Section 1 INTRODUCTION

SECTION OUTLINE

1 AN INTRODUCTION TO THE LAW AND AUSTRALIA'S LEGAL SYSTEM

LEARNING OBJECTIVES

In this chapter, you will:

- understand why a knowledge of the legal system in Australia is important to professional practice as a registered or enrolled nurse or midwife
- learn about the philosophies that underpin the development of our legal system
- examine the development of Australia's legal system including common law and parliamentary-made law
- understand the difference between civil and criminal law, and the application of criminal and civil law to your work as a nurse or midwife
- examine the administrative structure of Australia's legal and court systems encompassing the Commonwealth and the states and territories.

INTRODUCTION

To practise as a registered nurse, enrolled nurse or midwife in Australia requires registration with the Nursing and Midwifery Board of Australia. Once gained, that registration incorporates adherence to a *Code of conduct*[1] and a *Code of ethics*[2] as well as a *Standards for practice*[3] that sets out in broad principle-based terms the professional, ethical and legal responsibilities expected of nurses (both registered and enrolled) and midwives in the delivery of healthcare and health services.

More specifically, requirements within the *Standards for practice* make provision for such responsibilities in specific terms. For example, Standard 1.4 relating to a registered nurse states that, when practising, a registered nurse should comply 'with legislation, regulation, policies, guidelines and other standards or requirements relevant to the context of practice when making decisions'.[4] Similar such provisions apply in relation to the specific Standards for enrolled nurses[5] (Standard 1.1) and in relation to midwives[6] in Standard 3.2.

For a nurse (registered or enrolled) or midwife to attain the standard expected requires, in the first instance, a rudimentary understanding of what the law is, where it comes from and how it operates relevant to your professional practice. Such an understanding is essential to enable you to extract from a seemingly complex system sufficient practical information to be of benefit to you in your professional life.

The Development of the Law and Its Role in Society

Rather than seek to precisely define what the law is, it is more important to understand the rationale behind the development of the law and its role in society.

The sophisticated and complex legal system that exists in Australia today represents the development of many centuries of Western civilisation. The discovery and colonisation of Australia by England over 200 years ago saw the adoption in this country of the legal system and principles that existed in England at that time. The English legal system, as it then was, originated in primitive community or village systems and its historical development can be traced back over centuries of invasions. These primitive communities recognised the need for rules of behaviour which encompassed respect for each other and each other's property to ensure a degree of order in the community.

Hand in hand with such recognition was the inevitable desire for dominance and power over others, which has played such a major role in the development and subsequent decline of civilisations over the centuries.

Inevitably, what started as a crude system for rules of behaviour, operating on an individual community or village basis, was forced to develop and change over the centuries with the growth of the population and the diversity and sophistication of community systems, as well as the rapid growth of industry and technology.

As earlier stated, the laws of a community essentially comprise rules of behaviour as well as the recognition of personal and property rights. Within that process, certain philosophies have influenced, and continue to influence, the development of such rules. Primarily these are referred to as natural law and positive law philosophies.

Natural law philosophies, as a general rule, saw the origins of law as arising from a higher or divine being, which encompassed the notion of divine retribution operating in human affairs. Such a philosophy embraced the concept of sin as a transgression against the divine will, or contrary to certain principles of morality.

The development of the Greek civilisation, and to a lesser extent the Roman civilisation, was influenced by such natural law philosophies (in the shape of their gods), which stressed individual worth, moral duty and universal brotherhood. Such philosophies were developed further during the medieval period in Europe by the increasing influence of the Catholic Church, which set the tone and pattern of all speculative thought at that time. The Catholic Church pursued this natural law view as law derived from God with one faith, one church, one empire — not created by human societies but conceived as part of the universe.

In summary, natural law philosophies view situations as they might or ought to be, as opposed to how they are. It is an idealist notion with strong moral overtones. As an example, the United Nations Declaration of Human Rights is essentially a natural law document.

Positive law philosophies view law in a totally secular cast without regard for divine prescriptions or intervention. Such views emerged during the Renaissance period of European history (fourteenth to sixteenth centuries), which saw the rise of independent national states and an emphasis on the individual. Further development occurred during the nineteenth century, when states were established with absolute sovereignty not subject to an external natural law. The industrial revolution and the development of science supported this imperative theory of law, which saw the key concepts of law as being:

1. the command;
2. of a sovereign (used in this context, sovereign means the government of the state or country);
3. backed by a sanction (i.e. the penalty imposed for non-compliance with the command of the sovereign).

Such a view of the law takes no account of morality, and indeed positive law is most evidenced in the rigid separation of law and morals.

The Influence of Natural and Positive Law Philosophies on the Development of Legal Systems

Natural law philosophies have had their greatest impact on the development of the legal systems of Western civilisation in shaping statements of ideal intent. Apart from the United Nations Declaration of Human Rights, another example of the incorporation of natural law philosophies into a legal document can be found in the United States Constitution that provides for the individual right to certain fundamental freedoms — two of which are the freedom of speech and freedom of the press. Although such rights are guaranteed in the Constitution, such rights are not absolute in practice, as they are subject to constraints that prohibit that freedom in certain circumstances. As an example, the freedom of the press is subject to the laws of defamation, which will prevent the publication of material in particular circumstances and provide for the courts to award monetary compensation if defamatory material is disseminated. Nevertheless, it is the *intent* of the United States Constitution to guarantee absolute freedom of speech and of the press, so that every citizen and the press should be able to speak their mind and state their views freely, without fear of reprisal.

Natural law philosophies have also been responsible for the continuing influence of morality in shaping some of our present laws, much to the disapproval of positivist lawyers who believe morality should play no

part in such an activity. As an example, areas of law-making where morality and/or religious influences have played a significant role in influencing our present laws have been the contentious areas of abortion, same-sex marriage and voluntary euthanasia.[7]

The positive law view that law is a command of a sovereign backed by a sanction means that no regard should be paid as to whether the command of the sovereign may be considered immoral by general community standards or a particular group in the community. The mere fact that the sovereign (the parliament) has the power to command and, where necessary, impose a sanction for non-compliance legitimises such a command. An example of such a situation is the international legal recognition that is given to governments of various countries whose government regimes would be considered by any moral standards to be odious and repressive. At a more local level, an example would be where parliament has approved laws to permit same-sex marriage, abortion and voluntary euthanasia that some sectors of the community would not support because of their religious or moral beliefs.

