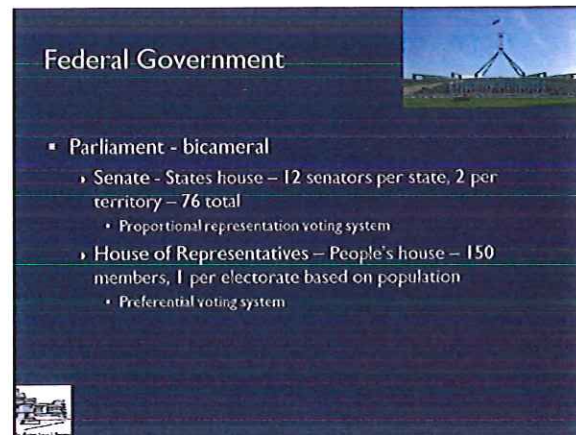
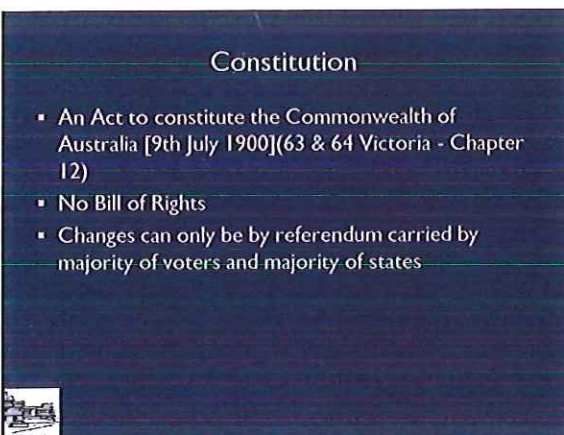
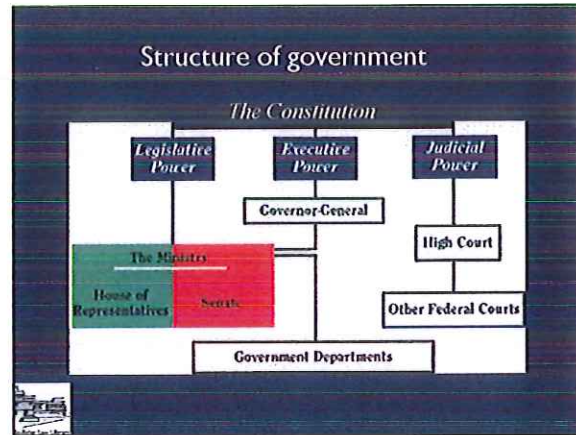
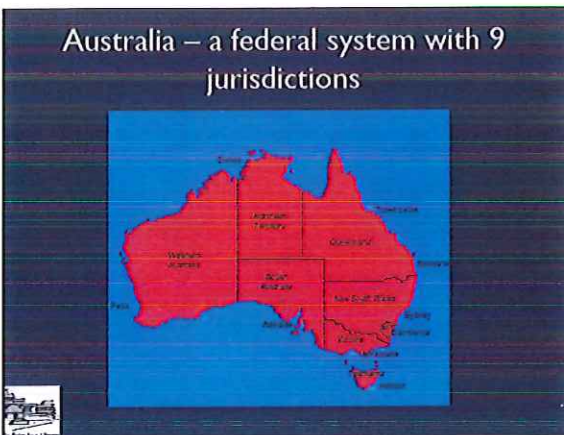
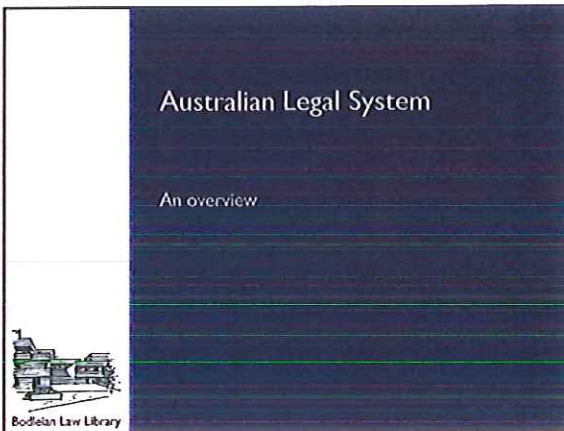


REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
TABLE OF CONTENTS FOR COURSE MATERIALS

Unit 3: Overview of the Australian Legal System (Prof. Poynder)

