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Australian Legal System

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For a community or society to work, it needs to have a level of structure that applies to everyone and is understood by everyone. Laws create that structure and regulate the way in which people, organisations and governments behave.

A law is a rule that comes from a legitimate authority and applies to everyone. Laws are created to make sure that everyone understands what is expected of them as a member of society (their obligations) and what they can expect of others, including government (their rights).

WHY DO WE HAVE LAWS?

We have laws so that society can work effectively, to make sure that people or organisations are not able to use power, money or strength to take advantage of others or to make things better for themselves. We have laws to make sure that everyone understands their rights and obligations, and the rights and obligations of others.

WHAT IS A ‘LEGAL SYSTEM’?

All countries have a legal system of some sort. The ‘legal system’ is a broad term that describes the laws we have, the process for making those laws, and the processes for making sure the laws are followed. Our legal system reflects how we, as Australians, behave and how we as a country expect people, organisations and governments to behave to each other.

WHERE DOES THE AUSTRALIAN LEGAL SYSTEM COME FROM?

The Australian legal system developed from the legal system of Britain, which was brought to Australia as part of the process of Britain setting up a colony in Australia, beginning in the 1770s. Between 1855 and 1890 the British Parliament granted a limited right to set up a local system of government to each of the British colonies within Australia, usually referred to as granting ‘responsible government’. As each of the colonies was granted this right it was able to develop its own laws and legal systems to deal with its particular situation. So, the law and legal system in each of the colonies began to develop separately.

During the late 19th century, there was a move towards creating a central government for the whole of the country. Representatives of the six colonies (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) met at a series of conventions held in the 1890s, to work on the wording of a constitution. A referendum was held in each colony to approve the draft constitution. The Australian Constitution was passed as an Act of the British Parliament, and took effect on 1 January 1901. The creation of the Australian Constitution in 1901 was the beginning of an independent Australian legal system that forms part of the system of government of Australia.

The Commonwealth of Australia was formed by the federation of the independent colonies (which then became states). This is why we refer to the establishment of the Commonwealth as ‘federation’ and our system of government in Australia as a ‘federal’ system. Under a federal system of government, power is divided between the federal government and the component state/territory governments.

The way in which the power is divided is set out in the Commonwealth of Australia Constitution Act 1900 (UK) (the Constitution). Section 51 of the Constitution lists what powers the federal government will have. State and territory governments have power over anything else within their borders, that is, anything that isn’t mentioned in section 51. The Constitution is structured this way because the states came together to create the Commonwealth and they agreed amongst themselves what powers the Commonwealth they were creating could exercise and which powers they would keep.

Some of those areas contained in section 51 are:

> defence
> external affairs
> interstate and international trade
> marriage and divorce
> taxation
> corporations
> immigration
> bankruptcy

**HOT TIP**

A constitution is a set of rules that sets out how an organisation or country is to be run (governed), how the organisation or country decides who will have power, how that power can be exercised. The constitution of a country sets up the system of government for that country. The full title of Australia’s Constitution is the Commonwealth of Australia Constitution Act 1900. The Constitution can be found in libraries or on the internet at [www.aph.gov.au/senate/general/constitution/index.htm](http://www.aph.gov.au/senate/general/constitution/index.htm)
This means that since Federation, all Australians have been subject to the laws of two legal systems – federal laws, and the laws of the state or territory in which they live.

**HOW LAWS ARE MADE**

In the Australian legal system the main ways that laws are made are by:

> parliaments passing Acts known as ‘statute law’;
> the executive developing ‘delegated legislation’, which is, regulations, rules, ordinances etc, made under the authority of parliament and statute law;
> courts interpreting the law, and deciding cases on the basis of how similar cases have been decided in the past and applying those decisions to the circumstances of the case they are currently deciding, known as ‘common law’ see page 5.

**WHO IS INVOLVED IN THE AUSTRALIAN LEGAL SYSTEM?**

We are all involved in the Australian legal system because it regulates what we may and may not do as members of the Australian community and because we elect those who make the laws:

> **Commonwealth government** – laws are passed by the Commonwealth Parliament, elected by all Australian citizens who are enrolled to vote;
> **State/territory government** – laws are passed by the state or territory parliament, elected by those Australian citizens who live in that state or territory who are enrolled to vote;
> **Local government** – local government by-laws are passed by the local councillors elected by people who live or own businesses within the local government area.

There are, however, some people and organisations that are at the heart of the legal system:

> the federal, state and territory parliaments
> courts and tribunals
> government departments
> government Ministers
> police
> lawyers

Each has a slightly separate role to play in the legal system and these are described further on in this *Hot Topics.*

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1. There are some situations where state and territory governments agree to give specific powers back to the Commonwealth, such as is currently being discussed in relation to a water management plan in the Murray-Darling Basin.
Other influences on the Australian Legal System

Over time, the Australia legal system has also been influenced by other legal systems.

INTERNATIONAL LAW

International law is the term used to describe the laws that have developed at an international level to regulate the relationships between countries and also to regulate the conduct of countries towards citizens and non-citizens. These include written documents such as international treaties and conventions for example, the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Law of the Sea. International laws also help regulate many areas of human activity that require cooperation between countries, such as:

- postal services
- telecommunications
- transport of goods and passengers by air, land and sea
- international trade
- protection of the environment

Also included in international law are principles that have been accepted by countries as guiding the way they deal with each other and their citizens. An example of such a principle is that slavery is prohibited everywhere in the world, whether or not all countries have signed on to the ICCPR which, in article 8(1), prohibits slavery.

The process for Australia to agree to an international treaty or convention is that it first signs the treaty and then may, at the same time or at a later time, ratify the treaty. By ratifying a treaty, Australia is effectively agreeing to make laws in Australia (referred to as 'domestic law') that reflect the requirements of the treaty. It is not required to do this in a single law. For some other countries, the ratification of a treaty has an immediate effect: the treaty automatically becomes part of the domestic law.

If Australia has ratified a treaty, but has not passed laws that reflect the treaty, the treaty may still have effect through influencing the way in which courts interpret Australian laws: a court will generally try to find a way of applying Australian laws that is consistent with treaties that Australia has ratified.

ADVERSARIAL AND INQUISITORIAL SYSTEMS

A feature of the Australian legal system is that it is 'adversarial'. This means that the competing claims of the two parties to a case are put forward (usually by legal representatives) for decision by an independent decision-maker (a court or tribunal). The role of the decision maker is to hear both sides of the dispute and then apply the law to that dispute. The decision maker has no role in investigating the situation. This is a feature that comes from the British common law system.

The adversarial system differs from the 'inquisitorial' system that operates in many other countries, such as much of Western Europe. Under the inquisitorial system, the role of the decision maker is broader: for example, they can have a role in questioning witnesses, in deciding what evidence is to be collected and presented, and in conducting investigations.

Over the last 30 years the Australian legal system has increasingly adopted some of the characteristics of the

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2. Information about international law can be found at the website of the United Nations: www.un.org and see Hot Topics 31: International Law.

3. For more information on the treaty making process see the Australian and International Treaty Making Kit available at www.austlii.edu.au/au/other/dfat/reports/infokit.html

HOT TIP

We often use the term 'the state' to refer to the whole of the system of government in a country or within a state or territory. So, for example, the ‘Head of State’ refers to the person who is the ceremonial head of Australia, and countries that sign international conventions are referred to as ‘States party to the convention’.
inquisitorial system. In particular, in the area of anti-discrimination law, there is an ‘investigation’ by an independent body before bringing the disputing parties together to try to resolve the dispute or have a hearing. At the state and territory level, the decision-making body for allegations of discrimination is most often a tribunal that can look for evidence that is relevant to its decision beyond what the parties have presented.

CUSTOMARY LAW

More recently, there has been recognition that Australia’s Indigenous people had systems of customary law that regulated their societies. To a limited extent, Australian courts – particularly in areas with high Indigenous populations living more traditional lifestyles – have given some consideration to that customary law in reaching decisions.

In many ways, the system of customary law is similar to common law, because it develops rules for behaviour that reflect the community’s needs and because it is not written down.