Both philosophies have had an impact on the laws that we have today and will have in the future.

WHERE DOES OUR LAW COME FROM?

As a legacy of our colonisation by England, Australia as a nation inherited many of England's laws — certainly its legal principles — and in doing so the historical development of its legal system. Therefore, let's examine briefly the history of the English legal system in order to understand ours.

The development of the English legal system saw the emergence of two major sources of law:

1. common law;
2. parliamentary or statute law.

The Development of the Common Law

To understand how the common law principles developed, appreciate that the land mass known to us as England and Wales[8] was not always the densely populated modern community that it now is. The development of English common law principles that were established on a central unified basis goes back to the time of Henry II, who ruled England from 1154 to 1189.

At that time Henry's kingdom consisted of a large number of feudal villages, each presided over by the feudal lord or chief of the village. Communication as we know it today did not exist, battles between warring factions were not uncommon, and Henry was having the usual problem of maintaining power and control over his kingdom that English monarchs were wont to have in those times.

The law, as then understood and applied, consisted of the rules of the individual villages, generally based on custom and practice, which were administered and interpreted by the feudal lord of the village. Such rules were generally arbitrary and subjective, were changed frequently and varied from village to village.

In an attempt to unify his kingdom and as an alternative to the capricious and variable nature of the individual village laws, Henry offered his subjects access to his law, known as the King's law. This law was also based on custom but had the great advantage of universal application. Henry arranged for his knights to visit each village in his kingdom on a regular basis to deal with disputes that had arisen. The villagers had the choice of being dealt with by the feudal lord according to the laws of the village, or they could wait and be dealt with by the King's knight according to the King's law. The King's emissary was usually fairer, as he was able to be more objective and his decisions were more certain and predictable. In due course more and more people chose to have disputes dealt with in this way and gradually the King's law supplanted the village law system completely.

In offering an alternative system of development and administration of law to his subjects, Henry II was also responsible for commencing the first central unified system of law reporting. In travelling from village to village, not only did his knights attempt to administer the law fairly and objectively but, having applied certain principles to a particular set of facts in one village, they would do so in all future situations where the same facts arose. To be able to do that, they kept notes of the cases they had dealt with and referred to them as required. The recording of previous decisions and the facts on which they were based saw the emergence of certain principles concerning personal and property rights, which became established and were known as **common law principles**.

The writing down of facts and decisions of decided cases also saw the development of what became known as the doctrine of precedent. That is, when a similar case came before the King's judges (knights) they would refer to the notes of previously decided cases based on similar facts to use as a precedent in determining the matter before them. Over the centuries this convenient practice became well established and developed into a rule of law known as the doctrine of precedent where a previous judgment of a court is used as an authority for determining a case based on similar facts. By the early twentieth century the doctrine of binding precedent had been established.

As communities developed and society became more complex and sophisticated, the common law principles as well as the doctrine of precedent were expanded and developed by the courts and judges who had long replaced Henry's knights of old.

It is interesting to consider that the present-day court structure, where magistrates or judges preside in our cities and towns in each state and territory to administer the law, owes its origins to the primitive system of the King's knights travelling on horseback from village to village administering the King's law.

Clearly, the centuries that have passed since Henry II's time have seen the continued development by the courts of the common law principles. Such principles are well enunciated and recorded in the present sophisticated system of law reporting, which represents the history of such development through decisions of the courts. The principles enunciated in the recording of cases in the law reports are the authorities relied on by lawyers to support a legal argument based on common law principles. This is sometimes referred to as **case law**.

As the court system applied the common law principles and recorded them, certain power struggles were developing, centred on the perceived divine right of the monarchy and the right of the people to have a say in the affairs of government. This struggle culminated in the establishment of the second major source of our law — parliament.

Parliamentary Law or Legislation

The institution of parliament as we know it today, with the power to make and unmake laws, was the result of many years of turmoil and struggle in English history. The long-established divine right of the monarchy, with the power to make and unmake laws and to tax the people at will without accountability, was gradually eroded by increasing demands for representation and participation in government. Out of the demands for representation and participation came the early beginnings of a parliament representative of the people. One of the powers that the early parliaments soon took upon themselves and away from the monarchy was the power to make laws. Although parliaments have also changed in complexity and sophistication, their fundamental right to make laws has remained unchallenged. In the last century particularly, parliaments have increased their law-making role significantly, to keep pace with social, industrial and technological changes in the community. Today many of the well-established common law principles have been extended or replaced by parliamentary-made law to take account of such changes.

Laws created by a parliament are embodied in documents known as **Acts** of that parliament and commonly referred to as **legislation**. When a document concerning a particular matter is placed before a parliament with the intention of creating legislation, it is known as a **Bill**. Once it has been passed by both houses of parliament (with the exception of Queensland, which has only a lower house) and subject to any amendments on the way, it then receives the Royal Assent from the King's representative and is formally proclaimed an Act of parliament. The provisions of an Act are known as **legislation** or **statutory law** (or statutory authority).

Acts of parliament often have a separate document known as **Regulations**, which accompany the Act and should be read in conjunction with it. The Regulations generally give precise directions that must be followed to comply with the intent of the Act; for example, the Regulations relating to the New South Wales (NSW) *Poisons and Therapeutic Goods Act 1966* provide considerable detail as to how drugs of addiction are to be stored and the steps that must be observed by registered nurses and midwives in administering such substances. This topic is covered in detail in **Chapter 8**.

Apart from their role in expounding and applying the common law principles, the courts are now increasingly occupied with interpreting the legislation passed by the relevant parliaments.

The Application of English Legal Principles to Australia's Laws and Legal System

The inheritance of the principles and sources of law arising from our colonisation by England laid the groundwork for the development of our legal system.

The English common law principles have been universally adopted throughout the states and territories of the Commonwealth as the basis for future development of the law.

