

ANNEXURE A: QUESTIONS ABOUT THE BILL

1. On 23 March 2023, the Prime Minister announced that a bill would be introduced for a constitution alteration to insert the following words in the Constitution:

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.*
2. In order to maximise support for this amendment, or some version of this amendment, the Parliament must determine answers to the following questions. Those answers will either confirm that Australians can be confident that no legal issues arise requiring attention, or what changes to the amendment would resolve any issues.
 3. This list of questions does not deal with the ‘design principles’ that the Government has released, and which it says will guide the drafting of the legislation through which the Parliament will set up the new body. This is currently scheduled to occur post-referendum.

NEW CHAPTER HEADING

4. Professor Nicholas Aroney has said:

‘... where the Voice is inserted into the Constitution will make a difference because, if it’s put into a chapter on its own, it structurally gives it a significance that it would not otherwise have. Because, at the moment, we have another institution called the Interstate Commission referred to in s 101 of the Constitution, but not in its own chapter. And in quite emphatic terms, there is meant to be an Interstate Commission, but it doesn’t exist. It has existed, but it’s not in its own chapter. Because, when you look at the chapters of the Constitution, they reflect the important institutions of the Constitution. That’s why Chapter I is about the Parliament, Chapter II is about the Executive Government, Chapter III is about the courts. Then we have a separate chapter about the States, because they are the four important institutions, as it were. And so, when you put an institution into its own chapter, you’re elevating it to a status that is similar to those other institutions, even if its functions are

*different... Would the Voice be a third chamber? No, I don't think it would be a third chamber in the strict sense of the word ... What it's given is an authority to make representations and that has its own special dynamic. It is a unique capacity, but it is a capacity ... it is a function in and of itself that is very significant ... it will be significant if it is proposed that it goes into its own chapter as opposed to a section on its own because the structure of the Constitution is also part of its meaning, and the High Court has said that.'*¹

5. Does the insertion of a new chapter affect how the Constitution is interpreted by the High Court?
6. Would this proposed amendment be interpreted in the same way if it were inserted into an existing chapter rather than into the proposed new Chapter IX?

PREAMBULAR LANGUAGE OR 'CHAPEAU'

7. The Government has added an additional sentence for the purpose of creating introductory language to the provision. The purpose of the introductory language is to provide a succinct explanation for the enactment of the provision and to link the provision very explicitly to the aspiration for constitutional recognition.
8. All members of the Expert Group agreed that introductory language of this kind would be appropriate, however, former Opposition spokesperson Julian Leeser argued in his speech to the National Press Club that this raises the following question:

'What rights privileges and obligations are implied by being recognised as the 'First Peoples of Australia' and what does the term imply at law?'

9. Leeser has also raised the question:

'By putting that provision under the chapeau, would we be implying that representations can only be made if in some way they are in recognition of the Aboriginal and Torres Strait Islander peoples as First Peoples of Australia?'

10. The Committee should consider these questions in detail, and determine if this chapeau is necessary. Given that recognition is mentioned in the long title of the Bill, recognition will be mentioned on the ballot paper that every elector will receive, and recognition is also featured in the title of the new chapter, suggesting that it may not be necessary to include it in a chapeau within the proposed s 129 as well.

RIGHT TO MAKE REPRESENTATIONS

11. Proposed section 129(2) says that the body created in s 129(1) 'may make representations'.

¹ [The Voice & The Constitution | Professor Nicholas Aroney - YouTube](#) at 1 02'53"

12. Professor Nicholas Aroney has said:

‘... depending on the language of the legislation or depending on the way the High Court interprets even the Constitution, there could be the proposition that there is a duty to consult. Now what that duty would then involve is an interesting question because there are overseas precedents – not in an indigenous context – but where governments have duties to consult – about what proper consultation entails. Because there are cases that have suggested (from South Africa and Canada and the UK) that the necessary consultation involves giving the body all of the information it needs in order to make a representation in an informed manner. And one of the cases has gone so far as to say that you need to present to the body what you are proposing to do and the reasons for it, the alternatives you considered, and why you haven’t chosen them, so that the body can read those and be fully informed when making its representations on those matters.’²

13. ‘Representations’ is not a term currently found in the Constitution.

14. What is the meaning of term ‘representations’?

a) What precedents would the High Court rely on when interpreting this term?

15. The Explanatory Memorandum explains that the new body’s core function is making representations.

16. Is this the only core function of the new body?

17. The Explanatory Memorandum states at §12:

‘the Parliament may provide for the procedures to be followed by the Voice in making a representation’.

