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# Electing an Aboriginal *Voice* in Australia – Who Will Get to Vote in Elections for the Proposed Advisory Body?

Bertus de Villiers*

*University of Johnnesburg*

## Abstract

The Aboriginal people of Australia have put forward a proposal for a Voice to be created whereby elected representatives from the Aboriginal community can advise the federal government and parliament on matters that affect the Aboriginal community. Although the Voice was proposed in 2017, little detail has emerged about its composition, how it would function and how it would interact with the federal parliament and cabinet. One of the questions to be resolved is who would be able to vote in elections for the Voice and how would disputes about voting eligibility be resolved? This question raises complex issues of defining the Aboriginal community, association with and acceptance by a community, the right to free association, the right of a community to determine its membership and separate electoral systems for indigenous people vis-à-vis the rest of the population. Australia would not be the first nation to create special institutions for indigenous people and useful lessons can be drawn from comparative arrangements abroad. This article considers the statutory frameworks and policies with regard to the Sami in Finland and the Maori in New Zealand to develop potential guidelines for the Voice in regard to who could vote for the Voice and how disputes about membership could be resolved. Consideration is also given to the now-abolished Aboriginal and Torres Strait Islander Commission (ATSIC), which for many years represented the interests of Aboriginal people in Australia. The article reflects on how courts have approached the question of eligibility to be part of a community and concludes that a separate electoral roll should not be used for Aboriginal people to elect the Voice, that individual self-identification should be the principle basis of voting in an election for the Voice, and that disputes about eligibility should be resolved on the basis of three primary criteria: individual self-

* Law School, University of Johannesburg, bertusdev@gmail.com

assertion of membership, descent from an ancestor of the community, and community acceptance.

**Keywords**

Aboriginal Voice; advisory body; membership of a community; elections of indigenous representatives; electoral roll for indigenous people; Sami; Maori; Aboriginal and Torres Strait Islander Commission (ATSIC); electoral dispute resolution; self-identification; descent; community acceptance

## Background

The Australian Minister for Indigenous Affairs, Ken Wyatt, announced on July 10, 2019 that a referendum will be held by 2021 to amend the federal constitution to provide for a 'First Nations Voice' for Aboriginal and Torres Strait Islander Peoples of Australia (collectively referred to as Aboriginal people) (Wyatt, 2019). This announcement had special *gravitas* since Minister Wyatt is the first Aboriginal minister of the federal indigenous affairs portfolio and the credibility of his appointment may inevitably be impacted by his ability to legislate the Voice into life.

The Voice is intended to give Aboriginal people an advisory role in federal policy and legislative issues that affect the Aboriginal community.[1] The Voice is proposed as part of Australia's ongoing process of reconciliation and recognition of Aboriginal people as the original owners of the land.

The Constitution of Australia does not contain special measures to protect the rights and interests of Aboriginal people. The legislative regime in the country is, in many respects, lagging behind those of many other countries in terms of the treatment of indigenous people.[2] The idea of a Voice arose from a nationwide consultation process on what Aboriginal people saw as a viable option for their interests to be better communicated to policy makers (Final Report, 2017: 36).

The announcement by Minister Wyatt came as a surprise, since a 2018 report by the federal joint select parliamentary committee, which had spent close to 12 months investigating practical aspects of the proposed Voice, had failed to make any specific recommendations about its election, powers, functions or composition.[3] The committee only recommended further consultation with the Australian community in general, and Aboriginal people in particular, in order to work out the details before presenting legislation to the federal parliament.

By committing to an estimated date for a referendum during the term of the current parliament, Mr Wyatt may have put the cart before the horse, or may have set a deadline to focus the minds and force discussions to some finality. Time will tell whether the former or latter applies, but either way, working out all remaining details and enacting relevant legislation prior to a 2021 referendum promises to be a mammoth undertaking. Retired Chief Justice

Robert French has observed, when expressing his support for the Voice, that 'there is much to be done. No doubt the devil will be in the detail' (French, 2019).

There are two key questions yet to be addressed: who will be allowed to vote in elections for representatives of the Voice, and how will disputes about eligibility to vote be resolved? This article attempts to develop answers to these questions.

Will Australia opt for a separate electoral roll for Aboriginal people, or will voters self-identify as Aboriginal in order to cast a vote on the day of the election? If it is the former, how would people register to vote? If it is the latter, how would one ensure that only Aboriginal people vote for the Voice? If a dispute about a person's aboriginality arises, how would the dispute be resolved? These questions are examples of the many issues on which little, if any, public or scientific discussion has occurred.