The Impact of the Federation of the Commonwealth of Australia on Australia's Parliamentary Law-making Powers

Prior to Federation, the land mass known as Australia consisted of a number of self-governing and independent colonies of the United Kingdom with no Commonwealth Government as we know it today. However, the creation of the Federation in 1901 with a Commonwealth Parliament together with the existing concurrent parliamentary systems in each state, with their inherent law-making powers, posed significant challenges as to what power to make laws would remain with the state parliaments and what powers would be transferred to the newly created Parliament of the Commonwealth of Australia.

The creation of the Federation pursuant to the *Commonwealth of Australia Constitution Act* (Cth) established a Commonwealth Parliament, and the former self-governing colonies became states of the Commonwealth of Australia. In the same Act, exclusive powers to make laws in relation to certain areas were given to the Commonwealth Parliament. Those areas are set out in section 51 of the Act, and include such common policy matters as customs, currency, overseas trade, defence, invalid and old age pensions as well as divorce and matrimonial causes (amongst others). At the same time, section 51 allowed certain powers to be shared between the Commonwealth and the states and territories. Such powers are known as **concurrent powers**. By implication, matters not mentioned in section 51 or elsewhere in the Constitution comprise the powers that can be exercised exclusively by the state or territory parliaments.

The outcome of such a sharing of powers with the right to make laws in relation to them means that all Australian citizens are subject to the laws of two parliaments — the Commonwealth Parliament and the parliament of the state or territory in which they reside. Understandably it can sometimes be confusing.

The power to make laws in relation to health is a concurrent power shared between the Commonwealth and the states and territories. For example, the Commonwealth is responsible for the legislation underpinning the funding of Medicare and general health insurance. Consequently, the Commonwealth has control over the level and extent of financial rebate that is paid by Medicare for general practice fees and medical specialist consultation fees. It also controls the level of fees able to be charged by health insurance companies, and administers and subsidises the Pharmaceutical Benefits Scheme available to all Australians in relation to the cost of approved and prescribed medications. However, it is the state and territory governments that have control of and responsibility for the delivery of hospital and public health services as well as a broad range of community-based health services. In 2012, the Commonwealth introduced a number of sweeping changes to the funding arrangements for the public hospital system in Australia that saw the Commonwealth have a much more direct say in the delivery of public hospital services.

A further example of where the Commonwealth Parliament has extended its powers in relation to healthcare matters has been in relation to the registration and regulation of health professionals. Prior to 2010, in order to practise, health professionals (including registered and enrolled nurses and midwives) were required to be registered in the state and/or territory in which they wished to practise and registration in one state or territory did not automatically confer a licence to practise in any other state or territory of the Commonwealth. Since 2010, however, Australia has had a national registration and regulation scheme for healthcare professionals, including registered and enrolled nurses and midwives. The system is known as the National Registration and Accreditation Scheme (NRAS). Under the *Health Practitioner Regulation (Consequential Amendments) Act 2010* (Cth), nurses (registered and enrolled) and midwives now need to hold only one licence to practise as a nurse or midwife in any state or territory of the Commonwealth.

The national Nursing and Midwifery Board of Australia (NMBA) is charged with overseeing national registration and regulatory provisions for nurses (registered and enrolled) and midwives. See **Chapter 4** for

full details of those provisions and the implications for nurses and midwives in relation to their professional responsibilities.

Apart from Commonwealth legislation regarding the regulation and registration of health professionals, there are also specific provisions of individual state or territory legislation regarding the delivery of health services that can, and do, vary. For example, although generally consistent in their respective approaches, each state and territory has its own version of a *Mental Health Act*. The same applies to the legislation relating to the control and supply of poisons and prohibited substances which governs the administration of dangerous drugs and drugs of addiction in each state and territory.

Nurses and midwives quite often move freely between the states and territories seeking employment or to practise independently. Accordingly, when such a shift is made, it is important that differences in legislative provisions which are relevant to one's professional practice are known and emphasised.

THE DIFFERENCE BETWEEN CRIMINAL LAW AND CIVIL LAW

The law is divided into two distinct areas:

1. criminal law;
2. civil law.

It is essential that such a distinction is grasped from the very beginning, as otherwise it makes it difficult to understand and follow the legal process.

Criminal Law

The best way to think of the criminal law is that it is essentially rules of behaviour (laws), backed by the sanction of punishment, that govern our conduct in the community, particularly in relation to other people and their property. Most of us are aware of the more common rules of behaviour — for example, not taking another person's property without their consent, not assaulting another person, or not exceeding the speed limit when driving a motor vehicle. The parliament's power enables it to set the rules by passing legislation (laws) stating what actions are deemed unlawful and generally determining the punishment (sanction) that will apply if a person is found to have committed the particular unlawful act.

The government monitors our behaviour in the community to ensure we obey the laws or face the sanction of punishment, by way of delegated authority to the police force. Their task, in the first instance, is to adopt a preventive role and, in the second instance, to 'catch' us when we do break the law. Having done that, the police must, via the relevant prosecuting authority, charge the person (the accused) with a breach of the law (a criminal offence) and then the prosecuting authority must prove that the accused committed the offence charged.

The task of having to prove an offence has been committed is known as having the **burden of proof** or **onus of proof**. In satisfying the burden of proof, the prosecution must prove the offence according to the criminal law **standard of proof** — that is, beyond reasonable doubt — by producing evidence from a number of different sources, for example:

- evidence of identification and relevant events from the victim (if possible);
- direct evidence of eyewitnesses who saw the offence being committed;
- medical or scientific evidence by experts;
- written or verbal admissions made by the accused.

A criminal charge will generally be dealt with before a judge and jury or before a magistrate sitting alone. More serious matters are generally always dealt with by a judge and jury, with the jury having the task of deciding the guilt or innocence of the accused based on the evidence presented. The role of the judge in such trials is to determine points of law and ultimately sentence the accused if he or she is found guilty. In some states, it is possible for the accused to elect to be tried by a judge alone without a jury. In such cases, the judge determines the guilt or innocence of the accused and, if found guilty, proceeds to impose a sentence. In less serious criminal matters a magistrate will hear and determine the matter without a jury and, where found guilty, sentence the accused. The degree of the punishment will depend on the nature and seriousness of the offence and can range from fines, bonds, community-based supervision or intensive correction orders, periodic detention and home detention, to imprisonment.

