



The Voice Referendum and The Australian Constitution

How will the Indigenous Voice to Parliament fit into the Australian Constitution?

The question that will be put to the Australian people at the 2023 referendum will be:

“A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander voice.

Do you approve this proposed alteration?”

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Powers and Division of Powers) are in the Constitution and why a referendum is necessary to change the Constitution. When we understand these fundamentals, we can make an informed decision about whether we will agree to make changes to our Constitution.

i. What is the Purpose of the Constitution

The Constitution is a legal document setting out the ‘basic’ laws for the government of Australia.

1. The change will be made to the Australian Constitution

Before we make a change to the Australian Constitution, Australians need to understand what the purpose of the Constitution is, what key features of government (including Separation of

After a series of conventions in the 1890's, the Constitution was created by representatives of the then colonies. Before it came into effect on 1 January 1901, its terms were approved (with one small exception) by the people of New South Wales, Victoria, Queensland, Western Australia, South Australia, and

Tasmania, and the Constitution took effect from 1 January 1901. Western Australia is not in the original preamble proclaimed on 9th July 1900 as they were originally reluctant to join the federation and did not hold a referendum on the question of federation until 31 July 1900.

Although our Constitution was given legal effect by an Act of the British Parliament, in reality, **the Constitution is a document which was conceived by Australians, drafted by Australians, and approved by Australians.** The British Parliament no longer has any power over Australia, and the Constitution's power as a fundamental law of Australia relies on the **Australian people's decision to approve of and be bound by the terms of the Constitution.**

ii. What is included in the Constitution?

The Act starts with a Preamble.

The Preamble is a concise summary of the rationale and principles behind the Constitution and is often symbolic of the history and aspirations of a new nation. The Australian Constitution highlights the colonial origins of the Act, that is, where people of the separate and self-governing colonies (now called the States) agreed to join together to UNITE and become a new nation, the Commonwealth of Australia.

Preamble

Commonwealth of Australia
Constitution Act



Commonwealth of Australia Constitution Act

9 JULY 1900

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Commonwealth is a medieval term, meaning that supreme power is vested with the people for their general welfare. It was deliberately chosen to represent equality and the common good.

The Constitution was created with equality before the law deeply engrained in it, and on the assumption that the rule of law would operate throughout Australia. The Constitution requires that the government obey the law and provides checks and balances to ensure that occurs.

iii. What are the key features of government under the Australian Constitution?

The Constitution is deliberately structured into chapters to create a legal and political system that governs Australia.

Rather than one central body holding all power, the Constitution has eight chapters to spread power between:

- the Federal and State governments (called the Division of Powers); and

- the Legislature, Executive and Judiciary (called the Separation of Powers).

The Constitution is also structured to provide for the Separation of Powers between:

The Constitution.

This Constitution is divided as follows:—

Chapter I. The Parliament:
 Part I. General:
 Part II. The Senate:
 Part III. The House of Representatives:
 Part IV. Both Houses of the Parliament:
 Part V. Powers of the Parliament:

Chapter II. The Executive Government:

Chapter III. The Judicature:

Chapter IV. Finance and Trade:

Chapter V. The States:

Chapter VI. New States:

Chapter VII. Miscellaneous:

Chapter VIII. Alteration of the Constitution.

The Schedule.

Structure

The Constitution has 8 chapters to define and limit the powers of government.

The **Division of Powers** ensures that all power is not held by one level of Government, and the **Separation of Powers** ensures that not one arm of government is more powerful than others.

Sections 51 and 52 limit the areas that the Federal Government can make laws about, called 'Exclusive powers'. These are predominately national issues (e.g. defence and immigration).

The states can then make laws on all those areas not explicitly covered in the Constitution. We refer to these as 'Residual powers' and include state issues (such as health and education) as State governments are generally closer to the community and able to deliver services that meet the needs of their community.

Section 109 provides that if there is any conflict between state and federal laws, the federal law will override the state law.

- **Legislative power** in Chapter I – The Parliament who make the laws (i.e. our Members of Parliament who are representatives elected by the people of Australia),
- **Executive power** in Chapter II – The Executive Government, those who put the law into effect (i.e. those who administer the business of the government such as government departments and government ministers)
- **Judicial Power** in Chapter III – The Judicature, those who interpret the law and conclusively determine legal disputes (i.e. High Court judges)

Each of these powers must operate in accordance with the Constitution. By separating and putting limits on power, it ensures each body works within their area of responsibility as defined within the Constitution. This provides checks and balances to avoid power being held by one single body AND is instead distributed across the three bodies ultimately ensuring that it is the people who rule.

There is no mention of Prime Minister, political executive, or Cabinet in the

Constitution. However, the Constitution was framed in accordance with many traditional legal and political conventions, not just the rule of law. One such convention under the Westminster system is responsible government.

iv. What is the role of the High Court in the Constitution?

The High Court is established in Chapter III, as the final Court of Appeal and to interpret the Constitution.