This article considers how electoral systems for indigenous people function in New Zealand and Finland, as well as the system operated for the now-abolished Australian ATSIC. By comparing these systems, insight may be gained about who may be eligible to vote in elections for the Voice and how disputes about eligibility to vote could be resolved.

The following section provide a brief overview of the background to the Voice and highlight examples of issues that remain unresolved. This is followed by a discussion of three electoral systems designed for indigenous people, and the way in which eligibility to vote and conflicts around eligibility are resolved. The final section makes some observations regarding the appropriate electoral arrangements for the Voice, specifically around the question of a separate electoral roll and how to resolve conflicts about voter eligibility.

## 1. The Voice: the state of play

In 2017, after extensive public consultation, a representative group of Aboriginal leaders agreed to the so-called Uluru Statement from the Heart (Uluru Statement), which proposed that a constitutional amendment provide for an advisory body to represent the views of Aboriginal people. The detail of the proposed Voice is yet to be settled but, in essence, it entails an Aboriginal-elected council to advise the federal parliament (and government?) on issues that may impact the interests of Aboriginal people. Essential elements of the Voice are that it is to be created by the Constitution of Australia; its members are to be elected by Aboriginal people; its powers are to be advisory in nature; and it is not intended to be a third chamber (in addition

to the House of Representatives and the Senate) or to otherwise restrict the sovereignty of parliament.[4]

The federal government initially rejected the proposal, but with Minister Wyatt's 2019 announcement, it seems as if the proposal may have found new traction in government. The official opposition also supports the concept of an advisory body for Aboriginal people, but it is not clear yet what their view is with regard to the details (Albanese, 2019). According to Albanese, the opposition Labour Party proposes that the Voice be recognized in the Constitution, but with all detail about its composition and functions to be contained in subsequent legislation.

A joint select committee of the federal parliament was formed in March 2018 to invite and consider public submissions regarding the Voice (Joint Select Committee). The committee's November 2018 report, in effect, raised more questions than it answered. It highlighted several aspects of the Voice on which further deliberations are required and recommended ongoing public consultation and parliamentary consideration. The lack of consensus within the committee and the broader public is summarized in the report as follows:

> 3.143
> The Committee has received 18 models of potential constitutional amendments. The fact that there are so many different provisions proposing to constitutionalisethe Voice and that a new provision was suggested in a late submission received by the Committee on 3 November 2018, nearly two months after submissions had closed, indicates that neither the principle nor the specific wording of provisions to be included in the Constitution are settled. More work needs to be undertaken to build consensus on the principles, purpose and the text of any constitutional amendments.
>
> 3.144
> For the reasons set out above, the Committee is unable to recommend either approach (referendum or legislation) at this time. Instead, the Committee is of the view that a process of co-design, according to the recommendation in the previous chapter, should be undertaken and concluded before this question is considered and resolved.

So far, at the time of writing (October 2019), no process of public consultation has commenced to give effect to the recommendations of the parliamentary committee. This means that more than two years after the issuing of the Uluru Statement, Australians are not much closer to agreeing on the concept or detail of the Voice. The path to realization remains long and steep.

In two previous articles I examined some questions that require a response before any proposal for the Voice can be put to the public in the form of a constitutional referendum (De Villiers, 2017; 2018), for example:

First, why amend the Constitution to create the Voice, if a similar outcome (with less risk, less cost, greater certainty and more flexibility) can be achieved by creating an advisory body through an Act of Parliament? Whereas constitutional recognition of Aboriginal people as the original owners and occupiers of the land may be typical of a statement that is found in a constitutional instrument, or perhaps in the preamble of a constitution, an advisory body with no legislative powers need not be of a constitutional nature, but could rather be a creature of statute. A statute would allow greater scope to adjust, experiment, and avert the risk and embarrassment of a failed referendum.[5]

