



Unit 9: The Constitution and the Making of Law in Australia – Year 8 - C & C  
Strand: Laws & Citizens

Topic 8.1: The making of law in Australia

## The common law, statute and the hierarchy of laws

There are different sources of laws and these affect the priority given to the law when it conflicts with another law.

### Common law

Lowest on the rung of laws is the common law. It is the oldest source of law. It is law that was originally recognised by the courts, based on existing custom, in the 12th and 13th centuries in England. It has since been developed in court judgments, which form precedents, over centuries. It is capable of adjusting over time to meet changed circumstances. It is not frozen in the past, but it builds on earlier precedents, drawing on fundamental principles.

British colonists, when they arrived in Australia, brought the common law with them as part of the new system of law that was imposed in the colonies. Indigenous laws were not recognised by the colonists. In 1992, however, in the [Mabo](#) case, the High Court decided that the common law recognised native title rights that existed under Indigenous laws, to lands and waters. Those native title rights continued on, having the same status as the common law. This meant that those rights were vulnerable to being overridden by statute, as are all common law rights.

While each State has its own statutes, the common law is currently treated by the High Court as uniform throughout Australia. Initially, it was the British Privy Council which was the ultimate authority upon the common law that applied in Australia. But since 1986, the High Court of Australia provides the authoritative determination of what the common law is in Australia.

There is also another branch of judge-made law, known as 'equity', which applies different principles and gives different remedies than the common law. But for present purposes, we will classify the term 'common law' as covering all judge-made law, including equity.

The common law must be interpreted in a way that is consistent with the Constitution. The Constitution is also interpreted in the context of the common law that existed at the time the Constitution was written. This is because the common law was seen as providing the foundational principles upon which the Constitution rested. There is therefore a close interconnection between the common law and the Constitution.

If the common law conflicts with a statute or delegated legislation, the statute or delegated legislation prevails. This is because they have the authority of Parliament, either directly or by delegation. But when interpreting a statute, a court will presume that the Parliament did not intend to take away or limit common law rights or freedoms, unless it said so in unmistakably clear and unambiguous language. The intention behind this presumption, which is often called the 'principle of legality', is to force Parliament to confront whether or not its actions are limiting rights, and take responsibility for that decision. The doctrine also protects rights by making sure that they are not inadvertently limited simply because no one has taken the care to think through the likely impact of a statute.

While much of the common law has now been replaced by statute, we can still see the common law in operation in areas such as negligence and contracts, some aspects of defamation, and the area of rights and freedoms. For example, in [Dietrich v The Queen](#), the High Court accepted in 1992 that an accused person has a common law right to a fair trial.



*Statutes are enacted by Parliament which is comprised of the Members of the House of Representatives and the Senate  
Source: Wiki Commons*

## Statutes

Statutes are enacted by Parliament. They override the common law (but need to be very clear about this if they are overriding common law rights). Statutes also override delegated legislation, such as regulations (except in the rare cases where a regulation is given the power to alter statutes, by what is known as a Henry VIII clause – see the separate article on 'Delegated Legislation').

Statutes must be consistent with the Constitution. A statute will be invalid if there is no constitutional power to enact it. The Commonwealth Parliament, for example, can only enact statutes that fall within certain specified subject areas, such as defence, external affairs, immigration and marriage. State Parliaments, on the other hand, can enact statutes on any subject at all, unless the power has been taken away by the Commonwealth Constitution or the relevant State Constitution.

Even if a statute falls within an authorised subject area, it will still be invalid if it breaches an express constitutional provision, such as section 92 of the Constitution which says that trade and commerce among the States shall be absolutely free. It will also be invalid if it breaches a constitutional implication, such as the separation of powers or the implied freedom of political communication.

For example, a Commonwealth law that convicted and punished a person would be invalid for breaching the separation of powers (because the Parliament would be exercising a judicial power) and a Commonwealth law that banned outright all public criticism of the Government would be invalid for breaching the implied freedom of political communication.

## Conflicts between statutes

If two statutes made by the same Parliament conflict, ordinarily, the most recently made statute will prevail as it will be treated as impliedly altering the earlier statute. If a federal and State statute conflict, then section 109 of the Commonwealth Constitution says that the federal statute prevails and the State statute is inoperative to the extent of the inconsistency.

What happens if statutes from two different States conflict? This is a tricky one, as the Constitution does not set out a rule to resolve it. The courts tend to try to avoid the problem by interpreting the two State statutes in such a way that they do not conflict. Mostly it does not arise, because State statutes normally only operate within the relevant State, so the scope for conflict is limited.



