

## Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum

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Attachment 1: UN Human Rights Committee General Comment 25 (regarding Article 25 ICCPR)

Attachment 2: Craig Myatt's email parliament, 16 March 2023, *A New Model for a Democratic Polity*

This submission details two problems with the proposed voice to Parliament and a solution:

1. The proposed wording violates Australia's primary human rights treaty obligations: Articles 2 and 25 of the *International Covenant on Civil and Political Rights (ICCPR)*; and
2. There are no exemptions in the *ICCPR* for violating Articles 2, 25 in the way proposed by the voice Bill; and
3. I recommend designing an *ICCPR* compliant policy, and I outline one example of an *ICCPR* compliant voice policy, which removes the consequences of violating the *ICCPR*.

### The voice as proposed violates Articles 2 and 25 of the ICCPR, equal political rights

The voice to Parliament proposed in the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill (The Bill)* is designed to doubly entrench a right to influence legislation and policy design, that is political access, for one racial-social group, Aboriginal people in our Constitution, as indicated in the Explanatory Memorandum<sup>1</sup>:

- 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.

The form of wording as proposed in the Bill, by its very design, separates Australians into those in the group the voice designates as "Aboriginal and Torres Strait Islander peoples", (**Aboriginal peoples**) and others outside this group. By design and by definition, the voice discriminates by race and social grouping. And its design is intended to extend permanent, unequal political rights to the favoured group, Aboriginal and Torres Strait Islander people. There has not been any explanation as

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<sup>1</sup> Explanatory Memorandum to the Constitution Alteration (Aboriginal And Torres Strait Islander Voice) 2023 Bill 2022-2023.

to why this violation of the *ICCPR* is needed now. And it is simple to create compliant policies: use *ICCPR* rules as design constraints.

The Explanatory memorandum states that *“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.”* But in reality, the proposed changes to the Constitution must violate Australia’s human rights treaty obligations with respect to political rights.

New laws made by the Parliament are measured against Australia’s ratified human rights treaty obligations, seven treaties listed in section 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*, (**Human Rights Scrutiny Act**) which states at s 3(1):

*human rights means the rights and freedoms recognised or declared by the following international instruments: ... (c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);*

The proposed voice bill should be scrutinised for compliance against the relevant rules for political rights, in Australia’s primary human rights treaty, the *ICCPR*, (sections 7 and 8 of the *Human Rights Scrutiny Act*).

Art 2 of the *ICCPR* states:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 25 of the *ICCPR* states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Put simply, the ICCPR requires balanced and so equal political access for all classes of Australians. Which is quite literally how Australians as egalitarian peoples understand democracy to be: one person, one vote. And that principle is espoused by the wording of Article 2 and Article 25 together:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The voice violates Articles 2 and 25, because it creates a distinction on the basis of race, colour, language, national or social origin, for a form of high-level access to public policy making, or “*the conduct of public affairs*”. That is, it creates discriminatory political access:

- Section 129(i) creates a distinction on race and social grouping: “*there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice*”;
- Section 129(ii) entrenches in Constitutional law privileged political access for people of one race and social grouping: “*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*”;
- And the prohibited exclusivity of political rights, the main violations of Art 25 and 2 is the intended design effect, justified in the Explanatory Memorandum by the historical opposite to privileged access, privileges now to be entrenched into law, indeed a permanent law:
  - Exclusion is an explicit design intention: “*This Bill...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.***”
  - Exclusive political access is a design intention: “*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*”;
  - Exclusivity on race or social origin is intended to be practiced: “*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.*”
  - These exclusive political rights will be doubly entrenched in the Constitution, into Australian law: “*The Bill introduces a new section into the Constitution which would be located in a new Chapter IX*”.

The key principle of Article 25 with respect to the classes of people in Article 2, is that political rights are not exclusive, but equal, shared. Article 25 requires that the ‘*conduct of public affairs, directly or through freely chosen representatives*’, via the voice, be ‘*without...distinctions [on] race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*’.

Article 2 requires that this shared access via the voice, be legislated, “*to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*” Yet

the voice sets up legislated access *“to make representations to the Parliament and the Executive Government on matters relating to **Aboriginal and Torres Strait Islander peoples [only].”***

Exclusive access for Aboriginal Australians only, political access limited to people of a certain race and social origin, is prohibited: political access must be universal and equal, *“without distinction of any kind”*. And to be democracy, it must be inclusive, or it is no longer democracy. The proposed voice excludes non-Aboriginal Australians by design, and so violates Article 25 of the *ICCPR*.