Second, how will representatives of the Voice be elected and what will be the popular mandate upon which members are elected, given that it is not intended to be a policy or a law-making body? Although 'Aboriginal people', 'Indigenous people' and 'First Nations' are often used interchangeably, in reality Australia has many Aboriginal peoples or communities, each with distinct languages, customs, laws, belief systems and interests. So how will the Voice ascertain the views of local Aboriginal communities in general, and native title holders in particular, on particular policy issues, and ensure local community views are accurately reflected in the national debate? If elections are ward-based, it is not clear how the interests of different Aboriginal communities *within* the ward would be reflected in a first-past-the-post system. If, on the other hand, elections are based on a form of proportional representation, it is not apparent how the opinion of local Aboriginal communities would be canvassed on a policy matter potentially impacting their lands, rights and interests. [6] Further, a nationwide electoral system may introduce a majority-take-all approach *within* the Voice; this may be inconsistent with the organization and nature of Aboriginal society, or it may be inconsistent with Aboriginal laws and customs that regulate interaction between communities as equals rather than on numerical size. There is also the associated risk that urban-based, majoritarian voting may cause an imbalance to the detriment of more rural, consensus seeking approaches.[7] Therefore, the proposition that a singular elected body would be authorized by legislation to speak for all Aboriginal communities is fraught with ambiguity.

Third, what advisory powers will the Voice have? It is not clear if the Voice would only give advice on matters referred to it, or if it would be able to self-initiate advice – and if so, with regard to which legislative or policy measures? What would the effect on legislation be if

parliament failed to seek the advice of the Voice, or if advice was sought but not followed? It is not clear what policies and/or draft legislation ought to be referred to the Voice for comment and exactly which issues are considered 'of relevance' to the Aboriginal community. On the one hand, anything happening in Australia can be construed as being relevant to Aboriginal people as ordinary citizens; on the other hand, a narrow approach could be adopted whereby only those policies and statutes that deal explicitly with Aboriginal people are referred for advice. Although it is accepted that the Voice would not constitute a third chamber of parliament, courts may nevertheless find grounds to review legislation on the basis that consultation with the Voice had not been proper, or that their advice had not been given due regard.

Fourth, how would deliberations *within* the Voice relate to the many agreements between Aboriginal communities and state and local governments? Substantial progress has been made in recent years in some Australian states to develop self-management and advisory structures for Aboriginal people in that coincide with their geographical areas of interest.[8] These agreements often reflect Aboriginal native title, land use agreements, treaty agreements or advisory services. It remains vague how the Voice – which may be dominated by some interest groups within the Aboriginal community – would interact with these local arrangements before advising on a particular policy issue. The risk of a dual system (and possibly different agendas) – where local Aboriginal communities and the national Voice have different responses to policy issues – is not to be ignored.

These questions are not insurmountable, but they highlight the complexity of creating the Voice, the importance of the Voice not becoming a 'toy telephone' where no one listens to advice (De Villiers, 2018), and the challenge of settling all the details in time for the proposed 2021 referendum.

The following sections will now take up the focal questions of this article regarding voting eligibility and membership dispute resolution.

## 2. Electoral roll for the Voice

There are three potentially useful case studies on which to draw when considering eligibility for voting in elections for the Voice: (a) a special electoral roll for the Sami Parliament in Finland; (b) a separate electoral roll for the Maori's reserved seats in parliament in New Zealand; or (c) voter self-identification for ATSIC in Australia.

### *2.1* ***Sami Parliament in Finland***

In Finland, the indigenous Sami people can vote for the Sami Parliament as well as for the national parliament (Josephsen, 2010). The Sami Parliament is not a sovereign legislative institution, but rather an administrative body that advises on matters of interest to the Sami, determines policy and spending priorities for the Sami, and undertakes community projects on behalf of the Sami (Hannikainen, 2002). The Sami Parliament comprises 21 members and was created by a statute of the national parliament (Sami Act).

No Sami person is obligated to register on the Sami electoral roll, and a person who has been registered can ask to have their name removed (s22, Sami Act). Being registered as a Sami voter does not disqualify a person to vote in general elections for the national parliament. The two electoral rolls of the Sami Parliament and the national parliament are therefore not mutually exclusive.

In order to register on the Sami electoral roll, a person must apply to the electoral committee of the Sami Parliament, with supporting evidence of their Sami identity. The committee then decides whether a person meets the statutory requirements of being Sami. A person who disagrees with the decision of the committee can seek review at the Supreme Administrative Court (s26b(3), Sami Act).

The proposed Voice is, in contrast to the Sami Parliament, not intended to be a body with delegated administrative powers. Its advisory function will be much narrower in scope and it will likely only be convened when advice is required, rather than sitting for the entire duration of the federal parliament.

