

PARLIAMENT

2.1: The powers of Australia's Parliaments

Parliamentary sovereignty and plenary legislative power

- Emerged in Britain to prevent the monarchy from holding absolute power
- Legislation is main source of executive power – parliament defines most executive power through legislation and any non-statutory power can be distinguished or modified by legislation
- Judiciary has to interpret legislation of parliament, and if the parliament doesn't like an interpretation of the judiciary they can override it – meaning that parliament is supreme
- No parliament is absolutely sovereign and both state and federal parliaments are constrained by the Commonwealth constitution

The powers of Australia's State Parliaments

- State parliaments cannot abolish themselves, however they have some latitude to determine what they look like (QLD abolished upper house)
- State legislatures are empowered to limit common law rights, provided that legislation is sufficiently clear (*Durham Holdings Pty Ltd v NSW* (2001))
- Legislation:
 - *Constitution Act 1975* (Vic) s 16
 - *Constitution Act 1902* (NSW) s 5
 - *Australia Acts 1986* s 2(2) – gives states the ability to legislate outside of their jurisdiction; however there needs to be some nexus
- *Union Steamship Co of Australia v King* (1988)
 - **Some legislature have plenary legislative power**
- *Kable v Director of Public Prosecutions (NSW)* (1996)
 - Accepted the existence of certain limits upon state legislative power as a consequence of the Separation of federal judicial power under Chapter III of the Constitution
 - Parliament cannot legislate to deprive someone of their liberty
- Laws with extra-territorial application
- Power to change state Constitutions
 - S 18(1B) Victorian Constitution – referendum
 - S 18(2) Victorian Constitution – majority is 60%

The powers of the Commonwealth Parliament

Australian Constitution

- Section 1: “the legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called *The Parliament*, or *The Parliament of the Commonwealth*.”
- Section 51: “The Parliament shall, subject to this Constitution, have power¹² to make laws for the peace, order, and good government of the Commonwealth with respect to..”
- Section 52: “The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to...”

Cases:

- *Leask v Commonwealth* (1996)
- *Burton v Hogan* (1952)
- *South Australia v Commonwealth* (1942)

2.2: Parliamentary Processes

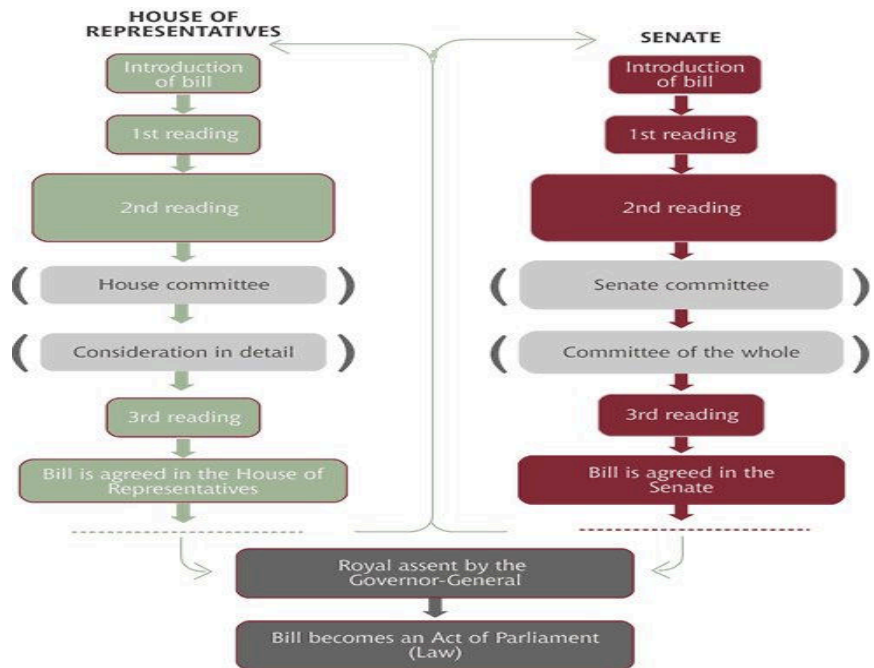
Parliamentary Privileges

- Power to compel people to attend the house, to conduct enquiries, produce documents etc
- Now set out in statute
- A form of democratic accountability

Enactment of Legislation →

Relationship between the Houses of Parliament: resolving parliamentary deadlocks

- Section 57
- Usually the senate will not refuse to pass an appropriation bill (monetary) no matter how hostile it is
- Trigger to dissolve parliament is the rejection of a bill twice in the space of three months
 - Governor General acts on the advice of the Prime Minister



2.3: Parliamentary Protection of Human Rights

Commonwealth: The Australian experience – the Brennan Report and Outcomes

- Brennan Report 2009 – 35,00 submissions, 87% in favour of Bill of Rights
 - Wanted to protect civil and political rights (freedom of association, speech, assembly etc)
 - Not the economic, social and cultural rights
 - No changes were made

Should The Constitution protect more rights in a Bill of Rights?	
YES	NO
<ul style="list-style-type: none"> - Unchecked majoritarian democracy often fails to protect rights and interests of vulnerable minorities - The democratic process is flawed - Rights are well understood and recognised in other jurisdictions (e.g. USA, UK, Canada) - The common law in Australia has failed on a number of occasions 	<ul style="list-style-type: none"> - Parliament democratically elected – best forum for debate and resolution of ideas - A preference for judicial supremacy is elitist - Rights are abstract ideals, not rule-like. Which rights should the constitution protect? - The common law provides

State: The Victorian *Charter of Rights and Responsibilities Act 2006*

- Protects mainly civil and political rights

- Sets out a range of factors that courts should take into account when considering whether rights are subject to modification

Legislature	Executive	Judiciary
<p>S 28 – statement of compatibility must be tabled</p> <p>S 29 – SoC doesn't affect validity, operation or enforcement of law</p>	<p>S 38 – 'public authorities' must act in a manner compatible with protected rights, and take rights into account when making decisions</p> <p>S 37 – when court has made a declaration of incompatibility, responsible minister must table response in Parliament</p>	<p>S 32 – laws must be interpreted in a way that is compatible with rights, insofar as is possible consistently with their purpose</p> <p>S 36 – if a compatible interpretation is not possible, the courts can make a declaration of incompatibility. This has no effect on the validity of the Act</p> <p>S 39 – no cause of action (someone can't go to court just saying their rights have been breached, they have to append that rights claim onto another claim (torts or administrative claim for example) arises due to breach of Charter by public authority</p>