

Citizenship and the protection of rights in Australia

- 6.1 This chapter summarises the roundtable discussions on citizenship and mechanisms for the protection of rights in Australia. It outlines:
- the constitutional basis of Australian citizenship and legislative arrangements that further define its scope;
 - the key issues raised at the session on citizenship and rights; and
 - the main mechanisms for the protection of rights in Australia, and the adequacy of those mechanisms including:
 - ⇒ the need for a Bill of Rights; and
 - ⇒ the merits of possible models of a Bill of Rights.

Citizenship and the Australian Constitution

- 6.2 In its broadest sense, citizenship refers to membership of a political community and can include both formal legal aspects and symbolic aspects of identity and belonging. Citizenship is associated with the protection of civil, political and social rights, such as the right to vote, freedom of association and freedom of speech.
- 6.3 The terms of citizenship in Australia are based on a mix of limited constitutional provisions, specific legislation and the common law system. Reflecting the prevailing values of its drafters, the Australian Constitution does not directly refer to citizenship, but rather to 'subjects of the Queen' (for example, at section 34).

6.4 The most relevant constitutional provisions directly concerning citizenship:

Section 44:

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Section 117:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

6.5 At section 51 (xix) the Constitution also provides for the Commonwealth to make laws about naturalisation and aliens. This section is generally understood to imply a nationhood power to define who may be a citizen. The Constitution does not prevent the Parliament from imposing a citizenship test for native-born Australians.¹

6.6 In other sections the Constitution does recognise membership of the Australian community in a variety of ways. Sections 7 and 24, which set out the composition of the Senate and the House Representatives, refer to 'the people of the State' and 'people of the Commonwealth' respectively.

6.7 The Constitution does not provide any clear definition of citizenship. As Professor Rubenstein outlined, most provisions use an inherently exclusionary approach to define who is a member of the community:

Those who were not British subjects were aliens, and it is that terminology around which our Constitution revolves in terms of membership. It is a point that I think continues to be significant in public policy and the discussion about membership of the Australian community. Its source is very much in the fact that membership is defined in a negative

1 Some Members noted that such a test for native-born Australians could result in citizenship being denied. However, some Members doubted whether the High Court would interpret the Constitution in this way. See *Transcript of Evidence*, pp. 80-81.

sense, through alienage, rather than through a positive statement of who we are as an Australian people and who the Australian Constitution speaks to in terms of membership of the Australian community. I think that is something that is really deserving of serious attention and change.²

Citizenship legislation

- 6.8 The legal category of Australian citizenship was first established by the Commonwealth through the *Nationality and Citizenship Act 1948*. That Act was since been reviewed and replaced by the *Australian Citizenship Act 2007*.
- 6.9 Professor Rubenstein explained how the machinery of citizenship law is linked to immigration policy rather than defining what citizenship should mean for all.³ Professor Blackshield agreed with this analysis, commenting that 'our citizenship law, such as it is, has been the tail wagged by the immigration dog'.⁴
- 6.10 The lack of defining provisions on citizenship in the Constitution has given the Commonwealth significant power in this area. As Professor Rubenstein explained:
- If we think about the current framework of the rights we attribute to citizenship, they are rights that come from legislation. So the Electoral Act is the act that gives citizens the right to vote and of course the duty to vote. It is the Migration Act that gives citizens the right to free entry in and out of the country. But those are legislative rights that can be changed.
- 6.11 Participants at the roundtable discussed whether the definition of citizenship should be incorporated in the Constitution. This is considered further in the following section.

Issues and possible areas for reform

- 6.12 The Individual Rights Committee of the 1988 Constitution Commission recommended inclusion in the Constitution of a section that stated:

2 Professor Rubenstein, *Transcript of Evidence*, p. 73.

3 Professor Rubenstein, *Transcript of Evidence*, p. 76.

4 Professor Blackshield, *Transcript of Evidence*, p. 79.

All persons who are:

- born in Australia;
- natural born or adopted children of an Australian citizen;
- naturalized as Australians

are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.⁵

6.13 However the Commission did not support this recommendation, as Professor Zines outlined:

[T]he Constitutional Commission deliberately rejected the individual rights committee's recommendation of defining 'citizenship' in the Constitution for the very reason that changes were being made and other changes could be made to citizenship. The commission said that before it could agree to a provision that had been recommended by the committee it would have to indicate very clearly to what extent that would override existing law. It decided that it would be undesirable.⁶

