

2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CONSTITUTION ALTERATION (ABORIGINAL AND TORRES STRAIT
ISLANDER VOICE) 2023**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Hon Mark Dreyfus KC MP)

CONSTITUTION ALTERATION (ABORIGINAL AND TORRES STRAIT ISLANDER VOICE) 2023

GENERAL OUTLINE

The Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Bill) recognises Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia in the Australian Constitution through an Aboriginal and Torres Strait Islander Voice (Voice). Enshrining the Voice in the Constitution is the form of recognition sought in the 2017 Uluru Statement from the Heart. The Voice would be an enduring institution to ensure that Aboriginal and Torres Strait Islander peoples can make representations to the Commonwealth Parliament and the Executive Government of the Commonwealth on matters that relate to them, improving the development and implementation of laws and policies.

The main elements of the Constitution Alteration

The Bill introduces a new section into the Constitution which would be located in a new Chapter IX, to be named ‘Recognition of Aboriginal and Torres Strait Islander Peoples’, at the end of the existing chapters of the Constitution. The section, to be titled ‘Aboriginal and Torres Strait Islander Voice’, would contain four key components. The purposes of these components are:

- to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia;
- to provide for the establishment of a new constitutional entity called the Aboriginal and Torres Strait Islander Voice;
- to set out the core representation-making function of the Voice; and
- to confer upon the Parliament legislative power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.

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

The new section in the Constitution would recognise Aboriginal and Torres Strait Islander peoples as Australia’s First Peoples.

Aboriginal and Torres Strait Islander peoples are the first inhabitants of Australia. They have occupied the Australian continent for over 60,000 years and represent the oldest continuous living cultures in human history. Aboriginal and Torres Strait Islander peoples have maintained a relationship with land, waters and sky since time immemorial.

Aboriginal and Torres Strait Islander peoples have experienced profound and continuing disadvantage as a result of European settlement. They were progressively dispossessed of their land. They continue to face unique challenges stemming from that dispossession.

From 1901 to 1967, the Constitution effectively excluded Aboriginal and Torres Strait Islander peoples in significant ways. Aboriginal and Torres Strait Islander peoples were not

represented at the Australasian Federation Conventions at which the draft Constitution was considered. Once in effect, the Constitution prevented the Commonwealth from counting Aboriginal and Torres Strait Islander peoples as part of the Australian population for electoral and some financial purposes, and prevented the Parliament from making special laws about them under s 51(xxvi).

Aboriginal and Torres Strait Islander peoples have a long history of advocating to be heard in the development of laws and policies that affect them. In 1937 Yorta Yorta elder William Cooper petitioned King George VI for parliamentary representation. The Yirrkala Bark Petitions (since 1963), the Larrakia Petition (1972) and the Barunga Statement (1988) are examples of Aboriginal and Torres Strait Islander peoples seeking more meaningful opportunities to have the Parliament and the Executive Government listen to their views on matters that affect them, including in the form of representative bodies and consultative mechanisms.

In 1967, Aboriginal and Torres Strait Islander peoples were instrumental in the successful referendum on including Aboriginal and Torres Strait Islander peoples in certain population counts and allowing the Parliament to make special laws about them under s 51(xxvi) of the Constitution.

Following that referendum, successive governments established a series of representative bodies to give Aboriginal and Torres Strait Islander peoples more direct input into policy and law-making processes. Those bodies were subsequently reformed, transformed and ultimately defunded or abolished. Despite the Parliament having the power to make special laws about Aboriginal and Torres Strait Islander peoples under s 51(xxvi) of the Constitution, Aboriginal and Torres Strait Islander peoples do not presently have a guaranteed body to provide views to the Parliament and the Executive Government about decisions, policies and laws that affect them.