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Division of powers

- Australian Constitution s. 51 defines federal powers:
 - › interstate trade and commerce power
 - › corporations power
 - › external affairs power
 - › taxation power
 - › military defence
 - › quarantine
 - › census
 - › currency
 - › weights and measures



...more federal powers

- Service and execution of court processes and the recognition of judgements
- Naturalisation and aliens and immigration
- Powers for implementation of a uniform railway system
- Postal, telegraphic, telephonic, and like services
- Pensions and social services
- Pacific relations
- The influx of criminals
- 'Special laws' for people of any race
- Marriage and divorce
- Copyright, patents, and trade marks
- Bankruptcy
- Bills of exchange
- Banking (other than state banking)
- Insurance other than state insurance
- Conciliation and arbitration of industrial disputes



Executive power

- Executive power – vested in the Queen of Australia, represented by the Governor General (Federal) or Governor (each state).
- Legislation must be signed by the Governor in Council
- Executive Council – in theory all ministers of the Crown



State government

- Each State and 2 territories (NT & ACT) has a parliament – lower house usually named Legislative Assembly; upper house is Legislative Council
- All bicameral apart from Qld
- Leader of government is called Premier
- Preferential voting



State powers

- States have all powers that are not specified in the Constitution – the residual powers, eg policing, public schools, roads and traffic, public hospitals (through an agreement with the federal government), public housing, and business regulation.
- Uniform laws in some areas between States
- Federal law takes precedence where there is overlap
- States receive GST tax



Australian Territories

- Mainland territories
 - ACT (self governing)
 - NT (self governing)
- Jervis Bay Territory
- External territories
 - Ashmore and Cartier Islands
 - Norfolk Island (self governing)
 - Christmas Island
 - Cocos (Keeling) Islands
 - Coral Sea Islands Territory
 - Heard and McDonald Islands
 - Australian Antarctic Territory



Local government

- 565 local government bodies in Australia - a diverse range of metropolitan, regional, rural, and Indigenous communities.
- Responsibilities can include:
 - infrastructure and property services, including local roads, bridges, footpaths, drainage, waste collection and management
 - provision of recreation facilities, such as parks, sports fields and stadiums, golf courses, swimming pools, sport centres, halls, camping grounds and caravan parks
 - health services such as water and food inspection, immunisation services, toilet facilities, noise control and meat inspection and animal control



continued...

- community services, such as child care, aged care and accommodation, community care and welfare services
- building services, including inspections, licensing, certification and enforcement
- planning and development approval
- administration of facilities, such as airports and aerodromes, ports and marinas, cemeteries, parking facilities and street parking
- cultural facilities and services, such as libraries, art galleries and museums
- water and sewerage services in some states
- other services, such as abattoirs, sale-yards and group purchasing schemes



Separation of Powers

- The *Separation of Powers* is the principle whereby the three arms of government undertake their activities separate from each other:
 - the Legislature proposes laws in the form of Bills, and provides a legislative framework for the operations of the other two arms.
 - the Executive enacts the laws by Royal Assent, administers the laws and carries out the tasks assigned to it by legislation;
 - the Judiciary hears cases arising from the administration of the law, using both statute law and the common law. The Australian courts cannot give advisory opinions on the constitutionality of laws.
 - the other arms cannot influence the Judiciary.



The judiciary

- Prior to the Australia Act 1986, (and associated legislation in the parliament of the United Kingdom), some Australian cases could be referred to the Judicial Committee of the Privy Council for final appeal.
- With this act, Australian law was made unequivocally sovereign, and the High Court of Australia was confirmed as the highest court of appeal. The theoretical possibility of the British Parliament enacting laws to override the Australian Constitution was also removed



Federal court hierarchy

- High Court of Australia – original and appellate jurisdiction. Established by The Constitution
- Federal Court of Australia - most civil disputes, some summary criminal matters governed by federal law are decided. Established by Judiciary Act 1903
- Family Court. Established 1975
- Federal Magistrates Court. Established 1999. Changed to Federal Circuit Court of Australia in 2013



State Court hierarchy

- Supreme Court in each State, with original and appellate jurisdiction.
- District or County Courts
- Magistrates Courts
- Small claims courts
- Cross vesting powers apply – Full HC decisions are binding on Full Court of each Supreme Court



