

Chapter 2: Our court system

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Chapter 2: Our court system

Overview

Every day in the media we hear about people being involved in cases before the courts. The evening TV news regularly carries reports of high-profile murder cases, with stories of drama in the courtroom and damaging testimony by witnesses and the anguished relatives of victims. Courtroom dramas have been a staple of television entertainment for many years, although many of these are American in origin and so do not reflect Australian courtroom practices. How does our court system work? Why do we have so many different courts? What different purposes does this variety of courts serve?

Even if we never commit an offence, we could still find ourselves coming into contact with the court system. You never know when you might witness something that might become evidence in a court case. Even witnessing a motor accident may be relevant to a legal dispute over who was to blame for any damage caused. Anyone over 18 can be called to do jury duty and, because selection is entirely random, you could find yourself in this situation as an adult. Our court system is an important element of our democratic society, and we should all have a basic understanding of how it works.



FIGURE 1 Let's take the mystery out of the court system.

eBook plus

eLesson

Going to court

Watch this video to learn more about how the court system works in Australia.

Searchlight ID: ELES-2362

STARTER QUESTIONS

1. Think of a high-profile case that you have heard about on the news or read about in the newspapers. In which court was the case heard? Why do you think the case received so much media coverage?

2. A man was recently fined for researching a case online while he was serving as a member of the jury hearing that case. Why do you think this happened? Is it possible to isolate a jury from information coming from outside the courtroom?
3. The legal system attempts to encourage parties to a dispute to sort out their differences without going to court. Apart from the obvious savings in cost, can you think of two other reasons why the system takes this approach?
4. Where is the local courthouse nearest to your home? Compile a list of other community services that are located near the courthouse. Why do you think this is the case?

2.1 The court hierarchy

Our legal system is made up of many different courts, each with different powers and responsibilities. These courts are arranged in different levels, in order of their power and importance. This arrangement is known as a hierarchy. The higher courts, which hear the most serious matters, are at the top of the hierarchy; and the lower courts, which hear less serious matters, are at the bottom of the hierarchy.

Criminal cases and civil cases

Criminal law protects the community from the harmful actions of others. When a person commits a crime, the state **prosecutes** that person by having them taken before a court. Our courts operate under an **adversary system**. This means that two opposing sides present their arguments to an independent umpire — a **judge** or **magistrate**. The prosecuting side (the prosecution) is required to prove the guilt of the person accused of the crime. The accused person has a right to present his or her side of the argument (known as the defence). In criminal cases a person found to be guilty will be sentenced to receive a punishment, such as imprisonment or a fine.

In criminal cases

... the police prosecute

... and the courts impose a penalty on a guilty party.



FIGURE 1 What happens in criminal cases

Civil law deals with non-criminal disputes between individuals or groups. These can arise in matters related to business dealings, or when a person is harmed by the careless actions of another. Civil cases also operate under the adversarial system, with each side presenting their arguments before an independent judge or magistrate. The person making the complaint is known as the **plaintiff** and the person accused of doing the harm is known as the **defendant**. If the plaintiff is successful, the defendant can be required to provide compensation for the harm done.



FIGURE 2 What happens in civil cases

An area of law for which a court has responsibility is known as its **jurisdiction**. In criminal cases the higher courts have jurisdiction over the most serious crimes. In civil cases the higher courts have jurisdiction over matters that will affect many people, involve complex legal issues or large sums of money. Cases heard in higher courts will be much more expensive for the community as well as those bringing the action. If an individual is unhappy with the ruling in a lower court, he or she can apply to have the case heard in a higher court. This process is referred to as 'making an appeal against a court decision'.



FIGURE 3 The higher the court in the hierarchy, the more expensive it will be to bring the case.

The lower courts

Each state has its lower courts, known as the Local Court in New South Wales, the Magistrates' Court in Victoria and the Magistrates Court elsewhere. These magistrates courts are at the bottom of the hierarchy. There are usually a relatively large number of these courts in each state or territory because they hear more than 90 per cent of all cases that go to court. In New South Wales the Local Courts sit in over 20 different locations in Sydney, and close to 100 locations in country and regional centres. In Victoria there are ten magistrates courts in metropolitan Melbourne, and over 40 in regional towns and cities. Other states and territories have smaller numbers, relative to their population and the area of land they cover. The Federal Circuit Court of Australia is a lower court that deals with matters relating to laws passed by the federal parliament. It sits in all capital cities, as well as some major regional centres such as Townsville and Cairns in Queensland, Newcastle in New South Wales and Launceston in Tasmania.



FIGURE 4

The historic courthouse in Bendigo is one of over 40 courthouses used for magistrates court hearings throughout rural areas of Victoria.

Intermediate courts

Intermediate courts are usually known as District Courts, although in Victoria the courts operating at this level are called County Courts. In most states these courts hear more serious criminal cases such as armed robbery, serious drug-related offences and serious assaults, including sexual assaults. Murder-related cases are heard in the highest state court, the Supreme Court.

In criminal cases a case will be heard by a judge and a **jury** of 12 people. The jury is required to consider all the facts presented by the prosecution and the defence, and to decide whether the accused is guilty or not guilty. The judge will help the jury if there are complex legal issues to be decided. If the jury decides that the accused is guilty, the judge will determine the appropriate punishment.

Intermediate courts usually have jurisdiction over a wide range of civil disputes, including claims made for workplace and motor vehicle injury, and disputes involving business dealings. A jury is usually not required in a civil case unless either the plaintiff or the defendant requests one. When juries are used they usually consist of between four and seven jurors, depending on the individual state requirements. In some states there is an upper limit on the amount of money involved in cases that can be heard in an intermediate court. Cases involving larger amounts than this limit need to go to the highest state court (the Supreme Court) to be heard.

Tasmania and the two mainland territories do not have an intermediate court as part of their court hierarchy.



FIGURE 5

A court with a judge and jury such as used in intermediate courts

Higher courts

The highest court in each state and territory is the Supreme Court. It hears the most serious criminal matters, as well as civil matters involving very large sums of money. In all states except South Australia, Supreme Courts are divided into a trial division and an appeal division. (See section 2.2 for more detail on the role of the various state Supreme Courts.)