An important development in Australia and in other countries has been the recognition of ‘native title’. This occurred in Australia in 1992, when the High Court of Australia made its decision in the case of *Mabo and Others v Queensland* (No 2) [1992] 175 CLR 1 (this case is referred to commonly as ‘Mabo’). Before that, the Australian legal system did not recognise that Indigenous Australians had any rights to the land that they had lived on and had a connection to before (and since) colonisation. *Mabo* recognised that Indigenous people should have specific property rights in relation to that land.4

LEGAL SYSTEM PRINCIPLES

Our legal system also depends on a set of core principles. Without these principles, people and society would not and could not place their trust in the system to protect and promote their legal rights and interests. These principles are sometimes referred to as principles of natural justice.

> **Fairness** – decisions will be made on the basis of a set of established rules that are known. For example, if there were no laws about smoking at work, it would be unfair for a person who smoked at work to be punished by the legal system.

> **Transparency** – what happens in the legal system can be seen and understood by the general public, that courts and tribunals are open to the public, rather than their decisions being made behind closed doors.

> **Equality before the law** – each person should be treated in the same way by the legal system no matter who they are. For example, the legal system must not make a different decision because a person is richer or poorer than another person, or because a person comes from another country. It means that everyone should be able to access the law and the legal system equally. It also means that the law applies equally to everyone. No person is above the law, no matter what position they hold in society.

> **Freedom from bias** – a decision maker must not have a personal interest in the decision she or he is making and must not prefer one person over another when they are making a decision. Another word for this is ‘impartiality’. For example, a judge must not be involved in deciding a case where one of the people involved is their brother, son, or doctor or friend.

> **The right to be heard** – a person who is affected by a decision made by the legal system has a right to present their views and facts that support that view (evidence) to the decision maker before the decision is made. It also means that a person who is accused of doing something wrong has a right to be told what it is they are said to have done wrong and to be shown the evidence against them so that they can defend themself against the accusation.

How Law is made

STATUTE LAW

The most important role of parliaments is to make laws for their state, territory or the Commonwealth. This is done through the parliamentary process of passing of statutes, known as 'Acts', to deal with regulating various aspects of our society. See pages 11-13 for a detailed explanation of this process of law making.

DELEGATED LEGISLATION

Often an Act of Parliament will include parts that give power to a Government Minister or another member of the executive to create a law that deals with particular aspects of that Act, usually to do with the details of how the Act operates. There are different ways in which delegated legislation becomes law, depending on whether it is made under an Act of the Commonwealth Parliament or one of the state or territory parliaments. For more information, see page 13.

COMMON LAW

The common law system of law making came before the parliamentary system. It began in England in the 11th century with the establishment by William the Conqueror, King of England, of the Kings Courts. The courts, in deciding local disputes, applied local customs. Over time, these customs became rules and were the basis for later courts to make decisions on similar disputes. The common law changed and developed as different types of disputes developed and different customs evolved. The common law was the main body of law until the 17th century when the British Parliament increased its law-making power and activity (this resulted in more laws coming into being through Acts of Parliament. Common law is often referred to as ‘judge-made’ law.

Common law is separate from statute law and does not rely on there being any Act of Parliament underpinning it. While statute law is the main source of law in Australia, the common law remains a vital and developing part of our legal system. Statute law always prevails over common law if there is a conflict.

The common law relies on the principle of precedent. This means that courts are to be guided by previous decisions of courts, particularly courts that have higher authority. (See page 19 for more information.) So, the extent that common law is written down is that it is found in decisions of courts. This means that it can often be difficult to find the common law that applies to a situation, as it is not in one single decision of a court, but rather different parts of it are set out in different decisions.

IMPACT OF INTERNATIONAL LAW ON AUSTRALIAN LAW

Increasingly, laws in Australia and other countries reflect international law. This is because of the much greater level of contact between countries. In some areas of international law, the influence is very large.

For example, Australian laws about what can and can’t be imported into this country have to be consistent with international trade law. International trade laws can also affect what governments in Australia are allowed to make rules about. For example, an Australian government cannot generally make laws that give preference to the purchase of Australian products.

How Law is made

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Law can be divided up in a number of ways. We have already seen that we have ‘statute law’ and ‘common law’. We can also divide it into:

- public law
- private law

Under this system, public law deals with relations between individuals and the state, and private law deals with relations between individuals (meaning individual people or organisations).

Another way to think about the law and what it does is to look at what sort of behaviour or relationships it deals with. So, we can divide law up into:

- criminal law
- civil law
- administrative law

Whether a situation involves criminal, civil or administrative law will affect who is involved in dealing with the situation and what the result is of that law being broken. It also affects how and where cases are dealt with in the legal system. For the differences in court process, see page 22.

**CRIMINAL LAW**

The term ‘crime’ is usually used to refer to acts that involve violence against a person; theft or property damage, but also includes actions such as parking where you are not allowed to park illegally, and ‘white-collar’ crimes such as embezzling, insider trading, etc. Offences are usually divided into summary offences (less serious offences), which can be decided by a magistrate at a local court, and indictable offences (more serious crimes), which are decided by a judge, or judge and jury in the District or Supreme Courts. Usually, in order to decide that a crime has been committed the court has to decide that the person committed an act (‘actus reus’) and intended to commit the act knowing it was wrong (‘mens rea’). However, for some crimes (such as naming a child involved in criminal proceedings) that are ‘strict liability’ crimes, there is no requirement that the person intended to do the act.

Criminal law deals with the regulation of conduct that the government, on behalf of society, considers is against the interests of the community. Because of this, criminal cases always involve the crown (government) bringing the case to a court to be decided. This is called ‘prosecuting’ the case. Criminal cases are dealt with in courts, rather than in tribunals.

The importance to society of people and organisations obeying criminal laws is also reflected in the fact that government takes responsibility for policing those laws through setting up a permanent police force as part of government (at both the state and federal levels).

The outcome of a criminal case is a decision that the person or organisation that is accused of breaking the law is either ‘guilty’ or ‘not guilty’. If the decision is that they are guilty, this means they have been ‘convicted’ of the criminal offence and the court can (and almost always will) order that the person or organisation be punished (‘penalty’). The most common penalties ordered by courts when a person or organisation is found guilty of a criminal offence are orders to:

- pay an amount of money to the government (a ‘fine’);
- spend a period of time in jail (‘imprisonment’) usually full-time but sometimes on a part-time basis, such as weekends only (‘periodic detention’); or
- do unpaid work that is needed in the community (‘community service’).

A person cannot be found guilty of a crime unless the decision maker is satisfied that the prosecutor has proved ‘beyond reasonable doubt’ that the person committed the crime. This means that the prosecutor bears the ‘burden of proof’ or responsibility for proving their case to the required standard. The standard of proof in criminal cases is ‘beyond reasonable doubt’, which is a higher standard of proof than in civil cases.)
CIVIL LAW

Civil law deals with the regulation of private conduct between individuals, organisations and government agencies. Unlike criminal law, most civil laws are found in common law rather than statute law.

Because civil law deals with relationships, it often involves contracts, which are agreements between participants in society that set out what the legal relationship will be between those participants. This can be in everyday dealings, such as entering into an agreement by taking a ticket in a carpark, or clicking on ‘I agree’ to internet terms and conditions.

Because civil law is about the relationship between participants in society, civil law cases are always about disputes between participants about something to do with their dealings with each other. A person or organisation who believes that another person or organisation has acted in breach of civil law in their dealings can bring a civil claim to court. This is often referred to as ‘suing for damages’, for example, for a personal injury.

A person or organisation that makes a civil law claim is called the ‘plaintiff’. The person or organisation against whom they make the claim is called the ‘respondent’.

Civil disputes can be dealt with in courts, or in specialist tribunals set up to deal with specific civil law matters. An example of a tribunal that deals with civil disputes is the NSW Consumer, Trader and Tenancy Tribunal.

