than \$10,000 will proceed to arbitration. The Magistrates' Court also has original jurisdiction in criminal law to hear summary offences (minor offences), some indictable offences (more serious offences) and committal hearings in relation to indictable offences that must be finally determined in the County or Supreme Courts. It also issues warrants and hears bail applications.
25. The Children's Court is a specialist court on the same level of the Victorian court hierarchy as the Magistrates' Court.

It deals with cases involving children and young people under the age of 18. It has two divisions: the Family Division and the Criminal Division.

26. The Coroners Court is a specialist court that investigates the cause and circumstances of certain types of deaths and fires. The coroner investigates “reportable deaths”, which are unexpected, violent or unusual deaths or deaths which resulted from accident or injury. Coroners must also investigate “reviewable deaths”, which occur when the second or subsequent child of a parent dies.
27. The County Court hears all serious offences under its original criminal jurisdiction except treason, murder and murder-related offences. The original civil jurisdiction of the County Court is for unlimited monetary amounts. In its appellate jurisdiction, the County Court can hear criminal appeals from the Magistrates’ Court against a conviction or severity of a sentence.
28. The Supreme Court is divided into two divisions: the Trial Division and the Court of Appeal. The Trial Division hears cases in their original criminal jurisdiction including treason, murder, manslaughter, attempted murder and other serious criminal matters. It also hears cases in their original civil jurisdiction for unlimited amounts of money. In its appellate jurisdiction, the Trial Division can hear criminal and civil appeals from the Magistrates’ Court based on a point of law and appeals from the Victorian Civil and Administrative Tribunal (VCAT). The Trial Division also hears procedural matters, including applications for bail, probate (dealing with the will of a deceased person), and urgent applications for injunctions (for example, a court order requiring an individual to stop doing something), and also hears matters related to corporations.
29. The Court of Appeal has no original jurisdiction. The Court of Appeal has appellate jurisdiction to hear criminal and civil appeals from the County Court and a single judge of the Supreme Court. A criminal appeal will usually be on a point of law, against a conviction (guilty or not guilty), or on the grounds of severity or leniency of sentence. A civil appeal will usually be on a point of law, question of fact or the amount of damages awarded. The Court of Appeal can also hear appeals from VCAT. Before they are allowed to be heard, some appeals will require permission from the Court of Appeal. This is referred to as “leave to appeal”.
30. The High Court is a federal court and is the highest court in the Australian court hierarchy. It has original jurisdiction in some Commonwealth law matters, including treason and sedition. It also deals with cases arising under the Constitution and its interpretation, matters arising under a treaty, disputes where the Commonwealth is a party and disputes between the states or residents of states. The High Court has appellate jurisdiction to hear appeals from the supreme courts of all states and territories, the Family Court, the Federal Court, the Federal Circuit Court, and from decisions made by a single justice of the High Court operating in the original jurisdiction of the court. There is no automatic right of appeal to the High Court. A person wishing to appeal must seek “special leave” to appeal.
31. The court hierarchy allows for the decision of a lower court to be reviewed on appeal by a higher court. An individual who is dissatisfied with the outcome of the case that he or she was involved in can ask a higher court to review the decision. The hierarchy also allows for the doctrine of precedent to function effectively. A precedent made by a higher court is binding and therefore must be followed by a lower court in the same hierarchy hearing a case involving similar facts. The court hierarchy allows for specialisation, with the courts developing expertise in their jurisdiction. Furthermore, the court hierarchy allows for administrative convenience with matters to be allocated to an appropriate court according to the seriousness and complexity of each case. This increases efficiency and reduces the chances that there will be delays in determining cases.



AT THE END OF THE DAY, ALL JOHN HENRY BARNBY WAS GUILTY OF WAS TAKING A LIE DETECTOR TEST DURING THE GREAT SAN FRANCISCO EARTHQUAKE OF 1906.

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