



Unit 10: Rights and freedoms in the Australian Constitution – Year 8 - C & C Strand: Citizenship, Identity & Diversity

Topic 8.2: Rights and Freedoms in the Australian Constitution

Our constitutional rights and freedoms? Why did the 1988 referendum to extend them fail?

The Commonwealth Constitution contains very few rights. The people who wrote it considered including some rights from the United States Bill of Rights but dropped most of them as they did not want to entrench phrases in the Constitution, such as due process and equality before the law, when they could not be sure how they would be interpreted in the future.

The few rights that were included were mostly applied as limitations on Commonwealth power – not the States. The three key ones were:

- freedom of religion in section 116;
- the right to trial by jury in section 80; and
- the right in section 51(xxxi) to receive just terms compensation if your property is compulsorily acquired under a Commonwealth law.

All of these rights have been qualified by the courts and given a relatively narrow interpretation.

The 1988 referendum

The referendum question dealt with three different rights within the one question. This meant that if voters objected to one bit of it, such as the freedom of religion provision, they then voted against the entire question, even though they would most likely have been in favour of receiving fair compensation if their property was compulsorily acquired.

Trial by jury: The current guarantee in section 80 of the Constitution of trial by jury for offences against Commonwealth laws only applies to certain types of offences, known as 'indictable offences' (being the more serious ones). One easy way of avoiding the application of the right to trial by jury is to classify an offence as not being an indictable offence.

The proposed constitutional amendment would have removed this issue by instead applying the guarantee of trial by jury to any offence where the person accused is liable to imprisonment for more than two years or any form of 'corporal punishment' (being physical punishment such as whipping or execution). It would therefore have ensured that the words of the section give better effect to its purpose.

The proposed amendment would also have extended the guarantee to offences against State or Territory laws (ie most criminal offences). But it would still have allowed the enactment of legislation to permit the accused not to take up the right to trial by jury and have a trial by judge alone instead (which is something that an accused may wish to do if he or she thinks in the circumstances that a jury would be likely to be prejudiced).

It would also have allowed laws to alter the size or composition of the jury and permit majority verdicts (eg a verdict by 10 out of 12 jurors, where the jury cannot otherwise agree).

Existing exceptions from trial by jury, such as the holding of a court-martial for the discipline of the Defence Forces and the power of a House of Parliament to find a person guilty of contempt of Parliament, were to be maintained.



Poster promoting the film
The Castle (1997)
 Source: Wiki Commons

Fair compensation for acquired property:

Section 51(xxxi) of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws about acquiring property from a State or a person, but says that just terms (i.e. fair compensation) must be applied.

For example, the Commonwealth might compulsorily acquire your house because it wants to build or expand an airport, but it must fairly compensate you for it (see the film *The Castle* where a family challenged the compulsory acquisition of their home in the High Court).

This constitutional guarantee applies not only to the compulsory acquisition of land, but also things (eg a boat), animals (eg a flock of sheep) or certain types of rights (eg the right to occupy land, or possess or use property, or an existing entitlement to compensation for being injured). It currently only applies at the Commonwealth level.

While a State will normally compensate people if it legislates to acquire their property, it is not forced by the Constitution to do so. This amendment would have meant that a law of a State or a Territory may not permit the acquisition of property from any person except on just terms.

Freedom of religion: Section 116 of the Constitution says that the Commonwealth Parliament cannot make any law for establishing a religion or imposing a religious observance or prohibiting the free exercise of a religion, and that it cannot impose a religious test for any Commonwealth office.

This proposed amendment would have expanded this provision so that it also applied to State and Territory laws. Such an extension had previously been proposed in the 1944 referendum (along with granting many powers to the Commonwealth) but it had failed.

The Yes and No Cases

The Yes case argued that these amendments would protect the right of Australians to trial by jury, freedom of religion and ensure that they get fair compensation if their property is acquired by a government. It argued that the amendments were about ensuring these rights are exercised consistently throughout Australia by all levels of government.

In relation to freedom of religion, which was the most controversial issue, the Yes case said that the proposed amendment would not prevent government aid to religious schools or hospitals, as the High Court had already ruled that this was permitted by existing Commonwealth laws. It also said that this religious freedom was not absolute and could not be used to commit harmful acts in the name of religious beliefs or to breach the normal laws of civilized behaviour.

The No case, however, argued that passing this amendment would open up old conflicts about providing government funding to religious schools. By changing the way the provision is drafted, especially removing the word 'for' which showed the intended purpose, the amendment would strip away the very words the High Court had relied upon to permit government funding to religious school. It would add uncertainty and potentially threaten existing religious rights. On the other hand, it could also open the way to religious sects, which were involved in extreme practices, arguing they were protected by the Constitution.

The No case also argued that defining rights potentially limits and weakens them and they could end up the subject of endless legal challenges as happens in America. Many religious bodies came out in support of the No case, causing it to fail.



