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Constitutional law and the documents themselves have come to be seen as the basic building block of a civil society. They are the foundations on which countries build their legal and political systems. Germany goes so far as to call their Constitution, the Basic Law of the Federal Republic of Germany. In other words all subsequent laws follow from it. Constitutions typically enshrine the values and aspirations of the societies that generate them. They are often written with a linguistic flourish, especially in their preambles.

'We the people of the United States, in order to form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defence, promote general welfare and secure the Blessings of Liberty…', so reads the United States Constitution. ‘Conscious of their responsibility before God and men, moved by the purpose to serve world peace…’ is the beginning of the Basic Law of Germany. The French Constitution invokes the ‘…Rights of Man and the principles of national sovereignty…’

Australia’s Constitution contains no such ambitious preamble. It is a far more benign and procedural. Similarly it contains scant references to individual rights. This is in stark contrast to other documents, for example the first article of the French Constitution explicitly states that ‘it shall ensure the equality of all citizens before the law, without distinction of origin, race or religion’. In Germany’s Basic Law, Chapter 1 is entitled – ‘Basic Rights’. Of course the US has its famous Bill of rights enshrined within the Constitutional document itself. In fact Australia is the only country in the developed world whose Constitutional documents do not explicitly contain detailed reference to individual rights.

However, it is important to consider the historical context of the Australian Constitution. It is a document created by consensus to unify the country not after war and unrest but instead after extensive public consultation through Constitutional Conventions and a referendum in each of the colonies. Compare this to the US Constitution forged in the crucible of the War of Independence or Germany’s Basic Law created in 1949 after the horrors of Nazism and World War Two. This historical context is significant because it helps us to understand the factors that drove the framers of the Constitution to write it in the way they did. The question, however, remains to what extent does our current Constitution actually protect our rights and most fundamentally does it effectively enshrine the democratic principles most Australians assume it does?

Two principles lie at the core of Australia’s Constitution – the division of power and the separation of power. The division of power allocates powers between the state governments (residual powers) and the Federal Government (exclusive powers) leaving some in both areas (concurrent powers). From the perspective of democracy it is the separation of powers that is important. By separating powers between the parliament, executive and judiciary, the Australian Constitution allows for a check and balance on power. The extensive powers granted to the judiciary within the Constitution have left an important legacy towards the protection of democracy and individual rights in Australia.

The Constitution does not explicitly discuss democracy or representative government, in fact these words do not appear at all in the document. However, as Patmore (2014) points out ‘…the High Court has been willing to imply recognition of these foundational principles’ (p.45). This notion that there are inferred rights and protections within the Constitutions is reinforced by numerous examples of case law. Perhaps most significantly is the role to be played by the people. This phrase – by the people appears in two crucial sections of the Constitution.

Firstly in Section 7, which relates to the Senate:

‘The Senate shall be composed of senators for each State, directly chosen by the people of the State…’

Secondly in Section 24, which deals with the House of Representatives:

‘The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth…’

Commonwealth of Australia Constitution Act [Australia]

Therefore, although not directly making reference to democracy the Constitution implies that the two houses
of the Federal Parliament are to be selected by the people. Of course, there remains the question of ‘who are the people?’ On this note the Constitution remains silent and instead we need to turn our attention to the High Court.

Two relatively recent cases highlight the role of the High Court in this area. The first is *Roach v Electoral Commissioner* (2007) 233 CLR 162. This case was a challenge to a law that withdrew the right of prisoners to vote. In a majority ruling the High Court found that removing the right of all prisoners to vote was in contravention to sections 7 and 24 of the Constitution and struck down the application of the law to most prisoners. The second, *Rowe v Electoral Commissioner* (2010) 243 CLR 1 was a challenge to amendments to the electoral law that reduced the amount of time eligible people had to enrol to vote once an election was called. Again in a majority ruling the High Court found this was against the implied rights of the people.

The two cases above highlight the role of the judiciary in promoting and protecting the role of the people in determining the government. Some, including *Arcioni* (2014,) have gone further though and note that the High Court has taken the concept of implied freedoms well beyond that of voting rights. *Arcioni* argues that the Court has used the right of the people to choose the Senate and the House of Representatives to further imply that Australians have a right to freedom of political communication and freedom of speech. This was seen in the Court’s judgements in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and subsequently in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181. In these cases the Court ruled that the public needed free information in order to exercise an informed decision in electing officials.

