

# HUMAN RIGHTS

CORE AREA OF STUDY

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*Does the Australian legal system adequately protect and enforce individual rights?*

“The legal and political provision of individual rights creates responsibilities for individuals and society. Australian law attempts to balance the rights and responsibilities of the individual with the best interests of the greater community.”

(QUEENSLAND LEGAL STUDIES SENIOR SYLLABUS, 2013)

# CHAPTER 1

## WHICH CURRENT LEGAL ISSUES RELATE TO HUMAN RIGHTS FOR AUSTRALIANS?

### *FOCUS TOPICS*

- 1.1 HUMAN RIGHTS IN AUSTRALIA
- 1.2 INTERNATIONALLY RECOGNISED HUMAN RIGHTS
- 1.3 CURRENT HUMAN RIGHTS ISSUES FOR AUSTRALIANS
- 1.4 HUMAN RIGHTS, LEGAL RIGHTS AND LEGAL DUTIES

### *FOCUS OBJECTIVES*

To understand and appreciate:

- ▶ Australians live in a free society where human rights are extremely important and highly valued;
- ▶ Australia's involvement in human rights occurs in a global context;
- ▶ there are a range of circumstances which give rise to issues about human rights for Australians; and
- ▶ all human rights are not necessarily protected in the Australian legal system by a corresponding legal right.

## 1.1 HUMAN RIGHTS IN AUSTRALIA

A **human right** is:

*that which is ethically good and proper and in conformity with the moral Law as it pertains to people*

SOURCE: MACQUARIE DICTIONARY

**Human rights** in Australia today are constantly under consideration because of the nature of our social and political systems. Our **democratic traditions** encourage open discussion and engagement when we are faced with challenges that arise because of our present circumstances, our historical past, or because of our place in the world. In the relatively recent past, our community has been challenged by the legacy of disadvantage and discrimination imposed on Indigenous Australians. Our international relationships and our role in the international



community have seen Australia involved in armed conflict and in military peacekeeping obligations in countries outside Australia. The perception of Australia as a free country, as a land of relative opportunity with a high standard of living, has made it attractive to displaced persons from other countries. Asylum seekers from persecution and armed conflict in overseas countries have arrived in large numbers by boat. The lives of many Australians continue to be affected by gender issues, workplace issues, homelessness, and environmental concerns.

Clearly, we see ourselves in an **international context**, as part of a wider world community, and in particular, as part of the **Asian community**. This raises issues for us about human rights, and influences our social, political, and economic responses to these issues. The international context is introduced next because it will help you to put into perspective the various current issues which we then identify in the next part of this chapter.

## 1.2 INTERNATIONALLY RECOGNISED HUMAN RIGHTS

The United Nations ([www.un.org](http://www.un.org)) was formed in 1945 as a concerted, worldwide effort to foster and protect peace and understanding within and between nations. The atrocities perpetrated against millions of innocent people during World War II led to the global recognition of human rights in the United Nations' *Universal Declaration of Human Rights 1948* (the *Universal Declaration*). In the Preamble, the General Assembly of the United Nations proclaims the *Universal Declaration* as:

*... a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance ...*



As an original member of the United Nations, the Australian Government has formally committed itself to passing laws to uphold the letter and the spirit of the *Universal Declaration*. Although not part of Australian law, the *Universal Declaration* is an international benchmark by which Australia's laws can be evaluated in terms of their fairness to specific individuals and groups within our society.

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (Article 26(1))

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. (Article 25(1)(2))

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (Article 24)

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(1)(2))

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives ... The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (Article 21 - excerpts)

Everyone has the right to freedom of peaceful assembly and association (for example, unions, churches). No one may be compelled to belong to an association. (Article 20(1)(2))

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (Article 1)

Everyone has the right to life, liberty and security of person. (Article 3)

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. (Article 4)

All are equal before the law and are entitled without any discrimination to equal protection of the law. (Article 7 - excerpt)

No one shall be subject to arbitrary arrest, detention or exile. (Article 9)

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Article 10)

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. (Article 12 - excerpt)

Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country. (Article 13(1)(2))

Everyone has the right to seek and enjoy in other countries asylum from persecution. (Article 14(1))

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (Article 16 - excerpts)

Everyone has the right to own property alone as well as in association with others. (Article 17 - excerpt)

Everyone has the right to freedom of thought, conscience and religion ... (Article 18 - excerpt)

Everyone has the right to freedom of opinion and expression ... (Article 19 - excerpt)

### Examples of rights/ freedoms recognised in the *Universal Declaration of Human Rights 1948*



*It is our duty to ensure  
that these rights are a  
living reality – that they  
are known, understood  
and enjoyed by  
everyone, everywhere.*

UN Secretary General  
Ban Ki-moon, 2007

*Practical application*

P

1. Obtain a copy of the full text of the *Universal Declaration*. In your class divide into small groups (six or less) and, using the *Universal Declaration* as a basis, brainstorm the rights which you think should be represented in the Australian legal system. Make a list. Use the words 'Right to ...' before each of the rights you identify. For example, 'Right to a fair trial'.  
Choose those which you think are the most important. Justify your choice. [K] [I] [R]
2. Are any of the rights you have chosen not represented in the *Universal Declaration*? Why is this so? [I] [R]

**1.3 CURRENT HUMAN RIGHTS ISSUES FOR AUSTRALIANS**

Have you ever complained to a parent, a teacher or perhaps another student, "How unfair is that!?" You might have heard someone else exclaim this when punished for something they claim not to have done or where they may believe the punishment is unjust. When you think something is unfair, you usually do so because it infringes some right we believe we have, for example, if you are given a detention for something you did not do.



The word, 'rights', comes to mind when we believe the law is unjust in the way it is applied to a person or a group of people. The following scenarios give rise to a wide range of human rights issues affecting the parties and others in the community.

*Practical application*

P

- We have set out some examples of current issues in the following 'snapshots' that may raise human rights for you to consider. For each one, respond to the following question:
- What issues affecting human rights, if any, are raised in the context of each example given? Describe each of the rights you identify using the expression "The right to...". [K] [I]

**CHILD SEX ABUSE**

The full extent of child sexual abuse will shock the nation when the Royal Commission begins its hearings today, advocacy groups and victims' lawyers have warned. But with an average of 23 new calls a day and a waiting list already of 1400 victims wanting to tell their stories in private hearings, the Royal Commission into institutionalised child sex abuse has said it expects to hear from many thousands of survivors of child sexual abuse as it investigates where institutions went bad.

SOURCE: *THE COURIER MAIL*, 16 SEPTEMBER, 2013.

**CHILDREN WITH SPECIAL NEEDS**

The Northern Territory information statement of June 1988, which currently still applies in that territory, states:

*Children who are recognised as having special needs should have access to education programs which are appropriate to those needs.*

*If it is at all possible for a child to receive an appropriate education in a regular classroom, that is where it should be provided. Only when this mainstream experience is demonstrably not in the best interests of the child should a less integrated placement be sought. When such an alternative placement is arranged, a full range of support services should be available.*

SOURCE: WWW.HUMANRIGHTS.GOV.AU/PUBLICATIONS, ACCESSED 20/11/2013.



## WHEELCHAIR ACCESS

After a three-and-a-half year legal battle, Julia Haraksin has won a discrimination case against a bus company that wouldn't let her book a trip because it did not have wheelchair accessible vehicles. Ms Haraksin, who was born with brittle bone disease, said she hopes the victory in the Federal Court on Thursday will inspire other disabled people to take action when they have been discriminated against. Ms Haraksin tried to book a trip from Sydney to Canberra with coach company Murrays Australia in August 2009 so she could attend a conference, but was told her booking could not be taken because the buses could not accommodate wheelchairs.

SOURCE: EXTRACTS FROM 'WOMAN WINS DISCRIMINATION CASE', *THE SYDNEY MORNING HERALD ONLINE* (WWW.SMH.COM.AU), 14 MARCH, 2013, BY STEPHANIE GARDNER.



## MENTAL ILLNESS

Mentally ill people detained by the criminal justice system are frequently denied treatment. Sometimes they are subjected to brutality. For example, a young woman with a history of psychotic episodes, who was in jail, was subjected to inhumane treatment.



*When she expressed her delusional beliefs to prison officers, she was told not to tell lies and was transferred to a 'dry' cell because of her disruptive behaviour. When she went to the toilet and realised the toilet could not be flushed, that there was no toilet paper and she could not wash her hands, she became increasingly psychotic and her agitation increased. She began screaming and was told that the longer the noise continued the longer she would remain in this cell.*

SOURCE: EXTRACTS FROM A SPEECH AT THE MENTAL HEALTH, CRIMINAL JUSTICE AND CORRECTIONS CONFERENCE, MARRICKVILLE (19 OCTOBER 2001) BY DR SEV OZDOWSKI OAM, HUMAN RIGHTS COMMISSIONER.

## THE HEALTH OF INDIGENOUS AUSTRALIANS

Aboriginal and Torres Strait Islander People can expect to live substantially shorter lives than other Australians - up to 20 years less in some cases. Babies born to Aboriginal mothers die at more than twice the rate of other Australian babies, and Aboriginal and Torres Strait Islander people experience higher rates of preventable illness such as heart disease, kidney disease and diabetes. It is a health crisis you would associate with an impoverished nation, but it is happening right here in our own backyard.

SOURCE: WWW.OXFAM.ORG.AU/CLOSE THE GAP, ACCESSED 21 NOVEMBER 2013.

## SLAVE LABOUR

The widow of indigenous crusader Eddie Mabo wants to open the door on one of the darkest chapters of Queensland history. Today marks the 150th anniversary of the arrival of South Sea Islanders to work as virtual slaves on Queensland farms. Bonita Mabo will use the occasion to step up an equal rights campaign for "the other stolen generation".

SOURCE: EXTRACTS FROM 'MABO PLEA FOR LOST ISLANDERS', *THE SUNDAY MAIL*, 25 AUGUST, 2013, BY JEREMY PIERCE ROBERTSON.

## FAIR TRIAL

Most of Australia has heard about the death of Allison Baden-Clay. She went missing on 20 April (2012) in Brookfield, on Brisbane's outer west ... her body was found two weeks later at Kholo Creek in Brisbane on April 30 ... I knew that we were in the beginning of a trial by media. Lo and behold, Gerard Baden-Clay, her husband, has now been charged with her murder, and interfering with a corpse.

Various social media and other website commentators have not disappointed me in their attitudes. Comments like: "I knew it was him", "It's always the husband", "He had an affair and just killed her so that he didn't have to go through the financial mess of a divorce" have been popping up all over the place. It is absolutely outrageous.



People reading and commenting on this case remember this: Gerard Baden-Clay is innocent until proven guilty. He is innocent until the DPP proves otherwise and he is found guilty beyond a reasonable doubt by a jury. People made presumptions about Lindy Chamberlain, too. Look how well that turned out.

SOURCE: EXTRACTS FROM 'GERARD BADEN-CLAY: INNOCENT UNTIL PROVEN GUILTY', *KIKIANDTEA.COM*, 14 JUNE, 2012, BY TAMSIN HOWSE, EDITOR-IN-CHIEF.

## VOTING



Opponents of compulsory voting have mounted strong arguments since its introduction in Queensland in 1915 and across Australia in 1924. The most common is that it's an ideological paradox to force citizens to participate in any action said to strengthen the democratic fabric. An equally common argument is uninformed voters will "cancel out" more informed voices. In what has been labelled the "pollution of the polls", it's said apathetic voters increase the number of informal votes and elect governments on spurious reasons such as a leader's appearance.

Another is just 32 countries opt for compulsory voting and just 19 of those enforce it. As the only English-speaking nation on the list, perhaps it's time we joined Britain, the US and New Zealand in offering voluntary voting. A less commonly cited argument says compulsory voting creates safe parliamentary seats for comfortably ensconced MPs who, in never fearing defeat, become lazily nonchalant.

SOURCE: EXTRACTS FROM 'BURDEN OF BALLOT MUST BE WEIGHED CAREFULLY', *THE COURIER MAIL*, JANUARY 5, 2013, BY PAUL WILLIAMS, SENIOR LECTURER, GRIFFITH UNIVERSITY SCHOOL OF HUMANITIES.

