



AUSTRALIAN
CONSTITUTION
CENTRE

Separation of powers in detail

One of the basic ideas in our Constitution is the Separation of Powers between the different branches of government: the Parliament, the Executive and the Judiciary. In his book "The Spirit of the Laws" of 1748, the French political thinker and social commentator Montesquieu wrote:

Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go....To prevent this abuse, it is necessary from the very nature of things that power should be a check to power....When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Montesquieu published the book anonymously due to his previous works being subject to censorship. However it was translated and quickly spread around the world. A few years later Montesquieu's book was banned by powerful authorities, but it was too late. The ideas had already influenced the work of others including the founders of the American Constitution in 1787. And so the Australian Constitution was formed on the same idea of providing checks and balances in a system of government that aims to limit the powers of the individuals who hold public office.

The Separation of Powers is provided in the Constitution by dividing the institutions of government into three separate groups. These are the Legislature, the Executive and the Judiciary. The legislature is better known as the Parliament, which debates and makes laws. The Executive government, which we usually refer to as 'the government', recommends new laws and puts them to the Parliament. The Judiciary applies and interprets the law.

In the Australian Constitution each of the three

branches of Government are stipulated in different Chapters. Chapter I is entitled the Parliament, chapter II, the Executive Government, and chapter III the Judicature.

Power is divided between these three branches of Government to ensure that each branch of Government is able to provide checks and balances upon the others and that no one branch of Government contains all the power.

Chapter I Legislative Power

The legislative power is vested in the Parliament in Australia. We have a Senate and a House of Representatives. Legislative Bills must be passed by members of both Houses of Parliament voting, before it is presented to the Governor-General for the Queen's assent. At this point the Bills become an Act of Parliament. Under our Constitution, the Commonwealth Parliament has defined subject areas where it has power to legislate. This is different from the States, who have general law making powers. However, where a valid Commonwealth law is inconsistent with a law of a state, then the Constitution provides that the Commonwealth law prevails.

Chapter II Executive Power

The Prime Minister and other government ministers make executive policy decisions and then put legislation before the Parliament. Apart from the Governor-General and the Queen, Ministers of the Executive must be Members of the Parliament. Besides deciding on new policies, they administer Government departments and Government services. The Executive implements the laws of Parliament.

Executive power is described in the Constitution as vested in the unelected Queen (the Crown) and exercised by the Governor-General, who has been nominated by the Prime Minister. While executive power is exercised by the Governor-General, it is on the advice of the Prime Minister and ministers who have day to day responsibility for governing Australia.



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Chapter III Judicial Power

The Judicial power of the Commonwealth is vested in the High Court, federal courts created by Parliament, and courts invested with federal jurisdiction. The Australian Constitution gives the High Court the power to rule on the validity of Commonwealth legislation and to interpret the Constitution. The Justices are appointed by the Executive branch of government. Judges must retire at the age of 70, but cannot be removed from office other than by a vote in both houses of Parliament on grounds of proved misbehaviour or incapacity. No High Court justice has ever been removed from office.

Security of tenure for judges is considered an important feature of an independent judiciary in Australia because they cannot be influenced in their decisions and judgments by the voters, the Executive or the Parliament. The High Court has the duty of keeping Parliament and the Executive within its constitutional bounds. So too must the High Court stay within its constitutional role. The High Court of Australia today has seven Justices who sit to exercise independent and impartial judicial power. The High Court is seen as one of the most trusted of institutions in Australia.

But what does 'judicial power' actually mean? It is often said that judicial power involves deciding controversies between citizens, or between citizens and government. It involves a court having power or jurisdiction over a particular controversy, and the ability to make a binding determination which can be enforced. It means that courts can only decide cases which involve a genuine dispute. Courts do not give advice, they settle disputes. At its most basic, courts determine what the law is, what the facts are, applies the law to the facts and reaches a conclusion which binds the parties to the case. One important part of judicial power is that only courts can sentence people to imprisonment.

Checks and balances

We do not have a strict Separation of Powers in Australia. The Legislature and the Executive overlap, as the Executive is made up of members of the Parliament. But we do have a strict separation between the Judiciary on the one hand, and the Parliament and Executive on the other. This means that only courts created under the Constitution can exercise Judicial power, and only Parliament can exercise Legislative power. The separation of Judicial power assists the public perception, central to our system of government, that legal controversies are resolved by judges acting independently of the other branches of government, free from political interference. Judges must be independent of Government, because so much of their work involves dealing with disputes between the Executive Government and citizens and the rule of law often requires courts to uphold the rights of citizens against the Executive Government. It is a guarantee of liberty. The separation of Judicial power is also very important in our Federation because it is the High Court which has the final say on the division of powers between States and the Commonwealth and on important matters affecting the rights and duties of all people subject to the laws of the Commonwealth.

The Separation of Powers involves each branch of government respecting the role of the other. Our Constitution has given the High Court the role of making sure that each branch of government stays within its limits.

Questions:

1. What are the three branches of government?
2. What is the separation of powers
3. How does the separation of powers protect us?

