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The dominant constitutional doctrine relating to the structure of Australia’s system of democratic government is that of parliamentary sovereignty. This means that in a constitutional democracy, the parliament is supreme. That in turn means, in theory at least, that once the parliament enacts a law, the law is incapable of being overturned. The law is sovereign.

Again, in theory, parliamentary sovereignty also means that there is no limit on the power of the parliament to legislate. As A.V. Dicey, the principal early theorist of the British constitution wrote ‘Parliament has…the right to make or unmake any law whatever; and further, …no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’

This doctrine is directed in particular at the relationship between the parliament and the courts. It holds that the courts are under an obligation to apply the legislation made by the parliament and may not hold an act of parliament to be invalid.

A written constitution

While this general rule applies in the United Kingdom, the position is quite different in Australia. That is because, unlike the United Kingdom, Australia has a written constitution. The Australian Constitution sets down the structure and powers of the Commonwealth Government and to a certain extent, the powers of state governments. In Australia, therefore, legislation enacted by parliament must conform to the terms of the Constitution. If an act of parliament is incompatible with the provisions of the Constitution, it can be invalidated following a ruling as to inconsistency made by a court. In the Australian case, this means by a decision of the High Court of Australia.

So, legislation may be invalidated on a number of grounds which include, for example, if it conflicts with the separation of powers, if it infringes human rights guarantees in the Constitution, or where it has not been passed in accordance with the procedure set down in the Constitution. The principal ground for the invalidation of legislation, pursuant to the Constitution however, is if the Commonwealth Parliament makes a law beyond the specific powers conferred upon it by the Constitution.

The powers conferred upon the Commonwealth Parliament are set down in detail in s.51 of the Australian Constitution. These powers fall into a number of different categories. The principal categories are these. Legislative powers with respect to:

- trade and commerce
- corporations and industrial relations
- foreign affairs and defence
- immigration and emigration
- governmental financial arrangements
- taxation and social security.

If the Commonwealth Parliament legislates outside the boundaries of the specific powers allocated to it under s.51, the High Court of Australia may strike down the provision that is constitutionally incompatible.

It is also worth noting that the Constitution specifically denies the Commonwealth the power to legislate in particular fields. The Commonwealth may not legislate to:

- establish any religion, impose any religious observance or prohibit the free exercise of any religion (s.116).
- make any law with respect to trade, commerce revenue in a manner that gives preference to one state over another (s.99)
- abridge the rights of a state or its residents to reasonable use of the water of rivers for conservation or irrigation (s.100).

Other restrictions on Commonwealth legislative power exist by virtue of constitutional convention. There are two principal examples. First, the parliament may make two laws that are inconsistent with each other. When this happens, it is desirable that the parliament make clear that the later act repeals the inconsistent provisions of an earlier act.

If no specific provision of this kind is made, the matter is left for the courts to determine. The courts have adopted the principle that they will apply the act which is later in time. So, as a matter of statutory interpretation, the courts have determined that where two acts are inconsistent, the earlier act is taken to be impliedly repealed by the later act to the extent of the inconsistency.

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Secondly, it is inherent in the nature of a legislature that parliament should be free to make new laws. So, the courts have developed and applied the rule that parliament may not bind future parliaments. Similarly, no parliament is regarded as being bound by acts of its predecessor parliaments. It is for this reason, among others, that this doctrine has stood as a significant obstacle to the adoption of a statutory bill of rights in Australia. The aim of a statutory bill of rights is to protect human rights not just against the actions of a contemporaneous parliament but also the actions of future parliaments. This contravenes the general rule that one parliament cannot bind its successors. If one is to protect against the parliamentary infringement of human rights, therefore, the safest course is to have a bill of rights incorporated into the Australian Constitution.

Student activities

1. What is parliamentary sovereignty?
2. Look at the quote from A.C. Dicey. Explain why this is both true and not true in Australia.
3. Where will you find the powers of the Commonwealth Parliament?
4. Explain s116 of the Constitution. Why do you think this provision is in the Constitution?
5. What can occur if the Commonwealth Parliament makes two laws that are inconsistent with one another?
6. What has stood as an obstacle against the Commonwealth Parliament passing a bill of rights in Australia?

The separation of powers

I noted earlier that the Commonwealth Parliament’s legislative power may also be limited if it runs contrary to the fundamental constitutional doctrine of the separation of powers. That the separation of powers exists as a legal doctrine informing the interpretation of the Australian Constitution is demonstrated clearly by the organisation of the Constitution’s first three chapters. The first chapter is concerned with the Legislature, the second chapter with the Executive, and the third chapter with the Judiciary. These are the three principal branches of democratic government.