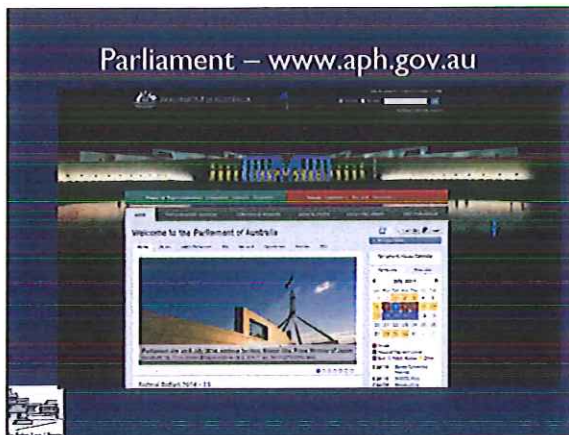
Other bodies

- Administrative Appeals Tribunal
- Native Title Tribunal
- Industrial bodies

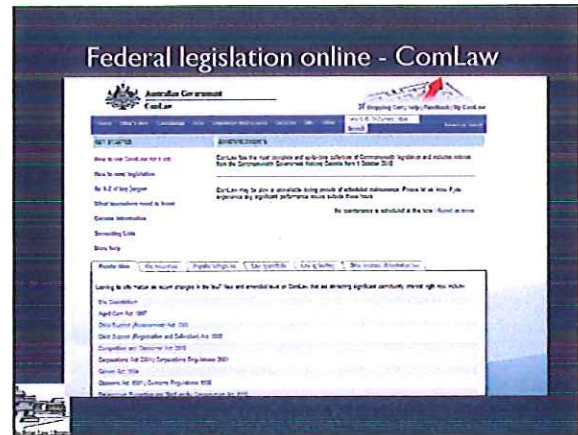
Court reports

- High Court – Commonwealth Law Reports (authorised) & Australian Law Reports (unauthorised)
- Federal Court – Federal Court Reports (authorised) & Federal Law Reports (unauthorised)
- Each State Supreme Court produces an authorised series of law reports

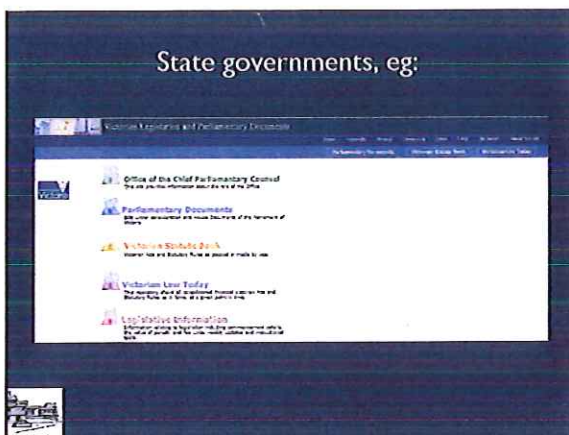
Parliament – www.aph.gov.au



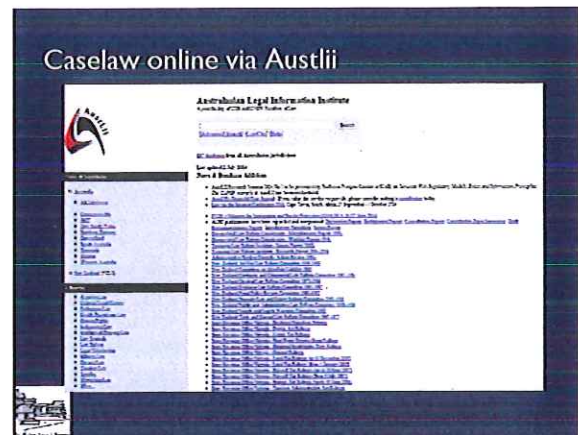
Federal legislation online - ComLaw



State governments, eg:



Caselaw online via Austlii





Infosheet 20 - The Australian system of government

THE AUSTRALIAN SYSTEM OF GOVERNMENT

Australia is a federation of six States which, together with three self-governing Territories, have their own constitutions, parliaments, governments and laws. This Infosheet is about the national or central government, usually called the Federal Government or the Commonwealth Government. However, State and Territory governments are also based on the same principle of parliamentary government.

Readers of this Infosheet are also recommended to read Infosheets No. 13 'The Constitution' and No. 19 'The House, Government and Opposition'.

