



Teacher Reference Document 101



AUSTRALIAN
CONSTITUTION
CENTRE

Unit 11: Changing the Constitution (referenda) – Year 9 - C & C Strand:
Government & Democracy

Topic 9.1: Referendum: the process for Constitutional change

Referendum on Indigenous Constitutional Recognition (student resource)

When the Commonwealth Constitution was negotiated, Aboriginal and Torres Strait Islander people were not consulted and did not participate. The Constitution did not recognise their unique status as Australia's first peoples and did not protect their continuing rights. It excluded Aboriginal people from being counted in the population for certain purposes and excluded them from the Commonwealth Parliament's power to make special laws for the people of any race. Aboriginal and Torres Strait Islander people were subject to discriminatory laws at the State, Territory and national levels, including in relation to voting rights.

This is why there has been a long history of Aboriginal and Torres Strait Islander people seeking constitutional reform, to protect their rights and to ensure that they have power to influence laws that are made about them. This included [William Cooper's petition](#) to the King in 1937, asking for reserved Indigenous seats in Parliament and the [Barunga Statement](#) in 1988 calling for a 'national elected Aboriginal and Islander organisation'.

While the 1967 referendum showed Australian support for Aboriginal and Torres Strait Islander people, it allowed the Parliament to make laws for Aboriginal and Torres Strait Islander people that could be either beneficial or detrimental. It also removed the only references to Aboriginal Australians from the Commonwealth Constitution. There is now no reference at all in the Constitution to Australia's first peoples.

In 1991 the [Council for Aboriginal Reconciliation](#) was established. It proposed a referendum to recognise Australia's Indigenous people in the



*Day of Mourning /
26 January 1938*

Source: State Library of NSW

Constitution in a new preamble (ie introduction) to it, to repeal [section 25](#) of the Constitution (which recognises the possibility that a State might deny the vote to people on the ground of race) and to insert a new provision prohibiting discrimination on grounds of race. The reason for seeking constitutional, rather than legislative, change is that: (a) the Constitution is the most important law in Australia, signifying the importance of Aboriginal and Torres Strait Islander people; (b) everybody, including the people in the Parliament and the Government, have to obey the Constitution; and (c) once something gets into the Constitution, it will last, because it is so hard to change the Constitution.

Recent reform efforts

All the States have recognised Indigenous Australians in their State Constitutions – but this was symbolic recognition, not the more practical and empowering constitutional reform desired by many Aboriginal and Torres Strait Islander people. It was also done by passing ordinary legislation, without a referendum. This meant it had little impact because it did nothing to cause change and most people did not even know it had happened.



Senator Pat Dodson, Chair of Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, attends a CEFA High Court gathering with former Governors-General Sir Peter Cosgrove and General Michael Jeffery, former Chief Justice Robert French and Chief Justice Susan Kiefel
 Source: CEFA

The moral, political and educative force of a 'Yes' vote of the Australian people was missing from the process.

At the Commonwealth level, the Gillard Government appointed an Expert Panel to report on what sort of constitutional recognition should be put in a referendum. The Panel [reported](#) in early 2012. It proposed the repeal of sections 25 and [51\(xxvi\)](#) (the 'race power') of the Constitution and the insertion of a new section 51A, with its own preamble, to give the Commonwealth Parliament power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. It also proposed including a racial non-discrimination provision in the Constitution.

As the political situation was bitter and divisive, these reform proposals were not pursued. Indigenous leaders then developed an [alternative proposal](#) to guarantee Aboriginal and Torres Strait Islander people [a voice](#) in the laws and policies made about them.

The Referendum Council and the Uluru Statement

In December 2015 a Referendum Council was established as a joint initiative of the Prime Minister and Leader of the Opposition. It conducted a number of dialogues with Indigenous Australians across the country to determine what they really wanted when it came to Indigenous constitutional recognition.