On a similar level to state Supreme Courts in the Australian court hierarchy are the Federal Court and the Family Court. (The role of the Family Court is also discussed in section 2.2.) The Federal Court of Australia has a largely civil jurisdiction, although it can hear criminal matters if they are part of Commonwealth law. As most criminal law is determined by state governments, most criminal cases are heard in state courts. The Federal Court can hear civil disputes involving large businesses that operate in a number of different states, disputes relating to federal consumer protection laws, disputes over customs or taxation issues, or **industrial relations** matters.

Table 1 Australian court hierarchies

Jurisdiction	Highest court in the hierarchy	Highest state or territory court	Intermediate state or territory court	Lowest court
Commonwealth	High Court of Australia	Federal Court Family Court		Federal Circuit Court
NSW		Supreme Court	District Court	Local Court
Victoria		Supreme Court	County Court	Magistrates' Court
Queensland		Supreme Court	District Court	Magistrates Court
South Australia		Supreme Court	District Court	Magistrates Court
Western Australia		Supreme Court	District Court	Magistrates Court
Tasmania		Supreme Court		Magistrates Court
ACT		Supreme Court		Magistrates Court
Northern Territory		Supreme Court		Magistrates Court

High Court of Australia

The High Court of Australia is our highest court. It performs the following roles:

- It is the highest court of appeal from the state court system.
- It has the power to interpret the Australian Constitution. The court reads, interprets and applies the words of the Constitution in disputes when they arise.

- It resolves disputes between state governments, and between state governments and the Commonwealth Government.



FIGURE 6 The High Court of Australia in Canberra is at the peak of the court hierarchy.

ACTIVITIES

REMEMBER

1. Define the following terms in your own words:
 - a. plaintiff
 - b. defendant
 - c. prosecution
 - d. adversary system
 - e. jurisdiction.
2. What is a court hierarchy?
3. What is the name of the intermediate court in your state or territory?
4. What are the three main functions of the High Court of Australia?

EXPLAIN

5. What is the difference between a judge and a magistrate?
6. Explain the difference between civil law and criminal law.

DISCOVER

7. Using internet resources, investigate the operation of the Federal Circuit Court and the Federal Court of Australia. For each court:

- a. Identify and explain two areas of law where the court has jurisdiction.
- b. Describe one recent case in each court, including:
 - Who was involved?
 - What were the main facts of the case?
 - What area of law was involved?
 - What was the result of the case?

THINK

8. Do the following cases involve criminal or civil law? Explain your answers.
 - a. You are disturbed by neighbours loudly renovating their property at 2 am.
 - b. Your aunty is convicted of driving with a blood alcohol content of 0.09.
 - c. Your smartphone is stolen when you are mugged by a robber armed with a baseball bat.
 - d. Your Hindu friend, a strict vegetarian, finds a half-eaten prawn in a salad sandwich bought from a café and realises that she has just eaten the other half.
 - e. Your leg has to be set in a plaster cast when you slip on some detergent that has been spilled on the supermarket floor.
9. Do you think that a court hierarchy is necessary? Explain your answer

2.2 The roles of particular courts

The efficiency of our legal system is helped by having different courts with different jurisdictions. This allows the judges and magistrates to specialise in particular areas of law, and to apply the law consistently across all cases. It also allows for serious matters to be given the time they need for a fair trial in the higher courts, while less serious cases can be dealt with more quickly and cheaply in lower courts. To illustrate these principles, we examine state Supreme Courts, state magistrates courts, and the federal Family Court.

Supreme Courts

Each of the six states and two mainland territories of Australia has a Supreme Court as its highest court. Each Supreme Court has two main types of jurisdiction: an **original jurisdiction** and an **appellate jurisdiction**. The way each Supreme Court is structured varies from state to state, but in each case the structure reflects these two roles.

Some state differences

Differences in Supreme Court structures between states can be summarised as follows:

- In Victoria, New South Wales, Queensland and Western Australia there is a clear separation between the original jurisdiction and the appellate jurisdiction. Some judges specialise in only hearing appeals, and other judges only hear original trials.
- In South Australia, Tasmania and the two mainland territories there is no such specialisation. Instead, all judges hear both original cases and appeal cases.

Original jurisdiction

The original jurisdiction of each state's Supreme Court is usually carried out by the trial division. It includes both criminal and civil law cases, and the court sits with only one judge. In criminal matters, there will also be a jury of 12 citizens who have to weigh up the facts and decide on the guilt or innocence of the accused. No jury is required if the accused pleads guilty to the charges, and the main role of the judge then is to listen to arguments from the prosecution and the defence relating to the severity of the punishment. Based on these arguments, the judge decides on the length of a prison term or other appropriate penalty.



FIGURE 1 Jury members in criminal trials have to carefully weigh up the evidence to decide whether or not the accused is guilty.

Usually the Supreme Court will deal with only the most serious crimes such as murder, attempted murder or **manslaughter**. In Tasmania and the two territories, where there is no intermediate court, the Supreme Court will also hear a broad range of criminal matters such as armed robbery, serious drug-related offences and serious assaults, including sexual assaults.

The Supreme Court in each state also hears only the most serious civil cases. This usually means cases involving disputes over very large sums of money. The actual amount will vary from state to state. For example, in New South Wales, Queensland and Western Australia all civil cases involving

amounts greater than \$750000 will generally be heard in the Supreme Court, with cases involving lesser amounts held in lower courts. Other states have different monetary levels for the civil jurisdiction of the Supreme Court, depending on how they divide up the jurisdiction with intermediate and lower courts.



FIGURE 2 Only civil disputes involving large sums of money are likely to be heard in the Supreme Court.

Appellate jurisdiction

As mentioned earlier, if either party is unhappy with a decision in a lower court, that party can make an appeal to a higher court. When there is a separation between the original and the appellate jurisdictions of the Supreme Court, these appeals are usually heard by the appeal division, or Court of Appeal. The Court of Appeal hears appeals from intermediate courts and from the trial division of the Supreme Court. When hearing an appeal the court usually sits with either three or five judges, depending on the seriousness of the case. In South Australia, Tasmania and the territories, where there is no separation between a trial division and an appeal division, appeals are heard by any three Supreme Court judges. Of course, the appeal judges must not include the judge who heard the case originally.



FIGURE 3 When the Supreme Court acts as the Court of Appeal, it usually sits with three or five judges.

Magistrates courts

In most states up to 90 per cent of all cases are heard in a magistrates court (known in New South Wales as Local Courts). These courts have both criminal and civil jurisdiction.

