Essentials of Law for Health Professionals has been thoroughly revised and updated to reflect the recent changes in legislation relevant to the provision of health care services in Australia. Contemporary issues such as work cover, health and safety obligations and anti-discrimination are clearly outlined and discussed, while the legal issues surrounding genetics, fertility and surrogacy are reviewed in conjunction with the current position on abortion and wrongful deaths.

This breadth of material is presented in a dynamic manner. It emphasises major points and includes summaries on how the law relates to practice rather than merely stating the law. Essentials of Law for Health Professionals 3e is an important resource that clinicians and students will carry through to professional practice.

**FEATURES**
- explores topical and controversial issues such as abortion, wrongful death, tissue transplants, genetics and infertility
- examines recent changes to industrial relations law — information that is essential for health professionals entering into employment
- outlines recent legislation affecting the daily practice of the health professional such as poisons, mental health legislation, child and elder abuse, and the notification of births and deaths
- highlights contemporary issues faced by health professionals with the implementation of National Registration
- takes a multidisciplinary approach to the subject of health care law and includes case studies and activities

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Essentials of Law for Health Professionals
Essentials of Law for Health Professionals
3e

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FOREWORD

In the Foreword to the earlier editions of Forrester and Griffiths’s *Essentials of Law for Health Professionals* I wrote: ‘The law can be a mysterious and troubling beast. Many healthcare providers would rather see lawyers keeping their noses out of healthcare; however, we are all regulated and controlled by the law. We are expected to obey it and there may be dire consequences for those who fail to do so. The law, however, is extremely complex and difficult to find. This is particularly so for non-lawyers, although we lawyers also encounter difficulties. It is therefore encouraging that Elsevier Australia has produced Forrester and Griffiths’s *Essentials of Law for Health Professionals*. This updated edition includes important changes in the law that will affect health professionals. Of particular interest are changes in health privacy laws and changes to the medical negligence regimes.

The authors give a clear, concise and comprehensive explanation of the legal system, adversarial processes, rules of natural justice, constitutional arrangements between state and federal governments and other important legal concepts, including the structure of the courts. Each chapter contains learning objectives and review questions and activities. So, for example, on completion of Chapter 1, the reader should be able to explain why the study of health law is an essential aspect of professional practice. Useful reading lists appear at the end of each chapter and the updated edition contains important new additions to these, including readings on industrial relations and professional regulation.

Healthcare workers may become involved with the law in many ways. They could themselves be the subject of a complaint or they could be sued. More commonly, they act as expert witnesses providing reports and appearing in court cases, assisting Health Complaints Commissioners by participating in conciliation. Litigation is unsuitable for most healthcare complaints. The authors use the example of the Queensland Health Rights Commission to illustrate the work of an independent statutory authority that provides an alternative to litigation for consumers and health workers. Section 2 deals with legal concepts for health professionals. The management of patient and client information is of fundamental importance. Excellent record keeping is vital for patient care and also to protect healthcare workers if their actions are complained about. Healthcare information is sensitive and patients need to know they can trust their healthcare workers. The authors give a clear exposition of the legal and ethical obligations of confidentiality.
They also include the important legislative changes to health privacy legislation in several states.

The concept of ‘medical negligence’ sends shivers down the spines of many health service providers. It is complex, untherapeutic and, fortunately, reasonably rare. The authors acknowledge an increase in malpractice claims, but there is little evidence of a ‘crisis’ in medical malpractice litigation. The authors carefully explain the incidence of patient injuries, the differences between adverse events and adverse outcomes, and the law of negligence. This is done in an extremely practical way, including the onus on the plaintiff to provide ‘proof’.

Healthcare providers are aware of the concept of ‘duty of care’, but the term is often bandied about rather loosely. The explanation given in this book is a reminder of where that duty comes from, what it means, to whom it is owed and the consequences of a failure. The importance of explaining risks and of obtaining informed consent is explained carefully and, while many providers are aware of the importance of the High Court case of Rogers v Whitaker, this book explains subsequent developments in the law of informed consent. Life and death issues, statutory requirements and mechanisms that allow patients to refuse treatment in all of the Australian jurisdictions are included, as are medical powers of attorney, guardianship and not-for-resuscitation orders. The case example of a refusal of a blood transfusion in Victoria in Qumsieh is used to illustrate the complexities of issues that arise in this area. Human tissue removal and legal definitions of death are identified, as are the conditions necessary to establish brain death.

Occasionally, health practitioners come into contact with criminal law. This could be because of inappropriate sexual contact with patients or because there has been a death in suspicious circumstances. Chapter 9 looks at criminal law issues and the role of the coroners, with, again, succinct and helpful explanations.

We are witnessing changing corporate structures in medicine with much more emphasis on multidisciplinary team approaches to patient care. Section 4, ‘Working within the Law’, explores the contractual elements of professional practice, the obligations of employers and employees and the conditions under which employment can be lawfully terminated. Unfair dismissal is also included, as are issues dealing with discrimination and sexual harassment.

In my experience, our technological skills have advanced significantly. Unfortunately, communication skills have not kept pace and most complaints received about healthcare workers are based on failures of communication. The authors, both nurse lawyers, are a welcome exception. They write in plain language and avoid jargon completely. They have expressed legal expectations as clearly as possible, interpreting legislation and case law from all Australian jurisdictions. This assists health professionals to identify the clinical practice significance of medico-legal concepts and principles. This totally revised book will be useful for all health workers and administrators and makes an important contribution to health service provision.

Beth Wilson
Health Services Commissioner
Victoria
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This book was written with the intention of providing students undertaking studies in health sciences with an introduction to the legal issues relevant to the provision of healthcare services in Australia. Over preceding decades, courses in nursing, medicine, physiotherapy, pharmacy and other allied health fields have recognised the significance of including legal content in the curriculum and have incorporated health law as a discrete unit within a suite of compulsory subjects. This occurred as a response to the need recognised by health professionals to have knowledge of the legal principles and legislative provisions that are pertinent to their area of clinical practice and the delivery of patient and client care.

