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Submission to the Joint Select Committee

Creation of the Aboriginal and Torres Strait Islander Voice will be an historic step towards national cohesion and true reconciliation among the peoples of Australia. Alteration of the Constitution to "enshrine" the Voice merits the support of all Australians.

The Bill for the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 proposes for addition to the Constitution, as s 129 within a new Chapter 9 headed "Recognition of Aboriginal and Torres Strait Islander Peoples", the following provision:

> "129 Aboriginal and Torres Strait Islander Voice
>
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
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> 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."

An issue requiring attention

One aspect of this proposed provision must be modified to ensure that the Constitution, as amended, will operate in a way that is certain and efficient. I refer to the power of the Voice to "make representations to . . . the Executive Government of the Commonwealth".

The focus of this submission is not the issue of "justiciability" that has received significant media attention. The concern is, rather, that use of the words "the Executive Government of the Commonwealth" in s 129(2) will introduce unacceptable ambiguity. Those words will create substantial doubt as to the identity of the audience that the Voice will be permitted and entitled to address under the second aspect of its power. The doubt already exists in reported public perception of the Voice proposal and the text of the Constitution itself. It is a doubt that cannot be ignored in the hope that it may dissipate. It must be addressed and eliminated at the threshold.

Public perception

The following quotations reflect opinions circulating in the community as to the aspect of the s 129(2) power concerning "the Executive Government of the Commonwealth":

- "The Voice is primarily a Voice to Parliament, informing the ultimate national law-making authority, but it must also be engaged with government in the development of policies and legislative proposals."[1]
- "Indigenous leaders advising the Albanese government on the Voice referendum are adamant that the body should have power to advise the cabinet as well as the parliament."[2]
- "Giving the Voice the ability to advise federal cabinet has been contentious among some conservatives and lawyers . . ."[3]
- "Attorney-General Mark Dreyfus says the Indigenous Voice to parliament must be able to give advice to federal cabinet . . ."[4].
- "I think most people believe they'll be voting on a Voice to Parliament, advising on proposed legislation, certainly not on policy and decision-making across Cabinet and the whole public service."[5]
- "Advising the people actually writing the laws as well as the politicians makes perfect sense to me."[6]

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[1] "What do we know about the Voice to Parliament design, and what do we still need to know" UNSW Newsroom, 7 December 2022.
[2] "Legal concerns raised over Voice proposal to speak to cabinet, not just parliament" Sydney Morning Herald, 17 February 2023.
[3] "Anthony Albanese announces final wording for Voice to parliament referendum", news.com.au, 23 March 2023.
[4] "Indigenous Voice must be able to advise cabinet: Dreyfus", Australian Financial Review 28 February 2023.
[5] Blog PUNTROADEND, 19 February 2023.
[6] Ibid, 19 February 2023.

- "A Voice should be able to advise the executive, which in the constitution would presumably be the GG in Council as cabinet is certainly not mentioned."[7]
- "Proponents of this say it's important the Voice is able to lobby both the parliament as well as cabinet ministers and government departments."[8]
- "Advising the executive is broader, and could include advice to the public service, and on administrative decisions."[9]
- "Will representations by the Voice to the executive – ministers and public servants – bog down government?"[10]
- "Well, obviously it's going to mean advice to department heads."[11]
- "What the voice is going to do is . . . make representations to the executive about the decisions of the executive, which is decisions of ministers, decisions of senior public servants, and policies that they develop."[12]
- "The Voice will be able to speak to all parts of the government, including the cabinet, ministers, public servants, and independent statutory officers 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."[13]

As these quotations show, there is a wide range of views and assumptions about the scope of a power concerning "the Executive Government of the Commonwealth". In some minds, the power will merely allow input into the development of legislation before it is introduced into Parliament. Others think that the power will extend also to the development of policies. Another view is that the Voice will be able to communicate with the cabinet or "the GG in Council". Yet another perception is that the permitted audience will extend beyond the cabinet to department heads. A more expansive view still is that the provision will cover public servants generally or the whole of the public service. The most comprehensive coverage envisaged is one that extends to the cabinet, ministers, public servants and independent statutory officers and agencies.