Criminal jurisdiction

The criminal jurisdiction usually covers relatively minor offences, sometimes known as summary offences. These include driving offences; many cases of theft, such as shoplifting; assault cases where the victim has received relatively minor injuries; and public order cases, such as being drunk and disorderly in a public place.

Use the **Magistrates court procedures** weblink in your Resources section to watch a video of typical proceedings in a magistrates court. 

Magistrates courts also perform some important roles in more serious criminal cases.

- Most cases heard before an intermediate court or the Supreme Court take time to prepare, and are expensive to run. Both the prosecution and the defence can take months to organise witnesses and other evidence in readiness for a fair trial. Before resources are dedicated to preparing all this material, it is useful to test whether or not the prosecution case is strong enough to be likely to convince a jury of the guilt of the accused.
- It is also important to find out in advance whether or not the accused is planning to plead guilty or not guilty.
- In our legal system an accused is presumed innocent until proven guilty. In many cases it would be inappropriate to hold an accused in custody for months awaiting a trial.

Magistrates courts carry out significant functions in relation to all these issues.

Bail and remand

When a person is charged with an offence that is serious enough to be heard by an intermediate court or the Supreme Court, a decision has to be made as to whether that person will be detained in custody or released into the community awaiting trial. Releasing an accused into the community is known as granting [bail](#).

If the arresting police officers believe that releasing an accused on bail would create a danger to the community, a bail hearing will be held if the accused wishes to be released. This hearing will often be held in a magistrates court. Both sides will present their arguments to the magistrate, who will then decide whether or not to grant bail. If bail is granted, the magistrate may require that a [surety](#) be lodged with the court, and may also impose conditions on the accused. These can include a requirement that the accused regularly report to his or her local police station. If bail is not granted, the accused will be [remanded in custody](#) until the case goes to trial.



FIGURE 4

A person who is remanded in custody will be held in prison until his or her case comes to court.

Committal hearings

A committal hearing is a preliminary hearing held to determine whether or not the prosecution case is strong enough to justify a full jury trial in the Supreme Court or in the District or County Court. It also provides an opportunity for an accused to indicate whether he or she intends to plead guilty or not guilty. If the accused pleads guilty, he or she will be committed to stand trial in the Supreme Court or in the District or County Court.

If the accused pleads not guilty, the prosecution is required to present its evidence to a magistrate, and that evidence can be challenged by the defence. The magistrate does not have to decide whether or not the accused is guilty. Instead, the magistrate assesses whether the accused should be committed to stand trial before a judge and jury, or whether the charges should be dismissed because the evidence is insufficient for a trial. The committal hearing also gives the accused a chance to hear details of the prosecution case, possibly encouraging the accused to plead guilty to some or all of the charges. This can ultimately save time and resources when the case eventually goes to trial.

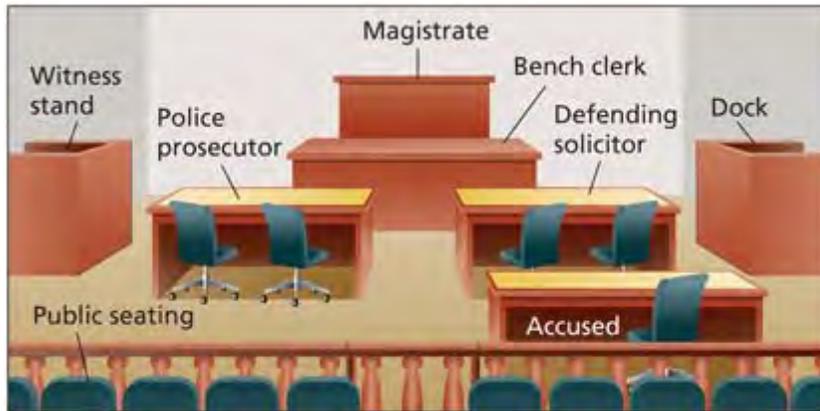


FIGURE 5 Magistrates courts deal with minor offences and committal hearings.

Civil jurisdiction

Magistrates courts can hear a variety of civil matters. These are usually of a less serious nature than those matters heard by intermediate courts or the Supreme Court. The jurisdiction of the magistrates courts is limited to hearing cases where the amount of money involved does not exceed a prescribed amount, which varies by state and territory. For example, in New South Wales and Victoria these courts can only hear civil matters where there is less than \$100 000 involved. In Queensland the maximum amount is \$150 000, while in Tasmania it is \$50 000. Civil cases involving sums of money that exceed these maximums will be held in higher courts in the hierarchy such as the District or County Court, or the Supreme Court.

Family Court of Australia

The Family Court is a federal court that handles disputes over divorce, parenting arrangements, child support, and property disputes following a relationship breakdown. This court was established in 1975 as a result of laws passed by the Commonwealth Parliament. It is on the same level in the court hierarchy as the state Supreme Courts.

The Family Court sits regularly in all capital cities, as well as major regional cities in each state. The exception is Western Australia, which has its own state-based Family Court. Relationship breakdown can be a very emotional experience for those involved, and particularly for children of the relationship. For this reason, the Family Court operates under a number of principles, including the following:

- The interests and welfare of children are always at the centre of any decisions made by the court, and they are given higher priority than the wishes or preferences of parents.
- The court is required to assume that it is in the child's best interests for both parents to have equally shared parenting responsibility for the child. This does not mean that the child must spend equal time with both parents, but there must be consultation between the parents on issues related to the child's welfare.
- The court encourages separating couples to reach agreement over as many issues as possible. This can include parenting plans and agreed division of property. Reaching agreement in this way can reduce the cost of going to court.

- If a couple is unable to reach agreement, the court will provide support and assistance in this process. The court can order the couple to attend **mediation** in an attempt to resolve some of the issues in dispute. At all stages the court attempts to solve issues without the need for an expensive court hearing.
- If the parties have reached agreement over some issues, they can apply to have this agreement approved by the court. This approval by the court is known as a **consent order**, and it means that the agreement can be legally enforced by both parties.



FIGURE 6

The Family Court encourages divorcing couples to engage in mediation in the hope of reaching agreement over as many issues as possible.

ACTIVITIES

REMEMBER

1. Define each of the following in your own words:
 - a. bail
 - b. remand
 - c. surety
 - d. committal hearing
 - e. mediation
 - f. consent order.

EXPLAIN

2. Explain the difference between original jurisdiction and appellate jurisdiction.
3. What is the purpose of a bail hearing?
4. Why does the Family Court encourage parties before it to reach agreement on as many issues as possible?