The outcome of a civil case is a decision on whether or not the plaintiff has proved ‘on the balance of probabilities’ that the other party failed to fulfil (‘breached’) their civil law obligations to the plaintiff. If this has been proved, then the court or tribunal can make an order for damages. This usually means ordering that the respondent pay an amount of money to the plaintiff that reflects the loss suffered by the plaintiff because of the respondent’s breach of the plaintiff’s rights.

A significant area of civil law is family law. As marriage and divorce are areas covered by section 51 of the Constitution, family law is dealt with by Federal Courts – the Family Court of Australia and the Federal Magistrates Court.

ADMINISTRATIVE LAW

Administrative law deals with the conduct of the executive branch of government in relation to non-government participants in society. Administrative law imposes obligations on the executive branch of government in its dealings with members of the society and in its exercise of executive power.

Administrative law provides for specific ways in which people affected by government action can get information about and challenge that action. So, for example, individuals can make an application under freedom of information law to get access to government records. This may be records that the government holds about the applicant, or records about government actions or decisions that affect the applicant, or it can be records that there is a public interest in the government making available.

There are laws dealing with freedom of information in all states and in the ACT as well as federally. These Acts are all called the Freedom of Information Act. The Federal Act is the Freedom of Information Act 1982 (Cth). The NSW Act is the Freedom of Information Act 1989 (NSW). The NSW Act applies not only to information held by government departments, but also to information held by government agencies and by local government. All government departments, agencies and local government have a process for making an application under freedom of information law. While there is usually an application fee, this fee can be waived in certain circumstances, such as if the person making the application can’t afford to pay the fee.

Administrative law cases are often dealt with by specialist tribunals, but the decisions can be reviewed by courts.

HOT TIP
If a criminal law has been broken, the court can make the person who broke the law ‘pay a penalty’. This is paid (or served if it is a sentence of time in prison) to the state, rather than any person who was affected by the criminal act.

If a civil law or right is broken, the court or tribunal can make the person ‘remedy’ the loss to a person affected by the law being broken. This is usually done by the court deciding on a dollar amount that reflects the loss (‘damages’) and ordering that amount be paid by the person who broke the law to the person affected.

5. Not all contracts are written down. A contract can be made simply by one person speaking to another person and offering to pay that person to do some work and the other person saying ‘yes’ to that offer.

HOT TIP
The executive is the branch of government that has responsibility for putting the law into effect - for more detail see page 14.
Government is the term broadly used to describe how a country or state is to be run:

- who will have powers;
- what type of powers they will have;
- how they will be allowed to use those powers; and
- the extent of those powers.

However, people use the term ‘government’ to mean both the whole system that makes up the way the country is run and also the group of parliamentarians that have majority control of the lower house of parliament. So, the ‘current Federal Government’ describes the parliamentary members of the political party that has the most elected members in the Federal House of Representatives headed by the Prime Minister.

**WHY DO WE HAVE GOVERNMENT?**

There are a range of theories about why we have government. These include:

- to create order out of what would otherwise be chaos;
- to protect the natural rights that we all have as human beings;
- to enable the people to work together through a collective mechanism to meet shared needs.

Certainly, one of the key roles of government is to identify how the community’s resources can be most effectively used to meet the community’s needs. In general terms, the role of government is to regulate human activity in the interests of society as a whole.

**OUR STRUCTURE OF GOVERNMENT**

Australia is a ‘constitutional monarchy’ with a parliamentary system of government. The Head of State of Australia is Queen Elizabeth II and she is represented in Australia by the Governor General and the State Governors. The Queen appoints the Governor General on the advice of the Prime Minister, the state Governors are appointed on the advice of the relevant State Premier.

The structure of the Commonwealth Government is set out in the Constitution, which divides the government into three ‘arms’ or ‘branches’. Each has defined roles and is not permitted to exercise the power of any of the other branches. The three branches are:

- the legislature
- the executive
- the judiciary

Each of the three branches of government has a role in the legal system.

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**HOT TIP**

The word ‘government’ comes from the Latin word ‘guvernare’ meaning ‘to steer’, ‘direct’, ‘rule’, which in turn comes from the Greek word ‘kubernan’ meaning ‘to steer’.

**HOT TIP**

The principle that there is a separation between the branches of government is referred to as the Doctrine of the Separation of Powers.

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6. There is debate about whether the head of state of Australia is the Queen or the Governor General. The Australian Constitution does not include any reference to the ‘head of state’.
THE LEGISLATURE

Both houses of the federal parliament, the House of Representatives and the Senate, make up the legislature, which is responsible for debating and voting on whether or not to make new laws or change existing laws.

THE EXECUTIVE

Federal government employees – often referred to as ‘the public service’ – and those members of parliament who are appointed as Government Ministers make up the executive. The executive is responsible for putting into effect and administering the laws made by the legislature. This is done through government departments and agencies. Interestingly, there is no reference to Ministers in the Constitution. Rather, their role has developed over time and is now seen as a key element of the executive working effectively.

The role of the head of state is to give final approval to a Bill becoming law. This is done on the advice of the executive.7

THE JUDICIARY

The judiciary, comprising the High Court and Federal Courts, is responsible for interpreting the laws of the Commonwealth in court decisions and making decisions on whether or not the other two arms are acting within their powers.

LIMITS ON THE POWER OF THE BRANCHES OF GOVERNMENT

If one of the arms of the Commonwealth Government attempts to exercise the power of another arm of the Commonwealth Government, or of the States and Territories, this can be challenged as being ‘unconstitutional’, that is, it is not consistent with the structure and powers of government set out in the Constitution. Decisions about whether or not an action is unconstitutional are decided by the High Court (see pages 16-18 for more information on the High Court).

Each state has its own constitution, for example, in New South Wales the Constitution Act 1902 grants ‘power to make laws for the peace, welfare, and good government of New South Wales’, subject to the Commonwealth Constitution. Each state has a head of government called the ‘Premier’ and a head of state, or ‘governor’.

The Territories were established by Commonwealth statutes: the Northern Territory (Administration) Act 1910 and the Seat of Government (Administration) Act 1910. Both territories now also have self-government Acts. The territories each have a ‘Chief Minister’ as head of government.

The roles of the legislature, executive and judiciary at the state and territory level mirror the federal system. Each of them plays a vital role in the legal system:

- The legislature makes laws by passing Acts of Parliament: statutory law;
- The executive decides what laws are needed, administers laws that have been made and put laws into effect;
- The judiciary applies the statute law to situations that they are asked to decide on (this is called statutory interpretation); and develops the law to apply to particular situations where there is not statute (through development and interpretation of common law).

Authority for Local Government is delegated to it by its State or territory government. For example, section 51 of the NSW Constitution Act 1902 provides for a ‘system of local government for the State’.

Each level of government controls (to some degree) activities within their geographic boundary and/or within an agreed set of issues. The statutory law making in each level of government is done by those people elected by the people who live within the boundaries of the government’s authority.

**HOT TIP**

The ‘Crown’ is another word used for the governing authority in Australia at both the Federal and state and territory levels eg ‘Crown lands’. The term ‘crown’ reflects the fact that Australia is a constitutional monarchy.
The Legislature

The term ‘legislature’ is the proper name given to the houses – or ‘chambers’ – of parliament within any of the governments in Australia. The legislature at both federal and state/territory levels of government is made up of people elected by citizens.

FEDERAL PARLIAMENT

Federal Parliament is made up of the House of Representatives, which is sometimes called ‘the lower house’, and the Senate, or ‘upper house’. Members of the Senate use the title ‘Senator’ in front of their name, while Members of the House of Representatives use the initials ‘MP’ (for member of parliament) after their name.

Members are elected to each of the two houses of federal parliament by Australian citizens who are enrolled to vote on the date of the federal election. There is a different system for voting in the two houses.

Members are elected to the House of Representatives on the basis of electorates. There are 150 electorates represented in the Federal House of Representatives. Voters in each electorate vote for who will represent them in the House of Representative and the person elected is the person who is able to get more than 50 per cent of the votes cast in their electorate. This is referred to as ‘preferential’ voting.