Given the Voice's limited scope, a separate electoral roll is probably not justified. Also, the administrative burden and cost of establishing and maintaining a separate electoral roll, the risk of litigation around eligibility and the racial nature of a separate roll all weigh against a separate electoral roll for the Voice. Two principal concerns have been raised against a separate roll in Australia, namely its potential discriminatory effect and the complexity and controversy to classify individuals according to race.

### *2.2 **Maori electoral list in New Zealand***

In New Zealand, there are reserved seats for the Maori community (currently seven based on the proportional size of the Maori population) in the national parliament. A separate electoral roll is kept for those who identify as Maori (s24, New Zealand Electoral Act), with around 249,320 individuals currently registered (Maori Enrolment)

No Maori person is obligated to place their name on the Maori list, but once registered, the person can no longer vote on the general electoral list (Hinemanu, 2018: par. 10). However, a Maori person may remain on the general list and be a candidate on the general list (Bargh, 2017). The two lists are therefore mutually exclusive (Royal Commission). A person may ask for their name to be removed from the Maori list for purposes of the next election (s77(1), New Zealand Electoral Act). The Maori list may not be used for any other purposes other than government statistical data collection.

The right of free association is therefore maintained, since it is at the Maori person's own discretion whether to have their name on the Maori list or to remove it. In contrast with the Sami electoral roll, no evidence is required in order to register on the Maori list.

Incidentally, there is no requirement for candidates of the Maori seats to be Maori themselves. This is because it is assumed that non-Maoris can also agitate for the best interests of the Maori community.[9] There is a distinct difference between the rationale for the Maori roll and the Sami roll. The Maori-elected representatives participate in the national parliament, and therefore the names of the Maori voters cannot appear on the Maori roll *and* the general electoral roll (Atkinson, 2003), as this would in effect mean a double vote for the same parliament. Since the Sami Parliament does not form part of the national parliament, registering as a voter for the Sami Parliament does not impact on registration as a voter for the national Parliament of Finland.

Since the Voice is not intended to be a legislative institution, the Finnish logic ought to apply:; participating in an election for the Voice should not disqualify a person from voting at any other level of government.

### *2.3* ***Self-identification in ATSIC (Australia)***

Aboriginal people in Australia do not have access to reserved seats in parliament as the Maori do, nor an advisory and consultative body similar to the Sami Parliament. Instead, they had ATSIC, an elected body for Aboriginal people with limited delegated administrative and advisory powers. It was established in 1990 and abolished in 2005 (De Villiers, 2019(a); Palmer, 2004). ATSIC can provide useful insights regarding the question of a separate electoral roll for the Voice.

ATSIC had delegated powers by which it could administer legislation and implement policies of relevance to Aboriginal people. It could determine spending priorities in some functional areas that affected Aboriginal people, it could hold and manage land on behalf of

Aboriginal people and it could advise the federal government on matters that affected Aboriginal people (a3, Australia ATSIC Act). ATSIC was, arguably, the closest Aboriginal people have come to a form of self-administration and self-government. It is somewhat ironic that, having abolished an institution with so much potential for Aboriginal self-governance such as ATSIC, Australians should now seek to create a Voice with relatively reduced jurisdiction and powers.

The ATSIC Act provided that a 'person from the Aboriginal race of Australia' could participate in elections for ATSIC (a4, Australia ATSIC Act), but no separate electoral roll was established. The federal parliament's general electoral roll, containing the names of all Australian voters, was used for the purposes of ATSIC elections, which were managed by the Australian Electoral Commission. Any person who regarded themselves as eligible to vote in ATSIC elections simply attended an ATSIC booth on the day of the election and identified themselves by way of the general electoral roll. Participating in an ATSIC election was voluntary (whereas voting in state and federal elections in Australia is obligatory). No record was kept of who voted and there was no test to ascertain if a person who voted was indeed 'from the Aboriginal race'. The ATSIC electoral system was therefore consistent with its limited powers.

### *2.4* ***Observations about eligibility to vote for the Voice***

The case studies therefore provide the following observations that may be relevance to the case of the Voice:

Since the Voice will only be an advisory body, similar to ATSIC, the voting system should also be similar to ATSIC: (a) any Aboriginal person is eligible (but not obligated) to vote; (b) the general electoral roll is used for purposes of identifying that a person is a voter, but (c) there be no test of aboriginality in order to vote.

Without the power to create and maintain a separate electoral roll, the Voice should not have similar powers to the Sami Parliament to determine whether a person is 'from the Aboriginal race'. If any questions about voter or candidate eligibility arise, they ought to fall within the jurisdiction of the Australian Electoral Commission and ultimately the Court of Disputed Returns.

