

# 20 Australia's justice system and the courts

## 20.1 Overview

Jurisdiction, judges and juries — how does the justice system punish and protect Australian citizens?

### 20.1.1 How does Australia's justice system work?

Australia's justice system values these principles: fair treatment by the courts for everyone, independent judges who are free to make fair decisions, and the right to appeal a decision made by a court. These principles contribute to a democratic and just society.

But how do our justice system and the courts 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 or become involved in a legal dispute ourselves, we could still find ourselves in contact with the court system. This may occur through being a witness to something that might be brought before the courts, or perhaps being called upon to do jury duty, or even just attending court to support someone we know. Our justice system and the courts are important elements of our democratic society, and it is important that we all have a basic understanding of how they work.

#### Resources

-  **eWorkbook** Customisable worksheets for this topic
-  **Video eLesson** Going to court (eles-2362)

#### LEARNING SEQUENCE

- 20.1 Overview
- 20.2 The court hierarchy
- 20.3 The roles of particular courts
- 20.4 Different courts, different jurisdictions
- 20.5 How the courts make laws
- 20.6 **SkillBuilder:** Problem solving and decision making 
- 20.7 Equality before the law
- 20.8 The independence of our courts
- 20.9 The right of appeal
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- 20.11 **SkillBuilder:** Creating and analysing a survey 
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## 20.2 The court hierarchy

### 20.2.1 Levels of courts within the legal system

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; the lower courts, which hear less serious matters, are at the bottom of the hierarchy.

**FIGURE 1** The higher the court in the hierarchy, the more expensive it will be to bring the case.



### 20.2.2 Criminal cases and civil cases

#### Criminal law

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.

**FIGURE 2** What happens in criminal cases

In criminal cases

...the police prosecute

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



#### Civil law

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.

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 for 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** What happens in civil cases



### 20.2.3 The lower courts

The lowest court in the Victorian court hierarchy is the Magistrates’ Court. There is a relatively large number of these courts across the state because they hear more than 90 per cent of all cases that go to court. In Victoria there are ten Magistrates’ Courts in metropolitan Melbourne, and over 40 in regional towns and cities. The Federal Circuit Court of Australia is a lower court that deals with matters relating to laws passed by the federal parliament. In Victoria it sits in Melbourne and Dandenong in the metropolitan area, as well as major regional centres such as Geelong, Bendigo, Morwell and Shepparton. It hears matters relating to family law and child support, bankruptcy, copyright, human rights, industrial law, migration, privacy and trade practice.

### 20.2.4 Intermediate courts

In other states, intermediate courts are generally known as District Courts, but in Victoria the court operating at this level is called the County Court. The County Court hears 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

**FIGURE 4** The historic courthouse in Bendigo is one of over 40 courthouses used for Magistrates’ Court hearings throughout regional areas of Victoria.



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.

**FIGURE 5** Typical layout of a courtroom



- A** The judge's associate is a trained lawyer who manages much of the paperwork.
- B** Anyone whose name is on the electoral roll can be called as a juror. In a criminal case, the jury consists of 12 people. The jury must decide beyond reasonable doubt whether a person is guilty. All the jurors have to agree.
- C** The prosecutor has to convince the jury that the accused person is guilty. This is done by asking questions of witnesses to draw out relevant information.
- D** The judge is addressed as 'Your Honour'. The judge listens to arguments presented by the prosecutor and the counsel for the defence, and is not allowed to ask a witness questions (except to clarify a point). The judge has to make sure jury members understand the proceedings and evidence presented. If a jury announces a guilty verdict, the judge decides the sentence.
- E** The counsel for the defence represents the accused. If the accused pleads guilty, the counsel for the defence presents arguments to try to lessen the punishment. If the client pleads not guilty, defence counsel must convince the judge or jury that the client is innocent.
- F** The tipstaff helps the judge keep order in the court.
- G** Witness box, from which people give evidence
- H** Members of the public, who listen to and observe the court proceedings
- I** A prison officer from the prison where the accused has been held
- J** The accused
- K** Members of the media, who observe proceedings so they can report what happens.

## 20.2.5 Higher courts

The highest court in Victoria is the Supreme Court. It hears the most serious criminal matters, as well as civil matters involving very large sums of money. The Supreme Court is divided into a trial division and an appeal division. (See subtopic 20.3 for more detail on the role of these divisions.)

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 discussed in subtopic 20.3.) 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. The Federal Circuit Court is the relevant lower court in the same hierarchy as the Federal Court.

**FIGURE 6** The Australian court hierarchy

Levels in the hierarchy	Victorian state jurisdiction	Commonwealth jurisdiction
Highest Australian court	High Court of Australia	
Higher courts	Supreme Court, including Court of Appeal	Federal Court Family Court
Intermediate courts	County Court	
Lower courts	Magistrates' Court	Federal Circuit Court

## 20.2.6 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 7** The High Court of Australia in Canberra is at the peak of the court hierarchy.



## 20.2 ACTIVITY

Use internet resources to investigate the operation of the Federal Circuit Court and the Federal Court of Australia.

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

**Examining, analysing, interpreting**

## 20.2 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

### 20.2 Exercise 1: Check your understanding

1. **CS1** Define the following terms in your own words.
  - (a) Plaintiff
  - (b) Defendant
  - (c) Prosecution
  - (d) Adversary system
  - (e) Jurisdiction
2. **CS1** What is a court hierarchy?
3. **CS1** What is the name of the intermediate court in Victoria?
4. **CS1** What are the three main functions of the High Court of Australia?
5. **CS1** What is the difference between a judge and a magistrate?
6. **CS2** Explain the difference between civil law and criminal law.

### 20.2 Exercise 2: Apply your understanding

1. **CS6** 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 by a robber armed with a baseball bat.
  - (d) Your strict-vegetarian friend 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.
2. **CS6** Do you think that a court hierarchy is necessary? Explain your answer.
3. **CS3** In which courts and in which types of cases is a jury required?
4. **CS4** If a person was accused of smuggling guns and ammunition into Australia, contrary to Commonwealth law, which court would hear this criminal case?
5. **CS3** In 1983 there was a dispute between the federal government and the Tasmanian state government over the building of a dam on the Franklin River in south-west Tasmania. Which court would have heard this case?

Try these questions in learnON for instant, corrective feedback. Go to [www.jacplus.com.au](http://www.jacplus.com.au).

## 20.3 The roles of particular courts

### 20.3.1 Jurisdiction

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 the state Supreme Court, the Magistrates' Court, and the federal Family Court.

### 20.3.2 The Supreme Court

The Victorian Supreme Court has two main types of jurisdiction: an **original jurisdiction** and an **appellate jurisdiction**. There is a clear separation between these two jurisdictions, with some judges specialising in only hearing appeals, and other judges in only hearing original trials.

#### Original jurisdiction

The original jurisdiction of the Supreme Court is 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.

In its criminal jurisdiction, the Supreme Court will deal with only the most serious crimes such as murder, attempted murder or **manslaughter**.

Similarly, in its civil jurisdiction, the Supreme Court hears only the most serious cases. In the past this meant it heard cases involving disputes over very large sums of money. There was an upper limit on the amount of money that could be involved in civil cases dealt with in the County Court, with all cases above that limit heard in the Supreme Court. Since 2007, there has been no upper monetary limit on the civil jurisdiction of the County Court, so civil cases heard in the Supreme Court tend to be those involving the most complex legal issues. These cases usually require the higher level of legal knowledge and experience of Supreme Court justices to resolve them.

#### 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. These appeals are usually heard by the Court of Appeal. The Court of Appeal hears

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



**FIGURE 2** Only civil disputes involving complex legal issues are likely to be heard in the Supreme Court.



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.

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



### 20.3.3 The Magistrates' Court

Up to 90 per cent of all cases are heard in the Magistrates' Court, which has both criminal and civil jurisdiction.

#### Criminal jurisdiction

The criminal jurisdiction of the Magistrates' Court 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.

The Magistrates' Court also performs some important roles in more serious criminal cases.

- Most cases heard before the County 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.

The Magistrates' Court carries 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 to either detain the accused in custody or release them into the community to await trial. Releasing an accused into the community is known as granting **bail**.

