

COMMUNIQUÉ

Australian Federalism:
a question of balance

Old Parliament House, Canberra
21 to 23 March 2012

17TH NATIONAL SCHOOLS
CONSTITUTIONAL CONVENTION





With the exception of the Commonwealth Coat of Arms and where otherwise noted all material presented in this document is provided under a Creative Commons Attribution-NonCommercial 3.0 Australia (<http://creativecommons.org/licenses/by-nc/3.0/>) licence.

The details of the relevant licence conditions are available on the Creative Commons website (accessible using the links provided) as is the full legal code for the CC BY-NC 3.0 AU licence (<http://creativecommons.org/licenses/by-nc/3.0/legalcode>).

The document must be attributed as the National Schools Constitutional Convention 2012 Communiqué.

This Project was funded by the Australian Government Department of Education, Employment and Workplace Relations and was managed by National Curriculum Services and the Australian Curriculum Studies Association.

The views expressed here do not necessarily represent the views of the Australian Government Department of Education, Employment and Workplace Relations.

Background

The National Schools' Constitutional Convention seeks to promote understanding and informed discussion amongst young Australians about the Australian Constitution and system of government. Its three main aims are:

1. To provide an opportunity for senior students to explore Constitutional issues.
2. To encourage those students who are informed and actively interested in the Australian system of government to pursue this interest.
3. To increase student awareness of key Constitutional matters.

The seventeenth National Schools' Constitutional Convention (NSCC) was held at Old Parliament House in Canberra from 21–23 March 2012.

One hundred and twenty-four students from government, independent and Catholic schools from across Australia, covering metropolitan and country areas attended. Approximately 56% of students were from government schools, 21% were from independent schools and 23% were from Catholic schools.

The purpose of this particular Convention was to:

1. introduce and inform student delegates about the current allocation of legislative responsibilities in a number of international constitutions;
2. consider why these take the form that they do;
3. think about the implications of these divisions;
4. introduce the specific listing of Commonwealth powers that is in the Australian Constitution; and
5. consider whether there should be a change to the Constitution to include water and health as Commonwealth powers.

Visits and receptions

On Day 1 of the Convention, student delegates attended Question Time at Parliament House. This was followed by a welcome reception hosted by the Hon Peter Garrett AM MP, Minister for School Education, Early Childhood and Youth representing the Prime Minister, the Hon Julia Gillard MP. Delegates were then afforded the opportunity to meet and have their photographs taken with other Parliamentarians.

Day 2 commenced with the Official Opening of the Convention at Old Parliament House. The Convention was officially opened by Senator the Hon Jacinta Collins, Parliamentary Secretary for School Education and Workplace Relations and Senator for Victoria, and Mrs Matilda House, Ngambri woman, provided a Welcome to Country.

In the evening, student delegates attended the Official Convention Dinner which was held at the High Court of Australia. Delegates were welcomed by Mr Ben Wickham, Senior Executive Deputy Registrar of the High Court, who spoke about the history of the High Court and the important role the High Court fulfils in interpreting the Constitution. The key message from his address was that the decisions of the High Court over the years have generally strengthened the Commonwealth's powers and reduced states powers.

Mr Nicholas Tebbey, ACT Young Lawyer of the Year, 2009 presented an address about the legal profession and the opportunities it offers to engage in important issues and bring about social change. In summing up, Nicholas asked delegates to use their talents and skills to tackle social injustices and help those who cannot help themselves. Delegates were provided with a tour of Court 1 where High Court staff explained how the courts worked and responded to delegates' questions.

On Day 3, after completion of their deliberations, delegates visited the National Archives of Australia prior to gathering in the House of Representatives chamber at Old Parliament House to witness the presentation of the Convention Communiqué to Senator the Hon Stephen Parry, Deputy President of the Senate and Senator for Tasmania.

Convention focus

Delegates at this year's Convention investigated the division of powers between the states and Commonwealth and were asked to address the question 'Should there be a change to include water and health as Commonwealth powers?'. Delegates firstly considered the division of powers in other federalist jurisdictions, the division of powers in the Australian constitution and the arguments for and against transferring responsibility for water and health from the states to the Commonwealth. They then considered the means by which constitutional change is given effect under section 128 of the Australian Constitution and participated in a mock referendum on the issue of where the responsibility for water and health should be located.

Convention processes

Emeritus Professor John Warhurst AO assisted in developing the two-day program and facilitated the Convention proceedings at Old Parliament House.

Student delegates were provided with pre-reading in the form of an extract from *Conversations with the Constitution, not just a piece of paper* by Greg Craven and a *Convention Introduction and Background* booklet that provided a definition of the Constitution and its purpose and contained selected sections from the Constitution that were of relevance for the Convention topic. A workbook outlining the tasks of the four Working Groups that delegates would be participating in was also distributed to delegates at the Convention.