The principle of freedom of association must form the basis of an electoral system for the Voice. No person should be obligated to vote for the Voice and no record should be kept of who voted for the Voice. Voting should not be obligatory as is the case with Australian state

and federal parliamentary elections. There should, in essence, be no form of *apartheid*-classification of persons into racial groups.

The type of electoral system that is used to elect the Voice should be commensurate with the powers and functions of the Voice. If the Voice is solely an advisory body, the voting system should be similar to ATSIC whereby (a) any Aboriginal person is eligible to vote; (b) the general electoral roll is used for purposes of identification that a person is a voter, but (c) there be no test of aboriginality in order to vote. Any dispute whether a person qualifies to vote or be a candidate, including whether they are Aboriginal, can be dealt with by the Court of Disputed Returns where the objector must submit information why the eligibility of a person is contested.

Neither the Voice nor any of the committees it may establish should have similar powers to the Sami Parliament to determine whether a person is 'from the Aboriginal race'. If any question about eligibility of a voter or an elected representative arise it ought to fall within the jurisdiction of the Australian Electoral Commission and ultimately the Court of Disputed Returns.

In light of the foregoing it is proposed that the Voice be elected is similar way as ATSIC had been, namely that no separate voters roll is kept for Aboriginal persons; the general electoral roll is used for purposes of voter identification; any person can be nominated as an candidate; and any person who self-identifies on the day of the election as 'from the Aboriginal race' ought to be able to cast a vote.

## 3. Disputes about who is 'from the Aboriginal race'

It is widely acknowledged in international law and constitutional practice that special arrangements may be made to accommodate minority communities, particularly indigenous peoples, in legislative and other policymaking processes (e.g. a27 International Covenant; a4 United Nations Declaration). Designing an electoral system to cater for the needs of a specific ethnic community or indigenous community may seem a simple objective, but its implementation may undermine the very principles of a liberal democracy: protecting equality and fundamental human rights. It raises complex questions of freedom of association, non-discrimination, special arrangements for minorities, self-determination of a community, and privacy. If elections for the Voice are limited to persons who are 'of the Aboriginal race', what measures are to be adopted to ensure that only members of the Aboriginal race cast a vote for

the Voice? The Voice will have to overcome this challenge and determine how to resolve disputes in the event that a person's purported membership of the community is challenged.

Once again, the experiences of the Sami Parliament in Finland, the Maori's in New Zealand and ATSIC in Australia may offer useful insights in this regard. In general, these three countries have adopted a three-pronged test to ascertain if a person does indeed belong to the community that is the beneficiary of the special measures, namely: (a) does the person *claim* to belong to the community; (b) does the person *descend* from person/s who belonged to the community; and (c) does the community *accept* the person as belonging to them?

Whereas these criteria may seem simple, they are complex in their application.

### 3.1 ***Registering as a Sami voter***

Membership of the Sami has become contested since policy issues that are debated in the Sami Parliament have attracted increased registration of persons who purport to be Sami. The Sami Parliament, through a special committee, is responsible for considering applications to be added to the Sami electoral roll and, from time to time, has refused an application. Although the Sami Parliament is primarily responsible for these decisions, they are subject to review by the Finnish Supreme Administrative Court (s26(2); 26b(3) Sami Act).

Registering as a Sami is subject to strict requirements: a person must be able to prove that they speak a Sami language, or that their parents or grandparents speak or spoke a Sami language, or that a parent is or has been on the Sami electoral register (s1, Sami Act).

The Sami language competency test raises questions about the standard required to prove language ability, and why a person who otherwise identifies as Sami and is accepted socially as Sami should be excluded because they fail to speak the language to the required standard (Aikio-Puoskari and Pentikainen, 2001). Similar to Australian Aboriginal languages, all of the Sami languages are regarded as threatened, which means speakers of those languages are often older, rural dwellers (United Nations, para. 17; Council of Europe, 2015: 29). The electoral system for the Sami Parliament therefore creates a group within a group, whereby those Sami who can speak the language can vote, whereas those Sami who cannot speak the language are excluded. A further irony of the electoral system is that the Sami Parliament controls who can be registered as a Sami voter. This has given rise to criticism of conflict of interest, since persons who oppose the views of the Sami Parliament may be excluded from elections on the pretext of inadequate language competency (Petersen, 2011: 23).