As registered nurses, both the authors bring decades of clinical experience in a wide range of clinical areas, including critical care, midwifery, medical and surgical nursing and coronary care, to the content of the text. They have sought, based on their own clinical experience and legal backgrounds, to address the law and legal processes in a manner that has application to the multidisciplinary nature of healthcare and in a context that emphasises the practical relevance of the information to clinical practice.

Both authors teach students studying a variety of health disciplines. It is from this experience that the authors appreciate students’ desire for concise legal answers that may translate into meaningful practice guidelines. While it is recognised that the law is often imprecise, the authors have attempted to, first, state the law as it currently exists in many Australian jurisdictions and, secondly, to highlight and comment on those areas of the law that lack clarity. This book is not intended to provide legal advice in the strict sense, but rather to be a starting point to allow practitioners to identify relevant sources and principles of law, develop a knowledge base and then embrace further legal research.

Ultimately, this book aims to provide undergraduate students from a wide range of healthcare disciplines with the information and knowledge necessary to make well-informed and considered decisions about their legal rights and obligations, and the legal rights and obligations of the patients and clients under their care. Such knowledge should significantly contribute to sound, independent clinical judgments in relation to daily practice.

The book has been divided into four sections. Section 1, ‘Introduction to Law for Health Professionals’, deals with an overview of the Australian legal system,
Preface

including some practical information when working with legal representatives. Section 2, ‘Legal Concepts for Health Professionals’, includes chapters that examine current practice concerns including the law of negligence, consent and patient information. Section 3, ‘Life and Death Issues’, adopts a broad approach to a number of common concerns such as the patient’s right to refuse treatment and substituted decision making, the law of abortion and criminal aspects of health practice. Finally, Section 4, ‘Working within the Law’, addresses industrial and employment issues, professional regulation and legislation that may affect practice and the mechanisms used to change the law.

The task of writing this book has been both inspirational and challenging and we therefore wish to acknowledge and thank those who have provided assistance. The authors wish to thank Vaughn Curtis, Publishing Director, Elsevier Australia for his unfailing support during the writing of each of the three editions of this book. We would also thank George Conrad for his very valuable comments and contribution in researching and checking resource materials. The book is dedicated to George Conrad and Julian Pearce. The legislation and commentary in this text is as current as possible at the time of going to press; however, no statement of the law should be relied on without verification.

Kim Forrester
Debra Griffiths
2009
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Introduction to Law for Health Professionals
LEARNING OBJECTIVES

Upon completion of this chapter you should be able to:

- explain why the study of health law is an essential aspect of professional practice;
- identify sources of law and explain the different types of law;
- discuss the hierarchy of the courts and understand the concept of jurisdiction;
- discuss the features of the Australian legal system;
- understand the distinction between criminal and civil law;
- describe the significance of the doctrine of precedent;
- understand a case citation; and
- recognise the distinguishing features of a statute.

INTRODUCTION

The delivery of healthcare services occurs within an environment which, to a significant degree, is regulated and controlled by the law and the legal system. The provision of healthcare, by its very nature, will bring the health professional into situations where legal issues need to be considered when making clinical decisions. The provision of patient and client care by all health professionals is therefore based on a framework of legal principles and legislative provisions which regulate and determine the standard of care to be delivered and the rights and obligations of both the providers and the recipients of the care. This area of law, which has come to be referred to as ‘health law’, controls not only what health professionals and healthcare institutions are expected to do, but also what they are to refrain from doing as part of their professional practice in the provision of their services.

An understanding of health law is fundamental to the provision of safe and competent patient care and, as such, exists as a resource for professional decision-making. Within the Australian context, health law refers to a wide variety of legal concepts. These include the common law, civil and criminal law, contract law, the regulation of industrial relations and agreements as well as the statutory arrangements between state and federal governments and Australia’s commitment to international treaties.

As health law is one subject area of the law that governs the conduct of all citizens it is important that the reader has an understanding of the Australian legal
system. The purpose of this chapter is therefore to provide a broad outline of the structure of the Australian legal system, including the hierarchy of the courts, the doctrine of precedent and the sources of the law, so as to assist in an understanding of the content of the following chapters.

**LAW AS A PRODUCT OF SOCIETAL VALUES**

The law is produced by social forces and brings to society a measure of stability. The law represents a set of socially sanctioned rules and principles generated by the history and values of the society in which it operates. The law therefore reflects that history and those values. Moreover, the law may be both prescriptive and punitive. It is prescriptive when it tells people what they must do and what they are to refrain from doing. It is punitive in that it provides for the punishment of those people who disobey. It can bestow powers on individuals and groups, for example judges and the police. It can also take away or limit powers of individuals or groups such as minors or convicted criminals. In this way the law can be regarded as a framework that compels people to abide by the decisions of government and the courts. Laws regulate people's actions and apply sanctions to those who do not meet legal requirements. Effectively, the law establishes expected behaviour and standards of practice for health practitioners.

The law is omnipresent. For example, births, deaths and marriages must be registered; employers have a contract with employees to provide a safe system of work; and employees have a contract with employers to perform their work in the manner agreed.

**SOURCES OF LAW**

The Australian legal system, as it currently exists, developed from both the historical links with Britain as a colonial power and the federation of the colonies. Each colony had developed independently and came together as the Commonwealth of Australia in 1901. Initially the British imposed their laws and system of government on the individual colonies. Despite the fact that each of the colonies had developed its own constitution by the end of the 1890s, it was considered desirable that they federate under one constitution. The Commonwealth Constitution Act 1900 (UK) passed by the British Parliament effectively transformed each of the colonies into separate states federated under the name of the Commonwealth of Australia.

In Australia, there are two sources of the law. The first is legislation passed by the parliaments at both the state and federal levels. Each of the state parliaments, through their individual constitutions, may pass laws for the 'peace, welfare and good government of the State'. In addition, the federal parliament may pass legislation as specifically determined by the Commonwealth Constitution. The second source is the common law, which has developed from judicial decisions handed down by the courts. It is necessary to have an understanding of the laws that control and regulate the practice of health professionals, as the law emanates from both sources. Refer to Box 1.1.