If the arresting police officers believe that the accused presents a danger to the community but the accused wishes to be released, a bail hearing will be held. This hearing will often be held at the Magistrates' Court. Both sides will present their arguments to the magistrate, who will then decide whether 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 their local police station. If bail is not granted, the accused will be **remanded in custody** until the case goes to trial.

## Committal hearings

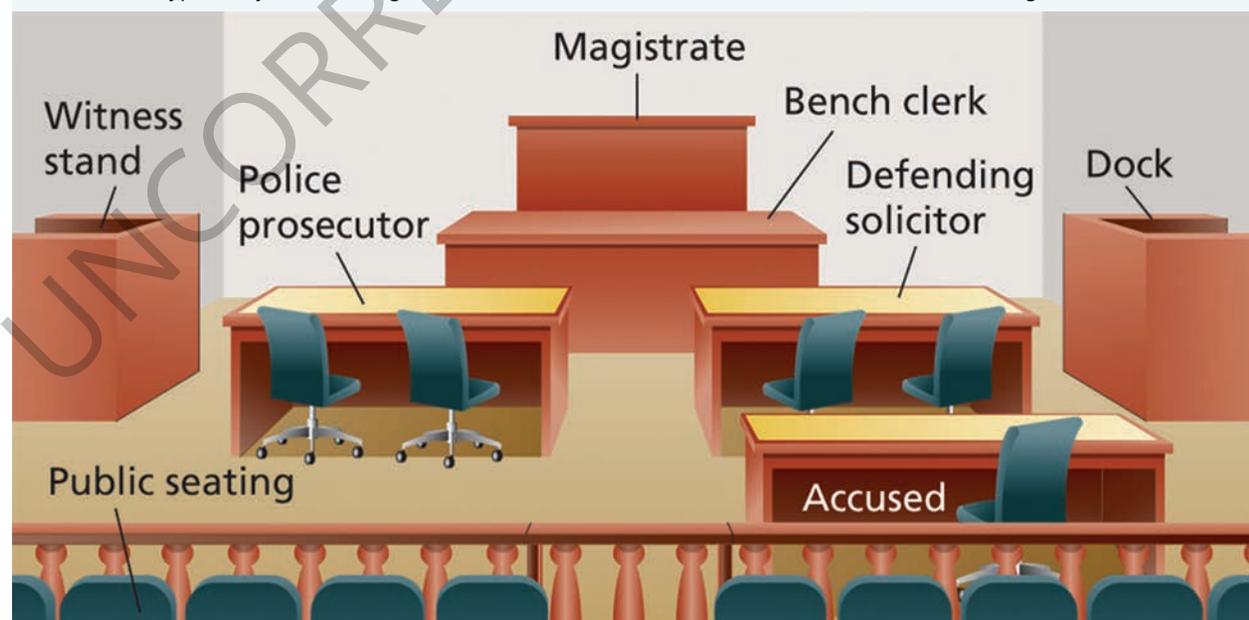
A committal hearing is a preliminary hearing held to determine whether or not the prosecution case is strong enough to justify a full jury trial in the Supreme Court or in the County Court. It also provides an opportunity for an accused to indicate whether he or she intends to plead guilty or not guilty. An accused who pleads guilty will be committed to stand trial in the Supreme Court 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 4** People remanded in custody are held in prison until their case comes to court.



**FIGURE 5** Typical layout of a Magistrates' Court, where minor offences and committal hearings are dealt with



## Civil jurisdiction

A variety of civil matters can be heard in the Magistrates' Court. These are usually of a less serious nature than those matters heard by intermediate courts or the Supreme Court. The jurisdiction of the Magistrates' Court is limited to hearing cases where the amount of money involved does not exceed a prescribed amount. In Victoria these courts can only hear civil matters involving less than \$100 000. Civil cases involving sums of money that exceed this amount will be held in higher courts in the hierarchy such as the County Court or the Supreme Court.

### 20.3.4 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 Supreme Court.

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.



### 20.3 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

#### 20.3 Exercise 1: Check your understanding

1. **CS1** Define each of the following in your own words.
  - (a) Bail
  - (b) Remand
  - (c) Surety

- (d) Committal hearing
  - (e) Mediation
  - (f) Consent order
2. **CS2** Explain the difference between original jurisdiction and appellate jurisdiction.
  3. **CS2** What is the purpose of a bail hearing?
  4. **CS1** What is the maximum amount of money that can be involved in a civil case heard in the Magistrates' Court?
  5. **CS1** What is the maximum amount of money that can be involved in a civil case heard in the County Court?

### 20.3 Exercise 2: Apply your understanding

1. **CS2** Why does the Family Court encourage parties before it to reach agreement on as many issues as possible?
2. **CS6** 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
3. **CS2** Explain the purpose of committal hearings in a Magistrates' Court.
4. **CS5** How do committal hearings contribute to the fairness and efficiency of our court system?
5. **CS5** Explain why the Supreme Court is most likely to hear civil cases involving complex legal issues, rather than just those involving a large amount of money.

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## 20.4 Different courts, different jurisdictions

### 20.4.1 Alternate methods

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 by alternative 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.

### 20.4.2 Consumer law disputes

Australian consumers 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 by Consumer Affairs Victoria. 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 the complaint to Consumer Affairs Victoria. This organisation 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 Victorian Civil and Administrative Tribunal (VCAT). VCAT operates similarly to a court but is generally less formal and cheaper. A small fee usually has to be paid to lodge a claim, but there is no need to have legal representation. The tribunal 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 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 the Magistrates' Court. Consumer Affairs Victoria 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. For example, on a number of occasions retailers selling children's toys that have been found to be dangerous have had the toys seized and have been prosecuted.

**FIGURE 3** The buyer should always attempt to sort out the problem directly with the seller before taking legal action.



### 20.4.3 Human rights disputes

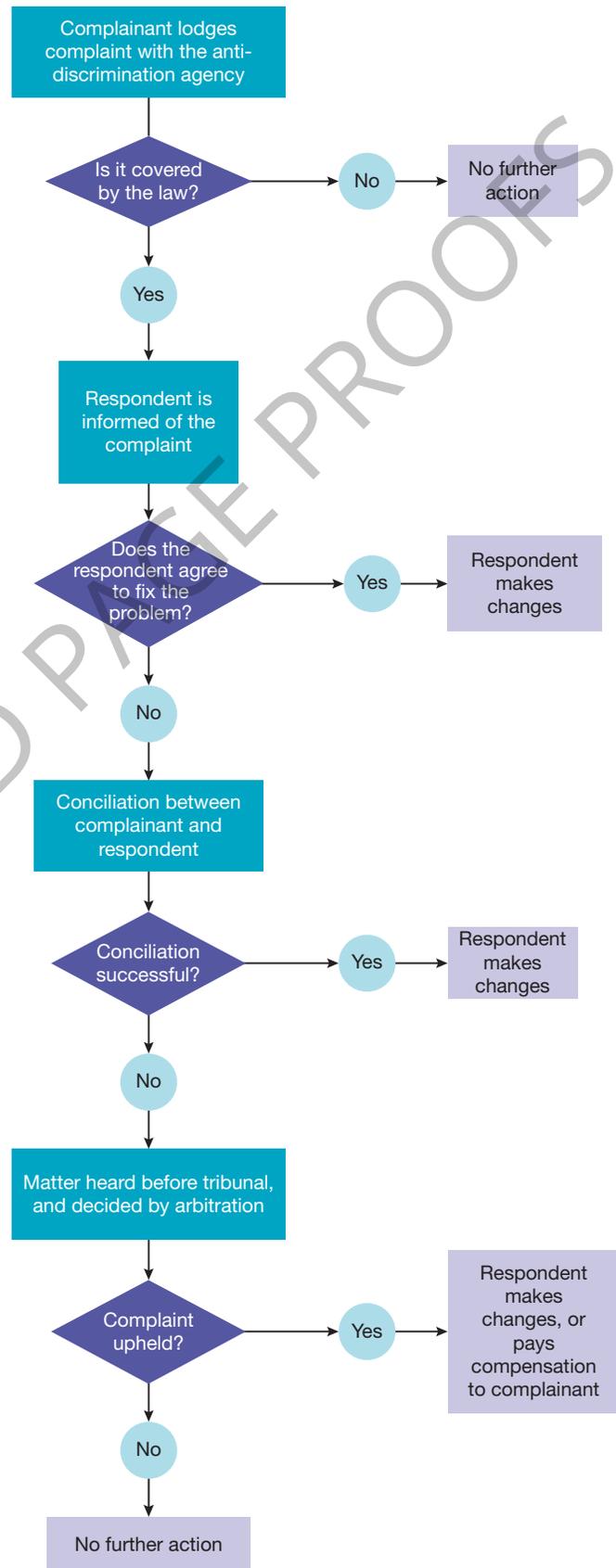
The federal and state governments in Australia have passed laws to protect our human rights. These include equal opportunity and anti-discrimination laws which make it illegal to discriminate against anyone based on characteristics such as their gender, racial or ethnic background, age, religion, marital status or sexual orientation. Each state and territory has its own anti-discrimination agency. In Victoria, this body is the Victorian Equal Opportunity and Human Rights Commission. This body has the dual role of educating the public about human rights and anti-discrimination issues, as well as dealing with complaints.

