

COMMUNIQUÉ

Does Australia need a Bill of Rights?

10 & 11 MAY 2022

Museum of Australian Democracy at Old Parliament House

27TH NATIONAL SCHOOLS
CONSTITUTIONAL CONVENTION



1. Introduction

The Twenty-seventh National Schools Constitutional Convention (NSCC) was held at the Museum of Australian Democracy at Old Parliament House in Canberra from 10-11 May 2022.

99 students from Government, Independent and Catholic schools from across Australia, covering metropolitan, regional, rural and remote locations, registered to attend the two-day activity. Day One 98 students attended the hubs and Day Two 85 students. The reduction in number was due to COVID-19.

Due to uncertainties surrounding COVID19, the students and supervisors gathered in their own states and territories in 11 hubs across Australia – the hubs were in Canberra ACT, Sydney NSW, Melbourne VIC, Brisbane QLD, Bundaberg QLD, Townsville QLD, Cairns QLD, Adelaide SA, Perth WA, Hobart TAS, and Darwin NT. Key speakers and facilitators, together with the ACT delegates, gathered at the Museum of Australian Democracy at Old Parliament House in Canberra. Each hub's participation was facilitated through Zoom.

The Convention topic that delegates were tasked to investigate was, *Does Australia need a Bill of Rights?*

2. Convention processes

Through a program of pre-reading, working groups and keynote speakers, delegates considered a wide range of issues around the topic before deciding their preferred option for an Australian Bill of Rights.

The Convention was facilitated by Emeritus Professor John Warhurst AO.

Convention opening remarks were given by:

- Emeritus Professor John Warhurst AO, Australian National University, provided opening remarks and welcomed the delegates.
- His Excellency General the Honourable David John Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia provided the official opening for the 27th National Schools Constitutional Convention. The opening remarks posed several key questions for the delegates – if we are to consider a Bill of Rights how should it function, who should interpret it and who would protect it?

Questions asked by the delegates focused on:

- The different possible models that a Bill of Rights might take, such as constitutional and legislative models
- Experiences and stories of Human Rights being upheld, lived and valued by ordinary Australians

Convention speakers were:

- Ms Lorraine Finlay, Human Rights Commissioner – *Human Rights in law and politics – history and the Australian context in 2022*. The address provided delegates with an overview of the central role that democratic institutions such as the rule of law, separation of powers and federalism, play in protecting human rights in Australia.

Questions asked by the delegates focused on:

- Whether it is possible to balance competing and conflicting human rights within a Bill of Rights
- How to uphold human rights and create a cohesive society when we all have different perspectives on what rights society should value

- What costs (monetary, political and otherwise) might be involved in the creation of a Bill of Rights, and whether those costs might outweigh the benefits
 - What role young people can play in upholding and protecting human rights in Australia
 - Whether the development of a Bill of Rights could lead to further politicisation of Human Rights
 - Whether entrenching a Bill of Rights within the Constitution could compromise any of our existing structures that underpin democracy and protect human rights
 - Whether democracy is a necessary pre-condition for the protection of human rights
 - How to facilitate positive public and political discourse in relation to human rights
 - Should Australia look to model its Bill of Rights based on international examples, such as the United States?
 - The role the Human Rights Commission plays in protecting human rights in Australia
- Dr Helen Watchirs OAM, ACT President and Human Rights Commissioner – *Experience of different countries*. The address provided delegates with an overview of human rights approaches in five countries – the United Kingdom, New Zealand, South Africa, Canada and the United States. Dr Watchirs also reflected on her experience as the ACT Human Rights Commissioner.

Questions asked by the delegates focused on:

- What role does the ACT Human Rights Commission play in the development of legislation?
- What role should our courts play in the interpretation of a Bill of Rights?
- The merits of delineating rights explicitly as compared to leaving rights open to interpretation
- New innovations in the protection of human rights in other jurisdictions
- The benefits of a Bill of Rights for marginalised groups in Australian society
- How to avoid the politicisation of judicial appointments
- How to balance competing perspectives on rights, especially when some perspectives seek to silence others
- How best to enforce human rights in practice.

Dr Andrew Banfield, Director of Politics and Public Administration Section, Research Branch, Parliamentary Library at Australian Parliament House – *What rights if any should be protected by a bill of rights? Should some rights be given a higher priority than others? If they should be protected, how should that be best done?* The address provided delegates with an approach to categorising human rights in terms of first-generation rights (protection of citizen from the state), second-generation rights (obligations on states) and third-generation rights (obligations on international systems). Dr Banfield also argued that human rights must come from and live on in people, and cautioned that we should “codify carefully”.