By addressing the need for such an institution, this proposed constitutional amendment provides a form of recognition that is practical and substantive. It both ensures that the Constitution reflects the historical truth of Aboriginal and Torres Strait Islander peoples' long-standing and continuing place in Australia, and provides for an institution to improve their lives. Laws, policy making processes and decisions affecting Aboriginal and Torres Strait Islander peoples should be informed by their unique experiences. When Aboriginal and Torres Strait Islander peoples' perspectives are taken into account, those processes are more likely to result in approaches that are better targeted, achieve their goals, have community legitimacy and improve peoples' lives over the long term.

The Uluru Statement from the Heart

In 2017, over 250 Aboriginal and Torres Strait Islander delegates at the National Constitutional Convention issued the Uluru Statement from the Heart. Addressed to the Australian people, the Uluru Statement from the Heart calls for a constitutionally enshrined Voice and the establishment of a Makarrata Commission to supervise agreement-making and truth-telling. The Uluru Statement from the Heart is attached to this explanatory memorandum.

The proposed constitutional amendment would implement the first element of the Uluru Statement from the Heart, to recognise Aboriginal and Torres Strait Islander peoples in the Constitution through a Voice.

The Uluru Statement from the Heart was the product of a National Constitutional Convention held from 23 to 26 May 2017, which was the culmination of the Referendum Council-run process of 12 First Nations Regional Dialogues and one Regional Meeting on options for constitutional recognition. The Regional Dialogues involved 1,200 Aboriginal and Torres Strait Islander delegates, made up of 60 per cent traditional owner groups, 20 per cent community organisations and 20 per cent key individuals. The overwhelming majority of Aboriginal and Torres Strait Islander delegates at the Dialogues endorsed a Voice as an appropriate form of constitutional recognition.

The 2017 Final Report of the Referendum Council details the Uluru Dialogues process and the nature of the proposals considered.

Origins of the Voice and constitutional recognition

Constitutional recognition in the form of a Voice brings together two long-standing calls from Aboriginal and Torres Strait Islander peoples – for an enduring representative body and to be recognised in the Constitution.

In addition to the Uluru Statement from the Heart, a series of reports has examined options to recognise Aboriginal and Torres Strait Islander peoples in the Constitution as the First Peoples of Australia and for a Voice, some before and some after the Uluru Statement from the Heart, including:

- *The Final Report of the Expert Panel on Constitutional Recognition of Indigenous Australians* in 2012.
- *The Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* in 2015.
- *The Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples* in 2018.
- *The Indigenous Voice Co-design Process Final Report* in 2021.

General purpose of the Bill

The purpose of the Bill is to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia in the Constitution through an Aboriginal and Torres Strait Islander Voice to the Parliament and the Executive Government.

The Voice would be an independent advisory body that would be empowered to make representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples. The intention is that the members of the Voice would be selected by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities by such means as the Parliament specifies.

The constitutional amendment would enshrine a Voice in the Constitution, including its core function of making representations.

It would also empower the Parliament to enact legislation about matters relating to the Voice, including its composition, functions, powers and procedures. The Parliament should have

flexibility to ensure the Voice can adapt and respond to the contemporary needs of Aboriginal and Torres Strait Islander peoples.

The Voice would be able to make representations on matters relating to Aboriginal and Torres Strait Islander peoples. While the constitutional nature of the body and its expertise in matters relating to Aboriginal and Torres Strait Islander peoples would give weight to the representations of the Voice, those representations would be advisory in nature.

The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government.

The constitutional amendment would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action.

FINANCIAL IMPACT

The Government provided \$59.1 million through the October 2022-23 Budget to prepare for the referendum. This includes:

- \$50.2 million provided to the Australian Electoral Commission to commence operational preparations; and
- \$8.9 million for the National Indigenous Australians Agency, the Department of Finance and the Attorney-General's Department collectively to support the work necessary to deliver the referendum.

Additional funds for the operation of the referendum have not yet been announced at the time of the introduction of this Bill into the Parliament. Implementation of the Voice would have a financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. This Bill recognises Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia in the Australian Constitution, through an Aboriginal and Torres Strait Islander Voice (Voice).