## WORKER PARTICIPATION

*There is barely an occupation, a job, sector or an age group where women do not earn less, often hugely less, than men.*

*As Justice Mary Gaudron, the first woman appointed to the High Court, famously said in 1979: "Equal pay was won in 1969 and again in 1972 and yet again in 1974." And, she added, "We still don't have it".*

SOURCE: 'GENDER PAY GAP STILL A DISGRACE', 5 JANUARY 2013 DR ANNE SUMMERS. SEE *LEGAL STUDIES FOR QUEENSLAND VOLUME 2 (SIXTH EDITION)*, PAGE 22.

## PREGNANT WOMEN

A Melbourne retail company which breached discrimination laws by reducing a worker's hours after she fell pregnant has agreed to apologise and pay compensation. Shawna Pty Ltd, which trades as home wares retail outlet 'Good Housekeeping Australia - Cranbourne', has also agreed to revamp its workplace policies. The company has agreed to the corrective actions under the terms of an *Enforceable Undertaking* it has entered into with the Fair Work Ombudsman.

The employee, a retail assistant in her early 20s, informed Shawna's owner-operator, Hui Zhou, that she was pregnant in 2011. Zhou then sent her a text message stating: "You have a baby now, and I can't let you too tires (sic)". Zhou later told the employee - who was working 23-to-27 hours per week before becoming pregnant - that her work hours would be reduced to only seven per week and she could accept this or resign. The employee subsequently resigned, in what the Fair Work Ombudsman found was a 'constructive dismissal' of the employee under workplace laws.

SOURCE: EXTRACTS FROM 'RETAIL OUTLET DISCRIMINATED AGAINST PREGNANT EMPLOYEE', FAIR WORK AUSTRALIA MEDIA RELEASE, 12 FEBRUARY, 2013.

## CASUAL WORKERS

Australia's growing mass of casual workers face increased job anxiety and risk of sexual harassment. While nearly a quarter of the workforce do not feel very secure in their jobs, this rises to a third among those in part-time or contract employment. And in the weekly battle for securing work hours, casual workers who make complaints about unfair treatment or sexual harassment are being left off the roster.



SOURCE: EXTRACTS FROM 'FORGOTTEN CASUAL WORKERS FACE DAILY ANXIETY AND SEXUAL HARASSMENT', NEWS CORP AUSTRALIA NETWORK, 28 JULY, 2013, BY JACKSON GOTHE-SNAPE.

## SEX-CHANGE CHILDREN

Two 16-year-olds will have irreversible gender-changing treatment so a boy can become a girl and a girl a boy, after a court decision. A Family Court judge has made orders in a joint decision, allowing both sets of supportive parents to consent to puberty-blocking drugs and irreversible hormone treatment for teens.

SOURCE: 'COURT TICKS GENDER SWITCH', *THE COURIER MAIL*, 8 AUGUST, 2013, BY KAY DIBBEN.

## THE ENVIRONMENT & THE GREAT BARRIER REEF

*Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.*

SOURCE: KLAUS TOEPFER, *STATEMENT IN CONTEMPORARY PERSPECTIVES ON HUMAN RIGHTS LAW IN AUSTRALIA*, 2013, PAULA GERBER AND MELISSA CASTAN, EDS. SESSION OF THE COMMISSION ON HUMAN RIGHTS, 2001,



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The World Heritage Status of the Great Barrier Reef (GBR) is under threat from the coastal development of major new ports. An international mission from the UNESCO World Heritage Centre visited Australia in 2012 to assess the state of conservation of the GBR. It concluded that the scale of coastal development currently being proposed and consented to presents a significant risk to the GBR, and that *the scale and pace of development proposals appear beyond the capacity for independent, quality and transparent decision-making.*

SOURCE: *LEGAL STUDIES FOR QUEENSLAND VOLUME 2*, SIXTH EDITION, PUBLISHED 2013, PAGE 110.

## ABORTION

Women's groups have issued a call to arms after the controversial "Zoe's law" Bill passed a conscience vote in the NSW Lower House. Seen by some as an infringement of women's reproductive rights and others as a law to ease victims' suffering, the Bill passed 63 votes to 26 yesterday. The Bill was named in honour of the unborn child of Brodie Donegan, who was hit by a drug-affected driver on Christmas Day in 2009. Zoe was stillborn. The proposed changes would allow someone to be charged with harming a foetus that is either 20 weeks or 400g by allowing it to be treated as a living person. Independent MP Alex Greenwich said the Bill put female reproductive rights at risk, providing "personhood to a foetus, giving it rights that could be at odds with a pregnant woman's".

SOURCE: 'WOMEN'S GROUPS UP-IN-ARMS OVER "ZOE'S LAW"', *THE COURIER MAIL*, 22 NOVEMBER, 2013.

## EUTHANASIA



NATHAN VERHELST, WHO WAS BORN NANCY, HAS BEEN EUTHANISED ON HIS REQUEST AFTER A BOTCHED SEX CHANGE IN BELGIUM. (IMAGE SOURCE: WWW.NEWS.COM.AU)

A 44-year-old man who was born a woman has been euthanised in Belgium on the grounds of "unbearable psychological suffering." The Telegraph reports that Nathan Verhelst, who was born Nancy, was given legal euthanasia by Wim Distelmans, a cancer specialist who made headlines last year when he gave 45-year-old twins Marc and Eddy Verbessem lethal injections because they feared they were going blind as well.

Verhelst told Belgian newspaper *Het Laatste Nieuws* that he had hormone therapy in 2009, followed by a mastectomy and a penis construction in 2012 but "none of these operations worked as desired". "I was the girl that nobody wanted," he said in the hours before her death. "While my brothers were celebrated, I got a storage room above the garage as a bedroom. 'If only you had been a boy', my mother complained. I was tolerated, nothing more."

"I was ready to celebrate my new birth," he told the newspaper. "But when I looked in the mirror, I was disgusted with myself. My new breasts did not match my expectations and my new penis had symptoms of rejection. I do not want to be... a monster. "

SOURCE: EXTRACTS FROM 'NATHAN VERHELST EUTHANISED IN BELGIUM AFTER BOTCHED SEX CHANGE', *NEWS LIMITED NETWORK* (NEWS.COM.AU), 2 OCTOBER, 2013.

## DEATH PENALTY

[Federal] Opposition back-bencher George Christiansen says the Federal Government should clear the way for states to introduce the death penalty by revoking international conventions. The Mackay-based MP told *The Courier Mail* he wanted to see the death penalty introduced for serious crimes including murder involving sexual assault.

# CHAPTER 2

## WHAT ARE THE SOURCES OF INDIVIDUAL RIGHTS IN AUSTRALIA?

### *FOCUS TOPICS*

- 2.1 INTRODUCTION
- 2.2 INTERNATIONAL CONVENTIONS
- 2.3 THE COMMON LAW
- 2.4 THE CONSTITUTION OF AUSTRALIA
- 2.5 FEDERAL AND STATE LEGISLATION
- 2.6 CUSTOMARY LAW

### *FOCUS OBJECTIVES*

To understand and appreciate:

- ▶ Australia is a member of the international community and enters many treaties with other countries which can become part of Australian law;
- ▶ there are common law rights protected and enforced by the courts in the Australian legal system;
- ▶ the Australian Constitution contains a limited number of express rights;
- ▶ the High Court has found that there are implied rights arising out of the Australian Constitution;
- ▶ Federal and State legislation is subject to scrutiny by the courts but it also has been used to expand the individual rights of Australians; and
- ▶ customary law continues to provide opportunities and ideas for new legislation, especially relating to indigenous Australians.

## 2.1 INTRODUCTION

*“Ours is the age of rights. Human rights is the idea of our time”*

SOURCE: ATTRIBUTED BY Z. ELKINS IN ‘GETTING TO RIGHTS...’ HARVARD LAW REVIEW, VOLUME 54, NO. 1, WINTER 2013, TO PROFESSOR LOUIS HENKIN IN HIS BOOK ‘THE AGE OF RIGHTS’, PUBLISHED 1990.

Human rights are an important part of our modern Australian legal system. Many human rights, such as the right to be **presumed innocent until proven guilty**, have been part of our legal system for centuries. Others, such as **the right to express your sexual orientation** have come more recently from international obligations imposed by treaties and conventions.

Human rights are the **fundamental freedoms** that all nations should have enshrined in their laws. In this way, the human rights of individuals can be protected and enforced by every legal system. They are also monitored by international bodies, including the United Nations and its Human Rights Council as well as the Security Council and the International Court of Justice.

While the idea of human rights is widely accepted as universal, the scope of these rights and the extent to which they are understood and implemented varies considerably. We have seen that the *Universal Declaration of Human Rights 1948* is a relatively recent happening. In Australia, although we are signatories to the *Universal Declaration*, it is not in its entirety incorporated into Australian law. What this chapter aims to do is to increase your understanding of what is meant by human rights and to look at the means by which Australia legally recognises human rights.

There is no single source of these rights enjoyed by our citizens. In an ideal world all the human rights that could be enjoyed by our citizens would be set out in a single document. This single document could be a Bill Of Rights (referred to in Chapter 5).

However, we do not have a **Bill of Rights** in Australia. The sources therefore of these rights that we do enjoy are very difficult to locate. One has to look hard to find them. Even when you do find them, the list may be incomplete. There may be rights which some citizens believe are fundamental which are not included in the list. You will see from the rest of this chapter the human rights covered here have grown from different sources over time and they can be quite easily withdrawn from our citizens in the future.

The sources of these individual human rights in Australia are:

2.2 International Conventions

2.5 Federal and State Legislation

2.3 The Common Law

2.6 Customary Law

2.4 The Constitution of Australia

## 2.2 INTERNATIONAL CONVENTIONS

Australia is a founding member of the United Nations. Successive Australian governments have regarded the United Nations as an essential forum through which to influence world affairs, promote a stable international framework, defend Australia’s security and sovereignty, pursue trade and economic interests and promote Australian values.

### HOW HUMAN RIGHTS BECOME PART OF A NATION’S (DOMESTIC) LAW

International law and the contribution of the United Nations (UN) are important in deciding which rights should be supported and enforced in Australia. The UN creates monitoring agencies to report on how nations are meeting their international human rights obligations. The UN is not an international parliament empowered to make laws which all nations are bound to follow. It is a forum for debate and discussion. The discussion can result in **treaties**, which are contracts between nations (also called conventions, covenants, charters and declarations). When a nation signs and then **ratifies** (formally accepts) some or all terms of a treaty, these should become part of that nation’s



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(domestic) laws. So when Australia ratifies a treaty, the Federal Government has an obligation to pass national legislation to bring it into effect and to ensure that the laws of the six states and two self-governing territories also conform with human rights requirements.

When, in 1990, Australia signed and ratified the *Convention on the Rights of the Child 1989* (CRC) our family law needed to be reformed to reflect, for example, the important principle of the ‘best interests of the child’. The amendments were made in 1995. As a result, an Australian court must ensure that any parenting order has the best interests of the child as the ‘**paramount consideration**’ *Family Law Act 1975* (Cth)). Australia did add one **reservation** (a formal objection which excludes the term from applying) to the CRC. The reservation was to Art. 37(c) which requires signatory nations to have separate imprisonment for children, and adults. The reservation entered means that in Australia children under the age of 18 can be held in an adult prison. In Queensland, a 17 year old person is considered an adult for the purposes of the criminal law and can be sent to an adult prison.



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#### ▶ **WHAT DO YOU THINK?**

1. The CRC defines a child as any human being under the age of 18, unless the age of majority (when you are legally an adult capable of making your own decisions) is attained earlier under a state’s own domestic legislation. Do you think Queensland’s criminal law is in breach of Art. 37 of the Convention? [R]
2. Do you think the provision ‘unless the age of majority is attained earlier’ under a state’s own laws, enables countries to disregard the 18 year old cut-off? What about nations which have loose definitions of an adult, such as ‘having attained puberty’? [R]



The Australian Government has signed various **international treaties and conventions** that deal with human rights, including the following:

- ▶ *International Covenant on Civil and Political Rights*
- ▶ *Convention on the Rights of the Child*
- ▶ *Declaration on the Rights of Mentally Retarded Persons and Declaration on the Rights of Disabled Persons*
- ▶ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*
- ▶ *International Convention on the Elimination of All Forms of Racial Discrimination*
- ▶ *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*
- ▶ *Convention on the Elimination of All Forms of Discrimination against Women*



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There are many acts of Parliament, both Federal and State, which seek to promote and enforce the human rights which are contained in the international treaties and conventions signed by the Australian Government. These are referred to where relevant in different parts of this section. For example, the *Racial Discrimination Act 1975* (Cth).

