



Unit 8: Australia's legal system, the Courts and the Australian Justice System
– Years 7-9 - Strand: Laws & Citizens

Topics 7.2 & 9.4: Key features of Government & the Australian Justice System: Separation of Powers and the Judiciary

Separation of Powers - The blurred border between executive and legislative power (Student Resource)

The separation of powers is mostly recognised in Australia as separating the judiciary from Parliament and separating the judiciary from the Executive Government. But is there a separation between the Executive Government and Parliament?

Such a separation is clearer in the United States, where Cabinet offices are held by people who are not members of Congress. But in Australia and the United Kingdom, the system of responsible government requires that members of the Executive Government come from Parliament. So the border between the Executive Government and Parliament, and between executive and legislative power, tends to be a bit blurred.

What does the Constitution say about it?

Section 1, in Chapter I of the Commonwealth Constitution, gives legislative power to the Federal Parliament. Section 61, in Chapter II of the Constitution gives executive power to the Queen and allows it to be exercised by the Governor-General. The Governor-General then, almost always, acts on the advice of Ministers in exercising that power.

Section 64 says that the Governor-General appoints Ministers to administer government departments (i.e. to run the public service) and that no one can be a Minister for more than three months unless he or she becomes a Member of Parliament.

By 'convention' (i.e. an unwritten rule that everyone agrees applies), the Governor-General appoints as Prime Minister the person who is most likely to 'command the confidence' of the lower House – the House of Representatives. In practice, this is normally the person who leads the political party, or coalition of parties, with a majority of seats in the lower House (i.e. the leader who 'won the election'). The Prime Minister then advises the Governor-General which other Members of either House of Parliament should be made Ministers, to run the various government departments.

This means that the Ministers who exercise executive power are also Members of Parliament who exercise legislative power. So is there any real 'separation' between them?

The power to make laws and the requirement to obey them

Because of section 1 of the Constitution, only Parliament (not the Executive Government) can pass legislation. While the Executive Government will usually control a majority of votes in the House of Representatives, it often will not control a majority in the Senate and can be frustrated by not being able to get laws passed by Parliament. This is one form of the separation of powers – the Executive Government cannot pass statutes and needs Parliament to do this.

The Executive Government is required, under the 'rule of law' to obey all laws. It cannot dispense with the application of an existing law or impose a tax or create a criminal offence by using its own traditional executive powers (known as 'prerogative powers').

But Parliament can, and very often does, pass laws that delegate legislative powers to the Executive Government. This allows the Government to make lesser forms of law, sometimes known as statutory rules, regulations, legislative instruments, subordinate legislation or delegated legislation.



Members of the Executive Government were sworn into office by the Governor General after the Australian Labor Party won the May 2022 Federal election
 Source: Albanese Twitter

This means that the Executive Government can make a kind of law – but it is restricted by Parliament in how it does so and what it can cover.

First, the statutory rule must fall within the scope of the power given in the statute. If the statute only gives a power to make a statutory rule about the terms and conditions of a fishing licence, then that's all the Executive Government can do. It can fill in the detail of a framework established by an Act, but it cannot go beyond the scope of what the Act allows.

Second, the Parliament usually supervises the making of statutory rules, by making them disallowable. This means that either House can vote to 'disallow' a statutory rule (i.e. strike it down as no longer valid) within a certain period after it is made.

Third, statutes enacted by Parliament override statutory rules. In a conflict, the statute wins. The exception is where a statute contains a 'Henry VIII clause'. Such a clause allows the Executive Government to make a statutory rule that can override or alter other statutes. This is very rarely done, because it is a serious matter to allow the Executive Government to make a statutory rule that overrides statutes passed in a more democratically accountable way by Parliament.

The power to appropriate and spend public money

Another form of separation arises under section 81 of the Constitution. It says all money received by the Executive Government has to go into a special fund, and can only be withdrawn so it can be spent, if it is 'appropriated' by Parliament.

This means that the Executive Government has no power to spend money without Parliament first passing a law that takes the money out of the fund. In recent years the High Court has also held that in most cases Parliament will also have to legislate separately to approve the spending of that money on programs such as those that give government grants.

So while the Executive Government can exercise an executive power, such as declaring war, it needs the support of Parliament to be able to fund the war. Governments can't function without money. Parliamentary control over money is one way of making the Executive Government responsible to Parliament.

The executive powers to dissolve Parliament or enter into treaties

Some executive powers are expressly conferred by the Constitution, so the Parliament cannot take control of them or alter them, as this would breach the Constitution. For example, section 5 of the Constitution gives the Governor-General the power to dissolve Parliament. The Parliament could therefore not legislate to take over that power and vote to dissolve itself. This would breach the Constitution.