Legislative power is the power to enact general laws that regulate the conduct of public and private organisations and individuals. Executive power is the power to administer the law. It will for instance include the practical implementation of the law, the maintenance of order and the promotion of economic and social welfare. Judicial power is the power of the courts to determine disputed questions of fact and law, in accordance with the law laid down by the parliament. This is a function exercised by judges.

These three powers must be separated. This means, for example, that neither the legislative, executive or judicial branches of government may exercise the powers of the other two (although in practice the executive and the legislative work together). Similarly, one branch of government should not be permitted to control or interfere with the operation of another.

The most critical facet of this arrangement is the necessity to ensure that the judiciary retains its independence from the legislature and executive government. In Australian constitutional law, this requirement has resulted in the establishment of a number of important constitutional rules whose purpose is to entrench the integrity and independence of federal courts and judges.

Only courts created under Chapter III of the Australian Constitution can exercise judicial power (R v Kirby; Ex Parte Boilermakers Society of Australia, 1956 94 CLR 254). Secondly, certain powers are regarded as exclusively judicial in character. So, for example, only courts have the power to adjudge criminal guilt and to punish those who have broken the law. Thirdly, judges of federal courts must not accept functions that are incompatible with their role as judges. So, for instance, judges cannot at one and the same time also be members of parliament.

These rules operate as an additional constitutional constraint on the legislature’s sovereign power to make or unmake any laws. The Commonwealth Parliament, therefore, cannot legislate to confer judicial power on any non-judicial body. In Australian law, bodies such as administrative tribunals, ombudsmen, and other independent statutory office holders, like the Auditor-General and the President of the Australian Human Rights Commission, are considered as forming part of executive government. The Commonwealth Parliament, therefore, cannot invest them with any part of the Commonwealth’s judicial power.

The Commonwealth Parliament cannot legislate in any way such as to interfere with the principles of fair trial. So, for example, Commonwealth Parliament cannot legislate so as to undermine citizens’ equality before the law. Nor can it legislate to undermine fair trial by legislating in a way that might deny an applicant before a court, or a person accused of a crime, of procedural fairness. Similarly, no law may be enacted that would confer upon a body that is not a federal court the power to conduct a criminal trial or to punish a person found guilty of a criminal offence or for any other reason. To give the legislature the power to declare a person guilty
of a crime would be offensive to justice.

The Commonwealth Parliament may not legislate so as to compromise the independence or integrity of federal court judges. So, for instance, no law may be enacted that provides for judges to exercise executive power. A judge may not, for example, be appointed as a ministerial adviser. If a judge were to be appointed as a ministerial adviser, he or she would be required to act in a manner that is inconsistent with the proper exercise of judicial power, that is, independently and impartially. (Wilson v Minister for Aboriginal and Torres Strait Islander Affairs, 1996, 189 CLR 1).

Finally, the Commonwealth Parliament cannot make any law that would compromise the independence of the judges of federal courts, such as the High Court of Australia, the Federal Court of Australia or the Federal Magistrates Court. The Constitution, Chapter III provides explicit protections against any such interference. It provides that judges must be provided with security of tenure until the age of 70 (s.72). And it requires that their remuneration must be maintained during the course of their tenure. Judges may only be removed from office upon a motion of both Houses of Parliament on the grounds of ‘proved misbehaviour or incapacity’.

Student activities
7. What are the three branches of democratic government? Explain each.
8. Explain the doctrine of separation of powers
10. Why do you think is it important to ensure judges security of tenure until the age of 70?

Human rights

The Australian Constitution is almost, but not quite, bereft of human rights protections. Express protection for rights is given in three different instances. S.80 provides for a right to trial by jury. S.116 precludes the Commonwealth from making any law to establish any religion, to impose any religious observance, or to prohibit the free exercise of any religion. S.51 (31) provides for the Commonwealth’s compulsory acquisition of property but only on ‘just ‘terms’. It follows, therefore, that the Commonwealth Parliament may not make laws that infringe upon any of these express rights.

That is not, however, where the protection of fundamental rights ends. The High Court has also implied the existence of certain fundamental rights from the text and structure of the Constitution. The most prominent of these is a right to freedom of expression with respect to public and political affairs. The High Court drew this implication from ss.7 and 24 of the Constitution which provide that members of the House of Representatives and the Senate must be directly chosen by the people.

