

Explainer: A Constitutionally Guaranteed First Nations Voice



This pamphlet answers common questions about a constitutionally-guaranteed First Nations Voice.

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Radical Centre Reform Lab



BACKGROUND

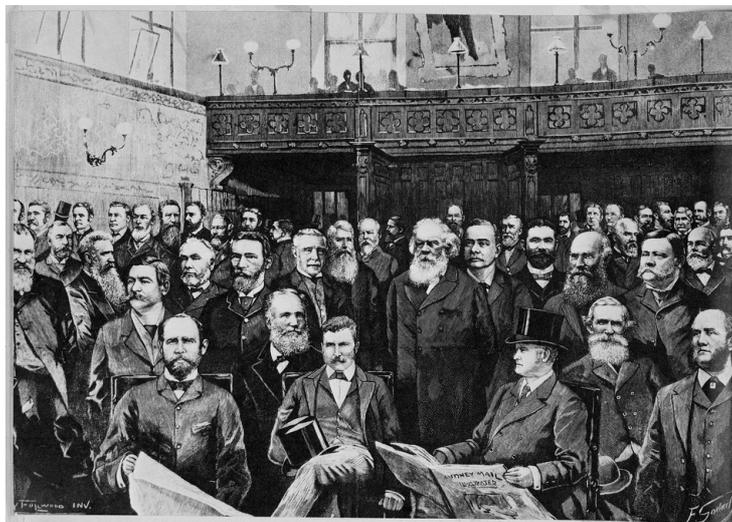
What is the Constitution?

The Constitution of 1901 is Australia's highest legal rule book. It is the power-sharing compact which created the federal government, the courts and the Australian nation. The Constitution contains the basic legal and political rules for how Australia is governed.

The Constitution can only be changed by 'double majority' approval at a referendum. This means a majority of voters in at least four states, and a majority of voters nationally, must vote 'yes' in favour of the change.

What is constitutional recognition?

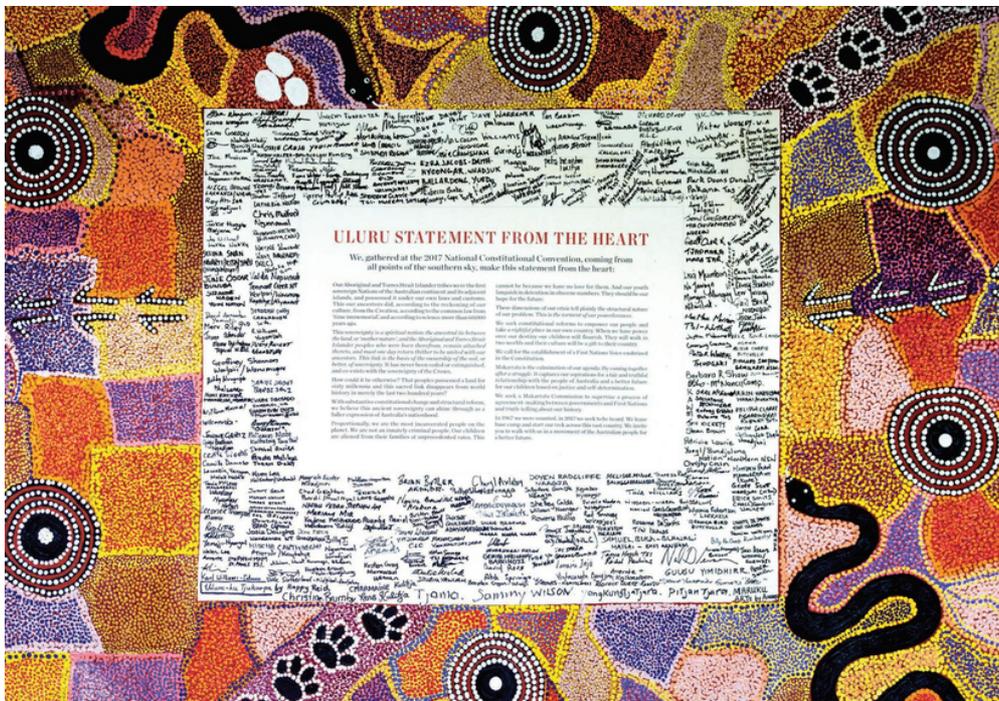
Indigenous peoples did not get a say in the Constitution that was created in 1901. In fact, the Constitution originally contained clauses that excluded them. The Constitution has consequently presided over many unjust laws and policies made about Indigenous Australians.



Delegates at the National Australasian Convention in Sydney, 2 March – 9 April 1891. NAA: A6180, 30/11/83/23.

While the 1967 referendum gave the Federal Parliament power to make special and necessary laws about Indigenous peoples - like native title and heritage protection laws - it doesn't require input from Indigenous people themselves in the making of those laws and policies. It maintains a top down relationship. As only 3% of the population, Indigenous peoples struggle to be heard when parliament and government make laws and policies about them.

