

27 The law and courts in Australia

This chapter summarises for doctors the sources and forms of law and the structure and roles of courts and tribunals in Australia. The constitutions of the Australian states and the *Commonwealth of Australia Constitution Act 1900* derive their authority from legislation passed in the Parliament of the United Kingdom. That Parliament, in theory, could amend the Australian Constitution until 3 March 1986, when the *Australia Act 1986* came into operation by a proclamation signed by the Queen. The Australia Act terminated the power of the UK Parliament to legislate for the Commonwealth of Australia or its states and territories. It also ended the links that had existed between the Australian and British court systems by terminating the right of appeal to the Privy Council from either the High Court of Australia or the supreme courts of the states [1,2].

27.1 Sources and forms of law in Australia

The two main sources and forms of law in Australia are legislation and common law. Legislation comprises laws made by parliament, or regulations, or other types of subordinate legislation made by some other person or body authorised by legislation to do so. Laws passed by parliament are embodied in printed documents called Acts of Parliament or statutes. Common law consists of the principles developed by judges in cases that come before them and includes the vast body of law developed by the British courts over many hundreds of years. In recent decades, superior courts in Australia (state supreme courts, the Federal Court of Australia and the High Court of Australia) have also referred to and relied on case law from other countries sharing the same UK common law heritage, such as Canada, New Zealand and, to a lesser extent, the United States. In Australian health law, important developments have been influenced by case law from these countries.

27.2 Legislation

Legislation, or statute law, will always prevail over the common law, however ancient and celebrated [2]. This is a clear expression of the democratic foundations of the UK, Australia and its states, and the Australian Commonwealth. A statute of the UK Parliament was defined as a document that had received the threefold assent of the Sovereign, Lords and Commons. The Constitution of the Commonwealth of Australia established a similar law-making trinity

comprising the Governor-General, the Senate and the House of Representatives. Thus, legislation must be passed by both houses, then assented to by the Governor-General before it becomes law. Similarly, the constitutions of the states (other than Queensland, which abolished its upper house in 1922) established comparable trinities in the Governor, the Legislative Council and the Legislative Assembly.

27.3 The Australian Federation

Australia is a federation of self-governing states and territories and has nine legislatures that generate large quantities of law each year. The federal constitution that establishes the Commonwealth gives to the Australian Parliament capacity to make laws ‘with respect’ to a designated list of subject matters—for example, trade and commerce, taxation, naval and military defence, post and telegraphs, copyright, and divorce. A law made by the Australian Parliament is only valid if it can be characterised as a law ‘with respect’ to one of those subjects.

By contrast, the constitutions of the states and territories give their parliaments power to make law on any subject, usually expressed as laws ‘for the peace, order and good government’ of the state or territory. In response to the prospect of inconsistency between state and Commonwealth laws, the Australian Constitution provides that in the event of conflict, federal laws prevail to the extent of the inconsistency. In the health field, the Commonwealth Parliament has no explicit power to make laws, other than with respect to pharmaceutical, sickness and hospital benefits, leaving the substantive regulation to the states and territories. At the same time, the Commonwealth exercises control over provision of financial assistance to the states and territories and through this exercises significant influence.

The constitutional structure has been the source of much litigation, especially in challenging the validity of Commonwealth legislation. In more recent years, cooperative arrangements such as the Council of Australian Governments (COAG) and the Australian Health Ministers’ Conference and its advisory body, the Australian Health Ministers’ Advisory Council, as well as the Standing Committee of Attorneys-General have addressed issues of shared significance to the states, territories and Commonwealth.