



This Q & A factsheet is part of a series Reconciliation Australia is producing aimed at informing the community and stimulating conversations about the issues that affect us all.

Indigenous Australians and the Constitution

Changing our Constitution to recognise and respect the rights of Indigenous Australians has been a topic of discussion for many years. The issue is an important part of the conversation about Indigenous rights and reconciliation. Here are answers to some questions you might have about Indigenous Australians and the Constitution.

- 1. What does the Australian Constitution do?**
- 2. Does the Constitution recognise or mention Indigenous Australians?**
- 3. Why doesn't the Constitution recognise Indigenous Australians?**
- 4. Why should Indigenous Australians be recognised in the Constitution?**
- 5. Why should the body of the Constitution be changed?**
- 6. What's the difference between recognising Indigenous Australians in a preamble to the Constitution and changes to the Constitution itself?**
- 7. What might a statement in the preamble recognising Indigenous Australians say?**
- 8. What changes to the body of the Constitution have been proposed?**
- 9. What could be added to the body of the Constitution?**
- 10. Would changes to the Constitution help close the gaps between Indigenous and other Australians?**
- 11. How have other countries recognised Indigenous peoples in their constitutions?**
- 12. Would recognising Indigenous Australians in the Constitution give them special rights that other Australians don't have?**
- 13. How is the Constitution changed?**
- 14. Why was the 1967 referendum so successful?**
- 15. What's the difference between Constitutional rights and rights set out in another kind of charter of rights?**

1. What does the Australian Constitution do?

The Constitution of Australia, created in 1900, is the most powerful set of laws in the nation. It is the foundation of our political and legal systems. The Constitution tells the federal and state governments what they can and cannot do and neither governments nor politicians can change the Constitution. Our highest court, the High Court, has the final say on interpreting the Constitution and only the Australian people have the power to change it (through referendums).

2. Does the Constitution recognise or mention Indigenous Australians?

Indigenous Australians aren't mentioned in our Constitution.

3. Why doesn't the Constitution recognise Indigenous Australians?

Over a hundred years ago when the Constitution was written, Indigenous Australians were largely considered to be an inferior race that was likely to die out. Their rights, cultures, history and prior occupation of Australia weren't valued or considered important enough to be included in the Constitution. It was also feared that any official recognition of Indigenous Australians might lead to claims for rights to, or compensation for, land taken since colonisation.

4. Why should Indigenous Australians be recognised in the Constitution?

As well as being a set of laws, a Constitution reflects a nation's values, its idea of itself. Indigenous Australian peoples and cultures, as part of the world's longest continuing tradition, form a key part of that idea. Recognition and acknowledgment of Indigenous Australian peoples and cultures past and present in our Constitution would show their valued place as part of our national identity.

The state constitutions of Victoria, Queensland and New South Wales all formally recognise Indigenous Australians.

5. Why should the body of the Constitution be changed?

Many Australians might not know that our Constitution still permits racial discrimination, making Australia the only country with a Constitution that allows for discrimination against its Indigenous peoples based on their race. This needs to be redressed to ensure that equal rights and respect are given to Indigenous Australians in law, and to bring our national Constitution into accord with the values of contemporary Australian society.

6. What's the difference between recognising Indigenous Australians in a preamble to the Constitution and changes to the Constitution itself?

When people talk about recognising Indigenous Australians in our Constitution there are usually two main areas they're talking about changing. The first is changing the wording in the preamble. A preamble is a statement that introduces a constitution but has no legal power. Changing the preamble to acknowledge Indigenous Australians would be an important statement about the place and value of Indigenous Australians in our nation.

The second possible change that people talk about is changing or adding to the main part of the Constitution where the laws are set out, which would have legal significance. For example, if a non-discrimination clause was included in the body of the Constitution, a government would no longer be able to make laws which discriminate against Indigenous Australians.