#### Dealing with complaints

There is a standard procedure for dealing with complaints of discrimination or other infringements of human rights. **FIGURE 4** and the following text shows the typical process.

1. A person who believes their rights have been infringed can lodge a complaint with the Victorian Equal Opportunity and Human Rights Commission. 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 Commission sets up a **conciliation** process. This process brings the two parties together with a conciliator in an attempt to resolve the matter.
5. If the matter cannot be resolved through conciliation, it may then be taken to VCAT.
6. VCAT operates similarly to the courts but is less formal and less expensive. It has 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, VCAT can order the respondent to 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 was dismissed.

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



## 20.4.4 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

The Victorian state 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. This organisation is known as the Environment Protection Authority (EPA). The EPA 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** The EPA 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 can begin legal action. In Victoria, environmental disputes are heard in either the Magistrates' Court or the County Court.

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.

#### 20.4 ACTIVITY

Use internet resources to investigate the Victorian Equal Opportunity and Human Rights Commission.

- What are its three most important goals or aims?
- What is the structure of the organisation?
- Give two examples of the way in which the Commission attempts to educate the community on anti-discrimination issues.

**Examining, analysing, interpreting**

## 20.4 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

### 20.4 Exercise 1: Check your understanding

1. **CS1** Outline two examples of behaviour that is illegal under Australian consumer law.
2. **CS2** Describe two ways in which consumers are protected by consumer law.
3. **CS1** Identify three examples of illegal discrimination against a person or group of people.
4. **CS2** Define these terms in your own words and provide an example of each.
  - (a) Conciliation
  - (b) Arbitration
  - (c) Negligence
  - (d) Recklessness
5. **CS2** Explain one penalty that can be imposed by a court on a business that is prosecuted for breaching environmental law.

### 20.4 Exercise 2: Apply your understanding

1. **CS2** In which circumstances could a person or organisation have criminal action brought against them for breaking environmental laws?
2. **CS2** What is the difference between a complainant and a respondent?
3. **CS2** Explain the powers of the EPA in dealing with individuals or organisations it believes are doing something that could harm the environment.
4. **CS5** 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.
5. **CS5** The Environment Protection Authority (EPA) in Victoria has the power to deal with environmental breaches through administrative action. Explain what powers the EPA has in these circumstances, and a possible advantage of the use of these powers.

Try these questions in learnON for instant, corrective feedback. Go to [www.jacplus.com.au](http://www.jacplus.com.au).

## 20.5 How the courts make laws

### 20.5.1 Common law

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.

### 20.5.2 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:

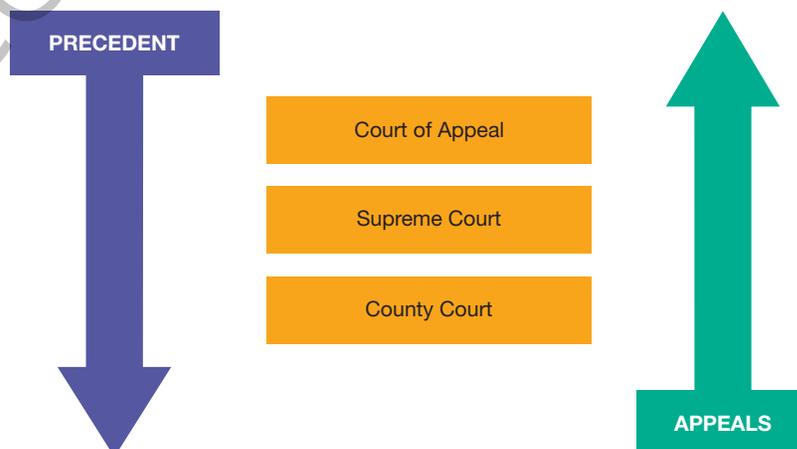
- Cases that are similar in facts are decided in a similar manner to provide consistency within the legal system. The previous case provides a precedent for later cases.
- There is a hierarchy of courts, with higher courts having greater authority than lower courts in that hierarchy.

- 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.
- 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.

**FIGURE 1** If there is no existing relevant law, judges can create a new legal rule to settle a dispute.



**FIGURE 2** The court hierarchy allows for appeals to be taken to higher courts, and precedent to be followed by lower courts.



### 20.5.3 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 the 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, or interpretation, 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 *ratio decidendi* becomes new law and creates a binding precedent that must then be followed in later cases with the same or similar facts.

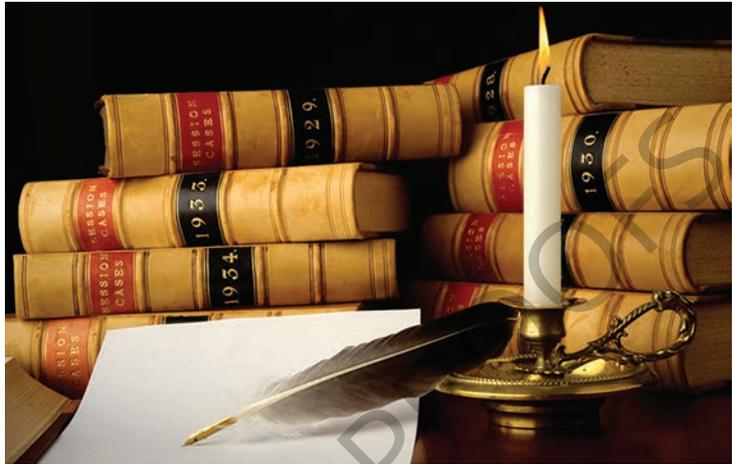
Sometimes a judge will make other comments about the case. For example, a judge might suggest ways in which the decision could have been different if some of the facts had been different. These comments are known as *obiter dictum*, a Latin term that means ‘things said by the way’. Unlike the *ratio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

#### The studded belt case

One example of a precedent being created by the interpretation of an existing law is the studded belt case. In this case, a young man who was wearing a studded leather belt to hold up his trousers was charged with possessing a regulated weapon and found guilty in a Magistrates’ Court hearing. He subsequently successfully appealed this verdict in the Supreme Court.

In making his decision, the Supreme Court Justice had to interpret the intention of the *Control of Weapons Act*. He considered definitions of a weapon, and whether any reasonable person would consider that the wearing of a studded belt would constitute possession of a weapon. He deemed that the young man had a lawful excuse for possessing the belt (it was holding up his trousers!), and that he had no intention of using it as a weapon. The precedent clarified the Weapons Act, by stating that a studded belt is not, in and of itself, a weapon but may become one if there was intent for it to be used in this way. In this case, the Justice deemed there was no such intent, and therefore the young man was not guilty of an offence.

**FIGURE 3** Previous court decisions are documented in law reports.



**FIGURE 4** Is a studded belt a weapon? According to precedent set by the Supreme Court, only if there is intent for it to be used in this way.