Senators are elected by a state or territory; in other words the whole of the state or territory is the electorate. This means, for example, that every voter in NSW is asked to choose from the same list of Senate candidates. Each of the states elects 12 Senators, and each of the territories elect two; a total of 75 Senators. In order to get elected as a Senator, a candidate must get a quota (a set percentage) of the votes cast in their state or territory. The usual quota for half-Senate elections for each of the states is approximately 14 per cent and for double dissolution elections it is approximately seven per cent. This system is referred to as proportional representation voting.

There are different systems for electing members to the state and territory parliaments.

Except for Queensland, all of the state legislatures have two ‘houses’ or ‘chambers’ of parliament. The two territories – the Australian Capital Territory and the Northern Territory – each have only one house: the Legislative Assembly. The names given to these houses are: NSW, Victoria and Western Australia each have a Legislative Assembly (the ‘lower house’) and Legislative Council (the ‘upper house’); South Australia and Tasmania have a House of Assembly (‘lower house’) and a Legislative Council (the ‘upper house’). Queensland’s parliament is the Legislative Assembly.8

Legislatures with two ‘houses’ or ‘chambers’ are called ‘bicameral’ parliaments. Legislatures with only one ‘house’ or ‘chamber’ are called ‘unicameral’ parliaments.

STATUTE LAW

The legislature has a central role in making statute law (individual laws are called ‘Acts’). It is the body that decides whether or not a law will be made to regulate an aspect of society or a particular activity.

Statutory laws usually begin their formal process of becoming law as a ‘Bill’ (a draft Act) in the lower house. The process for a Bill becoming law is:

Introduction and First Reading

The Bill is presented to either the upper or lower house by a member of that house who is proposing that it becomes a law. This is called ‘tabling the Bill’. When the Bill is presented (or ‘introduced’), the ‘short title’ of the Bill is read out to the house – called the first reading speech – to let the members know that the Bill is being presented. The majority of Bills are presented in the lower house (the House of Representatives in the Federal Parliament).

HOT TIP

The word ‘legislate’ means ‘to make or enact laws’ and the term ‘legislature’ means ‘the power that makes or enacts laws; a body of people empowered to make or enact laws’.


8. The Queensland Legislative Council was abolished from 23 March 1922 by the Constitution Act Amendment Act of 1922 (Qld).
**Printing the Bill and making it public**

Once the Bill has been introduced, an order is made for the Bill to be printed, along with a document – the ‘explanatory note’ or ‘explanatory memorandum’ – that explains the purpose of the Bill and then outlines how each of the sections of the Bill are intended to operate.

**Second Reading Speech**

The member of parliament proposing the Bill makes a detailed speech to the other members setting out the purpose of the Bill and why it is important for the Bill to become law.

**Debate**

Members of the house of parliament have an opportunity to debate for and against the Bill becoming law. Members can also propose changes to the Bill – called ‘amendments’ – and each of these amendments can be debated.

**Voting on the amendments and the Bill**

All of the members of the house are called into the house to vote on the amendments to the Bill and on the Bill itself.

**Introduction and first reading in the other house**

A Bill is usually presented to the other house of parliament after it has been passed by the first. It is presented by a different member of parliament, because it has to be presented by a member who is elected to that house of parliament.

**Second Reading in the other house**

Just as with the process in the first house, the member who introduces it in the second house makes a speech in support of the Bill becoming law and then there is a debate and possibly amendments.

**Committee review**

A member can ask to have the Bill reviewed by a Parliamentary Committee. There are a number of these Committees that have responsibility for particular aspects of the parliament’s work. If the Bill is sent to a Committee to be reviewed, the house will decide when the Committee has to report back. When a committee is asked to review a Bill, they can advertise the fact that they are doing this and invite members of the public to provide their views on the Bill. This can be done both through people writing to the committee and by going to speak to the committee. The committee considers all of the views and discusses the Bill in order to make a report to the house on whether or not the Bill should become law and whether or not any changes should be made to the Bill before it becomes law.

**Tabling of Committee report**

The head of the committee that reviewed the Bill presents the committee’s report to the house. The debate about whether or not to vote in favour of the Bill becoming law and about any amendments then continues.

**Voting on the amendments and the Bill**

Again, all the members of the second house are called into the chamber to vote on any amendments to the Bill and on the Bill itself.

If the Bill has been amended in the second house, it has to go back to the first house for voting on the amendments that have been made since it was originally passed in that house.

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Assent

Once the Bill has been passed by both houses it becomes an Act of Parliament. It is sent to the executive to be approved by the head of state (the Governor-General if it is an Act of Federal Parliament or the Governor if it is an Act of NSW Parliament). This is called ‘assent’. The words used by the Governor-General are: ‘In the name of Her Majesty, I assent to this Act.’

Commencement: becoming law

An Act of Parliament does not automatically come into effect as a law. Sometimes an Act of Parliament will include a section that sets a particular date for the Act to come into effect. Others will include a section that says the Act will come into effect a certain amount of time after it is approved by the head of state. Others include a section that says that the Act will come into effect on a ‘date to be proclaimed’. It is important to check whether a new Act has actually commenced. Some Acts commence immediately on Assent; others can take a long time, many months or in some cases years, before they become actual law.

DELEGATED LEGISLATION

The legislature can delegate responsibility to the executive to make laws under the authority of a statute. This is called ‘delegated legislation’, ‘legislative instruments’ or ‘subordinate legislation’.

At the Commonwealth level, a legislative instrument must be registered and tabled (presented) in both houses of Federal Parliament. In NSW, a statutory rule is made by publishing it in the NSW Government Gazette and both Houses of Parliament must be given written notice of rule being made within a specified time.

Generally, legislative instruments can be overruled by the relevant parliament, but there is a process for doing this and it usually has to be done within a specified period of time after the instrument was presented to parliament.

Legislative instruments must be consistent with the Act under which they are made and cannot go beyond what the Act sets out can be dealt with in the instrument.

Examples

1. National Parks and Wildlife Act 1974 (NSW): section 126 deals with the issuing of licences to allow the import to and export from NSW of protected fauna (animals). The general power to make regulations to do with the National Parks and Wildlife Act is found in Part 13 of the Act. The National Parks and Wildlife Regulation 2002 (NSW) sets out who is authorised to issue licences and the grounds on which an import or export licence can be refused.

2. Jury Act 1977 (NSW): section 72 says that a person is entitled to be paid the prescribed rate for jury duty. The prescribed rate is listed in the Jury Regulations 2004 (NSW).

3. Rail Safety Act 2002 (NSW): section 117 gives the general power to make regulations, including creating offences. Penalties for specific rail offences, such as not having a valid ticket are set out in the Rail Safety (General) Regulation 2003 (NSW).

HOT TIP


The Senate votes 34–31 to continue debate during the second reading speech of the therapeutic cloning (stem cell) legislation, Parliament House, Canberra, 7 November 2007.

Alan Porritt, Sydney Morning Herald.
The Executive

The executive is the branch of government that puts government laws and programs into effect. It is made up of the public service and government ministers. Every government department and agency and the Ministers responsible for every government department are all part of the executive. This includes a number of Ministers, government departments and agencies that are directly involved in the legal system.

The most senior Ministers make up a committee of the executive called ‘Cabinet’. In Australia, an important role of the Cabinet is to decide the policy of the political party in power as Government and how that policy will be put into practice, particularly through making laws. What happens in Cabinet meetings is secret.10

Government ministers are (as a matter of tradition) members of parliament from the party that is in power who are appointed to be responsible for a particular area of government operation. For example, the Attorney General is responsible for the legal system and the Minister for Defence is responsible for the army, navy and air force and for the Department of Defence.

The public service is made up of all the people employed directly by the government in government departments and agencies. It is called the public service because of its role in serving the public. The public service is sometimes referred to as the ‘civil service’.

THE EXECUTIVE’S INVOLVEMENT IN MAKING LAWS

The executive is a very important part of the law-making process. They have responsibility for delegated legislation (see page 13). Also, they are often involved in the law-making process from the beginning, by identifying that a new law is needed, through to the point where the law is made by the parliament.

