

Parliament of Victoria



Parliament and the courts:
Separation of powers
Summary notes

About this resource

These notes were produced from a panel conversation on 2 March 2023, hosted by the Parliament of Victoria and Victoria Law Foundation. Participants included the Hon. Judge Elizabeth Brimer KC from the County Court of Victoria, Matt Fregon MP, Member for Ashburton and Deputy Speaker in the Legislative Assembly, and Robert McDonald, Clerk of the Legislative Council.

The conversation focused on the separation of powers between the legislative, executive and judicial branches of Victoria's democratic system. The discussion considered the responsibilities of each branch, how they interact with each other, and their accountability functions. Panel members explored the strengths and challenges of this system and their implications when making and applying the law.

These notes are not intended to serve as a definitive resource for the topics covered, however, they do offer useful insights into the perspectives of the experts who took part in this conversation.

Panellists



Her Honour

Judge Elizabeth Brimer KC

Judge of the County Court of Victoria and Vice President of VCAT

Her Honour Judge Elizabeth Brimer KC was appointed to the County Court of Victoria on 16 April 2019. She is Judge in charge of the Arbitration List and a Vice President of the Victorian Civil and Administrative Tribunal. Before her appointment, her Honour built a wide and varied practice at the Bar including in commercial law, common law, criminal law, OH&S law, and administrative law.

Her Honour appeared in the Victorian Court of Appeal and the Supreme Courts of Victoria, Western Australia and the ACT, as well as appearing in Coronial Inquiries, Royal Commissions and WorkSafe prosecutions.

Her Honour completed the CIArb Diploma of International Commercial Arbitration in 2016 and became a Fellow of the CIArb in 2018. She was appointed arbitrator on the General list of arbitrators, Court of Arbitration for Sport in 2021 and was appointed to the CAS ad hoc panel of arbitrators for the 2022 Commonwealth Games.



Matt Fregan MP

*Deputy Speaker of the Legislative Assembly,
Member for Ashburton*

Matt was born and raised in Melbourne's east. He worked in his Dad's Ferntree Gully pharmacy, where he learnt the value of community and giving back. Before being elected to parliament in 2018, Matt ran a small IT business based on High Street Road, Glen Iris, for over a decade.

In 2010, Matt and his wife chose Mount Waverley to raise their family and be their home. Matt is a passionate advocate for mental health awareness, public education, and encouraging local connections and is working hard to support local schools, cultural groups, and sporting clubs from Parliament House.

Some of his proudest achievements while in government include delivering the Mount Waverley Ambulance station, and investing over \$40 million in local school infrastructure. Matt was honoured to be re-elected as the local voice for the new Ashwood District in 2022, as well as being newly appointed in the role of Deputy Speaker.



Robert McDonald

Clerk of the Legislative Council

Robert commenced working at the Parliament of Victoria in 2004. After roles in the Legislative Assembly Procedure Office and Legislative Council Table Office between 2004 and 2011, he then became Secretary to the Legislative Council Standing Committee on Economy and Infrastructure from 2011 to 2013. In August 2013,

he re-joined the Department of the Legislative Assembly as Assistant Clerk Procedure & Serjeant-at-Arms and in November 2017 became Deputy Clerk. In October 2022, Robert was appointed Clerk of the Legislative Council. Robert has a Bachelor of Laws (Hons) and Bachelor of Science from Melbourne University.

Understanding the separation of powers

The separation of powers in Victoria, as in any democratic system, is a fundamental principle that supports the democratic process by ensuring that no single person or group has too much power or influence, the idea being that each of the different branches—the legislature, the executive and the judiciary—should have distinct and independent powers and responsibilities.

In Victoria, the separation of powers is reflected in the *Constitution Act 1975*, which establishes the three separate branches of government and each of their unique powers and responsibilities, including the mechanisms to hold each of the branches to account.

The separation of powers is considered a vital component of the democratic process, ensuring that the government operates transparently, accountably and fairly, and that the rights and freedoms of citizens are protected. It does this by:

- ensuring no one branch of government can dominate the others or act outside of its authority, helping to prevent abuse of power
- ensuring that decisions are made through a process of debate, negotiation, and compromise
- promoting transparency and accountability, such as reporting to the public and the other branches on its activities and decisions. This helps to ensure that decisions are made in the best interests of the public.

Overall, accountability and the separation of powers are crucial to maintaining consistency in decision-making, upholding the rule of law, and preserving the trust of the public in the judicial system.



