

REFERENDUM FAQ

CHANGING THE CONSTITUTION

1. What is the Constitution?

The Australian Constitution is the foundation document that united the Australian colonies into a single nation state - the Commonwealth of Australia. It came into force on 1 January 1901.

The Constitution sets out rules, procedures, checks and balances for Australia's system of government. It borrows heavily from Westminster principles of representative and responsible government. In addition, it provides for a federal government system by allocating power to a national Commonwealth Government (the 'Commonwealth') and providing for the continued existence of the Australian States (formerly, the colonies). The Constitution gives the Commonwealth law-making powers on such matters as taxation, defence, foreign affairs, immigration, interstate and overseas trade and commerce, marriage and divorce, and telecommunications and postal services. In some areas, the Constitution provides that the Commonwealth's law-making powers are exclusive. However, in many other areas, the Commonwealth shares legislative powers concurrently with the Australian States. The Australian States also retain exclusive law-making power over certain matters, including police, healthcare and education.

The Constitution empowers the three arms of Australian government – the legislature, the executive and the judiciary. It stipulates that the legislature, which is made up of the House of Representatives and the Senate, shall be elected by the Australian people. The Constitution also establishes the High Court of Australia, which, along with being a court of final appeal, interprets the Constitution and adjudicates on conflicts arising from constitutional matters.

2. How can the Constitution be changed?

A normal law can be changed by an ordinary Act of Parliament, but the Constitution is different. The text of the Constitution is said to be 'entrenched'. Subject to some contentious arguments to the contrary which are discussed further below, it can only be changed by the specific process for amendment set down in s 128 of the document.

Before the formal stages of constitutional change commence, an often lengthy period of public discussion takes place in relation to proposals for amendment. This may include debate and discussion through mechanisms such as constitutional conventions, public consultation, submissions of interest groups to Parliament, commissions of inquiry or parliamentary committees.

The formal process begins when a Bill proposing to amend the Constitution is introduced and passed by both houses of Parliament, the House of Representatives and the Senate, by absolute

majority. That means that a majority of the members of each house must agree to the Bill, not just a majority of those present for the vote. That is 76 out of 150 members of the House of Representatives, and 39 of 76 members of the Senate. If an absolute majority is achieved in one house but not the other, a deadlock provision may be invoked. This provides that if there is another vote after three months, and the houses still cannot agree, the amendment proposal may nonetheless proceed to referendum. It is then up to the people to decide.

Next, the proposal is normally put to the Australian people in a referendum. The Governor-General issues a writ for a referendum to be held usually between 33 and 58 days after the writ is issued. It sets out the day the electoral roll is closed, the day of the vote, and the day the writ is to be returned with the results. Voting is compulsory, and Australian citizens aged 18 years or over are eligible to vote if they are enrolled on the electoral roll and are not excluded for any reason. The day of the referendum is the same day across Australia. Australian's are asked a vote 'Yes' or 'No' to the proposed a change to the Constitution. The referendum must achieve a double majority, that is majority of all votes nationally, and a majority of votes in a majority of States (Territory votes are counted nationally, but not in the State vote). If any majority is not achieved, the Constitution will not be changed. For example, if a referendum gains 65% overall majority, but only gains a majority in three out of six states, the referendum will fail.

If the referendum achieves a double majority, the final step is the Governor General's Royal Assent making the Bill and Act of Parliament that changes the Constitution.

3. What is the difference between a referendum and a plebiscite?

A referendum is a vote by the people, the result of which is enforceable by law. A plebiscite differs as it is a vote by the people that is not legally binding. It cannot be used change the law or to force government to act, but can be used to gauge public opinion on an issue to determine if and how a referendum may take place in the future. Plebiscites are extremely rare, with only three being held since 1901. It was proposed that a plebiscite be held to assess the public mood in relation to Australia becoming a republic, but this was never held.

4. Do States and Territories also hold referendums?

Yes, referendums are not just held at the Commonwealth level. Referendums are unnecessary to change normal laws as they can be changed by an ordinary Act of Parliament. Generally State and Territory Constitutions are normal laws and can therefore be changed without a referendum. However, there are exceptions in some States that require a referendum to change important parts of their Constitutions. For example, the New South Wales Constitution requires a referendum to remove its Upper House of Parliament, the Legislative Council.

Even Local Governments may require referendums. For example, the New South Wales Local Government needs a referendum to change how a Mayor is appointed.