Australia is often referred to as a common law country. This means that the system of government and courts is, in the main, similar to that of other common law countries, for example the United Kingdom, Canada and New Zealand. These countries have both common law and statutory law embodied in their legal systems.
Introductory Concepts and the Court Hierarchy

Parliamentary law

One of the functions of a parliament is to enact legislation, also known as Acts or statutes, which are designed to regulate certain aspects of society. An Act of Parliament is considered to be the primary source of the law. This means that the law contained in the legislation has priority over the common law. Some states or territories have codes. Where a code exists, it is the complete statement of law in that particular area. Refer to Chapter 9 for the criminal law codes. While parliament enacts the legislation, the role of the court is to interpret those sections of the legislation that are relevant to the cases before it.

The state and federal parliaments consist of a lower house of representatives and an upper house of review. The exceptions are Queensland and the territories where there are no upper houses of parliament. There is an established procedure for the passage of legislation through both the state and federal parliaments. An item of legislation will be known as a ‘Bill’ prior to it being finally passed into law when it then becomes an Act. Refer to Figure 1.1 for a detailed explanation. There are many Acts of parliament at both the state and federal levels to regulate and control the practice of health professionals and the provision of healthcare services.
The need is established for a new law or changes to an old law

Members of parliament are made aware of the need for change

Notice is given to the lower house that a Bill will be introduced at the next sitting

First reading

Second reading and debate

Committee stage

Third reading

Upper house follows a similar process as that in the lower house

The Bill is presented to the Governor-General or Governor for Royal Assent

The Act of Parliament is proclaimed

**Figure 1.1** Stages of passing an Act of Parliament
To give some examples, at the state level, there are statutes that control the registration and regulation of health professionals, legislation controlling workplace health and safety, and legislation providing avenues for complaints by healthcare consumers. At the federal level, the legislation is primarily directed to the issues of funding and regulating Commonwealth healthcare agencies and services.

The law at state and federal levels is also influenced by Australia's international obligations. International law is a body of rules that regulate and control the conduct of nations in their dealings with one another in an international context. These general principles of international conduct are variously called treaties, protocols or declarations and are negotiated by members of the United Nations. When the Commonwealth government is a signatory to an international treaty, it must pass domestic legislation that is consistent with the obligations of that particular treaty. Therefore, the influence of international treaties and conventions on Australian domestic law is becoming increasingly significant. For example, the language of the Family Law Act 1975 (Cth) draws heavily on the Universal Declaration of Human Rights and the laws in relation to children reflect the obligations imposed under the Declaration of the Rights of the Child (Article 4) and the United Nations Convention on the Rights of the Child (Article 24). Australia is a signatory to these documents.

Delegated legislation

An Act as passed by parliament may provide that a particular person or body, for example a Minister of the Crown, the Governor-General or professional regulatory authority, is delegated the power to make rules, regulations, by-laws or ordinances in relation to specified matters. For example s 78 of the Nurses and Midwives Act 1991 (NSW), empowers the Governor, under the Act to:

(1) … make regulations, not inconsistent with this Act, for or with respect to any matters that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Although this delegated power is derived from the parent Act and does not exist in its own right, such rules, regulations, by-laws and ordinances are binding and are to be read ‘as one with the Act’. A regulation made under the delegated power is inherently more detailed and precise in its practical application than what is provided in the Act. It is of note that in relation to the management of drugs and poisons by health professionals, it is often the regulations that state the individual practitioner’s obligations when prescribing and administering the substances.

Common law

The common law is the accumulated body of law made by judges as a result of decisions in cases that come before the courts. Since the Norman Conquest of Britain in the 11th century the decisions handed down by judges have been applied in similar cases that came before them. The recording of cases and the principles established in the decisions provided a level of certainty in the operation of the law (refer to the doctrine of precedent below). These decisions can be located in the law reports of the jurisdiction where the case was decided.

Australia inherited the common law at the time of British settlement. However, since that time, both prior to and following federation, the Australian legal system has continued to develop a large body of judge-made law. Generally, statute law
overrides common law and common law prevails when no specific statute exists. Both common law and statute law are applied in the courts. In Australia, there is a hierarchy of courts (refer to Figure 1.2) within the state and territory jurisdictions and the federal jurisdiction.

One feature of the common law is the development of equitable principles. These principles were developed by the English Court of Chancery. Equitable principles have evolved to address the issues of fairness and justice in those cases where common law remedies were considered to be inadequate. The rules of equity prevail over inconsistent common law rules. An example of an equitable maxim is ‘He who comes to equity must come with clean hands’. That is, where parties are seeking an equitable remedy, they themselves must have behaved in an honest, fair and lawful manner.

**TYPES OF LAW**

There are various methods of classifying the different types of law, one method being to describe law as either substantive or procedural.

*Substantive law* is the law that regulates citizens in specific areas of their lives. This includes industrial law, contract law, criminal law, family law, tort law and even constitutional law. *Procedural law* governs the way in which laws are implemented and enforced. This would include rules of the courts, rules applied to civil and criminal procedures and rules of evidence. An understanding of the different types of law will assist with identification of the differences, similarities and effects of both the substantive and procedural law. Both common law and parliamentary law combine to produce substantive law. The list below is not exhaustive but refers mainly to those areas of law that apply to the practice of health professionals.

Some examples of substantive law include:

- **industrial law**, where matters arising from the employer and employee relationship are identified and defined. Primarily industrial law involves agreements and awards that establish the obligations and rights of both parties in their working environment.

- **contract law**, which places agreements within a formal framework that enables promises made by the parties to be enforced. Health professionals come into contact with a range of contractual agreements, including contracts of employment and contracts for the purchase and sale of goods and services.