The key steps to law-making that are carried out by the executive are:
> identifying the need for a new law;
> researching what the law needs to cover and how it should be written to achieve what is needed;
> preparing the draft Bill;
> making the draft Bill available for community comment in the form of an ‘Exposure Draft’;11
> reviewing the comments made by the community and changing the Bill;
> presenting the Bill to the Cabinet for its approval to be presented to parliament.

The Bill is presented to the parliament by the Minister responsible for that area of government.

THE EXECUTIVE’S ROLE IN LAW REFORM

Government departments have staff to research and develop policies for improving particular aspects within the department’s responsibility. So, for example, the Attorney General’s Department may have staff looking at developments in the legal systems of other countries to see if they might be applicable to the Australian legal system. A lot of research on laws and legal systems is carried out for the executive by law reform commissions, at the request of the Attorney General. The executive can also rely on research by others, such as university academics, community organisations or industry bodies.

Once research has been done, the executive is usually involved in writing the proposed law and sometimes asking the community for its comments and ideas about the law. Often changes are made to a proposed law during this process. Once the proposed law is ready, it is presented to Cabinet, which decides whether or not to take the proposed law to parliament in the form of a Bill.

THE EXECUTIVE AND THE LEGAL SYSTEM

The executive has a lot of involvement in the legal system through its role in putting laws into effect. Some parts of the executive are more directly involved in the legal system.

The Attorney General’s Department

At both the Commonwealth and State levels of government, this department is under the control of an Attorney General and usually deals with the management and administration of the key functions of the legal system including the courts and tribunals, and laws. It also provides support to the Attorney General in relation to her or his role as legal advisor to the government.

10. In Australia, cabinet records are kept secret for 30 years and cabinet notebooks (which record the views of particular cabinet ministers) are kept secret for 50 years.
11. Not all draft Bills are made available for comment as exposure drafts.
Departments responsible for police and prisons

In NSW there are several departments that have a role to play in the legal system. These are the Ministry of Police, the Department of Corrective Services (responsible for the prison system), and the Department of Juvenile Justice.

Ministers

The Attorney General has responsibility for courts and tribunals and is the primary legal adviser to the government. The Attorney General is sometimes referred to as the ‘First’ or ‘Chief Law Officer to the Crown’. There is an Attorney General for each of the state and territory governments, as well as a Federal Government Attorney General.

Ministers are responsible for a range of other government departments and agencies including the courts (sometimes this is the Attorney General), the police, prisons, security and intelligence agencies. Different governments have different names for many of these roles.

Office of the Director of Public Prosecutions

The Director of Public Prosecutions (DPP) is appointed for a fixed period by the Governor, to be responsible for the prosecution of people charged with breaking the law. The Office of the DPP reports to the Attorney General, but is an independent body. There is a Director of Public Prosecutions for the Commonwealth, who deals with prosecutions of federal law offences. There is also a Director of Public Prosecutions in each state and territory, who deals with prosecutions under their state or territory laws. For more information on prosecutions see pages 20 & 22.

In NSW, the DPP is responsible for prosecutions in relation to ‘indictable’ offences, and for conducting appeals in any of these cases. An indictable offence is an offence that entitles the accused to a jury trial. For more information about juries in the legal system, see page 19.

Legal Aid Commission

The Legal Aid Commission is a body set up to provide legal aid to people in a defined range of situations. Legal aid is provided as a grant, which can either be used to employ a lawyer separate from the Legal Aid Commission, or to get assistance from a lawyer employed by the Legal Aid Commission. Legal aid is not available for every type of legal problem or for everyone. Generally, it is only available if a person has very limited income or money or has some other disadvantage in dealing with the legal system, such as a disability. Legal Aid represents a very large proportion of people in NSW charged with criminal offences. It also assists in family law and a range of other types of legal problems. There is a legal aid commission in each state and territory. There is no Commonwealth Legal Aid Commission as the state and territory legal aid commissions assist not only with state or territory cases, but also federal cases.

Law Reform Commissions

A law reform commission is a body set up to do research on particular laws or legal processes and to recommend changes to those laws or processes to make them work more effectively. Once the Law Reform Commission has completed its research it makes recommendations to the Attorney General. There is a law reform commission or institute in every state and territory and there is also an Australian Law Reform Commission.

Police Force

The main roles of the police force are in crime prevention and crime investigation. The police also have a role in prosecuting people who break the law in relation to non-indictable (summary) offences.

There are a number of other parts of the executive, however, that manage whole areas of law. For example, the Australian Taxation Office (ATO) is responsible for the administration of income tax law for the whole of Australia. The ATO not only collects income tax and other forms of Federal tax, but it also has a major role in providing guidance to the community on how income tax and other forms of taxes work. The ATO also sets up systems for individuals and organisations to report on their income and other information that is relevant to tax obligations. And, when a person or organisation fails to pay the tax they owe, the ATO has power to prosecute that person or individual in order to force them to pay what is owed.

There are many other parts of the executive that manage aspects of the legal system, and have a role in prosecuting individuals or organisations who act in breach of the particular law that they manage. Examples include:

> Australian Security and Investment Commission (ASIC), which is responsible for the administration of the laws that regulate the actions of corporations;
> NSW Environmental Protection Authority, which is responsible for the administration of the laws that regulate behaviour that could damage the environment;
> NSW WorkCover Authority, which is responsible for the workers’ compensation system in NSW and also for ensuring that employers and others comply with occupational health and safety laws;
> Human Rights and Equal Opportunity, which is responsible for managing federal human rights and anti-discrimination laws.

12. See page 27 for contact details for the Legal Aid Commission.
The judiciary is the branch of government that decides when laws have been broken (breached) based on evidence presented in court cases and on what the penalty or remedy is to be for the particular breach of the law.

All people holding the position of ‘judge’ or ‘justice’ are members of the judiciary. They are always people who are qualified as lawyers. Most of them have been barristers (see page 23 for more information about solicitors and barristers).

In Australia, members of judiciary are appointed rather than elected or employed. In some other countries, the judiciary are elected through popular election; and in other countries, the judiciary are employed having done training especially to become judges.

The judiciary also includes the court system itself. Under the Constitution, the highest court in Australia is the High Court. The High Court has seven judges who, once they are appointed, stay on the High Court until they reach the age of 70, unless they choose to retire earlier. Not all cases dealt with by the High Court are heard by all seven judges. Cases can also be dealt with by three judges or by one judge. The head of the High Court is the Chief Justice.

The High Court building is in Canberra, but the High Court can hold hearings in other places in Australia.

THE JUDICIARY’S ROLE IN MAKING LAW

The judiciary have two roles in the law-making process:

Interpretation and ‘filling the gaps’ in legislation

The most common role of a judge is to interpret how a law applies to a particular situation. This is often done with statute law. The statute might be quite general in how it deals with a situation, or not particularly clear. The role of the judge is to decide what the law means in relation to the particular case.

Making new law

If a judge is dealing with a case and there are no previous cases on the same question and there is no statute dealing with the situation, the judge may use common law principles to develop a specific way to decide the particular case. This could include looking at what the law says about similar situations, and what the law in other common law countries says about the situation. This role is less common for judges, as most areas of law are covered by statutes.

What is the relationship between the judiciary and government?

The judiciary is a branch of government. However, it is important to understand that it is independent of the other branches of government to the greatest extent possible. Our system of government protects the independence of the judiciary by:

> having judges appointed until a fixed retirement age (70 years of age for judges appointed to federal courts);
> having judges appointed rather than elected;
> having the pay and conditions of judges decided by an independent review body, rather than by the judiciary or the executive;
> giving the judiciary power to make rules about how courts will be run.

THE JUDICIARY

13. The number of judges appointed to the High Court is set out in section 5 of the High Court of Australia Act 1979 (Cth), while the retirement age of judges on the High Court is set out in section 72 of the Constitution.

14. For more information about the High Court, visit their website www.hcourt.gov.au
WHAT ARE THE DIFFERENCES BETWEEN COURTS AND TRIBUNALS?