## 2.3 THE COMMON LAW

In the Australian legal system, much of the law is found in the **decisions of judges**. These decisions form the basis of the **common law**. Over the years, the common law has been changed by various acts of Parliament (statute law), but it is still extremely important, and the basis of much of our law. This system of law had its origins in England. Many of our individual rights are only found in the common law.

The English legal system developed over hundreds of years from its origins in customary law, through the writings of learned authors, and in the decisions of courts. Eventually the courts became centralised, and administered the same law and the same legal procedures for all of England. Sir William Blackstone published his work entitled *Commentaries on the Law of England*, in the 18th century, which set out in a readable form what he regarded as the individual rights of persons in

England at the time. Other writers took up his ideas and **the common law system**, as it became known, was adopted in many of the former colonies of the British Empire, particularly in the United States of America, Australia, Canada, South Africa, and India. A comprehensive discussion of the **common law** can be found in *Legal Studies for Queensland* Volume 1, Sixth Edition 2011, in Chapter 4.

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### COMMON LAW RIGHTS

Common law rights in Australia include the following:

- ▶ the right to a court hearing;
- ▶ the right to compensation for property resumed by the government;
- ▶ the right to refuse access to information given to a lawyer in confidence as a client;
- ▶ the right to refuse to give evidence which incriminates oneself;
- ▶ the right to challenge a penalty or sentence imposed by a court outside what is allowed by statute;
- ▶ the right to sue governments and government authorities;
- ▶ the right to sue for interference with your property rights;
- ▶ the right to religious worship without interference;
- ▶ the right to legal representation when accused of a serious crime;
- ▶ the right not to be detained or imprisoned unlawfully;
- ▶ the right to a fair hearing when accused of a public offence; and the right to freedom of speech and movement.



SOURCE: ABRIDGED FROM THE ADDRESS TO THE ANGLO AUSTRALASIAN LAWYERS SOCIETY BY CHIEF JUSTICE RS FRENCH. 4 SEPTEMBER 2009, SYDNEY. *THE COMMON LAW AND THE PROTECTION OF HUMAN RIGHTS*.

If you believe that the above may not be comprehensive, you are right. You should remember that the system of development of rights through the common law really only occurs when cases come before a court.

### THE COMMON LAW AND THE PROTECTION OF HUMAN RIGHTS

Once the rights exist at common law, then obviously they can be enforced by the courts. This is why the **doctrine of precedent** is important. The principles or rules of law are worked out on a case-by-case basis. Nowhere is this more apparent than in *Mabo v Queensland (Mabo No.2)* (1992) 107 ALR 1; 175 CLR 1 where the High Court reversed earlier decisions of lower courts to find that **the doctrine of terra nullius did not apply** and that Aborigines did have native title to their traditional lands. Before 1992, other courts in Australia made decisions on the basis that the doctrine of **terra nullius** did apply and did not recognise that Aboriginal people had any title to their traditional lands.

Once the High Court decided, after nearly 200 years had passed since Australia was first settled by the British, that **native title had not been extinguished**, the Australian Government moved quickly to pass the *Native Title Act 1993* (Cth) so that there was **unambiguous statutory law** governing the issue of native title rights.

### COMMON LAW RIGHTS AND FREEDOMS AND THE INTERPRETATION OF STATUTES

The common law has another role, namely, the protection of human rights. That role lies in the interpretation of statutes. A principle has been developed by the courts that, unless the words of the statute which take away an individual right are so clear, that there is really no doubt that the Parliament intended to take away the right, then the courts will not assume that the Parliament intended to do so.

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The courts in Australia can prevent Parliament from taking away our common law rights. This is done by applying principles of statutory interpretation which have evolved as the courts have been asked to make decisions about the extent to which various Acts of Parliament have limited or taken away common law rights.

## C Case study

*Potter v Minahan* (1908) 7 CLR 277

**Facts:** Minahan was a Chinese person who was born in Australia. He left Australia to live in China for some years but always intended to return to where he was born to live permanently. His mother was a British subject and lived in Victoria. Minahan therefore acquired a British nationality and the domicile (permanent place of residence) of his mother, which was Victoria. When he returned to Australia, he failed to pass a dictation test within the meaning of the *Immigration Restriction Acts 1901-1905* (Cth). He was therefore charged with being a prohibited immigrant. The magistrate in the Court of Petty Sessions of Victoria was of the opinion that Minahan was not an immigrant within the meaning of the Act Minahan was acquitted. Potter, on behalf of the Commonwealth, appealed the Magistrate's decision.

**Legal issue:** Does every person entering the Commonwealth immigrate into it within the meaning of the term "immigration" as used in s 51 (xxvii) of the Constitution? That is, is a person who lives in Australia, leaves it for a period, then returns

home an immigrant? If this was the intended meaning of the Constitution, Minahan would be a prohibited immigrant.

**Decision:** The High Court decided that the word "immigration" in the Constitution did not mean any person entering Australia. It stated that a person born in a particular place is entitled to remain in or return to that place unless that right is lost (for example, by being outlawed). The word "immigration" must receive its "ordinary signification (meaning) unless the context requires some other meaning to be adopted".

### Questions:

1. What is the fundamental human right recognised by the High Court in this case? [K]
2. What is the important principle of statutory interpretation applied by the High Court in this case? [K]
3. Was the decision of the High Court just in terms of its outcome for Mr Minahan? [R]

In 2009, Chief Justice French identified the principle stated in *Potter's* case. It is the general rule that Parliament must use words that are so specific that the inference of an intention to set aside or limit a common law right would be irresistible. Two of the cases to which he refers are set out below with a brief comment for each. These are examples where the High Court has protected certain common-law rights.

## C Case study

### 1. The right to sue a government or government authority

*Bropho v State of Western Australia* (1990) 171 CLR 1

**Facts:** Mr Bropho brought a court action to stop the construction of the Swan Bay brewery on a sacred site. The defendant was the authority approving the development (the State of Western Australia). In the lower courts an action brought by the State of Western Australia to dismiss Mr Bropho's claim was successful. Mr Bropho appealed to the High Court.

**Legal Issue:** Could Mr Bropho successfully argue he could sue the authority?

**Decision:** The High Court reversed these decisions and found for Mr Bropho on appeal. It said he was entitled to bring the action and that the State of Western Australia could not stop it from doing so by claiming immunity. During its analysis of the relevant law, it restated its support for the principle in *Potter's* case. It said that when deciding the meaning of the statute there was a presumption "against the modification or abolition of fundamental rights or principles".

## Case study

C

## 2. The right to sue for interference with property rights

*Coco v the Queen* (1994) 179 CLR 427

**Facts:** Coco was convicted on the basis of evidence which was obtained by the use of a listening device which required a judge to authorise its use. The judge also needed to authorise the police to enter Coco's property to install the device. Coco appealed on the basis that the evidence obtained was inadmissible. His appeal was rejected by the Queensland Court of Appeal and the matter went on appeal to the High Court.

**Legal Issue:** Did the legislation entitle the judge to approve the listening device?

**Decision:** The High Court examined the relevant legislation. The High Court set aside the order of the Court of Appeal of Queensland and, in its place, ordered that the appeal to the High Court be allowed, Mr Coco's conviction be quashed and a new trial be held. The High Court, in the course of its judgment, noted that *Bropho's case* had relied on the principle in *Potter's case*. The High Court said:

1. Any person in possession of premises is entitled to exclude others from those premises because it is a fundamental right.
2. The police officer who enters those premises without the permission of the person in possession commits a trespass unless that entry is authorised by law.

3. The Judge had not authorised the use of the listening device and thus the police officer had committed a trespass.
4. In the absence of express words to the contrary, the Parliament could not have intended to authorise any conduct of this police officer which would otherwise have been in breach of the right of the citizen in possession of property to exclude others.



## Questions:

1. Was the principle in *Potter's case* correctly applied to the facts in *Bropho's case* and *Coco's case*? [I]
2. Was the High Court correct in quashing Mr Coco's conviction and ordering a re-trial? [R]

Clearly Parliament can, with unambiguous, precise language, encroach on the common law rights of Australians. In applying the principle in *Potter's case*, the courts are ensuring that our rights and freedoms are protected to the extent that the legal system allows it.

Whether or not we need a Human Rights Act or Bill of Rights to enlarge or enhance that protection is a question which is dealt with later in Chapter 5.

## ► RESEARCH

Go to [www.austlii.edu.au](http://www.austlii.edu.au) or Google *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 and *Evans v New South Wales* (2008) 168 FCR 576. Prepare notes in the case study format (Facts, Legal issue, Decision) for these two cases. What did the Full Court of the Federal Court of Australia say about *Bropho's case* and *Coco's case*. [I] [R]



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## 2.4 THE CONSTITUTION OF AUSTRALIA



THE STOCKMEN'S PROCESSION CELEBRATING FEDERATION PASSING ALONG SPRING STREET, MELBOURNE.

A Constitution is "the system of fundamental principles according to which a nation, state or body politic is governed" (refer Macquarie Dictionary). We can add that it is a written document that has been created with the approval of the nation by some accepted process and embodies the principles which were acceptable to that nation at the time it came into being. This is certainly the case with the Australian Constitution, which was approved by a series of referenda by the people of the Australian colonies. The approved draft was enacted as part of the *Commonwealth of Australia Constitution Act 1900 (Imperial-United Kingdom)*. Some delegates to the original 1898 Constitutional Convention were in favour of including a Bill of Rights in the Australian Constitution similar to the rights found in the Constitution of the United States of America. The majority of delegates felt that the traditional rights and freedoms of British subjects under the Parliamentary system with an independent judiciary to be created under the Constitution would be sufficient. This view prevailed. As a result of this, the fundamental purpose of our Constitution was to establish a Commonwealth Government of Australia, and to detail what powers that Commonwealth Government was to have. It did not in any way attempt to deal with the comprehensive rights of the citizens of Australia.



### WHAT RIGHTS DOES THE AUSTRALIAN CONSTITUTION EXPRESSLY PROTECT?

There are a limited number of rights expressly protected by the Constitution. These are as follows:

#### THE RIGHT TO JUST COMPENSATION

**Section 51(xxxi):** the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

#### THE RIGHT TO TRIAL BY JURY

**Section 80:** the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

### THE RIGHT TO FREE TRADE BETWEEN THE STATES

**Section 92:** the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

### THE RIGHT TO FREEDOM OF RELIGION

**Section 116:** the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

### THE RIGHT AGAINST DISCRIMINATION ON THE BASIS OF OUT-OF-STATE RESIDENCE

**Section 117:** a subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

#### ▶ WHAT DO YOU THINK?

Do you think it was necessary to include all of the above rights in the Constitution?  
Are there any rights which you think were important enough to be included which were left out?  
Give your reasons. [R]



### WHAT RIGHTS DOES THE AUSTRALIAN CONSTITUTION IMPLIEDLY PROTECT?

Apart from the rights expressly set out in the Constitution, the High Court of Australia has concluded that there are hidden within the Constitution some implied rights. One of these is the implied **freedom of political communication**.

In *Lange v Australian Broadcasting Corporation* (“*Political Free Speech case*”) (1997) 189 CLR 520, the High Court revisited certain views that were expressed by some of the judges in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and stated:

*Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be “directly chosen by the people” of the Commonwealth and the States, respectively...ss7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.*

*In Lange’s case this implied freedom of political communication arising out of the Constitution was confirmed by the majority of judges.*

To understand the role of the Australian Constitution in the Australian legal system, students should refer to *Legal Studies of Queensland*, Volume 1, Sixth Edition, Chapter 2.6. Importantly, you should understand that the principle in *Potter’s case* applies equally to the Constitution as well as to other statutes, both State and Federal.