For these reasons, Indigenous Australians have for decades called for constitutional reform to empower them with a Voice in their affairs. Since 2007, both major parties have supported changing the Constitution to recognise Indigenous peoples. In 2017, Indigenous peoples came to a historic national consensus on how they want to be constitutionally recognised. This was articulated in the Uluru Statement from the Heart.



The Uluru Statement from the Heart, signed by 250 delegates representing Indigenous communities across Australia.

What is a constitutionally guaranteed First Nations Voice?

The Constitution would be amended to require Parliament to establish an Indigenous advisory body, to advise Parliament on laws and policies with respect to Indigenous affairs. The First Nations Voice would be consultative and its advice would be non-binding. It would have no veto.

The constitutional amendment would be non-justiciable, which means the courts could not use it to strike down laws. This will respect parliamentary supremacy and uphold the Constitution, while empowering Indigenous communities with a Voice in their affairs.

Why do we need to change the Constitution?

The constitutional guarantee means that the First Nations Voice could not be abolished, while ensuring that Parliament can evolve and change the institution over time, as needed. In the last 50 years, four Indigenous advisory bodies have been created and later abolished by different governments. Whatever their problems, abolishing these bodies was not a constructive solution. This is why the Uluru Statement calls for the First Nations Voice to be enshrined in the Constitution. Constitutional protection would ensure that governments work with and invest in the First Nations Voice. Legislative flexibility means it can evolve. This proposal therefore balances stability and flexibility.

THE REFERENDUM

In late July 2022, the Government announced a draft referendum question and draft constitutional amendment for further consultation.

Draft referendum question

Do you support an alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander Voice?

Draft constitutional amendment

A new section would be inserted into the Constitution. It would read:

- 1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*
- 2. The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples*
- 3. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.*

HOW COULD IT WORK?

The previous Liberal Government conducted a co-design process to flesh out details for how a First Nations Voice could work in practice. The Labor Government has said it will use these recommendations to design the First Nations Voice. However, these are only ideas intended for further consultation.

How would representatives be chosen?

According to the Co-Design Process Final Report, there could be 16-18 members of the First Nations Voice, representing each state, territory and the Torres Strait Islands. They could either be selected by their respective Local and Regional Voices (see below), or elected directly by the Indigenous population in their state, territory or region.

Possible institutional structure

The Co-Design Report envisions the First Nations Voice having two integrated levels: 'Local and Regional Voices' and a 'National Voice'. The Local and Regional Voices would each represent one of 25-35 different regions across Australia, demarcated according to existing community groupings. The Local and Regional Voices would be community-led and designed and could incorporate local groups. The Local and Regional Voices would report to the National Voice, which would advise Parliament and the Government. Community perspectives would thus be relayed to decision-makers in Canberra.

How would this improve practical outcomes?

To 'close the gap', policies must be guided by consultation with Indigenous local communities. Indigenous communities know their needs and interests best, especially remote Indigenous communities, which often have needs different to the wider population. For example, some remote communities in Queensland and the Northern Territory want community-specific alcohol bans. Similarly, needs relating to health services, traditional lands, and languages are influenced by unique locational, historical, cultural and factors. Effective policy requires a framework for dialogue between communities and government, which is what the First Nations Voice would provide. If policy-makers listen to and work with Indigenous communities, this will help improve policies and practical outcomes.

When have Indigenous people not been properly consulted?

Even in 2022, well-meaning policies often lack proper consultation. In June, mandatory alcohol restrictions in the Northern Territory were lifted, against the wishes of some remote communities. Indigenous communities must be empowered so they can co-design solutions and policies in partnership with government.



What matters would the First Nations Voice advise on?

According to the Co-Design Report, the First Nations Voice could advise on matters directly relating to the social, spiritual and economic wellbeing of Indigenous peoples. This would include policies and laws that 'have a significant or distinctive impact on' Indigenous peoples. This is likely to include:

- 'Closing the Gap' targets
- Health and social services in remote communities
- Suicide prevention in Indigenous communities
- Drug and alcohol regulation in Indigenous communities
- Indigenous incarceration rates
- Land rights and native title
- Preservation of Indigenous cultures and languages

The Voice could also raise with Government any national issue that it considers to be important for Indigenous peoples. This might include, for example, advice on how the impacts of environmental legislation affects Indigenous economic development.



FAQS

Would this be a third chamber of Parliament?

No. The proposed function of the First Nations Voice, which is strictly advisory and non-binding, is completely different to the law-making powers of Parliament. Parliamentary supremacy would be unchanged. Moreover, Parliament would fully control and oversee the Voice's operation. The proposed body would have no veto and no power to make laws. There would be no change to the Houses of Parliament whatsoever. Both former Prime Minister Malcolm Turnbull and Nationals MP Barnaby Joyce, who incorrectly called this proposal a 'third chamber' in 2017, have since admitted this was wrong. Turnbull has now said he will vote 'yes' in a First Nations Voice referendum.

Where is the detail about how this will work?