Parliamentary government

The Constitution of Australia establishes the federal Government by providing for the Parliament, the Executive Government and the Judicature (more usually called the Judiciary)—sometimes referred to as the 'three arms of government'. However, some of the central features of Australia's system of government (described as parliamentary, or responsible government) are not set down in the Constitution but are based on custom and convention.

Parliamentary government means that the Executive Government comes from within the Parliament; responsible government means that the Executive Government is responsible to the Parliament. This is the central feature of a Westminster-style government following the United Kingdom model—in contrast to other systems of government where the Executive is quite separate and not directly answerable to the Legislature—for example, in the United States of America.

The separation of powers

Political theory recognises three powers of government—the legislative power to make laws; the executive power to carry out and enforce the laws; and the judicial power to interpret laws and to judge whether they apply in individual cases.

The principle of the separation of powers is that, in order to prevent oppressive government, the three powers of government should be held by separate bodies—the Legislature, Executive and Judiciary—which can act as checks and balances on each other.

With parliamentary government the legislative and executive functions overlap, as the members of the Executive Government—the Ministers—are drawn from the Parliament. However, in the Australian system there are still checks and balances between the Executive and Legislature—Ministers are subject to the scrutiny of other Members of the Parliament led by an officially recognised Opposition. In addition, the Executive does not necessarily control both Houses of the Parliament (see below).

Infosheet No. 19 'The House, Government and Opposition' gives more detail on the relationship between the Parliament and the Executive Government.

The Parliament

The Constitution gives the legislative power of the Commonwealth—the power to make laws—to the Parliament.

The Parliament consists of the Queen, represented by the Governor-General, and two Houses—the House of Representatives and the Senate. The Parliament passes legislation. Proposed laws have to be agreed to by both Houses of Parliament to become law. The two Houses have equal powers, except that there are restrictions on the power of the Senate to introduce or directly amend some kinds of financial legislation. Infosheet No. 7 'Making laws' describes the parliamentary processes for the passage of legislation. The Governor-General has a role in the legislative process by assenting to Acts. See later in this Infosheet for more information about the role of the Governor-General.

The Parliament also authorises the Executive Government (often simply called the Government or the Executive) to spend public money by agreeing to government proposals for expenditure and taxation, scrutinises the administrative actions of the Government and serves as a forum for the debate of public policy.

Another function of the Parliament under our system is to provide from its membership the members of the Executive Government. After a general election the political party (or coalition of parties) with the support of a majority of members in the House of

Representatives becomes the governing party and its leader becomes the Prime Minister.

The composition of the House also determines who will form the official Opposition. The party (or coalition of parties) which has the most non-government Members in the House of Representatives becomes the opposition party and its leader becomes the Leader of the Opposition. The Opposition has the officially recognised function, established by convention, of opposing the Government. The Opposition is an essential part of Australia's democratic system of government. This subject is discussed in more detail in Infosheet No. 19 'The House, Government and Opposition'.

While the Government has, by definition, the support of a majority of Members in the House of Representatives, the system of voting used for Senate elections gives greater opportunity to minority parties and independents, and the Government often does not have majority support in the Senate.

The Executive Government

Constitutional provisions

The Constitution states that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. However, a realistic understanding of Australia's Executive Government cannot be obtained from the Constitution alone, and in fact a literal reading of the Constitution can be misleading.

The Executive Government in practice

In reality, the executive power is possessed by the Prime Minister and Cabinet (senior Ministers). Their power derives:

- constitutionally from their membership of the Federal Executive Council—see below—and status as 'advisers' to the Governor-General;
- politically, from the people at elections for the House of Representatives; and
- from convention—that is, custom and tradition.

Neither the Prime Minister nor the Cabinet are mentioned in the Constitution—the framers of the Constitution took their existence for granted, as they did the various conventions of the Westminster system of government inherited from the United Kingdom.

Table 1 below gives a comparison of the constitutional provisions and the actual practice according to the conventions which have operated in Australia.

Composition of the Ministry

Prime Minister

The Prime Minister is the head of the Government. He or she achieves this position by being the elected leader of the party in government (in the case of a coalition government, the major party).

Cabinet

The Cabinet, consisting of senior Ministers presided over by the Prime Minister, is the Government's pre-eminent policy-making body. Major policy and legislative proposals are decided by the Cabinet. The Prime Minister selects Ministers for Cabinet positions.