The High Court is a powerful check that ensures the Legislature and Executive act within their roles as defined in the Constitution. In particular, section 75 requires officers of the Commonwealth to act within the law. **This is a key element to the rule of law, where all people, including those in power must follow the law.**

The High Court also ensures any laws made by the Legislature are consistent with the Constitution. These disputes may be between governments or between citizens and governments over the limits of the powers defined in the Constitution. The High Court takes into account the text and structure of the Constitution, particularly the division of distinct chapters when considering and interpreting the Constitution.

The Constitution provides for the two pillars of an independent judiciary, these being

the **tenure (length of service) and conditions of service**. By outlining the remuneration and length of service of the judiciary, it ensures the judiciary is not easily influenced by those in government and safeguards the impartial independence of the courts.



v. Why is a Referendum needed to change the Constitution?

The Constitution is the people's document so it can only be changed BY the people.

It would not be good for the stability of our nation and system of government if those in power such as the government of the day, could easily change the Constitution to further their own political or personal interests. As a result, the Constitution has outlined a specific process that is required to get the consent of the people before the Constitution can be changed (known as a referendum).

The required elements needed to change the Constitution are:

1. The proposed change must be passed by majority of both house of Federal Parliament; and
2. The majority of Australians must vote in favour of the change (i.e. more than 50% of the voting age population); and
3. The majority (4) of 6 states must have a majority of voters in favour.

This is called a **Double Majority**.

Referendums

Chapter VIII. Alteration Of The Constitution

128. Mode of altering the Constitution

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament...

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General...

Must pass both houses of Parliament

Must have the majority of States in favour

Must have the majority of Australians in favour

Changing the Constitution is deliberately a difficult process to protect our foundational document and ensure that it is the people of Australia who decide whether they are in favour of making any changes.

vi. Does the Australian Constitution include a Bill of Rights?

The Australian Constitution is a mechanical document that outlines the allocation of power and responsibilities between the federal and state governments and sets up the three branches of government.

Because the creators of the Constitution believed our rights were best protected by a parliamentary democracy, it does not contain a Bill of Rights and only contains a few express rights. These are:

- the right to trial by jury on indictment for offences against Commonwealth laws - s 80;
- The right to freedom of religion - s 116;
- the right not to be subject to discrimination on the basis of the state where you live - s 117, and
- the right to protection against the acquisition of property on unjust terms – s51 (xxxii).

Some implied rights are also identified, for example, freedom of political communication and the right to vote.

Unlike the United States of America's Constitution, the Australian Constitution does not contain a Bill of Rights with clauses such as the right to bear arms.

2. How will the Voice to Parliament change the Australian Constitution?

It has been proposed that the Australian Constitution needs amending to recognise and respect the Aboriginal and Torres Strait Islander peoples and to provide a permanent mechanism to listen to Indigenous peoples about matters that affect their lives so they can improve their outcomes and 'close the gap'.

The question that will be put to voters in the 2023 Referendum is whether to vote YES or NO to adopt the proposed law, the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill, that will alter the Constitution by inserting a new chapter, *Chapter IX - Recognition of Aboriginal and Torres Strait Islander Peoples*.

i. Will the proposed amendment recognise Indigenous Peoples in the Preamble?

The Voice proposal will not include a change to the preamble, like the failed 1999 Referendum that proposed to recognise First Australians in the preamble to the Constitution.

Instead, the Voice will be a separate chapter in the Constitution, establishing a new body called 'The Voice' alongside other major institutions established by the Constitution such as the Parliament, Executive and Judicature.

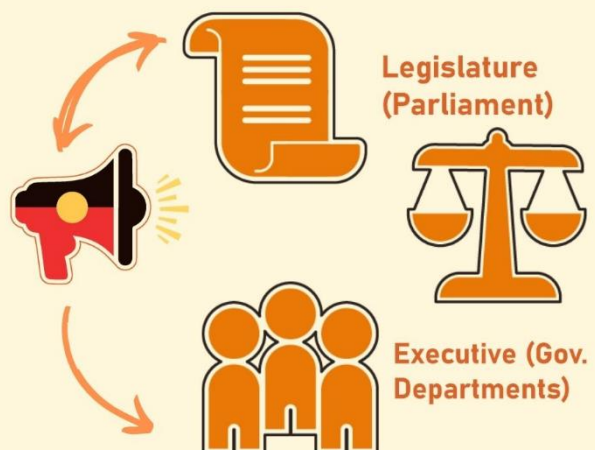
Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- ii. the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- iii. the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

The Constitution Alteration Bill



ii. There is considerable debate about the impact of the proposed Voice

As outlined in the Australian Government's Official [Yes/ No Case Pamphlet](#) there are arguments on both sides of the debate for voting YES or NO. Voting is compulsory and no one is forced to vote a particular way.

It is up to each individual Australian to make an informed decision about whether they wish to make this change to the Australian Constitution.

There has been significant disagreement among legal experts regarding the legal implications about the reach and powers of the Voice that form a new Chapter within the Australian Constitution.

To find more details, we encourage you to watch the YouTube from the Sydney Institute on the Voice Referendum outlining the legal arguments for and against the voice on [YouTube](#).



