

Separation of Powers

AUSTRALIAN DEMOCRATS ACTION PLAN
SEPARATION OF POWERS
PRIME MINISTER & CABINET

In order to promote accountability of government, hinder corruption and protect the fundamental freedoms of citizens from the will of the government of the day, it is essential to keep separate the Parliament's power to make laws, from the Executive's power to administer laws, and from the Judiciary's power to hear and determine disputes according to the law. This separation is designed to protect the people from a concentration of power, and the ability of individuals or groups to manipulate government for personal gain and to ignore the will of the people.

An Australian Separation of Powers?

"It is clear that the Australian Constitution lacks sufficient expression and clarification of the roles, relationships and powers of the Parliament, Cabinet and Prime Minister and Head of State, which contributes to problems arising from a lack of true separation of powers.

Andrew Bartlett
Senator for Queensland

The system of federal constitutional government adopted at Australia's federation in effect, combines the principles of two very different government structures - responsible government and separation of powers.

The theory of responsible government assumes that the Parliament, which is subject to popular election, will act in accordance with the will of the people. Executive government, in turn, will be responsible to Parliament, being comprised of a selection of its members. By contrast, the theory of separation of powers requires the three branches of government, the judiciary, legislature and executive, to be entirely separate in both membership and function.

By combining these two theories of government only a partial separation can be achieved between the Executive, Legislature (Parliament) and Judiciary in our system.

The Executive is comprised of Ministers who are members of Parliament, chosen by the Prime Minister. The Constitution broadly describes the separate functions to be performed by each body, but the specifics are determined according to practice and convention, with the result that the Executive has become the dominant force both in parliament and in government. The Prime Minister also appoints the Governor-General and the heads of the bureaucracy (public sector), further entrenching the power of the Executive.

There is an uncomfortable degree of overlap, in both membership and function, between the Executive and Parliament.

The federal judiciary is theoretically entirely separate from the other two branches of government. However, the separation is not absolute since the government is responsible for the appointment and removal of judges.



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Need for Reform

A true separation of government powers is essential to ensure the accountability of government, hinder corruption and protect the fundamental freedoms of citizens against the will of the government. Each branch of government must be, and be seen to be, free to act as a check and balance on the other without fear or interference.

The Executive government has exceeded its legitimate role in government, exercising unwarranted influence over Parliament, and to a lesser extent, over the judiciary. The executive can even declare war without the approval of Parliament.

A weakness of the current system of government is that power is centralised in the executive arm of government. The separation of powers is modest. Section 61 of the Constitution provides the main source of the Commonwealth's executive power.

Executive power is exercisable by the prime ministerially appointed Governor-General, as the Queen's representative but on the instructions of the Prime Minister exercised through the Executive Council. The scope of section 61 empowers the executive government to make certain decisions with constitutional legitimacy, without the need for parliamentary or legislative sanction.

The power to declare war and make decisions about the disposition and control of the armed forces is one such action.

It is clear that the Australian Constitution lacks sufficient expression and clarification of the roles, relationships and powers of the Parliament, Cabinet and Prime Minister and Head of State, contributing to the problems arising from a lack of true separation of powers.

Clarification of the relationship between the Judiciary and the Executive and Parliament is also missing. This has led to the unfortunate situation where members of the Executive feel it is within their power to call for restrictions on the performance of judicial functions and to appoint judges on the principal basis of political ideology not judicial qualification.

Recommendations for reform

The Democrats recommend the following Constitutional and legislative changes to counter the problems identified above:

- The precise role, powers and responsibilities of the Executive, Parliament and Judiciary and the Head of State must be clearly defined in the constitution. It must be clear from these definitions that the Executive, Parliament and Judiciary are entirely separate from each other. An express statement to this effect should also be included.
- Judicial appointments should be made by a Judicial Appointments Committee (JAC) according to a set of selection criteria developed by the JAC. The JAC would be comprised of representatives of the judiciary, legal academia, legal profession and federal and state governments.



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- The role of the AAT as an independent body to review government activity and ensure compliance with specified government powers and responsibilities must be constitutionally guaranteed. The provision of adequate resources must also be legislatively ensured to protect the AAT from governments who view it as a costly and irritating intrusion into government activity.
- The media plays a vital role in ensuring the proper performance of government functions by informing the public of government transgressions. The independence of the media to fairly and accurately report on government activity, must be legislatively guaranteed.
- The Senate should remain a strong and independent House of Review. The WA Commission on Government recommended that Ministers should be removed from the State's upper house to ensure it functions exclusively as a house of review and to strengthen the separation of powers. The desirability of a similar approach in the Senate should be examined.