- **criminal law**, which identifies activities that the state considers unacceptable to a degree that warrants punishment. Criminal law may apply in the healthcare setting in relation to grossly unacceptable conduct or behaviour such as theft, criminal assault or murder.

- **tort law**, which is concerned with civil wrongs. The word ‘tort’ essentially means ‘twisted’ and was interpreted as amounting to conduct that was ‘wrong’. The primary purpose of tort law is to redress the wrongs suffered by a plaintiff. This is accomplished by the provision of compensation, which seeks to put the injured party in the position they would have been in, had they not suffered the damage. There is rarely an element of punishment; however, one of the functions of tort law is to act as a deterrent by regulating behaviour to an acceptable standard. In the healthcare context, examples of tort law are negligence, negligent misrepresentation and trespass to the person.

- **constitutional law**, which sets out the legal framework within which the country’s political and legal systems operate.
Procedural law involves the processes of litigation, controlling the actions of all parties involved prior to trial and then regulating the way the trial will proceed. This aspect of law is the machinery that allows substantive law to be processed and applied. For example, it will determine the legal rules governing evidence that can be presented in court; how a case progresses through court; and the requirements of proof.

Another significant distinction in the law is that between civil and criminal law. The common distinguishing features that differentiate civil and criminal jurisdictions include the following:

- **who can bring an action.**
  - In civil matters, the action involves one citizen, for example, a patient bringing an action against another citizen, such as a health professional or the hospital.
  - In criminal matters, the action is initiated by the state in the form of the police or the public prosecutor against a defendant who has allegedly committed a crime.

- **the standard of proof required.**
  - In civil law the standard of proof is *on the balance of probabilities*.
  - In criminal cases the standard is *beyond reasonable doubt*.

- **the purpose or intention of the two forms of action.**
  - Civil law is about compensation for wrongs done.
  - Criminal law is about punishing wrongdoers.

### GENERAL FEATURES OF THE AUSTRALIAN LEGAL SYSTEM

#### Adversarial system

The function of the law is to resolve disputes when there are conflicts between individuals, companies or institutions. This takes place in a court when a case is brought before a magistrate, judge, or judge and jury with the expectation that one party will be declared the ‘winner’. This competition between the parties takes place within the courts and is referred to as the adversarial process. The role of the judge during court proceedings is to remain impartial and to ensure that the procedural rules are adhered to. The judge or jury will determine the outcome where only one of the parties to the proceedings will be successful. This is different from the inquisitorial approach where the court may become a participant in the actual process. That is, the court is not confined to the evidence put before it by the police and lawyers, but may seek out information in its own right as part of the process of reaching a decision. Within the healthcare context, the operation of the Coroner’s Court would be classified as inquisitorial whereas cases involving negligent actions will progress in an adversarial manner.

#### Natural justice

In a general sense, the notion of natural justice ensures that the proceedings are conducted fairly, impartially and without prejudice. Natural justice is a fundamental principle that applies to all courts and tribunals. It means that the court or tribunal must give the person against whom the accusations are made a clear statement of the actual charge, adequate time to prepare an argument or submission and the right to
be heard on all allegations. It is described as making two demands ‘before a person’s legal rights are adversely affected, or their “legitimate expectations” disappointed: (1) an opportunity to show why adverse action should not be taken … ; and (2) a decision-maker whose mind is open to persuasion, or free from bias’.  

**Presumption of innocence**

The law regards all accused people as being innocent until proven guilty. This is a core principle of the Australian legal system. As an example, in a criminal matter the presumption is that the accused is innocent until proven guilty. In civil proceedings, the presumption operates so as not to allocate liability until all of the elements of the action are proven.

**Mediation**

In all Australian jurisdictions, alternate dispute resolution (ADR) is used in the civil jurisdiction as a mechanism to assist the parties, either before or after the commencement of legal proceedings, to negotiate and resolve their dispute. Mediation has become one of the more popular methods of ADR and is defined as ‘a process … under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication’. Whether mediation is the appropriate mode for the attempted resolution of a dispute will be determined on a case-by-case basis; however, in many jurisdictions both the legislation or court may refer proceedings to mediation whether or not the parties object. It has been suggested the objective of ADR in legal proceedings is ‘to assist the parties to reach a negotiated and satisfactory resolution of their dispute, improve access to justice and reduce the cost of delay’.

**THE COURT HIERARCHY**

The Australian court system is structured hierarchically so as to delineate the extent of authority and the jurisdictional limits of each court. Refer to Figure 1.2.

**Understanding jurisdiction**

Jurisdiction is the authority, or power, vested in a court of law allowing it to adjudicate or decide on an action, suit, petition or application brought before it. Jurisdictional power varies according to the seriousness of the offence, the amount of compensation that can be awarded, the nationality or place of residence of the parties, whether the matters are criminal or civil in nature, or even when and where the offence or event occurred. For example, a claim by a patient alleging negligence against a health professional will be heard in the civil courts and not the criminal courts, the family law courts or the bankruptcy courts, as these courts have no jurisdiction, or power, to hear such a claim or award an amount in damages should the plaintiff succeed.

**Original and appellate jurisdiction**

When a matter first appears, the court in which it is heard has what is known as original jurisdiction. Before a decision may be appealed in another court, the dissatisfied party must be able to establish appropriate grounds. In this case, the subsequent court will be exercising its appellate jurisdiction. A decision may be the subject of an appeal in certain circumstances, including when a judge has misdirected a jury
or made an error in relation to admitting or refusing to admit evidence; or when there is an issue as to the severity or leniency of the sentence. For example, the Supreme Court may hear a matter and, if its decision is appealed, then the Full Court or Court of Appeal of the Supreme Court will hear the following case using its appellate jurisdiction, where appropriate. Appellate jurisdiction is restricted to the superior courts including the District/County Court, Supreme Court, Federal Court, Family Court and High Court. In relation to the High Court, special leave (permission) must be sought before it will exercise its appellate jurisdiction. An overview of the court hierarchy follows, to illustrate the differences in both structure and jurisdiction of the courts in the hierarchy. Refer to Figure 1.2.
Overview of the courts/tribunals