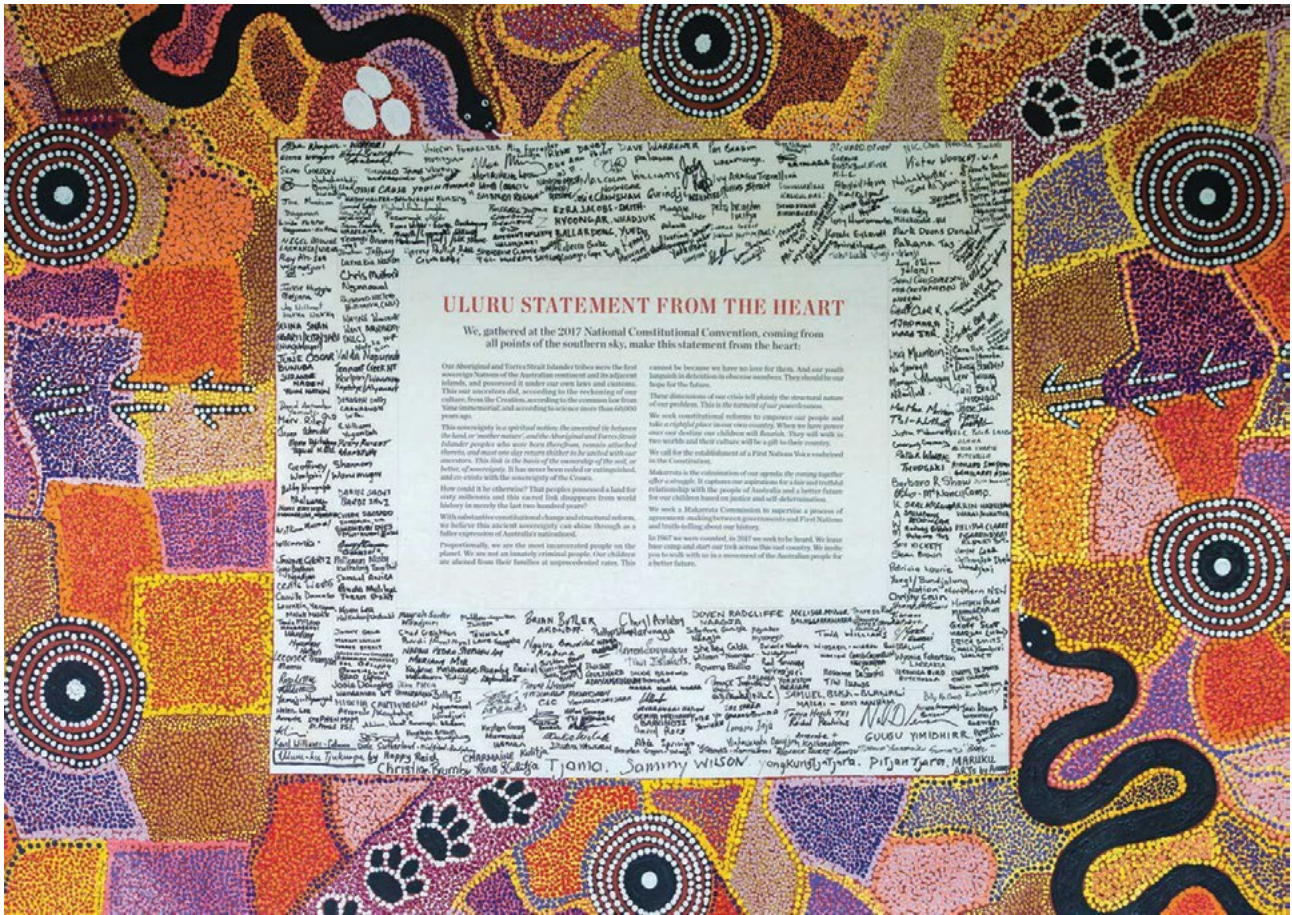
The final dialogue at Uluru abandoned all the earlier proposals. Instead the '[Uluru Statement from the Heart](#)' proposed a 'voice to the Parliament' and a Makarrata Commission to engage in truth-telling and supervise a process of agreement-making.

It was agreed at the dialogues that symbolic recognition was not sufficient and that real change was needed that would lead to an improvement in the lives of Aboriginal and Torres Strait Islander people. Recognition in words printed on a page would achieve little, as State constitutional recognition has shown.

Active and continuing recognition, which requires Parliament and the Government to recognise and listen to Aboriginal and Torres Strait Islander voices about the laws and policies that affect them, would be much more likely to [change daily lives](#) for the better. The idea of a Voice to Parliament was therefore about allowing Aboriginal and Torres Strait Islander peoples the ability to influence (not control) Governments and Parliament before laws and policies are made, so that they can be better informed and produce more effective and better quality laws and policies about Indigenous affairs.