6.14 While some participants expressed concerns about the inclusion of a definition of citizenship in the Constitution, there was support for the use of the term. Professor Zines commented:

I certainly would be opposed to defining citizenship, but I think it would be a good idea to change 'subject of the Queen', wherever it appears, to 'Australian citizen' because it is confusing to people.⁷

6.15 It was noted that Australian citizens lacked a constitutionally protected right to return to the country. Professor Rubenstein explained:

[I]n argument before the High Court recently, the Solicitor-General was making the point that it would be within the power of the Commonwealth to restrict Australian citizens from re-entry into Australia, if the parliament so determined. In other words, there is no protection of that

5 Professor Rubenstein, *Transcript of Evidence*, p. 76.

6 Professor Zines, *Transcript of Evidence*, p. 78.

7 Professor Zines, *Transcript of Evidence*, p. 77.

fundamental right that I think most of us would agree citizens have – that is, to live in their country of citizenship.⁸

6.16 Professor Blackshield advised that such a provision was part of a proposed Bill of Rights in the 1980s.⁹

6.17 It was also observed that the rights of non-citizens or ‘aliens’ are not well protected. Many people reside in, positively contribute to and shape the Australian community for long periods without obtaining formal citizenship. Professor Rubenstein suggested that current arrangements can discriminate against resident non-citizens who have a substantial connection with Australia:

A good example in terms of current public policy, of course, is those individuals who have lived all of their lives in Australia – one case involved someone who was 27 days old when he came to Australia – but have the potential to be removed from Australia by virtue of the fact that they have not taken out formal citizenship. There is a question of whether those are appropriate rights standards that should apply within a constitutional understanding of membership of the community.¹⁰

6.18 In some circumstances, however, the different treatment of non-citizens may be appropriate. According to Professor Saunders, while it may be reasonable to deny non-citizens the right to vote in elections:

... once you start moving into other areas like detention, for example, I think you should look at other sorts of rights to create those safeguards.¹¹

6.19 Participants also discussed the need to link the concept of citizenship with rights in the Constitution. Professor Saunders stated:

I would favour a clear statement of the basic democratic rights of Australian citizens in the Constitution and the creation of a constitutional status of Australian citizen. I am actually less fussed about defining the basis of citizenship. I

8 Professor Rubenstein, *Transcript of Evidence*, p. 76.

9 Professor Blackshield, *Transcript of Evidence*, p. 78.

10 Professor Rubenstein, *Transcript of Evidence*, p. 73.

11 Professor Saunders, *Transcript of Evidence*, p. 81.

would probably be happy to do that too, but, as long as the status was there and the rights attached to it were there ...¹²

- 6.20 In the view of Professor Charlesworth, it is not necessary to entrench any more than the most basic rights (such as the right to vote) in the Constitution. In her view, rights need not be tied to citizenship because rights have a universal quality and should not be restricted to national boundaries:

One issue is that human rights as expressed at the international level are not tied to citizenship, generally speaking. It seems to me that one way into this argument – this is an international way of speaking – is to just talk about the simple fulfilment of our international obligations.¹³

- 6.21 This issue of the protection of rights in Australia is considered in more detail in the sections below.

The protection of rights

- 6.22 The Constitution is limited in terms of the elaboration and protection of rights. Governments and courts provide the primary means of establishing and protecting rights in Australia. Professor Rubenstein noted:

[W]ithin our constitutional structure there is no protection of rights that we think of as inherent in citizenship. Similarly, it is open to discussion as to how well voting rights are protected in the Constitution. So basic rights that we think of as civic and citizenship rights are not in our constitutional document. If we look at the rights that are in the document – and the point has been made several times – this Constitution was not framed within the context of thinking about the protection of rights by constitutions.¹⁴

- 6.23 Professor Charlesworth noted that the right to vote in particular was seen as an issue of some importance for inclusion in the Constitution:

The one thing that I think we do need in the Constitution in terms of rights is the right to vote. I think that is a great flaw

12 Professor Saunders, *Transcript of Evidence*, p. 79.

13 Professor Charlesworth, *Transcript of Evidence*, p. 82.

14 Professor Rubenstein, *Transcript of Evidence*, p. 75-76.

in the Constitution. If you think about it, that is the most fundamental right that the whole Constitution should hang off – the whole notion of the people, the whole notion of representative government, the notion of responsible government.¹⁵