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 **Video eLesson** The ability of the courts to make law (eles-2380)

## 20.5.4 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.

### *Heaven v. Pender (1883)*

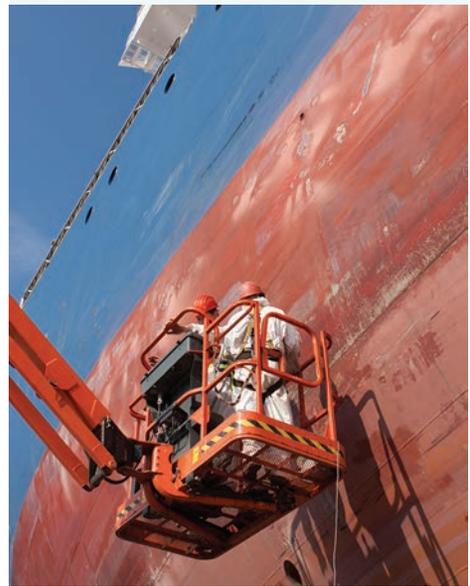
In this case Gray had a contract to paint a ship. The ship was moored in Pender's dock, and Pender provided a platform to be hung over the side of the ship to assist with this task. The plaintiff, Heaven, was employed by Gray to carry out the painting, but while he was doing so the ropes holding the 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 5** When you use shampoo today you are protected by the law — even if someone else bought the shampoo for you.



**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.

### *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 that was an English case and Grant's case was heard in an Australian court. Judges in the Australian court system felt the English precedent was a fair and just law, so it became part of Australian common law.

### 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.

**FIGURE 7** When May Donoghue found a decomposed snail in her bottle of ginger beer, she sued the manufacturer.



#### DISCUSS

'Judges have used common law processes to bring greater fairness to the law by adapting previous decisions to suit the new facts before them.'

- a. Suggest an argument to support this case and then a counterargument to represent an opposing viewpoint.
- b. Which viewpoint do you support? Give reasons.

[Critical and Creative Thinking Capability]

## 20.5 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

### 20.5 Exercise 1: Check your understanding

1. **CS1** What is common law?
2. **CS1** Identify the key principles of the doctrine of precedent.
3. **CS2** In your own words, define:
  - (a) duty of care
  - (b) negligence.
4. **CS2** What is the difference between the *ratio decidendi* and *obiter dictum*?
5. **CS2** Why are law reports important in helping judges make and apply common law?

### 20.5 Exercise 2: Apply your understanding

1. **CS2** Explain why the court hierarchy is important in the operation of the doctrine of precedent.
2. **CS4** 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.
3. **CS3** Before 1869 in English common law, a legal duty of care was only owed between people who had a direct contractual relationship. How did the decision in *George v. Skivington* change this law?
4. **CS5** Explain why the case of *Heaven v. Pender* is a good example of the doctrine of precedent.
5. **CS5** In *Donoghue v. Stevenson* the judge used *obiter dictum* from a previous case to create a new *ratio decidendi*, and therefore a new principle under common law. Explain how this was possible under the principles of the doctrine of precedent.

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## 20.6 SkillBuilder: Problem solving and decision making

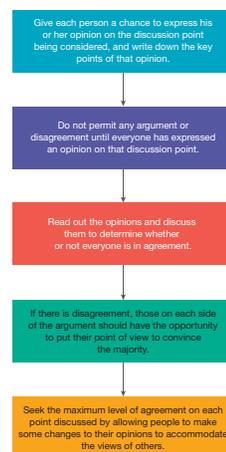
### What is involved in problem solving and decision making?

Problem solving and decision making involve working collaboratively in groups, negotiating and using teamwork to solve an issue and develop a plan for action.

#### Select your learnON format to access:

- an explanation of the skill (Tell me)
- a step-by-step process to develop the skill (Show me)
- an activity to allow you to practise the skill (Let me do it).

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# 20.7 Equality before the law

## 20.7.1 Fair treatment

Equality before the law is an important and central principle of our legal system. In Australia we believe that all parties are entitled to be treated fairly by a court — regardless of whether they are a victim, an offender or any other participant in the justice system. This does not mean that everyone should be treated in the same way; it means that anyone who comes into contact with the courts should know that they are being treated fairly and without **discrimination**.

## 20.7.2 Discrimination and the courts

Equality before the law is a basic **human right**. Article 7 of the **Universal Declaration of Human Rights** states: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law.’ Australia signed the International Covenant on Civil and Political Rights in 1991, which includes ‘the right to equality before the law and non-discrimination.’

Australia has several laws relating to human rights, discrimination and the need to treat people fairly. Some of the laws made by the Commonwealth Parliament include 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*. Various statutes across the states also define discrimination and protect human rights.

It is against the law to discriminate against someone on the basis of their gender, ethnicity, disability, sexual orientation, age, religious affiliation, socioeconomic background, size or nature of family, literacy level or any other prescribed characteristic. The law and the courts must treat everyone fairly regardless of their personal characteristics.

No-one in our country is exempt from our laws. This means that everyone is entitled to have a case heard by an independent and impartial court, and everyone must obey the laws of Australia.

**FIGURE 1** It is against the law to discriminate on the basis of personal characteristics, status or beliefs. This applies to the way that people are treated by the law and by the courts.



### DISCUSS

What are the challenges of equality before the law in a culturally diverse country? In what ways does our court system show that it values cultural diversity?

[Intercultural Capability]

## 20.7.3 Promoting equality before the law

It is very important that people who come into contact with the justice system believe they are being treated equally and fairly so that confidence in the system is maintained. Judges and courts must be aware of any personal bias or prejudice against any person from a particular background and make sure that this is nullified. This may mean that not everyone is treated in the same way. Some different approaches for dealing with an individual’s specific background or circumstances can be seen in **FIGURE 2**.

Respect and courtesy should be shown to everyone in their dealings with the justice system. Discriminatory attitudes have no place in a courtroom. Everyone is entitled to be treated fairly under the law in Australia so that we are all protected from injustice.

**FIGURE 2** Approaches that promote equality before the law



- A** Permitting people to present their evidence from a different place. *Example:* Allowing people to speak from a hospital bed or stretcher
- B** Understanding the differing circumstances and needs of people. *Example:* In relation to the timing and length of court appearances, accommodating (where appropriate) people with religious affiliations, childcare responsibilities, children and young people, or people who have a particular type or form of disability
- C** Avoiding false assumptions about the lifestyle of a person. *Example:* Not making assumptions about the lifestyle of a lesbian or gay man, or a person with low income and/or a high-cost disability
- D** Knowing and using appropriate terminology. *Example:* Using terminology that does not cause offence or the perception of discrimination
- E** Using an alternative method of communication for those people that need it. *Example:* Using different communication for children and young people, people with no or limited English, those with a communication disability, or for people who are representing themselves
- F** Understanding the practices of a specific culture that might influence behaviour in relation to a matter before the court. *Example:* Taking into account the importance of the attitudes, values and behaviour of Indigenous people
- G** Using a different oath for people who observe a non-Christian religion. *Example:* Taking an oath on the Koran or Torah

## DISCUSS

Is it fair if different people receive unequal punishments for the same crime? Why/why not? Explain your reasons.

[Ethical Capability]

### 20.7.4 CASE STUDY: In jail, no fair trial

In March 2014, ABC TV's *Lateline* aired a story about a 23-year-old Aboriginal woman who spent 18 months in a Kalgoorlie jail in Western Australia.

Rosie Anne Fulton was charged with driving offences. She had crashed a stolen car in Western Australia after consuming a large amount of alcohol. Her case was heard in a Kalgoorlie court, where the magistrate declared her unfit to plead as a result of her disability. Ms Fulton was born with foetal alcohol syndrome and has the mental capacity of a small child. She was placed on a prison-based supervision order.