The Referendum Council [reported](#) to the Prime Minister and the Leader of the Opposition on 30 June 2017. It proposed:

- '1. That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament...
2. That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.'



The Referendum Council also noted the proposal for a Makarrata Commission with the function of supervising agreement-making and truth-telling. But as this was outside the Council's terms of reference, it could not formally recommend it.

The Turnbull Coalition Government rejected the proposal for a Voice to Parliament, suggesting that it would be like a third chamber of Parliament and would breach the principle of equality. It was critical of a lack of detail in the proposal. [Others disagreed](#) with these [criticisms](#). For example Professor Anne Twomey [wrote](#) 'It could not be a third House of the Parliament, simply because it would have no power to initiate, pass or reject bills.'

The Government then established a parliamentary joint select committee. It recommended that there be a process of 'co-design' to determine how the idea of an Indigenous Voice would work, how the Voice would be constituted and how it would connect national, regional and local elements.

The Uluru Statement from the Heart
Source: National Museum of Australia

'Co-design' means that the detail will be worked out by Aboriginal and Torres Strait Islander peoples and the Government together in a cooperative process. The final report on the co-design process was issued in December 2021.

The Albanese Labor Government was elected in May 2022. It committed itself to hold a referendum during its first term to establish an Aboriginal and Torres Strait Islander Voice to Parliament in the Constitution. Draft wording for an amendment was released by the Prime Minister at Garma in July 2022. It was then scrutinised by a Referendum Working Group, comprised of Aboriginal and Torres Strait Islander representatives, which was itself advised by a Constitutional Expert Group on constitutional matters. The Government then introduced its referendum bill in the Commonwealth Parliament in March 2023 and had been passed by both Houses of the Commonwealth Parliament by the 19 June 2023. The constitutional referendum was held on 14 October 2023 and was not successful with a majority of voters around Australia voting 'no' and a majority of people in each of the States voting 'no'.



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Topic 9.1: Referendum: the process for Constitutional change

Referendum on Indigenous Constitutional Recognition (teacher resource)

Aboriginal and Torres Strait Islander peoples were not represented in the constitutional conventions that gave rise to the Commonwealth Constitution. They did not have a say in its terms. Accordingly, the Constitution does not include any provisions that recognise the unique status of Aboriginal and Torres Strait Islander peoples as Australia's first peoples, including their ongoing rights. It provides no specific means to protect Aboriginal and Torres Strait Islander people from discriminatory laws made by Parliament. Nor does it provide any dedicated mechanism for them to influence the making of laws and policies which affect their rights – apart from through normal electoral processes.

The 1967 referendum, although symbolically powerful, did not prevent discrimination or guarantee Aboriginal and Torres Strait Islander peoples a voice in the making of the laws that affect them. One of the effects of the 1967 referendum was to remove the only references to Aboriginal Australians from the Commonwealth Constitution. There is now no reference at all in the Constitution to Australia's First Peoples.

Calls for reform

For decades, Aboriginal and Torres Strait Islander people have been calling for constitutional reforms. For example, in 1937, Yorta Yorta man, [William Cooper](#), organised a petition to the British King, asking for reserved Aboriginal seats in Parliament, like the Maori have in New Zealand. The [petition](#) read:

TO THE KING 'S MOST EXCELLENT MAJESTY
IN COUNCIL THE HUMBLE PETITION of the
undersigned Aboriginal inhabitants of the
Continent of Australia respectfully showeth:-
THAT WHEREAS it was not only a moral
duty, but a strict injunction, included in the
commission issued to those who came to
people Australia that the original occupants
and we their heirs and successors should be
adequately cared for;
AND WHEREAS the terms of the commission
have not been adhered to in that -
(a) our lands have been expropriated by Your
Majesty's Government in the Commonwealth,
and (b) legal status is denied to us by Your
Majesty's Government in the Commonwealth;
AND WHEREAS all petitions made on our
behalf to Your Majesty's Government in the
Commonwealth have failed.
YOUR PETITIONERS humbly pray that Your
Majesty will intervene on our behalf, and,
through the instrument of Your Majesty's
Governments in the Commonwealth of Australia
- to prevent the extinction of the Aboriginal
Race and better conditions for all and grant us
power to propose a member of Parliament in
the person of our own Blood or White
man known to have studied our needs and to
be in Sympathy with our Race, to represent
us in the Federal Parliament.
AND YOUR PETITIONERS WILL EVER PRAY



Day of Mourning |
26 January 1938

Source: State Library of NSW

Aboriginal and Torres Strait Islander advocates have also long called for a representative body to ensure they have a voice in their affairs (such as through the [Barunga Statement](#) in 1988), and judicially enforceable guarantees of their rights. They have also consistently called for a treaty between Aboriginal and Torres Strait Islander peoples and the nation. These are all reforms that they argue would establish a fairer power relationship between Aboriginal and Torres Strait Islander peoples and the Australian nation as a whole. Such advocacy continued after the 1967 referendum and continues today.