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#### ▶ RESEARCH

Obtain a copy of the Constitution of the United States. Identify those parts which are commonly referred to as the ‘Bill of Rights’. It is available on the Internet or your teacher will provide you with a copy.

1. Make your own list of the rights that you think are important in the Bill of Rights. [K]
2. Are all of the express and implied rights in the Australian Constitution found in the Bill of Rights? [K]
3. If you had been present at the 1898 Constitutional Convention in Australia which of the rights in the Bill of Rights would you have argued should be included in the Australian Constitution, if any? Give your reasons. [I] [R]



# CHAPTER 3

## WHAT RIGHTS DO AUSTRALIANS HAVE IN BOTH A CRIMINAL AND CIVIL CONTEXT?

### *FOCUS TOPICS*

- 3.1 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- 3.2 THE RIGHT TO A FAIR TRIAL
- 3.3 THE RIGHT TO VOTE
- 3.4 FREEDOM OF SPEECH, ASSEMBLY AND ASSOCIATION
- 3.5 FREEDOM FROM DISCRIMINATION
- 3.6 THE RIGHT TO EQUALITY BEFORE THE LAW

### *FOCUS OBJECTIVES*

To understand and appreciate:

- ▶ Australia is a signatory to the *International Covenant on Civil and Political Rights 1966*, and many of its provisions are found in our laws;
- ▶ the right to a fair trial is well established in both the civil and criminal court processes which apply in the Australian legal system;
- ▶ there are a range of circumstances which give rise to issues about human rights for Australians;
- ▶ all adult Australians have the right to vote and are required to do so by law;
- ▶ generally all Australians enjoy freedom of speech, assembly and association, even though these rights are not set out in the common law, or by statute;
- ▶ there are limits to our freedoms which are found in many of our laws and in the common law rights individuals can exercise to protect themselves when their rights are infringed;
- ▶ Australian laws have given to its citizens freedom from discrimination since the *Racial Discrimination Act 1975*, relying on a suite of anti-discrimination Acts which have been passed since 1975; and
- ▶ Australian laws and the Australian judicial system strongly support the right to equality before the law.

### 3.1 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The *International Covenant on Civil and Political Rights (ICCPR)* was adopted by the United Nations General Assembly in 1966. Australia is a signatory to this treaty, although it has reserved certain rights in relation to some of the provisions. For example, it does not agree with the provision that all juvenile offenders must not be held in custody in adult prisons. It also reserves the rights of the individual states of Australia to be the bodies which implement the provisions of the treaty where the rights are determined by the laws of each state. In our federal system, it is not possible for the Commonwealth Government, for example, to pass laws overriding the criminal law in each state.

The ICCPR is not part of the law of Australia, although many of its provisions are found in our law and have existed for many years prior to 1966. This will become more apparent as you read further.

The most important provisions of the ICCPR are contained in Articles 6 to 27 inclusive. These are sometimes described as the substantive or core provisions of the ICCPR.

**Articles 6-8** cover the right to life, and prohibit torture and slavery.

**Articles 9-10** prohibit arbitrary arrest and detention, and cover the rights of persons arrested or detained.

**Articles 14-16** address the need for procedural fairness so that the rights of accused are protected and there is a right to a fair trial.

**Articles 12-13, and 17-27** address the freedoms of movement, religion, thought, speech, assembly, and association.

#### Practical application

P

Go to [www.humanrights.gov.au/international-covenant-civil-and-political-rights](http://www.humanrights.gov.au/international-covenant-civil-and-political-rights) and download the ICCPR. Alternatively, your teacher will be able to provide you with a copy of Articles 6 to 27 of the ICCPR.

1. Using the articles of the ICCPR, prepare a list of the rights contained in them. [K]
2. Draw up a chart with three columns. The headings should be Rights, Australian examples, Overseas examples. The chart could be done individually, in small groups, or as a class activity and displayed in your classroom for all to see.

3. List a brief summary of examples you have found, identifying your source, in the appropriate columns. Keep a copy of the source material for future reference. [K] [I]
4. Where possible, if there is a law (case law or statute) which applies to the example, identify it by quoting the case or the statute which is applicable. [I]
5. Use a simple points system to allocate positive points for promoting a human right and negative points for infringing or opposing a human right. Tally these periodically (say monthly) and compare Australia to the overseas countries from which examples have been recorded. [R]



### 3.2 THE RIGHT TO A FAIR TRIAL

All legal proceedings are subject to Article 14.1 of the ICCPR, which states:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.* (excerpt)



A discussion of the **key ideas** in Article 14.1 follows.

#### EQUALITY, INDEPENDENCE, IMPARTIALITY



These **key ideas** apply to both **civil and criminal** proceedings.

#### CIVIL PROCEEDINGS.

Civil proceedings in the Australian legal system are generally adversarial (parties to a dispute oppose each other). Federal and State Governments provide the framework of legal rules and pay for the tribunals and courts which hear and decide the disputes between members of the community.

The **main features** of the Australian legal system which ensure **equality, independence, and impartiality** in civil proceedings are:

- ▶ rules for the conduct of the proceedings (e.g. court rules);
- ▶ the rules of evidence (these decide the evidence which can be presented to the court/tribunal);
- ▶ access to legal representation; and
- ▶ an independent judicial system (judges and tribunal members who make independent and impartial decisions).



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The above features of the Australian legal system are set out in detail in *Legal Studies for Queensland*, Volume 1, Sixth Edition (*Legal Studies for Queensland*), in Chapters 5 and 6.

### P Practical application

Read Chapter 6 of *Legal Studies for Queensland* and, if possible, arrange with your class teacher to attend at a court close to your school to observe and make a record of a civil proceeding. Using this information, answer the following questions.

1. What was the plaintiff's claim and how was it presented to the court? [K] [I]
2. What was the defence of the defendant and how was it presented to the court? [K] [I]
3. Were there any witnesses other than the parties (plaintiff and defendant), and if so, what evidence did each of them give? [K][I]
4. Were the parties both legally represented? Describe the role of each legal representative. How important was legal representation to the

presentation of each party's case?  
Give reasons. [K] [I]

5. Was all the evidence that the judge needed to make a decision available to him/her? [K] [I]
6. Describe the conduct of the judge during the proceeding. Did he/she favour either party during the proceeding? [K] [I]
7. Using the material you have observed and studied when doing this Practical application, prepare a balanced argument for and against the following proposition:

**'The proceeding was conducted in a fair and impartial manner by an independent judicial officer.'** [I] [R]

## CRIMINAL PROCEEDINGS

As criminal offences are regarded as offences against **all of society**, it is the State itself that brings the **charge**, gathers the **evidence** and conducts the **trial** against a person accused of an offence. In the Australian legal system an accused person is **innocent until proven guilty**. This is a basic and important principle in our system. It is called the **presumption of innocence**. The **State (prosecution)** has the **onus (responsibility)** of proving **beyond reasonable doubt** that the accused person is guilty of the offence with which he or she is charged.

When a crime is committed, the police have **special investigative powers** to enable them to search for evidence and interview people. For example, if the police have **reasonable grounds for suspecting that relevant evidence for an offence can be found in a particular place**, they can conduct a search of private property. Once a person has been **arrested, and charged with an offence**, a **search of their person** can be carried out lawfully.

It is always a **balancing act between individual freedoms**, such as a citizen's right to privacy and fair treatment, **and the society's need to be safe and protected from crime**. For example, there is **no legal duty to answer questions** asked by police officers, both before and after arrest.

In addition to those features identified above in civil proceedings as ensuring equality, Independence, and impartiality, there are additional features of criminal proceedings in the Australian legal system, which, it can be argued also contribute to a fair trial. It should be said that the key ideas and features relevant to civil proceedings are also present in criminal proceedings to a large extent. The additional features we are about to discuss are, by and large, not present in civil proceedings. These features are:

- ▶ trial by jury;
- ▶ the right to silence; and
- ▶ the rule against double jeopardy.



## TRIAL BY JURY

Chapter 9.5 of *Legal Studies for Queensland* looks in detail at how the jury system works. To understand the jury system properly, you should read Chapter 9.5.

The jury system has been part of the common law since the *Magna Carta* in 1215. The **Magna Carta** essentially said that a free man could not be imprisoned “*except by the legal judgment of his peers, or by the law of the land*”. Section 80 *Constitution of Australia* confirms the principle that

*“The trial on indictment of any offence against the law of the Commonwealth shall be by jury”.*

This principle is enshrined in the law of each State and Territory in Australia as well as the Commonwealth. The **jury is regarded as the cornerstone of our criminal justice system**. Juries decide whether the accused is guilty or not guilty on the **admissible** evidence presented in the trial. Juries are regarded as **impartial fact finders** because they are randomly selected and represent a cross section of the community.

### Practical application

Read chapter 9.5 of *Legal Studies for Queensland*, and, if possible, attend the opening day of a jury trial at your local Court.

1. Outline the main features of the jury system. [K]

2. Conduct a class debate on the following:

**‘The right to trial by jury, like the right to vote, is an inseparable part of our democratic system’.** [I] [R]



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## THE RIGHT TO SILENCE

In all Australian states there is an **absolute right to silence at the police questioning stage** of an investigation. The general principle is that there is no legal duty to answer questions asked by police officers. The fact that the person refuses to answer police questions is not allowed to be raised in a later trial. There is a detailed discussion of **pre-trial silence** in *Legal Studies for Queensland* Chapter 9.9.

### P Practical application

Read the part of Chapter 9.9 that relates to pre-trial silence and then answer the questions in the 'What do you think?' activity on page 221.



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It is also the case that an accused person has the right not to give evidence in his or her defence at trial (**at-trial silence**). This basic right, which can be exercised by an accused, has its origins in the **common law**. To understand this right, you need to review the procedures used in criminal trials, particularly those used in trials of serious offences which involve a jury. This is because it is the responsibility of the State to **prove the guilt of the accused**, and the accused (or the legal representative of the accused) may be of the opinion that his or her case is better presented to the judge and jury **by not giving evidence or calling witnesses to give evidence on his or her behalf**. It will assist you to understand this key idea if you attended a criminal trial in court and study the procedure used in a trial of an indictable offence. You will find the latter in *Legal Studies of Queensland*, Chapter 9.7.



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It is argued that the right to silence would be weakened if juries could infer guilt or other negative consequences from an accused person not taking the stand and answering questions. The exercise of this right means that judge, prosecutor or co-accused **cannot make any adverse (negative or harmful) comments about the fact that the accused remained silent** during the trial.

### P Practical application

Read the part of Chapter 9.9 that relates to at-trial silence and then answer the questions in the 'What do you think?' on page 223



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## THE RULE AGAINST DOUBLE JEOPARDY

No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure for each country.

Article 14 (7) *International Covenant on Civil and Political Rights*.

Once a judge or jury finds a person not guilty, he or she is acquitted of that offence and can never be tried for the same offence again. This rule is not only enshrined in the ICCPR, it was stated by Sir William Blackstone in his *Commentaries on the Law of England* (1789) to be "... a universal maxim of the common law of England...". It is also contained in ss16 and 17 of the *Criminal Code* (Qld). In the United States, the Fifth Amendment guarantees double jeopardy protection in the Constitution. It is the law in the Commonwealth, and in all Australian States and Territories.

There is always the possibility that a person **acquitted or convicted of an offence** has been wrongly found guilty or not guilty. This is particularly the case because of advances in forensic science in recent years.

## Practical application

## P



### Campaign for change to double jeopardy law

PM - Wednesday, 9 April, 2003

18:35:00 Reporter: Louise Willis

MARK COLVIN: The Prime Minister has agreed with the mother of a murdered baby girl who's campaigning for changes to the "double jeopardy" law, which prevents a person from being tried twice for the same crime.

John Howard has questioned whether justice was served in a controversial Queensland murder case, which has dragged on through two trials, two acquittals and a failed High Court appeal.

The mother of the murdered toddler, Faye Kennedy, today launched a petition urging the Queensland Government to overhaul the 800-year old legal rule of double jeopardy.

Tomorrow, Federal, State and Territory Attorneys-General will discuss the issue in Melbourne, as Louise Willis reports.