Ministers

Ministers are selected by the Prime Minister. There are currently 30 Ministers. The maximum number can be increased by legislation. About 19 or so senior Ministers administer the major departments and are, usually, members of Cabinet. Other Ministers are responsible for particular areas of administration within a major department, or may be in charge of a small department. Ministers are appointed from both Houses of Parliament, although most (about two thirds) are Members of the House of Representatives.

Parliamentary Secretaries

Up to 12 Members and Senators are appointed by the Prime Minister as Parliamentary Secretaries to assist or represent Ministers in their administrative responsibilities.

The role of the Governor-General

The Governor-General performs the ceremonial functions of head of state on behalf of the Queen. While executive government powers are exercised by the Governor-General or in his or her name, such actions are carried out as advised by the Prime Minister and Ministers.

Under the Constitution the Governor-General:

- Appoints and dismisses Executive Councillors
- Appoints and dismisses Ministers to administer the public service departments and agencies
- Appoints judges (the dismissal of judges can only be initiated by the Parliament)

- Is the commander in chief of the defence forces
- Decides when the Parliament meets (subject to some constitutional requirements), and may prorogue (suspend) or dissolve it
- Issues writs for general elections
- Initiates government expenditure by recommending appropriations to the Parliament
- Converts proposed laws to Acts of Parliament by assenting to legislation that has been passed by both Houses
- May block or propose amendments to any law passed by the two Houses of Parliament

The Governor-General also has executive powers under many Acts of Parliament—for example, the power to proclaim legislation (that is, bring it into effect) and to make regulations and other kinds of delegated legislation (that is, legislative powers that the Parliament has delegated to the Executive Government). Most of the executive actions taken by the Governor-General are of this kind.

In practice, except when reserve powers are involved—see below—these functions are exercised as advised by the Prime Minister and Ministers.

The Governor-General's reserve powers

In some matters the Constitution gives the Governor-General powers to act independently. These include the power to dissolve the House of Representatives and, in certain situations, both Houses (see Infosheet No. 18 'Double dissolution'). However, in other than exceptional circumstances, the Governor-General will follow the advice of a Prime Minister who retains the confidence of the House.

The powers that the Governor-General has to act without advice are referred to as 'prerogative' or 'reserve' powers and are not clearly defined in the Constitution. Constitutional experts do not agree on their precise extent or on the nature of the exceptional circumstances in which they may be exercised.

The role of the Federal Executive Council

The Federal Executive Council is the constitutional mechanism for providing ministerial advice to the Governor-General. It is not a forum for policy debate or deliberation and its proceedings are entirely formal. All Ministers and Parliamentary Secretaries become members of the Executive Council. They receive the title 'Honourable'. The Council's full membership never meets. In practice the minimum number of Ministers or Parliamentary Secretaries (that is, two in addition to the person presiding) are rostered to attend. Meetings of the Council are presided over by the Governor-General or a deputy appointed

by the Governor-General (usually the Minister with the title Vice President of the Executive Council). The matters dealt with at each meeting are recommendations by Ministers, for the approval of the Governor-General in Council, that something be done—for example, that a regulation be made, a treaty be ratified, or a person be appointed to a position.

While the Executive Council may seem no more than a rubber stamp, the processes involved in bringing matters before the Council ensure that Ministers' actions are properly documented, are legally and constitutionally valid, and are in accordance with government policy.

The role of the Queen

Australia is a constitutional monarchy. A monarchy is a country where the position of head of state is inherited. A constitutional monarchy is one where the powers of the monarch or sovereign—the King or Queen—are limited by law or convention, and generally exercised only according to the advice of an elected government.

The head of state is a formal, symbolic and ceremonial position, as opposed to the position of head of government, which has the administrative power to govern the country. In some systems of government the head of state and head of government are the same person—for example, in the United States the President has both functions.

Australia's head of state is Queen Elizabeth II. Queen Elizabeth is also Queen of the United Kingdom and several other countries which used to be part of the former British Empire. The Queen's role as Queen of Australia is quite separate from her role as Queen of the United Kingdom. The United Kingdom Government plays no part in the Queen's role as Queen of Australia.

In Australia the powers of the Queen have been delegated by the Australian Constitution to her representative in Australia, the Governor-General. That is, while Australia's head of state is the Queen, the functions of head of state are performed by the Governor-General. The Queen's only necessary constitutional function is to appoint the Governor-General, and in doing this the Queen acts as advised by the Australian Prime Minister. The Constitution gives the Queen the power to disallow an Australian Act of Parliament, but this has never been done and it is extremely unlikely that it would ever be done.