Why change the Constitution?

Why is it important to Aboriginal and Torres Strait Islander people that their rights are recognised in the Constitution? Changing the Constitution is hard. It requires the approval of a majority of voters overall and a majority of voters in a majority of states. This is difficult to achieve. It means that once a reform is put into the Constitution, it is very difficult to change or remove it. It becomes an enduring promise.

As Yolgnu elder, Galarrwuy Yunupingu, [explained](#) in 1998:

"Our Yolgnu law is more like your Balanda [i.e. non-Indigenous] Constitution than Balanda legislation or statutory law. It doesn't change at the whim of short-term political expediency. It protects the principles which go to make up the very essence of who we are and how we should manage the most precious things about our culture and our society. Changing it is a very serious business...If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights..."

This is one reason why some Aboriginal and Torres Strait Islander people seek recognition of their rights and interests in the Constitution. Another reason is the significance of recognition in Australia's most important document.

In 1991, the [Council for Aboriginal Reconciliation](#) was established with bipartisan support. Its mission was to promote a process of reconciliation between Aboriginal and Torres Strait Islander peoples and the broader Australian community through cultural appreciation, education and cooperation.

The Council proposed a referendum to recognise Aboriginal and Torres Strait Islander people in a new preamble (ie introduction) to the Constitution, to repeal [section 25](#) of the Constitution (which reduces the representation of a State in the House of Representatives if the State denies the vote to people on the ground of race) and to insert a new provision prohibiting discrimination on grounds of race. There have been many similar, but so far unsuccessful, proposals over the last 30 years to amend the Commonwealth Constitution to recognise Aboriginal and Torres Strait Islander peoples.

State Constitutional Recognition

While each State has now recognised Indigenous Australians in its State Constitution, the States provided only symbolic recognition, while Aboriginal and Torres Strait Islander peoples are generally seeking more substantive and empowering constitutional reform. [Some](#) State Constitutions added a 'non-justiciability clause' (being a provision that says the constitutional recognition does not have any legal effect and cannot be used by the courts to interpret the Constitution or laws), but [not all States](#) did so.

These constitutional recognition clauses had minimal impact for two reasons. First, because they were purely symbolic, they did not alter the power dynamics within their jurisdictions or effect any practical change. Second, because the constitutional changes were made by the relevant State Parliament, without the assent of the people through a referendum, few people know about them. The moral, political and educative force of these changes was reduced, probably because the affirmative vote of the Australian people was missing from the process.



Proposals for a federal referendum

Before the 2007 election, the Liberal Prime Minister, John Howard, promised that if he was re-elected he would ensure that a national referendum was held on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. His Labor opponent, Kevin Rudd, then matched that promise. Rudd won the election, but distracted by the global financial crisis, he did not implement the promise.

The 2010 election produced a 'hung Parliament'. Neither side won a majority and both had to negotiate with small parties and independents to get their support to form a government. One of the conditions imposed by the Greens and some Independents for their support was the holding of a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. Labor's Julia Gillard agreed and became Prime Minister. She set up an Expert Panel to report on what sort of constitutional recognition should be proposed. It [reported](#) in early 2012.

The Expert Panel proposed the repeal of sections 25 and [51\(xxvi\)](#) (the 'race power') of the Constitution and the insertion of a new section 51A, with its own preamble, to give the Commonwealth Parliament power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. It also proposed the insertion of a racial non-discrimination provision in the Constitution and another section recognising Aboriginal and Torres Strait Islander languages as the original Australian languages, as well as English as the national language.