Questions asked by the delegates focused on:

- Whether codification of some rights leads to the exclusion of other rights
- How to ensure the moral behaviour of corporations without codifying a Bill of Rights
- Who does a Bill of Rights provide protection from?
- How foreseeable a Bill of Rights is in Australia’s political landscape
- Why there is such a large difference in awareness of the Constitution in Australia as compared to the United States

- How to reconcile the fact that human rights must come from the people, and the protection of underrepresented and minority groups
 - Whether codifying a Bill of Rights could repair some of the distrust in our democratic institutions
 - How the growing importance of global challenges and global interconnection is shaping human rights.
- Fr Frank Brennan SJ, Jesuit Priest and Rector of Newman College at the University of Melbourne – *Protection of Human Rights in Australia*. The address provided delegates with an overview of the impact of choosing between a constitutional or statutory Bill of Rights, particularly with respect to how this influences who holds final decision-making power in regard to human rights. Fr Brennan also described his personal involvement as chair of the National Human Rights Consultation Committee established by the Rudd Government in 2008.

Questions asked by the delegates focused on:

- How does Australia currently hold itself accountable for breaches of human rights and its international obligations?
 - Whether there is a place for religious values in the discussion of human rights, and how best to balance competing perspectives in a Bill of Rights
 - Whether there is benefit to allowing different jurisdictions to implement their own human rights frameworks
 - The extent to which it is desirable to leave a Bill of Rights purposefully open to interpretation by the judiciary
 - How Fr Brennan’s faith has shaped his thinking in relation to human rights
 - How do we find the appropriate balance between individual liberties and the needs of the state, and how do we ensure that minority groups are protected in this process?
- Ms Megan McCrone, Australian Electoral Commission, provided an overview of the referendum and plebiscite process.

Questions asked by the delegates focused on:

- Whether entrenching a constitutional Bill of Rights is practical, given the difficulties of the referendum process
- How we can seek to promote meaningful engagement with democratic process and voting in Australia, especially for young people.

3. Delegate deliberations

Workshops

Three Working Group sessions were designed to generate features and ideas that might be suitable for inclusion in a proposed Bill of Rights, and to decide on what form (if any) it should take.

Working Group 1: *How are rights protected at the moment? What are the strengths and weaknesses of the mechanisms and processes? In what way should rights be balanced against responsibilities?*

Delegates considered the ways in which rights are currently protected in Australia through a variety of mechanisms, including common law protections and the variety of statutory protections at both Federal and State level. Delegates also considered arguments concerning how best to balance rights and responsibilities. After considering these ideas, delegates discussed:

- The main sources of human rights protection coming from common law and statute law
- Human rights additionally being protected through the fact that they are culturally engrained and valued within our society
- The importance of democratic structures and institutions in protecting human rights, such as rule of law, separation of powers, freedom of the press, membership in international rights organisations
- Weaknesses of the current system included that a patchwork approach leaves many Australians unclear on what their rights are, and consequently more vulnerable to infringements of those rights
- Other weaknesses included difficulties in enforcing human rights and the vulnerability of statutory protections to arbitrary changes
- Delegates proposed that South Africa and Canada provided useful and specific examples of how to balance rights and responsibilities.

Working Group 2: *What rights, if any, should be protected by a bill of rights? Should some rights be given a higher priority than others?*

Delegates considered the varying approaches and rights protected in the United States, Canada, South Africa and New Zealand. In Workshop Groups they considered the ways in which these approaches emphasised and prioritised some rights above others and discussed how this might influence the rights to be prioritised in an Australian Bill of Rights. Delegates also considered whether a Bill of Rights should place limits on the scope of rights, and how this limitation should be expressed. After considering these ideas, delegates discussed:

- The difference between first generation rights (protection of citizen from the state), second generation rights (obligations on states) and third generation rights (obligations on international systems)
- First generation rights are more appropriate to be entrenched in a constitutional Bill of Rights whereas second and third generation rights might be more appropriately included in a statutory Bill of Rights as they would then be more flexible and open to growth and change in a dynamic society
- Rights should not be absolute, and it is reasonable to place limitations upon them. Examples of appropriate limitation clauses were drawn from South Africa and Canada.