However, most votes at the State and Territory level have been advisory only (what would be called a plebiscite nationally) rather than resulting in binding legal changes.

5. Can citizens initiate referendum proposals?

In Australia, the decision to formally initiate a referendum lies exclusively with the Australian Government. A citizen's role in the referendum is to vote on the proposal put to him or her by the Parliament. In some countries citizens may initiate a vote including a referendum or a plebiscite. This is commonly known as a 'citizens initiated referendum' or 'CIR'. For example, New Zealand allows for an advisory vote to be initiated by citizens, whereas California allows for a binding referendum started by citizens. There has been some debate about introducing CIR in Australia including failed attempts to introduce Bills into Parliament providing for CIR in the 1980s and in 2013. Its supporters argue citizens should be able to participate in the subject of referendums and when they are held as well as voting on proposals made by government. However, the contrary view is that it may interfere with the principles of responsible and representative government on which Australian democracy is based, and have potential for abuse by the wealthy and corporate interests.

6. Is it possible to change the Constitution without a referendum?

As mentioned above, it is likely that the text of the Constitution can only be changed by the process set out in s 128 of the document itself. However, there are two ways that it is argued that it might be possible to change the Constitution without a referendum.

As the Constitution was originally introduced in an Act of the United Kingdom, there is at least in theory the potential that it might be amended by the United Kingdom Parliament without a referendum. However, it is unlikely that this would ever happen and if it did, it is likely that such an amendment would be ignored by Australia. The second possibility is that there is a provision within the *Australia Acts 1986* which provides that if all the States and the Commonwealth agree, the Commonwealth Parliament may amend a United Kingdom law known as the *Statute of Westminster 1931*. A provision in the *Statute of Westminster* states that it does not give the power to alter or repeal the Australian Constitution. It is therefore possible that this provision of the *Statute of Westminster* could be amended, thereby providing an alternative to a referendum as a mean of amending the Constitution. These are, however, very unlikely theoretical possibilities and s 128 remains the only widely accepted mechanism for formal amendment.

Less dramatic methods of 'changing' certain aspects of the Constitution are also possible. One method is by what is called constitutional conventions. Much of Australia's system of government is ruled by convention rather than the actual words of the Constitution. For example, the Constitution does not mention the Prime Minister or Cabinet, yet it is convention that the Governor General acts on their advice. These conventions can be seen as 'changing' the Constitution. Also, the way the words of the Constitution are interpreted may change over time which gives them new meaning. For example, in a dispute, the way the High Court interprets the

scope of the Commonwealth's power can be different to the way the government of the day interpreted their power.

7. How much do referendums cost?

Referendums can be expensive. The cost includes the production and dissemination of Australian Electoral Commission (AEC) pamphlets to every voter in Australia, government advertising to get voters to turn up at the polling booth on the day of the referendum, conventions held to debate the drafting of proposed changes, and the costs incurred on voting day including polling booth paraphernalia, staff and vote talliers. Referendums have generally become more expensive since the first referendum in 1906 due, at least in part, to inflation and the increased number of enrolled voters. For example, the 1999 referendum cost the public a total of approximately \$114 million. The AEC stated the largest expense was the running of the ballot on the day of the referendum, accounting for over half of its total expenditure at approximately \$33 million. The other major cost was the constitutional convention at \$28 million.

8. Who decides what question will appear on the ballot?

The Parliament has ultimate responsibility over the wording of the question that is put before voters in a referendum. However, the Parliament must comply with the provisions of the *Referendum Act*. It states that the question on the ballot must include a short title of the law proposed to be changed. The ballot does not state the text of the proposed change as it is presumed that voters are aware of the changes through official AEC pamphlets sent to every voter prior to the day of referendum.

AUSTRALIA'S REFERENDUM RECORD

9. What is Australia's record on constitutional change?

Australia has a very low success rate when it comes to changing the Constitution. There have only been 19 referendums held since 1901 that have proposed 44 changes. This amounts to a referendum day every 5.7 years since 1901. Only eight changes have been successful, decided by six separate referendums. This means 36 proposed changes have failed to succeed at referendum.

The first referendum was held in 1906 and the last was in 1999. The past 14 years is the longest period between referendums since 1967. The first successful referendum was in 1906 making one change and the last successful referendum was held in 1977, resulting in three changes to the Constitution.

