



Teacher Reference Document 56



AUSTRALIAN
CONSTITUTION
CENTRE

Unit 7: The Australian Constitution and its three key institutions of government and how the Separation of Powers (SoP) protects democracy and the people – Years 6 and 7 - C & C Strand: Government & Democracy

Topic 6.3 & 7.1: The Australian Constitution and its three Key Institutions of Government

Separation of Powers – Overview: the three institutions or branches of government: SoP Overview

'Power tends to corrupt, and absolute power corrupts absolutely'.

This aphorism has been repeated so often it has become a cliché. But it does contain an essential truth. The phrase was written by a British politician, Lord Acton, in a letter to a Bishop in 1887. But Lord Acton was picking up an idea that had previously often been expressed. For example, a former British Prime Minister, the Earl of Chatham (known as 'Pitt the Elder') said in the British House of Lords in 1770: 'Unlimited power is apt to corrupt the minds of those who possess it'.

If power is concentrated in the hands of one person, or one group of people, it will often end up being abused. For that reason, systems of government are now usually established so as to ensure a separation of powers, so that no single person or group can exercise full power.

In the 18th century, a French man named 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 in America and given effect in the United States Constitution.

Separation of powers in the United States

In the United States, legislative power is exercised by the Congress, judicial power is exercised by the courts and executive power is exercised by a President and Cabinet, who are elected or appointed separately from Congress. But there remain cross-overs in power in the United States. The Vice-President, for example, serves as President of the Senate. While the Vice-President usually only presides in the Senate on ceremonial occasions, he or she can also exercise a substantive role in exercising a tie-breaking vote when the Senate is evenly divided.

Australian Parliament House
Source: IStock





In the United States judges are also nominated by the Executive but must be approved by the Senate. The President can be 'impeached' (ie removed) by both Houses of Congress.

Separation of powers in the United Kingdom

In the United Kingdom, the system of responsible government requires that the Executive be formed from Members of either House of the Parliament. This means that there is not as clear a separation between the Executive and the Legislature as there is in the United States, because some of the same people (i.e. Ministers) exercise both legislative and executive powers. But those powers are still allocated to separate institutions (i.e. the Parliament and the Executive), so there is still an institutional separation of powers, even though some of the personnel are the same.

The United Kingdom also has a constitution which has slowly developed over centuries from a time of complete concentration of power in a monarch, to a constitutional monarchy with a system of responsible and representative government. There were plenty of anomalies along the way. For example, up until 1399, both Houses of the English Parliament heard appeals from decisions of lower courts. From 1399 only the upper House, the House of Lords, continued to operate as an appeals court as well as a legislative body. The court aspect of its work was later exercised by an 'appellate committee' of the House of Lords, which was comprised of judges. Those judges could also, however, sit and vote in the House as part of the legislature.

The Commonwealth Ministry, July 2022
Source: Albanese Twitter

In the United Kingdom a separate Supreme Court was only established to replace the judicial role of the House of Lords in 2009. It therefore took a long time to make that complete separation between the Parliament and the courts.

Separation of powers in Australia

The people who wrote the Australian Constitution in the 1890s were influenced not only by the British system of responsible government, but also by the United States approach to the separation of powers. The Commonwealth Constitution therefore combines both.

The framers of the Commonwealth 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. Chapter III deals with the judiciary. This was not just a tidy way of organising things. It was a quite deliberate attempt to entrench the separation of powers into the very structure of the Constitution.

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.



The High Court of Australia
Source: HCA

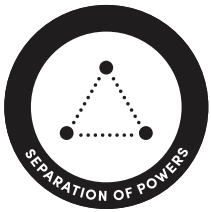
Section 61, which is the first section of Chapter II of the Constitution, says that the 'executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative'. Again, it is only executive power that is conferred on the Executive – not any other power.

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 – not any other power.

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. It is the High Court, through its interpretation of the Constitution, which has developed this doctrine. Sometimes, it has permitted exceptions, such as the existence of military courts outside of Chapter III of the Constitution, or acceptance that in some cases judges can exercise non-judicial powers in their personal capacity.

This is often for historical reasons, as the Constitution must also be interpreted in the context of the laws that applied at the time that it was created. But it is certainly the case that over time the High Court has become stricter in its application of the separation of powers, particularly in the way the doctrine is used to protect the independence of the judiciary and the maintenance of its institutional integrity.

The Constitutions of the Australian States do not have the same textual and structural indications of a separation of powers. State courts can therefore exercise non-judicial powers without breaching a State Constitution. But because State courts also exercise federal jurisdiction under Chapter III of the Commonwealth Constitution, they must not exercise any powers which are 'incompatible' with fulfilling that role. This means that some, but not all, aspects of the separation of powers, may affect the operation of State courts.



Topic 6.3 & 7.1 Lesson One



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The Constitution and the main institutions of Government : The Parliament, the Executive Government and the Courts

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour	Students will <u>understand</u> that there are three branches or institutions of government, they will be able to <u>define</u> the powers of each of the branches and <u>compare</u> the Australian model of the separation of powers to the UK and the USA.

Rationale

To understand that the separation of powers of the branches or institutions of government in the Australian Constitution provides checks and balances and ensures that power cannot be concentrated in one person or one group of people.

Teaching Reference Documents:

[TRD 56 - Separation of Powers – Overview: The three Institutions of Government](#)

[Separation of powers in detail](#)

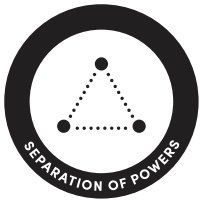
Resources

A copy of the Australian Constitution to examine the chapters that specify the three branches or institutions of Government. Chapter I: The Parliament (legislative power), Chapter II: the Executive Government (executive power) and Chapter III: The Judicature (judicial power).