3. The Bill introduces a new section into the Constitution which would be located in a new Chapter IX, to be named ‘Recognition of Aboriginal and Torres Strait Islander Peoples’. The section, to be titled ‘Aboriginal and Torres Strait Islander Voice’, would contain four components. The purposes of these components are:

- introductory words to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia;
- subsection 129(i) to provide for the establishment of a new constitutional entity called the Aboriginal and Torres Strait Islander Voice;
- subsection 129(ii) to set out the representation-making function of the Voice; and
- subsection 129(iii) to confer upon the Parliament legislative power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.

4. The Voice would be an enduring institution to ensure that Aboriginal and Torres Strait Islander peoples can make representations to the Commonwealth Parliament and the Executive Government of the Commonwealth to improve the development and implementation of laws and policies that relate to them.

Human rights implications

5. The Bill engages the following rights:
- a. the right to self-determination in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the principle in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
 - b. the rights to equality and non-discrimination in Articles 2 and 26 of the ICCPR, Article 2(2) of the ICESCR, and Article 5 of the International

Convention on the Elimination of All Forms of Racial Discrimination (CERD), as well as the principle in Article 2 of the UNDRIP; and

- c. the right to take part in public affairs and elections in Article 25 of the ICCPR.

Right to self-determination

6. Article 1 of the ICCPR and Article 1 of the ICESCR provide that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

7. The principles underlying the right are also contained in Article 3 of the UNDRIP. While the UNDRIP is not a legally binding instrument and is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it informs the way governments engage with and protect the rights of Indigenous peoples.

8. The Bill is consistent with the realisation of Aboriginal and Torres Strait Islander peoples' right to self-determination. Section 129 would establish the Voice as a representative body for Aboriginal and Torres Strait Islander peoples to make representations to the Parliament and the Executive Government on issues relating to Aboriginal and Torres Strait Islander peoples, including their communities. The intention is that the members of the Voice would be selected by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities by such means as the Parliament specifies. The Voice will improve Aboriginal and Torres Strait Islander peoples' participation in and input into the decisions, policies and laws that affect their rights and interests. The Voice will therefore improve the way in which decisions, policies and programs take into account Aboriginal and Torres Strait Islander peoples' views and interests. It will be for the Aboriginal and Torres Strait Islander Voice to determine the matters relating to Aboriginal or Torres Strait Islander peoples on which it will make representations, by reference to the priorities of Aboriginal and Torres Strait Islander communities.

Rights to equality and non-discrimination

9. Articles 2 and 26 of the ICCPR provide that all individuals have the right to the equal protection of the law and effective protection against discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2(2) of the ICESCR, Article 5 of the CERD and the principle in Article 2 of the UNDRIP make similar provision.

10. This Bill is consistent with the right to equality and non-discrimination. It would promote the rights and freedoms of Aboriginal and Torres Strait Islander peoples by acknowledging their continuing disadvantage, and historical exclusion from participation in the making of decisions, policies and laws that affect them. The Bill does this in a way that would not abrogate or otherwise negatively affect the ability of members of the broader community to enjoy or exercise their political, economic, social, cultural or other rights and freedoms. The Voice, as a representative institution, would enable Aboriginal and Torres Strait Islander peoples to express their views to the Parliament and the Executive Government of the Commonwealth on issues that relate to them, including their communities. This will ensure that the laws, policies and programs of the Commonwealth are better attuned to empowering Aboriginal and Torres Strait Islander peoples, addressing disadvantage, and improving outcomes.

Right to take part in public affairs

11. Article 25 of the ICCPR provides that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives.

12. This Bill promotes the right to take part in public affairs. Section 129 would enable the improved participation of Aboriginal and Torres Strait Islander peoples in the Australian democratic process through a Voice that can make representations to the Parliament and the Executive Government. This would allow Aboriginal and Torres Strait Islander peoples to contribute their views on the decisions, policies and laws that affect them at a national level through an enduring representative body. This will improve Aboriginal and Torres Strait Islander peoples' public participation on issues that affect them.