DISCOVER

5. Use internet resources to find the civil jurisdictions of the lower, intermediate and Supreme Courts in your home state in terms of the amount of money involved in the case. Present your information in a table similar to this one:

Name of court	Maximum financial amount of civil jurisdiction

PREDICT

6. In which court are the following likely to be heard?
 - a. A murder trial
 - b. An appeal from the Supreme Court
 - c. A minor traffic offence
 - d. A dispute over the division of property in a divorce
 - e. An armed robbery trial
 - f. The preliminary hearing of a rape case
 - g. A civil dispute between business partners involving \$100 million
 - h. A case dealing with an aspect of the Australian Constitution

THINK

7. Explain the purpose of committal hearings in a Magistrates' or Local Court.
8. How do committal hearings contribute to the fairness and efficiency of our court system?

2.3 Different courts, different jurisdictions

Going to court can be a very expensive experience, particularly if the legal matter has to be dealt with in a higher court. On many occasions, legal disputes can be solved through alternate methods. We have already seen how the Family Court makes use of mediation as a means of resolving issues before the parties attend a court hearing. There are many other ways in which the legal system makes use of special courts and tribunals, as well as specialised procedures, to deal with particular types of disputes. These can include disputes between consumers and businesses, disputes over human rights and issues of discrimination, and disputes over environmental issues.

Consumer law disputes

Consumers throughout Australia are protected from being exploited by unscrupulous or dishonest businesses by Australian consumer law. This law is enshrined in the *Competition and Consumer Act 2010*. It was passed by the Commonwealth Parliament and applies in all states and territories.

How does consumer law protect us?

Australian consumer law gives consumers the right to take legal action if they are the victims of certain types of behaviour by businesses selling them goods or services. In particular, consumers are protected from the following activities:

- false and misleading representations in relation to goods or services, including making claims about a product that the seller knows to be untrue
- bait advertising — when products are advertised at a certain price but only a small number are actually sold at that price — as a means of falsely luring customers to the seller's business
- businesses offering gifts or prizes to customers, and then not actually providing them
- referral selling — when a seller offers a special deal to a customer in return for that customer referring other customers to the business.



FIGURE 1 It is illegal to make claims that the seller knows to be untrue.

In addition, consumers have particular rights that are guaranteed in relation to the goods or products they buy. These include the following:

- A guarantee must be given in relation to the ownership of the goods. This means that a seller must have the legal right to sell the goods so that the buyer knows that he or she will become the legal owner once the goods have been paid for.
- Goods must be of an acceptable quality, free from defects, safe and durable.
- Goods must be fit for the purpose for which they would be expected to be used.
- Manufacturers must ensure that repairs and spare parts are available for a reasonable time after the goods are supplied.



FIGURE 2

Manufacturers must ensure that spare parts are available for a reasonable time after the goods are supplied.

What action can we take?

Enforcement of consumer rights is carried out in each state and territory by the Office of Fair Trading or the Consumer Affairs Office. If a consumer has a complaint against a supplier, the following process is generally recommended:

1. The consumer should attempt to sort out the problem directly with the seller, making it clear what the problem is and requesting that it be fixed. Receipts or other documents should be kept to support the claim.
2. If this fails, the consumer should write a formal letter of complaint to the business and keep a copy.
3. If direct contact with the business does not produce a result, the consumer can take his or her complaint to the relevant state or territory Office of Fair Trading or Consumer Affairs Office. These organisations will contact the business on the consumer's behalf and attempt to resolve the matter.

4. If the business still refuses to fix the problem, the consumer can take the matter to the state's Civil and Administrative Tribunal. Most states have these bodies, which operate like a court but are generally less formal and cheaper. A small fee usually has to be paid to lodge a claim with one of these tribunals, but there is no need to have legal representation. Tribunals will usually try to resolve the dispute through mediation, by bringing the parties together to reach agreement.
5. If the parties cannot resolve their differences, the tribunal can hold a hearing to decide the issue. This is less formal than a court hearing, but it has the power to make a decision that is legally binding on both parties.
6. If either party is dissatisfied with the decision of a tribunal, he or she can appeal to the state Supreme Court. Of course, this is much more expensive.
7. In some cases a supplier who breaches Australian consumer law may be guilty of a criminal offence, and can be prosecuted in a magistrates court. Each state's Office of Fair Trading or Consumer Affairs Office has the power to bring a criminal prosecution against a business or other supplier that has acted illegally under the provisions of the consumer law. On a number of occasions, retailers selling dangerous children's toys had the toys seized and were prosecuted. In South Australia a company claiming its plastic bags were biodegradable was fined when the bags were found to contain heavy metals.



FIGURE 3

The buyer should always attempt to sort out the problem directly with the seller before taking legal action.

Human rights disputes

The federal and state governments in Australia have passed laws to protect our human rights. These include equal opportunity and anti-discrimination laws which make it illegal to discriminate against anyone based on characteristics such as their gender, racial or ethnic background, age, religion, marital status or sexual orientation. Each state and territory has its own anti-discrimination agency. These include organisations such as the Anti-Discrimination Board of New South Wales,

the Victorian Equal Opportunity and Human Rights Commission, and the Equal Opportunity Commission of Western Australia. Each of these bodies has the dual role of educating the public about human rights and anti-discrimination issues, as well as dealing with complaints.

Dealing with complaints

Most states and territories have similar procedures for dealing with complaints of discrimination or other infringements of human rights. The following is typical of the processes followed:

1. A person who believes their rights have been infringed can lodge a complaint with their state anti-discrimination agency. This complaint must be in writing and can usually be lodged online, but it may also be necessary to provide evidence of the alleged discrimination. The person lodging the complaint is known as the complainant, and the individual or organisation complained about is known as the respondent.
2. Once a complaint has been lodged, representatives of the agency examine it to see whether it comes within the areas of discrimination covered by the relevant legislation. If it does not, they will contact the complainant to inform him or her that no further action will be taken.
3. If the agency believes that the complainant has been discriminated against, it will contact the respondent and provide a copy of the complaint. The respondent then has the opportunity to fix the problem and the issue is resolved.
4. If the respondent refuses to accept that the alleged discrimination has taken place, the anti-discrimination agency sets up a **conciliation** process. This process brings the two parties together with a conciliator in an attempt to resolve the matter. (Use the **Conciliation procedures** weblink in your Resources section to see how conciliation works in this typical Queensland example.) 
5. If the matter cannot be resolved through conciliation, it may then be taken to the relevant state tribunal. This could be a broad civil and administrative tribunal such as NCAT (NSW), VCAT (Victoria), or QCAT (Queensland), or a specialised body such as the Tasmanian Anti-Discrimination Tribunal.
6. Tribunals are similar to courts, but are less formal and less expensive. They have the power of **arbitration** over the dispute. This means that both sides can present their arguments to the tribunal, and the tribunal can make a legally binding order to resolve the issue.
7. If the complaint is successful, a tribunal can order the respondent to change its behaviour and refrain from continuing the discriminatory behaviour. It can also order the respondent to pay a sum of money in compensation to the complainant. If the discrimination was employment related, the tribunal can order a respondent to reinstate the complainant to a position from which he or she may have been dismissed. (Follow the **Tribunal procedures** weblink in your Resources section to watch a Queensland video explaining QCAT procedures.) 