Professor Warhurst delivered the initial address on federalism, explaining what it was and providing context for future discussions. This was followed by a panel discussion that canvassed arguments for and against the Commonwealth assuming full powers over water and health. Professor Warhurst led the discussion with the panellists Dr Andrew Banfield from the School of Politics and International Relations at the Australian National University; Dr Richard Denniss from the Australian Institute; and Professor Fiona Wheeler from the Australian National University College of Law. Following the presentations and extended discussion, students were given an opportunity to ask questions, to clarify points and to seek further information as well as challenge the views put forward by the speakers. The panel discussion provided a context for delegates' subsequent Working Group activities.

Working Group 1 followed the panel session on comparative constitutions. In this session delegates from a variety of schools worked in groups of twelve or thirteen to look at examples of national constitutions and the way that powers are distributed between the respective levels of government. Delegates were required to examine a range of constitutions from other countries and:

- document reasons why certain powers are allocated to central government;
- identify areas of responsibility that they considered as being unambiguously 'national' in character;
- identify areas of responsibility that they considered should not be listed as powers of central government;
- formulate a rationale for the allocation of legislative powers directly to state governments;
- list reasons for the allocation of powers to central government;
- list reasons for the allocation of powers to state government; and
- identify which countries the distributed constitutions were from and when they were drafted.

Working Group 1 was designed to promote thinking about the division of powers in comparative constitutions. A report back session enabled a representative of each group to briefly report on their Working Group discussions and conclusions.

Some of the reasons identified by delegates as to why certain powers are allocated to central government included that the powers:

- were in the national interest (e.g. defence and diplomacy supports national security);
- enhanced prosperity (e.g. by reducing barriers to interstate trade and strengthening the nation's bargaining position when entering into international trade agreements);
- helped to promote social equity (e.g. consistent social welfare arrangements nationally);
- reduced unnecessary duplication / improved efficiency (e.g. one central agency for managing the national taxation system);
- enabled the Government to respond quickly to needs (e.g. the Government's rapid economic response to the global financial crisis);
- reduced confusion / promoted consistency (e.g. having all cars drive on the same side of the road avoids the possibility of citizens being required to adjust their driving behaviour should they cross a state boundary);
- established common and consistent approaches to the law and/or service delivery (e.g. a citizen's human rights are protected regardless of the state they live in or move to; and there is one currency across the nation); and
- promoted consistency and reliability and avoided the shifting of blame for poor service delivery between the states and the Commonwealth.

Areas of responsibility that delegates considered as being unambiguously 'national' in character included:

- defence;
- postage and communications;
- immigration;
- human rights;
- external affairs, international relations and foreign aid;
- responding to large-scale disasters (e.g. extensive flooding, drought, hurricane or fire damage);

- currency;
- census and other data collections of national importance; and
- interstate transport infrastructure and services.

Rationales for the allocation of legislative powers directly to state governments identified by delegates included that the powers:

- promoted more responsive government / greater personalisation of services (i.e. local conditions and traditions are more likely to be responded to within a state arrangement);
- provided greater checks and balances on government (i.e. government is less remote and is more susceptible to scrutiny at a state level than at a national level);
- enhanced the likelihood of innovation as states compete to be the best providers of services; and
- reduced the workload of central government (e.g. small misdemeanours should be dealt with by state law systems and not become a matter for the Commonwealth to address).

It was revealed that the sample constitutions that were provided as alternative models to consider came from Canada, the United States of America, Germany and Brazil. Most delegates were able to match the sample constitutions with their country of origin.

After the report back session, delegates reformed their groups to undertake the tasks set for Working Group 2. In this session delegates specifically concentrated on the following questions about the Australian Constitution and the allocation of powers:

- What are the underlying themes or principles with the Australian division of powers?
- What should be the absolute minimum powers held by a national Parliament?
- What most important powers should be left to the States?
- Do the Commonwealth powers as defined in sections 51 and 52 of the Constitution give an accurate picture of the ways that the different levels of government in Australia work?

In Working Group 3 delegates specifically concentrated on where the powers for health and water should reside. Five groups concentrated on the issue of health and five concentrated on the issue of water.

The groups focused on the issue of health were required to list arguments in favour of moving control of health policy to the Commonwealth by a formal change to the Constitution and to list arguments against doing this.

Arguments advanced in favour of the Commonwealth assuming control for health included:

- The current arrangements for health are not working and need to be changed.
- The Commonwealth will produce a fairer allocation of funds, which will build the quality of health services.
- The level of funding going into health will be significantly increased if the Commonwealth assumes control.
- The tendency for blame shifting between the Commonwealth and the states will be removed.
- Commonwealth control will help to facilitate national monitoring and improved accountability for service delivery nationally.