Magistrates’ Courts or Local Courts are presided over by magistrates who are addressed during the proceedings as ‘Your Worship’ or in some jurisdictions as ‘Your Honour’. Magistrates sit alone as there are no juries at this level in the court structure. The jurisdiction of the Magistrates’ Courts is determined by the relevant legislation in each of the states and territories. These courts are the lowest courts in the hierarchy and determine the greatest volume of cases. As a general principle, Magistrates’ Courts deal with minor civil and criminal matters and with more serious criminal matters by way of committal proceedings. For example, a health professional may appear before a magistrate in relation to practising without a licence or being in possession property they have unlawfully removed from the premises of their employing facility. It is from this level of the hierarchy that magistrates are appointed as coroners or to preside over Children’s Courts and Licensing Courts. These courts developed in response to the need to reduce the load from the Magistrates’ Courts and in recognition of the requirement for specialist knowledge.

District or County Courts are presided over by judges who sit with or without a jury. Their jurisdiction is both original and appellate. District Courts hear and determine civil and criminal matters that are governed by the relevant legislation in each of the states and territories. As a general statement, all criminal matters other than murder, manslaughter, serious drug matters and serious sexual assault will be heard in the District or County Court. An appeal from the decision of a professional disciplinary tribunal will be heard in the District Court. The judges who preside in these courts and more senior courts are referred to as ‘Your Honour’. Supreme Courts are the most senior courts in the states and territories and are presided over by a judge, with or without a jury. Supreme Courts have an internal appeal mechanism referred to as the Court of Appeal or Full Court of the Supreme Court. When the court is sitting as the Full Court, there are three or more judges. While the jurisdictional limitations are determined by the relevant legislation in each of the states and territories, in civil matters they may hear claims for unlimited damages and in the criminal jurisdiction murder, manslaughter, serious drug matters and serious sexual assault. It is in the Supreme Court that most medical negligence actions involving health professionals will be conducted.

The High Court was established under the Constitution of the Commonwealth of Australia and is comprised of the Chief Justice and six other judges. The first High Court was appointed under the Judiciary Act 1903 (Cth). Historically, the Privy Council in England was the final Court of Appeal for state Supreme Courts and the High Court of Australia. The right to appeal to the Privy Council was abolished in three stages. First, the right to appeal in all matters of federal and territorial jurisdiction was abolished by the Privy Council (Limitation of Appeals) Act 1968 (Cth). The Privy Council (Appeals from the High Court) Act 1975 (Cth) abolished appeals from the High Court on all matters of state jurisdiction. The Australia Act 1986 (Cth), passed concurrently with the same Act in the United Kingdom, established the High Court in Australia as the final Court of Appeal for both federal and state courts. While the High Court is the most senior court in the Australian hierarchy, it is possible for a case to be heard by an international court or tribunal. This can occur if federal parliament has become a signatory under an international declaration or convention.

The original jurisdiction of the High Court concerns any matters that involve interpretation of the Constitution of the Commonwealth of Australia, or disputes
between residents of different states, or between states and the Commonwealth government.

Provided leave has been obtained, appeals to the High Court of Australia can come from the Federal Court, the Family Court and the Supreme Court of any state or territory involving civil or criminal matters. The full bench of the High Court, comprising all seven justices, hears cases in which the principles are of great public importance, involve interpretation of the Constitution or invite departure from a previous decision of the High Court. Appeals from state and territory Supreme Court decisions, and from decisions of the Family Court, will be dealt with by the full court of not less than two justices. A single justice may hear and determine specified matters.

The Federal Court of Australia was established under the Federal Court of Australia Act 1976 (Cth). This court was set up to further reduce the load on the High Court. Constitutional cases involving such matters as trade practices, bankruptcy and federal industrial disputes are heard. Appeals on decisions can be made to the High Court or the Full Court of the Federal Court.

The Federal Magistrates’ Court was established in 2000 to deal with less complex matters than would otherwise have been heard in the Federal Court or Family Court. The range of cases coming before the Federal Magistrates’ Court includes matters relating to bankruptcy, discrimination, privacy and family law. This court does not hear appeals.

Specialist tribunals may be established under Commonwealth or state laws to exercise specific jurisdiction and perform functions similar to that of the courts. The number and type of tribunals are increasing as government regulation of society becomes more complicated. Tribunals are established by statutes for different purposes and therefore their powers and composition vary greatly. Examples of tribunals include administrative appeals tribunals, tenancy tribunals, small claims tribunals and professional regulatory tribunals. These tribunals perform ‘quasi-judicial’ functions in that they make decisions within the ambit of their limited or specific roles. Decisions are made in a variety of ways and may involve a judge or, alternatively, a board of specialists not qualified in law. Unlike the courts, the tribunals do not make laws that are applied by the courts. In a number of Australian states and territories the individual specialist tribunals have been amalgamated into multi jurisdictional tribunals. The Victorian Civil and Administrative Tribunal (VCAT) and Western Australian State Administrative Tribunal (SAT) include an extensive range of jurisdictions. A similar approach is being adopted in both the ACT and Queensland. In New South Wales the Administrative Decisions Tribunal (ADT) deals with administrative appeals and particular civil matters while the Consumer, Trade and Tenancy Tribunal deals with commercial, consumer and tenancy disputes. While tribunals lie outside the court hierarchy, appeals may be made from their decisions into the court system if permitted under legislation. Often the role of tribunals is limited and narrowly defined.

THE DOCTRINE OF PRECEDENT (STARE DECISIS)

The search for certainty

In the discussion of common law, mention was made of the role of judges in making law. The word ‘common’ is used to denote the fact that judges have developed a process whereby courts are, to a certain extent, bound to follow
decisions they have made previously as well as being bound by decisions made by other judges at the same level of the hierarchy or in senior courts. Judge-made law, or common law, began as a custom that valued the accumulation of judicial wisdom passed on through the ages. In this way, a common thread of judicial certainty was maintained despite different judges presiding. Early in the 19th century, this custom became enshrined as a doctrine known as stare decisis or the doctrine of precedent. It allows for some predictability when dealing with legal matters involving courts because one is able to determine the outcomes of similar cases that have occurred before, and estimate the probability of similar judgments being passed.