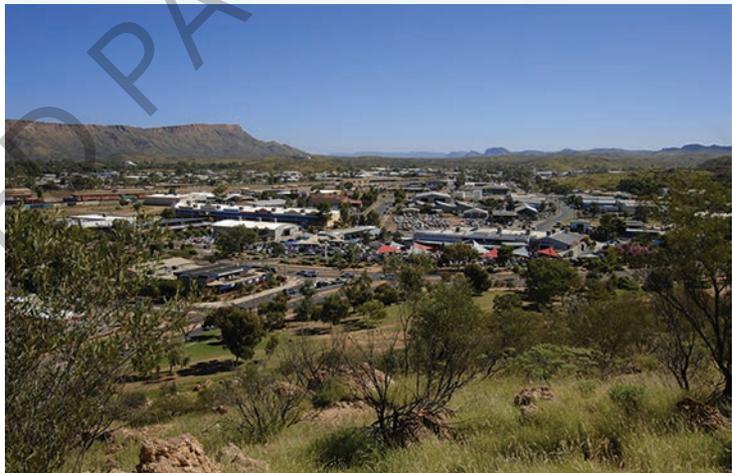
Ms Fulton and her legal guardian, Ian McKinlay, appealed to Northern Territory authorities to house Ms Fulton in a secure care facility near the prison in Alice Springs. This would allow her to stay close to her Alice Springs family and remain in specialist accommodation, built for people with intellectual disabilities and challenging behaviours. However, the application was rejected.

'They're leaving Rosie Anne in prison, neglected, forgotten and ignored,' Mr McKinlay said.

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda noted that Aboriginal and Torres Strait Islander people are over-represented in the justice system. 'It is a breach of Ms Fulton's human rights which must be urgently addressed,' he said.

**Disability Discrimination**  
Commissioner Graeme Innes agreed that it was unacceptable to put people in prison for indefinite periods when they have not been found guilty of a crime. 'Prison is simply not an alternative accommodation option for people with disabilities,' he said. 'We launched a report in February which demonstrated the lack of equal access to justice for Australians with disabilities, and this is just one example of a bigger problem.'

**FIGURE 3** Rosie Anne Fulton grew up living in the riverbeds around Alice Springs.



## DISCUSS

Is there a difference between acting ethically and acting within the law? Which is more important?

[Ethical Capability]

### 20.7 ACTIVITY

- Choose one of the courts in your state or territory. Use internet resources (such as the court's website, or an annual review or strategic plan) to find out what the court has done to ensure that everyone is treated fairly. (You might need to find the goal or purpose of the court.) Write down some of the things you see related to equality before the law.
- Use internet resources (including brochures or videos) to identify the services offered by the courts, or offered to those attending court, that ensure everyone is treated fairly. (Look for support and assistance or legal help.) List three of the services you discover.

**Examining, analysing, interpreting**

## 20.7 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

### 20.7 Exercise 1: Check your understanding

1. **CS1** Identify the ways in which it is against the law to discriminate against someone.
2. **CS1** List two approaches that the justice system could take to treat participants equally and fairly.
3. **CS1** Outline what is meant by the principle of equality before the law.
4. **CS1** What is the name of the international treaty that Australia has signed, which is designed to guarantee equality before the law?
5. **CS1** Identify two pieces of Australian legislation that are designed to protect citizens' rights.

### 20.7 Exercise 2: Apply your understanding

1. **CS3** Read the 'In jail, no fair trial' case study. In what ways has the justice system discriminated against Rosie Anne Fulton?
2. **CS2** Describe what could happen if the courts did not treat everyone fairly.
3. **CS6** Do you think that everyone who comes into contact with our courts is equal before the law? Justify your answer.
4. **CS6** Write a response debating the topic, 'Everyone is equal before the law.'
5. **CS4** Not all cases of similar crimes receive identical punishments. What factors do you believe could justify the handing down of more or less severe punishments for similar crimes?

Try these questions in learnON for instant, corrective feedback. Go to [www.jacplus.com.au](http://www.jacplus.com.au).

# 20.8 The independence of our courts

## 20.8.1 An independent judiciary

Independence of the **judiciary** is an important feature of Australia's legal system. This is the principle that our judges and courts need to be kept separate from the other two branches of Australia's government. An independent judiciary ensures that we continue to live in a democratic and just society. Judges and courts should not be subject to political influence from government, or from the political interests of any other person or organisation.

## 20.8.2 Separation of powers

The Australian Constitution supports the idea of the **separation of powers** to allow for three arms of government: a legislative arm, an executive arm and a judicial arm.

- *Legislative arm.* This is the parliament. Its function is to make new laws or to change or remove existing ones. Under the Constitution, parliament is the supreme law-maker. The courts are bound by legislation passed by parliament and by precedent.
- *Executive arm.* This arm of government administers the legislation passed by parliament. Executive power officially lies with the Governor-General or the Governor, who represents the Crown. It is government ministers and the public service who actually exercise this power. For example, the department of health is an Australian public service department which administers the running of Australia's health system. The head of this department reports to the minister for health.
- *Judicial arm.* This is the judiciary and the courts. They make judgements about the law, and are responsible for settling disputes and enforcing the law. The High Court of Australia is responsible for interpreting and applying the Constitution. It makes sure that the other arms of government do not act in a way that is outside the powers granted by the Constitution. The judiciary can for example declare that laws passed by parliament are unconstitutional, or require particular actions if they believe that a branch of government is not performing a constitutional duty.

The rationale behind the separation of powers is that it allows each arm of government to check and balance the powers of the others. This prevents any arm from becoming too powerful and in this way helps maintain a fair and just society.

**FIGURE 1** The separation of powers allows for three arms of government.



### 20.8.3 How we ensure that our judiciary remains independent

Two safeguards in the Constitution protect judicial independence: **security of tenure**, and the way in which judges are appointed.

#### Security of tenure

By appointing judges for a long period of time, we expect that they will be free to act independently. Judges who are secure in their position are more likely to decide cases and make rulings objectively even when they know that those decisions might be politically unpopular. Judges are commonly appointed until the age of 70, unless they choose to retire earlier. This makes it less likely that governments will be able to influence the decisions of judges.

#### The way in which judges are appointed

Judges are appointed by the Governor-General (or Governor in each state) acting on the advice of the government. They cannot be removed from office except by the Governor-General (or Governor), following an address from both houses of parliament. Judges cannot be removed from office just because a government disagrees with their decisions in court. Because judges cannot be easily removed by the executive or legislative arm, it is assumed that they can work independently and make decisions without fear of interference.

**FIGURE 2** Judges are appointed for an extended period of time and in a manner which promotes their independence from the other branches of government.



### 20.8.4 Do we really have an independent judiciary?

Judges and courts which only exist to do what a government wants them to do provide no guarantee of a fair and just society. Australia's judiciary is independent — to an extent. Even though judges and courts have the responsibility of interpreting the law, courts also make laws by establishing legal principles. This encroaches on the responsibility of parliament. Judges can make law through the use of common law but these law-making powers are limited.

Judges are formally appointed by the Governor-General (or Governor), who is part of the executive branch of government. Because this appointment is based on the recommendation of the government, there is a small conflict between the executive and judicial arms. However, this is considered to be a minor conflict and Australia's judiciary is generally thought to be independent.

**FIGURE 3** The judiciary is considered to be independent of the government in Australia, unlike the situation depicted here.



### 20.8 ACTIVITY

- Judges often comment on the principle of the independence of the judiciary. Using the internet or newspapers, find an article or commentary written by a judge or magistrate that refers to judicial independence. What opinion does the judge or magistrate hold? **Examining, analysing, interpreting**
- People in the community (including members of the public, journalists and politicians) often criticise the judiciary. Using the internet or newspapers, find an article or commentary referring to judicial independence that was written by (or quotes) a member of the public, a journalist or a politician. What opinion does this person hold? **Examining, analysing, interpreting**

### 20.8 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

#### 20.8 Exercise 1: Check your understanding

- CS1** Define judiciary.
- CS1** What is the role of the judiciary?
- CS2** Outline what security of tenure is and why it is significant in guarding judicial independence.
- CS2** Explain how the way in which judges are appointed protects their independence.
- CS2** Identify two roles the courts have in the way laws are made and interpreted in Australia.