In addition to the criminal offences that most people think of when they think of the criminal law — that

is, murder, assault, robbery, theft, fraud and so on — there are other categories of criminal offences that individuals or companies can commit. For example, companies and/or individuals can be prosecuted for environmental, occupational health and safety, or corporate law offences.

Unless the accused is acquitted of the offence, the outcome of the criminal law process is punishment.

What Constitutes a Crime?

If a person is charged with a criminal offence, the prosecution must prove that two essential elements existed at the time the offence was committed:

1. the activity that constitutes the offence; and
2. the intention to carry out the particular activity or a high degree of reckless indifference as to the probable outcome of a particular activity.

The first element is often referred to as the *actus reus* of the offence. For example, in a charge of theft, the 'activity' of the offence would be the dishonest appropriation of property belonging to another person without that person's consent.

The second element is often referred to as the *mens rea* of the offence — that is, the guilty mind, where there is the intention to carry out the offence, or in some instances a high degree of reckless indifference as to the probable outcome of a particular activity.

As a general rule, if the activity is carried out without intention there can be no crime. So, using the example of the offence of theft again, the 'activity' and 'intent' elements of that offence, when expressed together, would be the taking of property belonging to another without their consent with the intention of permanently depriving them of the property. The presence or otherwise of an intention to harm is particularly relevant in the healthcare environment. That is, a health professional may, by their actions or a failure to act, cause harm to a patient but almost invariably they do not intend to harm the patient.

Nurses and Midwives and the Criminal Law

It is hoped that a detailed knowledge of the criminal law does not arise for consideration in your day-to-day professional practice. However, regrettably, there have been instances where registered nurses have been charged with serious criminal offences relating to their professional activities.[9]

Remember, for the actions of a nurse or midwife to constitute a criminal offence it is necessary for the prosecution to prove not only that the nurse or midwife did the act that constitutes the crime but also that he or she intended to do the act. Most actions of a nurse or midwife that do cause harm to a patient are never intended to do so. They are almost invariably a negligent act without any intent to harm. However, the negligent act may create a **civil** liability on the part of the nurse or midwife or his or her employer.

Criminal Negligence and the Significance of Intent

On occasions, incidents may occur in hospitals or healthcare centres that, at first glance, suggest a criminal offence has been committed. For example, if a patient died as a result of the administration of a wrong drug, it might be thought that whoever administered the drug was guilty of murder or manslaughter. However, as far as the criminal law is concerned, the most significant factor to be established would be the presence or otherwise of any intent to cause harm or a high degree of recklessness or inadvertence such as to amount to criminal negligence. If the wrong drug were administered intentionally, with the deliberate intent to kill the patient, this would clearly amount to murder. If the drug were given in the belief that it was the right drug but with an attitude or degree of recklessness as to the amount to be given or the contraindications to be observed in the administration of the drug and the patient died as a result, this may amount to the offence of manslaughter on the basis of criminal negligence.

In most situations in hospitals where mistakes are made, a degree of carelessness or error of judgment is usually present such as to amount to civil negligence. For a nurse or midwife to be found guilty of criminal negligence as a result of their activities at work, there has to be a much higher degree of negligence, which would demonstrate an attitude of recklessness or inadvertence to the possibility of harm occurring.

It follows that it is important to distinguish between civil negligence and criminal negligence. One of the earliest cases that clearly made that distinction concerned the actions of a doctor in attending a woman during delivery. **Case example 1.1** sets out the relevant facts; then consider **Clinical study 1.1**, which follows.

CASE EXAMPLE 1.1

***R v Bateman*[10]**

Dr Bateman attended a woman at home during labour. The labour was prolonged, and the child's presentation was unusual and difficult. The doctor attempted to turn the child by the procedure known as 'version'. In doing so, he used considerable force over a period of an hour and delivered the child, which was dead. In delivering the placenta he also removed, by mistake, a portion of the patient's uterus. After the delivery the doctor left the patient at home. Five days later the patient was so ill that the doctor then transferred her to hospital where she died 2 days later. The post-mortem examination revealed the following:

> **…the bladder was found to be ruptured, the colon was crushed against the sacral promontory, there was a rupture of the rectum and the uterus was almost entirely gone.**[11]

Comment and Relevant Considerations Relating to *R v Bateman* and Later Judicial Decisions

Dr Bateman was charged with manslaughter on the grounds of criminal negligence in that he had:

- caused the internal ruptures in performing the operation of version;
- removed part of the uterus along with the placenta;
- delayed sending the patient to hospital.

Dr Bateman was initially found guilty of the charge, but successfully appealed that decision. His conviction was quashed. In handing down their decision the appeal court judges said:

> *To support an indictment for manslaughter the prosecution … must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment …* there is a difference in kind between negligence which gives a right to compensation and the negligence which is a crime.[12] *[emphasis added]*

While the appeal court judges may have considered Dr Bateman had been less than professionally competent in carrying out the surgery, they did not accept that his actions amounted to a 'disregard for the life and safety' of his patient such as to amount to criminal negligence.

Although Dr Bateman's case was some considerable time ago, the test to be applied when considering manslaughter by criminal negligence has remained fundamentally unchanged. In 1992, the High Court of Australia approved the following formulation of the elements of manslaughter by criminal negligence in the following terms:

> *In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow (and) that the doing of the act merited criminal punishment.*[13]

Where, as in the case of Dr Bateman, a specific duty of care is owed to the victim, the elements of the offence that must be established beyond reasonable doubt were expressed in 2019 in the South Australian Supreme Court decision[14] involving a midwife charged with two counts of manslaughter by criminal negligence as follows:

- The accused owed the victim a duty of care.
- The objective standard of conduct required of her was that of a reasonably competent midwife.
- The accused's act and omissions caused the death of the victim (in the sense of being a substantial cause of death).
- The accused's acts and omissions were deliberate.
- The accused's acts and omissions fell so far short of the applicable standard as to amount to gross or criminal negligence and thereby to warrant criminal punishment.