Conclusion

13. This Bill is compatible with human rights.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

1. Clause 1 provides for the short title of the Act to be the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*.

Clause 2 – Commencement

2. Clause 2 provides for the Bill to commence on the day on which the Bill receives Royal Assent. Under s 128 of the Constitution, a proposed law to alter the Constitution shall be presented to the Governor-General for Royal Assent if it is approved by a majority of electors voting in a majority of states and by a majority of all electors voting.

Clause 3 – Schedules

3. Clause 3 provides that the Constitution is altered as set out in Schedule 1.

Schedule 1

4. Item 1 of Schedule 1 would amend the table of contents which appears at the beginning of the Constitution to insert a reference to a new ‘Chapter IX’ named ‘Recognition of Aboriginal and Torres Strait Islander Peoples’.

5. Item 2 would insert a new Chapter IX titled ‘Recognition of Aboriginal and Torres Strait Islander Peoples’ in the Constitution. It would also insert a new s 129 titled ‘Aboriginal and Torres Strait Islander Voice’, as the only section in Chapter IX of the Constitution.

6. The inclusion of Chapter IX and s 129 in the Constitution would recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia in the Constitution through an Aboriginal and Torres Strait Islander Voice (Voice).

Recognition of Aboriginal and Torres Strait Islander peoples

7. Section 129 would contain an introduction recognising Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. This introductory text explains that enacting s 129 formally acknowledges Aboriginal and Torres Strait Islander peoples as Australia’s First Peoples in the Constitution.

Establishment of the Voice as an enduring body

8. Subsection 129(i) would provide for the establishment of an Aboriginal and Torres Strait Islander Voice. The Voice is intended to be an enduring institution granted this status through constitutional enshrinement.

9. The term ‘body’ is used to indicate the nature of the Voice as an entity with a basis in the Constitution. The Parliament would have the power to make laws about the composition of the Voice under s 129(iii).

Representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples

10. Subsection 129(ii) would set out the core function of the Voice. The Voice may make representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

11. The purpose of this function is to ensure that Aboriginal and Torres Strait Islander peoples, through the Voice, can provide advice to the Parliament and the Executive Government on matters relating to them.

Making representations

12. A representation is a statement from the Voice to the Parliament or to the Executive Government, or both. A representation would communicate the Voice's view on a matter relating to Aboriginal and Torres Strait Islander peoples. The Parliament or the Executive Government may decide what action, if any, to take in response to a representation by the Voice. The Parliament may provide for the procedures to be followed by the Voice in making a representation.

13. Under s 129(ii), the Voice 'may' make representations. It is not obliged to do so in relation to any particular matter. While the Voice would be able to make representations on a broad range of matters, it would be both impractical and unrealistic to require or expect the Voice to make representations about all matters relating to Aboriginal and Torres Strait Islander peoples.

14. Subsection 129(ii) would not require the Parliament or the Executive Government to wait for the Voice to make a representation on a matter before taking action. Nor would s 129(ii) require the Parliament or the Executive Government to seek or invite representations from the Voice or consult it before enacting any law, taking any action or making any decision. Subsection 129(ii) would also not require the Parliament or the Executive Government to furnish the Voice with information about a decision, policy, or law (either proposed or in force) at any time.

15. Finally, s 129(ii) would not oblige the Parliament or the Executive Government to *follow* a representation of the Voice. While the constitutional nature of the body, and its expertise in matters relating to Aboriginal and Torres Strait Islander peoples would give weight to the representations of the Voice, those representations would be advisory in nature.

Representations to the Parliament

16. Subsection 129(ii) empowers the Voice to make representations, including to the Parliament. This would include making representations about existing or proposed laws, as well as representations in relation to the Parliament's other functions, such as parliamentary committee inquiries, on matters relating to Aboriginal and Torres Strait Islander peoples.

17. The term 'the Parliament' has the same meaning as elsewhere in the Constitution (see especially s 1). It refers to the Parliament of the Commonwealth, which consists of the Sovereign, the House of Representatives and the Senate.