Tribunals are similar to courts because they use similar processes to resolve disputes between parties. However, tribunals are not part of the constitutionally established system of government, while the courts are. Most tribunals are set up to deal with a limited type of dispute and often cases that involve a dispute between an individual and government.

Tribunals have many features that are similar to courts, for example:

- tribunals, like courts, are independent. They are separated from the executive and legislative branches of government;
- tribunals and courts are open to the public;
- tribunals and courts have a duty to be transparent by providing reasons for their decisions;
- parties have the right to appeal against decisions of courts and tribunals.

Some examples of the differences between courts and tribunals include:

- tribunals have a more relaxed approach to the rules of evidence than courts;
- tribunals encourage and often require parties to speak on their own behalf. Lawyers are only permitted in special circumstances;
- tribunals often specialise in resolving disputes in a particular area – courts generally have the power to hear a much broader range of cases;
- it is usually much cheaper to resolve a dispute at a tribunal rather than have it litigated at court;
- tribunals are most often made up of a panel of three people, only one of whom is a lawyer – the other two members are usually experts within the particular field of the tribunal;
- members of tribunals are appointed for a fixed period of time, rather than until they reach retirement age.


The High Court of Australia has a particularly important role to play in government. It has the power to decide whether or not the actions of the other two branches of government are consistent with the Constitution.

What is the relationship between the judiciary and the legal system?

The judiciary is central to the legal system. Without the judiciary, there would be no one to make impartial decisions about disputes using the law as its framework.

The courts have a very important role in making sure that that noone acts above the law. The courts are able to do this without fear of being overruled by parliament or the executive because of the principle of independence of the judiciary. Under this principle, once a judge is appointed they cannot simply be sacked by the government. The constitutions of the Commonwealth and each of the states and territories set out the way a judge’s appointment can be terminated. So, for example, section 72(2) of the Commonwealth of Australia Constitution Act 1900 (UK) requires a decision by both houses of federal parliament meeting together to ask for a judge’s appointment to be terminated. This can only be done on the basis of ‘proved misbehaviour or incapacity’.

COURTS AND TRIBUNALS

We have courts and tribunals to resolve disputes between people using the law. This is very important as it provides a peaceful, fair and predictable way of dealing with disputes.

Courts and tribunals resolve disputes using a predictable process and apply all of the relevant law to the particular set of circumstances to decide on the rights and obligations of the parties who are in dispute. Their role is to make a decision about a particular dispute. Their role is not to make policy about how all similar disputes should be resolved or to decide what rights or obligations people should have; this is the role of parliament.

Hierarchy of courts

As well as a federal system of courts, each of the states and territories has a separate system of courts and tribunals. The following diagram shows how the NSW and Federal Court Systems are arranged, with the High Court of Australia overseeing both systems.
Each court system has a hierarchy - the courts higher up in the hierarchy have authority over the lower courts. The highest court is the High Court of Australia. This is at the top of both the Commonwealth court and tribunal system, and the court and tribunal systems of all states and territories. It is the final court of appeal (only on matters of law) and deals with matters relating to the Constitution. The Federal Court of Australia has responsibility for federal law and hears appeals from the Federal Magistrates Court (except for family law matters, which go to the Family Court).

Within the NSW court system, the highest court is the Supreme Court of NSW. The Supreme Court also has an ‘appellate’ level (for hearing appeals) See information on appeals see p 21.

Who are the participants in the courts and tribunals?

Courts have a number of participants who each play an important role in making sure that the legal system works effectively. They can be grouped into four key roles:

> decision makers
> other court officials
> parties
> representatives

When a case is taken to court, the process is called a ‘hearing’ or a ‘trial’. The order in which a hearing runs is almost the same for criminal and civil cases.

> The representatives of the parties introduce themselves to the court.
> The representative of the party that has brought the case to court, presents all of their evidence to the court through having witnesses testifying. That evidence can be challenged by the other party through ‘cross-examination’ of witnesses.
The representative of the party that is responding to or defending themselves against the charges, presents their evidence to the court. Again, the other party can challenge the evidence through cross examination.

The representatives then each tell the court what they think the evidence proves and how that is relevant to what has to be proved in the case.

The decision maker makes their decision on what happened.

The decision maker makes their decision on what the penalty or remedy is to be.

Decision makers in courts

There are two key types of decision makers in the courts: judicial officers and juries. Not all courts or court cases involve juries. All courts and court cases involve judicial officers. Judicial officers in different courts have different titles:

- Local Court judicial officers are called magistrates;
- in all other courts the judicial officers are called judges.

Both magistrates and judges are now referred to in court as 'Your Honour'.

Juries

Generally, juries are involved in criminal cases involving indictable offences. A person charged with an indictable offence can ask to have the case heard by a judge and jury. A jury in a criminal case is made up of 12 people, all of whom are adult citizens.

The judge’s role, where a jury is used, is to make decisions about how the case is run, such as whether or not the law allows certain evidence to be presented to the jury.

Once both parties have presented all of their evidence, the judge instructs the jury on the areas of the case which it is their responsibility to decide. For every criminal offence there are certain ‘elements’ that have to be proved ‘beyond reasonable doubt’ in order for the accused person to be found guilty. So the judge has to outline what those things are that have to be proved, and also has to explain to the jury what ‘beyond reasonable doubt’ means.

The role of the jury is then to decide the facts of the case, that is, what the evidence proves happened and whether the evidence proves what the judge has said must be proved beyond reasonable doubt. This is done away from the courtroom, in secret.

The jury then come back to the court with their decision. In a criminal case heard in NSW (whether it is a Federal criminal offence or a NSW criminal offence, the decision must be either:

- unanimous, that is, every one of the jurors must agree with the decision; or
- if there are 12 jurors and after at least eight hours they cannot all agree, agreed by 11 of the jurors; or
- if there are 11 jurors and after at least eight hours they cannot all agree, agreed by 10 of the jurors.

A jury can be used in non-criminal cases, including:

- defamation cases;
- cases in the District Court at the request of a party and subject to the Judge agreeing that it is in the interests of justice to have a jury involved;
- cases in the Supreme Court at the request of a party and subject to the Judge agreeing that it is in the interests of justice to have a jury involved;
- coronial inquests in limited circumstances.

Usually, a jury in a civil case is only four people, but the size of a jury in a civil case in the Supreme Court can be increased to 12 people if a party to the case asks the Court to do so. A jury in a coronial inquest is six people.

In a civil case, the decision must be either be:

- unanimous, that is, every one of the jurors must agree with the decision; or
- if there are nine, ten, 11 or 12 jurors and after at least four hours they cannot all agree, agreed by eight of the jurors; or
- if there are four jurors and after at least four hours they cannot all agree, agreed by three of the jurors.

Once the jury has made its decision, the judge’s final role is to decide what the penalty (in a criminal trial) or remedy (in a civil case) is to be.
Decision makers in tribunals

Generally, a tribunal is a decision-making body that is made up of more than one person. There are no juries in tribunals. The make-up of a tribunal is set out in the Act of Parliament that sets up the particular tribunal.

There are a number of different titles used for tribunal members depending on the Act that sets up the tribunal. If the tribunal has a judicial member who is a judge or magistrate, then they are referred to in the same way as they would be in court (see above). If the tribunal is chaired by a lawyer who is not a judicial officer, they may be called ‘President’, and the other members may simply be called ‘Member’.

Court officials

There are a range of staff working in the court system to make sure that it runs efficiently. These include:

> Registrars and their staff: these people manage the court or tribunal’s registry. This includes being responsible for accepting documents related to a case and making sure that all the documents relating to a case are on the court or tribunal’s file for that case. Registrars also manage the early stages of a lot of cases, by setting deadlines for parties to produce documents and to come to court;

> Sheriff’s Office staff: the Sheriff’s Office is responsible for assisting the courts in a range of ways, including delivering documents that are issued by courts, making sure that the courts have enough security and helping with juries.

Parties

There are always at least two parties in any case that is to be decided by the courts: the party that is bringing the case to court and the party that is responding to the case.

When a criminal case is heard, the party bringing the case:

> always represents the Crown, either as the Federal or the State Government;

> is called the prosecutor;

> is represented either by a Police Officer or a Police Prosecutor (generally for less serious cases), or by the Public Prosecutor.