- Health services will be administered more efficiently and effectively.
- The cost of health services will be reduced as duplication and waste is more easily eliminated.

Arguments delegates advanced against the Commonwealth assuming control for health included:

- The Commonwealth will be remote from service providers and will not be as effective as the states in targeting areas of need and responding to local difference.
- The Commonwealth will need to work through the states when delivering health services, so why not leave the states in charge as they will be responsible for delivery.
- The states will develop their own policies for improving services and this will promote innovation in service delivery and help to lift the quality of services across the country.

The groups focused on the issue of water were required to list arguments in favour of moving control of rivers to the Commonwealth by a formal change to the Constitution and to list arguments against doing this.

Arguments delegates advanced in favour of the Commonwealth assuming control for rivers included:

- As the Commonwealth is not directly affected by water allocation decisions, it will produce a fairer distribution of water between the states.
- Water resources will be better managed and decisions about the balance between the needs of the environment and that of farmers can be made within the broader perspective of what is in the national interest.
- Uniform laws can be established to ensure the longer-term sustainability of the nation's river systems.
- The Commonwealth is better situated to fund the infrastructure needed to improve water management across the nation.
- Rivers are not only essential for food production; they are a tourist attraction and contribute to the natural beauty of the environment. The needs of all groups whose livelihood and lifestyle relies on a quality river system would be better managed at the Commonwealth level.

Arguments delegates advanced against the Commonwealth assuming control of rivers included:

- The Commonwealth could make decisions without really understanding the different needs of different states.
- The national interest argument could be used to produce an outcome that favours or disadvantages a particular state.
- The states need to maintain control over decisions that relate to rivers that only flow within the state's borders.
- As there are more rural members in state parliaments than in the Commonwealth Parliament, state parliaments are more likely to be attuned to the needs of farmers who are reliant on the rivers for their livelihood.
- Transferring responsibility to the Commonwealth could increase the complexity of administration as rivers generate hydro-electricity and electricity is a states' responsibility. Conflict between the states and the Commonwealth could arise when it comes to balancing state needs for electricity with Commonwealth needs for controlling water flows.

Delegates then engaged in a Report Back session that enabled them to share their views expressed in Working Groups 2 and 3. Perspectives provided largely reinforced the arguments advanced in the Working Group 3 discussions.

A Soap Box session followed, enabling students to make a concise statement to the whole group about what they thought in relation to the proposal that the Constitution should be amended to enable the Commonwealth should assume full powers over water and health.

Presentations made by delegates included the observations that:

- the tyranny of distance argument that is sometimes used to support powers going to or residing with the states is not valid as modern communications enabled people to be consulted regardless of where they lived;
- the argument that decisions at the Commonwealth level produce a 'one-size-fits-all' solution are spurious as the Commonwealth is able to draft legislation that is responsive to the different needs and conditions across the nation;
- in both health and water there is a significant need to lift the quality of service and resource management and handing power to the Commonwealth will be necessary in order to overcome the vested interests of the states that inhibit the establishment of more equitable outcomes; and
- regardless where the power lies for policy decisions in relation to health and water, as needs of individuals can differ significantly, policies will need to incorporate positive discrimination to ensure equity in service and resource delivery.

The topic of whether or not Australia should become a republic also emerged as an issue about which many students expressed their opinion.

At the beginning of the final day, the Australian Electoral Commission provided a presentation that outlined the grounds upon which a change can be made to the Australian Constitution and how a referendum is conducted.

This session was followed by a whole group discussion facilitated by Professor Warhurst that focused in the initiation and process of referenda.

After the whole group session, delegates reformed their groups to undertake the tasks set for Working Group 4. This working group session focused on the referendum process. It required delegates to consider and respond to the following questions:

- Why is there provision for a referendum when the House of Representatives and the Senate disagree? What happens in this case?
- What is the status of the Territorians in the counting of votes at a referendum?
- In terms of Citizen Initiated Referendum (CIR), what do you believe are the three most significant arguments in favour of this approach and what are three against?
- What are three arguments for and three arguments against the states having the capacity to initiate a referendum?
- If you are in favour of the states having this right, how many states do you think should agree on the proposed question before it can be put to the voters?

Responses in favour of a Citizen Initiated Referendum included that it:

- provides citizens with a direct say in shaping the laws of the country;
- places a check on the Commonwealth exercising too much power;

- is likely to have a high response rate and likelihood of success; and
- enables concerns of single issue advocates (e.g. citizens seeking to prevent mining on their farmland) to be brought to the attention of the nation.