10. What changes to the Constitution have Australians made in the past?

The eight changes have been made to the Constitution decided by six separate referendums. The first successful referendum in 1906 made one change relating to the commencement of the Senate term. This was an uncontroversial procedural change aimed at aligning Senate and House of Representative elections.

The 1910 referendum successfully changed the Constitution to enhance the Commonwealths power to take over State debts.

The 1928 referendum change allowed the Commonwealth to enter into agreements with the States in relation to their borrowings and debts. This provision was introduced as a result of the financial difficulties experienced by the States in the 1920s. This amendment had huge public support attaining 74.3 per cent total majority and a majority in all six states.

The 1946 referendum introduced a new social services head of power for the government including the ability to make laws concerning maternity allowances, widow's pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services, benefits to students and family allowances..

The next successful referendum was held in 1967, with the country voting to remove two racially discriminatory provisions in the Constitution and grant the Commonwealth the power to make laws in relation to Aboriginal people. This meant Aboriginal and Torres Strait Islander people were included in the census for the first time. The 1967 referendum had the most popularly supported 'Yes' campaign in Australian history, achieving a total majority of 90.8 percent and a majority in all six states.

The most recent successful change to the constitution was in 1977. The referendum resulted in three uncontroversial changes, which were promoted as sensible and fair. They were: bringing elections in line for both the Houses of Commonwealth Parliament; giving people residing in the Territories the right to vote in referendums; and fixing the mandatory retirement age for federal judges at 70 years.

11. What sorts of changes have Australians rejected at referendum?

The most common type of referendum question that has been rejected by the Australian public are those that attempt to give more power to the Commonwealth Government. Of the 44 changes put to the Australian people at referendum, 24 have been seeking additional power be given to the Commonwealth. Only three of these 24 changes have been successful. Referendum questions that have failed when put to the Australian public include:

- Giving the Commonwealth more powers over corporations, trade and commerce, labour and employment (1911 & 1913) and post-war reconstruction (1944)
- Banning the Communist Party and communism in Australia (1951)
- Altering the duration of Parliamentary terms (1974, 1977, 1984, 1988)

- Incorporating human rights into the Constitution (1988)
- Most recently, Australians rejected the question of becoming a republic (1999)

12. Why have so many referendums failed?

There is no overarching reason why referendums fail. It is often multiple features of individual campaigns that lead to their failure. Common criticisms of failed referendums have included:

- Asking too many questions on the ballot paper
- Seeking too many changes in one question
- A confused message of ‘Yes and ‘No’ campaigns, or no campaign at all
- Lack of public knowledge on the question (the ‘Don’t Know, Vote No’ response)
- Weak leadership that fails to inspire change
- Lack of public engagement and consultation
- Opposition by political parties or State governments

13. What are the key ingredients of a successful referendum?

While there are no absolute criteria needed for a referendum to succeed, from Australia’s referendum record there are a few common features that are shown to improve likelihood of success. These centre on getting the question and the process of change right, including:

- A clear, unconfused message
- Strong leadership by government advocating ‘Yes’
- Bipartisan support across political parties
- State government support
- National consensus of a well-informed electorate
- Extensive deliberation that addresses public concerns
- Community involvement through public forums in schools, universities, the media and community groups
- A community driven campaign to ‘Yes’
- Minimal rather than multiple and broad changes

From the features listed it is clear that community education and engagement with the issue is paramount. Government leadership and a control of the process of referendum is also important.

14. Are referendums less successful when they are held on election day?

Despite some suggestion that holding a referendum on election day may divide public opinion on the matter based on political lines and therefore make it less likely to succeed, this has not been the case in practice. Australia’s record of constitutional change shows that of the eight successful referendums, half have been held on election day and half on a separate date.

15. How does Australia's referendum record compare to other countries?

The Constitution has been changed just eight times in over 110 years despite an offering to the Australian public of 44 changes. This has led to Australia being described as a constitutionally 'frozen continent'. In comparison, the United States of America's Constitution has been altered 27 times in over 220 years. It is important to note, however, that 10 of those 27 changes happened at its birth and are generally considered part of the original US Constitution. On that assessment, both countries have experienced about 7.5 changes per 100 years. The Greek Constitution has been changed just three times since its inception in 1975. On the other hand, Canada's Constitution has been changed 10 times since 1982; a rate of 50 changes per 100 years and the South African Constitution has been changed 16 times since 1996; a rate of 100 times in 100 years.

This FAQ has been compiled based on 'People Power' by George Williams and David Hume (UNSW Press, 2010).