The party responding to the case where it is a criminal matter is called the ‘defendant’ or ‘accused’. They will often be represented by Legal Aid or by a Public Defender.

When a civil case is heard, the party bringing the case is called the ‘plaintiff’. The party responding to the case is usually called the ‘respondent’.

When a case is an administrative law matter, the party bringing the case is often called the ‘applicant’, and the party responding is called the ‘respondent’.

Representatives

Parties in court cases are usually represented by someone else. This may be a legal practitioner (a solicitor or a barrister)15, a police officer, or a public prosecutor.

15. See page 23 for more information about legal practitioners and the different roles of barristers and solicitors.

Redfern Courthouse was built in 1898 and only ceased operating as a court in 2005. It was one of a group of courts designed by Walter Liberty Vernon, the first NSW Government architect.

P Serris, DWSPL.
What process does a court use to deal with a legal dispute?

A court can only deal with a legal dispute at the request of one of the people or organisations affected by the dispute. The process used by courts to resolve disputes is slightly different for different kinds of cases – for example, criminal cases and civil cases have slightly different processes. Even within the criminal law, there is a slightly different process for dealing with indictable offences (more serious offences) and summary criminal offences (less serious offences).

Courts can only decide the outcome of a case using the evidence that is presented in the hearing. They cannot go out looking for other evidence or calling witnesses. This is because Australia has an ‘adversarial’ legal system.

In order to reach the decision at the end of a hearing, the court has to identify what laws are relevant to the situation and then how those laws apply in the particular situation. To do this the court relies heavily on the parties to point out what laws are relevant and how those laws should be applied to the situation.

Except in very limited cases – such as cases involving children or cases involving national security – the hearing of cases is public. This means that anyone can walk into the court and stay to listen to the hearing and the decision. This is an important part of our court system because it means that the process can be seen and understood by anyone and so has to be open and fair.

APPEALS

An ‘appeal’ is a review by a higher court of a decision made by a lower court in the court hierarchy.

An appeal can be made against a conviction, sentence or penalty imposed by the Local Court. The appeal is usually heard in the District Court, generally by way of a rehearing of the evidence. The Supreme Court can also hear appeals from the Local Court, and from the District Court, although permission (‘leave’) may need to be given by the Court first.

In NSW, the highest courts of appeal are the Court of Criminal Appeal for criminal matters and the Court of Appeal for civil matters.

Appeals to the High Court of Australia can only be made on matters of law and require permission from the court, called ‘leave to appeal’.

Tribunal appeals

In limited circumstances, an application can be made to appeal a decision of a NSW tribunal. The Administrative Decisions Tribunal has an Appeals Panel that deals with appeals against decisions of the Tribunal. Decisions of the tribunals in NSW can only be appealed to the Supreme Court of NSW on a question of law.
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In NSW the legal profession is made up of two types of legal practitioners: solicitors and barristers.

In order to be allowed to practice law in NSW, a person must either:
> be admitted as a legal practitioner in another state or territory of Australia; or
> have a qualification in the study of law, gain experience of legal practice by completing a period of practical legal training, have their qualification and experience approved by the Legal Profession Admission Board, and be 'admitted' to the legal profession by the Supreme Court of NSW.

In NSW, a solicitor is a person who holds a NSW practising certificate that allows them to practice as a 'solicitor and barrister', and a barrister is a person who holds a NSW practising certificate that allows them to practice only as a 'barrister'.

Most people who become legal practitioners have got their legal qualification by completing an approved law degree at a university. It is also possible for a person to get their legal qualification in NSW through a completing a Diploma in Law under the management of the Legal Profession Admission Board.

BARRISTERS

Generally, the term ‘barrister’ is used to refer to legal practitioners who are self-employed and whose main work is presenting cases in court and other tribunals. In NSW, barristers are often required to wear a black gown over their usual clothing and a short white curly wig. This is not required in all courts and tribunals.

For a person to become a barrister in NSW, they must be admitted as a legal practitioner and have completed the NSW Bar Association’s ‘Reading Programme’ (or be given an exemption). This involves completing exams – the Bar Exams – and a period of ‘reading’ under the guidance of a barrister.

SOLICITORS

By contrast, solicitors are legal practitioners whose main work is giving legal advice, checking and preparing legal documents, such as contracts and leases, negotiating on behalf of clients, and preparing cases for hearing.

In NSW, legal practitioners are employed as solicitors in a wide range of organisations including:
> the Legal Aid Commission of NSW;
> private law firms;

The letters ‘QC’ and ‘SC’ after a barrister’s name indicate that the barrister has been appointed as a senior barrister. Until 1993, all such senior counsel were appointed as ‘Queen’s Counsel’, or ‘QC’ by the NSW Governor (on advice from the NSW Attorney General). Since then, the President of the NSW Bar Association has appointed barristers of suitable seniority and eminence as ‘Senior Counsel’ or ‘SC’. A barrister cannot simply use these letters after their name, they must have been formally appointed as QC or SC.

QCs and SCs are sometimes referred to as ‘silks’ because they are permitted to wear a black silk version of the usual barrister’s black gown. They are also permitted to wear a different wig, which is called a ‘full-bottomed’ wig, but tend to do so only at ceremonial occasions.

16. In NSW, solicitors and barristers are admitted to the legal profession by the Legal Profession Admission Board under the Legal Profession Act 2004 (NSW). There are now laws across Australia that allow a person admitted to legal practice in one state or territory to practice law in another state or territory.
community legal centres;
government departments and agencies with a legal focus, e.g., the NSW Attorney General’s Department, the NSW Crown Solicitors’ Office, the NSW Office of the Director of Public Prosecutions, the NSW Anti-Discrimination Board, the Human Rights and Equal Opportunity Commission, and the NSW Police Force;
other government departments and agencies, such as the Sydney office of the Australian Taxation Office, the Australian Security and Investment Commission, the NSW Department of Ageing, Disability and Home Care, and the NSW Office of Fair Trading;
law departments in other organisations, such as private companies and not-for-profit organisations.

Only a very small amount of the work of solicitors involves going to court. Solicitors do most of their work in their own office.

When a solicitor is involved in a court case, they will usually work with a barrister by giving the barrister a document detailing the case and all the evidence available and engaging the barrister to present the case in court. The document detailing the case and evidence is called a ‘brief’. Solicitors are allowed to present cases in courts and tribunals, but in NSW are not allowed to wear a wig and gown.

WHO PAYS FOR SOLICITORS AND BARRISTERS?

Usually the work of solicitors and barristers is paid for by their clients. However, there are some services that do not charge their clients for the legal work they do, or only charge in limited situations.

So, for example, if a person is eligible for a grant of legal aid, they may not have to pay anything for the legal help they get, or they may pay a reduced fee. Community legal centres generally do not charge their clients for the legal services they provide.17

Sometimes a barrister or a lawyer in a private law firm will do legal work for free – this is called pro bono18 – if the person needing the legal service can't afford to pay the legal fees and can't get a grant of legal aid. Some legal practitioners or firms limit their pro bono work to cases that are ‘in the public interest’.

Land title documents. The legal process of transferring property ownership from a seller to a buyer, or ‘conveyancing’, is a traditional area of practice for solicitors.

Michele Mossop, Australian Financial Review.

17. The Legal Aid Commission of NSW is able to provide free legal services because this work is paid for by the Federal and NSW government. Community legal centres are able to provide free legal services because they get money from government and other organisations to do this work.
18. Pro bono is short for the Latin term ‘pro bono publico’ which means in English, ‘for the public good’.
Finding the law

FINDING ACTS OF PARLIAMENT

To find the name of an Act of parliament check general books or other sources about the law such as The Law Handbook, or other Hot Topics. Once you have found the correct name you can find copies of the Acts on the internet, or telephone LIAC on 9273 1558.

To find current NSW legislation use the Parliamentary Counsel's Office website at www.legislation.nsw.gov.au

1. Select the Browse A-Z in Force tab.

This will give you a choice of Acts in Force or Regulations in Force. 'In force' means that the Acts or Regulations are current and include all amendments that have been made.