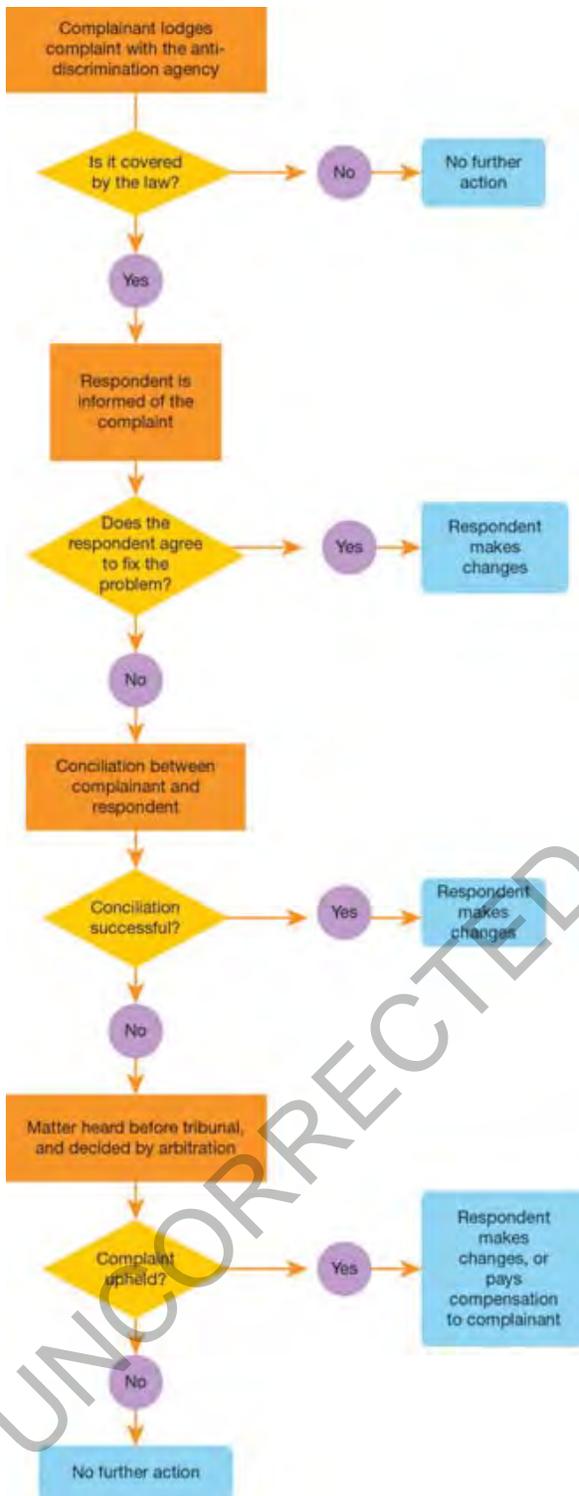


FIGURE 4 The dispute-resolution process in discrimination complaints or other infringements of human rights

Environmental law disputes

The Commonwealth, state and territory governments all have laws in place to protect the environment. These laws need to be enforced when an individual or organisation has carried out actions that could cause pollution or other damage to the environment. Action taken to enforce environmental laws will usually involve administrative action, civil action or criminal action.

Administrative action

Each state and territory government has an organisation set up to educate the public on environmental issues, to assist businesses in complying with environmental laws, and to investigate possible breaches of those laws. In all states and territories except Queensland this organisation is known as the Environment Protection Authority (EPA). In Queensland, the Department of Environment and Heritage Protection (EHP) carries out similar functions. Each organisation has the power to issue infringement notices or penalty notices to any individual, business or other organisation that it believes is doing something which could harm the environment. This type of notice usually requires the polluter to stop the action causing the pollution, and to clean up the land or waterway that has been affected. Failure to do so can then result in legal action being taken.



FIGURE 5 State environmental authorities can order businesses to stop any action that causes pollution.

Civil action

If an individual or organisation accused of causing pollution fails to take **remedial action** to fix an environmental problem, the EPA or EHP can begin legal action. In New South Wales, South Australia and Tasmania there are special courts or tribunals to deal with environmental disputes. For example, the Land and Environment Court of New South Wales is on the same level in the court hierarchy as the Supreme Court of that state. Other states deal with environmental disputes through their standard court system.



FIGURE 6 Some states have specialist courts to hear disputes over environmental issues.

Civil action against a polluter can be taken if the actions causing the pollution are a result of **negligence** or **recklessness**, rather than deliberate or intentional actions. A court can order an individual or organisation to clean up the pollution, or impose a financial penalty to pay for the appropriate authorities to carry out the clean-up. If the pollution results from the normal activities of a business, a court can stop the business from operating until it changes those activities.

Criminal action

Criminal action can be taken through the courts if there is evidence that an individual or business deliberately or intentionally caused the pollution. A successful criminal prosecution for intentionally causing environmental damage can lead to heavy fines or even imprisonment for the person responsible, whether as an individual or as a business owner.

ACTIVITIES

REMEMBER

1. Outline two examples of behaviour that is illegal under Australian consumer law.
2. Describe two ways in which consumers are protected by consumer law.
3. Identify three examples of illegal discrimination against a person or group of people.
4. Define these terms in your own words and provide an example of each:
 - a. conciliation
 - b. arbitration
 - c. negligence
 - d. recklessness.

5. In which circumstances could a person or organisation have criminal action brought against them for breaking environmental laws?