18. Are there any limits on how the Parliament is able to legislate the procedures that the Voice must follow?

19. Is there a legal difference between ‘providing advice’ and ‘making representations’?

20. Could the proposed Chapter IX give rise to an implied constitutional duty to consult along the lines that Canadian courts have developed on a duty to consult Indigenous peoples?

21. What information would the body require from the Parliament or the Executive Government in order to be in a position to make representations?

a) How might this impact on Cabinet processes and the requirements for confidentiality?

22. What are the legal consequences of making representations?

23. The Explanatory Memorandum states that a representation would be a ‘statement’ that would communicate the Voice’s views.

24. Are the representations made in s 129(2) representations of the peoples referred to in the chapeau or are they representations of the body established in s 129(1)?

a) In other words, does the body act as a conduit between the peoples referred to in the chapeau and the Parliament and the Executive Government of the Commonwealth? or

² [The Voice & The Constitution | Professor Nicholas Aroney - YouTube](#) at 52’05”

- b) Does the body determine its own policy positions and make representations on its views about the interests of the peoples referred to in the chapeau (rather than as a conduit for the views of the peoples)?
- c) Would the statutory scheme to establish the body need to be different if the body established in s 129(1) were required to act as a conduit for the peoples recognised in the chapeau, so that they could make representations directly to the Parliament and the Executive Government, or if the body established in s 129(1) were required to form its own position as to the interests of the peoples recognised in the chapeau and then make representations about the body's position on the peoples' interests?

PARLIAMENT

25. At a press conference on 27 March 2023 about proposed legislation to address climate change, the Prime Minister was asked by a journalist:

*Is this something you can imagine a Voice providing advice on and would a Voice provide advice to the Greens as they would the Government or is it purely for legislation like this? How would that work?*³

26. Section 129(2) refers to making representations 'to the Parliament'.
27. Are the representations 'to the Parliament' made to the Parliament as established in s 1, i.e. the King, the Senate and the House of Representatives, as a whole, or does this allow for representations to be made to one or more components of the Parliament?
28. If the latter, does this include making representations to individual members of one of the Houses that is a constituent of the Parliament (such as individual members who are also members of the Greens), or only to the House as a whole?
29. Would a representation to the Parliament as a whole be treated as an intramural activity of the Parliament as anticipated by Professor Twomey, who had originally drafted an amendment that provided for 'advice to be tabled in each House of Parliament as soon as practicable after receiving it'?⁴
- a) If a representation to the Parliament is not an intramural activity of the Parliament (e.g. tabling in both Houses), would the High Court show its customary deference to Parliament in relation to its intramural proceedings as Professor Twomey had anticipated?

³ [Press Conference - Parliament House, Canberra | Prime Minister of Australia \(pm.gov.au\)](https://www.pm.gov.au/media/2023/03/27/press-conference-parliament-house-canberra)

⁴ <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>

EXECUTIVE GOVERNMENT

30. Professor Nicholas Aroney has said:

‘... the term “executive government is a very large concept. Technically, it includes everything from the King to the Governor-General and the Prime Minister and the Cabinet and the Ministers and the Government Departments and all of the civil servants. That collectively is the Executive Government... The interesting question is whether it includes government agencies—statutory agencies, statutory corporations, because in a sense they are arms of the Executive in a looser or more diffuse sense.’⁵

31. Does a reference to ‘the Executive Government of the Commonwealth’ in the

Constitution include a reference to:

- a) The King
- b) The Governor-General
- c) The Federal Executive Council
- d) The King’s Ministers of State for the Commonwealth individually
- e) The Cabinet (comprising those Ministers of State)
- f) Parliamentary Secretaries under the Ministers of State Act
- g) Members of the Australian Public Service
- h) Commonwealth entities and Commonwealth corporations (as both terms are defined in the *Public Governance, Performance and Accountability Act 2013*) that are not departments of state and/or employees of such bodies

32. Does the right to make representations to the Executive Government in s 129(2) include the right to make representations to all or only some of these?

33. Australian Public Service employees are answerable to ministers for the exercise of delegated authority and, through them, to the Parliament.

34. Currently, the Australian Public Service (APS) is accountable to the Australian community under the law and within the framework of ministerial responsibility.

- a) How will the framework of ministerial responsibility change?
- b) Who will be responsible for the representations made directly to the Executive?
- c) How will this impact the framework of ministerial responsibility?

35. Does the Voice’s right to make representations extend to making representations in areas relating to the exercise of prerogative powers such as appointment of public servants,

⁵ [The Voice & The Constitution | Professor Nicholas Aroney - YouTube](#) at 52’05”

appointment of judges, establishing Royal Commissions, appointing diplomats, awarding honours?