These disparate views should be tested against any legal meaning that the words "representations to . . . the Executive Government of the Commonwealth" will have in s 129(2) if it becomes part of the Constitution.

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[7] Ibid, 19 February 2023.
[8] "No, the Voice isn't a 'radical' change to our Constitution", Law Society Journal Online, 27 February 2023.
[9] "Voice supporters want it to advise executive government. Why are critics worried?", The Guardian, 3 March 2023.
[10] "Constitutional lawyer Greg Craven asks: 'So, whose Voice is it anyway?'", The Australian, 18 March 2023
[11] "Thank you, Marcia Langton, for your candour", Quadrant Online, 25 February 2023.
[12] "Slim hope of compromise on Indigenous voice to parliament", The Australian, 31 March 2023.
[13] "Professor Megan Davis declares: 'you won't shut the Indigenous voice to parliament up'", The Australian, 1 April 2023

The language of the Constitution

The Explanatory Memorandum on the Bill for the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 says:

> "The term 'the Executive Government of the Commonwealth' has the same meaning as elsewhere in the Constitution."

But the Constitution does not define "the Executive Government of the Commonwealth". It in fact uses that undefined expression in only seven places. Four of the references, now of historical significance only, relate to transfer of functions of the former colonies to "the Executive Government of the Commonwealth".[14] Another is concerned with revenues raised by "the Executive Government of the Commonwealth".[15] There is also a provision, mentioned below, about "other officers of the Executive Government of the Commonwealth".[16] The remaining reference is in the heading of Chapter II dealing with "the executive power of the Commonwealth".[17] Except for the provision about "other officers", none of these casts any light on the current meaning of "the Executive Government of the Commonwealth", particularly in the sense of a passive recipient of "representations".

The first and fundamental achievement of the Constitution is to create a polity. It then distributes the powers of that polity. Each of three powers – legislative, executive, and judicial – is "vested in" an institution or instrumentality,[18] and provision is made regarding the exercise of the power.

Under Chapter II, the executive power of the Commonwealth is "vested in the Queen"[19] and "exercisable by the Governor-General as the Queen's representative".[20] A Federal Executive Council is to advise the Governor-General "in the government of the Commonwealth".[21] The Governor-General is empowered to "appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish".[22] Those "officers" are declared to be "members of the Federal Executive Council" and "the Queen's Ministers of State for the

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[14] Sections 52(iii), 70, 84 and 86.
[15] Section 81.
[16] Section 67.
[17] The Acts Interpretation Act 1901 does not apply to the Constitution and therefore does not explain the effect of headings within it. In his work, "Commentaries on the Constitution of the Commonwealth of Australia" (1901), Robert Garran suggested, although with apparent diffidence, that headings in the Constitution could be used "in order to determine the sense of any doubtful expressions in sections ranged under it". Even if that is so, the principle does not assist here.
[18] Or, in the case of judicial power, several institutions.
[19] Section 61.
[20] ibid.
[21] Section 62.
[22] Section 64.

Commonwealth".[23] Provision is also made for "the appointment and removal of all other officers of the Executive Government of the Commonwealth".[24]

The Constitution thus provides that "the Executive Government of the Commonwealth", being "the government of the Commonwealth" in which the Governor-General is "advised by the Executive Council", is the medium through which the executive power of the Commonwealth is deployed. It is "a branch of the national polity".[25]

Thus understood, "the Executive Government of the Commonwealth" is a system of administration. It is not a person or juristic entity,[26] although persons are obviously integral to its operation. The Constitution identifies the following persons as relevant to the apparatus of "the Executive Government of the Commonwealth":

- the Sovereign.
- the Governor-General.
- "officers" who are "members of the Federal Executive Council" and "the Queen's Ministers of State for the Commonwealth" administering "departments of State of the Commonwealth".
- "other officers of the Executive Government of the Commonwealth".