In the above case, after considering all the evidence and the legal elements required to be established, the court determined the midwife not guilty on both charges. The matter involved two homebirth deliveries, one in 2011 and another in 2012 involving two different women. The evidence was that in both situations and given the risk factors present, both women should have delivered in hospital. In the first homebirth the cause of death was determined to be hypoxia due to placental abruption. In the second homebirth in 2012 the cause of death was determined to be total occlusion of the umbilical cord. In both cases, the judge determined that while 'the accused's conduct did not reach the standards of a reasonable competent midwife, I am not satisfied that … the accused was criminally negligent' and further that her actions did not 'answer the quite demanding requirements of the concept of criminal negligence'.

Having regard to the above elements that must be established to satisfy a charge of criminal negligence, consider the hypothetical example set out in **Clinical study 1.1**.

CLINICAL STUDY 1.1

A patient, Mr Smith, was ordered to have a number of units of blood following major surgery. The appropriate cross-matching had been done and the cross-match slip was received in the ward. When one of Mr Smith's units was complete, Ms Jones, a registered nurse, went out to the refrigerator where cross-matched blood for all of the patients in the hospital was kept. Ms Jones picked up the first bag of blood she saw and did not bother to check it against any slip or with any other person. She came back to the ward and then proceeded to administer it to Mr Smith. The blood was incompatible; Mr Smith had an extremely adverse reaction to the incompatible blood; he nearly died and was extremely ill for many months. When questioned about her actions, Ms Jones admitted that she was aware of the dangers of incompatible blood transfusions and the need for checking but thought that on this one occasion it would be 'all right', and that nothing would happen. She also said she was sorry about what had happened and had not really meant to hurt Mr Smith.

Comment and Relevant Considerations Relating to Clinical Study 1.1

Ask yourself these questions:

- Did Nurse Jones owe Mr Smith a duty of care?
- What was the standard of care expected of Nurse Jones in administering the blood transfusion?
- Did Nurse Jones's acts and omissions cause the injury and damage to Mr Jones?
- Were Nurse Jones's act and omissions deliberate?
- Did Nurse Jones's acts and omissions fall so far short of the applicable standard as to amount to gross or criminal negligence and thereby warrant criminal punishment?
- If so, in what way?
- What should Nurse Jones have done?

On the facts provided, it is highly likely the prosecuting authorities would consider Nurse Jones's actions did warrant charging her with criminal negligence. Obviously the example is extreme, but it illustrates the degree of negligence that must be present to constitute the requisite intent in a charge of criminal negligence occasioning grievous bodily harm. If Mr Smith had died as a result of the incorrect blood transfusion, again on the basis of the facts given, Nurse Jones would probably face a charge of manslaughter by criminal negligence.

In considering what Nurse Jones should have done, it would be said that, as a registered nurse, Nurse Jones owed Mr Smith a duty of care. Further, Nurse Jones was well aware of the significant dangers of administering incompatible blood to a patient. As well, there would be a clear policy and checking procedure required to be followed when administering a blood transfusion to a patient. Knowing that, the actions of Nurse Jones would, we submit, be considered as showing a reckless disregard for, or indifference towards, the safety of Mr Smith.

As a general rule (thankfully) the type of professional activity that would constitute criminal behaviour falls outside the scope of practice of most nurses and midwives. However, it is the element of either direct intent or 'reckless indifference' to the possible outcomes of one's actions that can render a harmful act a crime, and it is important to bear this in mind in going about your day-to-day work as a nurse or midwife.

How does the above process differ from the civil law?

Civil Law

The first thing to remember about civil law is that, generally speaking, it has nothing whatsoever to do with the police force and punishment. The best way to think of civil law is that it exists to enable us, individually and collectively, to resolve the disputes and differences of a personal and property nature that arise between us as members of the community and which we are unable or unwilling to resolve ourselves. Usually in resolving such disputes, monetary compensation (damages) will be sought by the person or party alleging personal and/or property loss and damage. There are many divisions of the civil law — for example, family, industrial, land and environment, and workers compensation, to name just a few. There is also what is known in civil law as a common law division and into that division are allocated those matters whose origins are the well-established common law principles, such as contract law, negligence, defamation or nuisance.

The person who initiates an action in civil law is known as the **plaintiff** and the person against whom the action is taken is known as the **defendant**. There are exceptions to this; for example, in family law the person seeking a divorce is the **applicant** and the spouse from whom the divorce is sought is the **respondent**.

Similar to the requirement in criminal law, the person who brings an action in one of the areas of civil law (the plaintiff) bears the burden of proving the matter in dispute. The significant difference here is that, although the plaintiff has that onus, the standard of proof in civil matters is not the same as in criminal matters. In a civil action the plaintiff has to prove his or her case only on the balance of probabilities. What this means is that the evidence would disclose that, on balance, the allegation made by the plaintiff, when considered against the evidence produced, and in light of the law as currently applying, is the most probable cause of the matter in dispute. Proving an allegation on the balance of probabilities is a much lower standard of proof than that required in criminal law.

When the plaintiff succeeds in proving the matter in dispute, the final and most important issue to be determined by the court will be the amount of monetary compensation (damages) to be awarded to the plaintiff. In most circumstances, the outcome of the civil law process is compensation. There are some exceptions to this and civil law does provide for other remedies that may compensate the plaintiff. For example, the court could order that the defendant do a certain thing (specific performance) or refrain from doing a certain thing (an injunction). In family law the court may make a decision about access to or custody of children or the division of the assets of the marriage. However, as a general rule, the awarding of a sum of money to the plaintiff is seen as the most appropriate way of resolving the dispute between the parties.

In the awarding of damages by a court, the court itself does not actually give the money awarded to the plaintiff. The court hands down a judgment identifying the amount of compensation it determines the plaintiff is entitled to. The plaintiff must then recover that money from the defendant. In most civil litigation that means recovering the money from the defendant's insurance company. However, if there is no relevant insurance company standing behind the defendant and the defendant is impecunious, then the plaintiff may well be left without compensation. It is a salutary reminder of one of the pitfalls of civil litigation.