The legislature

The legislature at a state level is Parliament of Victoria and is made up of the Members of Parliament, including ministers, backbenchers, and crossbenchers.

The legislature is responsible for making laws through a process of debating and passing bills (draft laws) into legislation. Most of the bills introduced into parliament come from the executive but any Member of

Parliament (backbenchers, opposition members and crossbenchers) can introduce a bill.

The members of the legislature are elected by the people and are therefore responsible for representing the interests of everyone in their respective electorates. This helps to ensure that laws are made in the best interests of the people and are based on principles of fairness and equity. While members of the legislature debate bills and the arguments may represent different parts of the political spectrum, the processes of passing laws and the rules of debating in parliament aim to be impartial allowing opportunities for all Members of Parliament to speak and represent the views of their electorates.



The executive

The executive, which is headed by the Governor of Victoria and includes the Premier and Ministers, is responsible for implementing and enforcing the laws. The executive also sets the policy direction for the state and will most likely introduce the vast majority of bills into parliament.

The executive's legislative agenda is often planned out several years in advance of bills being introduced into parliament. This allows specialists who work in the Office of the Chief Parliamentary Counsel (which is attached to the Department of Premier and Cabinet) to draft the legislation.



The judiciary

The judiciary, including the courts and judges, is responsible for:

- interpreting and applying the laws
- ensuring that the laws made by the legislature comply with the constitution
- upholding the rule of law, and
- ensuring that laws are applied fairly and equitably

The judiciary is considered to have true independence from the legislature and the executive. This helps to ensure that laws are interpreted and enforced fairly and impartially.

The judiciary's role in making laws is limited. It does not involve themselves in policy aspects of the executive or in the law-making processes of parliament. While members of the legal fraternity have opportunities to provide input before legislation is passed and opinions are given, judges and parliament do not work side by side. The courts only interpret the law or review decisions that have been made.

Every six months, once laws have been passed and received Royal Assent, copies of the new legislation are sent to the Supreme Court as part of a formal communication process. However, the court will already be aware of changes to legislation or new legislation through other channels.

To interpret legislation, the judiciary looks at the text, context, and the legislative purpose through Hansard, the official records of parliament. According to the High Court this is an expression of the constitutional relationship between the arms of government with respect to making, interpreting, and applying laws. (see p. 9 of [Gageler, S. \(2019\), Legislative Intention, Monash University Law Review, 41\(1\), 1-16](#) and [Justice Kenny \(2013\), Constitutional Role of the Judge: Statutory Interpretation](#), Address to the Judicial College of Victoria and the Melbourne Law School).

The Attorney-General, who is a member of the executive branch, may speak on behalf of the judiciary to parliament in matters related to the administration of justice or legal reforms. However, the Attorney-General does not represent the judiciary as a whole. The independence of the judiciary is a fundamental principle of the Victorian Constitution, and the judges and magistrates are responsible for upholding this principle by making impartial and fair decisions based on the law.

Judges, judicial officers, and lawyers can contribute to some of the law reform committees and reviews in Victoria. The executive can establish various law reform bodies, such as the Victorian Law Reform Commission (VLRC). The VLRC is a statutory body that seeks input from a range of stakeholders, including legal professionals and makes recommendations to the Attorney-General. Parliamentary committees are established by the legislature to investigate issues and services. Part of the report from committees may be recommendations for new legislation or to revise existing laws. The judiciary may be represented at hearings by members with specialist knowledge, such as someone from the coroner's court where findings from an inquest is relevant to the committee inquiry.

Lawyers can also contribute to committees such as the VLRC reviews by submitting written or oral submissions, providing evidence, or participating in public hearings. As legal practitioners, they often have a deep understanding of the law and its practical implications, and can offer valuable insights into how proposed changes may affect their clients or the broader community.

The judiciary is not subject to political pressure or interference, despite being appointed by the executive because they cannot be removed by the executive. There is a separate process to remove judges, which ensures that judges can interpret and apply the law fearlessly. The independence of the judiciary across Australia is maintained through a level of respect between the pillars of government, conventions, and the constitution.

The Hon Geoffrey Nettle AC QC has written a paper exploring how the process for removing judges from office has evolved in Australia, including how the process relates to separation of powers. [Nettle, G. \(2021\). Removal of judges from office, Melbourne University Law Review, 45\(1\), 241-276.](#)

Accountability measures

In Victoria, there are several accountability measures in place for each of the branches of government to ensure that all three operate within the limits of their respective powers and responsibilities, and that the public interest is protected. These measures also provide an avenue for redress if any branch exceeds its powers or violates the law.