The Judiciary

The Constitution vests the judicial power of the Commonwealth—the power to interpret laws and to judge whether they apply in individual cases—in the High Court and other federal courts. The High Court is established by the Constitution. Other federal courts are created by legislation of the Parliament. Judges are appointed by the Governor-General acting on the advice of the Prime Minister and Cabinet. Judges can only be removed from office by the Governor-General following a request for the removal from both Houses of Parliament on the ground of proved misbehaviour or incapacity.

One of the major functions of the High Court is to interpret the Constitution. The High Court may rule a law to be unconstitutional—that is, beyond the power of the Parliament to make—and therefore of no effect. While the Parliament may override a court’s interpretation of any ordinary law by passing or amending an Act of Parliament, the Parliament is subject to the Constitution. The Constitution cannot be changed by an Act of Parliament alone—a referendum of the people is necessary.

For more information

House of Representatives Practice, 6th edn. Department of the House of Representatives, Canberra, 2012. pp 1–41, 43–82.

Table 1 – The Executive Government of Australia

| | How achieved | Formal appointment pursuant to Constitution | Constitutional functions | Conventions applying / functions in practice |
|-----------|--------------|---|--|---|
| Sovereign | Inherited. | | Head of Executive Government and one of constituent parts of the Parliament, but these functions are delegated | Head of State. Only necessary personal function is to appoint the Governor-General. May on occasion perform acts normally carried |

| | |
|---|--|
| to the Governor-General. | out by the Governor-General, such as opening a session of Parliament or assenting to an Act of Parliament. |
| Appoints the Governor-General. | |
| May disallow an Act of Parliament (but this has never been done). | Acts as advised by the Prime Minister. |

| | | | | |
|------------------|---------------------------------|---|--|---|
| Governor-General | Selected by the Prime Minister. | By the Sovereign, as her representative in Australia. | Represents the Queen as head of Executive Government and one of constituent parts of the Parliament. In most matters must act as advised by the Federal Executive Council. | Performs functions of Head of State. Normally in all matters acts as advised by the Prime Minister and Ministers. Has reserve powers to act independently in emergencies. The extent of these and way they should be exercised are not agreed on. |
|------------------|---------------------------------|---|--|---|

| | | | | |
|----------------|--|---|-------------------|--|
| Prime Minister | Leader of the party which has the support of the most Members of the | By the Governor-General as a Minister of State. | As for Ministers. | The Governor-General commissions the leader of the party (or coalition) with |
|----------------|--|---|-------------------|--|

House of Representatives. Is elected leader through internal party processes.

By the Governor-General as a member of the Federal Executive Council.

The position of Prime Minister is not recognised by the Constitution.

the largest number of Members of the House of Representatives to form a Government.

The Prime Minister chairs Cabinet and is in practice the Head of the Executive Government.

Ministers

Selected by the Prime Minister from Members of the House of Representatives and Senators from the party or coalition of parties in government. The Prime Minister's selection may be constrained by internal party processes.

By the Governor-General as Ministers of State.

By the Governor-General as members of the Federal Executive Council.

(Ministers must be appointed to the Federal Executive Council.

Ministers must be Members of the House of

As Ministers, to administer Departments of State.

As Executive Councillors, to advise the Governor-General.

The Cabinet is not recognised by the Constitution.

Senior Ministers are in charge of larger or more important departments, and are normally members of the Cabinet.

Junior Ministers may be in charge of a small department, or assist another Minister in the administration of a larger department.

The Cabinet is, in practice, the heart of the Executive

Representatives or Senators, or become so within three months of appointment).

Government. All major policy and legislative proposals are decided by the Cabinet.

| | | | | |
|---------------------------|-------------------|--|---------------------------------|--|
| Parliamentary Secretaries | As for Ministers. | As for Ministers (Parliamentary Secretaries are a class of Ministers designated as Parliamentary Secretaries). | As for Ministers. | Parliamentary Secretaries assist Ministers in the administration of their departments. |
| Executive Councillors | As for Ministers. | By the Governor-General (there is no constitutional restriction on who should be appointed). | To advise the Governor-General. | Only Ministers and Parliamentary Secretaries are appointed (generally for life). Only Executive Councillors who are members of the current Government advise the Governor-General. |