

# THE SEPARATION OF POWERS

The separation of powers is the idea that there are checks and balances on the powers of government. The Australian Constitution creates three arms of government which check each other's use of power...

## The Parliament

Elected representatives in the House of Representatives and the Senate debate and pass statute law.

76 151 9

Senators

Members of the House of Representatives

Political parties represented + independents

as of 27/09/2019

The Parliament is bicameral which means that there are two houses: the House of Representatives and the Senate.

Elected representatives in the Australian Parliament represent approximately 24 million Australians from 6 States and 2 Territories.

### How busy is the Parliament?

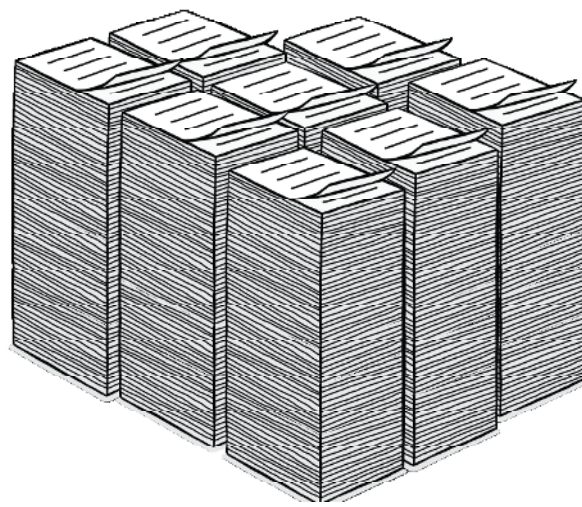
In 2017

The Parliament passed  
**141 Bills**

In the first 6 months of 2018

The Parliament passed

**76 Bills**



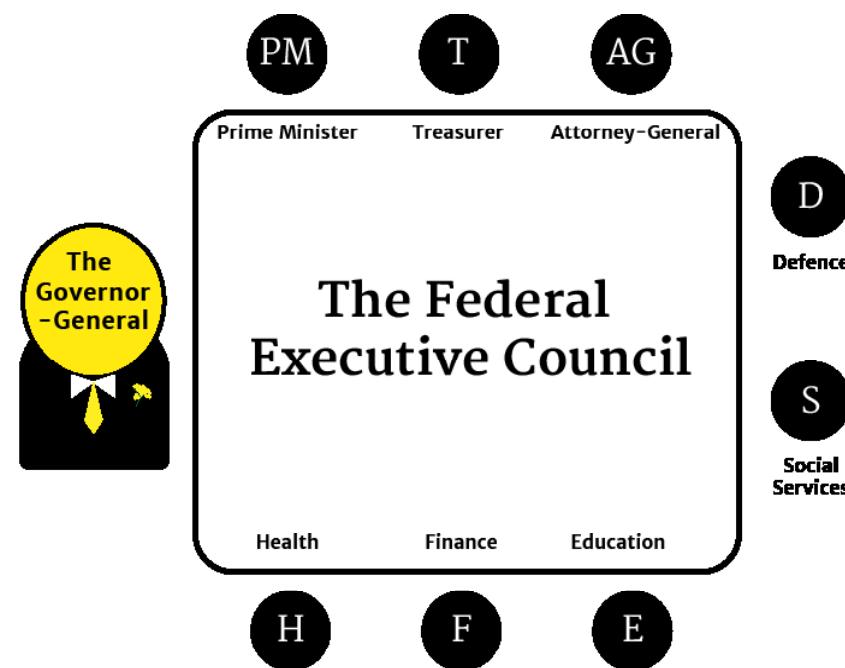
## The Executive

Ministers appointed by the Governor-General use powers granted by the law to run the country.

The Governor-General (GG) is the Queen's representative in Australia, and is the head of the Executive. The GG must give 'assent' to any bill passed by the Parliament before it becomes law.

The GG asks the leader of the political party with the most seats in the House of Representatives to form a government. That person becomes the Prime Minister, and selects other members of Parliament to be ministers of government departments who become the Federal Executive Council.

The Cabinet, consisting of members of Federal Executive Council, makes decisions about running the country. Discussions and documents at these meetings are confidential for reasons of national security and to allow government departments to give honest and frank advice to the Ministers about how to exercise their powers.



## The Judiciary

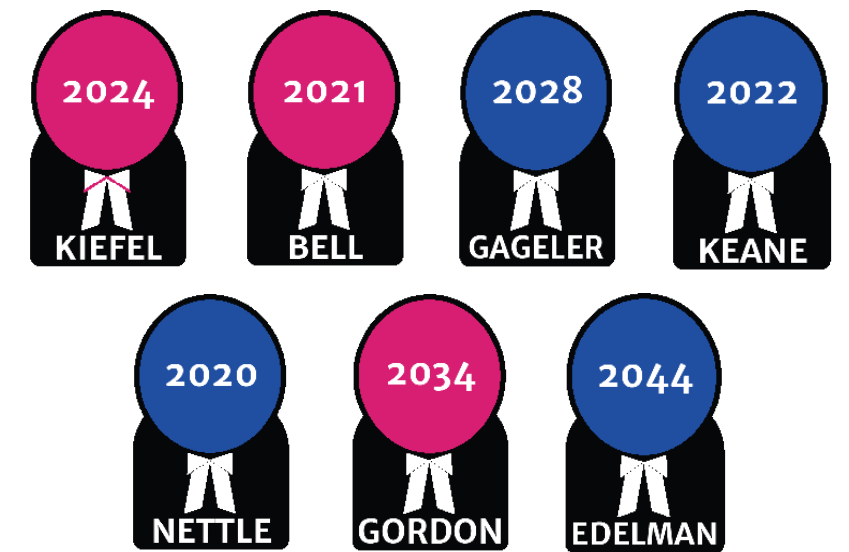
Judges make decisions about cases according to law, setting precedents which add to the common law.