The teaching of a language is, of course, a valid objective to pursue for a community, but differentiating membership of the community on the basis of language ability (especially a language that is threatened) may in effect be discriminatory, and is not an approach recommended for the electoral system of the Voice. The competing objectives of equality among individuals and language competency are obvious: maintaining a language may be essential for the unique identity of a community to survive, whereas an inclusive approach may be needed to facilitate, rather than restrict, membership of a community.

The ability of an ancestor to speak a language is also used in native title proceedings in Australia, where Aboriginal witnesses often refer to the ability of their forebears to speak a language even if the current generation can no longer speak it, or only know a few words. In native title litigation, however, language capability is merely used as *one* of the elements to prove connection to a particular community. Whereas the Sami uses language proficiency as a strict mechanism to narrow the scope of potential voters, in Australia it is likely that a more inclusive approach would be adopted by the Voice, such that a more general association with Aboriginal ought to be adequate for purposes of voting.

The Supreme Administrative Court of Finland has, over the years, given thorough consideration to the threshold for registering with the Sami electoral roll (Joona, 2016). However, the Sami Parliament has criticized the court's recent tendency to put less weight on language, taking a so-called 'overall' approach regarding the interaction between a person and the Sami community. Language proficiency is therefore *a factor* for the court to consider, alongside other factors such as place of residence, lifestyle and community interaction (Supreme Administrative Court, Judgement 2011: 81).

The Sami Parliament's concern is that persons who are not otherwise accepted as Sami, based on language competency, may attempt to register in order to influence policy debates within the Sami Parliament. In fact, the Sami Parliament has even attempted to further narrow registration by requiring actual knowledge of customs and compliance with cultural norms. The Supreme Administrative Court has, however, adopted a more contemporaneous approach whereby all evidence of association with the Sami is considered; language proficiency is important, but not conclusive (Supreme Administrative Court, 2015: 148).

The approach adopted by the Supreme Administrative Court is not without controversy. Some support the court's 'overall' approach (Suski, 2015) whereas others emphasize the right of the Sami Parliament to regulate their own membership and to emphasize the importance of

language proficiency; cultural knowledge and adherence to traditional practices in order for the Sami culture to survive (United Nations Human Rights Committee, 2019).

The debate about who ought to qualify as a Sami voter highlights the challenge of accurately defining the boundaries of an indigenous or ethnic community. Communities are inevitably made up of persons with various backgrounds, mixed origins, different levels of knowledge, adopted children and so forth. Membership is therefore likely to be nuanced rather than legally strict.

Since the objective of the Voice is reconciliation and self-determination for the entire community, the system should encourage rather than discourage Aboriginal participation. It should therefore be based on a holistic approach to aboriginality rather than a specific criterion, including all Aboriginal people rather than being limited to those who practice traditional law or speak a particular language.

### 3.2 ***Registering as a Maori voter***

The New Zealand Electoral Act defines a Maori person as 'person of the Maori race of New Zealand; and includes any descendant of such a person' (a3, New Zealand Electoral Act).[10] Statistics New Zealand emphasize that the word 'descent' is preferred by Maori people, since the term 'ethnic' refers to social and cultural, rather than biological, considerations (Stats NZ, Definition).[11] The requirement of descent is given pre-eminence with no statutory allowance for other forms of community acceptance or compliance with cultural norms and traditional practices. A person registering as Maori must declare that the self-identification is correct and need not present any documentary evidence to support their registration. The definition of the Electoral Act does not reflect the importance of tribe or community membership within the Maori community (Geddis, 2006).

Of course, the problem with a predominantly biological test is that inadequate consideration is given to the reality of who a person is, with whom they associate and whether the community accepts the person as part of them (Rotimi, 2003). This explains why in a general cultural, legal and policy context, New Zealand also accounts for a wide variety of indicia to ascertain if a person is Maori, for example ancestry, name, area of origin, language and other societal factors (Atkinson, 2003). Ultimately, however, descent is legally and practically a requirement for meeting the definitional requirement of Maori (Kakutai, 2004).

As far as registration for the Maori list is concerned, the principle of freedom of association applies. This means that any person who regards themselves as Maori in accordance

with the Electoral Act may register for the separate roll. No evidence or documents are required at the time of registration. In recent years, the number of persons registering on the Maori list has increased (Wicks, 2008).