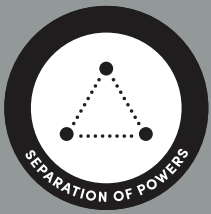


*Parliament House, Canberra
Source: IStock*

The Parliament can regulate many other executive powers, or even abolish them or replace them with executive powers given and controlled by statutes. But there are doubts about whether the Parliament could itself exercise some executive powers.

For example, the Executive Government has the power to enter treaties. Parliament could legislate to control the process of doing so – eg by requiring certain permissions or procedures before the Government signs or ratifies a treaty. But there is doubt about whether Parliament could give itself the power to actually enter into treaties.

Hence, there really is a separation between legislative and executive power, even though those who exercise them are often the very same people.



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Topics 7.2 & 9.4: Key features of Government & the Australian Justice System: Separation of Powers and the Judiciary

Separation of Powers - The blurred border between executive and legislative power (Teacher Resource)

The separation of powers is mostly recognised in Australia as separating the judiciary from Parliament and separating the judiciary from the Executive Government. But is there a separation between the Executive Government and Parliament?

Such a separation is clear in the United States, where Cabinet offices are held by people who are not members of Congress. Under its 'Presidential system' of government, where the head of state and the head of government are the same person, the President is elected, through an electoral college, and is not responsible to the legislature. The President appoints the members of the Cabinet, although these appointments are subject to confirmation by the Senate.

But in Australia and the United Kingdom, the system of responsible government requires that members of the Executive Government be responsible to, and drawn from, Parliament. So the border between the Executive Government and Parliament, and between executive and legislative power, tends to be a bit blurred.

What does the Constitution say about it?

[Section 1](#), in Chapter I of the Commonwealth Constitution, confers legislative power on the Federal Parliament. [Section 61](#), in Chapter II of the Constitution confers executive power on the Queen and makes it exercisable by the

Governor-General. The Governor-General then, almost always, acts on the advice of Ministers in exercising that power.

[Section 64](#) says that the Governor-General appoints Ministers to administer government departments (i.e. the public service) and that no one can be a Minister for more than three months unless he or she becomes a Member of Parliament. This means that there is a period of leeway to allow a Minister to stand in a by-election and gain a seat, but it is not long.

For example, in 1968, when Senator John Gorton won the leadership of the Liberal Party, after the death of Harold Holt, Gorton became Prime Minister while a Senator. He then resigned from the Senate, so that he could run for Holt's former seat in the House of Representatives, which is the House in which the Prime Minister customarily sits. Gorton was Prime Minister for a few weeks without being a Member of Parliament until he won the by-election. If he had not won the by-election and three months passed, he would have no longer been permitted to be Prime Minister.

By convention, the Governor-General appoints as Prime Minister the person who is most likely to 'command the confidence' of the lower House – the House of Representatives. In practice, this is normally the person who leads the political party, or coalition of parties, with a majority of seats in the lower House (i.e. the leader who 'won the election'). Sometimes there is no party, or coalition of parties, that holds a majority of seats. This is known as a 'hung Parliament'.

A Government can still operate as a 'minority government', as long as it retains 'confidence' (i.e. a vote of no confidence in the government is not passed) and it can secure 'supply' (i.e. the Parliament authorizes the withdrawal of the money needed to run the government).



*Members of the Executive Government were sworn into office by the Governor General after the Australian Labor Party won the May 2022 Federal election
Source: Albanese Twitter*

During the Gillard minority Government from 2010-2013, Prime Minister Gillard had 'confidence and supply' agreements with the independents in the House of Representatives, which showed the Governor-General that she held the confidence of the House and could form a government.

Once appointed, the Prime Minister then advises the Governor-General which other Members of either House of Parliament should be made Ministers, to run the various government departments. The Governor-General acts on the Prime Minister's advice about such appointments.

The consequence is that the Ministers who exercise executive power are also Members of Parliament who exercise legislative power. So is there any real 'separation' of these powers?

The power to make laws and the requirement to obey them

Because of section 1 of the Constitution, only Parliament (not the Executive Government) can pass legislation. While the Executive Government will usually control a majority of votes in the House of Representatives, it often will not control a majority in the Senate and can be frustrated by not being able to get laws passed by Parliament. This is one form of the separation of powers – the Executive Government cannot pass statutes and needs Parliament to do this.

The Executive Government is required, under the 'rule of law', to obey all laws. It cannot use its 'prerogative powers' to make, alter or repeal statutes.

The prerogative powers are those powers historically held by the Crown in England since medieval times, which have been inherited by the Crown in Australia and have not been altered or abolished by legislation. They are recognised by the common law and exercisable by the Executive Government, but are subordinate to legislation and can be regulated or removed by legislation. The courts in the United Kingdom and Australia have held that the prerogative powers cannot be used by the Executive Government to dispense with laws, impose taxes or create criminal offences. This can only be done by Parliament enacting statutes.