### **There are no exemptions in the *ICCPR* for violating Articles 2, 25 in the proposed way**

Where the Explanatory Memorandum states<sup>2</sup> that *“[t]he Bill promotes the right to take part in public affairs”*, in Article 25, and that it *“would not abrogate or otherwise negatively affect the ability of members of the broader community to enjoy or exercise their political...rights”*, it means that it ‘does not violate Article 25 of the *ICCPR*’. The correct test of compliance with Article 25, is whether the voice creates a distinction on race and social origin for the new voice political rights. The voice does make such a distinction, so in reality it fails the human rights scrutiny test, because it will violate Article 25 of Australia’s primary human rights treaty, the *ICCPR*, referred to in s 3(1) of the *Human Rights Scrutiny Act*.

It is clear that even some of the ‘upheld rights’ noted in the Explanatory memorandum, are in fact simultaneously being promoted as well as violated, for example the mention of Article 2 of the *ICCPR* in Clause 9 and Article 25 in Clause 11, as *espoused* by the proposed voice. I will show you that there is, despite the implication in the voice design, no exemption to violate these human rights principles and *ICCPR* rules.

The UN’s General Comment 25<sup>3</sup> states with respect to Article 25: *“No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

Summarising General Comment 25, while ‘conditions’ may be applied to voting or political positions access outside these characteristics, for example an age restriction, and positive measures *could* be provided to maintain access to voting only, there are **no racially based** exemptions to alter access to ‘*The conduct of public affairs*’ (art 25.x), *[which] ‘covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.’* Which describes the voice as proposed in the Bill. (GC25.x5?)

Article 25 protects access on equal terms to the political process. It does not speak about ‘social disadvantage’, nor provide a specific remedy to that. Any argument that specific aboriginal peoples’ disadvantage justifies a ‘distinction’ on political access for non-Aboriginal peoples, misses a fundamental aspect of Article 25: it protects political access only, it does not uphold rights like dignity, access to education, or a certain equal living standard, covered by other treaty rights.

And that means that the present implication, that ‘good policy intentions create provisional *ICCPR* compliance’, is an error. Putting that another way, even if the proposers of the Bill for the voice could prove that Aboriginal peoples have very low access to public policy decision making, justifying some kind of ‘distinction’ expressly prohibited by Article 25, AND they had borne the burden to prove by some evidence this was so, AND that evidence reflected the ‘real status of Aboriginal peoples’, the principle of Article 25 is simply equal political access, *“one person, one vote”*.<sup>4</sup> It would

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<sup>2</sup> Explanatory Memorandum Cl 12.

<sup>3</sup> General Comment 25, cl 3, see Attachment 1.

<sup>4</sup> See General Comment 25 cl. 21: *“The principle of one person, one vote, must apply...”*.

not matter even if the Bill pointed to such evidence, or the burden to prove that case was borne, because that is simply not the rule. And in any event, given Aboriginal people's political prowess in getting the voice proposal to the Bill stage, ipso facto, as a social group their access is clearly expert, and comparatively high. Aboriginal peoples enjoy excellent access for '*The conduct of public affairs*'.

The argument that there are no valid exemptions to full and equal political access, under Article 25 of the ICCPR is rebuttable.<sup>5</sup> For example, the voice designers could argue that like assistance for some people to get access to voting, Aboriginal peoples should be given assistance, via the voice, to get access to policy development. My point is not that Australia cannot violate Article 25. My point is that Australia *should not* violate Article 25, and compliance is not only easy, it creates better public policy which will be far more durable and workable, over the years Constitutional rules must serve.

It was an error to assume, imply or state that the voice as proposed might or could fall into an exemption from Article 25, which is that it 'provisionally complies', as stated in the Explanatory Memorandum, Clause 1, impliedly given the policy's 'very good intentions', for example, "the realisation of Aboriginal and Torres Strait Islander peoples' right to self-determination", and "the right to equality and non-discrimination". Those rights are upheld by many other existing rules in Australia's legislative landscape. Violating Article 25 is wholly redundant.

**The recommendation**, therefore, must be to design a new policy: design an *ICCPR* compliant policy to replace the proposed wording of the voice, in the Bill.

### **One example of an *ICCPR* compliant voice policy**

Three important consequences for Australia, a leading democracy, arise when violating Articles 2 and 25 of the *ICCPR*:

1. It creates a right for Australians to take complaints against Australia to the United Nations human rights committee, for example the political freedom case in *Coleman v Australia*;<sup>6</sup>
2. It creates an obligation and right of state parties to the *ICCPR* to publicly repudiate Australia for Article 25 and 2 violations, as Australia promised not to violate the *ICCPR*;<sup>7</sup> and
3. It creates the risk of incoherent domestic and foreign policy related to democracy, with the downstream risk of another morally conflicted war for Australia, for example the loss in Vietnam, while 'fighting for' democracy.