However, the Electoral Commission may remove a person's name from the Maori roll if it is found that the person was not eligible to register (ss. 95, 96, 98(1)(h) and 118, New Zealand Electoral Act); the Commission's decision is subject to judicial review (s97, New Zealand Electoral Act). If a person objects to the registration of another person on the Maori list, the objection must be supported by adequate information to establish why the matter should be investigated (s95(2) New Zealand Electoral Act). If the Electoral Commission is satisfied that an adequate basis has been established for an objection to proceed, it informs the registered person of the objection and invites them to respond (s95A(3) New Zealand Electoral Act). The district court is ultimately the arbiter if the dispute is not resolved by the Electoral Commission (s97 New Zealand Electoral Act).

The electoral system developed for the Voice should be more akin to the Maori approach of self-identification since this reflects the experience under ATSIC and is consistent with the principle of freedom of association. Whereas Aboriginal voters should not be subjected to any form of challenge as far as their eligibility to vote is concerned, limited time may be allowed for objections against the aboriginality of a candidate. And similarly, to New Zealand, the Australian legislation may provide that aboriginality is not a requirement to be a candidate for the Voice.

### 3.3 *When is a person 'from the Aboriginal race'?*

Australia has a long policy and legal history (painful and embarrassing) regarding the question of whether a person belongs to the Aboriginal race (Gardiner-Garden, 2003). Aboriginal identity is relevant at various levels: first, Aboriginal status may qualify a person for special socioeconomic treatment, assistance and privileges; second, only a person from the Aboriginal community was allowed to vote and be a candidate in ATSIC elections; and third, Aboriginal ancestry is a necessary precondition for native title ownership.

But ascertaining aboriginality in general, and membership of a community specifically, is complex due to mixed origins; disruption of living patterns and historical removal of children from their parents. The difficulty in definitively defining aboriginality motivated the Australian Law Reform Commission to assert, in 1986, that 'there are distinct advantages in leaving the

application of the definition to be worked out, so far as is necessary, on a case by case basis' (Australian Law Reform Commission).

Around the same time, the federal government accepted the following 'working definition' for the term 'Aboriginal person':

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives. (Department of Aboriginal Affairs).

As mentioned, Australia mirrors New Zealand and Finland in taking a three-pronged approach to defining aboriginality: self-declared association, descent from ancestors and acceptance by the community. In the Mabo decision on native title, the court endorsed the three-pronged approach but also emphasized that all relevant information must be considered about a person's connection to the land and the community, without being bound by a specific formula or weighting of the criteria. In native title matters, descent from the original traditional owners of the particular land is of course given great weight, but it is not necessarily conclusive because a person could have been adopted or married into or otherwise accepted as part of the community without having a link to the ancestors of the claimant community.

The approach adopted by the court was, in brief, as follows:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people. (Mabo, par. 70)

In Harrington-Smith v Western Australia, another native title proceeding, the court emphasized that it is in the final instance the native title community who determines who is part of them, but that the decision must not be taken arbitrarily. The court is assisted by evidentiary events such as place of residence, acceptance, interaction with the community and knowledge of culture and traditions, but none of those are entirely conclusive since all factors must be taken into account. In the event of a dispute within the community, it rests on the court to determine if a person who purports to be a member of a community, is indeed a member (Harrington-Smith par. 2,967).

In *general disputation* about whether a person is Aboriginal, descent is also relevant but less so than in native title proceedings. Whereas the courts previously emphasized descent, they are now more aware of the totality of a person's interaction with a community and are therefore

more inclined to adopt an holistic or 'diffused' approach, whereby the opinion of the community is given greater weight than mere objective considerations (De Costa, 2014). In Shaw v Wolf, for example, the federal court acknowledged that descent is an important criterion, but highlighted that social interaction with and acceptance by the community are also important considerations. The court therefore must not only consider historical evidence, but also contemporaneous evidence about the conduct of the individual and the community (Shaw, 1998). Justice Merkel (Shaw, 1998: 223) observed that:

> The development of identity as an Aboriginal person cannot be attributed to any one determinative factor. It is the interplay of social responses and interactions, on different levels and from different sources, both positive and negative, which create self-perception and identity…In my view the current Australian community accepts that the widely divergent and differing histories and experiences of the process by which an Aboriginal person acquires and develops an Aboriginal identity is, inherently, a process personal to and discrete for each individual.