As well as the notion of implied rights within the Constitution Australia has relied heavily on what have become known as constitutional conventions. These are also a feature of the UK constitutional system. In *Commonwealth v Kreglinger & Ferbau Ltd* [1926] 37 393, Sir Ivor Jennings noted that these conventions ‘… provide the flesh which clothes the dry bones of the law’ (cited Goss, 2015, p.2). These conventions are unwritten rules so they not legally enforceable, although, as in the case above, they can inform the judiciary in their rulings. As Goss notes breaking these conventions typically has more political rather than legal consequences. For example, the concept of ministerial responsibility is one that is central to the Westminster parliamentary system. Under this system a minister is expected to take responsibility for the actions of their departments and resign in the event of a serious problem. This is not written anywhere. It has become a convention, not a law, and those ministers who flout the convention are often dealt with harshly by political colleagues and indeed the media but not by the law.

The Australian Constitution therefore is a document that implies many of the rights we have come to expect. It is scant in detail and leaves much up to the development of conventions and the rulings of the judiciary. However, in a modern society is this enough? As discussed earlier most comparable nations have Constitutions that enshrine rights, including the key right of representative democracy. Hence a constant question in regards to the Australian Constitution is whether a bill of rights, or at least a charter of rights, should be added.

A bill of rights is a document that resides within the Constitution and contains the fundamental rights citizens have. The most famous is of course US Bill of rights. By being within the Constitution it far more stable and difficult to change. In contrast a charter it is developed by the parliament and is more akin to statutory law.

On two occasions the Australian Parliament has examined the idea of a Human Rights Bill – in 1973 and again in 1986. On both occasions it was soon abandoned and thereafter Australia has used a combination of International Law, common law and statute law to create a network of human rights protections.

Legal academic George Williams undertook an analysis of laws across Australia and in his 2016 paper he claimed to have found 350 instances of Commonwealth and state laws that infringed democratic rights and freedoms. These include laws, such as the 2014 amendment to the *Australian Security Intelligence Organisation Act 1979* (Cth), which relates to the disclosure of information significantly limiting investigative reporting on intelligence matters and is seen as a significant erosion of freedom of the press. State laws, like Tasmania’s *Workplace (Protection from Protesters) Act 2014* (Tas) have restricted rights around protesting. In a 2016 speech the Chief Justice of the NSW Supreme Court, Justice Bathurst, outlined many examples of where parliaments, through statute law have eroded specific rights. He noted that in the area of the presumption of innocence, perhaps the most fundamental of all legal rights in Australia, he was able to identify 52 examples where this right was encroached within NSW alone. He also noted 183 provisions within the statutes that encroached on the rights around self-incrimination. Therefore, the extent to which statute law has been effective in protecting human rights is, perhaps, thrown into doubt when considering these statistics.
The Convention on the Elimination of All Forms of Discrimination, to which Australia is a party, is monitored by the Committee on the Elimination of Racial Discrimination. In 2010 the Committee raised a concern that there is an absence of any real protections against racial discrimination in the Australian Constitution. In response the Australian Government pointed to the strength of statutory law in this area, for example the Racial Discrimination Act 1975 (Cth). However, as Charlesworth and Durbach (2011) pointed out in their analysis of the 2007 Northern Territory Intervention the strength of this Act is questionable.

The National Emergency Response Act 2007 (Cth) suspended the Racial Discrimination Act. This was done using Section 8 (i) of the Racial Discrimination Act which allows for the suspension as a special measure. At the time the then Howard Government argued that special measures were needed to manage Indigenous communities in the Northern Territory. The Response Act, and the use of Section 8, was highly controversial at the time. Many argued that this section was intended for use for positive reasons, for example, to allow for positive discrimination to address historical inequalities. The Act was repealed in 2010 and the normal operation of the Racial Discrimination Act returned to the communities in the Northern Territory. This episode casts further doubt on the extent to which statutory law can actually protect rights and freedoms. It is by its nature open to change.

This then brings us back to the notion of a Constitution that enshrines rights within it. In a 2008 speech Justice Patrick Keane, who was appointed to the High Court in 2013, spoke of the advantages of not having rights enshrined in the Constitution. He argues, for example, that if the framers of the Constitution had done so then principles around racial purity, as found in the White Australia Policy, would almost certainly have been included. He points out the framers of our Constitution understand that the country would face crises that could not be foreseen and that ‘those crises could only be resolved by the collective wisdom of the people of that time’ (p.2).

The Second Amendment to the United States Bill of rights illustrates this point. The amendment in full reads:

‘A well regulated militia being necessary to the security of a free state, the right to bears arms, shall not be infringed’.