The *ICCPR* is more than just a promise to the community of nations, by Australians, not to breach rules. We have an obligation to those who have given their lives and efforts, to uphold Article 25 of the *ICCPR*. If only to comply with our international obligations to do so, but also to honour the true commitment we have to our democracy. We should uphold Articles 2 and 25, without being asked or pushed. I proposed this *ICCPR* compliant policy to Parliament's members recently as one way to do that, and to enjoy almost all of the benefits of the proposed voice:

- (a) include everyone in a voice, one of the core principles of democracy;
- (b) move recognition of Aboriginal peoples to the preamble, a widely supported idea;
- (c) include the issue of Sovereignty (or a Republic), an unspoken issue in the voice;
- (d) gain the consent of the polity via an adequate Constitutional Convention process;

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<sup>5</sup> See General Comment 18, cl 10, "*Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.*"

<sup>6</sup> Via the Optional complaints protocol to the *ICCPR*.

<sup>7</sup> See Article 41 of the *ICCPR* which deals with "claims that another State Party is not fulfilling its obligations under the present Covenant."

(e) where broad consensus is established *before* a referendum.

My email detailing this policy to members of Parliament on 26 March 2023 is at Attachment 2.

Craig Myatt

## **Attachment 1**



OFFICE OF THE HIGH COMMISSIONER  
FOR HUMAN RIGHTS



***General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments)***

Convention Abbreviation: CCPR

GENERAL COMMENT 25

The right to participate in public affairs, voting rights and  
the right of equal access to public service

(Article 25)

(Fiftyseventh session, 1996) [\(1\)](#) [\(2\)](#)

Adopted by the Committee at its 1510th meeting (fiftyseventh session) on 12 July 1996. The number in parenthesis indicates the session at which the general comment was adopted.

1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.

2. The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.

3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of "every citizen". State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language,



religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.

4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.

5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b).

8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

9. Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law.

10. The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.

11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

12. Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice. States parties should indicate in their reports the manner in which the difficulties highlighted in this paragraph are dealt with.

13. State reports should describe the rules governing the right to vote, and the application of those rules in the period covered by the report. State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.

14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

15. The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the

right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.

16. Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.

17. The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

18. State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g. age limits, and any other qualifications or restrictions. State reports should indicate whether there are restrictions which preclude persons in public-service positions (including positions in the police or armed services) from being elected to particular public offices. The legal grounds and procedures for the removal of elected office holders should be described.

19. In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or

compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.

21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.

22. State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. Reports should describe the electoral system and explain how the different political views in the community are represented in elected bodies. Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.

23. Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.

Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.

24. State reports should describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes. Reports should also indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent.

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

26. The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.

27. Having regard to the provision of article 5, paragraph 1, of the Covenant, any rights recognized and protected by article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.

### Notes

1/ Adopted by the Committee at its 1510th meeting (fiftyseventh session) on 12 July 1996.

2/ The number in parenthesis indicates the session at which the general comment was adopted.



## **Attachment 2**

## A New Model for a Democratic Polity

“Plussing” another person’s idea is taking another person’s idea without judgement, and ‘plussing’ it, making it better by some addition to it. So here goes. Let me ‘plus’ the Voice to Parliament.

Firstly, let me define the Voice. In essence, it is a Constitutional rule which creates a Parliamentary power to enshrine an aboriginal (race of peoples) voice to the Australian Parliament. If this becomes law, Parliament could then pass laws to create a body of people, the voice, to make these aboriginal policy representations on lawmaking or governing. Constitutional rules like this are effectively permanent. The Voice is likely to be voted on by referendum within 12 months.

Secondly, I can’t consent to the voice. I think it is very poorly designed public policy, from another age when privileged access to lawmaking and government was seen as ‘acceptable’. I believe that the voice suppresses the fundamental democratic principle of one person, one vote. Variations of that view have been expressed by [Chris Merritt](#), [James Allan](#) and [Janet Albrechtsen](#).

So let me plus the Voice to Parliament, in theory overcoming its deficiencies, and compounding its inherently wholesome features. This is just an idea, but let me have a crack at it:

- We create a new democratic polity, making these changes to the constitution;
- We formally recognise the existing British sovereign, Australia’s aboriginal peoples, and immigrants as historical parts of the modern Australia;
- We emphasise their contributions to Australia: Parliamentary democracy from the British, First Nations long tenure and connection with the land; and the hard work of immigrants who built modern Australia;
- We define ‘sovereignty’ as attaching to our polity, represented by a 'person', whose role is to represent the sovereign to 3 branches of government, which are subordinate to the polity;
- We entrench ‘the voice’ to Parliament, as a formalised means of local community access to Parliament, to directly influence legislation and policy, for all voters;
- Creating a novel 'democratic polity', forged from British, Aboriginal and immigrant heritage.