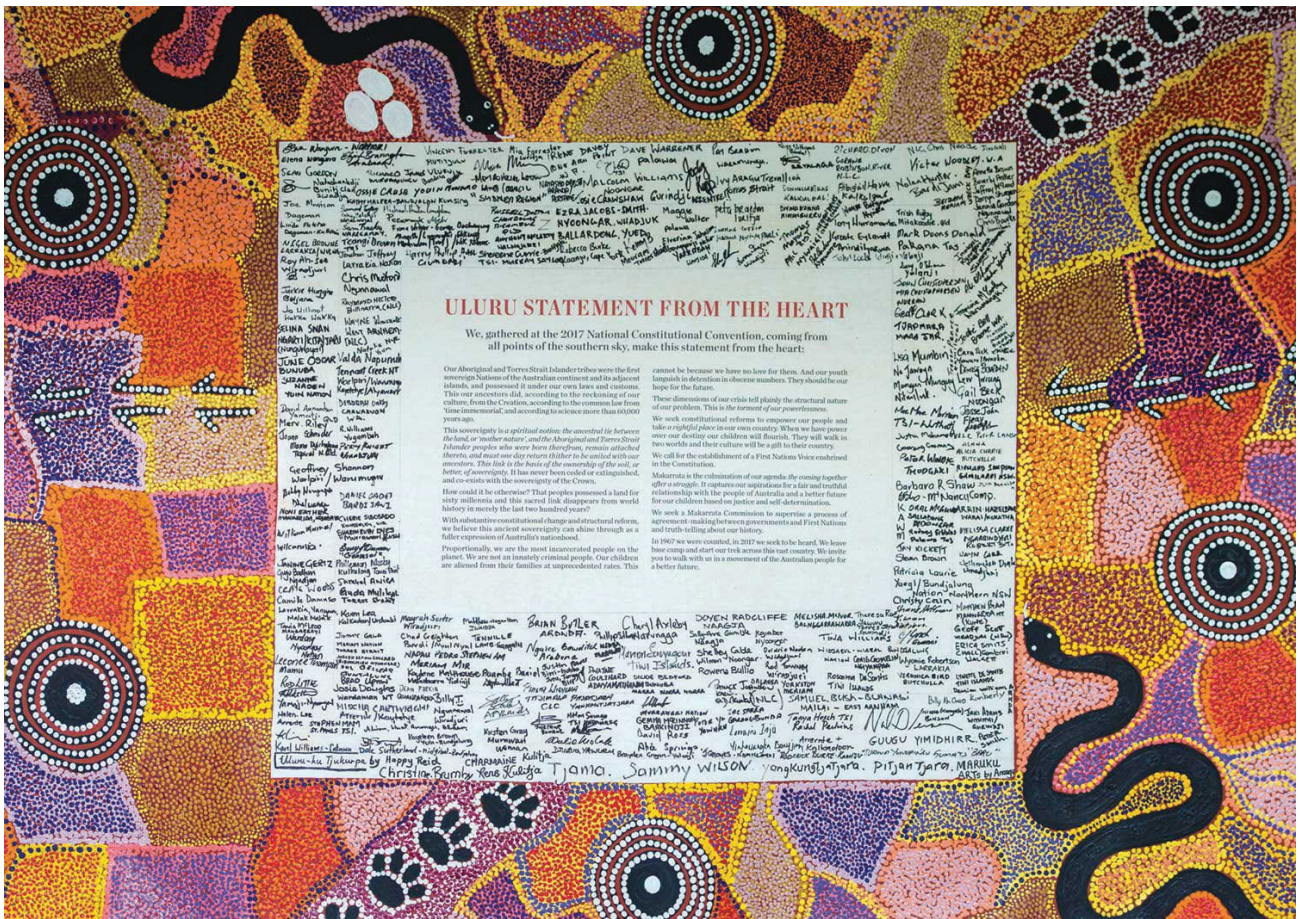
Former Senator Pat Dodson, Chair of Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, attends a CEFA High Court gathering with former Governors-General Sir Peter Cosgrove and General Michael Jeffery, former Chief Justice Robert French and former Chief Justice Susan Kiefel
Source: CEFA

There was a political backlash, particularly against the racial non-discrimination provision. As the political situation was bitter and divisive, these reform proposals were not pursued. Some First Nations leaders then developed an [alternative proposal](#). They came up with [the idea](#) that the Constitution could guarantee Aboriginal and Torres Strait Islander peoples [a voice](#) in the laws and policies made about them. It could require the establishment of an [advisory body](#) to better inform Parliament and the Executive about the impact of laws and policies on Aboriginal and Torres Strait Islander peoples.