18. Section 129 does not impose any obligations on the Parliament in relation to representations made by the Voice.

Representations to the Executive Government

19. Subsection 129(ii) empowers the Voice to make representations, including to the Executive Government of the Commonwealth. This would include representations about any matter within the executive power of the Commonwealth, such as law reform, policy development, decisions made under specific legislation, and other matters of government administration, provided they relate to Aboriginal or Torres Strait Islander peoples.

20. The term ‘the Executive Government of the Commonwealth’ has the same meaning as elsewhere in the Constitution.

21. It is a matter for the Parliament to determine, in the exercise of its power under s 129(iii), whether the Executive Government is under any obligation in relation to representations made by the Voice.

‘Matters relating to Aboriginal and Torres Strait Islander peoples’

22. Subsection 129(ii) provides that the Voice’s core representation making-function concerns ‘matters relating to Aboriginal and Torres Strait Islander peoples’. This requires a connection between Aboriginal and Torres Strait Islander peoples and the matters on which the Voice makes representations.

23. The matters may relate to Aboriginal peoples or Torres Strait Islander peoples, or both.

24. The phrase ‘matters relating to Aboriginal and Torres Strait Islander peoples’ would include:

- a. matters specific to Aboriginal and Torres Strait Islander peoples; and
- b. matters relevant to the Australian community, including general laws or measures, but which affect Aboriginal and Torres Strait Islander peoples differently to other members of the Australian community.

25. Consistent with the principle of self-determination, it would be a matter for the Voice to determine its own priorities with respect to the representations that it wishes to make, within the boundaries set by s 129. This is intended to ensure that the role and function of the Voice can evolve over time in response to the concerns of, and issues impacting, Aboriginal and Torres Strait Islander peoples.

The Parliament’s power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures

26. Subsection 129(iii) would allow the Parliament, subject to the Constitution, to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures. It confers upon the Parliament a broad power to make laws in relation to the Voice, without detracting from its constitutionally guaranteed existence (under s 129(i)) and representation-making function (under s 129(ii)).

27. The particular matters specified in s 129(iii) are not exhaustive. Accordingly, the Parliament may make laws about any matters relating to the Voice, including how the Voice will operate, its relationships with other bodies and entities, and how those bodies and entities can respond to its representations. In particular, s 129(iii) would empower the Parliament to make laws establishing standard procedures to be followed for interactions between the Voice and the Executive Government or the Parliament. One aspect of that would be providing for the ways in which the Parliament and the Executive Government would receive representations from the Voice.

28. The legislative power under s 129(iii) would also allow the Parliament to make laws about the Voice's representations, including specifying whether or not, and if so in which circumstances, an Executive Government decision-maker has a legal obligation to consider the Voice's representations.

Composition

29. The Parliament's power to make laws with respect to the composition of the Voice would support laws about the membership, structure and legal form of the Voice. This could include matters such as how members of the Voice will be selected, the number of members of the Voice, any eligibility criteria to be a member, and the length of members' terms.

Functions

30. The Parliament would have power to make laws with respect to the Voice's functions. This would allow the Parliament to make laws both about the Voice's constitutionally-enshrined function of making representations to the Parliament and the Executive Government, and to confer other functions on the Voice, such as to make representations to state or territory parliaments or governments.

Powers

31. The Parliament would be able to make laws with respect to the Voice's powers. This would allow the Parliament to confer powers on the Voice to assist the Voice in discharging its functions. For example, this could include powers to gather information required to perform its functions.

Procedures

32. The Parliament would have power to make laws with respect to the procedures of the Voice. This encompasses a wide range of matters relating to the functioning of the Voice. This could include governance arrangements, as well as the procedures to be followed by the Voice when deciding whether to make, or when making, a representation to the Parliament or the Executive Government and the form in which a representation should be made.

ATTACHMENT

ULURU STATEMENT FROM THE HEART

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from ‘time immemorial’, and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.