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Australia’s system of government is one based on the idea of representative democracy. Representative democracy means that the authority of government is founded upon the will of the people. The will of the people is expressed in periodic and genuine elections. Voting in elections is by universal suffrage.

The crucible of Australian democracy is the Commonwealth Parliament. The Australian Constitution sets down the essential components of parliamentary democracy. The Parliament is comprised of the elected representatives of the people. The Constitution establishes a bicameral parliament, that is, a parliament that is comprised of two separate houses.

Section 24 of the Constitution provides that ‘the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth. Similarly, Section 7 of the Constitution provides that ‘the Senate shall be composed of senators for each state, directly chosen by the people of the state, voting...as one electorate’.

Australia has six states and two territories. Every state has its own parliament. With the exception of Queensland, state parliaments are also bicameral. Queensland’s parliament is unicameral, i.e. there is only one house of parliament in that state.

The Commonwealth Parliament exercises the Commonwealth’s legislative power. Legislative power means that it is the parliament that makes the nation’s laws. This is encapsulated in Section 1 of the Australian Constitution which provides that: ‘The legislative power of the Commonwealth shall be vested in a federal parliament which shall consist of the Queen, the Senate and a House of Representatives and which is called...The Parliament of the Commonwealth’.

Legislative power, defined formally, means that the Parliament has the power to create legal rights and duties, to alter existing laws, to impose taxation and to provide for the expenditure of public money. If then, we are to speak of making law in Australia our primary concentration must be on the structure and operation of the federal and state parliaments. My concentration in this article will be on law-making in the Commonwealth Parliament (also referred to as the Federal Parliament).

Law-making through parliament

So, how does a law get made through the Parliament? The process is complex but here are the key steps.

1. The original ideas for new laws are formulated. These may come from a diverse array of sources. They may come, for example, from government ministers, political parties, election platforms, parliamentary committees, individual parliamentarians, government departments, law reform commissions, pressure groups, media organisations, industry lobby groups, trade union organisations, universities and civil society organisations of all different kinds.

2. Ministers will take ideas that have been proposed and request their departments to work up detailed proposals about how the ideas might best be implemented and embedded in legislation. The minister and department will then work up a Bill (draft law) for the consideration of the federal cabinet. The cabinet is the body that sits at the apex of government and is comprised of the ministers in charge of the most important departments of state.

3. The cabinet will accept or reject a recommended draft law. If accepted, a draft law will then be sent to the Office of the Parliamentary Counsel for final checking and proper legal wording.

4. The responsible minister then presents the bill to the parliament for its first reading. At the first reading, the bill is distributed to all members of parliament for consideration.

5. The bill is given a second reading. This is the most important stage of the parliamentary law making process. Upon a second reading, the relevant Minister makes a speech explaining the purpose, general principles and the content of the proposed law.

6. There is a second reading debate. In this debate, members of parliament have the opportunity to provide arguments about why the bill should be supported or opposed. Amendments to the provisions of the bill may also be proposed.

7. When the bill is complex and detailed, it may be referred by the House to a parliamentary committee for further consideration and recommendation.
8. Once finalised, the bill is read a third time.

9. A vote on the bill is taken in the House of Representatives and if passed, the bill is sent to the Senate for review. The Senate may propose further amendments to the bill and will take a second, final vote.

10. If the bill has been passed by both houses of parliament, it is then presented to the Governor-General for final assent. When final assent is given, the bill becomes law as an act of the parliament.

Against that background, we may now consider some important issues and problems that may sometimes arise during the parliament’s law making process.

The Australian Constitution

The first of these issues relates to the Australian Constitution. The Constitution, adopted in 1901, is the nation’s supreme law. It establishes the key institutions of government, the Commonwealth Parliament, the executive and the judiciary and defines their respective powers. It demarcates the powers of the Commonwealth and state governments. It establishes a limited number of democratic and legal rights. The Constitution provides the source and authority for the exercise of public power and circumscribes the limits of that power.

The idea of limits on power is highly significant for law-making. This is because no law passed by the Commonwealth Parliament may be legislated inconsistently with the terms of the Constitution. It is for the judiciary to determine whether or not a law of the Parliament transgresses constitutional limits. If, for example, the Parliament adopts a law that lies outside the powers of the Commonwealth and state governments. It establishes a limited number of democratic and legal rights. The Constitution provides the source and authority for the exercise of public power and circumscribes the limits of that power.

Parliamentary deadlock

A second problem may arise when there is a disagreement between the two houses of parliament. The House of Representatives may pass a law, but upon its arrival in the Senate, it may be rejected. A parliamentary deadlock may result.