Parliament can, and very often does, pass statutes that delegate legislative powers to the Executive Government. This allows the Executive Government to make lesser forms of law, sometimes known as statutory rules, regulations, legislative instruments, subordinate legislation or delegated legislation. Most Commonwealth Acts will have a provision towards their end which confers a power on the Governor-General, or in more recent times a Minister, to make regulations or statutory rules that are necessary or convenient to give effect to the terms of the Act. Those statutory rules are all registered and publicly accessible on the [Federal Register of Legislation](#).

While the Executive Government can therefore make a kind of law – it is restricted by Parliament in how it does so.



*Parliament House, Canberra
Source: IStock*

First, the statutory rule must fall within the scope of the power given in the statute. If the statute only gives a power to make a statutory rule about the terms and conditions of a fishing licence, then that's all the Executive Government can do. It can fill in the detail of a framework established by an Act, but it cannot go beyond the scope of what the Act allows. If a statutory rule goes beyond what is authorised by its parent Act, then its validity can be challenged on the ground that it is 'ultra vires' – meaning that its making was beyond power.

Second, the Parliament usually retains a supervisory power over statutory rules, by making them disallowable. This means that either House can vote to [disallow](#) a statutory rule (i.e. strike it down so as to be no longer valid) within a certain period after it is made.

Statutory rules are the subject of scrutiny by the Senate [Standing Committee for the Scrutiny of Delegated Legislation](#) on several grounds, including whether they are within power, do not unduly trespass on personal rights and liberties, and do not contain material that should be included in a statute. The Committee publishes a '[Disallowance Alert](#)' which alerts the Senate to problems with a statutory rule that might cause it to disallow it. While disallowance is unusual, it does happen from time to time.

Third, statutes override statutory rules. In a conflict between them, the statute prevails. The exception is where the statute that conferred the power to make the statutory rule contains a '[Henry VIII clause](#)'.

A Henry VIII clause allows the Executive Government to make a statutory rule that can override or alter statutes. This should be very rarely done, because it is a serious matter to allow the Executive Government to make a statutory rule that overrides statutes passed by Parliament.

During the 2020 COVID-19 pandemic, the Parliament sat infrequently and many emergency laws were made by statutory rules, rather than the enactment of legislation. This was possible because Parliament anticipated that in an emergency of this kind, urgent rules might need to be made even though Parliament was not sitting, or was not able to sit.

Sections [477](#) and [478](#) of the *Biosecurity Act 2015* (Cth) give extensive powers to the Minister for Health to make orders during a human biosecurity emergency. They contain a Henry VIII clause, which says that directions and determinations made under sections 477-478 apply 'despite any provisions of any other Australian law', and that they are not disallowable instruments. While this allows the Government to deal decisively with an emergency, it does remove the ordinary democratic accountability mechanisms, which could be dangerous.

Even though Parliament sat rarely during this period, the Senate Standing Committee for the Scrutiny of Delegated Legislation kept a close watch on the various statutory rules that were made. To help people know what was being done, it also listed them on a [special page](#) of its website, explaining what action the Committee had taken in scrutinising them.

The fact that some statutory rules were not disallowable led to [accountability concerns](#). The Committee then decided to [inquire](#) into this kind of exemption from parliamentary oversight.

The power to appropriate and spend public money

Another form of separation of powers is shown by the application of section 81 of the Constitution. It provides that all money received by the Executive Government (eg taxes, fines and payments for goods and services) has to go into a special fund, known as the Consolidated Revenue Fund, and can only be taken out of that fund, in order to spend it, if it is 'appropriated' by Parliament. This means that the Executive Government has no power to spend money without Parliament first passing a law (known as an 'appropriation', a budget bill or 'supply') that withdraws the money from the fund.

In recent years the High Court also held, in the [Williams case](#) (also known as the [school chaplains case](#)), that not only must money be appropriated by Parliament, but in most cases Parliament will also have to legislate separately to approve the spending of that money on programs such as those that give government grants to bodies.

So while the Executive Government can exercise a prerogative executive power, such as the power to declare war, it needs the support of Parliament to be able to fund the war. Governments can't function without money. Parliamentary control over money is one way of making the Executive Government responsible to Parliament.

The executive powers to dissolve Parliament, declare war and enter into treaties

Some executive powers are expressly conferred by the Constitution, so the Parliament cannot take control of them or alter them, as this would breach the Constitution. For example, section 5 of the Commonwealth Constitution confers on the Governor-General the power to dissolve Parliament. The Parliament could therefore not legislate to take over that power and itself determine when Parliament was to be dissolved. This would breach the Constitution.