The High Court determined that elections to both Houses of the Commonwealth Parliament could not properly be conducted unless Australian citizens, who comprised the electorate, were able to speak freely about the conduct of politics and public affairs. (ACT v Commonwealth, 1992, 117 CLR 106). For that reason, that is to underpin the effective functioning of Australian democracy, freedom of expression with respect to matters concerning politics and public policy was essential. This freedom, therefore, was implied as being an element essential to the effective conduct of Australia’s constitutional democracy. It is crucial to the capacity of electors to make informed choices about who their representatives in parliament should be. Subsequent cases have suggested that this freedom also extends to freedom of assembly and freedom of movement.

It follows that the Commonwealth Parliament may not enact any law that is incompatible with this implied constitutional freedom.

In a similar vein, the High Court has upheld the right to vote. In the case of Roach, a challenge was made the prohibition on prisoners being excluded from voting at federal elections (Roach, 2007, HCA, 3). The Court decided that a blanket ban on prisoners voting was cast too widely. So, it narrowed the provision to allow prisoners who had been sentenced to a term of imprisonment of less than three years to take part in an election to the Commonwealth Parliament. In the case of Kruger (Kruger v Commonwealth, 1990 CLR 1) the High Court made it clear, on the basis of the constitutional principle that all Australian citizens should be treated equally before the law, that no segment of the Australian citizenry could arbitrarily be prohibited from voting. So, for instance, it will no longer be open to the Commonwealth Parliament to deny the right to vote to Australia’s indigenous people.

The implied constitutional right to vote and to equality in access to voting, therefore, also stand as clear limits upon Commonwealth powers to make or unmake the law.

Conclusion

This article began with a brief description of the constitutional doctrine of Parliamentary Sovereignty. In accordance with that doctrine, a parliament, like Australia’s Commonwealth Parliament, may, in theory, make any laws it pleases. Nevertheless, it should now
be evident, that parliamentary sovereignty, while the correct starting point for any analysis of the operation of the Constitution, is nevertheless quite significantly qualified in its practical operation.

Limits derived from the existence of the Australian Constitution itself, from the separation of legislative, executive and judicial power, and from the protection of certain express and implied constitutional rights, act as a break on unbridled parliamentary supremacy. That is not a bad thing.

Australia is a constitutional democracy. Constitutional limits on the exercise of unbridled legislative or executive power, therefore, are essential to the preservation of an effective democratic system of government and to the protection individual rights and freedoms.

**Student activities**

11. Explain two rights that are protected by the Constitution.

12. How does the following High Court determination that ‘Australian citizens, who comprised the electorate, were able to speak freely about the conduct of politics and public affairs’ protect democracy?

13. Explain the provisions of Roach, 2007, HCA, 3 in relation to a prisoner’s right to vote. Do you agree with this finding? Give your views.

14. How did Kruger (Kruger v Commonwealth, 1990 CLR 1 affect the rights of Indigenous Australians?

15. Do you think that there should be limits placed on the Commonwealth Parliament with respect to laws that they can pass? Explain.
The last thing most people want is to go to court. But most people take for granted that if they do end up in court, they will get a fair hearing. The court system in Australia is separate from the parliament and the government and prides itself on being impartial. Anyone going to court can expect an impartial and unbiased hearing that will not be influenced by government or corporate interests, bribery, or corruption.

The law in Australia is complex. Common law actions (such as breach of contract or negligence claims) are based on centuries of case law and require parties to demonstrate that the facts of their cases fit within these legal parameters. Cases based on legislation, such as consumer law, Social Security Appeals and tax law, also involve highly complex legal rules and reliance on case law.

For most people, the law can be overwhelming – legislation that affects everyday life such as the tax law or the social security law contains thousands of provisions, often expressed in difficult legal language. It is fair to say that most people need a lawyer to understand the law. The same goes for presenting a court case. It’s not just about telling your story to the judge and hoping they will believe you. Going to court requires parties to present evidence to support their claims. The rules of evidence are detailed and very legalistic. Even a simple thing like asking a judge to take a document into account has to be done in a particular way – you have to be able to prove where the document came from, explain why it is relevant to your case, and often call the person who created the document to give evidence to prove that it is authentic. Most people just don’t know where to start.

The adversarial court system
This is why our court system is based on the idea that parties will always be represented by a solicitor. We operate in an adversarial system. The expectation is that both parties will have a lawyer to untangle the law and work out the best way to present the facts and evidence. There can be a lot of strategy involved as well. 100 years ago this was the norm – people seldom took a case to court if they were not legally represented. The only exception was for criminal offences, where accused people would be left to represent themselves unless the court appointed a solicitor for them. This is usually what happens in serious cases, because it is too much to expect an individual with no legal knowledge to be able to defend themselves effectively.