EXPLAIN

6. What is the difference between a complainant and a respondent?
7. Explain the powers of state environmental authorities in dealing with individuals or organisations they believe are doing something that could harm the environment.

DISCOVER

8. Use internet resources to investigate the anti-discrimination organisation in your state.
 - a. What is the name of the organisation?
 - b. What are its three most important goals or aims?
 - c. What is the structure of the organisation?
 - d. Give two examples of the way in which the organisation attempts to educate the community on anti-discrimination issues.

THINK

9. In disputes involving consumer, human rights and environmental laws, every effort is made to resolve the matter without having to engage in an expensive court case. Explain how this is achieved in the dispute-resolution processes of each of these three areas of the law.

2.4 How the courts make laws

We know that laws are made by parliaments at both the state and federal level, but did you know that the courts can also make laws? Australia's court system was adapted from the British legal system. One of the unique features of that system is the **common law**. The term 'common law' originally meant that the law was common to everyone. Whenever a dispute came before a court, the judge would look at the previous decisions that other judges had made in similar cases. Whenever possible, a judge would try to decide the dispute in the same way as the previous decision. If there was no previous decision, and no parliamentary law that was relevant, the judge could effectively create new law to apply to the case.



FIGURE 1 Judges can create new law if there is no existing law that applies to the case before them.

The doctrine of precedent

The key feature of our legal system that allows the courts to make laws is the doctrine of **precedent**. This means that when a judge is deciding a case, he or she will look at the legal principles applied in similar cases and be guided by the decision in those cases. The doctrine of precedent relies on the following set of principles:

- Cases that are similar in facts are decided in a similar manner to provide consistency within the legal system. The previous case provides a precedent for later cases.



FIGURE 2

If there is no existing relevant law, judges can create a new legal rule to settle a dispute.

- There is a hierarchy of courts, with higher courts having greater authority than lower courts in that hierarchy.
- Lower courts have to make decisions that are consistent with precedents set by higher courts in the same hierarchy. By doing so, they are said to follow the decisions of those higher courts.

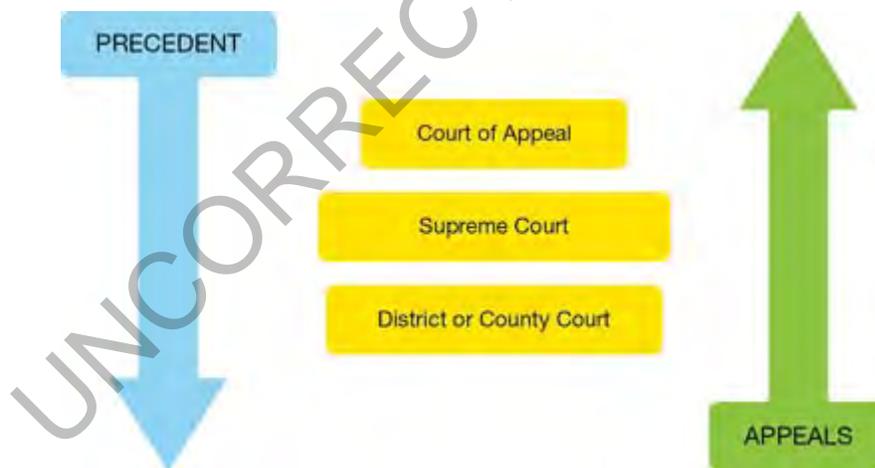


FIGURE 3

The court hierarchy allows for appeals to be taken to higher courts, and precedent to be followed by lower courts.

- A higher court in the hierarchy has the power to overrule a decision made in a lower court. This may happen because one of the parties to the original case has decided to appeal to the higher court.
- Details of decisions made by higher courts are written down and kept in law reports, which are readily available to all legal practitioners.
- Because parliament is the supreme law-making body, it has the power to overrule any law made by judges in the courts.
- When a new issue comes before a court, the judge has the power to create new law provided that it is not inconsistent with an existing precedent or with relevant legislation.

What makes a precedent?

Law reports contain details of cases that have been decided previously. Each case report contains the actual words written and spoken by the judge in delivering his or her decision. The judge will usually include a summary of the facts of the case, and the law that has been applied in reaching a decision. The outline of the law that has been applied is known as the *ratio decidendi*, which is a Latin term meaning ‘the reason for the decision’. Sometimes this will be a precedent from a previous case that the judge has found applies to the facts of the case being considered. Sometimes it will simply be the application of a relevant law passed by parliament.

On some occasions there will be no relevant precedent and no other law that applies to the facts before the judge. In these cases, the reason the judge gives for his or her decision becomes new law and creates a new precedent. It is this reason for the decision, or *ratio decidendi*, that becomes the binding precedent which must then be followed in later cases with the same or similar facts.



FIGURE 4 Law reports contain details of cases that have been decided previously.

Sometimes a judge will make other comments about the case. For example, a judge might suggest ways in which his or her decision could have been different if some of the facts had been different. These comments are known as *obiter dictum*, a Latin term that means ‘things said by the way’.

Unlike the *ratio decidendi*, statements recognised as *obiter dictum* are not binding on judges in later cases. Nevertheless, if the *obiter dictum* has been delivered by a prominent judge in a higher court, judges in lower courts may gain some guidance from these statements if they can be applied to the facts before them.

Duty of care — case studies in the application of precedent

We can illustrate how the doctrine of precedent works by examining a series of cases decided in English courts during the late nineteenth and early twentieth centuries. These cases all dealt with questions of people supplying products to other people, and the degree to which the supplier was responsible for the safety of the products supplied. Before these cases, it was generally accepted that a supplier was responsible only to the person with whom he or she had a direct contractual relationship. This meant that the seller owed a **duty of care** only to the person who actually bought the products.

George v. Skivington (1869)

In this case a husband bought some hair shampoo from a chemist, who had made the mixture himself. When he bought the shampoo, the husband made it clear that he was buying it for his wife. When she used it, the woman suffered skin irritation and hair loss, so the husband sued the chemist. Lawyers for the chemist argued that because his contractual relationship was with the husband who had bought the shampoo, and not with the wife, the chemist had no duty of care towards the wife. The judge did not accept this argument, and stated that the chemist owed a duty of care to the ultimate user of the shampoo. Because the husband made it clear that the shampoo was for his wife, the legal relationship that existed between the chemist and the husband should be extended to include the wife, and the chemist owed her a duty of care.



FIGURE 5

When you use shampoo today you are protected by the law — even if someone else bought the shampoo for you.