Civil and Criminal Consequences Arising from One Action

Having taken pains to distinguish between the civil and criminal law processes, we must now muddy the waters somewhat and point out that one incident can lead to both civil and criminal law proceedings. For example, while driving your motor vehicle one day you wrongfully fail to give way to traffic on your right at an intersection and, as a result, an accident occurs and a number of people in the other vehicle are badly injured. The police will be called, and you, as the driver of the vehicle that caused the accident, will be charged with a number of offences such as negligent driving and failing to give way. Your action and the charge that follows is deemed to be a criminal act pursuant to the legislation covering motor traffic offences in your state or territory, and in due course you will be dealt with before the appropriate court. Assuming your guilt, you will then be punished — you will probably be fined, your licence may be taken away or an even more severe

penalty may be imposed, depending on the culpability of your action.

However, the people that you have left badly damaged at the scene of the accident may be more concerned with seeking some money from you to compensate them for the pain, injury, loss and suffering you have caused them as a result of your negligent act — that is, your **civil wrong**. Those people will commence an action against you and allege that, on the basis of certain facts, you drove your car negligently, as a result of which they suffered certain damage. They will have to prove, on the balance of probabilities, the facts and damage they are alleging. Assuming they are successful, they will be awarded damages as compensation for their injuries and the subsequent losses that flow from those injuries.

It will be seen from the above example that the major distinction to be drawn between the civil and criminal act *resides not in the nature of the wrongful act but in the legal consequences that may follow it*.[15] That is, if the wrongful act is capable of being followed by what are called **criminal proceedings**, that means that it is regarded as a **crime** (otherwise called an offence). If it is capable of being followed by **civil proceedings**, it is regarded as a civil wrong. If it is capable of being followed by both, it is both a crime and a civil wrong.[16]

Civil and criminal proceedings are (usually) easily distinguishable; the procedure is different, the outcome is different and the terminology is different.

ADMINISTRATIVE STRUCTURE OF AUSTRALIA'S LEGAL AND COURT SYSTEM

The administrative structure of Australia's legal and court system encompasses the Commonwealth and the states and territories. In its day-to-day operation the administration of the law is also divided along criminal and civil lines. In addition, there is a hierarchical structure that determines:

- what matters can be dealt with by particular courts;
- the powers that are vested in the different courts to deal with matters that come before them;
- if a right of appeal exists from a particular court, how and in what circumstances it is to operate.

All the states and territories have a similar basic hierarchical structure of the administration of the law. The titles of the courts may vary from state to state or territory, but not to any significant degree. The following summary of the roles of the various courts should be read in conjunction with **Figure 1.1**, which illustrates the basic hierarchical structure of courts in Australia.

State and Territory Courts

Local or Magistrates' Courts

The *Local Courts Act 1982* (NSW) formally changed the title of magistrates' courts from Courts of Petty Sessions to the Local Courts of New South Wales. The Northern Territory did likewise in 2016. In the other states and territories, such courts continue to be known as Magistrates' Courts.

These courts are at the bottom of the legal hierarchy, but undoubtedly deal with the greatest number of matters. They are presided over by magistrates, who are legally trained and qualified. Even tiny country towns have sittings of the Local or Magistrates' Court and, in big cities, Local or Magistrates' Courts are located in many suburbs.

In carrying out their task, magistrates sit without a jury and can deal with criminal and civil matters, including some family law matters. However, magistrates can deal only with those matters they have the power (jurisdiction) to deal with. In general terms, magistrates can deal with civil matters where the amount claimed in damages does not exceed the amount determined by the relevant legislation. In most states that amount is generally $100 000, up to $150 000, with some provision for extending that for money claims excluding personal injury cases, except in Tasmania where it is expressed to be 'more than $50 000 if all parties agree'.[17] In the Northern Territory and the Australian Capital Territory, the jurisdictional limit is $250 000.

In criminal matters, magistrates deal with a wide range of criminal offences as well as applications for apprehended violence orders and alleged breaches of such orders. Not surprisingly, such offences constitute the bulk of crimes committed in the community. Magistrates have the power to impose a custodial sentence limited generally to between two and five years, and are also able to impose a range of other sentencing orders such as fines and community service orders.

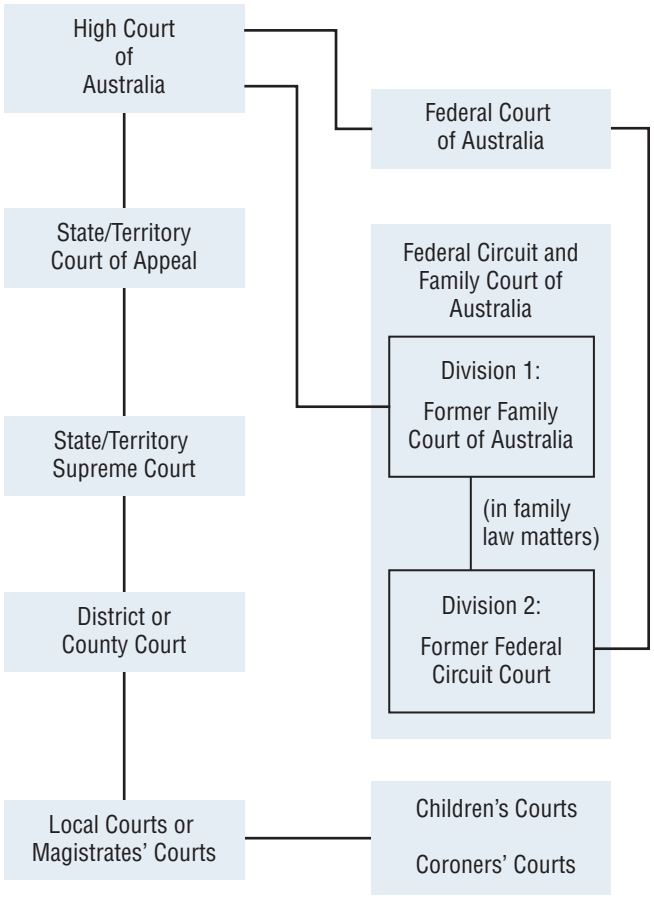

Figure 1.1 ■ **Hierarchical structure of courts in Australia.**

One extension of a magistrate's role in criminal matters is that, in relation to serious criminal offences which they do not have the power to deal with to finality, they do have the job of deciding whether there is sufficient evidence to establish a *prima facie* case against the accused — that is, based on first impressions and from a consideration of the evidence, whether there is sufficient evidence to show that a jury is likely to find the accused guilty. If they so decide, the accused is then sent for trial before a higher court. Such proceedings are known as **committal proceedings**. In some states now, the initial committal process has been significantly truncated: instead of having an extensive preliminary hearing at the committal stage, the prosecution simply tenders the statements from those persons they wish to call at trial. Witnesses may or may not be called at that stage. Whatever procedure is observed from state to state and territory, the magistrate is still required to formally commit the accused to stand trial.