LOUISE WILLIS: There's been a national outpouring of sympathy for the years of legal wrangling the Kennedy family has endured since the brutal murder of 17-month old Deidre at Ipswich in Queensland in 1973.

The man convicted of the murder, Raymond John Carroll, was later acquitted on appeal. He was tried again on perjury charges from the original trial, found guilty, but then set free after the Court of Appeal found the double jeopardy principle applied, a decision later backed by the High Court.

Now, the Prime Minister has joined the family's campaign.

JOHN HOWARD: It does seem to me that this particular case is a, you know, it is just horrific that a law such as that... I mean, it's a simple test of justice. The, you know, demented, dogmatic adherence to something because it's been around for a long time, and here is a social conservative speaking, I'm not in favour of changing things that work, but I am very much in favour of changing things that don't work, and this rule doesn't work.

LOUISE WILLIS: Mr Howard's comments come on the same day that the mother of the murdered toddler, Faye Kennedy, has launched a petition urging the Queensland Government to overhaul the double jeopardy principle. The petition calls for an amendment to the rule to be known as "Deidre's Law".

FAYE KENNEDY: And I thought it was very fitting. That way I believe, you know, her death and her little short life wouldn't be in vain. I promised my children, when the perjury trial was on, they both asked me - mum, would you please, when this is done, let it be done. And I broke that promise to them, because now I need to pursue this and have this law changed.

LOUISE WILLIS: Faye Kennedy says going public with this petition is painful, but she feels she has a responsibility to promote a debate.

FAYE KENNEDY: And there should be an avenue in this law that if there is new evidence and DNA, that we can put these people to trial again. I don't want this law to be open slather for every fiddly crime. But when it comes to rape and murder, and heinous crimes, we need to know that our public are protected.

LOUISE WILLIS: Faye Kennedy.

Queensland's Attorney General has prepared a discussion paper for a meeting of his Federal, State and Territory colleagues tomorrow. Rod Welford says he has an open mind on the issue, but would prefer a nationally uniform approach.

MARK COLVIN: Louise Willis reporting.

1. What law was Prime Minister John Howard referring to when he stated "this rule doesn't work"? [K]
2. Why was it unfair for the High Court to apply the double jeopardy principle and acquit Raymond John Carroll? [K] [I]
3. How does Faye Kennedy want to change the rule against double jeopardy? [K]
4. Read the extended case study of Carroll's case set out in *Legal Studies for Queensland* at Chapter 9.10 and answer the questions in the 'What do you think?' activity on page 227. [R]

## THE RIGHT TO LEGAL REPRESENTATION

Article 11 the *Universal Declaration of Human Rights* states:

*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*

It should be apparent to you that lawyers play an important role in criminal proceedings. It has been asked **how fair a trial can be** if the accused is not given **skilled legal representation**. The High Court considered this question in *Dietrich's case*, where Dietrich was convicted after a 40 day trial in which he was legally unrepresented. The High Court found there was no absolute right to legal representation through the provision of legal counsel at public expense, but, it held that in criminal trials for serious offences, where the judge felt an accused could not get a fair trial due to lack of legal counsel, the judge could stay (stop) until legal representation could be obtained. In *Dietrich's case* the majority of the High Court (5:2) quashed his conviction and ordered that there be a new trial.



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### P Practical application

Read the facts of *Dietrich's case* set out in the case study of pages 219 and 220 of *Legal Studies for Queensland*, and answer the questions at the end of the case study. [R]

## 3.3 THE RIGHT TO VOTE

Since the *Electoral Act 1918* (Cth) was amended in 1962 to give all Aboriginal adult citizens the right to vote, there has been **universal suffrage** in Australia. That is, all adult Australian citizens have the right to vote. In fact, voting is compulsory in Australia and all persons entitled to vote must do so. Although there was a long delay before Aboriginal Australians were granted the right to vote in Federal elections, the Commonwealth Parliament originally granted the right to vote to men and women who were British subjects 21 years or older in the *Franchise Act 1902* (Cth).



When the *Australian Colonies Government Act 1850* (UK) was passed by the **British House of Commons**, making Victoria, South Australia, and Tasmania, separate States from New South Wales, this gave each of those states the power to alter their constitutions and change the voting qualifications of electors.



### ► RESEARCH

Investigate the state voting rights of Australian citizens from the different States of Australia. You should at least investigate voting rights in your home state and in one other state. Find the answers to the following questions as part of your research.

1. At what age was an elector entitled to vote? [K] [I]
2. Were men and women treated equally? If not, when did this occur? [K] [I]
3. Were there some members of Parliament who were not elected by the voters? [K] [I]
4. Was eligibility to vote sometimes restricted to persons with certain property qualifications? [K] [I]
5. In your research, have you formed any conclusions about the history of the 'right to vote' in the states of Australia? Do you think it is a history which has been progressive and forward looking or did the Australian states attempt to restrict the rights of its citizens to select their governments by universal suffrage? [R]

## AUSTRALIA'S INTERNATIONAL COMMITMENT TO THE HUMAN RIGHT TO VOTE

The ICCPR, to which Australia is a signatory, states in Article 25:

*Every citizen should have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:*

(a) *to take part in the conduct of public affairs, directly or through freely chosen representatives;*

(b) *to vote and to be elected at genuine periodic elections which shall be held by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and*

(c) *to have access, on general terms of equality, to public service in his country.*



In addition, Australia is a signatory to the *Universal Declaration* in which the right to vote is set out in Article 21. The United Nations Human Rights Committee publishes General Comments to support the principles set out in the ICCPR and the Universal Declaration. It states that human rights are not infringed by restrictions on who can vote in an election, as long as those restrictions are based on objective and reasonable criteria.



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### ► INQUIRY FOCUS

DEFINE the legal issue to be investigated.

Is the right to vote enjoyed equally by all Australians?

A preliminary examination of the sources of information about the right to vote in Australia suggests that the above inquiry is one which is appropriate. Such an inquiry is suggested by the Australian Human Rights Commission (AHRC) in an article entitled, *The right to vote is not enjoyed equally by all Australians* (see <http://humanrights.gov.au/publications/right-vote-not-enjoyed-equally-all-australians>). In its opening remarks, the article states:

*If you are young, live in a rural or remote area, have a disability, are indigenous, homeless or a prisoner serving a sentence of more than three years, your right to vote in a Federal election may be restricted as a legal or practical matter.*

The underpinning facts, law and concepts which form the inquiry

The young

In Australia, all persons who are Australian citizens and have attained the age of 18 are entitled to vote. (See Electoral Act 1918 (Cth), s 93 (1) (primary source). There are different views about whether or not 18 is the appropriate age to grant entitlement to young persons to vote. This issue has been debated in the Australian community, just as the proposal to lower the voting age from 21 to 18 was debated before it became law. It was the subject of a recent newspaper article in the *Canberra Times* which is set out in the Practical application on the next page which follows.



# CHAPTER 4

## HOW DOES THE PROMOTION AND ENFORCEMENT OF HUMAN RIGHTS IN AUSTRALIA IMPACT UPON SOCIETY?

### *FOCUS TOPICS*

- 4.1 WHO PROMOTES AND ENFORCES HUMAN RIGHTS IN AUSTRALIA?
- 4.2 AN INQUIRY-BASED LEARNING APPROACH TO INVESTIGATING HUMAN RIGHTS ISSUES
- 4.3 INQUIRIES INTO HUMAN RIGHTS TOPICS IN AUSTRALIA

### *FOCUS OBJECTIVES*

To understand and appreciate:

- ▶ the various government and non-government organisations which take part in the promotion and enforcement of human rights in Australia;
- ▶ the inquiry-based learning approach to investigating issues affecting human rights, recommended as an effective strategy by the Queensland Studies Authority (2013 Syllabus) for the development of higher order thinking skills in Legal Studies; and
- ▶ how to apply the inquiry-based learning strategy to investigate the impacts on society of the promotion and enforcement of selected human rights in Australia.

## 4.1 WHO PROMOTES AND ENFORCES HUMAN RIGHTS IN AUSTRALIA?

*Right is right even if no one is doing it; wrong is wrong even if everyone is doing it.*

(AUGUSTINE OF HIPPO, 354-430)

The focus of this chapter is on **applying the process of ‘Inquiry-based learning in Legal Studies’** (referred to in this text as ‘INQUIRY’) to various human rights topics, beginning with an inquiry into the topic of **‘Bullying in Schools’**, which is then **followed by outlines of inquiries into a range of other issues**, in order to demonstrate how to investigate, and respond to, the extent to which people’s **rights are promoted and enforced in Australia**, and the **impacts of such promotion and enforcement, or the lack thereof, on society**.

You have already seen in **Chapters 1, 2 and 3** of this Human Rights section **how the Australian legal system promotes and enforces legal rights**. Before commencing the Bullying inquiry and other selected inquiries in this chapter, you need to **develop an understanding and appreciation of various government and non-government organisations** which you will come across as you launch into each human rights inquiry.

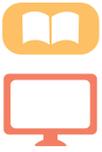
In relation to the issue of **bullying in Australia’s schools**, for example, when considering **who does, and who should, promote and enforce the right to be safe from bullying**, is it enough for **students, parents, your teachers and your principal** to say bullying is wrong or is there a need for **governments and courts**, at the state and/or federal levels, to become involved? Does the **Australian Constitution** or the **Queensland Constitution** have anything to say about bullying? What about the responses and recommendations for reform of various interest or lobby groups and organisations, such as the **Queensland Council of Civil Liberties** or the **Australian Human Rights Commission**? What about the **United Nations**? Does it, either directly or through its relevant conventions or other formal declarations, have something to say about this issue and, in any event, does it have any real influence over the responses of authorities in Australia?



### ► RESEARCH

1. Log onto the website of the **Australian Human Rights Commission (AHRC)** (<http://www.humanrights.gov.au>).
  - a. What current (‘news’) issues/cases are featured on the website’s home page? [K]
  - b. On the home page, what are the ‘major areas of work’ that are listed, starting with the area of Aboriginal and Torres Strait Islander Social Justice? [K]
  - c. For each of these ‘major areas of work’ of the AHRC, click on the bullet point icon and answer the following questions:
    - i. What laws apply to this area of work? [K]
    - ii. What is an example of a specific case or issue in this area of work? [K]
    - iii. What are competing legal rights and responsibilities in the above example? [I]
    - vi. What role does the ARHC play in promoting this area of human rights? [K]
    - v. Do you agree with the response of the ARHC to the fairness of existing laws in this area of human rights? Justify your opinion. [R]





### ► RESEARCH CONTINUED ...

2. Log onto the website page of the **Australian Government's Attorney-General Department**, featuring the **National Human Rights Action Plan**, released on Human Rights Day, 10 December, 2012 (<http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx>).
    - a. Click on the link, The National Human Rights Action Plan [DOC 787KB], scroll down to the Contents page and make a list of all of the items mentioned from 'Protection and promotion of human rights in Australia' down to 'Refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds'. [K]
    - b. Allocate each of the above items between the class, either individually, in pairs or small groups so that each item in the report can be read and briefly summarised for sharing with the rest of the class in terms of what the Human Rights Action Plan proposes for promoting and enforcing each area of human rights in Australia. [K]
    - c. As you discover what each item in the plan is about, either during your own research or while listening to presentations in class, identify competing legal rights and responsibilities arising from them and decide whether or not you agree with the plan's recommendations for reform of our legal system on the basis of justice and equity for the stakeholders affected by each issue. [I] [R]
  3. Log onto the websites of the following government and non-government organisations, which are involved in promoting, and in some cases, enforcing, human rights in Australia. Then answer these questions in relation to each of the organisations:
    - a. What do each of the above organisations stand for? [K]
    - b. What is one specific legal issue that each organisation identifies as involving important human rights issues? [K]
    - c. Do you agree with the response to the specific issue identified above by each organisation, both in the determination of legal outcomes and the fairness of the outcomes to the parties and other stakeholders? Why or why not? [I] [R]
- United Nations Human Rights Council (<http://www.ohchr.org>)
  - Amnesty International Australia (<http://www.amnesty.org.au>)
  - UNICEF Australia (<http://www.unicef.org.au>)
  - Parliament of Australia – Civil and Human Rights ([http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/law/civlaw](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/civlaw))
  - Australian Law Reform Commission (<http://www.humanrights.gov.au>)
  - Anti-Discrimination Commission Queensland (<https://www.google.com.au/#q=queensland+anti-discrimination+commission>)
  - Queensland Law Reform Commission (<http://www qlrc.qld.gov.au>)
  - Queensland Council of Civil Liberties (<http://qccl.org.au>)
  - Queensland Government Victims of Crime (<http://www.justice.qld.gov.au/justice-services/victims-of-crime>)
  - Victims of Crime Australia (<http://www.victimsofcrimeaustralia.com.au>)
  - Bravehearts (<http://www.bravehearts.org.au>)
  - Right Now – Human Rights in Australia (<http://rightnow.org.au>)
  - Refugee Advocacy Network (<http://refugeeadvocacynetwork.org>)
  - Australian Christian Lobby (<http://www.acl.org.au>)
  - Australian Muslim Advocates for the Rights of All Humanity (AMARAH) (<http://www.amarah.org>)
  - Cherish Life Queensland (<http://www.cherishlife.org.au>)
  - Children by Choice (<http://www.childrenbychoice.org.au>)
  - The Australian Family Organisation (<http://www.family.org.au>)
  - Australian Marriage Equality (<http://www.australianmarriageequality.com/wp>)