Because the executive power of the Commonwealth is "vested in" the Sovereign, it might be thought that representations to "the Executive Government of the Commonwealth" should be made to the Sovereign. Because the power is "exercisable by" the Governor-General, it could be said that representations should be made to that official. But each of these literal possibilities is at odds with the system of responsible government embodied in the Constitution. The view might therefore be taken that representations should be made to the decision-makers at the apex of the executive structure, that is, "the Ministers of State for the Commonwealth" who administer "departments of State of the Commonwealth" and are accountable to Parliament. Another possibility is that all the "other officers of the Executive Government of the Commonwealth" are within the description and that representations can be made to all or any of them – as well as to anyone within any of the earlier descriptions mentioned.

Looking beyond the language of the Constitution

Descriptions such as a "part", "arm", "organ" or "agent" are often used by courts in relation to the "Executive Government". These disclose other and wider possibilities. Descriptions such as these have been applied to the Australian Electoral

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[23] ibid. Responsible government is ensured by the requirement in s 64 that a Minister of State be or become a senator or a member of the House of Representatives.
[24] Section 67.
[25] Williams v Commonwealth of Australia [2012] HCA 23 at [21].
[26] ibid.

Commission,[27] the Australian Security Intelligence Organisation,[28] the Australian Securities and Investments Commission,[29] the Administrative Appeals Tribunal[30] and Royal Commissioners appointed under Commonwealth law.[31] This recognises that exercise of executive power is not confined to the sovereign, the Governor-General and the two classes of "officers" mentioned in the Constitution itself.

This "part", "arm", "organ" or "agent" thinking is at the heart of a modern reality recently noted by Dr Yee-Fui Ng:[32]

> "The Constitution does not contemplate any machinery other than ministerially administered departments through which the executive power of the Governor-General may be exercised. Since colonial times, however, the Australian Parliament has routinely passed legislation conferring functions that are neither legislative nor judicial in character — and thus are prima facie executive — not on the Governor-General, nor on Ministers appointed under s 64, nor on officials within departments, but on statutory oversight bodies with legal personality separate from that of the Commonwealth and not under direct ministerial control."

A footnote identifies the Auditor-General, Ombudsman and Information Commissioners as examples of these statutory oversight bodies.

In relation to current arrangements for the allocation and exercise of executive power, Dr Ng says:

> "According to the traditional concept of responsible government, there is a clear vertical line of authority by which the Minister is responsible to Parliament for the actions of their department. This tidy arrangement has been disrupted by the plethora of statutory authorities, government companies and contractors, thus dispersing responsibility among Ministers, heads of statutory bodies, boards of directors and contractors."

Under arrangements prevailing today, therefore, an array of bodies beyond the functionaries mentioned in the Constitution itself may be within the "executive government". And while the allied description "officer of the Commonwealth" in s 75(v) of the Constitution has been held to exclude corporate bodies,[33] that is not necessarily so in relation to these additional elements of the executive.

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[27] Mulholland v Australian Electoral Commission [2002] FCA 1255.
[28] Church of Scientology v Woodward [1982] HCA 78.
[29] Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2001] HCA 1.
[30] In re Rent to Own Pty Ltd [2011] AAT 689.
[31] R v Winneke; Ex parte Gallagher [1982] HCA 77.
[32] Yee-Fui Ng, "Towards Constitutional Consonance: Institutional Adaptation and the Administrative State" (2021) 44(3) Melbourne University Law Review 889.
[33] See, for example, Australasian College of Cosmetic Surgery Limited v Australian Medical Council Limited [2015] FCA 468 at [42] and cases there cited.

