

The Hon R I Barrett AO



20 April 2023

Committee Secretary
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice
Referendum
PO Box 6201
Canberra ACT 2600

Supplementary Submission to the Joint Select Committee

I seek the Committee's indulgence to add a short supplement to my submission dated 3 April 2023 (No 2 in the list of published submissions).

Like this supplement, my 3 April submission is wholly concerned with the second aspect of the Voice's s 129(2) function, that is, the aspect giving it power to make representations to "the Executive Government of the Commonwealth". The 3 April submission says, in summary, that, in the few places in which the Constitution uses the undefined expression "the Executive Government of the Commonwealth, the reference is to a system of administration, not a person or entity; that a provision contemplating "representations to" (that is, communication with) "the Executive Government of the Commonwealth" will generate great uncertainty as to who may be the addressee of those representations; that the proposed constitutional provision must be recast to identify the permitted addressee or addressees in terms consistent with the existing text of the Constitution (possibilities, in increasing order of coverage, range from "the Ministers of State for the Commonwealth" to "officers of the Executive Government of the Commonwealth" to "persons and bodies exercising the executive power of the Commonwealth"); and that it is for Parliament, having made a decision as to the precise identity of the audience and therefore the precise scope of the power, to express that decision in revised language for submission to the people.

With those thoughts in mind, compare the following statements about the second aspect of the currently proposed s 129(2):

Statement One: The Voice will be able to speak to all parts of the government, including the cabinet, ministers, public servants, and independent statutory offices and agencies – such as the Reserve Bank, as well as a wide array of other agencies including, to name a few, Centrelink, the Great Barrier Marine Park Authority and the Ombudsman – on matters relating to Aboriginal and Torres Strait Islander people.



Statement Two: Such legislation [that is, postulated legislation enacted pursuant to s 129(3) requiring that all representations to the Executive Government be sent to one office or to the relevant Minister] would avert concerns that have been expressed about representations being sent to individual public servants, agencies and Commonwealth entities. Section 129(ii) refers to the Executive Government of the Commonwealth collectively – not to individual officers or agencies.

Statement One says that the second aspect of the s 129(2) power will enable the Voice “to speak to all parts of the government” and gives several examples of officials, offices and agencies that will be permitted addressees of its representations. Statement Two, in its second sentence, indicates that the Voice will be able to speak to “the Executive Government of the Commonwealth collectively – not to individual officers or agencies”. These statements appear to be in direct conflict. Both cannot be correct. Perhaps neither is correct. The statements illustrate in stark form the manifest uncertainty that surrounds the second aspect of the Voice’s function under the currently proposed s 129(2).

Statement One is attributed by media to Professor Megan Davis.¹ Statement Two forms part of a submission made to the Committee by Professor Anne Twomey.² Each of these distinguished scholars has done – and continues to do – valuable work on the design and development of the Voice proposal and deserves the gratitude of all Australians accordingly.

But the fact that highly qualified participants in the Voice process appear to have quite different views about the scope of the second aspect of the s 129(2) function proves that Parliament must change the dangerously ambiguous words “the Executive Government of the Commonwealth”. It must formulate and submit to the people substitute wording that makes it plain exactly whom or what, in terms of persons (including, if relevant, non-human persons), the Voice will be entitled to address under that second aspect.

Finally, noting that some authors of submissions to the Committee have included curricula vitae, I should add by way of postscript that I have experience with legal text, having served as a Judge (2001 to 2015), Judge of Appeal (2012 to 2015) and Acting Judge of Appeal (2016 to 2020) of the Supreme Court of New South Wales.

Yours faithfully



Reginald Barrett

¹ “Professor Megan Davis declares: ‘you won’t shut the Indigenous voice to parliament up’”, *The Weekend Australian*, 1 April 2023.

² Submission dated 13 April 2023 (No 17 in the list of published submissions).