The Judiciary is the system of judges and Federal Courts, including the High Court, Federal Court, Federal Circuit Court and Family Court.

The High Court deals with disputes between States, Territories and the Commonwealth Governments, individuals and the Commonwealth Government, the interpretation of the Australian Constitution, and matters concerning treaties, and representatives of other countries. It is also the last court of appeal for all civil and criminal cases in Australia.

Judges provide written decisions called judgments which become part of the common law and form precedents. Written judgments are essential if the decision of a court is to be appealed to a higher court.

The current justices of the High Court are:



The year indicates the year the justice will be 70 years old. The judges of Federal Courts must retire at the age of 70.

## The Senate

In Australia, the **Parliament** and **Executive** overlap.

**The Senate** is an important check on the power of the Parliament and Executive.

The Executive Council are appointed from the members of the Parliament who belong to the political party or coalition that wins the most seats in the House of Representatives. Scrutiny of laws or the actions of the Executive is less likely to occur in the House of Representatives where the political party in power controls the vote. ● 🔗 ●

The Senate is structured differently having the same number of Senators for each State and Territory. The political party in control of the House of Representatives does not always have the most Senators. ● 🔗 ●

The Senate is often called the "house of review". It can act as a check on the power of the Executive, and has the authority to review any law passed by the House of Representatives. The Senate may also: ● 🔗 ●

- form Committees to investigate matters of public interest and provide recommendations for improvements to Bills;
- conduct hearings during which government departments and agencies must answer questions about how they are performing and spending their money. ● 🔗 ●



## The High Court and the Separation of Powers

The **High Court of Australia** and the other courts are the main way individual rights are protected in Australia. If a person believes a **law** is unconstitutional, or that an **action of government** is unlawful they can challenge the law or government in the courts. Judges are required to be **independent, impartial** and make **decisions based on the law**.

### Checks on the Power of Judges

Precedents established by judgments can be overridden by the Parliament passing a law. This does not mean the Parliament can change the judgment of a court, but it can pass a law to prevent the courts interpreting the law that way in the future. ● 🔗 ●

For example, in 2015, the Parliament passed a law which overruled the precedent set in *X7 v Australian Crime Commission* (see opposite) which stated that a person could not be forced by the Australian Crime Commission to answer questions about matters for which they had not yet been tried. ● 🔗 ●

### Protecting the Independence of Judges

The independence of judges and the courts is protected from outside influence to ensure that decisions made by judges are based on the law, and are made without fear or favour.

The Executive may not reduce the pay of a judge while they hold office.

A judge can only be removed for proven misconduct or incapacity. The decision to remove a judge is made by the Governor-General following a joint sitting of the Senate and House of Representatives that votes to remove them. ● 🔗 ●

### Cases Where the High Court has acted as a Check on the Power of the Parliament or Executive:

**R v Wilson [1934] HCA 63** – the High Court freed a well-known German Communist immigrant, who had been detained after failing a language test in Scottish Gaelic, saying the Federal Government was not obeying the laws passed by the Federal Parliament. ● 🔗 ●

**Australian Communist Party v Cth [1951] HCA 5** – the High Court prevented the banning of the Australian Communist Party, saying that the Federal Parliament did not have the power to make the laws under which it was to be banned. ● 🔗 ●

**A v Hayden [1984] HCA 67** – the High Court found that members of the Australian Security Intelligence Service had acted beyond the law during a training exercise and that acting on behalf of the Executive did not grant them immunity from the criminal law of in the State of Victoria. ● 🔗 ●

**Plaintiff S157/2002 v Commonwealth [2003] HCA 2** – the High Court allowed an asylum seeker to seek judicial review of a decision to deny him a protection visa, saying that the Federal Parliament did not have the power to prevent judicial review in circumstances like his. ● 🔗 ●

**Plaintiff M70/2011 v Minister for Immigration [2011] HCA 32** – the High Court prevented the deportation of an asylum seeker from Australia to Malaysia as part of the Federal Government's so-called "Malaysia Solution", saying that the Federal Government was not obeying the laws passed by the Federal Parliament, which required certain human rights protections to be in place. ● 🔗 ●

**X7 v Australian Crime Commission [2013] HCA 29** – the High Court prevented the compulsory examination by the ACC of an individual charged with drug trafficking, saying that, by continuing to examine him, the Federal Government was not obeying the laws passed by the Federal Parliament. ● 🔗 ●