The Referendum Council and the Uluru Statement

In December 2015 a [Referendum Council](#) was established as a joint initiative of the Prime Minister and Leader of the Opposition. It conducted a number of dialogues with Aboriginal and Torres Strait Islander peoples across the country to determine what they really wanted when it came to constitutional recognition.

The final dialogue at Uluru resulted in the abandonment of all the earlier proposals. Instead the '[Uluru Statement from the Heart](#)' proposed



*The Uluru Statement from the Heart
Source: National Museum of Australia*

a 'voice to the Parliament' and a Makarrata Commission to engage in truth-telling and supervise a process of agreement-making.

Following decades of Aboriginal and Torres Strait Islander advocacy, it was agreed at the dialogues that symbolic recognition was not sufficient and that real change was needed that would lead to an improvement in the lives of Aboriginal and Torres Strait Islander peoples. Merely symbolic recognition in words printed on a page would achieve little, as State constitutional recognition has shown. Active and continuing recognition, which requires Parliament and the Government to recognise and listen to Aboriginal and Torres Strait Islander voices about the laws and policies that affect them, would be much more likely to [change daily lives](#) for the better.

The idea of a Voice to Parliament and Government was therefore about allowing Aboriginal and Torres Strait Islander peoples the ability to influence (not control) Governments and Parliament before laws and policies are made, so that they can be better informed and produce more effective and better quality laws and policies about Aboriginal and Torres Strait Islander affairs.

If practical and empowering change was achieved within the Constitution, through a Voice, then symbolic statements of recognition could be achieved outside the Constitution, in a Declaration – without the need for a referendum. Given the 1999 preamble was 'crippled by compromise' and failed as a result, a Declaration outside the Constitution could be more expansive and inspiring because people wouldn't worry about how it would affect constitutional interpretation.

The Referendum Council [reported](#) to the Prime Minister and the Leader of the Opposition on 30 June 2017. It proposed:

1. That a referendum be held to provide in the representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament...
2. That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.'

The Referendum Council also noted the proposal for a Makarrata Commission with the function of supervising agreement-making and truth-telling. But as this was outside the Council's terms of reference, it could not formally recommend it.

The Turnbull Coalition Government [rejected](#) the proposal for a Voice to Parliament, suggesting that it would be like a third chamber of Parliament and would breach the principle of equality. The government's statement was also critical of a lack of detail in the proposal, and claimed that the Australian people would reject the proposal at a referendum.

[Others disagreed](#) with these [criticisms](#). For example Professor Anne Twomey [wrote](#) 'It could not be a third House of the Parliament, simply because it would have no power to initiate, pass or reject bills.'

The Government then established a parliamentary joint select committee. It [recommended](#) that there be a process of 'co-design' to determine how the idea of a Voice to Parliament would work, how the Voice would be constituted and how it would connect national, regional and local elements. 'Co-design' means that the detail will be worked out by Aboriginal and Torres Strait Islander peoples and the Government together in a cooperative process.

The [final report](#) on the co-design process was issued in December 2021.

The Albanese Labor Government was elected in May 2022. It committed itself to hold a referendum during its first term to establish an Aboriginal and Torres Strait Islander Voice to Parliament in the Constitution. Draft wording for an amendment was released by the Prime Minister at Garma in July 2022. It was then scrutinised by a Referendum Working Group, comprised of Indigenous representatives, which was itself advised by a Constitutional Expert Group on constitutional matters. The Government then introduced its referendum bill in the Commonwealth Parliament in March 2023.

On 23 March 2023, the Prime Minister announced the proposed wording of the amendment which would be introduced into Parliament. The amendment would insert a new Chapter at the end of the Constitution, which would comprise a new section 129, saying:

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:

(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 the Parliament and the Executive Government of the Commonwealth 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 matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

The constitutional referendum was held on 14 October 2023 and was not successful in achieving the required double majority to change the Constitution: the result was that a majority of voters around Australia voted 'no' and a majority of people in each of the States voted 'no'.

There is now discussion about next steps following the failed federal 2023 referendum. However, there is also progress being made at the State level. For example, South Australia has established a State-based First Nations Voice to Parliament.





