



Aboriginal and Torres Strait Islander Australians and the Constitution

Check out the [Recognise website](#) for more information on recent developments in relation to the recognition of Australia's first peoples in the constitution.

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1. What does the Australian Constitution do?

The Constitution of Australia, came into effect on 1 January 1901 and is the most powerful set of laws in the nation. It is the foundation of our political and legal systems. It united the British colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania and later, Western Australia as a federation known as the Commonwealth of Australia. 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 Aboriginal and Torres Strait Islander Australians?

When it came into effect on 1 January 1901, the Australian Constitution did not recognise Aboriginal and Torres Strait Islander Australians but it did contain several references that explicitly discriminated against Indigenous Australians. These references were removed following the 1967 Federal Referendum when over 90% of eligible voters voted YES to changes that removed those references.

Currently, Aboriginal and Torres Strait Islander Australians are still not recognised or specifically mentioned in the Australian Constitution, however, the Constitution still contains references (in Sections 25 and 51) that allow the Commonwealth or State governments to discriminate against people on the basis of race. This power has been used several times by governments to enact legislation to affect only Aboriginal and Torres Strait Islander people.

3. Why doesn't the Constitution recognise Aboriginal and Torres Strait Islander Australians?

The Australian Constitution was drafted at two constitutional Conventions held in the 1890s.

Women, Aboriginal and Torres Strait Islander people and members of ethnic communities were excluded from participating in these Conventions. As a result, the Constitution reflects the predominant views and prejudices of the men of British heritage who were invited to attend the Conventions and draft the constitution for the new Commonwealth of Australia.

At the time of drafting the Constitution the rights, cultures, history and prior occupation of Australia by Aboriginal and Torres Strait Islander people was not considered to be valuable or important enough to be included in the Constitution. And so Aboriginal and Torres Strait Islander peoples were excluded from the discussions concerning the creation of a new nation to be situated on their ancestral lands and territories. It was also feared that any official recognition of Aboriginal and Torres Strait Islander Australians might lead to claims for rights to, or compensation for, land taken since European settlement.

Although the Australian Constitution was intended to unite Australia under the original and continuing agreement of the Australian people, the first peoples of Australia – Aboriginal and Torres Strait Islander Australians - were not included in this agreement.

4. Why should Aboriginal and Torres Strait Islander Australians be recognised in the Australian Constitution?

As well as being a set of laws, a Constitution reflects a nation's values, its idea of itself.

Today Australia prides itself on being a place of fairness and equity for all its citizens. But the Australian Constitution still does not recognise Aboriginal and Torres Strait Islander Australians as the first people of this land.

Importantly, we now know that Aboriginal and Torres Strait Islander people and their cultures form part of the longest culture on Earth and evidence of their presence in Australia is now dated back over 60,000 years. It is only right that modern Australia should recognise and acknowledge Aboriginal and Torres Strait Islander people and culture - past and present - in our Constitution to record their valued place as part of this country and our national identity.

Most of the states - Victoria, Queensland, New South Wales and South Australia have already amended their Constitutions to formally recognise Aboriginal and/or Torres Strait Islander Australians as the first people and nations of their jurisdictions. It is time our nation's birth certificate, the Australian Constitution, is amended to recognise the first people of this land and their continuing place in our nation's history and identity.

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

When it came into effect in 1901 the Australian Constitution contained several specific references that allowed governments to discriminate against Aboriginal and Torres Strait Islander Australians. The most glaring discrimination occurred in:

Section 51 of the Constitution that provided: *"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-*
*...(xxvi) The people of any race, **other than the aboriginal people in any State**, for whom it is necessary to make special laws.*

And Section 127 stated: **'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'**.

Both of these sections were changed in 1967 after 90.77% of eligible voters voted in a referendum to change the Constitution to remove the words '**... other than the aboriginal people in any State...**' from section 51(xxvi) and the whole of section 127.

The 1967 referendum provided the highest YES vote ever recorded in a Federal referendum and is still celebrated every year on the 27th May as the start of National Reconciliation Week.

Many Australians don't know that our Constitution still permits racial discrimination in Sections 25 and 51. This makes Australia the only country with a Constitution that allows for discrimination against its Indigenous peoples based on their race. The Constitution needs to be changed to remove references to race to ensure that equal rights and respect are given to all Australians including Aboriginal and Torres Strait Islander Australians in law, and to bring our national Constitution into line with the values and aspirations of contemporary Australian society.

6. What's the difference between recognising Aboriginal and Torres Strait Islander Australians in a preamble to the Constitution and changes to the Constitution itself?

When people talk about recognising Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander Australians would be an important statement about the place and value of Aboriginal and Torres Strait Islander people as the original inhabitants – the first people – of Australia..

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 Aboriginal and Torres Strait Islander Australians.

7. What might a statement in the preamble recognising Aboriginal and Torres Strait Islander 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 Aboriginal people 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?

There are two main objectives to be achieved through proposed changes to the Constitution:

1. We need to fix the historical exclusion of Aboriginal and Torres Strait Islander peoples from the Constitution, and;
2. We need to remove those references that remain in the Constitution that allows discrimination on the basis of race.

An Expert Panel - which included Indigenous and community leaders, constitutional experts and parliamentarians - consulted extensively across the nation and reported to the government in January 2012. It recommended that Australians should vote in a referendum to:

- Remove Section 25 – which says the States can ban people from voting based on their race;
- Remove section 51(xxvi) – which can be used to pass laws that discriminate against people based on their race
- Insert a new section 51A - to recognise Aboriginal and Torres Strait Islander peoples and to preserve the Australian Government's ability to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples
- Insert a new section 116A, banning racial discrimination by government
- Insert a new section 127A, recognising Aboriginal and Torres Strait Islander languages were this country's first tongues, while confirming that English is Australia's national language.

10. How will constitutional reform improve the lives of Aboriginal and Torres Strait Islander people?

Just like the 1967 Federal Referendum, the Bridge Walks in 2000 or the 2008 National Apology to Australia's Indigenous Peoples, recognising Aboriginal and Torres Strait Islander people in the Australian Constitution as the first people of Australia will be another important step in our reconciliation journey

Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution has the potential to:

- address a history of exclusion of Aboriginal and Torres Strait Islander peoples in the life of the nation
- improve the sense of self worth and social and emotional well-being of Aboriginal and Torres Strait Islander peoples both as individuals, communities and as part of the national identity
- enshrine the principles of non-discrimination in our Constitution
- change the context in which debates about the challenges faced by Aboriginal and Torres Strait Islander communities take place
- build positive relationships based on trust and mutual respect between Aboriginal and Torres Strait Islander peoples and the broader Australian community

By supporting improved social, economic and civic inclusion of Aboriginal and Torres Strait Islanders within the broader Australian community, Constitutional reform is a

critical step towards overcoming Indigenous disadvantage and bringing non-Indigenous and Aboriginal and Torres Strait Islander people and communities closer together.

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 Aboriginal and Torres Strait Islander 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 proposed change to be accepted a national majority of voters in a majority of states must vote 'yes'. It is very difficult to make changes to the Constitution through a referendum. Since 1901, 44 Constitutional referendums have been held and only 8 were passed when a majority of voters in a majority of states voted 'YES' to accept proposed changes.

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 Aboriginal and Torres Strait Islander people in the Australian Constitution. The referendum followed decades of activism by Aboriginal and Torres Strait Islander and non-Indigenous Australians who campaigned side by side. Campaigners spent the years leading up to the referendum holding events

and educating the wider community about the importance of the referendum and the YES vote. Critical to the success each of the main political parties supported the 'yes' vote and there was virtually no opposition to the proposed changes.

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.