Paying a solicitor is a very expensive proposition. Even quite junior solicitors will charge upwards of $280 per hour. A relatively simple case might require 10 or 20 hours of solicitors work. The cost quickly escalates. A more complex case (such as a personal injury from falling over in a supermarket, or a breach of contract for a badly built kitchen) can easily cost $50 000, and that’s before the trial even starts.

This means that more and more people simply can’t afford a lawyer to help them with complex legal cases. These people end up representing themselves. They are known as ‘self-represented litigants’ (SRLs) or ‘litigants in person’.

Most SRLs are unrepresented because they can’t afford a lawyer. A few choose not to have a lawyer, because they believe they can probably handle the case themselves, or just don’t trust lawyers, but most people simply can’t afford it.

Impact of self-represented litigants on the justice system
This is a real problem for the justice system. When one party is representing themselves, and the other party has a lawyer, there is a huge imbalance in knowledge and power between the parties. Without legal advice and support most people just don’t know where to start to sort out a legal problem, let alone prepare a case for court. The worst outcome is that the person who is not
represented doesn’t put the right arguments, and doesn’t have the right evidence, and consequently loses their case. It is also a real problem for the judiciary, because judges are required to be neutral and impartial. They are not permitted to give legal advice or guidance to parties before them. Trials where one or both parties are not represented take much longer and are much more stressful and frustrating for everyone involved. It can be very frustrating for the judge who might see that the person simply can’t present their case but can’t help them to do so.

Legal aid for self represented litigants

Concerns about SRL’s are relatively recent in Australia. Australia has had a strong tradition of providing legal aid for people who can’t afford lawyers. Anyone with a good case who could show that they did not have the financial capacity to pay for a lawyer could apply for legal aid, and a lawyer would be paid for by the legal aid authority. Legal aid authorities have been set up in each state in Australia, funded by both the Commonwealth Government (on the basis that justice access was a key aspect of any democracy) and the states. At the same time, organizations known as community legal centres were also set up. Also funded by the Commonwealth, these centres are located in regional and suburban areas to supplement legal aid commissions, and to provide specialized legal support, for example in the area of welfare, housing, young people, women, environment, as well as for general claims. Over the last 20 years there have been catastrophic cuts to legal aid funding from both Commonwealth and state governments. These days legal aid commissions can only provide aid for limited purposes – typically serious criminal offences, family law disputes involving children, some administrative cases (such as Centrelink appeals, housing appeals, and migration cases). Community legal centres try to pick up some of the excess, but they are also very poorly funded, and have far more work than they can handle.

The following discussion is about all areas of law except criminal law. Legal services offices in each state in Australia continue to provide legal aid to people charged with serious criminal offences. This policy recognizes that the power differential between the prosecuting authorities (the police, or the Directors of Prosecutions) is so vast that the individual cannot really hope to present their case properly without legal support. As funding for legal aid has diminished, legal aid services have focussed their resources on the areas of most critical need – criminal and often family law. This means that in most other, particularly civil law areas, there is no legal aid available, and many more SRLs in these areas.

Student activities

5. Explain three reasons a self-represented person presents problems for the courts
6. What are community legal centres?
7. How has the funding of cases by legal aid authorities changed over the years?
8. In particular, why is it important that a person charged with a crime is represented in court?

Responses to self-represented litigants

Over the last 20 or so years there have been many attempts to meet the needs of SRLs. These range from brochures and ‘how to’ guides, to more sophisticated online and video resources. Unfortunately, many of these are limited to procedural advice: how to fill in court forms; how to behave in court; where to locate alternative dispute resolution services or legal advice. Some of these are better than others, but most people still find navigating court process really challenging. The one thing that these resources don’t provide is advice on the merit of cases. Most litigants don’t understand the law. They are convinced that they are right and that if they tell their story to the judge, they will be believed, and they will win. They don’t realize that proving a case is much more complex than this, and they don’t appreciate that there will be another party who believes their case is just as strong. Both sides can’t be right and both sides desperately need someone to help them relate their case to the law, decide if they have a good case, and help them to get it ready for court. Sometimes the best advice that they can receive is not to go to court. Parties, who go to court and lose, often have to pay the other sides’ legal costs. People can be bankrupted trying to do this – yet if they had had some legal advice earlier on maybe this could have been avoided.

The Family Court of Australia experiences a high proportion of SRL’s – it is believed that about 80 per cent of parties in children’s matters are self-represented. Most of these cases are highly emotional, extremely stressful, and involve critical rights and interests of the parties and their children. In a case in the Family Court, Justice Faulkner spoke about the difficult of SRLs. He said that the only way to meet the needs of SRLs was to make them lawyers, provide them with lawyers, or change the system.