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

36. Professor Nicholas Aroney has said:

‘... when an administrative decisionmaker – that’s the Executive Government – makes a decision they are under law obliged to take everything that is relevant into consideration – whatever is relevant to that decision – and they’re also under an obligation not to take into consideration things that are irrelevant strictly so. And a person affected by that decision can initiate legal proceedings when they believe that relevant matters have not been considered or irrelevant matters have been considered. And if they can convince the court that that is the case, the court will order the decisionmaker to go back and make the decision again and take into consideration what they should have. And it does seem to me quite likely that a constitutional provision that says that the Voice has the function of making representations in itself would lead to that inference.’⁶

37. Does the reference to ‘matters’ in s 129(2) include administrative decisions?

38. If so, would this give rise to a right under s 75(v) for a constitutional writ or injunction

- a) if the decisionmaker did not consider representations made under s 129(2)? or
- b) if the body were not given an (adequate) opportunity to make representations before the administrative decision was made? or
- c) If the body were not given adequate information about the decision in order to make properly informed representations?

SCOPE OF THE RIGHT TO MAKE REPRESENTATIONS

39. In *Indigenous Voice Co-design Process: Final Report to the Australian Government* (the Calma-Langton report), it is proposed that

‘The proposed model for the National Voice includes a set of consultation standards for when, how and on what types of matters the Australian Parliament and/or Government should consult with the National Voice.’⁷

40. The Calma-Langton report assumes that Parliament can legislate for consultation standards under s 51(xxvi) of the Constitution. This was proposed before s 129(2) guaranteed a right to make representations – a right which might restrict laws that can be made under s 51(xxvi) or the proposed s 129(3), which must be interpreted ‘subject to this constitution’, which means subject to ss 129(2) and 75(v).

⁶ [The Voice & The Constitution | Professor Nicholas Aroney - YouTube](#) at 52’05”

⁷ [Indigenous Voice Co-design Process Final Report to the Australian Government \(niaa.gov.au\)](#), p. 11.

41. Who decides what constitute 'matters relating to Aboriginal and Torres Strait Islander peoples' for the purposes of s 129(2)? Is this a matter for the body, the legislature or the judiciary?
42. Aside from special measures, does this include all laws of general application, or only laws of general application that impact Indigenous people in a special way?
 - a) If it is the latter, does the body established in s 129(1) decide what it means for a matter to impact Indigenous people in a special way, or is it a matter of law?
43. What is the meaning of 'Aboriginal and Torres Strait Islander peoples' for the purposes of s 129(2)?
 - a) Is it the common law definition or does it have some other meaning?
44. Federal government departments adopted the three-part definition as their 'working definition' for determining eligibility to certain services and benefits, which continue to be applied administratively.
45. Would this definition need to be prescribed in law?

SCOPE OF PARLIAMENT'S POWER IN RELATION TO THE NEW BODY

46. It has been reported that the Attorney-General and the Solicitor-General identified a potential problem concerning the legislative power of the Commonwealth to limit the legal effect of representations made under s 129(2) and that they proposed that the additional words, 'and the legal effect of its representations' be added to the end of s 129(3) in order to clarify that the Parliament may make laws to limit the legal effect of representations made under s 129(2).⁸
47. What are the limits of the legislative power conferred in section 129(3)?
48. Can the Parliament make laws to clarify whether the representations in s 129(2) are representations of the body established in s 129(1) or the peoples referred to in the chapeau; or
 - a) would there be a constitutional restriction on how the Parliament could legislate for the relationship between the body and the peoples?
49. Can the Parliament make laws restricting what counts as a 'matter relating to Aboriginal and Torres Strait Islander peoples' for the purposes of s 129(2)?

⁸ [Legal experts worry the words 'executive government' could lead to Voice referendum court battles - ABC News](#)

50. Can the Parliament make laws limiting how representations in s 129(2) are made to the Parliament or to constituent parts of the Parliament?
51. Can the Commonwealth Parliament make laws to restrict which persons in the Executive Government to whom representations may be made under s 129(2)?
52. Can the Commonwealth Parliament make laws to limit the legal effect of representations made under s 129(2)?
53. Can the Parliament make laws restricting the terms on which representations can be made to the Executive Government and/or to which persons within the Executive Government representations can be made?
54. Would the Parliament be able to make laws limiting the s 129(1) body's right to seek relief under s 75(v) in relation to representations made under s 129(2)?