The doctrine of precedent originated in England and over time developed into a sophisticated and historically consistent system of justice. The underlying principle is that if a case is decided in a certain way today then a similar case should be decided in the same way tomorrow. The reason or ground of a judicial decision is called the ratio decidendi. It is the ratio decidendi of a case which makes the decision a precedent in future cases. When the courts hand down their decisions, they are to be found in the many law reports that emanate from the state, federal and international jurisdictions. It is important to remember that many cases are not included in the published law reports; however, unreported decisions should be equally regarded as establishing precedent.

All judgments do not bind all courts. Nor are all judges compelled to follow all that has been set down in previous decisions. Precedent can only bind if it comes from a higher court within the same hierarchy. For example, a decision in the Supreme Court of NSW is binding upon the District Court in NSW and Local Courts in NSW but it is not binding on the equivalent courts in other states and territories of Australia because they are not in the same court hierarchy. Even so, a lower court in one state would be unlikely to depart from a decision taken in a higher court of another Australian state where the issues are similar.

Australian laws apply only to Australian courts. Australian courts are not bound to follow decisions made in foreign courts; however, they can influence decisions taken in Australia. This is sometimes referred to as persuasive precedent. For example, decisions made in other common law countries such as Canada or the United Kingdom may be considered by the Australian courts. Judgments made in English courts are no longer binding on any Australian court.

Case references

It is important for health professionals to understand judicial decisions as contained in the various law reports. The following will provide an overview of the elements of a case reference to assist reading and understanding of cases. For example, Harriton v Stephens (2006) 226 CLR 52 means the following:

- Harriton v Stephens refers to the litigants (the parties) involved in the case. If it is the first time the case has come to court the first party named is the plaintiff and the second party is the defendant. If the case is on appeal then the first party will be the appellant and the second party the respondent. It is usual form to italicise the names of both litigants.
- (2006) 226 CLR 52 provides information on the case and the location of the full court report of the case. This refers only to published law reports of which there is a wide range available in higher court jurisdictions.
Introductory Concepts and the Court Hierarchy

- (2006) refers to the year the case was reported. When the year is in round brackets it indicates that the volume number, and not the year, is the essential identifying feature of the citation. When the year is in square brackets it indicates that the year is the important identifying feature of the report and that the volume number is not essential, and may not even be present. An example is [1975] VR 1. When more than one volume is published in a particular year the volumes in that year will be numbered.
- 226 refers to the volume number of the law report.
- CLR is the abbreviation for the Commonwealth Law Reports series containing the report on the case of Harriton v Stephens.
- 52 refers to the page reference for the beginning of the case report.

Commonly used law reports are listed in the Abbreviations in Section 5.

Law reports

For health professionals to understand the common law principles that apply to their practice, it is necessary to have the skills to read a reported case. The following will provide an overview of the features of the case of Rosenberg v Percival (2001) 74 ALJR 734. Refer to Figure 1.3.

As this is an appeal to the High Court, Rosenberg is the appellant and Percival is the respondent. The letter 'v' between the names of the parties is the abbreviation of the Latin word versus and signifies that the parties are against one another in the process of litigation. Directly beneath the names of the parties is the court in which the case was decided, in this instance the High Court of Australia. Below the court title are the names of the justices before whom the case was heard: the Chief Justice, Mr Anthony Gleeson, and Justices McHugh, Gummow, Kirby and Callinan.

As this is an appeal, the last court that decided the case is referred to next; in this case it was the Supreme Court of Western Australia. Directly below are words or phrases that are written in italics. These are the catch words considered to be the important aspects of the case: here ‘… Negligence — Breach of duty — Whether failure to warn amounted to breach — Identification and meaning of material risk’.

The next section is referred to as the ‘headnote’, which is a summary of the case. These are the facts of the case which the reporter, responsible for providing the ‘headnote’ to the publisher, considered important to that decision. It is essential therefore to have a comprehensive understanding of the case by reading the entire judgment. The actual decision of the court, indicated by the word 'held', contains the ratio decidendi. A summary of the findings of each of the judges who heard and determined the case is also provided. This may appear as separate reasons as delivered by each of the justices or, where there is agreement (where they concur), two or more justices may hand down a joint decision. At the end of the written determination the ‘orders’ (the judges’ final decision) handed down by the court will be reported.

Cases may also be found ‘online’ via the World Wide Web or on CD-ROM or disk. The increasing number of cases that can now be accumulated through storage on electronic databases has resulted in unreported cases (those not formally reported in the printed volumes of the law reports) now being available. As an example, the unreported case of Edwards v Kennedy, though not available in the reported cases, can be located via LexisNexis, AustLII or a number of other legal databases. Note that the format of case reports on web-based databases differs from
ROSENBERG v PERCIVAL
[2001] HCA 18

Before Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ

Perth, 24 October 2000
Hobart, 5 April 2001

Appeal — Powers of appellate court — Limits of appellate review in respect of credibility-based findings.

Negligence — Causation — Failure to warn of material risk — Whether patient would have proceeded with treatment in any event.

Negligence — Breach of duty — Whether failure to warn amounted to breach — Identification and meaning of material risk.

The respondent patient sued the appellant surgeon for negligence following complications resulting from an operation on the patient’s jaw. The patient alleged that the surgeon failed to warn her of the risks inherent with the surgery. It was also alleged that had the patient been aware of the risks, she would have proceeded with the operation.

The action in the District Court was dismissed. The trial judge found that the surgeon had not been negligent in not warning the patient of any material problem that might develop. The trial judge also found that even if the patient had been warned of the slight possibility of complications, she would have proceeded with the surgery in any event. The patient’s appeal to the Full Court of the Supreme Court was successful. The Full Court held that the surgeon had breached his duty by failing to warn of the risks involved in the surgery. The Full Court also overturned the trial judge’s finding on the credibility of the patient and ordered a re-trial on the issue of causation.