## The Constitution

The Commonwealth Constitution is the ultimate law in relation to Australia. It overrides all other laws – common law, statute and delegated legislation, and in relation to all levels of government.

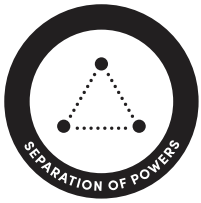
In the territories, the territory Legislature must act within the powers conferred upon it by the relevant Self-Government Act.

In the States, the State Parliaments must act within the powers conferred by the State Constitution (but note that State Parliaments can change some parts of State Constitution by enacting ordinary legislation).

State Constitutions and Territory Self-Government Acts must all comply with the Commonwealth Constitution. If they are inconsistent with the Commonwealth Constitution, then it is the Commonwealth Constitution which prevails.

Bonita Mabo, Her Excellency Quentin Bryce, former Governor-General of Australia and Bessie Mabo, 2010.  
Source: Greg Power, National Library of Australia





## Topic 8.1: Lesson/ Activities One

Statutes and Common law



AUSTRALIAN  
CONSTITUTION  
CENTRE

Time/Lesson	Learning Goal
<ul style="list-style-type: none"><li>1 hour/ 1 Lesson</li></ul>	<ul style="list-style-type: none"><li>To understand there are different types of law and a hierarchy of laws, with some overriding others.</li><li>To understand the process of passing a statute.</li></ul>
Rationale	Success Criteria
Students should understand the law-making process in Australia. This is essential to being informed citizens.	<ul style="list-style-type: none"><li>Students will be able to <u>recognize</u> different types of laws and which take priority over others.</li><li>Students will be able to <u>describe</u> in detail how a bill becomes a statute.</li></ul>
Teaching Reference Document	<ul style="list-style-type: none"><li>TRD 74: The Common Law, Statutes and the hierarchy of laws.</li></ul>
Resources	
VIDEOS:	
<ul style="list-style-type: none"><li>PEO's <a href="#">About Parliament – Making a law</a> (3:40).</li><li>PEO's <a href="#">Passing a bill</a> (8:35).</li></ul>	
WEBSITE:	
<ul style="list-style-type: none"><li>PEO's <a href="#">Rules and Laws</a>.</li><li><a href="#">Diagram</a> from PEO on Bill becoming a law.</li></ul>	
PEO's <a href="#">Pass The Bill</a> ENRICHMENT:	
<ul style="list-style-type: none"><li>PEO's <a href="#">role-play of a bill becoming a law</a>, will take more than one lesson.</li><li>PEV's <a href="#">Mix and Match game</a> on how a bill becomes a law.</li></ul>	
Tuning In	
<ul style="list-style-type: none"><li>DISCUSSION: What different types of law are there and in what order do they take priority over each other?</li><li>REVISE TOPIC 4.2: '<a href="#">What law did the British Bring to the Penal Colony of NSW</a>': British laws brought to Australia on the First Fleet, 1788. Lessons introduce the common law and statutes and where they come from.</li></ul>	

### Teacher Instruction

- EXPLAIN: Explain the different types of laws. The common law is developed by courts, statutes are made by parliament and delegated legislation is made by the Executive.
- READ TOGETHER: TRD: The Common Law, Statutes and the Hierarchy of Laws.
- DISCUSSION: Why do you think the current hierarchy of laws exists? Why is the Constitution the most important law which overrides everything else? Why do statutes override the common law and usually also override delegated legislation? What is so important about Parliament (eg its democratic election by the people) which gives its laws the priority over those made by the Executive and judges?
- WATCH: [PEO's About Parliament – Making a law](#) (3:40).
- Go through this [diagram](#) from PEO with class.

### Group/Independent Learning

- PLAY: PEO's [Pass The Bill](#).
- ENRICHMENT: Alternative is to WATCH PEO's [Passing a bill](#) (8:35).
- DISCUSSION: Why is it important to have such a thorough process for a bill to become a law?

### Wrapping It Up

- EXPLAIN: For a federal bill to become a law it needs to be passed by a majority in both Houses of Parliament and receive the assent of the Governor-General.
- EXIT SLIP: What law would you like to make in Australia? What would be the process for making that law? (Outline 3 steps of a bill becoming a law.)

### Differentiation/Enrichment

- PEO's [role-play of a bill becoming a law](#), will take more than one lesson.
- PEV's [Mix and Match game](#) on how a bill becomes a law.

### Assessment Strategies

Checking understanding from PEO's Pass The Bill.

### Extension Activities

Introduce students to the [Mabo case](#), 1992, where the High Court decided that the common law recognised native title rights that existed under Indigenous law, to lands and waters. (Australian Constitution Centre).