#### 20.8 Exercise 2: Apply your understanding

- CS3** Look at **FIGURE 3**. What the judge is saying conflicts with the principle of judicial independence and the separation of powers. Explain why this is the case.
- CS5** Outline what the possible consequences might be if Australia's courts lost their independence.
- CS5** Explain how the High Court's role in interpreting the Australian Constitution can prevent the parliament from passing laws that may infringe the right of Australian citizens.
- CS5** Over the years there have been a number of members of parliament appointed as Justices of the High Court. Outline one possible advantage and one possible disadvantage of this practice.
- CS5** 'Rights and freedoms in Australia are protected because no arm of government has absolute power.' Explain how the judicial arm provides the balance required to achieve this principle.

Try these questions in learnON for instant, corrective feedback. Go to [www.jacplus.com.au](http://www.jacplus.com.au).

## 20.9 The right of appeal

### 20.9.1 Appeals

Any person involved in a court case who is not happy with the outcome of that case has the right to **appeal** the decision. This means they can ask a higher court to review it. However, there are some restrictions on who can appeal and under what conditions a person can appeal.

### 20.9.2 What is the right of appeal?

No legal system is perfect. When a case is heard for the first time, it is possible that a mistake can be made by the magistrate, judge or jury. As a result, the law often allows people to contest a court decision. This is known as the right of appeal. Our court hierarchy allows the decision of a lower court to be reviewed on appeal by a higher court.

All the courts have the ability to hear cases for the first time. This is called original jurisdiction. Some courts have the power to hear appeals from cases that were first held in lower courts. They might completely rehear a case or examine points of law. These courts are known as appeal courts. They have appellate jurisdiction.

An appeal court has the power to decide if the court hearing the case for the first time was correct or mistaken in its decision. The appeal court may agree with the result of the lower court's ruling. If it finds that the lower court's decision was mistaken, it will usually overturn the decision and replace it with its own.

There are several reasons why a party may appeal. These include:

- dissatisfaction with the decision of a court on the grounds of a question of fact
- disagreement with the court on a point of law
- contention over whether the remedy imposed by the lower court reflects the nature of the evidence presented at the trial.

**FIGURE 1** The right to appeal is necessary because our legal system sometimes makes mistakes, and someone can be wrongly sent to jail as a result.



### 20.9.3 Who can appeal?

The person appealing to the court is known as the **appellant** and the person defending the appeal is referred to as the respondent. Who can appeal depends on whether a case involves criminal or civil law.

In a civil case, any party can appeal a decision. Some appeals can only be heard if the court gives permission to the person wanting to appeal. This is called **leave to appeal**.

In a criminal case, only the people who are directly involved in the case can appeal — the accused and the prosecution. Members of the community do not have the right of appeal (this includes victims).

Note that:

- the prosecution can only appeal against a sentence; it cannot appeal against a verdict of not guilty
- a defendant can appeal against a guilty verdict and a sentence, or apply for leave to appeal against a sentence.

## 20.9.4 How do appeals work?

In Victoria, criminal and civil appeals are dealt with as follows:

- In criminal matters, the County Court hears most appeals from the Magistrates' Court. The Court of Appeal, a division of Victoria's Supreme Court, hears and determines appeals from the County Court and the trial division of the Supreme Court.
- In civil matters, there is no right of appeal from the Magistrates' Court to the County Court. Instead, an appeal from the Magistrates' Court proceeds directly to a single judge of the Supreme Court. Appeals from the County and Supreme Courts are referred to the Court of Appeal.

Appeals from the highest appeal court in each state and territory are heard by the High Court. There is no right of appeal to the High Court. Usually the applicant must obtain special leave from the High Court in order to have the case heard. The High Court normally agrees to hear only a small proportion of the appeals brought to it. It is the final court of appeal.

## 20.9.5 What happens in an appeal?

An appeal will usually only hear legal argument about a specific point, and the court will only consider the evidence that was given at the original trial or sentence. If an appeal against a verdict is successful, the court will either find the appellant not guilty or will order a new trial with a different judge and jury. If an appeal against a sentence is successful, it may be reduced or changed to a different type of sentence.

**FIGURE 2** Appeals can be heard before a single judge or a group of judges (usually two to five), depending on the court and the type of matter being heard. A jury is not used in an appeal.



## 20.9.6 Why do we have the right of appeal?

The appeal process promotes a fair society and protects us all from unjust decisions. If citizens did not have the right of appeal, there could be an increase in cases involving injustice. Parties not satisfied with the outcome of their case would have no opportunity to ask a higher authority to review a decision made by a lower court. The appeal process is therefore important for correcting any mistakes made by lower courts. This supports a democratic and just society.

**FIGURE 3** The High Court is the final court of appeal in Australia.



### 20.9 ACTIVITIES

1. Using the internet or newspapers, look up a case that has gone to appeal. Summarise in writing what the appeal was about and what result was achieved. **Examining, analysing, interpreting**
2. Find the website of a court in the Victorian court hierarchy. Research the process for appealing a court's decision. Present this process in the form of a diagram. **Examining, analysing, interpreting**

### 20.9 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

#### 20.9 Exercise 1: Check your understanding

1. **CS1** What is the right of appeal?
2. **CS1** Why might a party appeal a court's decision?
3. **CS1** Who can appeal a decision and under what circumstances?
4. **CS2** Briefly outline what happens in an appeal.
5. **CS2** Describe the difference between original and appellate jurisdiction.

#### 20.9 Exercise 2: Apply your understanding

1. **CS2** Explain the process for appealing a court's decision.
2. **CS5** 'The right of appeal is an important principle of Australia's justice system.' Do you agree or disagree with this statement? Give reasons for your answer.
3. **CS6** Imagine you have been found guilty of a crime that you did not commit. What would happen to you if there was no right of appeal?
4. **CS5** Although the High Court is the highest court of appeal in Australia, relatively few appeal cases are heard by this court. Identify and explain one reason why this is the case.
5. **CS4** Critics of the appeal process say that it allows a guilty person to keep on appealing and avoiding responsibility for their actions. Give reasons as to why you agree or disagree with this view.

Try these questions in learnON for instant, corrective feedback. Go to [www.jacplus.com.au](http://www.jacplus.com.au).

## 20.10 When the system fails

### 20.10.1 Factors that can undermine the system

Our legal system is based on a number of principles that exist to make sure that anyone who makes contact with a court is treated fairly and receives justice. However, the system does not always work perfectly. Several factors can undermine the application of these principles. These include bribery, coercion of witnesses, trial by media and court delays.

### 20.10.2 Bribery

**Bribery** might occur in the justice system if someone tries to offer money, a gift or any other item of value to a judicial officer (such as a judge) or any other public official (such as a police officer) in the expectation that the person receiving the bribe will act in the briber's interests. A person might bribe a juror to make a certain decision, or bribe a witness to present a false testimony or withhold the truth. Note that it is illegal to give or receive a bribe.

Bribery is an offence under common law in many of the states and territories in Australia. Some states also have legislation referring to bribery. Under the Commonwealth *Criminal Code Act 1995*, the offence of bribing a public official is punishable by ten years in prison or a fine of \$2.1 million, or both, for an individual. A corporation can be fined either \$21 million, or three times the value of the benefit its management hoped to gain from the bribe, or 10 per cent of its annual revenue for the 12-month period before the bribe was attempted.

Bribery can undermine the principles of our system of justice. Judges who accept a bribe are no longer independent. They have agreed to alter their behaviour and act in someone else's interests. Witnesses who have been bribed may not present the truth or the full truth, which means that a fair trial will not occur. A jury that reaches a decision after receiving a bribe may reach the incorrect decision.

**FIGURE 1** Bribery can involve money, a gift or any other item of value. It undermines the principles of justice because it prevents the truth or interferes with a correct decision being made.



### 20.10.3 CASE STUDY: The bribe's in the mail

Police investigated a possible attempt to bribe judges in Victoria after several cheques were received in the mail in July 2012. The mail was addressed to judges and court officials at the Victorian Supreme Court. The cheques were discovered through the court's mail-handling security protocols. A court spokeswoman said, 'All envelopes were similar in appearance. Court staff opened one envelope, revealing a cheque made out to the addressee.' It is believed that all the suspicious envelopes opened were found to contain cheques.