This proposal has been the subject of a decade of deliberation, including four separate government inquiries. The Final Report of the Co-Design Process provides detailed options for the structure and operation of the First Nations Voice, across local, regional and national levels. There have also been many proposals for the wording of a constitutional amendment and the Government has now released a draft amendment for further consultation.

Will this divide us by race?

No. The Constitution already contains racially discriminatory provisions and has presided over much discrimination in relation to Indigenous peoples. A constitutionally guaranteed First Nations Voice will mean Parliament and government must hear Indigenous voices when making laws and policies specifically about them, which will help prevent discrimination and injustice. It will bring us closer together through productive dialogue.

The Constitution already empowers Parliament to make special laws in relation to Indigenous peoples. Section 51(xxvi), the 'race power', has only ever been used to make laws in relation to Indigenous affairs. A constitutionally guaranteed First Nations Voice will ensure that Indigenous people get a fair say in those laws. This is about unity, not division. Better dialogue with Indigenous people will help improve policies and laws, so we can better address Indigenous disadvantage.

Does this reform contradict democratic equality?

No. The Voice would only have advisory powers. This will enhance democratic equality, not undermine it. Historically, Indigenous people have not been heard in decisions made about them. There were even laws and policies denying them the vote. A constitutionally guaranteed First Nations Voice will help ensure these past discriminatory policies are not repeated. It will help prevent the unfairness of the past.

Will this enable the courts to strike down certain laws?

No. The Referendum Council made clear that the constitutional amendment requiring Parliament to establish a First Nations Voice must be non-justiciable. This means the High Court will not be able to use it to strike down laws and policies. It is important that the amendment is carefully drafted to ensure it respects parliamentary supremacy.

Would this body have a veto power?

No. The First Nations Voice would not have any veto. Some critics argue that the Voice would possess a 'virtual veto' because its advice would be difficult for governments to ignore. That is not a virtual veto but an example of listening, which is indispensable to meaningful consultation. Advice that makes governments pause is probably advice worth hearing. However, it is also inevitable that sometimes advice will not be followed.

Is it dangerous to make this body permanent?

To be effective, a First Nations Voice must be a permanent institution. There must be a constitutional promise that Indigenous peoples will always be heard in decisions made about them. However, Parliament will retain authority to improve, change and evolve the institution over time as needed.

Don't Indigenous members of Parliament already provide a voice for Indigenous people?

The First Nations Voice would serve a different purpose to Indigenous members of Parliament. The Voice would ensure that the government takes stock of uniquely affected Indigenous communities when devising laws and policies for them. In contrast, members of Parliament represent all the Australians in their electorates, and their political parties. Both Indigenous and non-Indigenous members of Parliament will benefit from advice from Indigenous communities in making policies and laws about them.

Do all Indigenous people support this idea?

Over 97% of delegates at the Uluru National Convention endorsed the Uluru Statement. Only 7 out of 250 delegates dissented. The opposing delegates were worried that the Uluru Statement would give up Indigenous sovereignty. It is unrealistic to expect 100% consensus among Indigenous people, but the Uluru Statement represents an unprecedented national Indigenous consensus. This deserves to be respected.

Is this just virtue signalling?

No. Effective Indigenous policy requires consultation with Indigenous communities. The First Nations Voice will improve policy and produce practical outcomes. This is about more than symbolism. In fact, the Uluru Statement rejected mere symbolism in favour of practical reform.

Is this just a Labor Voice? Is it a left-wing idea?

The proposal for a constitutionally-guaranteed Indigenous advisory body transcends left and right. It is about all Australians. In fact, the concept germinated through engagement between Indigenous leaders and constitutional conservatives in 2014. Prominent constitutional conservatives like Professor Greg Craven and the current Shadow Attorney-General and Shadow Minister for Indigenous Australians, Julian Leeser, have long been supporters of a First Nations Voice, even before the Labor Party. This proposal deserves the support of all political parties and all Australians across the political spectrum.

Won't this be just another ATSIC?

ATSIC was an Indigenous representative and consultative body set up only in legislation. It was not underpinned by a constitutional guarantee, and so it was abolished when problems arose. ATSIC had strengths and weaknesses, but it should have been improved and problems should have been fixed; it should not have been abolished. This demonstrates why legislative flexibility is important, but a constitutional guarantee is needed to ensure permanency. A First Nations voice will have both. It will be constitutionally guaranteed but legislatively flexible, so it can be a permanent institution that evolves and improves over time.

HOW CAN YOU HELP?

1. Talk to family, friends and colleagues to help build support for a 'yes' vote at a referendum.
2. Use this document to help inform people and to dispel common myths.
3. Help recruit potential volunteers who can assist in 'yes' referendum campaigning. Let us know how many volunteers are ready for action so we can work together to help secure a 'yes' vote.
4. Write to your local Liberal Party and National Party members to urge bipartisan co-operation on a First Nations Voice referendum.

Further Reading

[The Uluru Statement from the Heart](#)

[Final Report of the Referendum Council 2017](#)

[Final Report of the Indigenous Voice Co-Design Process 2021](#)

[Radical Centre Reform Lab](#)

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