The Constitution provides a complex method for the resolution of such deadlocks. Three months after the Senate’s first rejection of the law, the House of Representatives may once again present it for Senate approval. Then, if the Senate still refuses to endorse the law, the Governor-General may dissolve the House of Representatives and the Senate simultaneously. If, after such a double dissolution, the House of Representatives again passes the proposed law and the Senate rejects or fails to pass it, the Governor-General may convene a joint sitting of both houses of parliament. At the joint sitting, all members may vote on the law and if it passes with an absolute majority of the members present, it will be taken to have been duly passed by both houses of parliament and become law.

Minor parties and independents

A third, more recent problem with parliamentary law making has arisen. Public confidence in the two major political parties, the Liberal-National party and the Labor party has progressively ebbed away over the last decade or so. One consequence of this deterioration of confidence, is that a number of minor parties have been formed, and increasing numbers of representatives of such parties have been elected to the House of Representatives and, even more so, to the Senate. The Greens, One Nation, the Centre Alliance, and some high profile individuals like Derryn Hinch and Kerryn Phelps have been the principal beneficiaries of this change in the political landscape (the latter two no longer sit in parliament). In principle there is nothing wrong with such a development.

The problem arises, however, when neither of the major political parties has a majority of members in either house, meaning that the balance of power may be held by a minor party, or even by one or two individuals. This gives a small minority party or a very few individuals inordinate powers within the legislature. This is because no law can then pass the parliament without their approval.

That has the effect of skewing democratic process and power away from majorities and towards minorities. And sometimes the minorities have garnered only a very small number of overall votes. Some members of the Senate, for example, have been elected with not much more than 1% of the votes in their State. That, in turn, suggests that a reform of the voting system for the Senate should be considered. Accordingly, no party should be capable of election unless it has received a minimum of 5% if the overall votes cast in a Senate election for each state. A situation in which only two to or three members of a House of Parliament can exercise an effective veto over proposed legislation is clearly undesirable, especially if a senator received about 1% of the vote.
Role of citizens in the development of the law

What then, finally, is the role that citizens can play in the development of the law? As foreshadowed earlier there are a number of constructive avenues through which citizens can play an active role in law-making. Let me list just some them.

Obviously the Commonwealth Parliament and state parliaments are the principal form through which laws are made. So, a citizen's first approach in advocating for change in the law could be to their local member of parliament. Each member of the House of Representatives is responsible for his or her electorate. That means members must be alert to the concerns of the people who live in the electorate and they are, in addition, ultimately accountable to their constituents at elections. So, members of parliament are always keen to take the pulse of their electors and take action on their behalf.

Another way of approaching the parliament is through its parliamentary committees. The Commonwealth Parliament has a series of important committees which oversee the content and operation of every aspect of parliamentary work. Through their inquiries, committees contribute to better and more informed parliamentary deliberations and debates. They help members to access a wide range of expert and community views so that parliament becomes more knowledgeable about the community’s issues and attitudes. Committees also provide a forum in which citizens can participate and advocate for changes in laws and policies whether through individual submissions or through an invitation to appear in person.

Of course, joining a political party can be an effective way to participate in politics and policy. Through local, state and federal branches, political parties are constantly involved in examining contemporary economic and social issues, and proposing new policies and legislative initiatives to address important matters of widespread community concern. Through their branches members can contribute to the development of the political platforms that their chosen parties present to the community at federal elections. These platforms set the stage for the electorally successful party’s political, economic, social and cultural program throughout the next term of government.

Law reform commissions are a very important source of thoughtful recommendations for making new laws. There are law reform commissions in every state and federally. They are comprised of eminent judges, lawyers, academics and experts in fields in which a commission has a special interest.

When a government determines that it needs expert and detailed advice as to a complex matter of significant community concern that requires legal change, it will often refer the matter to a law reform commission for advice and recommendation. The advantage of such referrals is that the commission can examine an issue in detail, for example, the law with respect to homicide, and can take the time necessary to formulate new and innovative recommendations for change to relevant legislation. Law reform commissions normally proceed by way of public inquiries and these, in turn, provide a forum and opportunity for interested citizens to inject their own views as to the desirable direction for reform.

Finally, citizens interested in effecting changes to the law can join and participate in any number of civil society organisations. So, for example, anyone interested in policies with respect to refugees and asylum seekers could choose to volunteer at the Refugee Council of Australia, the Asylum Seeker Resource Centre, Refugee Legal, and the Victorian Foundation for the Victims of Torture, as well as any number of smaller organisations providing services to refugees from every different part of the world.