Magistrates also deal with the bulk of bail applications. Granting bail to a person arises when the person is charged with a criminal offence and is remanded in custody before they come before a court in the first instance. Very often, when they do appear before the court, an application is made that the person be granted bail — that is, released into the community subject to certain conditions while waiting for their matter to be heard by the court.

In some states, Magistrates may also preside over a range of other courts — for example, Coroners' Courts and Children's Courts. Of all of those subsidiary

courts, the Coroner's Court is most relevant to nurses and midwives. **Chapter 11** outlines the role of the Coroner's Court in more detail.

District or County Courts

The next tier in the hierarchy of the court and judicial system is the District or County Court, depending on the state or territory. In New South Wales, Queensland, South Australia and Western Australia it is known as the District Court, whereas in Victoria it is called the County Court.

Because of their relatively small size or population, the Australian Capital Territory, the Northern Territory and Tasmania do not have an equivalent intermediate court, and rely on the Magistrates' Court and Supreme Court to cover their criminal and civil jurisdictions.

Sittings of the District or County Court are presided over by a judge appointed from the legal profession. The judge sits with a jury in criminal matters, but generally sits alone in civil matters. The role of the jury in criminal matters is to decide on the guilt or innocence of the accused. The role of the judge in criminal matters is to decide questions of law, direct the jury on relevant points of law that arise, and punish the accused when, and if, he or she is found guilty of the offence. Juries are not routinely used in all civil matters. When they are, their role is to decide the issue in dispute and, if decided in favour of the plaintiff, to generally determine the amount of compensation to be awarded.

The role of the District or County Court judge is divided into civil and criminal sections and, like the Local and Magistrates' Courts, there is a limit placed on the jurisdiction of these courts to deal with such matters. There are variations between the states; in New South Wales, for example, the jurisdiction of the District Court to deal with civil matters is limited to those matters where the amount claimed in damages does not exceed $750 000 and is unlimited in relation to motor vehicle injury claims.

In criminal matters the District or County Court deals with all major criminal offences except murder, piracy and treason. In other states and territories the civil and criminal jurisdiction of this court does vary. The power of this court to punish extends to the penalties provided for the offences it has to deal with. Judges of this court sit daily in the capital cities and large country towns and travel on circuit to smaller country towns for a week or two at regular intervals.

Judges of this court can also hear appeals from a decision of a magistrate and, where provided for, in certain other matters.

Supreme Courts

All states and territories have a Supreme Court. It is the highest or most senior court in the judicial system within state and territory boundaries. Sittings of this court are presided over by judges appointed from the legal profession and, in carrying out their task, they sit with a jury in the same circumstances as judges in the District or County Court. The role of this court is divided into civil and criminal sections. This court has unlimited financial jurisdiction in civil matters and its criminal role is generally confined, as a matter of practice, to dealing with the capital offences of murder and serious sexual offences.

Like the District or County Court judges, judges of the Supreme Court sit daily in the capital cities. There are regular sittings of the court in major country towns, which are presided over by the judges travelling on circuit in the same way as the District or County Court judges do.

One of the additional tasks of the Supreme Court is to hear appeals from the lower courts and from decisions of a single judge of the Supreme Court. To do this, a Court of Appeal has been established within the Supreme Court and is presided over by at least three judges of appeal. Once again the appellate role of the Supreme Court is divided into civil and criminal sections.

Commonwealth Courts

Federal Circuit and Family Court of Australia

The Federal Circuit Court was created in 2013 replacing the old Federal Magistrates Court. In September 2021, the Federal Circuit Court was merged administratively with the Family Court of Australia and the new structure is now known as the Federal Circuit and Family Court of Australia (FCFCA). The intention was to create a consistent framework and case management approach in relation to family law matters.

The new court entity (FCFCA) has two Divisions. Essentially Division 1 replicates the existing Family

Court of Australia and Division 2 replicates the existing Federal Circuit Court. All family law cases now start in Division 2 of the new court structure and will be dealt with by that Division unless they are transferred to Division 1 of the new court structure. Judges of Division 1 will hear appeals from decisions of judges in Division 2.

In addition to being the starting point for all family law matters, judges in Division 2 of the new FCFCA will, as allocated, also continue to share concurrent jurisdiction with the Federal Court of Australia on the following matters:

- administrative law;
- bankruptcy;
- unlawful discrimination;
- consumer protection and trade practices;
- privacy law;
- migration;
- copyright;
- industrial law;
- admiralty law.

Judges of Division 2 of the new FCFCA do not deal with criminal matters.

Appeals from decisions of judges of Division 2 of the FCFCA can be made as of right either to a judge of Division 1 of the FCFCA or to the Full Court of the Federal Court of Australia depending on the jurisdiction exercised by a judge of Division 2 of the FCFCA.

Federal Court

The Federal Court was created by the Commonwealth Parliament in 1976 by the enactment of the *Federal Court of Australia Act 1976*. The main reason for its creation was to relieve the High Court of its workload that arises from some of the exclusive constitutional powers of the Commonwealth — for example, trade practices, bankruptcy, immigration and federal industrial issues. Within the Federal Court structure, there is provision for an appeal court of three judges known as the Full Court of the Federal Court. That court hears and determines appeals from decisions of single judges of the Federal court and, where appropriate, from judges of Division 2 of the FCFCA. There is also an appeal right with leave from the Federal Court to the High Court.