### 20.10.4 Coercion of witnesses

**Coercion** of witnesses is against the law. A person must not coerce or attempt to influence a witness in a court case to provide a false testimony, withhold the truth, or avoid turning up to court at all. Witnesses could be intimidated or bullied while attending court, or at their home or place of work by an offender, a family member of the offender or an accomplice of the offender who knows or discovers where the

witness lives or works. A court might make an order to stop the threatening or intimidating behaviour, or to stop the person attempting the coercion from coming near the witness again. The justice system can also offer protection programs if necessary, including protecting the identity of a witness and even relocating a witness.

Coercion of witnesses is covered by different legislation in each state and by the federal *Crimes Act 1914*, where it is referred to as ‘corruption of witnesses’. Depending on the state, the charge of threatening, corrupting or influencing a witness can result in sanctions including a fine, good behaviour bond, suspended sentence or prison sentence.

Influencing or coercing a witness can undermine the principles of our justice system. Evidence presented in court will become misleading and an incorrect verdict could result. An accused person who should be found guilty may instead be found not guilty. Conversely, an innocent person may be found guilty. A court trial would not hear the truth and therefore the trial would not be fair. Justice would not be served.

### 20.10.5 CASE STUDY: Please don't go to court

An 18-year-old man from Woollamia, New South Wales, was committed for trial in the District Court in February 2014 for influencing a witness to not give evidence in court. He was also charged with perverting the course of justice. Recordings produced by the police revealed that the accused was contacted by an inmate at the South Coast Correctional Facility. The police alleged that the prisoner asked the accused to go to another man's house and tell him not to appear in court to provide evidence relating to another inmate's matter before a court. The man who was the subject of the coercion was ordered to appear in the District Court in March.

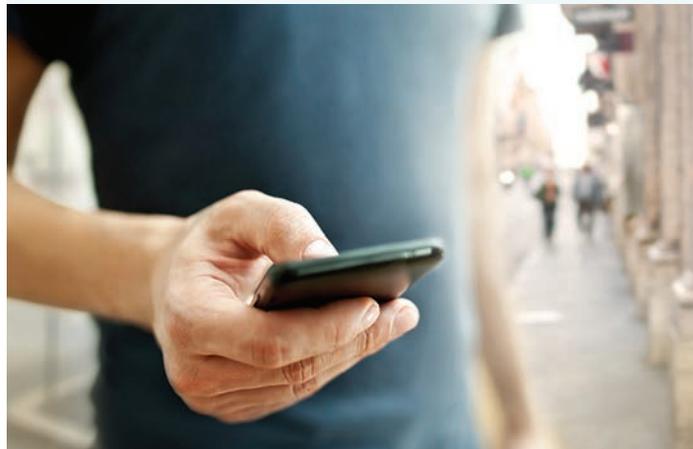
### 20.10.6 Trial by media

The media, including television and newspapers, will cover court cases. At times, this coverage can have an impact on the accused's reputation by creating widespread opinion regarding the person's guilt or innocence before the trial has occurred or before a verdict has been delivered. This is referred to as **trial by media**. A high-publicity case, where the reporting of events can create a frenzy, can make a fair trial nearly impossible.

**FIGURE 2** Threatening or intimidating behaviour towards a witness is illegal, whether this occurs inside the court or elsewhere.



**FIGURE 3** It is illegal to contact witnesses in order to influence them to change what they say in court or even to not appear in court.



In Australia, strict laws regarding contempt of court restrain the media from what it can report after a person is formally arrested or charged. These laws are designed to make sure that a defendant receives a fair trial in front of a judge or jury that has not formed an opinion biased by prior media coverage.

Courts take contempt laws very seriously. This is because justice can only occur when courts are able to operate independently, unhindered by outside interference, and are free to make a fair judgement. If the media publishes information about the accused's prior convictions before the end of a trial, disobeys a court order or interviews witnesses, the judge or jury may become prejudiced against the defendant. The opportunity to have a fair trial would therefore be lost.

**FIGURE 4** Trial by media can seriously impact an accused's chances of receiving a fair trial.



### 20.10.7 CASE STUDY: Trial by media

3AW radio broadcaster Derryn Hinch was found guilty of contempt of court in 2013 for breaching a suppression order made by a Victorian Supreme Court Justice. Hinch published tweets and blog entries about Melbourne woman Jill Meagher's murderer during court proceedings, referring to the accused's parole status. Melbourne newspapers then published front-page stories outlining the defendant's past, claiming that he was going to plead guilty. Hinch was ordered to pay a \$100 000 fine, but he refused to pay and spent 50 days in prison instead.

**FIGURE 5** Radio broadcaster Derryn Hinch

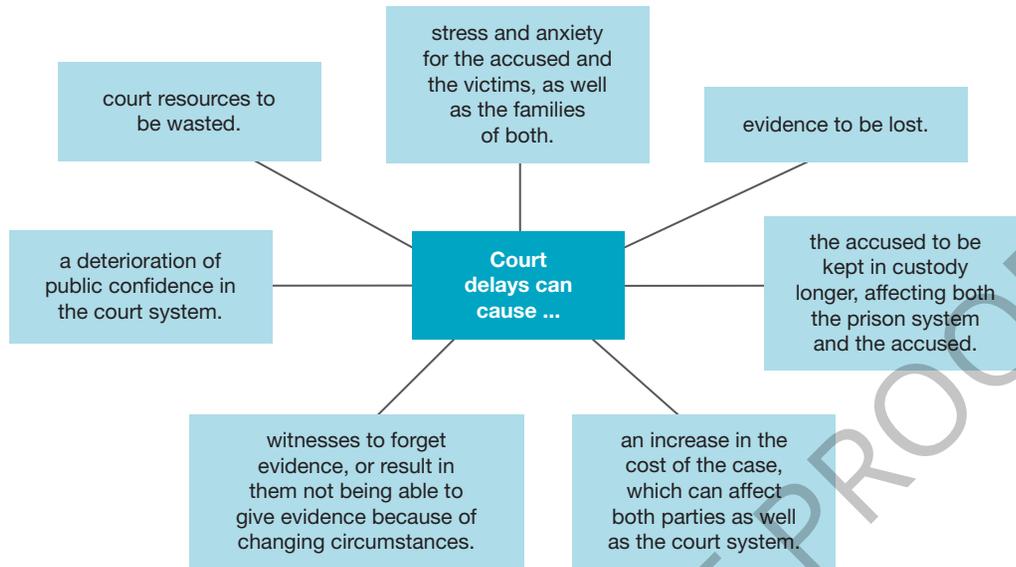


### 20.10.8 Court delays

There is an old saying in law: 'Justice delayed is justice denied.' It suggests that if a person is wronged in some way and a dispute needs to go to court but does not do so in a timely fashion, then there might as well have been no court case at all. Justice has not taken place. A **court delay** can undermine the application of the principles of justice. Yet there is no right in Australia, either under common law or in legislation, to have a court case conducted within a reasonable period of time.

However, the International Covenant on Civil and Political Rights, to which Australia is a signatory, states that anyone charged with a criminal offence is entitled 'to be tried without undue delay'. Numerous reviews and inquiries into court delays have been undertaken to explore why they happen and what can be done about the problem. Some of the problems caused by court delays are illustrated in **FIGURE 6**.

**FIGURE 6** Problems caused by court delays



Unnecessary delays can occur before the trial starts (between the date the case is committed to go to trial and the actual commencement date), or during the trial itself, making the court case drag on longer than necessary.

There are many reasons for delays that can cause a trial to last longer than necessary. These include:

- either side insufficiently or inadequately preparing its case
- lack of legal representation
- complex evidence and complex cases
- witnesses facing difficulties in getting to court
- either party using delaying tactics when in court.

Delays can also occur simply because the courts have more cases to deal with. This can happen for many reasons, including:

- a rise in the crime rate
- an increase in police numbers
- changes in population
- availability of legal aid
- changes in government policy
- changes in the law.

**FIGURE 7** Delays during trial can occur for various reasons and can undermine the principle of justice that the accused is entitled to be tried without undue delay.