2. Click on the first letter of the Act or Regulation you want eg J for Jury Act.

When you've located the Act you will see a table of contents in the left screen.

3. Scroll down this window until you find the section you want.

4. Click on the heading and the text of that section will appear in the window on the right. You can print a section by right-clicking the text window.

Other functions you can use are:
> Search Title tab to search the entire text of the Act;
> List Regs etc tab to find related regulations;
> Whole Instrument tab to open the entire Act.

To find current Commonwealth legislation use the AustLII website at www.austlii.edu.au

1. Under the heading Cases & Legislation on the left select Commonwealth.

2. Select Consolidated Acts. This will give you the most current version of the Act with all amendments to it included.

3. Click on the first letter of the Act you want.

Once you have located the Act you can:
> click on the section numbers to see each section;
> use the Search this Act tab to find a phrase or word;
> use the Download tab to read the entire Act.

To find legislation from other states use the links on LIAC's website at www.liac.sl.nsw.gov.au/legislation/index.cfm

For help locating current and historical legislation and earlier versions of Acts and Regulations contact LIAC on (02) 9273 1558 or liac@sl.nsw.gov.au

HOT TIP

There is a standard way to refer to an Act of parliament that indicates the name of the Act, the year it was made and which parliament made the particular Act.

For example the Disability Discrimination Act 1992 (Cth) was made by the Commonwealth Parliament in 1992.

Legal Profession Act 2004 (NSW) was made by the NSW Parliament in 2004.
FINDING CASES

HOT TIP

Not all cases are available. Just because a case is well known doesn’t mean that it has been published in print, or on the internet. Courts select and provide decisions for publication, usually on the grounds of legal significance.

Court and tribunal decisions can be found in published law reports and on the AustLII website www.austlii.edu.au.

To find a decision you generally need to know in which court or tribunal the case was heard.

1. Select the state from the left side of the AustLII homepage.
2. Then select the court that heard the case.

For example, to find the case R v Lavender [2004] NSWCCA 120 you would need to select NSW and the Court of Criminal Appeal.

NSW Case Law

Supreme Court of New South Wales Decisions 1995 -
Supreme Court of New South Wales Court of Appeal Decisions 1999 -
Supreme Court of New South Wales Court of Criminal Appeal Decisions 1999 -
Compensation Court of New South Wales Decisions 1985-2001
District Court of New South Wales (Pharmacist Appeals) Decisions 1992 -
Drug Court of New South Wales Decisions 1998 -
Land and Environment Court of New South Wales Decisions 1988 -

Click on the first letter of the case name eg to find R v Lavender click on R.

For cases heard in the High Court of Australia (HCA) you will need to select Commonwealth, and then the High Court.

HOT TIP

A decision of a court or a tribunal is often called a ‘judgment’, ‘case’, determination’ or ‘finding’.

Cases can become so famous that they are simply known by the name of one of the parties or their subject. For example, the judgment of the High Court: Mabo and others v Queensland (No 2) (1992) 175 CLR 1 is often referred to as Mabo and The Commonwealth of Australia v Tasmania (1983) 158 CLR 1 heard in the High Court is simply referred to as The Tasmanian Dams Case.

HOW TO READ A CITATION

A citation is the standard way to refer to court decisions that are published. Example: Waters v Public Transport Corporation (1991) 173 CLR 349.

The name of this case is Waters v Public Transport Corporation. The case takes its name from the parties of the case.

The ‘v’ stands for ‘versus’ meaning ‘against’.

1991 is the year of the decision.

173 is the volume of the report series.

CLR is the abbreviated name of report series, Commonwealth Law Reports.

349 is the page the decision starts on.

If a case is reported in more than one series these will all be shown.

You can find out what the report name abbreviations stand for in the Appendix to the Australian Guide to Legal Citation 2nd ed (2002). This is available online at http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf The abbreviations start on page 117.

In criminal cases the judgments will always include the Crown as one of the parties in the case name:


Regina or R refers to the Crown. (Regina means ‘Queen’ in Latin.)

Not all cases are available on the internet. For help locating cases contact LIAC on (02) 9273 1558 or liac@sl.nsw.gov.au

More information about how to find cases or refer to cases using the proper citation system can be found on the internet at, for example, http://info.library.unsw.edu.au/law/guides/lrmcite.html.

There are also useful guides to understanding citations in the Australian Guide to Legal Citation (1998) also available online at http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf
The **Legal Information Access Centre (LIAC)** can help you find more information about the legal system, including legislation and cases. The service is free and confidential. For contact details, see the back cover.

**WEBSITES AND CONTACT NUMBERS**

**Legal Aid Commission**
Tel: (02) 9219 5000
The website has information about the type of legal problems for which legal aid is available in NSW. Follow the 'Our Policies' link to 'Policies in brief'.

**LawAccess**
For legal information or advice
Tel: 1300 888 529 or for TTY access on 1300 889 529

**Parliament of Australia**
Website: [www.aph.gov.au](http://www.aph.gov.au)
Tel: 02 6277 7111
Detailed information about the history and operation of the Commonwealth Parliament, lists of proposed laws and Bills, live broadcasting of parliament, departmental details, access to Hansard (transcripts of parliamentary proceedings). See particularly the Parliamentary Education Office and on the Legislative Assembly page, links to Publications (which includes Fact Sheets), a Short Guide and the Procedure Book for detailed information.

**Australian Law Online**
Website: [www.law.gov.au](http://www.law.gov.au)
See section on Australian legal system.

**Parliament of New South Wales**
Tel: 02 9230 2111
Information resources about the historical development of State parliament, Bills and committees, member of parliament searches, parliamentary processes, access to Hansard (transcripts of parliamentary proceedings).

**Australian Electoral Commission**
Website: [www.aec.gov.au](http://www.aec.gov.au)
Tel: 13 23 26
Information about Australian electoral history, the development of the right to vote, modern voting processes, enrolling to vote, electoral searches, election results. You can download or order a copy of the Electoral Handbook at this site or you can order it by telephone.

**State Electoral Office**
Website: [www.seo.nsw.gov.au](http://www.seo.nsw.gov.au)
Tel: 1300 135 736
Information about the New South Wales electoral system, including electoral processes, enrolling and voting, districts, electoral searches, election results.

**High Court of Australia**
Website: [www.hcourt.gov.au](http://www.hcourt.gov.au)
Tel: 02 6270 6811
The role, history, and operation of the highest court in our legal system.

**Federal Court of Australia**
Website: [www.fedcourt.gov.au](http://www.fedcourt.gov.au)
Tel: 02 9230 8567
This site contains general information about the court as well as more detailed information for litigants. There is also extensive information for students regarding assignment writing and legal research.

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Family Court of Australia
Website: www.familycourt.gov.au
Tel: 1300 352 000
Information about the court’s organisation and processes, family law judgments and legislation, as well as step-by-step guides for litigants.

Federal Magistrates Court of Australia
Website: www.fmc.gov.au,
Tel: 1300 352 000
This site contains information about the court’s procedures as well as general information about federal law, family law and child support. It outlines the alternative resolution services it provides (called primary dispute resolution). It also contains legislation relevant to the court.

New South Wales Courts Information
Click on ‘courts and tribunals’ then follow the links. You can find court judgments, daily court lists, as well as general and historical information about each court. This site also contains links to courts and tribunals in other jurisdictions throughout Australia, and has a section on the Australian legal system in ‘Student Resources’.

BOOKS AND PUBLICATIONS


*Working the system, B Duffy 2nd ed, Public Interest Advocacy Centre, 2003


+Introducing the law, G Heilbronn, P Latimer, J Nielsen, T Pagone, 6th edn, CCH, 2002


+The Australian legal system, M Meek, 3rd ed, LBC Nutshell, 1999


* These are Legal Toolkit titles, available in all NSW public libraries

+ These books are Lawbooks for Libraries titles, available in many public libraries; check with LIAC www.liac.sl.nsw.gov.au or (02) 9273 1558.