High Court

The High Court was created by the *Commonwealth of Australia Constitution Act*, which has been previously referred to. The initial intent in creating the High Court was that it would deal with constitutional disputes that arose between the Commonwealth and the states and territories.

In addition to dealing with constitutional matters, the role of the High Court as a senior and final court of appeal from the Supreme Courts, as well as the Federal and Family Courts of Australia, has increased considerably to embrace civil and criminal matters. An appeal in such circumstances is not automatic, as the High Court must grant leave to appeal and will do so only if the matter to be appealed constitutes a point of law of general public importance.

For many years there was a right to seek leave to appeal from a decision of the High Court to the Privy Council in the United Kingdom, but this was abolished in 1975.

The High Court is the final Court of Appeal in Australia on all matters.

Other Court Systems and Tribunals Including Professional Disciplinary Tribunals for Nurses and Midwives

Coexisting with Australia's courts, and feeding into them at various points, generally for appeal purposes, is a wide range of courts and tribunals dealing with specific matters — for example, industrial courts, workers compensation courts, land and environment courts, anti-discrimination and administrative appeals tribunals as well as professional disciplinary tribunals. **Chapter 4** outlines in more detail the role of the nurses' and midwives' professional disciplinary procedures and administrative tribunals that deal with such matters.

The Appeal Process

Provision is made within the court structure for an appeals process. Generally speaking, there is nothing to prevent a person or party who so wishes from appealing against a decision of a magistrate to a higher court. Such an appeal may be based on a number of points — for example, that the magistrate erred on a point of law or that the punishment imposed

was too severe or too lenient. Likewise, the decision of a District or County Court judge or a single Supreme Court judge may also be appealed against to the appeal court of the Supreme Court of the state on similar grounds. From there, an appeal may be made to the High Court, subject of course to leave being granted.

CONCLUSION

Understanding Australia's legal system and court structure is an important first step that should assist nurses and midwives to readily and correctly incorporate their professional and legal responsibilities into the appropriate legal context.

CHAPTER 1 REVIEW QUESTIONS

Following your reading of **Chapter 1**, consider these questions in reaching the objectives of this chapter. Guidance on which part of the chapter will assist you in answering the questions can be found at http://evolve.elsevier.com/AU/Staunton/law/. You may, of course, consider other sources as part of your considerations.

1. What are the two major sources of law in Australia's legal system and from what events did they develop?
2. Both the Commonwealth and the state and territory parliaments have the power to make laws in relation to the delivery of health services including the registration and regulation of health professionals. Name two areas of healthcare where laws have been made by the Commonwealth Parliament and two that have been made by a state or territory parliament in which you currently practise as a nurse or midwife.
3. Is it possible to have a civil law action and a criminal law action arising out of one action? If so, give an example where such a situation may arise.
4. If a nurse or midwife were negligent in the course of their professional practice and a patient suffered harm as a result, what circumstances and legal principles would need to be considered to warrant the nurse or midwife being charged with criminal negligence as distinct from civil negligence?

ENDNOTES

1. A new Code of conduct for registered nurses and a Code of conduct for midwives were issued by the Nursing and Midwifery Board of Australia, effective from 1 March 2018.
2. In March 2018 the Nursing and Midwifery Board of Australia, the Australian College of Midwives, the Australian College of Nursing and the Australian Nursing and Midwifery Federation jointly adopted the International Council of Nurses (ICN) and the International Council of Midwives (ICM) Code of ethics.
3. The Nursing and Midwifery Board of Australia: Registered nurse standards for practice: June 2016. See Chapter 4 for more information.
4. Ibid, Standard 1.
5. The Nursing and Midwifery Board of Australia: *Enrolled nurse standards for practice*: June 2016.
6. The Nursing and Midwifery Board of Australia: *Midwife standards for practice*: October 2018.
7. It is worthwhile reflecting on recent developments in Australia where parliaments have passed laws in relation to each of these areas, all of which were subject to diverse community views. For example:
   (i) in December 2017, the Commonwealth Parliament approved an amendment to the *Marriage Act* permitting same-sex marriage in Australia;
   (ii) in October 2018, the Queensland Parliament decriminalised and approved the availability of abortion on request in the first 22 weeks of pregnancy: Qld *Termination of Pregnancy Act 2018*;
   (iii) in November 2017, the Victorian Parliament approved the *Voluntary Assisted Dying Act* permitting a person to voluntarily request medical assistance to end their life in circumstances where the person had a terminal illness together with a life expectancy of less than 12 months;
   (iv) in 2019, the NSW Parliament decriminalised abortion by removing it as an offence under the current NSW *Crimes Act*.

8. Scotland has developed a slightly different legal system from England, Wales and Northern Ireland, based on a combination of common law and Roman law principles.
9. For example:
   (i) in May 2013 a registered nurse, Roger Deans, pleaded guilty to 11 counts of murder and eight counts of causing grievous bodily harm arising from his actions in starting a fire in a nursing home in NSW. He started the fire to cover up his theft of prescription drugs particularly drugs of addiction. He was sentenced to 11 life sentences;
   (ii) in 2016 a registered nurse, Megan Hains, was sentenced to 36 years imprisonment with a non-parole period of 27 years for the murder of two elderly patients in a nursing home in NSW. It is alleged she injected them with insulin. She has appealed her conviction and sentence;
   (iii) in March 2019 a midwife, Lisa Jane Barrett, went on trial for manslaughter over the deaths of two babies in South Australia delivered in October 2011 and December 2012. On 4 June 2019, following a trial in the Supreme Court of South Australia, she was found not guilty on two counts of manslaughter. See *R v Barrett* (No 3) [2019] SASC 93.
10. R v Bateman (1925) All ER 45.
11. Ibid, at 47.11.
12. Ibid, at 49, 51.
13. Wilson v The Queen (1992) 174 CLR 313 at 333 approving the formulation as established in Nydam v The Queen (1977) VR 430 at 445.
14. R v Barrett (No 3) [2019] SASC 93, Vanstone J, at 110.
15. Williams G, Learning the law, 10th ed, Stevens, London, 1979, p 2.
16. Ibid, p 62.
17. Section 11 *Magistrates Court (Civil Division) Act 1992* (Tas).