Teacher Instruction

The teacher guides the students through their copy of the Constitution and guiding questions:

- Describe the Australian system of government:
 - The Parliament which debates and makes laws.
 - The Executive Government which makes policies, recommends new laws and puts them to parliament and delivers services and programs including the defence of the nation.
 - The Judicature or courts to exercise judicial power by applying and interpreting the law.
- Why might it be a good idea for one branch of government (the executive) to recommend new laws, while another branch (the legislature) has to make the law?
- How important is it that if the executive government wants to spend money, it must get a law passed by the legislature to approve that spending? What might happen if the executive could just spend money without having to go through the process of having a law made? How does this restrain the executive power?
- Describe how the USA separation of powers is different to Australia regarding the executive power.
- Research the separation of the judicial and legislative powers in the UK before 2009. Why is it important in Australia that the judicial power is quite separate from the legislative and executive powers?



Topic 6.3 & 7.1: Lesson/Activities Two



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Keeping power in check – A
separation of powers

Time/Lesson	Learning Goal
<ul style="list-style-type: none">• 1 hour/ 1 Lesson	<ul style="list-style-type: none">• To understand the rationale for creating a separation of powers in government.• To replicate situations where it demonstrates the importance of separation of powers.
Rationale	Success Criteria
It is important for students to know the key features of government under the Australian Constitution with a focus on the separation of powers, the roles of the Executive, the Houses of Parliament, and the division of powers (ACHCK048).	Students can <u>explain</u> the reasons for a separation of powers for government.
Teaching Reference Document	
<ul style="list-style-type: none">• TRD 56: CEFA Separation of powers – An overview	
Resources	
ONLINE GAME (Printouts are possible): <ul style="list-style-type: none">• iCivics' Separation of Powers: What's for Lunch	
Tuning In	
<ul style="list-style-type: none">• Think/Pair/Share – “If you didn’t trust someone, how could you make sure that they didn’t do anything they were not supposed to?” As part of the discussion, bring out that this person would need to have someone checking on them, and that someone would need to have to power to ensure the first person followed the rules.• Think/Pair/Share – “ ‘Power tends to corrupt; absolute power corrupts absolutely’ – Lord Acton” What does this mean? What is the difference between power and absolute power? How is this relevant to government and governing?	

Teacher Instruction

- Discuss the reasons why Americans might distrust government after their War of Independence and prefer a governmental system that separates power between different institutions.
- Think/Pair/Share – “How do you make a system that ensures there won’t be a King or President that has absolute power?” Consider the importance of who gets to make the rules (eg make the law and change the Constitution), who gets to raise money (eg impose taxes on the people) and who gets to decide how that money is spent. What if one group gets into power, through a democratic election, and then can change the rules so that no one else is allowed to compete against them at the next election, or that they can stay in power forever? What if they imposed taxes on the people but then only spent the money on themselves and their friends? What if they made laws to put all their opponents in gaol? Think of examples from history or stories (eg Robin Hood). How can a system of government prevent this from happening?
- Explain: Montesquieu had two ideas that are key to his separation of powers. The first one is to ensure that there are different institutions or bodies of people that exercise different types of powers, so that the all power is not in the same set of hands. So the power to make laws is given to one group - the Parliament. The power to make policies, provide government services and spend government money is given to a second group - the Executive (also known as the Government). The power to decide whether someone is breaking the law and to punish them is given to a third group - the Courts.
- Montesquieu’s second idea was that each of those groups should not only have their own powers, but should be able to act as a check (or limit) on the powers of the others and all of them would have to obey an overriding set of rules which was contained in a document known as a Constitution.
- For example, the Government, when it spends money or makes decisions, must obey the law, as set down by the Parliament. Courts can rule on whether the Government has broken the law and the consequences of that (eg that a Government decision is invalid or has to be re-made in a valid way).
- Courts can also decide that a law made by Parliament is invalid if it breaches the Constitution. But courts must obey and apply all laws that have been validly made, even if they don’t like them.
- Parliament makes the laws that impose taxes on people and although it is the Government that spends this money, it first has to get Parliament to pass a law (known as the Budget) to hand that money over to the Government.
- Ministers, who run the Government, are ‘responsible’ to Parliament, which means that they can be questioned in Parliament and have to account for their actions.
- The ultimate check is held by the people who get to decide at elections who to vote into Parliament and who should form the Government. Their right to do this is protected by the Constitution and cannot be changed without the agreement of the people in a referendum.

Group Independent Learning

- Play [iCivics’ Separation of Powers: What’s for Lunch](#).
- You will need a free iCivics account to do this.

Wrapping It Up

- DISCUSS: Was it easy for Lead Chefs and Menu Writers to agree in the ‘What’s for Lunch’ game? Was it good to have so many checks and balances? What were the pros and what were the cons? What would happen if there was only the Lead Chef, or the Menu Writer and no Nutrition Experts?
- Explain that the Lead Chefs are the executive, the Menu Writers the Legislature and the Nutrition Experts the judicial branch.

Differentiation/Enrichment

- PLAY: [iCivics' Branches of Power](#). NOTE: This is a detailed game about separation of powers in the USA, only play if there is interest and you have the time.

Assessment Strategies

Collect 'What's for Lunch' assignments for that demonstrate students' understanding of this lesson.