## 4.2 AN INQUIRY-BASED LEARNING APPROACH TO INVESTIGATING HUMAN RIGHTS ISSUES

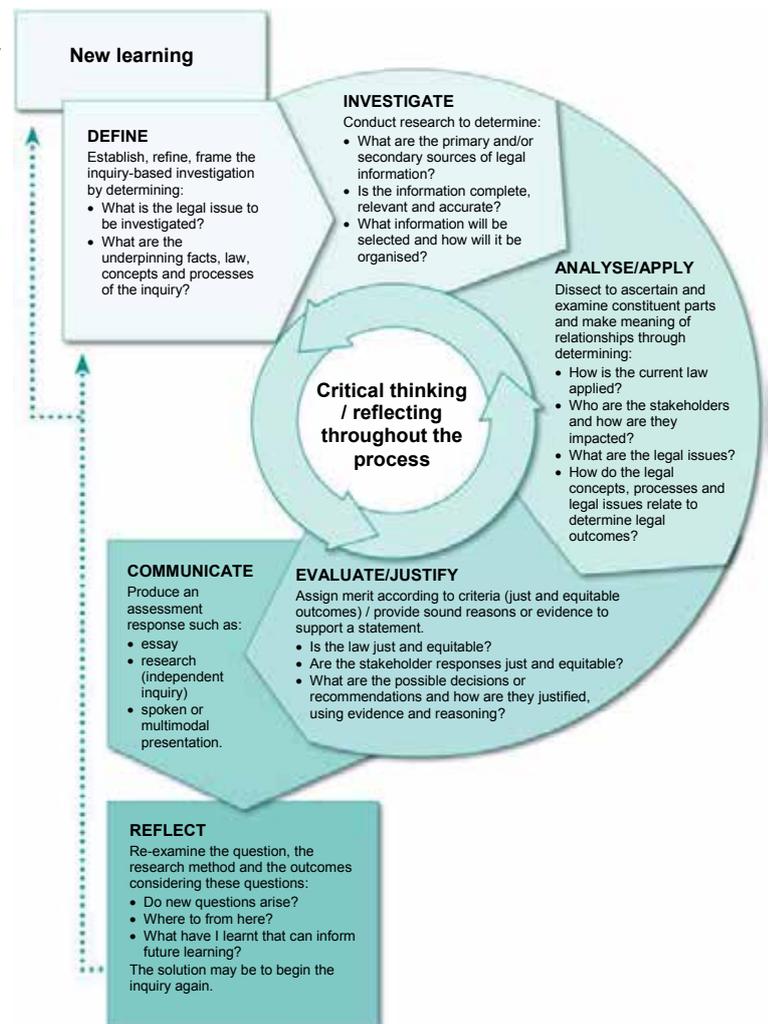
An ‘Inquiry-based learning’ approach is recommended by the Queensland Studies Authority ([www.qsa.qld.edu.au/downloads/senior/snr\\_legal\\_studies\\_13\\_syll.pdf](http://www.qsa.qld.edu.au/downloads/senior/snr_legal_studies_13_syll.pdf)). Page 11 of the 2013 Syllabus (Figure 1, which illustrates this learning process on page 12 of the Syllabus) says it is ‘... a process and a way of thinking when investigating legal issues’ that is ‘... an effective strategy for ... the development of higher order thinking skills in Legal Studies, including analysing, evaluating and justifying’.

*If you fail to plan, you plan to fail.*  
(OLD SAYING)

Each of the ‘INQUIRY’ topics covered in this chapter will focus on the three stages in Figure 1 of the Syllabus that relate to the three Legal Studies ‘dimensions’ (formerly called ‘criteria’) of learning and assessment set out on pages 2 and 3 of the Syllabus:

- ▶ ‘DEFINE’: Dimension 1:  
Knowing and understanding the law [K]
- ▶ ‘ANALYSE/APPLY’:  
Dimension 2: Investigating Legal Issues [I]
- ▶ ‘EVALUATE/JUSTIFY’:  
Dimension 3: Responding to the Law [R]

Figure 1: Inquiry-based learning in Legal Studies



*Nothing is particularly hard if you divide it into small jobs.*  
(HENRY FORD)

The stage of ‘INVESTIGATE’ in Figure 1 provides key focus questions to be asked when undertaking research into relevant primary and secondary sources of legal information. It is included as part of the ‘DEFINE’ stage of the ‘Should Bullying be a Criminal Offence?’ INQUIRY in Section 4.3 in order to provide a model for researching sources that provide a ‘... complete, relevant and accurate’ appraisal of each new legal issue to be investigated. As you can see in Figure 1, you will be required to communicate each inquiry-based response in a specified way or genre (the ‘COMMUNICATE’ stage of the process). You will also need to pause, from time-to-time, to re-examine the question in order to make sure you have fully addressed all questions in your research, note-taking and writing needed to fully justify your thesis (central argument, position or point of view) in response to the legal issue under investigation (the ‘REFLECT’ stage).



*Every story has three sides to it – yours, mine and the facts.*  
(FOSTER MEHARNY RUSSELL)

## 4.3 INQUIRIES INTO HUMAN RIGHTS TOPICS IN AUSTRALIA

This chapter is your opportunity to weigh up the relative merits of the asserted rights and responsibilities of competing stakeholders in a range of different topics affecting the human rights of individuals in our society. To fulfil the dimensions of learning under the 2013 Legal Studies Syllabus, you must:

- ▶ develop a comprehensive understanding of the relevant legal facts, concepts and processes relating to each human rights issue (Dimension 1: Knowing and understanding the law);
- ▶ investigate all relevant legal issues in great depth (Dimension 2: Investigating legal issues); and
- ▶ respond authoritatively and insightfully to the law (Dimension 3: Responding to the law) in relation to each of these topics,.

In this chapter we have identified topics, which raise human rights issues, for you to explore. These raise current issues and are often widely reported in the media due to being controversial. It is not possible to cover every aspect of these sample topics; however, the INQUIRY process undertaken on the following pages of this chapter will enable you to conduct your own investigations into these and other human rights issues, in accordance with the key headings and focus questions in Figure 1 of the Syllabus.



### ▶ INQUIRY FOCUS BULLYING IN SCHOOLS

#### DEFINE

- ▶ Establish, refine, frame the inquiry-based investigation by determining:
  - ▶ What is the legal issue to be investigated?  
Is bullying in Australian schools a breach of human rights that should be a criminal offence?
  - ▶ What are the underpinning facts, law, concepts and processes of the inquiry?



#### CONCEPTS

Bullying is ‘... repeated verbal, physical, social or psychological behaviour that is harmful and involves the misuse of power by an individual or group towards one or more persons,’ according to the Australian Government’s ‘Bullying. No Way!’ website (<http://bullyingnoway.gov.au>) This definition is taken from the Australian Government’s National Safe Schools Framework (accessed at <http://www.deewr.gov.au/Schooling/NationalSafeSchools/Documents/NSSFramework.pdf>).



## FACTS

## Practical application

P

During the past decade, increased media coverage of bullying in



Australian schools, such as the shocking footage on YouTube in 2011 of a bullying victim, Casey Heynes, picking up one of his bullies and smashing him onto a concrete path at school, has highlighted that it is an important human rights issue that urgently needs to be addressed.

1. Conduct research into the above case, including viewing relevant footage of the incident and subsequent television interviews, to find out the important facts that led to Casey Heynes reacting so violently to being bullied at his school. [K]
2. Was Casey Heynes' reaction to the bullying justified? [I] [R]
3. Research, investigate and report on other examples in the media of school bullying. [K]
4. In each of the examples you have found, what rights of the parties were infringed by the bullying? What responsibilities did the parties have to each other? [I]
5. For each example you have found, what is the fairest way of the law dealing with it? [R]

According to a new Census at School snapshot from the **Australian Bureau of Statistics**, Australian students are more worried about stopping bullying than any other social issue. The **Australian Human Rights Commission** says bullying is “endemic” and that tackling the problem must be a priority. The latest **Kids Helpline** Annual report highlights the extent of the issue, with the Helpline receiving almost 4000 requests for bullying-related counselling during 2012, mostly from students aged under 15. According to the Helpline report, bullying was the No. 1 topic of the 245,000 views on the website. This grim picture was further darkened by sobering statistics issued by the manager of **Queensland's Child Death Register at the Commission for Children and Young People**, Reyelle McKeever, that a record seven (out of a total of 17) child suicides in the state in 2012–2013 are likely to have been caused by bullying. According to Ms McKeever, 13 of the 63 child suicides in Queensland since 2010 had been attributed to bullying, with Australia topping a 2013 list of 24 countries in relation to bullying on social networks.

► **WHAT DO YOU THINK?**

Based on cases of bullying in the media and relevant statistics relating to bullying in Australian schools, do you agree with the above statement by the Australian Human Rights Commission that bullying is “endemic” and must be tackled as a priority? Give your reasons. [R]

?

## LAW

## WHAT LAWS IN AUSTRALIA APPLY TO BULLYING IN SCHOOLS?

There is no specific law against bullying, according to Senior Teaching Fellow in the Faculty of Law at Bond University, Louise Parsons. Specifically, there is no **crime of ‘bullying’** in any state of Australia, as observed by the former Chief Justice of the Family Court of Australia and current Chairman of the National Centre Against Bullying (NCAB), Alastair Nicholson, although **successful court actions in the common law tort of negligence** were brought against Australian school authorities in 2002 and 2007 for failure to protect victims of bullying.

## WHAT INTERNATIONAL LAWS APPLY TO BULLYING?

Of particular relevance to human rights affected by bullying in schools is the *Convention on the Rights of the Child (CRC) 1989*, which was the first international treaty to recognise children's rights independently from, and in addition to, human rights enjoyed by adults. The **Australian Government ratified the CRC in 1990**, which means that it has committed itself to protecting

children's rights set out in the Convention and to being accountable to the international community by assuming a duty to report to the United Nations Committee on the Rights of the Child every five years on its progress in implementing the CRC to protect the rights of children throughout Australia.



## **CRC@25** CONVENTION ON THE RIGHTS OF THE CHILD

As stated on the UNICEF website (<http://www.unicef.org/crc/>), the CRC focusses on the human rights of children, sensibly recognising that people under 18 years of age often need special care and protection that adults do not. The four core principles of the Convention are protection from discrimination; devotion to the best interests of the child, right to life, survival and development; and respect for the views of the child. Every human right contained in the Convention is '... inherent to the human dignity and harmonious development of every child'.