I think the benefits are clear, and the clear disbenefits of the current voice are avoided. But just to be doubly clear, let me spell out the benefits here, and the pitfalls avoided.

In this democratic polity model, I have created: Recognition. Reunification. Republic. But without the downsides. This model creates clearer and more formal recognition of First Nations peoples and their contributions, than the voice. Having explicit Constitutional text will form in the minds of the High Court who interpret the Constitution, the idea Aboriginal peoples have a certain status, which will carry with it beneficial legal implications. Others can argue the merits of such Constitutional implications, but I believe Recognition was primarily the point of the Voice: a positive change in the status of Aboriginal Australians. This model is clearly superior to the voice in formal Recognition for Aboriginal peoples.

Avoiding negative responses, or policy pitfalls, is key to public policy design for referendums. At present there is significant pushback to a voice to Parliament on the issue of creating an exclusive, some say divisive race-based, political body, via referendum. The voice would be rejected under normal circumstances, but that the ‘race’ is aboriginal Australians. So the democratic polity model removes race-based privileged access. Instead people who genuinely need it, including aboriginal Australians, can use ‘voice’ like access, built around exactly the same model, in order to get their policy ideas directly injected into Parliamentary discussion, debate, and legislation. Why not offer

the voice to all? Well, we can. And doing so avoids a key pitfall of racial exclusivity, something which clearly could not stand the required 'test of time' for Constitutional rules.

There is some risk, some friction in an idea which melds the British or Commonwealth sovereign, currently King Charles, Australian Aboriginal peoples, and all those who are Australian but do not fit into the first two categories, into a whole. Yes, the idea of 'demoting' the existing sovereign will be contentious, but avoids replacing them via a Republic. Yes, we must recognise the breadth and richness of our immigrant influx, well beyond our Anglo heritage, and the hard work in nation building. And yes, let us raise up Aboriginal Australians in status, as one of these three constituent parts of the modern Australia. But that is what Australia is: and what it was. So let's just formally recognise our ancestral roots, let us 'respect our elders' as aboriginal Australians advocating the Voice would say. This recognises something greater than the sum of the parts.

And that greater something is the modern sovereign, the polity of Australia. Anne Twomey refers to popular sovereignty in her paper 'The Unrecognised Reserve Powers', in her terms the 'Crown' being a metonym for the Sovereign:

*"A new Crown is established... The polity itself does not need to have attained formal independence or to be internationally recognised as sovereign..."*

The Sovereign being the holder of ultimate power in democracy. As former CJ Brennan said on being sworn in, on 21 April 1995:

*As the Constitution can now be abrogated or amended only by the Australian people in whom, therefore, the ultimate sovereignty of the nation resides, the Oath of Allegiance and the undertaking to serve the head of State as Chief Justice are a promise of fidelity and service to the Australian people.*

So let us say that: 'the polity of Australia is Sovereign'. In plain Constitutional text, so that the High Court can enjoy statutory clarity, legal certainty that puts the meaning of 'Crown' and 'Sovereign' beyond any reasonable doubt. It will be defined as The Polity, and mean that Australians are Sovereign.

Those changes can be rolled into a new set of Constitutional 'conversations' or conventions as they are called, with the policy view, as intended by the current government, of asking the community about a 'republic' or as I call it a *democratic polity*.

So this model overcomes the primary objection around the voice, of being race based. It upgrades the status of first nations peoples well beyond the Voice. It still delivers the voice to them, to use as they intended, but also to everyone, a fine policy idea. It does away with, but not so as to offend, our existing monarch. And it introduces into statutory being a beautiful idea, the already High Court accepted notion that political sovereignty rests with us, Australians.

Any referendum change is a lot of work, and ultimately gets down to one simple question: 'Would you vote for this, if asked'? I would. So I propose we *not* take the voice to a referendum. I propose instead we start a Constitutional conversation, or conventions process, which should carry on until it discharges, perhaps over 5-15 years, one which is a melding of the voice and the republic questions. Whereby we explore these ideas, and go to a referendum or perhaps intermediate plebiscites when required, or when consensus becomes apparent.

Putting a referendum question to Australians, without full and clear bipartisan support, risks turning Australians off recognition for First Nations. The Labor government would have at some point held a



referendum on the issue of a republic anyway. So this way, Aboriginal Australian's have a much better chance of being *fully* recognised, and *everyone* can enjoy the benefits of their voice. And a highly consensual, conventions conversation would put community consensus before a referendum, exactly where it should be.

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