Introduction to courts

The legal system in Australia is based on the English legal system, which was brought to Australia when eastern Australia was colonised by England in 1788. In common with other countries that derive their legal and political system from England – the United States, Canada, India and New Zealand – Australia has three arms of government:

- the legislature, consisting of democratically elected Members of Parliament, which makes statute law (legislation);
- the executive, which implements legislation and administers the affairs of government. In Australia, the executive is made up of the Queen and her Ministers. The Queen is represented at the Commonwealth level by the Governor-General and at the state level by the governor of the state; and
- the judiciary (also known as the judicature), which is responsible for making legally enforceable judgments about the legal rights and liabilities of people. The judiciary comprises judges and magistrates operating in the court system.

Further information

Hot Topics 79: Australian legal system - an overview of the elements of our system and how it developed, covering how law is made, what the law deals with and the roles of the legislature, judiciary and executive.

How Laws are Made videos - two 10-minute films: Parliament and Courts, which provide an overview of where Australian laws come from and how new laws are made.

More resources are listed under Courts and the legal system.

Looseleaf services such as Halsbury’s laws of Australia and Laws of Australia also contain information about the legal system.

The federal structure of Australia

The Constitution of the Commonwealth of Australia established a federal system of government. In a federal system, the powers of government are shared between a central, national government (the Commonwealth) and between regional governments (the six states and two territories). The Commonwealth and each state and territory has its own parliament and can make its own laws. There is a dual system of courts to match the dual system of government: federal courts exercise jurisdiction arising under Commonwealth laws (including the Commonwealth Constitution) and state and territory courts exercise jurisdiction under state and territory laws.

State courts may also in some circumstances exercise jurisdiction under Commonwealth laws, if Commonwealth and state legislation provides for this.

The role of courts

Courts are central to the system of law in Australia as they provide a forum for resolution of legal disputes between individuals (including corporate entities), or individuals and the government. Courts are where the application (and sometimes validity) of laws are determined. The essence of a court of law is that it is a body independent of the executive and legislature that has the power to conclusively determine disputes between persons in accordance with the law.

Legislation and common law

There are basically two kinds of laws in Australia:
• statute law – the laws made by parliaments, usually called ‘legislation’, which includes Acts, Regulations and Rules. Courts are responsible for interpreting and applying the relevant laws to the cases before them; and

• common law – the body of law developed through judges applying the law to the particular facts in individual cases. Where legislation does not cover the specific facts of a case, judges use legal principles and decisions made in similar cases to reach a decision. This is becoming less frequent, however, as legislation increasingly covers most areas of law.

Relationship between the two types of law

Australian common law is derived from English common law. This unwritten body of law came to be accepted as standard, and applied ‘in common’ to all, as opposed to local laws. Traditionally, most law was common law and there were relatively few areas covered by legislation. Since the nineteenth century, however, governments have greatly expanded their use of legislation in order to be able to address problems quickly, or to change the common law, or to create new areas of regulation. There are now very few areas of law that are not covered by legislation.

The way that legislation affects the common law depends on the intention of Parliament. An Act of Parliament will override and replace the common law, if that is the intention of Parliament. The power of a Parliament to make law is limited only by the Constitution that sets out the powers and limitations of the Parliament.

In many cases, Parliament intends that legislation and common law will co-exist, with the legislation filling a gap in the common law or modifying the common law in some way, but leaving the majority of the subject matter to be governed by the common law. In other cases, the intention is to completely replace the common law on a subject matter with a statutory scheme.

Legislation is also necessary when Parliament wants to create a new set of laws in an area where there is no common law. For example, legislation is necessary for a tax to be imposed, because at common law there is no requirement for any person to pay taxes to the government.

Although Parliament can override common law by passing legislation, this does not mean that Parliament is dominant over judges and the courts. Parliament enacts legislation, but it is judges who interpret the legislation and say what effect it has. This is because if there is a dispute about the meaning of a particular piece of legislation, the people in dispute can bring a case to the courts where it is the role of the courts to resolve that dispute and to determine the meaning of the legislation. Common law therefore gradually develops around legislation, and the law governing the subject matter of the legislation becomes a combination of statute law and common law.

Legal principles in the court

Related legislation

- [Australian Constitution](https://www.sl.nsw.gov.au)

One of the fundamental principles of the common law system is that justice should be administered in public. This means that court proceedings are usually open to the public and generally nothing should be done to discourage the publication of reports of court proceedings. Courts do have an inherent power to exclude members of the public where necessary to secure the orderly administration of justice. However, that power is rarely used.

Parliament can also legislate to allow or require courts to exclude members of the public in certain circumstances, and to limit disclosure about the parties or the proceedings. This is the case, for example, in the Children’s Court, where the names of people appearing before the court are not publicly disclosed to protect the identity of minors involved in criminal proceedings or care and protection proceedings. In NSW, it is a criminal offence to disclose the identity of minors involved in criminal proceedings ([Children (Criminal Proceedings) Act 1987, section 15A](https://www.sl.nsw.gov.au)).
Summary court proceedings are to be held in open court (Criminal Procedure Act 1986) but exceptions apply under other legislation eg in relation to children's appearances in court, in sexual offences and for reasons of security. Court proceedings that are closed to the public, including all proceedings in the Children's Court, are called 'in camera' proceedings. (This apparently contradictory term arose because the word 'camera' is based on the Latin word for 'chamber').

Natural justice
The common law requires all courts and tribunals to comply with the rules of natural justice (also called ‘procedural fairness’). These principles have developed to ensure that a person receives a fair hearing.

The rules include:

- each party should be given an opportunity to present the party's case
- the decision-maker should be disinterested (defined as an ‘absence of personal involvement or bias’, Macquarie Dictionary, 4th ed.)
- the decision-maker should take into account all relevant considerations, and should not take into account any irrelevant considerations
- the decision should be based on the evidence presented to the decision-maker.

Presumption of innocence
In criminal law, anyone charged with a criminal offence is presumed to be innocent until proven guilty by the prosecution. Guilt must be proven beyond reasonable doubt (for more information see Standard of proof in the Types of disputes section).

Right to legal representation
Legislation generally allows a person to be legally represented in court hearings, although in some tribunals, legislation may limit or prohibit legal representation. In criminal proceedings, an accused person has a right to legal representation (Criminal Procedure Act 1986 (NSW), section 36). At common law, there is no right to be represented by a lawyer in court at public expense. However, there is a common law right to a fair trial. The High Court has interpreted this right (in Dietrich's case) to mean that if a person without financial resources is charged with a serious criminal offence and the person does not have legal representation, the court should proceed with the trial only in exceptional circumstances. If a defendant or an accused person is not legally represented, it is the duty of the magistrate or judge to ensure that the person receives a fair trial.

Judicial independence
The concept of judicial independence means that neither the parliament (the legislature) nor the government (executive) can influence or determine the outcome of any particular case before the court, so that judges are able to act impartially and to make up their own minds about the merits of the case. See Judicial accountability.
Related content

Courts and the legal system [4]

Do you need a lawyer, or are you representing yourself in court? Find information about court procedures and forms. Find out about our legal system.

How Laws are made [14]

How Laws are made, presented as two 10-minute films on YouTube: Parliament and Courts, provides an overview of where Aus

Australian legal system - Hot Topics series, no 79 [2]

An overview of the elements of our system and how it developed, covering how law is made, what the law deals with and th


Links
[14] https://www.youtube.com/user/findlegalanswers