7. What might a statement in the preamble recognising Indigenous Australians say?

The wording for the preamble would have to be written in consultation with a broad range of Indigenous and non-Indigenous Australians. As an example, here is what the state constitution of Victoria says about Indigenous Australians in its preamble:

"The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –:

- have a unique status as the descendants of Australia's first peoples;
- have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- have made a unique and irreplaceable contribution to the identity and well-being of Victoria."

8. What changes to the body of the Constitution have been proposed?

Changes to the body of the Constitution that have been suggested focus on removing discrimination and including basic rights of equality and non-discrimination. This could include modifying section 51(xxvi) of the Constitution (called the 'race power') to ensure that governments couldn't make racially discriminatory laws. If this type of change was made to our Constitution, the equality of Indigenous Australians – and all other Australians – under law would be assured and they'd be protected against discriminatory laws by different governments when they come to power.

In 2010 the Gillard Government committed to establishing a bi-partisan panel made up of Indigenous leaders, politicians, constitutional law experts and members of the public to build support for the recognition of Indigenous people in the Australian Constitution.

9. What could be added to the body of the Constitution?

Adding a protection against discrimination to the Constitution would help prevent legal and political discrimination against Indigenous Australians and would be a greater protection than the Racial Discrimination Act. Tom Calma from the Australian Human Rights Commission has suggested a new provision in the Constitution that provides for equality before the law and non-discrimination similar to this one from the International Covenant on Civil and Political Rights:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

10. Would changes to the Constitution help close the gaps between Indigenous and other Australians?

Professor Mick Dodson says "There has never really been a moment in the history of our country where there's been a formal recognition or acknowledgment of the Aboriginal and Torres Strait Islander peoples as the first peoples of this country, the first peoples and nations of this country, the first peoples and nations as the rightful owners, occupiers, and custodians of this land we now call Australia."

This continues today, despite the fact that Australian society has changed and we now pride ourselves on our values of equality and the 'fair go'. Including recognition of Indigenous Australians in our Constitution would make a clear statement about the value of Indigenous Australians as the original Australians and be another important step in our reconciliation journey.

11. How have other countries recognised Indigenous peoples in their constitutions?

The Canadian Constitution expressly recognises the rights of Indigenous people, stating: The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.

The United States has negotiated almost 390 treaties with American Indian tribes which the Supreme Court recognises as similar to treaties between different nations. The Constitution gives the Federal Government sole power to deal with tribes.

The Treaty of Waitangi encapsulates many of the rights of the Maori in New Zealand. It's used as the foundation for human rights for Maori and many of its principles are incorporated into New Zealand's Constitution Act.

12. Would recognising Indigenous Australians in the Constitution give them special rights that other Australians don't have?

Acknowledging Indigenous Australians in the preamble in a way that recognised and valued their special place as the first Australians would not give them more rights than other Australians. Changing the body of the Constitution to include equality and protection from discrimination would give all Australians the benefit of better rights protections.

13. How is the Constitution changed?

In Australia the only way anything can be changed in the Constitution is through a referendum. A Constitutional referendum is when all voting age Australians vote 'yes' or 'no' to a proposed change. For a change to be accepted a national majority of voters in majority of states must vote 'yes'. Australians have not accepted many proposed changes, we've voted in 44 Constitutional referendums and only voted 'yes' for 8.

14. Why was the 1967 referendum so successful?

In the 1967 referendum, our nation's most successful, more than 90% of voters said 'yes' to removing discriminatory references to Indigenous people in the Australian Constitution. Indigenous and non-Indigenous Australians campaigned side by side for more than a decade to educate the community on the importance of the 'yes' vote. Both main political parties also supported the 'yes' vote.

15. What's the difference between Constitutional rights and rights set out in another kind of charter of rights?

Constitutional rights can only be changed by a majority of Australians agreeing to a change to the Constitution through a referendum. Governments cannot suspend or ignore the Constitution and can only make laws which comply with it. A legislative charter or statute of rights would be created by our federal government and could be changed or suspended by parliament.