Working Group 3: *Consequences of legislative and constitutional status and the effect, if any, of a bill of rights on the federal system. Are there particular issues for citizens in different states/territories?*

Delegates considered whether a Bill of Rights should have constitutional or merely legislative status, the mechanisms through which it might be enforced by courts, and whether a Bill of Rights should apply to all levels of Government or whether each jurisdiction should design its own model. Delegates also considered the process through which a Bill of Rights might be amended. After considering these issues, delegates discussed:

The Constitutional Status of a Bill of Rights

- That a Bill of Rights should not have constitutional status
- How constitutional entrenchment can come at the cost of flexibility
- Whether we should allow final decision making power over human rights to ultimately rest in the hands of unelected judges
- The extent to which human rights should only be limited in situations of emergency
- Suggestions for an independent human rights committee to interpret disputes around a Bill of Rights, and decide on whether limitations of rights in a given situation is acceptable

The Legislative Status of a Bill of Rights

- That a Bill of Rights should have legislative status
- There was support for the proposition that courts should be able to make a declaration that an Act is incompatible with the Bill of Rights
- There was support for the proposition that Parliament should be required to report on whether a bill is incompatible with the Bill of Rights to provide a mechanism for discouraging legislation that infringes on rights
- Suggestions for introducing a mechanism for Members of Parliament to query the compatibility of a bill with the Bill of Rights

Effect in a federal system

- Discussion of the merits and disadvantages of a uniform Bill of Rights at the Commonwealth level that would apply to all States
- Proposals that a uniform model at the Commonwealth level could allow for individual jurisdictions to build upon and expand this foundation
- Whether we should allow different rights in different states

Soapbox Sessions:

Students had the opportunity to participate in soapbox sessions throughout the convention, in which they spoke freely on issues of relevance to a Bill of Rights. Over 50 students shared their thoughts, arguments, and beliefs and contributed to enriching the experience of all delegates. Some of the main topics raised included:

- The importance of raising awareness of human rights, and the Australian Constitution
- The symbolic impact a Bill of Rights could have, and the role it could play in raising awareness of human rights issues
- What unifying principles can Australia, as a country, bring to a Bill of Rights – and an exhortation that perhaps we should think more in terms of a Bill of Values
- How to balance competing perspectives on human rights, and how to protect minority groups within Australian society
- Our current system has left human rights in the hands of individual jurisdictions at the state level, leaving some states more vulnerable to infringement of rights
- Arguments in favour of the entrenchment of, at the very least, first generation rights
- Discussion of instances in which the UN has found that Australia has infringed upon human rights, particularly in relation to refugees
- The importance of repairing trust in government and political system before we can begin designing a Bill of Rights

- Whether a statutory Bill of Rights would become a point of partisan contention, increasing political conflict in the area of human rights
- Would a Bill of Rights, being necessarily vague, encourage extremism in Australian society?
- The role of a Bill of Rights in protecting against the tyranny of the majority
- A Bill of Rights needs safeguards in place to ensure it continues to reflect community values
- Discussion of whether all first generation rights require entrenchment
- Whether the current system of rights protection in Australia is working effectively
- Why now is the best time to make a Bill of Rights a political priority
- The political capital required to make a Bill of Rights a part of the political agenda
- Whether a Bill of Rights should take a constitutional or legislative form
- The merits of stability and certainty in regards to rights versus the need for flexibility and growth
- Difficulties in the enforceability of any Bill of Rights
- Concerns about a legislative Bill of Rights being left to the whim of politicians of the day
- Concerns that by explicitly recognising some rights, we may be implicitly excluding others
- Discussion of the purpose of a Bill of Rights, and who it should or could benefit.

4. The Plebiscite

Delegates voted either 'YES' or 'NO' to the plebiscite question:

To establish an Australian Bill of Rights

The plebiscite results were as follow –

Voting results from **85** delegates were:

| National Tally Board | Formal YES | Formal NO |
|------------------------------|---------------------|---------------------|
| New South Wales | 11 | 3 |
| Victoria | 10 | 10 |
| Queensland | 8 | 7 |
| Western Australia | 6 | 8 |
| South Australia | 9 | 1 |
| Tasmania | 2 | 1 |
| Australian Capital Territory | 3 | 2 |
| Northern Territory | 2 | 2 |
| NATIONAL TOTAL | 51 (60%) | 34 (40%) |

The plebiscite to establish an Australian Bill of Rights passed.

5. Convention Outcome

Due to the Government being in caretaker mode for the election the Communiqué will be posted to the incoming President of the Senate once announced, requesting that it be tabled in Senate.