Legislative Branch

The legislative branch, represented by the parliament, is accountable to the electorate and the public and is also subject to scrutiny and oversight by the media and civic organisations. Members of Parliament are required to represent their constituents and uphold the interests of the public. The parliament is required to pass laws that are consistent with the Constitution and the rule of law.

The rules of both chambers (the Standing Orders) also ensure that the process of passing laws is followed and each bill is given due consideration. The bicameral nature (two chambers) of Parliament of Victoria provides a further accountability measure, with the Legislative Council often serving as a house of review, providing an extra layer of scrutiny to government proposed legislation (bills). Members of the Legislative Council have the important role of scrutinising the actions of the executive by asking questions, lodging questions on notice, and calling for the production of documents. The Legislative Council also reviews proposed legislation to determine if amendments are needed to make the legislation better or, on rare occasions, opposes legislation completely and defeats it.

Executive Branch

The executive branch, represented by the government including the Premier and Cabinet, is accountable to the legislature and the public. The government is required to report to the legislature on its policies, programs, and spending through annual budgets, regular reports, and parliamentary inquiries. The government is also subject to scrutiny and oversight by parliamentary committees, the Auditor-General, and other independent watchdogs such as the Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC).

In Victoria, the government does not have the power to overrule or control the judiciary, even in emergency situations. The separation of powers is a fundamental principle of the Victorian Constitution, which establishes the judiciary as an independent branch of government, and this independence is maintained during states of emergency.

While the government does have emergency powers to deal with crises and emergencies, such as natural disasters or public health emergencies, these powers are limited in scope and subject to judicial review. The government cannot use emergency powers to infringe upon the rights and freedoms of citizens or to undermine the independence of the judiciary.

For example, during the Covid pandemic where the government was exercising some emergency powers, the executive decisions were always subject to judicial review. If decisions were outside of the legislation that they were being made under, the government would need to go back to parliament and pass new legislation that could either extend the use of emergency powers or provide additional powers. This legislation would need to pass both houses of parliament, the same as any other legislation. One piece of legislation relating to the pandemic had a 12-month time limit on it, and there were occasions that the government came back to extend that. On another occasion the government introduced separate pandemic legislation.

In all three instances (the original legislation, the extension and the pandemic legislation) the legislation was and is subject to judicial review. The Acts were as follows:

- *COVID-19 Omnibus (Emergency Measures) Act 2020*, commencement 25 April 2020
- *Public Health and Wellbeing Amendment (State of Emergency Extension) Act 2021*, commencement 11 March 2021 (Sections 2A, 2B and 3A commenced on 20 April 2021)
- *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021*, commencement 8 December 2021 (however, several sections were scheduled to commence within 12 months of Royal Assent to allow for implementation)

The judiciary was called upon to review an aspect of the executive's pandemic response when a person challenged the directions issued by an authorised officer empowered by the Chief Health Officer under the *Public Health and Wellbeing Act 2008*. The court considered whether the legislation imposed an impermissible burden on political communications and whether the provisions were suitable, necessary, and balanced in pursuit of a legitimate purpose. The judge ultimately held that the provisions were valid and proportionate, taking into account the evidence surrounding the pandemic and the constitutional limitations on the exercise of power. [The Supreme Court of Victoria has details about the specific case.](#)

Furthermore, the *Emergency Management Act 2013*, which outlines the emergency powers of the Victorian government, specifically states that nothing in the Act authorises the government to override or disregard any law, including the Constitution or the laws that establish the judiciary as an independent branch of government.

Judicial Branch

The judicial branch is accountable to the Constitution, the law, and the public. Judges and magistrates are required to interpret and apply the law impartially and independently. The judicial branch is subject to scrutiny and oversight by the appellate courts, the legal profession, and the public. This includes transparency measures, such as, with very few exceptions, courts opened to the public and the publication of hearing dates and outcomes of cases.

The judiciary also play an important role in reviewing the decisions and actions of government officials, agencies, and other public bodies to ensure that they are consistent with the law and the principles of natural justice. Judicial review allows individuals and organisations to challenge decisions that affect their rights or interests, and to seek remedies or compensation if those decisions are found to be unlawful or unfair.

Some examples of decisions that may be subject to judicial review in Victoria include:

- decisions to terminate or cancel contracts or licences
- decisions to impose fines or other penalties
- decisions to make or amend regulations or bylaws.