Organisations such as these carry considerable weight with the Commonwealth Parliament because they take their positions and recommendations directly from their experience in dealing with refugee children and families on the ground. This intensive involvement forms the basis for expert and humane advice to be provided to parliamentary law makers whenever the rights and the welfare of this particularly disadvantaged group are to be considered, and legal reform is desirable. Participation in these kinds of organisation can be valuable, rewarding and influential.
Student activities

1. In what way is Australia a representative democracy. Explain.
2. What is a bicameral parliament?
3. Explain how senators are elected.
4. What is legislative power?
5. Think of an existing law that may need changing or a new law that may need to be made. Who do you think you would approach to try to convince them to include your suggested changed in their legislative program? Give reasons for your choice.
6. Explain the role of the federal cabinet.
7. Which is the most important stage of a bill’s passage through parliament? Explain.
8. After the bill has passed the House of Representatives and Senate, what steps must be taken before the bill becomes law?
9. Create a simple flowchart of the processes of developing and passing a bill through parliament.
10. How is the Australian Constitution relevant to the passing of a law through the Commonwealth Parliament?
11. When could a deadlock arise between a state parliament and the Commonwealth Parliament?
12. Explain a possible resolution to such a deadlock.
13. Explain a negative aspect of the rise of independents and minor parties in the House of Representatives and the Senate.
14. Why do you think members of parliament are keen to hear from people in their electorate?
15. Why might a concerned citizen approach a parliamentary committee? Explain.
16. Do you think it would be a good idea for a politically motivated person to join a political party? Discuss.
17. Why do you think law reform commissions are an excellent way of investigating a suggested law reform?
18. What path would you take if you wanted to help the plight of refugees in detention centres?
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. The United States Constitution begins: ‘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 the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.’

The Basic Law of Germany begins: ‘Conscious of their responsibility before God and men, moved by the purpose to serve world peace…’

The French Constitution invokes the: ‘…Rights of Man and the principles of national sovereignty…’

Historical context of the Constitution

Australia’s Constitution contains no such ambitious preamble. It is far more benign and procedural. Similarly, it contains scant references to individual rights. This is in stark contrast to other such documents. The first article of the French Constitution for example 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?

Division of powers and separation of powers

Two principles lie at the core of Australia’s Constitution – the division 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 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.

Implied rights

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, that 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 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.

**Constitutional conventions**

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). Conventions are unwritten rules and therefore not legally enforceable, although as in the case above, their rulings can inform the judiciary. 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 ministers are expected to take responsibility for the actions of their departments and resign in the event of a serious problem. This is not written anywhere, however. Instead it has become a convention but 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.

**Bill of rights**

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 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 of rights is developed by the parliament and is more akin to statutory law.

On two occasions the Commonwealth 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 that significantly limits investigative reporting on intelligence matters and is seen as a significant erosion of the 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 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 Commonwealth 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 National Emergency 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 implies 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 understood 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’.
Student activities

1. Compare and contrast the preamble of the Australian Constitution to that of the United States Constitution, the Basic Law of Germany and the French Constitution.

2. Why was the Australian Constitution an act of the British Parliament?

3. Investigates what rights are guaranteed under the Australian Constitution.

4. How do you think the historical background of each constitution would have made a difference to its contents?

5. Explain the importance of the division of powers and the separation of powers in relation to democracy and our political system.

6. How does the Constitution indicate that our parliamentary system must be a democracy?

7. Explain the significance of the following two cases to the right to vote, *Roach v Electoral Commissioner* (2007) and *Rowe v Electoral Commissioner* (2010).

8. Investigate the case of *Lange v Australian Broadcasting Corporation* (1997) and explain how this case is relevant to freedom of political communication and freedom of speech.

9. Explain constitutional conventions and how ministers might be forced to follow them.

10. What is the difference between a bill of rights and a charter of rights?

11. Why you think statute law may not be fully effective in protecting rights? Give examples of areas where some rights have been infringed.

12. Discuss how the Intervention of the Northern Territory by the Commonwealth cast further doubt on the extent to which statutory law can actually protect rights and freedoms.

13. Do you think that if more rights had been included in the Constitution, more problems could have arisen? Discuss. In your discussion comment on the US right to bear arms.

14. Does Australia need a bill of rights, do you think a charter of rights would be more effective in protecting the rights of Australians or should the rights of Australians continue to be protected by a broad scattering of legislation as is the current situation. Explain and discuss.

References


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