Topic 9.1 Activities/ Lesson 4



AUSTRALIAN
CONSTITUTION
CENTRE

Referendum 2023

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour/ 1 Lesson	<ul style="list-style-type: none">To understand the intention of Aboriginal and Torres Strait Islander Peoples' recognition in the Constitution and the Uluru Statement from the Heart.To speculate on future referendums.To apply knowledge of referendums and critically reflect on how future referendums could be successful.

Rationale	Success Criteria
Students should be able to use the knowledge they have from the lessons so far on referendums to determine what can make future referendums either failed or be successful. This will also allow them to participate as active citizens when voting on referendums in their adult life.	Students can identify what was proposed by the referendum on a Voice to Parliament and the Executive Government. Students analyse the factors that affect the success of referendums and show an understanding of the referendum process.

Teaching Reference Documents:
<u>TRD 101 Referendum on Indigenous Constitutional Recognition (Students)</u> _____
<u>TRD 102 Referendum on Indigenous Constitutional Recognition (Teachers)</u> _____

Resources
VIDEOS: <ul style="list-style-type: none">BTN's What is Constitutional Recognition? (5:11) (But note errors: Aboriginal people <u>were</u> mentioned in the Constitution when it was written, but in a negative way and those mentions were removed in 1967; and the Voice is <u>not</u> a 'special group in the federal Parliament').Introducing the Statement from the Heart (1:06)Uluru Statement from the Heart (4:20) WEBSITE: <ul style="list-style-type: none">the Uluru Statement of the Heart websitethe Uluru Statement from the Heart (PDF) PRINT OUT ACTIVITY: <ul style="list-style-type: none">INDIGENOUS VOICE IN THE CONSTITUTION (9.1. Lesson 3. Activity 1) ENRICHMENT: <ul style="list-style-type: none">Uluru Statement from the Heart (translations)PEO's Hold a referendum

Tuning In
<ul style="list-style-type: none">THINK/PAIR/SHARE: How would you like to change the Australian Constitution?DISCUSSION: Would these changes be likely to be successful and what difficulties would they face?REVISE Referendum – success and failure in Australia TRD and lesson in this topicREVISE: Previous topics that deal with issues concerning Aboriginal and Torres Strait Islander peoples, such as voting rights, terra nullius and the impact of British colonisation.

Teacher Instruction

- **WATCH:** BTN's [What is Constitutional Recognition?](#) (5:11) (but note errors mentioned above.)
- **DISCUSSION:** Why is constitutional recognition important to many Aboriginal and Torres Strait Islander people? What potential problems are raised in this video?
- **RESEARCH:** Starting with the information in the TRD, students build a timeline of different calls for the constitutional recognition of Aboriginal and Torres Strait Islander peoples. Students conclude with written observations about why they think it has taken so long to hold a referendum.
- **WATCH:** [Introducing the Statement from the Heart](#) (1:06).
- Provide a COPY of the [Uluru Statement from the Heart](#) to students.
- **WATCH:** [Uluru Statement from the Heart](#) (4:20) spoken by prominent Indigenous Australians.
- **ENRICHMENT:** Listen to the [Uluru Statement from the Heart](#) in other languages, including the local Indigenous language from your school's area

Group/Independent Learning

- **GROUPWORK** (2-4 students per group): Fill in 'Aboriginal and Torres Strait Islander Voice Referendum' worksheet.
- **DISCUSSION:** Students share their results and compare group outcomes.

Wrapping it up

- Summarise common factors that will be important for a referendum to be successful.
- **DISCUSSION:** Will these factors be required no matter what the referendum is about? Why/why not?
- Why do you think a majority of people in a majority of states voted no in the October 2023 Referendum?
EXIT SLIP: What future referendum would you like to see in Australia?

Differentiation/Enrichment

- **COMPARISON:** Compare the recommendations of the Expert Group in 2012 which were given to the Gillard Government with those of the Referendum Council in 2017 which were given to the Turnbull Government. What were the similarities and differences? Ask students which recommendations they prefer. Which ones would be more likely to succeed at a referendum?

Assessment strategies

- Collect 'Aboriginal and Torres Strait Islander Voice Referendum' work-sheet and check for accuracy and depth of understanding. Assess timeline and observations on why it took so long to get to a referendum.
- Extension Program: Explore the Constitutional Treasure Hunt Referendum 2023 neutral education campaign program developed by CEFA for the Australian Government. Includes animations, fact sheets, quizzes and blogs found on www.civicsaustralia.org.au