The High Court of Australia (HCA)
Source: HCA

The Proposal

A proposal to guarantee the rights to trial by jury, freedom of religion and just terms for the acquisition of property at the state level.

The results

The referendum failed overall and failed in all States:

	NSW	Qld	SA	Tas	Vic	WA	Total#
For	965,045	503,217	223,038	70,987	816,057	233,917	2,892,828
Against	2,289,645	1,027,218	634,438	207,486	1,625,484	597,322	6,503,752
Informal*	42,556	11,858	16,035	4,312	49,642	13,970	141,145

#Total includes Territory votes. * Informal votes are not counted in determining majorities.





Topic 8.2 Lesson/ Activities: One

Rights and freedoms under the
Constitution



AUSTRALIAN
CONSTITUTION
CENTRE

Time/Lesson

- 1 hour/ 1 Lesson

Learning Goal

- To identify rights and responsibilities in rule books, ranging from school rules to Constitutions.
- To explore the Magna Carta as an early source of rights and freedoms.
- To understand that certain freedoms are required for a democracy to function.
- To understand the rights provided in the Australian Constitution.
- To understand why there are few rights in the Australian Constitution and why voters failed to extend those rights in the 1988 referendum.

Rationale

Students should understand the importance of rights and responsibilities in participating in democracy and the contribution the Constitution makes to enabling this participation in Australia.

Success Criteria

Students can articulate the importance of rights and responsibilities in participating in democracy. Students will be able to explain and justify reasons concerning whether the rights and freedoms should be included in the Constitution or left to Parliament.

Teaching Reference Document

- TRD 80: Our constitutional rights and freedoms? Why did the 1988 referendum to extend them fail?

Resources

- A copy of your class or school's rules (see Topic 4.2 and lessons including samples of school rules)
- A copy of the Australian Constitution

VIDEOS:

- [Magna Carta – the story of our freedom](#)

ONLINE RESOURCES:

- [Big Lesson 1](#)
- <http://cefa.org.au/search/node/magna%20carta> have a look at The Constitution Education Fund (CEFA) Resources on the Magna Carta

Tuning In

- **DISCUSSION QUESTIONS:**
 - What was Magna Carta?
 - What are rights and freedoms?
 - What responsibilities come with rights?
- Provide students with your school or class rules.
- Have students note in the school/class rules any rights and responsibilities. They could highlight these with different colours on a PDF or hard copy of the rules.

Teacher Instruction

- **EXPLAIN:** In order for democracy to function, people need certain rights and freedoms to participate in the democratic system. These include freedom of speech, association, assembly, religion and movement. Many countries have a Bill of Rights in their Constitution setting out these and other rights. Australia does not have a Bill of Rights as the framers of the Constitution were wary about inserting uncertain terminology like 'equality before the law' and 'due process of law' in the Constitution if they were not sure what they meant.
- The framers recognised that freedom of speech, association, assembly and movement are already protected by the common law. They thought that Parliament and the voters could be trusted not to take away these rights or unduly limit them.
- The framers recognised that often rights conflict. Rights cannot be absolute, as this could put people in danger. A classic example is that you cannot rely on freedom of speech to yell out 'fire' in a crowded theatre and cause a stampede that results in people being injured. In the COVID-19 pandemic, we saw that freedom of movement could be limited to prevent the spread of disease and protect the health and lives of people. The question is who resolves these conflicts - should it be for democratically elected members of Parliament to decide how best to balance rights and the need to protect people, or should the courts do this instead?
- In the United States, this is done by courts because of the Bill of Rights. In Australia, it is done by Parliaments, without the need for litigation. Which approach is better?
- Why did the Australian people vote against extending rights in the 1988 referendum?

Group Independent Learning

- After watching the video students debate whether Australia should have a bill of rights in the Constitution. Is it better for rights to be determined by independent judges or by democratically elected Members of Parliament? What are the consequences if a court or Parliament make a decision about rights which the people disagree with? If a court decides the Constitution requires something, then its decision can only be overturned by a referendum amending the Constitution, but if Parliament decides, then it can be overturned by a change of government and a new law in the next Parliament. Is this a reason for or against having a constitutional bill of rights?

Wrapping It Up

Who won the debate? Ask the class what were the strongest arguments on each side.

Differentiation/Enrichment

- **WATCH** '[Bill of Rights](#)' song about USA and discuss what this shows about the good and bad effects of a bill of rights. What has been the consequences of the 'right to bear arms'?
- **EXPLORE** '[The Story of our Freedom](#)' by Australian Human Rights Commission.
- **ANALYSE** - In those States/Territories with a charter of rights, analyse what difference this has made for the people. Did it make any difference during COVID?

Assessment Strategies

Assess whether students can provide reasons for and against a Bill of Rights in the Constitution and can explain why the 1988 referendum failed. This could be done on a written exit slip if there is insufficient time during the debate.