- 6.24 According to Professor Behrendt, the key test of a Constitution is how well it protects less privileged members of society:

I firmly believe that, when we talk about considering whether or not the Constitution works, the test we should apply is how it works for the poor, the marginalised and the culturally distinct and historically disadvantaged. If it does not work for that most vulnerable sector of the community then we have to question how good it is. It is not good enough if constitutions work well for members of the middle class ...¹⁶

- 6.25 Similarly, Professor Blackshield expressed concerns about the lack of protection of the rights of minority groups:

I have a fundamental problem with a constitution that does not guarantee rights, especially the rights of minorities, because, for me, a society that does guarantee those rights is an essential part of my concept of democracy.¹⁷

- 6.26 Roundtable participants also debated the merits of a Charter or Bill of Rights, among other mechanisms, to enshrine the protection of rights in Australia.

A Bill of Rights for Australia?

- 6.27 A Bill of Rights is generally understood to be a declaration of certain rights, freedoms and protections afforded to citizens. Unlike many other comparable liberal democracies such as the United Kingdom, the United States and New Zealand, Australia does not have a Bill of Rights.

- 6.28 Since the 1890s there has been considerable debate in Australia over the need for a constitutional or statutory protection of rights. The omission of a Bill of Rights from the Constitution was a deliberate decision taken by the drafters, predominantly on the basis that it would undermine state autonomy. It was also thought that a 'due

15 Dr Twomey, *Transcript of Evidence*, p. 86.

16 Professor Behrendt, *Transcript of Evidence*, p. 78.

17 Professor Blackshield, *Transcript of Evidence*, p. 79.

process' provision would undermine some of the racially discriminatory colonial laws in place at that time.¹⁸

- 6.29 Various models for a Bill of Rights have been considered in Australia. Debate has centred on whether the instrument should be entrenched in the Constitution and binding on all governments, or established through government legislation and, as such, subject to amendment by the government of the day.
- 6.30 A constitutionally entrenched Bill of Rights is significantly more robust, as it can only be amended by referendum. However, the difficulty in amending an entrenched Bill of Rights can lead to the document becoming outmoded, and not reflective of modern values. A Bill of Rights established through legislation is easier to implement and amend but can thus be altered by governments when convenient.¹⁹ Both Victoria and the Australian Capital Territory (ACT) have established their own Charters of Rights through the legislative approach.²⁰
- 6.31 Professor Charlesworth noted that in relation to the ACT rights legislation, the real effect has been on the operation of the bureaucracy. The legislation requires the ACT public service to consider the protection of human rights, which are essentially those in the Covenant on Civil and Political Rights, in the development of any policy and in the development of legislation.²¹
- 6.32 Professor Charlesworth described the benefits of the ACT approach:
- [T]here have been very lively debates within the bureaucracy about whether particular policy proposals are actually consistent with human rights. In fact, I think it has had quite a positive effect in that it has made the executive arm of government really scrutinise its plans. Some of the wilder rushes of blood that occasionally come to the head of elected

18 H Charlesworth, 'Who Wins Under a Bill of Rights?', *University of Queensland Law Journal*, vol. 25 (1), 2006, p. 39; The Hon. David Malcolm, 'A Human Rights Act for Australia', *Australian Law Review*, University of Notre Dame, Vol. 8, 2006, p. 20.

19 There has been a great deal of literature produced on the need for, and possible models of, an Australian Bill of Rights. For example see, G Williams, *A Bill of Rights for Australia*, University of New South Wales Press, 2000.

20 See *Charter of Human Rights and Responsibilities Act 2006* (Victoria), *Human Rights Act 2004* (Australian Capital Territory).