Held (unanimously allowing the appeal): (1) There was sufficient evidence to justify the trial judge’s finding that the patient would have proceeded with the surgery, even if she had been adequately warned of the risks involved. The Full Court was in error in overturning the trial judge’s findings. [17], [23], [92], [165], [220]

(2) An appellate court has a limited scope for review where a trial judge’s findings of facts are based on an assessment of the credibility of a witness. A case must be exceptional to justify an appellate court overturning a credibility-based assessment of a trial judge. [27], [37], [41], [162]

(3) (By Kirby J) The Full Court was correct in holding that the evidence established that the surgeon had failed in his duty to provide her with a significant warning of a material risk inherent in the proposed treatment. [147]

(4) (By Gummow J) In order to ascertain whether there has been a breach of a duty to warn, the first step is to define the relevant risk by reference to the circumstances in which the injury can occur, the likelihood of the injury occurring, and the extent or severity of the potential injury if it does occur. This approach directs attention to the content of any warning that could have been given at the time. The Full Court erred in failing to identify the content of the risk. [69], [72]

(5) (By Kirby J) Unless such risks may be classified as “immaterial”, in the sense of being unimportant or so rare that they can be safely ignored, they should be drawn to the notice of the patient. [149]

(6) (By Gummow J) It is not necessary when determining materiality of risk to establish that the patient, reasonable or otherwise, would not have had the treatment had he or she been warned of the risk in question. However, it is necessary that the patient would have been likely to seriously consider and weigh up the risk before reaching a decision on whether to proceed with the treatment. It was open to the trial judge to conclude that a reasonable

Figure 1.3 Reading a case as recorded in a law report

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that of the traditional paper-based law reports. The cases reported on the Web
are not allocated volume or page numbers in the report and the paragraphs are
individually numbered for reference. As an example, the unreported case Edwards
and Kennedy, a case involving allegations of medical negligence, is available on the
LexisNexis data base as:

   Edwards v Kennedy BC 200901404,
   Supreme Court of Victoria — Common Law Division
   Kaye J
   5714 of 2007
   26, 27 February, 12 March 2009
Citation: Edwards v Kennedy [2009] VSC 74

THE PROCESS OF ENACTING A STATUTE
While a law is progressing through parliament, it is referred to as a Bill. Once
passed by parliament and assented to by the Governor-General, it becomes an Act
of Parliament. The process involved in the passing of an Act entails the following of
certain procedures in a prescribed sequence as shown in Figure 1.1 (page 6).

The first stage is when members of parliament are given notice that at the
next sitting of parliament a Bill will be introduced. Explanatory documents and
a brief outline of the reasons for the Bill usually, but not always, accompany this
announcement. The Bill is then placed on the agenda for the next parliamentary
sitting. Unless the Bill pertains to a matter of urgency, it is not dealt with in detail
at that sitting other than by way of a reading of the long title. This is known as
the first reading and generally the whole Bill is not read. Ministers are given the
documents to take away and read in preparation for the next stage. If the matter
is urgent then standing orders will be suspended and the Bill will be debated
and passed that day. Such a situation occurred in New South Wales in 1984
when the Minister for Health was given power to close public hospitals without
prior consultation with the public or officers of the Department of Health. As a
result, and despite public outcry, Crown Street Women’s Hospital was closed the
following day.

Under ordinary circumstances, the Bill is debated at a later date. This is referred
to as the second reading. At that time the matter is debated and the parties in opposition
may propose amendments before the Bill is passed by the lower house.

At the committee stage, each of the provisions of the Bill will be debated with
the full house of parliament sitting as a committee. This stage of the process is a
procedural mechanism and does not require the members of the parliament to
operate as an investigative committee. The purpose is to consider the details of a
Bill after the second reading and examine any amendments proposed by the upper
house if it is referred back. Basically this process is a way of determining whether
any of the provisions in the Bill fail to meet the intention of the proposed law,
or if there are any unintended consequences arising from any sections of the Bill.
The Bill then moves on to a ‘third reading’ and is passed by the lower house. In
situations where the government has an overwhelming majority in the house, it
is possible that the Bill can be forced through all of these processes and emerge
without undergoing the scrutiny that would be insisted upon if the numbers of
government and opposition were more balanced.

The Bill is then referred to the upper house where it is examined and debated
in a manner and sequence similar to that of the lower house. Any amendments to
the Bill recommended by the upper house are referred back to the lower house and if these are accepted, the Bill is presented to the Governor-General or Governor for Royal Assent. Once this occurs the Bill becomes an Act of Parliament. The Act may not become effective immediately, as it must be proclaimed. Sometimes the proclamation date will be mentioned in the Act, but usually it will be at ‘a date to be fixed’. One reason for this delay is to enable the executive government or bureaucracy to establish the necessary mechanisms for implementing the Act. Rarely will an Act be set up to take effect retrospectively.

**Statutory interpretation**
Statutes and regulations determine much of the professional activity in the delivery of healthcare. Legislative provisions pertaining to the health industry are therefore regularly amended and updated.

When reading legislation the focus must be on the actual words used. Examples of words that compel include ‘will’, ‘must’ or ‘shall’ whereas words such as ‘may’ are discretionary. The first step in interpreting the legislation is to read the statute as a whole so that the context of the words can be identified. Words that have a simple meaning can take on a technical or special meaning in legislation. Explanatory notes sometimes accompany the statute and associated regulations, to help resolve ambiguity or emphasise the intention of the law.

Interpretation of statutes is now governed by various state Interpretation Acts that enshrine the common law rules regarding interpretation of legislation. For example:

- the *purpose rule* obliges one to consider the underlying purpose of the legislation when attempting to interpret it;
- the *literal rule* applies the ordinary meaning to words unless an alternative new meaning is applied. Specific legal terms must be given their legal meaning; and
- the *golden rule* is that if any meaning when applied leads to ludicrous interpretation, then it is to be modified to avoid inconsistency and absurdity. The statute is to be read in its entirety so as to determine the meaning of the law as a whole.