### 20.10 ACTIVITIES

1. Construct a concept map or diagram that explains the impact that bribery, coercion of witnesses, trial by media and court delays have on the justice system. **Reasoning, creating, proposing**
2. Using the internet, newspapers or magazines, find pictures related to one factor that undermines the justice system. Attach the pictures to a page in your notes. Label each picture with one effect the factor has on justice and what can be done to lessen that effect. **Examining, analysing, interpreting**
3. Using the internet or newspapers, find a case involving bribery, coercion of witnesses, trial by media or a court delay. Write down the main facts of the case. **Examining, analysing, interpreting**

4. Working in groups of three or four, plan a video presentation explaining one of the factors undermining the justice system. Your plan should make the video engaging so that it will help viewers fully understand the factor, how it undermines the justice system and what the possible solutions are. Use internet resources and be creative in how you present your plan.

**Communicating, reflecting**

## 20.10 EXERCISES

**Civics and Citizenship skills key:** **CS1** Remembering and understanding **CS2** Describing and explaining **CS3** Examining, analysing, interpreting **CS4** Questioning and evaluating **CS5** Reasoning, creating, proposing **CS6** Communicating, reflecting

### 20.10 Exercise 1: Check your understanding

- CS1** Identify the factors that can undermine the principles of justice.
- CS1** Outline one example of the way in which bribery can undermine the legal system.
- CS1** How has the legal system attempted to deal with the possibility of coercion of witnesses?
- CS1** What action do judges sometimes take to avoid trial by media?
- CS1** Identify two parties who might be disadvantaged by delays in court proceedings.

### 20.10 Exercise 2: Apply your understanding

- CS6** Choose one of the case studies in this section and write a letter to an editor of a newspaper expressing your opinion on the issue in the case study. Clearly identify the issue and explain its key features. Outline what you think should be done to solve the problem.
- CS3** Copy and complete the following table to predict some of the likely outcomes of the situations shown. Suggest what should happen. (The first situation has been completed for you.)

Situation	Likely outcomes	What should happen
Vince tells a witness in a murder trial that \$100 000 will be transferred to her bank account if she changes what she will say when she is questioned in court.	<ul style="list-style-type: none"> <li>If the witness accepts the bribe, the truth of the case may never be heard.</li> <li>If the witness accepts the bribe and the bribe is discovered, she could be charged with accepting the bribe as well as lying in court (perjury).</li> <li>If the bribe is discovered, Vince could be charged with bribing a witness or influencing a witness.</li> </ul>	<ul style="list-style-type: none"> <li>The witness should not accept the bribe.</li> <li>Vince should not make the offer to pay the witness.</li> </ul>
Eve offers a judge \$250 000 to reduce the sentence for her boyfriend, who has been found guilty of manslaughter.		

(continued)

(continued)

Situation	Likely outcomes	What should happen
Sevilla tells a witness in a court case that her cousin will kill her if she turns up at the trial.		
Michael is a journalist who writes a story proclaiming that Kirby is guilty the day after she has been arrested and charged by the police.		
Chan is representing Hugh in his court case and decides to delay proceedings to the extent possible.		

3. **CS5** What do you believe would be the most appropriate strategy to prevent possible bribery or coercion of witnesses?
4. **CS3** Several years ago, a judge dismissed a jury part-way through a criminal trial and ordered a fresh trial, because one of the jurors had attempted an internet search of newspaper articles relating to the crime. What problem with the system was the judge attempting to overcome?
5. **CS5** Justice delayed is justice denied. What would you interpret to be the meaning of this statement?

Try these questions in learnON for instant, corrective feedback. Go to [www.jacplus.com.au](http://www.jacplus.com.au).

## 20.11 SkillBuilder: Creating and analysing a survey

online only

### What is a survey?

A survey is the process of collecting data for the purpose of analysing an issue. It consists of putting a set of questions to a sample group of people. For example, a political party may conduct a survey to find out whether citizens are satisfied with their policies.

### Select your learnON format to access:

- an explanation of the skill (Tell me)
- a step-by-step process to develop the skill (Show me)
- an activity to allow you to practise the skill (Let me do it).



# 20.12 Thinking Big research project: Protecting human rights

online only

## SCENARIO

There are a number of different bodies, both in Victoria and across Australia, that protect human rights and attempt to ensure equality before the law. Your task is to investigate and prepare a presentation on the aims, actions and regulations of one of these organisations.

Select your learnON format to access:

- the full project scenario
- details of the project task
- resources to guide your project work
- an assessment rubric



## on Resources



**ProjectsPLUS** Thinking Big research project: Protecting human rights (pro-0198)

# 20.13 Review

online only

## 20.13.1 Key knowledge summary

Use this dot point summary to review the content covered in this topic.

## 20.13.2 Reflection

Reflect on your learning using the activities and resources provided.

## on Resources



**eWorkbook** Reflection (doc-31734)  
Crossword (doc-31735)



**Interactivity** Australia's justice system and the courts crossword (int-7654)

## KEY TERMS

**adversary system** a system of trial in which the two sides argue their case and the judge or magistrate acts as an independent umpire

**appeal** the request to a higher court to review a decision made by a lower court

**appellant** the person appealing a court decision

**appellate jurisdiction** the power of a court to review a lower court's decision

**arbitration** the process of resolving a dispute by an independent third party, such as a court or tribunal, where the decision is legally binding on the parties

**bail** an agreement to release an accused person into the community while awaiting trial

**bribery** the act of giving money, a gift or any other item of value to a recipient in the expectation that it will alter the recipient's behaviour

**coercion** the practice of forcing someone to act in an involuntary manner by using intimidation or threats, or some other form of pressure

**common law** judge-made law, or law developed by judges through the decisions in actual cases brought before the courts

**conciliation** a process of settling disputes in which a neutral third party (a conciliator) assists the parties to reach agreement. It differs from mediation in that the conciliator can suggest solutions to the parties.

**consent order** a written agreement reached by the parties to a dispute and approved by the court

**court delay** a setback in the legal system that prevents justice from occurring in a timely fashion

**defendant** a person against whom a legal action has been brought

**discrimination** the treatment of an individual in an unfavourable manner based on an actual or perceived personal characteristic protected by the law

**duty of care** a responsibility to ensure the safety of any persons whom we can reasonably foresee might be affected by our actions

**human rights** the basic rights that are considered to be the entitlement of all humans

**industrial relations** refers to the laws and processes that govern the relationships between employers and employees

**judge** a court official who presides over cases in courts higher than a magistrates court or Local Court

**judiciary** the collective name given to the judges who preside over law courts

**jurisdiction** the power or authority of a court to hear specific types of disputes and cases

**jury** in criminal cases, the 12 people who are randomly selected to decide the guilt or innocence of an accused based on the evidence presented in court

**leave to appeal** permission from the court to appeal a decision

**magistrate** a court official who hears cases in the lowest court in the legal system

**manslaughter** the accidental or unintentional killing of one person by another person

**mediation** a process of settling disputes in which a neutral third party (a mediator) assists the parties to reach agreement. Mediators do not offer solutions; they help the parties to reach agreement through their own suggestions.

**negligence** failure to take reasonable care when a person or organisation is legally required to do so

**original jurisdiction** the power of a court to hear and decide a case for the first time

**plaintiff** a person who commences a legal action in a civil case

**precedent** a legal principle that is established by a court in resolving a dispute and is expected to be followed in later cases

**prosecute** to take legal action against a person accused of a crime

**recklessness** continuing on a particular course of action despite realising that doing so might result in harm to others

**remanded in custody** to be held by the authorities until a case is heard in court

**remedial action** action taken to restore a site to its previous or natural condition, or to an equivalent condition

**security of tenure** the constitutional guarantee that a political office holder cannot be removed from office except under exceptional circumstances

**separation of powers** the division of government into the executive, the legislature (parliament) and the judiciary with the aim of providing a system of checks and balances that prevents the excessive concentration of power in one group

**surety** when bail is granted, a sum of money deposited with a court as a guarantee that an accused will abide by the conditions of bail and will appear in court when required to do so

**trial by media** creating widespread opinion regarding a person's guilt or innocence before a trial has occurred or before a verdict has been delivered

**Universal Declaration of Human Rights** a declaration passed by the United Nations outlining the fundamental human rights of all people in the world