Responses against a Citizen Initiated Referendum included that it:

- allows narrow, self-interested groups to waste time and resources on a referendum that has no hope of success;
- could be manipulated by wealthy individuals and the media;
- could disrupt the stability of government; and
- could lead to a flood of referenda and prove to be time-wasting and very costly.

Responses in favour of states having the capacity to initiate a referendum included that:

- the states are closer to the people and are more likely to represent their concerns;
- it would help to reinforce the independence of the states;
- it would promote improved cooperation between the states as they would need to support each other in order to get the referendum question approved; and
- it would provide a check and balance on Commonwealth powers.

Responses against the states having the capacity to initiate a referendum included that such an arrangement could:

- generate conflict or friction between the states;
- lead to outcomes that favour the majority of states whilst disadvantaging the other states and territories;
- ignore the national interest and the interests of the territories; and
- increase the number of referenda and significantly add to the costs of running government.

Most groups supported the concept of the states being able to initiate referendum and that at least four out of the six states needed to support the proposed referendum question before it could be put to the voters.

After the report back session two mock referenda were conducted to gauge delegates' views on the proposal that the Commonwealth assume full powers over water and health. The ballot paper to be completed by the delegates pertaining to water contained the following proposal:

- A Proposed Law: To alter the Constitution to empower the Commonwealth Parliament to directly legislate for the waters of the Murray-Darling system.

The ballot paper to be completed by the delegates pertaining to health contained the following proposal:

- A Proposed Law: To alter the Constitution to empower the Commonwealth Parliament to directly legislate for health care, including public and private hospitals.

Delegates were asked to write 'YES' or 'NO' in response to the question 'Do you approve of this proposed alteration?'. One hundred and twenty-three formal votes were cast for the ballot on water and one hundred and twenty-two formal votes were cast for the ballot on health.

Delegate’s perspectives on the proposed constitutional changes

Results were tallied on the proposition to alter the Constitution so that the Commonwealth assumes full powers over the waters of the Murray-Darling system. The detailed results of this mock referendum are outlined on the following tally board designed by the National Electoral Education Centre of the Australian Electoral Commission.

| National Tally Board | Formal YES | Formal NO | Is the majority in favour? | |
|------------------------------|------------|-----------|---|--|
| New South Wales | 26 | 4 | YES | Is there a majority of voters in the majority of states in favour of the alteration? |
| Victoria | 19 | 8 | YES | |
| Queensland | 17 | 7 | YES | |
| Western Australia | 13 | 2 | YES | |
| South Australia | 12 | 0 | YES | |
| Tasmania | 4 | 1 | YES | |
| Australian Capital Territory | 5 | 0 | | |
| Northern Territory | 5 | 0 | | |
| NATIONAL TOTAL | 101 | 22 | Is there a majority of voters nationally in favour of the alteration? | YES |
| | | | HAS A DOUBLE MAJORITY BEEN ACHIEVED? | YES |
| | | | HAS THE AUSTRALIAN CONSTITUTION BEEN ALTERED? | YES |

The referendum to alter the Constitution to empower the Commonwealth Parliament to directly legislate for the waters of the Murray-Darling system was successful.

Results were tallied for the mock referendum on the proposition to alter the Constitution so that the Commonwealth assumes full powers over health care. The detailed results of this mock referendum in relation to health are outlined below.

| National Tally Board | Formal YES | Formal NO | Is the majority in favour? | |
|------------------------------|------------|-----------|---|--|
| New South Wales | 7 | 23 | NO | Is there a majority of voters in the majority of states in favour of the alteration? |
| Victoria | 11 | 16 | NO | |
| Queensland | 8 | 15 | NO | |
| Western Australia | 3 | 12 | NO | |
| South Australia | 4 | 8 | NO | |
| Tasmania | 3 | 2 | YES | |
| Australian Capital Territory | 2 | 3 | | |
| Northern Territory | 0 | 5 | | |
| NATIONAL TOTAL | 38 | 84 | Is there a majority of voters nationally in favour of the alteration? | NO |
| | | | HAS A DOUBLE MAJORITY BEEN ACHIEVED? | NO |
| | | | HAS THE AUSTRALIAN CONSTITUTION BEEN ALTERED? | NO |

The referendum to alter the Constitution to empower the Commonwealth Parliament to legislate for health care, including public and private hospitals was unsuccessful.

Convention outcomes

This Communiqué outlining the Convention program, processes and outcomes was developed and endorsed by delegates. Senator the Hon Stephen Parry, Senator for Tasmania and Deputy President of the Senate, joined the delegates in the House of Representatives chamber of Old Parliament House and accepted the Convention Communiqué for presentation to the Parliament and incorporation into Hansard.