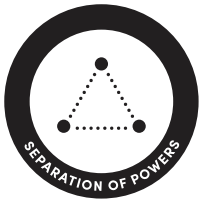
Parliament can regulate many other executive powers, or even abolish them or replace them with executive powers conferred and controlled by statutes. But there are doubts about whether Parliament could itself exercise some executive powers.

For example, the Executive Government has the power to enter treaties. Parliament could legislate to control the process of doing so – eg by requiring certain permissions or procedures before the Executive Government could sign or ratify a treaty. But there is doubt about whether Parliament could give itself the power to make treaties.

Similarly, Parliament could impose a process, requiring [parliamentary approval, before Australia declared war](#) on another country, but it is unlikely that the Parliament could itself take over the exercise of this executive power.

Hence, there really is a separation between legislative and executive power, even though those who exercise them are often the very same people.





Topic 7.2 & 9.4: Lesson Three

The weak separation between
executive and legislative power



AUSTRALIAN
CONSTITUTION
CENTRE

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour	To understand how the separation of powers between the Parliament and the Executive is affected by the system of responsible government.
Rationale	Success Criteria
Students need to understand how the separation of powers operates with respect to the Parliament and the Executive in the context of the system of responsible government.	Students understand that even though Ministers are Members of Parliament, there is still a degree of separation between Parliament and the Executive Government.
Teaching Reference Document	
<ul style="list-style-type: none">TRD 72: The blurred border between Executive and Legislative power (Student Resource)TRD 73: The blurred border between Executive and Legislative power (Teacher Resource)	
Resources	
Internet access for research	
Tuning In	
<ul style="list-style-type: none">Think/Pair/ShareWhen there is an emergency, should Ministers be able to make laws without parliamentary supervision? Would this undermine democracy and accountability or is it a sensible way to deal with a crisis quickly and decisively?Remember and revise topic 6.3 & 7.1, Unit 7: TRD 56 'Separation of Powers -Overview: the three institutions or branches of government'.	
Teacher Instruction	
<ul style="list-style-type: none">Explain: Teacher explains that there is not a complete separation between the Executive Government and the Parliament, because the Executive Government is formed from the Members of Parliament who hold majority support in the lower House. But this does not mean that the Government always gets its way. Governments need Parliament: (a) to give them the money necessary to run the government; and (b) to pass the laws that give the Government powers. While the Government can usually get its law passed by the lower House, it often does not control the upper House and has to negotiate. Sometimes its bills are blocked.Research: Students research a controversial example of when a Government did not get its way (eg the Medevac Bill that passed against the wishes of the Morrison Government in 2019 or the Senate defeat of changes to racial hatred provision in 2017). Students then reflect on some or all of the following questions: What role does the Senate play in ensuring that the Government is accountable and has to negotiate or moderate its proposals to get them passed? If a Parliament only has one House (eg Queensland and New Zealand), which the Government controls, does this mean that the Executive Government is more powerful and less accountable? What impact does this have on the effectiveness of the separation of powers? Is it a good thing (eg greater efficiency and an ability for the Government to get its election promises done) or a bad thing (policies can be more extreme and Governments can avoid having to justify them or be accountable for them)?	

Group/Independent Learning

- **Read:** CEFA TRD The blurred border between Executive and Legislative Power (Student Resource).
- **QUESTIONS:**
 - How does Parliament hold the Executive Government to account?
 - What kind of legal rules can the Executive Government make and how does Parliament supervise or limit them?

Wrapping It Up

- **CLASS DISCUSSION:** Why it is important for Parliament to act as a check on the Executive Government.
- **DISCUSS:** During the pandemic, the Commonwealth Government used powers given to the Minister by sections 477-78 of the *Biosecurity Act* to impose restrictions on the movement of people, including the ability to leave or enter the country. These powers were unusual because they allowed the emergency orders to override statutes and they were not disallowable by either House. In an emergency, is it more important to be able to act quickly and decisively to protect lives or to maintain parliamentary scrutiny and accountability. How do you set the balance in advance, before you even know the nature of the emergency?

Differentiation/Enrichment

Students explore the role of the Senate Standing Committee for the Scrutiny of Delegated Legislation in checking and reporting back to the Senate about the appropriateness of rules made by the Executive Government. Students discover what factors the Committee considers when undertaking its scrutiny and how effective it is. What did the Committee have to say about delegated legislation made during the pandemic?

Assessment Strategies

Assess responses to the Group/Independent Learning Questions and class discussion.

Extension Lessons and Activities

Students investigate what is a Henry VIII clause, as used in legislation, and why it should only be used rarely.