The amendment was ratified in 1791. This was only a few years after the conclusion of the War of Independence during which Americans fought against British rule at a time when American independence remained very fragile. In this context the need for civilians to be armed so that they could form a militia and fight for freedoms seems not just reasonable but perhaps essential. Fast forward to the 21st Century, however, and the focus on the Second Amendment is on the second point – ‘the right to bear arms’. This is used by the powerful US gun lobby, such as the National Rifle Association (NRA) to argue against laws that limit the sale and ownership of guns across the US. This is despite it having massive rates of gun deaths. In 2017 there were 39 773 gun related deaths in the United States with nearly 15 000 being homicides (Mervosh, 2018). The likelihood of dying from being shot is statistically similar to dying from a car crash in the US. By way of comparison in Australia you are as likely to die from a falling building as you are from a gunshot wound (Quealy & Sanger-Katz, 2016). It is highly arguable whether the framers of the Second Amendment meant to enshrine a right to bear arms and to limit the power of authorities to regulate guns in such as scenario. As Justice Keane argues such a crisis would have been unforeseen to the drafters in 1791.

Williams and Reynolds, from the University of New South Wales argue that rather than a bill of rights, Australia should first turn to a charter of rights. This, they argue “… would have the advantage of flexibility: future parliaments would be able to update the charter as needed to match changing community values and expectations’ (p.2). This could in many ways be seen as a compromise position. It formalises many of the rights that Australians have come to assume they have without the inflexibility created by a bill of rights. However, there remains the issue, as seen by the Northern Territory intervention, a charter of rights could be changed, suspended or repealed by future parliaments.

The Australian Constitution is at its core a procedural document. It lacks specific references to democracy or the rights of citizens. However, in doing so it has created flexibility and allowed for the courts and parliaments to adopt the laws and grant the rights that reflect the will of society at that time. A charter of rights could be seen as an albeit imperfect compromise between the need to clearly enunciate and enshrine rights legally but to retain the opportunity for future generations to adapt and amend as needed.
Student activities

1. United States and Australian constitutions. Discuss what could be added to the Australian preamble to improve it.
2. The Australian Constitution was framed in a different context to those of the United States and Germany. Explain.
3. How is the division of powers in the Australian Constitution important for a healthy democracy?
4. What are inferred rights within the Constitution? How are these rights established?
5. Explain the significance of Roach v Electoral Commissioner (2007) and Rowe v Electoral Commissioner (2010).
6. What are constitutional conventions?
7. How are human rights protected in Australia? Discuss the advantages and disadvantages of this type of protection.
9. What problems may have ensued from having a bill of rights enshrined in the Constitution at the time it was originally written?
10. Do you think legislators in the US today would enshrine the right to bear arms today? Discuss.
11. Discuss the merits of a bill of rights compared to a charter of rights.

References


Commonwealth of Australia Constitution Act [Australia], 9 July 1900


Defining law reform

Law reform involves the progressive development of the law in order to ensure that law is fit for contemporary conditions. Law reform is often promoted or undertaken in response to the identification of gaps in existing law, or where defects are found in an existing law. It may also be required to make the administration of the law by courts and administrative bodies more effective, or to simplify overly complex law. Law reform is often concerned with enhancing access to justice for members of the community.

Who undertakes law reform?

Changes in the law in response to recommendations made by law reform bodies, is undertaken by the Commonwealth Parliament and all state parliaments. The most prominent law reform body in Australia is the Australian Law Reform Commission (ALRC), which acts on the request of the Commonwealth Attorney-General. The ALRC is an agency of the Commonwealth Government. Its role is to conduct inquiries and research before making recommendations for law reform. Over 85 per cent of ALRC reports have been implemented, in whole or in part. This is an admirable record, which demonstrates the value and effectiveness of the agency in contributing to the enhancement of Australian law.

Law reform agencies also exist in all seven states and territories. For example, the NSW Law Reform Commission is currently seeking submissions on the operation of suppression and non-publication orders and access to information in NSW courts and tribunals. The Queensland Law Reform Commission recently concluded an inquiry which then influenced law reform in relation to the termination of pregnancy. The Tasmania Law Reform Institute has recently accepted a new reference in relation to ‘jury trials, social media and fairness to the accused’.

The functions and powers of the ALRC under the Australian Law Reform Commission Act 1996 (Cth) are:

**Section 21: The Commission’s Functions**

(1) The Commission has the following functions in relation to matters referred to it by the Attorney-General:

(a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:

(i) bringing the law into line with current conditions and ensuring that it meets current needs; and

(ii) removing defects in the law; and

(iii) simplifying the law; and

(iv) adopting new or more effective methods for administering the law and dispensing justice; and

(v) providing improved access to justice;

(b) to consider proposals for making or consolidating Commonwealth laws about those matters;

(c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;

(d) to consider proposals for uniformity between State and Territory laws about those matters;

(e) to consider proposals for complementary Commonwealth, State and Territory laws about those matters.