When a decision or action is subject to judicial review, the court will typically consider whether the decision-maker had the authority to make the decision, whether the decision was made in accordance with the relevant law and procedures, and whether the decision was reasonable and fair. If the court finds that the decision was unlawful or unfair, it may quash or modify the decision, or order the decision-maker to reconsider the matter in accordance with the law and the principles of natural justice.

There are several ways in which the judiciary is reviewed and held accountable in Victoria, including:

- **[Judicial Commission of Victoria](#)** is an independent body responsible for investigating complaints about the conduct or capacity of judicial officers in Victoria, including judges and magistrates. The Commission investigates complaints and provides recommendations to the relevant authority about any necessary disciplinary action.
- **[Victorian Civil and Administrative Tribunal](#)** (VCAT) is responsible for hearing and deciding cases involving a wide range of legal disputes, including disputes relating to the conduct of legal practitioners and judges. VCAT also has the power to hear and decide complaints against judges and magistrates.
- **[The Victorian Legal Services Board + Commissioner](#)** is responsible for regulating the legal profession in Victoria, including the conduct of legal practitioners. The Board + Commissioner has the power to investigate complaints about the conduct of lawyers, including those who appear before judges and magistrates, and to take disciplinary action if necessary.

- **[Sentencing Advisory Council](#)** provides research, statistics and education about sentencing in Victoria, bridging the gap between the community, the courts and the government. The Council was established as a result of a report into Victoria’s sentencing laws **[Pathways to Justice: sentencing Review 2002](#)**.

These various mechanisms provide oversight and accountability for the judiciary in Victoria. They are designed to ensure that judicial officers are held to a high standard of professional conduct, and that the public has confidence in the integrity and impartiality of the judicial system.

Independent Watchdogs

There are also independent watchdogs such as the Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC) that have been established to provide oversight and accountability over the actions of all branches of government. These independent bodies are designed to investigate and expose corruption, misconduct, and maladministration within the public sector.

Strengthening the separation of powers

Perceived breaches in the separation of powers can be caused by:

- Making decisions that bind successors to the decisions. For example, a government signing project contracts just prior to an election without either proper permissions or following the full process
- Misusing parliamentary funds. For example, the government raising taxes without going through the legislative process, or parliament seeking to control its own budget (Parliament budgets are passed through parliament as an appropriations bills)
- Interfering with the administration of justice. For example, if a Member of Parliament was to comment on a case before a court.

To address these issues, a better solution could be to strengthen the checks and balances on the exercise of executive power and to improve the oversight of government agencies and public officials. This could include measures such as:

- Greater transparency and accountability in the exercise of executive powers, including clear criteria and procedures for their use and regular reporting to parliament.
- Strengthening the independence of key government agencies and officials, such as the police, the judiciary, and the Ombudsman, through increased funding, enhanced powers, and greater accountability.
- Improving the mechanisms for identifying and addressing breaches of the principles of the separation of powers, such as through regular reviews and audits of government agencies and public officials.

Exploring the separation of powers

Below are a list of questions and short activities to help students explore the separation of powers, the responsibilities of each branch, and how the system might be strengthened.

1) Complete a Strengths, Weaknesses, Opportunities and Threats analysis on the separation of powers.

2) What recent cases can you find where the separation of powers may have been breached?

- What was the perceived breach?
- How was it addressed?
- What was the outcome?
- What systems or measures could be put in place to prevent either a breach or perceived breach in the future?

3) One of the common misconceptions of the separation of powers is that government and parliament are the same entity.

- What evidence can you find to support this statement?
- Why do you think the misconception exists?
- How would you explain the difference between parliament and government in Victoria?
- Is the difference between parliament and government the same at a federal level?

4) Create a Venn diagram for the legislature, executive and judiciary. Include:

- each branch's individual responsibilities and accountability measures
- how the branches interact with each other, including any shared responsibilities and communication they may have
- how the three branches work together to support the democratic process.

5) Consider the effects of the following on each of the legislature, executive and judiciary. If the power of one or more of the branches was:

- significantly reduced
- completely removed
- significantly increased, or
- divided into one or more additional branches.

6) One of the suggested ways of strengthening the separation of powers is to increase transparency and accountability measures.

- What systems are already in place for transparency and accountability?
- What additional systems would you put in place and how would these systems strengthen the transparency and accountability of the separation of powers?

7) What additional independent bodies, review and reporting processes would you like to see put in place to address potential breaches in the separation of powers?

- How would these additions strengthen the accountability and transparency of the legislature, executive and judiciary?