Pictured: George Williams & Chris Merritt at the Sydney Institute, The Voice to Parliament: The Legal Realities.

iii. YES: Legal opinions in favour of the Voice

The legal opinions in favour of the Voice proposal- the YES side, have said the amendment is a result of extensive consultation with Indigenous people who wish to be **Recognised** in the Constitution as the First Peoples of Australia by having a VOICE that has **a say on law and policies** that affect them, treaty and truth telling. Of these, only the VOICE requires constitutional change. This amendment is said to be a **modest** change to the Constitution with a body that can only provide advice to Parliament and the government.

As detailed further by George Williams, the amendment will provide:

1. RECOGNITION IN THE CONSTITUTION

“This is an act of recognition to ensure that Indigenous Australian are included in the nation's founding documents while affirming their status as the first peoples of Australia.”

2. LISTENING Leads to better outcomes

“As a result of dialogues with Indigenous peoples from across our land and waters, [Indigenous Peoples] sought three things; they sought a Voice that would enable them to have a say on laws and policies that would affect them, they sought

treaties, to provide for mutual co-existence and thirdly they sought the process of truth telling to shine light on their history and to provide a basis for shared understanding of those three things - voice, treaty, and truth. Only one requires Constitutional change and that is the Voice... to guarantee them a say in the making of laws and policies."

3. MODEST CHANGE TO CONSTITUTION

The change establishes "an advisory body of Indigenous people able to make representations to Parliament and the government... The body will provide advice, and does not have a veto, nor can it mandate outcomes."

"The High Court may be asked to ensure the Voice operates within its remit... the [High] Court has said repeatedly that it will not intervene in the internal working of Parliament. The Courts are more likely to scrutinize the work of ministers and public officials [the executive]... Ministers and public officials who receive a representation from the Voice may need to read and consider that representation when they make a decision."

"Parliament has the key role of determining how the Voice will operate."

iv. NO: Legal opinions against the Voice are NOT against Constitutional Recognition

Many legal experts against this proposed amendment have said they support Constitutional recognition of Indigenous people but just not in the form that has been put forward in the proposed Bill.

They are concerned about the permanent impact this amendment will have on the Constitution and equality of citizenship in Australia.

v. NO: Legal opinions against the proposed amendment to change the Constitution by inserting a new Chapter

The legal opinions against the Voice proposal- the NO side have said the amendment is **significant** as it adds a new chapter into the Constitution that will **divide** Australians, giving Indigenous Australians a **permanent** and additional method of influencing public policy. The scope and impact of the Voice is **uncertain** and the long term impacts on our system of government are unknown.

As detailed further by Chris Merritt the amendment is:

1. DIVISIVE (opposite to Equality)

"We are asked to make a major change to our system of governance by inserting a new chapter into the constitution where it

will sit alongside the chapters dealing with parliament, the executive, and the judiciary. This is not modest nor is it symbolic... the real purpose of this referendum is to change our system of government by injecting a permanent element of racial privilege into the heart of the Constitution... that would kill the doctrine of equality of citizenship."

"There is no requirement for the Voice to be limited to matters that relate ONLY or SPECIFICALLY to ATSI people... there is no limit at all because Indigenous people, like all citizens, can be affected by all laws and policies"

2. PERMANENT

"It would give Indigenous Australians and their descendants for all time a second method of influencing public policy that goes beyond the benefits of representative democracy that are already enjoyed by all citizens regardless of race."

3. RISKY and UNKNOWN

"Once a provision is inserted into the Constitution, its meaning and the resulting implications become the ultimate responsibility of the High Court."

"If we are going to Constitutionalise a new institution, we need to have more detail—rather than just a 'let's do the right thing' proposal... A lot of uncertainty can be

removed by legislating the Voice right now. Create a statute-based body, see how it goes and get a track record in place before we add it to the Constitution."

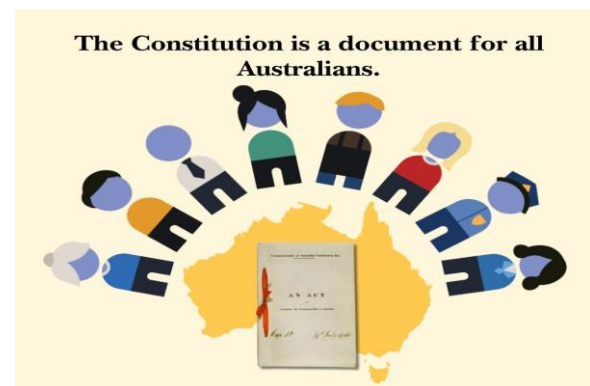
3. It is up to Australians to decide...

At the end of the day, the CONSTITUTION is **a document for all Australians** that sets out the basic laws of governance in Australia.

As Sir Philip Fysh, former premier of Tasmania said in 1897:

"We have cleared the way to federate as one people, and we are a united people, so soon shall we forget that we live not for ourselves only, but for others, and for the great country to which we belong."

Our Constitution has a past and a future; it does not merely exist in the present. It is the basic law of Australia and it is up to us to decide in the referendum what we want the 'rulebook' for Australia to look like.



This resource is authorised by Chris Merritt, Rule of Law Education Centre, Sydney.