Heaven v. Pender (1883)

In this case Gray had a contract to paint a ship. The ship was moored in Pender's dock, and Pender provided a platform to be hung over the side of the ship to assist with this task. The plaintiff, Heaven, was employed by Gray to carry out the painting, but while he was doing so the ropes holding the platform broke, leading to Heaven being injured. The court found similarities with *George v. Skivington* in that while no direct contract existed between Pender and Heaven, Pender had a duty to any person who might be required to use the platform. The court held that whenever one person supplies goods or machinery to be used by another person, and there is the likelihood of injury to the person to whom the thing is supplied, there is a duty of care to use ordinary skill and care in relation to the condition or manner of supply. One judge, Brett, went further in *obiter dictum* by suggesting that:

whenever one person is by circumstances placed in such a position in regard to another ... that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.



FIGURE 6

The dock owner who supplied the platform was found to have a duty of care to the workman painting the ship.

Donoghue v. Stevenson (1932)

A friend bought May Donoghue a bottle of ginger beer. The drink was in an opaque bottle, so it was not possible to see the contents. Donoghue drank some of the ginger beer, but when the last of the bottle was poured into a glass, the remains of a decomposed snail came out into the glass. Donoghue suffered from illness and shock as a result of drinking the ginger beer, and sued the manufacturer of the ginger beer, Stevenson. There was no direct contractual relationship in this case because it was Donoghue's friend who had actually bought the drink, and had bought it not directly from Stevenson but from a café supplied by Stevenson. The case was eventually decided in favour of Donoghue. The leading judgement was delivered by Lord Atkin, and it is the following words within his judgement that are accepted as the *ratio decidendi* of the case and therefore constitute the precedent that has become law:

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.

These words are very similar to the *obiter dictum* in *Heaven v. Pender*. Lord Atkin made it clear that he believed the comments by Brett in that case were a good basis for future law, so he adopted the same principle as his *ratio decidendi* in the case before him. This effectively created new law.



FIGURE 7

When May Donoghue found a decomposed snail in her bottle of ginger beer, she sued the manufacturer.

Grant v. Australian Knitting Mills (1936)

Dr Grant purchased a pair of underpants manufactured by Australian Knitting Mills. During the manufacturing process a chemical was left in the fabric, and Grant suffered from severe dermatitis as a result of wearing the underpants. He sued the company, and the court found in his favour. The principles of the case of *Donoghue v. Stevenson* were applied, even though the snail in the bottle case was an English case and Grant's case was heard in the Australian court hierarchy. Judges in the Australian court system felt the English precedent was a fair and just law, so it became part of Australian common law.

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The ability of the courts to make law

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The law of negligence

The area of law created by the cases just discussed is known as the law of negligence. Negligence is said to occur when a person owes a duty of care to another, but does not act in such a way as to ensure the safety of that person. It is now accepted that suppliers of all goods owe a duty of care to anyone who uses those goods, whether they were the actual buyer or not.

ACTIVITIES

REMEMBER

1. What is common law?
2. Identify the key principles of the doctrine of precedent.
3. Define the following in your own words:
 - a. duty of care
 - b. negligence.

EXPLAIN

4. What is the difference between the *ratio decidendi* and *obiter dictum*?
5. Why are law reports important in helping judges make and apply common law?
6. Explain why the court hierarchy is important in the operation of the doctrine of precedent.

PREDICT

7. How do you think a judge might decide the following cases?

- a. A woman buys a new car from a dealer. While preparing the car, a mechanic accidentally damages the brakes and the buyer has an accident. She sues the manufacturer and the dealer.
- b. A man has a lot to drink at a club. When he goes to leave, the club manager offers to order the man a taxi but he refuses it. While walking home the man staggers onto the road and is injured when a car hits him. He sues the club for negligence.
- c. A couple buy a house but discover that it is riddled with termites and will need to be demolished. They sue the previous owner although she claims she knew nothing about the termites.

THINK

8. 'Judges have used common law processes to bring greater fairness to the law by adapting previous decisions to suit the new facts before them.' Do you agree or disagree with this statement? Use examples from the cases discussed in this section to support your opinion.

SkillBuilder: Problem solving and decision making

Tell me

Problem solving and decision making involve working collaboratively in groups, negotiating and using teamwork to solve an issue and develop a plan for action. In order to do this successfully, you will need to do the following:

- Listen actively to the views of every member of the group.
- Display empathy for the views of others. This means that you have an appreciation for the feelings of others and respect their right to an opinion, even if it is different from your own.
- Negotiate to resolve differences of opinion.
- Arrive at a conclusion in a democratic manner. This can mean having a vote among members of the group, or arriving at a consensus where everyone agrees to change their views slightly until reaching a conclusion that everyone agrees with.

Show me

So how does this work in practice? Consider this issue: As we have seen, many types of disputes are resolved without going to court. Mediation and conciliation are recommended in Family Court disputes, anti-discrimination cases and consumer law cases. Is this a fair way of dealing with legal issues? What happens if one party feels intimidated in the mediation process? Might they give

away more than they had intended? On the other hand, these processes are much cheaper and can save parties thousands of dollars in legal fees.

If you had to decide as a group whether or not these alternative measures are fair, or if it would be fairer to have these matters decided by an independent umpire such as a judge or magistrate, how might you reach a conclusion that was agreeable to all?

Form into discussion groups to consider the following key points:

1. What are the benefits and disadvantages of going through a process of mediation?
2. What are the benefits and disadvantages of conciliation?
3. What are the benefits and disadvantages of taking the matter to court?
4. Does the more active role of a conciliator make this process less open to manipulation by one of the parties than mediation?
5. Would it be fairer to have an independent person arbitrate on the matter?
6. Does the lower cost of the mediation or conciliation make up for the lack of an independent umpire?

These discussion points should be tackled within each group one at a time. Members of the group can take it in turns to keep notes. For each discussion point you should use the procedure illustrated in figure 1.

