

FACT SHEET 9

Introducing the three key institutions of government and the separation of powers

There is one superior law which is the source of the Commonwealth power to make, enforce and resolve disputes about all other laws. It is called the 'Constitution'. The Constitution distributes powers between the Commonwealth and the States (each of which has its own Constitution that confers law-making powers on State Parliaments).

The Australian Constitution establishes the Federal system of democratic government, including our key institutions of government and their respective functions and powers. The Constitution also sets out the principles that define the way our democracy operates (such as representative and responsible government) and provides the framework for our federation.

The Australian Constitution separates the Commonwealth powers and functions of government among the three key institutions (or branches) of Government: the Commonwealth Parliament, the Executive Government, and the Judicature (the courts, also known as 'the judiciary'). The Parliament, also known as 'the legislature', debates and makes laws. The executive government, which we usually refer to as 'the government', is responsible for running of government programs, which includes implementing many of the laws passed by the Parliament. The courts, also known as the judiciary, resolve legal disputes. These institutions are at least partially independent, and therefore can act as a check upon each other's powers. This is known as the 'separation of powers', and the reason for it is to prevent one person or institution from getting all the power and misusing it.

It has been recognised for a long time that if power is concentrated in the hands of one person, or one group of people, it will often end up being abused. In 1770, British Prime Minister William Pitt said in the British House of Lords: 'Unlimited power is apt to corrupt the minds of those who possess it'. In 1887 another British politician, Lord Acton, wrote the now well-known phrase 'Power tends to corrupt, and absolute power corrupts absolutely'.

In the 18th century, a French philosopher known as Montesquieu developed the idea of the separation of powers as necessary to secure political liberty. He considered that legislative, executive and judicial powers should each be assigned to different institutions and that they should act as a check upon each other's powers. He explained this form of political philosophy so convincingly in his book *De l'Esprit des Lois* ('The Spirit of the Laws') that it was taken up by James Madison and Alexander Hamilton and written into the United States Constitution in September 1787.

In the 1890s the drafters of the Australian Constitution incorporated the separation of powers in both the text and structure of the Constitution (without expressly stating that there shall be a separation of powers). They did this by structuring the chapters of the Constitution. Chapter I deals with the Parliament. Chapter II deals with the Executive Government. Chapter III deals with the Judicature. This was a deliberate attempt to entrench the separation of powers into the very structure of the Constitution. There is a distinction between the strict separation of judicial power from executive and legislative power, and the not-strict separation between executive and legislative power (because the executive is drawn from members of parliament).

We can also see the separation of powers in the text and the numbering of provisions. Section 1, which is the first section of Chapter I, says that the 'legislative power of the Commonwealth shall be vested in a Federal Parliament...'. It directly confers legislative power, and only legislative power, on the Parliament.

Section 61, which is the first section of Chapter II of the Constitution, says that the 'executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative...'. Again, it is only executive power that is conferred on the Executive.

Section 71, which is the first section of Chapter III of the Constitution, says that the judicial power

of the Commonwealth shall be vested in the High Court of Australia and in such other federal courts as the Parliament creates or invests with federal jurisdiction. Again, it is only judicial power that is conferred on the courts.

These structural and textual indicators have been relied upon by the High Court as the constitutional source for the application of the doctrine of separation of powers in Australia.

Since 1901, our system of government has served Australia well. We have had referendums and regular elections to ensure that the people's will is listened to. In Module 1 we introduced the role of government in dealing with issues through referendums. Module 2 uncovers the three core constitutional institutions to the Australian democracy and why they are important to each and every one of us.

The three key institutions of government in the Australian Constitution include:

Chapter I-The Parliament. The Constitution gives the Commonwealth Parliament the power to make laws. Once a bill passes both the House of Representatives and the Senate and receives assent from the Governor-General it becomes an act. The Parliament is made up of representatives of the people who are chosen in elections.

Australian Parliament House | Source: iStock



Chapter II-The Executive Government. The law is 'administered' (i.e. applied) by the Executive Government. The executive is drawn from members of parliament, and includes the Prime Minister and other ministers.

The Commonwealth Ministry | Source: Albanese Twitter



Chapter III-The Judicature. The judicature is comprised of the High Court of Australia and other courts, which interpret and apply the law. The High Court has the power to resolve disputes over the meaning of the Constitution, laws made by the Parliament, or certain actions taken by the Executive Government. The High Court also hears appeals from other Australian courts on a wide range of legal matters, including criminal convictions, and commercial and personal disputes.

The High Court of Australia | Source: HCA



The Separation of Powers Infographic



The Australian Constitution

The Parliament

House of Representatives

Senate

The Executive

The King
(represented by the Governor-General)

The Prime Minister and other Ministers of State

Federal Government Departments and the Public Service

The Judicature

High Court

Other Courts



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