The following article (this is like a section in an Act of Parliament) in the CRC is relevant to each country's duty to educate children:

**Article 29.1:** State parties agree that education of the child shall be directed to:

- (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) the development of respect for the children's parents, his or her own cultural identity, language and values ...
- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

In addition, the United Nations' *Universal Declaration of Human Rights (UDHR) 1948*, which the Australian Government has also ratified, sets out essential human rights for all people of the world, including children, of course, with the following articles of relevance to the issue of bullying:

**Article 1:** *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

**Article 3:** *Everyone has the right to life, liberty and security of person.*

**Article 5:** *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

## WHAT ARE PRIMARY AND/OR SECONDARY SOURCES OF LEGAL INFORMATION?



Examples of **primary** sources:

- ▶ *Cox v State of New South Wales* [2007] NSWSC 471. Accessed 28 September, 2013, from [http://www.austlii.edu.au/au/cases/nsw/supre\\_ct/2007/471.html](http://www.austlii.edu.au/au/cases/nsw/supre_ct/2007/471.html).
- ▶ United Nations, 1948, *Universal Declaration of Human Rights (UDHR)*. Accessed 1 October, 2013, from <http://www.un.org/en/documents/udhr/>
- ▶ United Nations, 1989, *Convention on the Rights of the Child (CRC)*. Accessed 1 October, 2013, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

Examples of **secondary** sources:

- ▶ Australian Government, 2013, *Bullying.No Way!* Retrieved on 1 September, 2013, from <http://www.bullyingnoway.gov.au/teacher/index.html>.



- ▶ Australian Human Rights Commission, 2013, *Bullying – Know Your Rights: Violence, Harassment and Bullying Fact Sheet*, <http://www.humanrights.gov.au/bullying-know-your-rights-violence-harassment-and-bullying-fact-sheet> [Accessed 28 September 2013]
- ▶ Danks, K., 2013, ‘Threat to jail schoolkids in fight against bullying’, *The Courier Mail*. Accessed 13 July, 2013, from <http://www.couriermail.com>.
- ▶ Editorial, 2013, ‘Schoolyard bullying is everybody’s problem’, *The Courier Mail*. Accessed 5 August, 2013, from <http://www.couriermail.com>.
- ▶ Gerber, P. & Castan, M. (Editors), 2013, *Contemporary Perspectives on Human Rights Law in Australia*, Thomas Reuters (Professional) Australia Limited.
- ▶ Hall, P., 2013, ‘Attorney-General Jarrod Bleijie calls for Australia-wide plan to tackle bullying, revealing he was a bullying victim in his teens’, *The Courier Mail*. Accessed 18 January 2014 from <http://www.couriermail.com>.
- ▶ Parsons, L., 2008, ‘Beware of bullies! Lessons in liability from Cox v State of New South Wales’, *The National Legal Eagle*, Vol. 14, Issue 2, Article 2. [Available at <http://www.epublications.bond.edu.au/nle/vol14/iss2/2>]
- ▶ Queensland Parliament, 2013, *Youth School Students Safety Bill (A Mock Bill for use in Youth Parliament)*.
- ▶ Stolz, G. & Chilcott, T., 2014, ‘13 child suicides in three years prompt call for action as bullying victims take their own lives’, *The Courier Mail*. Accessed 10 January 2014 from UNICEF, 2006, <http://www.couriermail.com.au>
- ▶ *United Nations Secretary-General’s Study on Violence against Children Adapted for Children and Young People*. Accessed 28 September, 2013, from <http://www.unicef.org/crc/>

#### IS THE INFORMATION COMPLETE, RELEVANT AND ACCURATE?

By asking the above question in Figure 1 of the Syllabus, the Queensland Studies Authority is recommending that you **apply three criteria to determine if your research has borne the fruit of high quality information** that is well-balanced in terms of addressing all relevant facts, laws and perspectives (**COMPLETE**), specific to the issue under inquiry (**RELEVANT**) and authoritative (**ACCURATE**).

In determining if the information you have located is **COMPLETE**, it is helpful to ask yourself whether you have a **wide range of fairly balanced sources in order to fully represent the opposing evidence and viewpoints (arguments) of the relevant stakeholders**. In relation to the bullying inquiry, this would mean referring to sources that represent the opposing perspectives of bullies and their victims, as well as considering fully the evidence and reasoning for and against the contention that parliaments should pass laws to make bullying a crime that can be investigated and enforced by police officers, prosecutors and the courts. Examples of sources that provide **different perspectives about issues** under inquiry include:

- ▶ Danks’ ‘Threat to jail schoolkids in fight against bullying’;
- ▶ Stolz’s and Chilcott’s ‘13 child suicides in three years prompt call for action as bullying victims take their own lives’; and
- ▶ the United Nations Secretary-General’s Study on Violence against Children.

Information is **RELEVANT** if it **directly relates to the topic and issues under inquiry**. It is important to have a balance of **up-to-date evidence** that is **empirical** (can be measured objectively, usually in the form of statistics based on surveys, questionnaires and recording of data over a period of time) and **anecdotal** (case examples) in order to provide corroboration (reinforcing evidence or arguments) in support of your central thesis (your main position or point of view in response to the legal issue under investigation). **Examples** include the following:

# CHAPTER 5

## SHOULD AUSTRALIA HAVE A BILL OF RIGHTS?

### *FOCUS TOPICS*

- 5.1 WHAT IS A BILL OF RIGHTS?
- 5.2 THE UNITED STATES EXPERIENCE
- 5.3 THE UNITED KINGDOM EXPERIENCE
- 5.4 THE CANADIAN EXPERIENCE
- 5.5 ARGUMENTS FOR AND AGAINST A BILL OF RIGHTS

### *FOCUS OBJECTIVES*

To understand and appreciate:

- ▶ the nature of a Bill of Rights;
- ▶ the importance of determining a list of rights to protect Australians;
- ▶ the importance of how rights are able to be protected;
- ▶ the differences in the United States experience, the United Kingdom experience and the Canadian experience; and
- ▶ the arguments for and against a Bill of Rights.

## 5.1 WHAT IS A BILL OF RIGHTS?

A Bill of Rights is a document that contains a **formal list of the rights of a citizen in a society** which the society regards as being **fundamentally important** to its citizens. Its purpose is to list these rights and to provide protection of these rights.

**Australia does not have a Bill of Rights.** It is the only western democratic country that does not have one. You have previously seen how rights are protected in Australia. Later in this chapter, we consider the arguments for and against having a Bill of Rights in Australia. The types of arguments that are made for and against a Bill of Rights can only be mounted and refuted if people have regard to the following two main aspects of a Bill of Rights.

### WHAT RIGHTS SHOULD BE LISTED IN A BILL OF RIGHTS?

The very first issue is to settle the question as to what rights should be listed in a Bill of Rights, if we were to have one. This list would set out the rights that citizens of Australia wanted to be protected. They may include civil and political rights, such as freedom of religion, freedom of speech, freedom of association and assembly, freedom to protest, freedom to move within the country, and legal rights such as a right to a fair trial. Earlier in this section, you had the opportunity to see rights which are recognised internationally in the *Universal Declaration of Human Rights 1948*. You should look at the following to see the types of rights the citizens of other countries want to be protected.

#### ► RESEARCH

Visit the following websites:

- The Bill of Rights in the US Constitution (The Bill of Rights)  
[www.billofrightsinstitute.org/founding-documents](http://www.billofrightsinstitute.org/founding-documents)
- The Charter of Rights and Freedoms - Canadian Constitution (The Charter)  
[www.pch.gc.ca-canadiancharterofrightsandfreedoms](http://www.pch.gc.ca-canadiancharterofrightsandfreedoms)
- The European Convention on Human Rights (The Convention)  
[www.echr.coe.int/documents/convention](http://www.echr.coe.int/documents/convention)

Answer the following questions:

1. Select rights which are common to each of the Bill of Rights, The Charter, and the Convention. [K]
2. Are there any rights set out in the Bill of Rights that are not set out in either the Constitution or the Convention? [K]
3. Which of the Bill of Rights, the Charter or the Convention has the most extensive list of rights? [K]
4. The Convention prohibits capital punishment. The Bill of Rights does not. Can you think of reasons why that is the case? [I] [R]



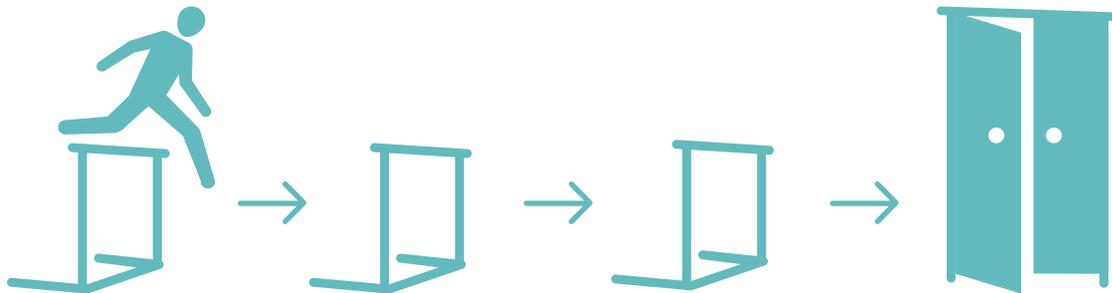
You will see immediately that the list of rights varies between countries. It should be no surprise that one country might consider some rights fundamental and needing protection, whereas another country might not. It might well also be that, even within one country, some rights are regarded as more fundamental than others and therefore attract greater protection. You will see this later in the section on the Canadian experience.

## HOW SHOULD THE RIGHTS BE PROTECTED?

Once a list of fundamental rights is settled, the next issue is to **decide to what extent those rights should be entrenched**. Another way of asking the same question is to ask: **to what extent should these rights be able to be removed from our citizens?** Should it be impossible? Should it be difficult or should it be relatively easy?

There are **two traditional ways of protecting rights**. The **first** of these is to have the **rights incorporated in the Constitution of Australia**. If they are so incorporated, then those rights can only be withdrawn or modified by changes to the Constitution, that is, by way of a referendum. Historically, successful changes to the Constitution by way of referenda, on any issue, have been very difficult to achieve. No doubt, a referendum designed to remove a fundamental right from a citizen would be extremely difficult to achieve. The **entrenchment**, therefore, of rights set out in the Constitution of Australia would be **very strong**. This is the case in the United States of America. The Bill of Rights in the United States has been developed by amendments to its Constitution. A change therefore of any of those entrenched rights in the United States requires an amendment to the Constitution of the United States.

## CHANGING THE CONSTITUTION BY A REFERENDUM



1. The proposed change (amendment) must be passed by a majority (over 50%) in both houses of Federal Parliament

2. Over 50% of Australian voters must vote in favour of the change

3. A majority (four) of the six states must each have over 50% of voters in favour of the change

AUSTRALIAN  
CONSTITUTION  
'CHANGE ROOM'



### ► RESEARCH

Go to the following websites on referenda in Australia:

- [www.aec.gov.au/.../constitutional-referendums](http://www.aec.gov.au/.../constitutional-referendums)
- [www.peo.gov.au/students/factsheets/referenda](http://www.peo.gov.au/students/factsheets/referenda)

Answer the following questions:

1. What is the requirement of a double majority in the passing of a referendum? [K]
2. What is the difference in the voting rights of citizens who live in the Territories as compared to those who live in the states? [K]
3. How many successful and unsuccessful referenda have there been since Federation? [K]
4. Can you suggest any reasons as to why changes to the Constitution by way of referenda are so difficult to achieve? [I][R]



The other traditional way of protecting rights is by a simple passage of legislation. Rights are currently protected in Australia, in the main, by statutes passed by the Commonwealth States and Territories. As has already been pointed out, this statutory protection of human rights has occurred, in part, by the Australian governments ratifying international human rights treaties by passing domestic legislation protecting such human rights. Most importantly, however, is the fact that, when rights are protected by means of the passing of statutes, **the entrenchment of those rights is very weak**. This arises from the simple fact that statutes or acts of parliament can be repealed or amended by later statutes. Generally, it requires nothing more than a subsequent statute passed by the government of the day to repeal the earlier statute and remove any entrenched rights.



CH 2

In Australia, there are **some rights guaranteed in our Constitution**. These should be regarded as strongly entrenched. However, those rights protected in the Constitution (and those arising by way of implication) are very small in range and could not be regarded as expressly constituting a Bill of Rights.



CH 2

Between the strongly entrenched method of incorporating rights into the Constitution and the weakly entrenched rights through legislation, you should be aware that **other models and solutions have been adopted by other countries**.