Make them lawyers

Some of the resources mentioned above show attempts to try to educate people about law and legal process. These are of some use, but they don’t provide the one thing that people need most – advice on the merit on
their case, the best strategy to take, and finding the evidence to support it. Only someone with good legal knowledge, familiar with the system, can give this sort of advice, and that of course costs a lot of money, money that most SRLs just can’t afford. One of the great values of having legal representation is that the lawyer is objective about the case. Most SRLs are far from objective, they passionately believe that they are in the right, and it is impossible for them to see both sides of the story and understand the risks they might face.

Give them lawyers

In Australia there are many organizations to help SRLs. In addition to legal aid commissions and community legal centres mentioned above, many law schools in Australia run legal advice services where students who are supervised by a solicitor provide free legal advice and in some cases court representation. Legal services commissions, and public interest advocacy services, provide ‘duty solicitors’ in courts to help people as they are entering the court door. Around Australia lawyers also do many hours of pro bono legal work each year, providing their services at a reduced or no fee to people in need. But this support does not meet the justice gap – there are still far more people wanting some legal support and advice than can access it.

Change the system

There have already been changes in our legal system. Many tribunals have been designed with SRLs in mind. Instead of demanding an adversarial approach, they encourage people to tell their stories in their own words. The decision makers in these tribunals are permitted to guide the parties in their case, by asking questions, explaining the law to them, and helping them to understand the evidence that they need to present. Tribunals such as the Administrative Appeals Tribunal, which hears Centrelink, tax, employment, workers compensation, child support and migration cases, and the Civil and Administrative Tribunals in most states, are known as ‘inquisitorial’ because they require the tribunal member to take a much more active role in hearings. This contrasts with adversarial civil and criminal courts which rely on the parties to present all aspects of the case, with the judge required to listen to the evidence and make a decision, and not becoming actively involved. Some courts are also inquisitorial – for example the Minor Civil jurisdiction of the Magistrates Court in South Australia, which hears claims up to $12000, is specifically authorized to take an inquisitorial approach. Whether self-represented or not, going to trial is stressful, exhausting, and costly – for the parties involved, and for the court. Going to court with a case you can’t win because you don’t know enough about the law and the process can be a terrible waste of time and court resources. Although there is very little empirical evidence about whether people who are self-represented do less well over all in court, it is generally believed that they do less well, and that many of them give up part way through the case because it is just too difficult.

Legal system changes

Once way that the legal system has responded to these challenges is to develop more flexible legal services. Instead of the traditional approach of the lawyer representing the party throughout the case from start to finish (which is beyond the resources of many parties), more and more organizations and law firms are providing ‘unbundled’ legal services, or ‘partial’ representation. These lawyers will step in from time to time to give the client legal advice about specific issues – such as the merit of the case, or the best evidence to obtain – but will expect the client to do most of the work themselves. This sort of partnership empowers clients to manage much of the case themselves, with the guidance of a legal advisor, and gives them the safety net of being able to access legal advice at critical points in the case. It also has the advantage of offering objective legal advice – which will often be that the best way forward is to try to settle the case or engage in mediation. Community legal centres such as Justice Connect provide unbundled and flexible self representation services in a range of courts throughout Australia. There is also increased emphasis on mediation as an alternative to litigation. Courts in Australia encourage parties to try mediation, and increasingly provide mediators within the court system. Some courts are also developing much more comprehensive resources for SRL’s. In Victoria, for example, the County and the Supreme Courts both have...
SRL registrars, whose job is to support and assist SRLs involved in litigation. Although the SRL registrars can’t give legal advice on the merits of the case, they can assist litigants to find pro bono lawyers or barristers to help them.

All of these initiatives are positive. But they do not close the gap between the need for some legal support in a complex and legalistic court system. Self help resources and limited or unbundled legal services can make a big difference for many litigants. But there are groups of litigants who need more than this. People who don’t have English as a first language, who are socially or educationally disadvantaged, isolated, on very low incomes, homeless, who suffer mental health challengers, often need far more support to engage with the justice system. These people continue to fall through the gaps. It has been said that the quality of a society is assessed against the way it treats the most disadvantaged members. Sadly, the gap between legal needs and accessible legal resources in this area leaves many of the most vulnerable members of our society unsupported.

**Student activities**

16. How can unbundled legal services or partial representation help SRLs?

17. Investigate Justice Connect and its role and how it operates. Does Justice Connect operate in your state or is there a similar organization?

18. How can court appointed mediators help?

19. How can SRL registrars provide assistance?

20. Does the system sufficiently provide the needs of all members of society? Discuss.