(2) It is a function of the Commission to report to the Attorney-General on the results of any review or consideration it carries out under subsection (1), and to include in the report any recommendations it wants to make.

Section 25 The Commission’s powers

The Commission has power to do everything necessary or convenient to be done for, or in connection with, the performance of its functions.
Current law reform inquiries in Australia

In 2019, the ALRC is engaged in two major inquiries – one focused on the ‘framework of religious exemptions in anti-discrimination legislation’ and the other on ‘Australia’s corporate criminal responsibility regime’. The first of these responds to the Review of Religious Freedom, headed by former MP Philip Ruddock, which reported in 2018. According to Attorney-General Christian Porter, ‘It is essential that Australia’s laws are nationally consistent and effectively protect the rights and freedoms recognised in international agreements, to which Australia is a party. This particularly applies to the right to freedom of religion and the rights of equality and non-discrimination.’ The inquiry’s terms of reference are to consider what reforms should be made in order to:

• limit or remove religious exemptions to anti-discrimination laws, while also guaranteeing the right of religious institutions to conduct their affairs consistently with their religious ethos; and

• remove any legal impediments to the expression of a view of marriage as it was defined in the Marriage Act 1961 (Cth) before it was amended by the 2017 – reforms that legalised same-sex marriage.

The corporate criminal responsibility inquiry, as with the religious freedoms inquiry, is due to report in April 2020. It has been initiated to consider what reforms might enhance legal capacity to hold corporations accountable for criminal misconduct by individuals employed by or representing them. In requesting the inquiry, the Attorney-General noted the complexity of the existing regime and asked the ALRC to consider whether it could be reformed to both strengthen and simplify the law.

What is a Royal Commission?

Royal Commissions are the highest form of inquiry available in Australia on matters of public importance. Royal Commissions have some relationship to law reform inquiries, in that they also aim to examine contemporary matters of controversy and produce recommendations for reform. However, they are broader than law reform inquiries in that their recommendations may extend to a wide range of potential stakeholders and practises.

In Australia, the Governor-General acts on the advice of Cabinet ministers to establish Royal Commissions, by issuing what are known as ‘letters patent’. This power has rested with the Governor-General since federation, under the Royal Commissions Act 1902 (Cth). A commission may be established into any matter relating to the peace, order or good government of the Commonwealth, or any public purpose or power of the Commonwealth. It is clear from the following provisions of the statute that Royal Commissions have considerably greater powers than law reform inquiries, and are established in a quasi-judicial role for some purposes.

Powers of a Royal Commission
Royal Commissions Act 1902 (Cth)

Section 2 Power to summon witnesses and take evidence

(1) A member of a Commission may summon a person to appear before the Commission at a hearing to do either or both of the following:

(a) to give evidence

(b) to produce the documents, or other things, specified in the summons.

4 Search warrants

(1A) A relevant Commission may authorise:

(a) a member of the relevant Commission; or

(b) a member of the Australian Federal Police, or of the Police Force of a State or Territory, who is assisting the relevant Commission; to apply for search warrants under subsection (3) in relation to matters into which the relevant Commission is inquiring. The authorisation must be in writing.

6H False or misleading evidence

(1) A person shall not, at a hearing before a Commission, intentionally give evidence that the person knows to be false or misleading with respect to any matter, being a matter that is material to the inquiry being made by the Commission.

(1A) A person must not, in response to a notice given to the person under subsection 2(3C) in connection with a Commission, intentionally give information or a statement that the person knows to be false or misleading with respect to any matter that is material to the inquiry being made by the Commission.

(2) A contravention of subsection (1) or (1A) is an indictable offence and, subject to this section, is punishable on conviction by imprisonment for a period not exceeding 5 years or by a fine not exceeding 200 penalty units.
For what purposes have Royal Commissions recently been held in Australia?

Two particularly significant Royal Commissions reported between 2017 and 2019 – the Royal Commission into Institutional Responses to Child Sexual Abuse and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Both inquiries responded to widespread political and public outrage over highly controversial cases and severe damage to individuals and communities throughout Australia.

The inquiry into the role of societal institutions in child sexual abuse scandals was initiated by then Prime Minister Julia Gillard in 2013 and, when it reported in 2017, was hailed as a model of international best practice for dealing with highly emotive evidence from witnesses and very difficult calculations regarding the apportioning of responsibility for redress to victims. The Commission held 57 public hearings, heard from 8,013 witnesses in private sessions, and issued 189 recommendations to government, faith-based and other community organisations responsible for the care and wellbeing of children.

