

Infosheet 23 - Basic legal expressions

BASIC LEGAL EXPRESSIONS

When the House is debating legislation or scrutinising government activities, various phrases are used, sometimes in a shorthand way. The concepts they refer to, which describe aspects of Australia's system of government and legal system, are not always understood. This infosheet provides a brief explanation of some of these terms. The descriptions are intended to be short introductions to concepts that are often complex and contested.

Bill of Rights

A Bill of Rights is a law that sets out the rights of a country's citizens. The term derives from the United Kingdom Bill of Rights 1688 which asserted the rights of parliament in relation to the monarch (in particular establishing freedom of speech in parliament), and included rights affecting the individual, such as the prohibition of excessive fines and cruel and unusual punishment. In the context of the rule of law an important provision was that laws should not be executed, dispensed with or suspended without parliament's consent.

While the UK Bill of Rights 1688 is part of Australian law, when people talk about a bill of rights for Australia they generally mean a more substantial document which would comprehensively set out the rights of Australian citizens and protect them from infringement by the government or by other legislation. Australia does not have a specifically Australian bill or charter of rights at the Federal level but it is a party to international 'foundation' rights documents such as the Universal Declaration of Human Rights (1948).

Common law

The common law system is the legal system followed in Australia, inherited from the United Kingdom. Common law is developed by judges on a case by case basis, building on the precedent and interpretation of earlier court decisions. Written laws (Acts of Parliament) may be made on matters not covered by case law or with the intention of overriding case law. However, written laws may not cover every eventuality. Common law courts are based on an adversarial method of operation in which two sides (the prosecution and accused in some criminal cases, for example) present their cases to a neutral judge or jury for decision.

Common law is usually contrasted with the civil law system deriving from continental Europe, under which extensive written laws are designed to cover all eventualities. Courts in a civil law system are based on an inquisitorial style of operation in which a judge is involved in the investigation of the case.

Constitutional monarchy

This refers to a system of government in which the Head of State is a monarch whose rights and powers are framed by a Constitution (as in Australia, for example).

Due process

The phrase 'due process of law' comes from statutes that were founded on the Magna Carta and provide:

- none shall be condemned without due process of law (*Liberty of Subject Act 1354*) and
- none shall be put to answer without due process of law (*Observance of Due Process of Law Act 1368*).

Due process has come to mean the conduct of legal proceedings according to established principles and procedures, designed to ensure a fair trial. This is also referred to as natural justice or procedural fairness.

Federalism

Federalism is a system of government in which powers are distributed between a central government and regional governments. In Australia, the Constitution establishes a federal system of government, with powers distributed between the Commonwealth and the states.

Habeas corpus

Habeas corpus ('produce the person') is the name of the writ, or legal order, that requires a prisoner to be brought before a court, for the court to determine whether the prisoner is being legally detained and, if not, to order the prisoner's release. Habeas corpus is a protection against illegal confinement, such as being held without charge. (For a modern version see the [Habeas corpus order](#) of the Australian Capital Territory.)

Judicial review

This refers to the review by the courts of the legality of powers used by administrative decision-makers.

Magna Carta

Magna Carta is a foundation document of English, and therefore Australian, constitutional law. In the context of the rule of law its fundamental provision was that the King undertook not to take action against a person except by lawful judgment of

his equals or by the law of the land, and not to sell, deny or defer justice. The Magna Carta was considered to establish that no-one, not even the King, is above the law. The Magna Carta ('Great Charter') of King John of 1215 was amended and reissued by later kings. On display at Parliament House is one of the four remaining originals of the 1297 issue, which contained the final wording that was entered on the Statute Roll of England.



An original of the 1297 issue of Magna Carta on display at Parliament House

Ministerial responsibility

Ministerial responsibility takes two forms. *Collective cabinet responsibility* requires ministers to accept collective responsibility for, and publically defend, the policies and actions of the government. *Individual ministerial responsibility* requires that ministers are individually responsible for actions taken under their authority, including actions taken by departments and agencies for which they are responsible.

Parliamentary sovereignty

In Australia this concept is taken to mean that parliament has the right to make, amend or repeal any law—within the limits of the Constitution. Parliament cannot make a law that a future parliament cannot change and, in general, parliament takes priority over the executive and judicial arms of government.

Prerogative powers

With the gradual acceptance of the principle of the rule of law, the originally absolute powers of the King were progressively narrowed by the Magna Carta, the Bill of Rights and other legislation. The residual powers of the crown—that is, the powers of the executive government to act on its own initiative, without relevant legislation—are known as prerogative powers. Examples include the power to make treaties, conduct

foreign affairs and declare war.

Prerogative powers in Australia are the powers of the crown that were inherited by the executive government of the Commonwealth at Federation. These are exercised subject to the Constitution, section 61 of which states that the executive power of the Commonwealth is vested in the Queen, is exercisable by the Governor-General, and extends to the execution and maintenance of the Constitution and the laws of the Commonwealth.

Principle of legality

This rule of statutory interpretation provides that unless there is express language or necessary implication to the contrary, courts will consider that even general words in a statute will be interpreted as subject to the fundamental rights of the individual.

Presumption of innocence

The presumption of innocence is the legal principle that the prosecution must prove guilt: the accused does not have to prove innocence and is considered to be innocent until proven guilty.

Representative government

A system of government in which members of parliament are chosen directly by the people and represent the people in parliament (for example, as in Australia).

Responsible government

Responsible government means that the executive government is responsible to the parliament. This principle underlies the Australian system of government, whereby the Crown (represented by the Governor-General) acts on the advice of ministers, who are members of, and accountable to, the parliament.

Rule of law

The rule of law is the principle that a nation should be governed by law and that all individuals, including government officials and law-makers themselves, are subject to the law and equally accountable before it. A person cannot be punished unless a court has found a breach of the law.

Separation of powers

The separation of powers doctrine is the principle that there are three powers of government—legislative, executive, and judicial—and that a country's liberty depends on these three powers being invested in separate bodies. This is because the division of powers among legislative, executive and judicial arms of government provides for checks and balances in a system of government. In relation to legal proceedings it is vital that the judiciary is independent from the executive government, and that the executive government should not have judicial powers. Judicial powers should only be exercised by the courts.

In the Westminster system of government followed by Australia, despite the appearance of formal divisions in the Constitution, there is some overlap between legislative and executive functions. Executive government is formed from a part of the legislature—Ministers come from parliament. However, the boundary between the judiciary, and the executive and parliament, is strictly observed. Also it is expected that parliament will scrutinise the proposals and performance of executive government and that the membership of the legislature, and the formation of executive government, will be regularly subject to the will of the people at elections.

Standard of proof

The standard of proof required by courts in criminal cases is that the accused's guilt in respect of a charge must be proved 'beyond reasonable doubt'. The standard in civil cases is 'on the balance of probabilities', in other words, that the facts asserted are more likely than not.

Sub judice convention

A matter is said to be sub judice ('before a judge') while it is under consideration by a court. The sub judice convention refers to the restriction that the House places on itself not to debate matters that are still before a court of law, so as to prevent parliamentary debate from influencing juries and prejudicing parties and witnesses in court proceedings.

For more information

Australia's Magna Carta, 2nd edn. Canberra, Department of the Senate, 2015.

House of Representatives [Infosheet No. 20: Australian System of Government](#).

House of Representatives Practice, 7th edn. Department of the House of Representatives, Canberra, 2018.

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