**READING AN ACT**
Legislation may be accessed via hard copy or online via the World Wide Web or other dedicated databases generated and maintained by Commonwealth, state and territory governments. In addition to the individual government websites all Australian legislation can be found at www.austlii.edu.au. The format of the legislation in hard copy will differ from that available online; however, the following aims to provide a general overview to assist in reading an Act.

The coat of arms of the particular jurisdiction usually appears at the top of the front page of an Act. All Acts are given a number; for example, the Health Quality and Complaints Commission Act 2006 (Qld) is Act No 25 of 2006. Numbering is strictly in the order in which the Acts are assented to by the Governor-General. If the date of assent is included it usually appears in brackets under the long title (see Figure 1.4); this is the date on which a Bill formally completes its passage through the parliament and meets the constitutional requirements for becoming an Act. It is not necessarily the date on which the Act comes into effect.
Introductory Concepts and the Court Hierarchy

The layout of an Act depends on its subject matter. Many Acts are divided into chapters and/or parts, which are like chapters in a book. For example, the Health Quality and Complaints Commission Act 2006 (Qld) has 241 sections in 17 chapters. Within many of the chapters are parts, which are broken down further into divisions. Chapter 1, Preliminary is made up of ss 1 to 10 and contains items such as the short title, the commencement, main objectives, who is bound by the Act, the dictionary and meanings of ‘health service’, ‘provider’, and ‘user’.

Chapter 2, ss 11 to 19, deals with the establishment, independence, functions and powers of the Health Quality and Complaints Commission. Chapter 3, ss 20 to 30, covers quality of health services and Chapter 4, ss 31 to 34, the

Figure 1.4 Reading an Act
development of a code of health rights and responsibilities. Chapter 5, ss 35 to 71, deals with health complaints and is divided into four parts that are further subdivided into divisions. For example, Chapter 5 Part 2 is separated into three divisions: who may make a health quality complaint, who may make a health service complaint and the process for making health service complaints. Chapter 6, ss 72 to 85, provides for conciliation; Chapters 7, ss 86 to 93, investigations by the commission; Chapter 8, ss 94 to 113, inquiries by the Commission; and Chapter 9, ss 114 to 146, monitoring, enforcement and investigation. Once again you can see that under Chapter 9 the sections and subsections are divided into parts and then again into divisions. Chapter 10, ss 147 to 173, deals with matters concerning the Commission and is set out in a way similar to Chapter 9. Chapter 11, ss 174 to 187, covers the office of the Health Quality and Complaints Commission and has four parts whereas Chapters 12, 13 and 14 have no parts or divisions. Chapter 15, ss 218 to 231, has two parts, which address repeal and transitional provisions and Chapter 16, ss 232 to 240, amendments to the Health Services Act 1991 (Qld). Chapter 17 has only s 241, which provides for the amendment of other legislation.

Certain items and prescribed forms are more conveniently set out in a list appended to an Act. This is achieved in the form of a schedule. Sections in the Act will refer to a schedule and this has the effect of incorporating it into the law. For example, in Figure 1.4 the schedules in the Health Quality and Complaints Commission Act identify facilities and institutions that are declared to be or declared not to be health services, relevant registration boards, amendments to other Acts consequential to the operation of this Act and a dictionary of terms.

**Regulations**

One of the last sections in an Act confers on the Governor-General the power to make regulations that may be necessary for the administration of the Act. Regulations provide the essential details of administration that may change more frequently than the Act can be amended by parliament. Regulations are used to set fees and charges as well as a variety of requirements necessary to enable the daily implementation of the Act. The regulations are called delegated legislation. Regulations are usually drafted in the Australian Government Attorney-General’s Department, advised by the department responsible for administering the Act. The regulations are tabled in parliament but they do not progress through parliament in exactly the same manner as a Bill.

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*Essentials of Law for Health Professionals*
REVIEW QUESTIONS AND ACTIVITIES

1. Identify and describe the sources of law in Australia.
2. Identify some Acts of Parliament that regulate and control your practice as a health professional.
3. What is the significance of delegated legislation?
4. Describe the significance of the doctrine of precedent to the development of the common law.
5. How does the legal concept of natural justice operate?
6. Describe the difference between an adversarial and an inquisitorial process.
7. Describe the legal term 'jurisdiction'.
8. Identify the courts in the court hierarchy from the lower court to the most senior court. Where are tribunals located in relation to the court structures?
9. Find one of the following health related cases:
   - Hunter Area Health Service & Anor v Presland [2005] NSWCA 33;
10. Distinguish civil from criminal proceedings.

Further reading
Endnotes

1 For example, the Constitution Act 1867 (Qld), s 2 and the Constitution Act 1902 (NSW), s 5. The Victorian Constitution Act 1975, s 16 provides that the Parliament is able ‘to make laws in and for Victoria in all cases whatsoever’.


3 Supreme Court of Queensland Act 1991 (Qld), s 96.

4 Supreme Court of Queensland Act 1991 (Qld), s 102; District Court Act 1967 (Qld), s 97; Magistrates Court Act 1921 (Qld), s 29.


7 ACT Civil and Administrative Tribunal Bill 2008 introduced into the Australian Capital Territory Legislature on 8 May 2008.


9 Case law can be located on www.austlii.edu.au for all Australian jurisdictions and on individual court websites in each of the individual states and territories.


11 Cth: www.comlaw.gov.au
ACT: www.legislation.act.gov.au
NSW: www.legislation.nsw.gov.au
NT: www.nt.gov.au/dcm/legislation
Qld: www.legislation.qld.gov.au
Tas: www.thelaw.tas.gov.au
Vic: www.dms.dpc.vic.gov.au
WA: www.slp.wa.gov.au/statutes