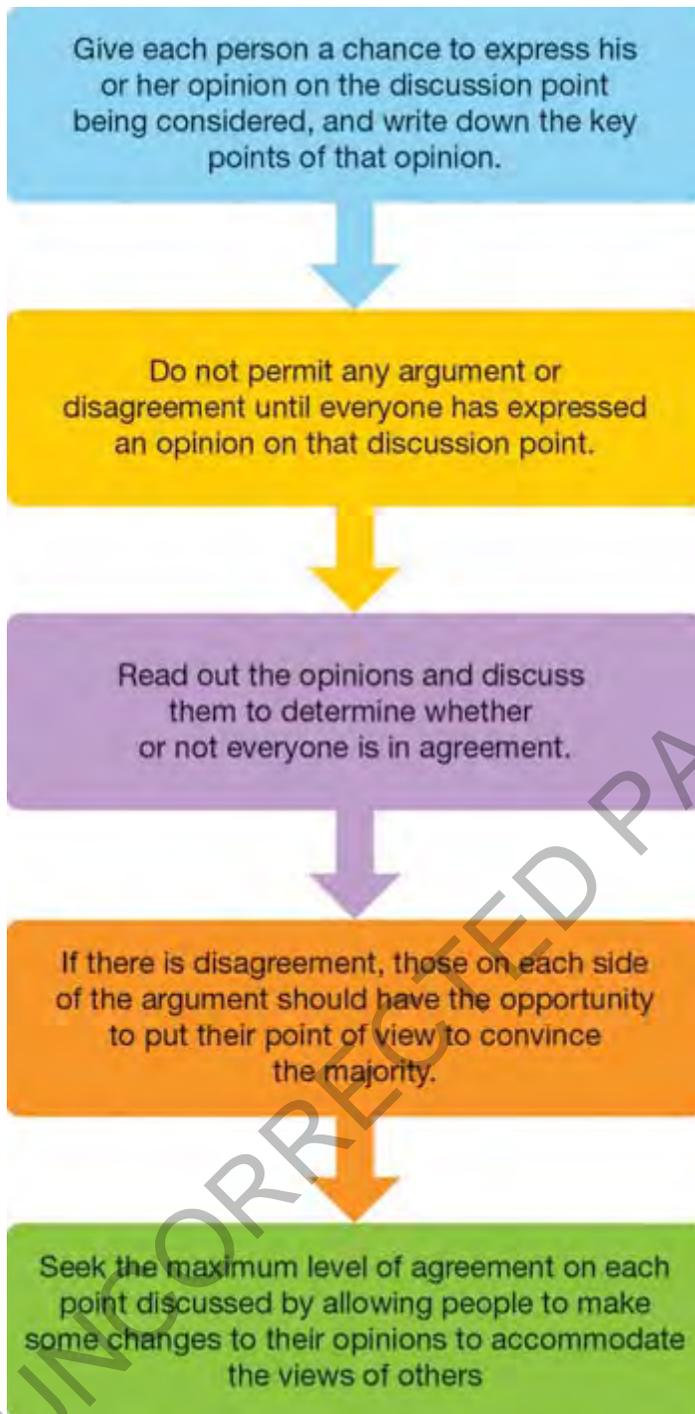


FIGURE 1

The procedure for problem solving and decision making

Let me do it

Use the procedure in figure 1 to consider the following issue: Law-making by the courts has provided the flexibility that allows new law to be made when there is no other law available to cover the issue at hand. Nevertheless, judges are not democratically elected in the way members of parliament are. Would it not be better to have all laws made by democratically elected members of parliament who are accountable to the voters?

Discussion points could include:

1. What are the advantages and disadvantages of law-making by the courts, both for individuals before the courts and for our society as a whole? (You may need to further research aspects of law-making by the courts to be able to provide useful examples. There is plenty of material available online.)
2. What are the advantages and disadvantages of law-making by parliament, particularly in a democratic society?
3. Are there changes you believe could improve the system, such as closer cooperation between parliament and the court system? How might this work?
4. If you do not see a need to change, how do you convince others to support the current system?
5. What ideas can you propose that would take advantage of the best features of law-making through the courts and law-making by a democratically elected parliament?

Review and reflect

Review

The court system provides us with a means of resolving disputes, as well as a means of bringing to justice those who commit crimes against society.

- Courts have both civil and criminal jurisdiction.
- All courts fit within a court hierarchy. The lower courts deal with less serious matters, and intermediate and higher courts have jurisdiction over more serious matters.
- A court hierarchy allows for a person to appeal to a higher court if he or she is unhappy with the ruling in a lower court.
- The Supreme Court in each state has both original and appellate jurisdiction.
- Magistrates courts (called Local Courts in New South Wales) hear around 90 per cent of all cases in each state.
- As well as hearing less serious cases, magistrates courts conduct committal hearings on more serious criminal matters to test whether the prosecution has a strong case against the accused.
- Magistrates courts also make decisions in relation to the granting of bail to those accused of crimes.

- The Family Court of Australia has jurisdiction over all matters relating to divorce and relationship breakdown.
- Disputes relating to consumer law can be heard by an administrative tribunal, which will usually attempt to resolve the matter through mediation before conducting a formal hearing.
- Anti-discrimination bodies in each state assist with cases involving discrimination. They attempt to use a process of conciliation to resolve these disputes.
- State environmental protection authorities have the power to order individuals or organisations to stop polluting and to clean up, but can also initiate civil or criminal proceedings if the polluter does not comply with any orders.
- Judges will follow precedents set in previous cases, particularly those precedents set in a higher court.
- When there is no relevant legislation and no existing precedent, judges can make new law when they decide a case brought before them.

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True/false

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Reflect

1. Discuss the following problems with a partner. For each problem determine how the problem would be resolved and which courts or tribunals might be involved.
 - a. Mietta applied for an apprenticeship as a chef. At the interview she was told they were only interested in employing males. She believes this is a case of discrimination.
 - b. A chemical factory operates a waste management process that cleans and filters its waste products before discharging clean water into a local creek. The system breaks down and toxic chemical waste is discharged into the creek.
 - c. The police charged Jason with assault and theft after he bashed a boy and took his mobile phone.
 - d. Thomas bought a new folding ladder at his local hardware store. When he tried to use it to paint his lounge-room walls, the hinges snapped and the ladder collapsed, injuring Thomas and spilling paint over the floor.
 - e. Lily is allergic to peanuts. She became seriously ill after eating a health bar. The label stated that the bar did not contain peanuts. The manufacturer apologised and said it had made a mistake with the labelling.

2. Imagine you are a member of a jury. The accused has been charged with armed robbery.
 - a. What court would you be in?
 - b. How many people in total are on the jury?
 - c. Draw a floor plan of the courtroom and indicate where the following are located: the judge, the jury, the prosecutor, the counsel for the defence, the judge's associate, the tipstaff and the witness box.

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