In October 2018, in response to a key recommendation of the Royal Commission, Prime Minister Scott Morrison delivered a national apology to victims and survivors of child sexual abuse. Another significant governmental response was the establishment of a National Redress Scheme for people who experienced institutional child sexual abuse. This scheme aims to hold institutions to account for the sexual abuse of children and provide help to survivors in the form of counselling and psychological services and a redress payment.

The Financial Services Royal Commission was established in 2017 and reported in February 2019. The inquiry, headed by former High Court Justice Kenneth Hayne, established that a number of banks and other financial entities had repeatedly charged consumers fees for no services, in some cases even after people had died. It found that some banks did not provide equal support to farmers for the content or smooth functioning of agricultural loans, resulting in farmers defaulting on loans. It raised significant concerns regarding the use and abuse of commissions by financial advisers and mortgage brokers.

The financial services inquiry received over 10,000 public submissions, heard from 130 witnesses over 68 days of hearings, and made 76 recommendations. Both the government and opposition have committed to fully implementing these recommendations, including by reforming the use of commissions, requiring mortgage brokers to act in the best interests of consumers, and tightening regulatory powers over the industry. The government has committed to establishing a compensation scheme of last resort for consumers who have fallen victim to bad behaviour by financial services institutions and their officers.

What recommendations have been made to reform the system of Royal Commissions and other inquiries?

In 2009, then Attorney-General Robert McClelland requested the ALRC to conduct an inquiry into whether the Commonwealth ought to develop an alternative form of inquiry to Royal Commissions, to enhance flexibility and cost-effectiveness and reduce formality. In its Report 111, the ALRC recommended a number of reforms, including:

• amendment of the *Royal Commissions Act 1902* (Cth) to an *Inquiries Act*, which would make provision for two tiers of inquiry – Royal Commissions and Official Inquiries

• the development of guidelines to help determine when a particular type of inquiry was most appropriate, including in terms of the level of public importance of the topic under review, the extent of powers an inquiry may require, and whether any recommendations are likely to influence government policy

• enabling Royal Commissions and official inquiries to refer a matter of law to the Federal Court for resolution.

Ten years on, however, the recommendations of this inquiry are yet to be implemented.

Conclusion

Law reform inquiries and Royal Commissions are important and consistently used tools for the maintenance and progressive development of Australian law. Their efforts often respond to matters of public concern and political controversy, and the Australian community relies on them to produce recommendations that lead to positive change. However, these inquiries rarely have the power to compel compliance, and the decision to implement recommendations is often dependent on political will or corporate interests. Members of the community can play an important role in pressuring governments and other societal organisations to follow sound advice from public inquiries and reports.
**Student activities**

1. Why does the law constantly need updating?
2. What is the role of law reform bodies? Do all reform bodies in Australia share the same understanding of what law reform means?
3. Do all law reform commissions in Australia follow the same process of acting on requests or referrals from the relevant Attorney-General?
4. Compile a list of a current or recently completed law reform inquiry in each state of Australia. Do the various jurisdictions share some common concerns or are the references quite different?
5. Explain the reasons behind holding an inquiry into the framework of religious exemptions in anti-discrimination legislation in Australia.
6. What is the purpose of the inquiry into corporate criminal responsibility in Australia?
7. What is your sense of how effective these two inquiries have been, the media coverage of these inquiries and whether any changes in the law will follow the inquiry according to their recommendations?
8. Investigate the Royal Commission into Institutional Responses to Child Sexual Abuse. Describe the processes that were used during this investigation. What is the aim of this Commission? List two recommendations that the Commission made.
9. Explain three activities that occurred as a result of this Royal Commission. Do you think the Royal Commission was successful in its aims?
10. Investigate the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. What processes were used in the conduct of this Commission? List two recommendations made by this Commission.
11. What is meant by the term ‘commissions by financial advisers and mortgage brokers’? How is this different from a Royal Commission?
12. Do you think there should be more Royal Commissions? Discuss the advantages and disadvantages of Royal Commissions.
13. Discuss the recommendations made by the 2009 inquiry into whether the Commonwealth ought to develop an alternative form of inquiry to Royal Commissions. Which of these recommendations do you think should be implemented? Give your reasons.
14. Can you identify current issues of controversy in the law or Australian society that justify either a law reform inquiries or a Royal Commissions?

**References**


Ben Mathews, ‘The Royal Commission’s final report has landed – now to make sure there is an adequate redress scheme’, *The Conversation*, 18 December 2019.