## 5.2 THE UNITED STATES EXPERIENCE

After the American War of Independence, delegates from the thirteen states of the United States of America came together in Philadelphia and drafted the Constitution of the United States. There was no Bill of Rights originally in the Constitution. The absence of a Bill of Rights caused much debate and argument. In the end, it was **the desire of the newly free Americans to have guaranteed rights that could not be overridden by any government that was decisive**. Having fought so hard to curb the power of the government in England, which the Americans believed was oppressive, they concluded that they did not want any government (including their own) to say how their lives should be conducted. **Amendments were made to the Constitution to include fundamental rights**. The first ten amendments to the Constitution were finally agreed upon and adopted, and these first ten amendments became known as the **Bill of Rights**. These rights were believed by the citizens of America to be **fundamental** to each and every one of them and to be **inalienable**, that is, never to be able to be taken from them.



The **First Amendment** included the following:

- ▶ Freedom of speech
- ▶ Freedom of religion
- ▶ Freedom of the press
- ▶ Freedom of assembly
- ▶ Freedom to petition a government

The **Second Amendment** contained the following right:-

- ▶ The right to bear arms (this entrenched right has been the source of much controversy in the United States)

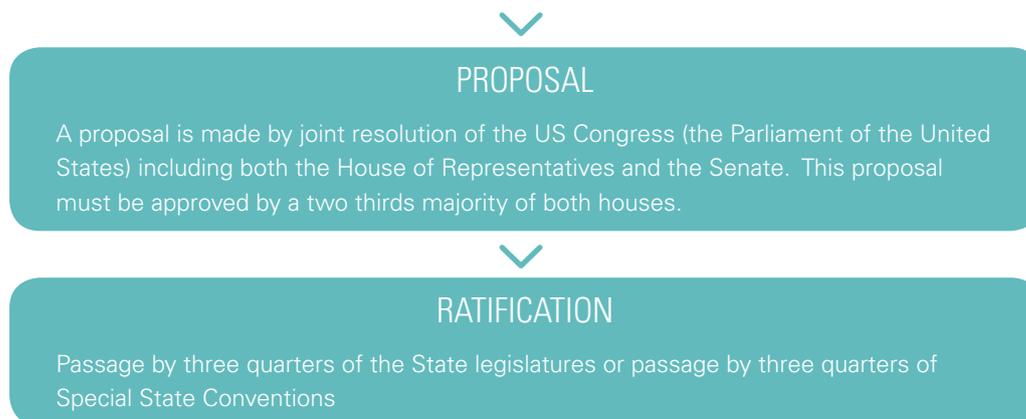


Despite these ideals, there was a glaring omission at the time the first ten amendments were adopted, namely, how to deal with slavery. The rights in this new Bill of Rights did not apply to slaves. It was not until the **thirteenth amendment** to the Constitution that **slavery was abolished**.

There have been **twenty-seven amendments** to the United States Constitution in total. The second most recent amendment, adopted on 1 July 1971, occurred during the Vietnam War. It arose because men were being drafted into military service in the United States before they were eligible to vote. This amendment set the voting age at 18 years of age, thus preventing Congress or any of the states in the United States of America from setting it any higher, ensuring that those people that might be going to war could vote.

When we look at the list of rights in the Bill of Rights of the USA, we can see that they are not very extensive, even though the Bill of Rights has existed for over 200 years.

The degree of entrenchment of the rights contained in the Bill of Rights of the USA, however, is strong. This is clear, not only from the very few amendments that have been made to the Constitution, but also from the fact that it is not easy to amend the Constitution. The following diagram shows the process required to change the US Constitution.



There have been thousands of proposals made to amend the Constitution. Only thirty three have ever obtained the necessary two-thirds vote in Congress and, of those thirty three, only twenty seven amendments have been ratified by the legislatures of the states. Ten of those were the original Bill of Rights. You can see from this that the rights contained in the Bill of Rights in the United States are very strongly entrenched.

It is the Supreme Court of the United States of America that decides constitutional issues and interprets the meaning of the words in the Bill of Rights. In short, the Supreme Court determines the extent of the rights represented by the words in the Constitution. It was in 1803 in *Marbury v Madison* that the court first established the principle that, if an Act of Parliament (Congress) was contrary to the Constitution, the Act of Parliament was invalid. That has remained the law. The Supreme Court protects the rights of citizens by striking down laws that violate the Constitution.

### 5.3 THE UNITED KINGDOM EXPERIENCE



The United Kingdom (UK) does not have a Bill of Rights. There is currently an unresolved debate occurring in Britain as to whether it should have its own Bill of Rights. Britain, however, has adopted the **European Convention on Human Rights (ECHR)**. The ECHR was incorporated into British law by the passing of the *Human Rights Act 1998*. The list of rights and freedoms set out in the ECHR is much more extensive than those set out in the Bill of Rights of the USA. So extensive are they that the current Prime Minister of England has made it clear that he is prepared to withdraw from the ECHR because it interferes with Britain's

capacity to refuse entry to, or deport, people who pose a threat to the United Kingdom. This is quite possible because the entrenchment of these rights in British law is based only upon an Act of parliament and is, therefore, weak.

If legislation is passed by the British Parliament, repealing the *Human Rights Act 1998*, then the ECHR will no longer be a part of British law.

The United Kingdom system works in the following way.

1. The *Human Rights Act 1998* places a **duty on the courts** in the United Kingdom to interpret any UK legislation, so as far as possible, in a way compatible with the rights set out in the ECHR.



2. If that is not possible, then the courts are allowed to issue a **Declaration of Incompatibility**, stating that the legislation is incompatible with the ECHR. This declaration is only issued when there is clear incompatibility. This declaration does not invalidate the legislation. What it does is simply raise a flag or commence a dialogue between the judiciary and the executive arm of government.
3. A Government Minister can, but is not required to, after the issue of a Declaration of Incompatibility, make a **remedial order** making such amendments to the legislation as the minister thinks are necessary to remove the incompatibility. These remedial orders do not require full legislative approval.

### Practical application

P

An example of the use of a remedial order is as follows:

- i. The *Terrorism Act 2000* (UK) gave power to police to stop and search vehicles, or individuals, for counter terrorism purposes, without requiring the police to have a reasonable suspicion that an offence has occurred or will occur.
- ii. These powers were able to be exercised in an area and over a period of time as might be specified in an authorisation given by a senior police officer.
- iii. It was alleged that such power was incompatible with Article 8 of the ECHR – *Everyone has a right to respect for his private and family life, his home, and his correspondence.*
- iv. The European Court of Human Rights found that those powers did violate the right to have respect for private and family life. The powers “were too open-ended and not subject to any adequate legal safeguards against abuse”.
- v. The Home Secretary (Minister for Home Affairs) issued a remedial order removing this incompatibility.

1. What did the *Terrorism Act 2000* (UK) give the police power to do? [K]
2. What allegation was made about the Act? [K]
3. What did the ECHR find when it considered the allegation? [K]
4. What was the Home Secretary’s response? [K]
5. Do you agree with the view of the ECHR? Why? [K] [I]



4. However, rather than the Minister using these remedial orders, the experience has been that **most declarations of incompatibility have been remedied through the passage of further legislation.**

From your research earlier in this chapter you will have seen that the list of rights is extensive, but the entrenchment of the rights set out in the ECHR and adopted in the UK system is weak. It relies entirely upon legislation by the UK parliament. The only remedy, therefore, arises from the sensitivity of the UK government to public opinion. At the Conservative Party conference in Manchester in the UK in September 2013, the British Prime Minister suggested that the UK may have to pull out of the ECHR entirely in order to extradite foreign criminals. If public opinion moves in the direction of the Prime Minister’s statement, the ECHR may no longer be part of UK law.



### ▶ WHAT DO YOU THINK?

Some problems with the ECHR in the UK have arisen in the following cases:

1. The *Human Rights Act*, making the ECHR enforceable in UK courts, has led to controversial decisions. One of those was the case of a Palestinian Muslim cleric Abu Qatada. This involved a decade-long legal battle with the ECHR about the cleric's deportation from London to Jordan where the alleged Al-Qaeda-linked cleric was wanted for conspiracy to carry out terror attacks. The deportation was repeatedly blocked by the Courts on the basis that the cleric could be tortured and would not receive a fair trial in Jordan. The deportation was in breach of Articles 3 and 8 of the ECHR.
2. Another debate is generated by the insistence of the ECHR that tens of thousands of UK prisoners, including serious criminals such as murderers and rapists, should have the right to vote. This is not currently the case in the UK. Section 3 of the *Representation of the People Act* 1983 sets out that a convicted person is illegally incapable of voting at any parliamentary or local election during the time he is detained in a penal institution. In November 2010, a UK Court found that the above law banning all prisoners from voting breached Article 3 of the ECHR – a right to free elections.
3. Foreign criminals and terrorists have made applications pursuant to the ECHR to avoid deportation from Britain. One of the most common grounds is that deportation would interfere with the right to a family life set out in the ECHR.

With specific references to the competing stakeholder responses in each of the above cases, at what point do you think the rights of individuals should give way to the security of the state? [R]

## 5.4 THE CANADIAN EXPERIENCE

Canada has a **Charter of Rights and Freedoms (The Charter)**, which came into force on 17 April 1982 when the Charter became part of the Canadian Constitution. The Charter, forming one part of the Canadian Constitution, sets out the rights and freedoms that Canadians believe are necessary in their society. The rights protected in the Charter are set out in the sections of the Charter. For example:



### SECTION 2: FUNDAMENTAL FREEDOMS

- ▶ Freedom of conscience and religion
- ▶ Freedom of thought, belief, opinion and expression, including freedom of the press
- ▶ Freedom of peaceful assembly
- ▶ Freedom of association

### SECTIONS 3 TO 5: DEMOCRATIC RIGHTS

### SECTION 6: MOBILITY RIGHTS

### SECTIONS 7 TO 14: LEGAL RIGHTS

### SECTION 15: EQUALITY RIGHTS

After you refer to the sections of the Charter, you will see the list of rights is reasonably extensive. As to how strongly these rights are entrenched in the Canadian legal system, you should have regard to the following three ways of effecting changes to the rights:



## 1. CHANGES TO THE CONSTITUTION

Changes can be made to the Canadian Constitution by withdrawing or adding to these rights. However, this is very difficult. To make a change to the Constitution, the following flowchart provides a summary.



It is difficult therefore to amend the charter by changing the constitution. The Charter has only been amended twice since 1982.

## 2. CHANGES BY LEGISLATION THAT THE SOCIETY ACCEPTS AS REASONABLE

Section 1 of the Charter gives to Canadian governments a power to limit the Charter rights. **The governments can pass laws limiting those rights, so long as those limits are ones that a free and democratic society would accept as reasonable.** An example of this would be a limit to the freedom of expression contained in the Charter by the enactment of laws restricting the publication of pornography. The following case study provides another.

### Case study

C

*R v Keegstra* [1990] 3 SCR 697

**Facts:** A Canadian school teacher was charged under Section 319(2) of the *Criminal Code* with wilfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. His teachings attributed various evil qualities to Jews. He described them as treacherous, subversive, sadistic, money loving, power hungry and child killers. He said that they were responsible for depressions, anarchy, chaos, wars and revolutions and that they had "created the Holocaust to gain sympathy". He was found guilty and appealed to the Alberta Court of Appeal on the primary grounds that Section 391(2) of the *Criminal Code* unjustifiably infringed his freedom of expression as guaranteed by Section 2(b) of the

Charter. The Court of Appeal accepted his argument and the Crown appealed to the Supreme Court of Canada.

#### Legal Issue:

1. Did Section 319(2) of the *Criminal Code* infringe Section 2(b) of the Charter's guarantee of freedom of expression.
2. Further, was that infringement of the Charter justifiable under Section 1 as a reasonable limit in a free and democratic society?

#### Decision:

It was held that Section 319(2) of the *Criminal Code* did infringe Section 2(b) of the Charter, however the section was justified as a reasonable limit within the meaning of Section 1.

1. What was the reason for the decision? [K] [I]
2. Do you think the decision was a proper balance of freedom of expression (2(b) of the Charter) of an individual and the Government adopting reasonable limits? [I] [R]