Proposed s 129(2) requires clarification

In formulating a proposed constitutional amendment for submission to the electors, Parliament must adopt a form of words that is unambiguous. It should not base the proposed amendment on an expression that is obviously of fluid and therefore doubtful meaning. The proposed s 129(2) must identify with precision the person or persons to whom representations may be made under the part dealing with "the Executive Government of the Commonwealth."

There are, in essence, three options:

1. Enable the Voice to address executive decision-makers at the highest level of government.
2. Enable the Voice to address both those decision-makers and any public servant.
3. Enable the Voice to address any person, agency or instrumentality whatsoever exercising the executive power of the Commonwealth.

Intermediate positions might be considered but it is by no means obvious where any other line of demarcation should be drawn.

If Option 1 were chosen, the words "the Executive Government of the Commonwealth" in proposed s 129(2) might be replaced by:

> "the Ministers of State for the Commonwealth."

Under Option 2, the substituted words could be:

> "officers of the Executive Government of the Commonwealth."

For Option 3, the words might be:

> "persons and bodies exercising the executive power of the Commonwealth."

Each of these formulations, if construed as part of the Constitution, would convey meaning that "the Executive Government of the Commonwealth" obscures. And each formulation would be easily explained to electors.

Proposed s 129(2) must itself provide the clarification

If proposed s 129(2) is adopted in its present form, it will not be possible for this essential clarification to be supplied by an Act passed pursuant to the new s 129(3). The legislative power conferred by s 129(3) will not support an attempt by Parliament to define or explain the words "the Executive Government of the Commonwealth" in s 129(2). This is because s 129(3) will operate "subject to this Constitution", so that its force is subordinate to that of s 129(2). Section 129(3) will no doubt support laws

going to matters such as process and methodology and the responsibilities, if any, incurred by recipients of s 129(2) representations. But it will not authorise a law that qualifies the scope of the s 129(2) power by precluding or burdening communication with any person within the description "the Executive Government of the Commonwealth", whatever it means.

Some resort might be had to travaux préparatoires to elucidate the meaning of "the Executive Government of the Commonwealth". This could not be achieved through s15AB and other other provisions of the Acts Interpretation Act 1901.[34] Rather, it would be necessary to rely on pronouncements of the High Court[35] about discovering from extraneous materials[36] the "intent" of Parliament and the electors (and perhaps the executive) when playing their respective roles in the process towards constitutional amendment. To rely in advance on the likely effect of such materials would be a misguided approach. The primary task must be to choose at inception words conveying certain meaning. Extrinsic referenda materials cannot displace the deliberately chosen text and should not be designed as a means of aiding future interpretation of a provision that is left ambiguous at the outset.

Conclusion

Before submitting the proposed alteration to the electors, Parliament must resolve the ambiguity in the currently proposed language. It must decide exactly whom the Voice will be able to address under the "Executive Government" aspect of its function. And having made that decision, Parliament must embody appropriate replacement language in the proposed law. Only then will it be possible for the people of Australia to engage in a fully meaningful and informed way with this landmark innovation.

It is beside the point to say that it makes little difference whether someone to whom the Voice in fact speaks is or is not within the constitutionally permitted description. Recipients must know whether representations they receive have been made in exercise of constitutional authority. And the Voice itself must know the boundaries of its power so that it can understand its function and perform it accordingly.

Yours faithfully

(sgd) R I *Barrett*

Reginald Barrett

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[34] That Act is concerned with the interpretation of "Acts". A "proposed law" which is agreed to by both Houses of Parliament and receives the approval of electors as envisaged by s 128 of the Constitution does not thereby become an "Act".

[35] Particularly in Kartinyeri v The Commonwealth [1998] HCA 22 and Wong v The Commonwealth [2009] HCA 3.

[36] Such as Second Reading Speeches and Parliamentary Debates, the 'Yes / No' pamphlets made available to electors, Cabinet documents and advice from the Solicitor-General, and expert publications.