21 Professor Charlesworth, *Transcript of Evidence*, p. 89.

governments about a quick, knee-jerk response to a particular problem have had to go through a human rights filter.²²

- 6.33 Professor Behrendt was also supportive of the ACT legislation on rights, and noted its broad implications for policy development:

The more you get into it, even a simple piece of legislation ... can have huge impacts on people ... I was amazed that a simple piece of legislation like the transportation legislation could have such a large interaction of basic human rights. It provided a very good example of the very important role that a charter of rights can play. It can also give many of us comfort that middle-level bureaucrats go through the process when they draft legislation of thinking how to make it compliant with simple things like due process before the law.²³

- 6.34 Professor Blackshield emphasised that the Bill of Rights was important as just one instrument in a spectrum of protections:

We have a whole variety of instrumentalities for protecting human rights. One of the most effective is the work that individual members of parliament do on behalf of their constituents. This is a very important function. But the proponents, such as I, of a bill of rights are not saying we should have a bill of rights instead of those other things; we are saying there is room for this protection too, as part of the whole panoply of protections of human rights.²⁴

- 6.35 However some roundtable participants expressed reservations about the role of judges in interpreting any Bill of Rights. Professor Craven explained:

[I]t fundamentally offends my notion of democracy, which says that basic policy decisions are going to be made by people who are elected and electorally accountable. That lets out the judges, and I do not buy it ... I just do not think the judges are competent to do it. I do not see why I would place confidence for fundamental policy decisions and rights decisions in a group of people awfully like myself and the

22 Professor Charlesworth, *Transcript of Evidence*, p. 91.

23 Professor Behrendt, *Transcript of Evidence*, p. 91.

24 Professor Blackshield, *Transcript of Evidence*, p. 85.

rest of us who have not been trained in that position and have no particular claims to serve as social arbiters.²⁵

6.36 In a similar vein, Professor Flint stated:

What I find difficult is that I think [interpretation of the Bill of Rights] gives the judges a political role which is inappropriate for the judiciary. It is almost at times a corrupting role.²⁶

6.37 Professor Flint also noted that even a constitutional Bill of Rights can be breached, citing the example of the internment of United States citizens of Japanese descent during the Second World War.²⁷

6.38 In contrast, Professor Behrendt argued the appropriateness and capability of judges to deal with the complex issues that a Bill of Rights might raise:

I know there is a strong argument against the entrenchment of rights because of the role the judiciary plays in deciding them, but I think that argument sits very curiously beside the fact that every day our courts make really important decisions about our rights – for example, the rights of a custodial parent against a non-custodial parent.²⁸

6.39 Professor Craven considered judicial review as inevitable:

If you have a statutory bill of rights and you have judicial review, I think it is reasonable that people are going to focus quite strongly on the courts. There is nothing you can do about that. Whenever I hear that nothing has gone wrong in the ACT and nothing has gone wrong in Victoria, my response is: 'Yet'. We have not had enough time to see how that goes.²⁹

6.40 While there are some clear arguments against a statutory Bill of Rights for Australia, its introduction could serve as a test for rights provisions before these are enshrined in the Constitution, which is harder to amend. Professor Blackshield supported a constitutional Bill of Rights, but accepted that:

... what you should have is a statutory bill or charter first.
The theory is that it would operate for 10 years or so and then

25 Professor Craven, *Transcript of Evidence*, p. 82.

26 Professor Flint, *Transcript of Evidence*, p. 86.

27 Professor Flint, *Transcript of Evidence*, p. 86.

28 Professor Behrendt, *Transcript of Evidence*, p. 81.

29 Professor Craven, *Transcript of Evidence*, p. 92.

you would put it into the Constitution, partly so that the community has experience of how it is working and to see that some of the threatened, horrible consequences do not in fact ensue; and partly so that when judges do make mistakes in interpreting it, the parliament has an opportunity to correct the mistakes before you put it into the Constitution.³⁰

Committee comment

- 6.41 It is the view of the Committee that some of the language of the Constitution, especially the references to subjects of the Queen, is not reflective of the contemporary approach in Australia.
- 6.42 The concept of citizenship and the rights of both citizens and those residing in Australia are key issues for the Australian community. This raises the question as to the purpose of the Constitution and whether it is appropriate for it to include a concept of citizenship.
- 6.43 It was not the original intention of the Constitution to articulate a concept of citizenship, nor to specifically protect the rights of those residing in Australia. As a consequence some Australians believe that the current Constitution ties Australia to a historical foundation rather than contributing to building a nation for the future.
- 6.44 Even in terms of meeting its original intention, there appear limitations to the Constitution in its current form. Primarily the Constitution sets out the federal-state powers and responsibilities, and establishes the governance structures for Australia. However, as the roundtable and debates elsewhere have demonstrated, some of these provisions now appear outmoded and can even impede the coordinated national management of key issues.

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30 Professor Blackshield, *Transcript of Evidence*, p. 85.