The courts acknowledge that acceptance by a community is 'inherent in the nature of a society', that the decision about membership cannot be arbitrary, that membership of a community is dynamic, and that the subjective assertion of membership may be adequate for a community to accept a person (Aplin, 2010).The Australian courts therefore continue to apply the three-pronged approach, but the criteria are respectively weighted on a case by case basis. These criteria – applied individually or collectively – may not be conclusive, but they at least allow the flexibility to consider the nuances of community membership as well as the complexity of mixed origin.

*3.4 Observations about resolution of disputes about aboriginality*

The above case studies yield some observations that may be of relevance to the Voice:

Since the Voice will be an advisory body, inclusivity is the preferred approach such that all persons who regard themselves as Aboriginal should be encouraged to vote. It is estimated that only around 25% of Aboriginal voters voted in the 2002 ATSIC election, whereas 66.7% of Maori voters participated in the 2017 New Zealand election. Such a low turnout for ATSIC, an institution that had more powers than the proposed Voice, suggests that eligibility to vote for the Voice must have a low threshold.

In line with this inclusive approach, if a dispute arises about the aboriginality of a person, the burden of proof should rest on the challenger. Consistent with the Maori and ATSIC approaches, self-identification should be adequate *prima facie* evidence of aboriginality.

Resolving a dispute about aboriginality ought not to be within the jurisdiction of the Voice but should be the responsibility of the Australian Electoral Commission and ultimately the Court of Final Returns. This is consistent with the Maori and ATSIC approaches. If membership is left to the sole discretion of the Voice, fundamental rights of freedom to associate may be infringed upon, and a conflict of interest may arise between the Voice and persons seeking to participate in elections (Badger, 2011: 503).

When considering evidence about aboriginality, the three-pronged test endorsed by the federal court should be used. The weight given to each criterion should be determined on a case by case basis. For example, whereas descent is an important consideration in native title disputes, general acceptance of a person as aboriginal by the community may be more relevant for purposes of elections for the Voice.

**Conclusion**

The question of who will get to vote for the Voice, and how disputes about eligibility could be resolved, has not been settled in Australia. The statutory framework and policy developments regarding the Sami and Maori, together with the previous experiences of ATSIC, provide useful insights into possible solutions.

The following principles may form a basis for resolving the outstanding issues:

The statute giving rise to the Voice ought to define what is meant by 'Aboriginal person'. The definition proposed by the Department of Aboriginal Affairs in 1981 may suffice.

In light of the Voice's narrow scope of powers, a separate electoral roll for Aboriginal voters is not appropriate. The approach adopted by ATSIC can be applied whereby the general electoral roll is used to establish a person's identity as a voter, but that no evidence of aboriginality is required on the day of the election.

The essential principle to be respected is that of the individual right to free association, whereby people who subjectively view themselves as Aboriginal ought to be entitled to vote for the Voice. The threshold to participate in an election for the Voice should therefore be relatively low and primarily based on self-identification whereby, a person's assertion of being Aboriginal is accepted as *prima facie* evidence of the fact.

If an objection is raised about the aboriginality of a voter or candidate, the onus ought to be on the objector to justify why a dispute should be heard. If a dispute proceeds, the three criteria of self-identification, descent and community acceptance ought to guide the court.

Since the Voice is not intended to be a legislative institution, casting a vote for the Voice should not exclude a person from voting in any other election at local, state or federal level.

## *Notes*

[1]Aboriginal people comprise various communities with distinct languages and identities, albeit that they also share common characteristics, laws and customs. Aboriginal people number around 650,000 and comprise around 3.3% of the population of Australia. Several efforts have been made in the past to grant some form of self-governing and advisory roles to Aboriginal people, but so far none of those have been successful (De Villiers, 2019a).

[2] Section 51(xxvi) of the Australian Constitution empowers the federal parliament to enact specific legislation for people of particular racial groups. This heading could be used for the federal parliament to legislate for the Voice. For other examples of special measures that have been adopted by other countries, refer to the arrangements by South American states to protect and promote the rights of indigenous people, the special chamber for traditional leaders in South Africa, the Sami parliament in Finland, Norway and Sweden, the reserved seats for Maoris in New Zealand and the measures in the USA and Canada to accommodate indigenous peoples (Lennox and Short, 2016).

[3] The joint select parliamentary committee was established on March 19, 2018; its interim report was published on July 30, 2018 and its final report was published on November 29, 2019.

[4] Senior Aboriginal leader, Noel Pearson, said the following about the proposed powers of the Voice: 'This is not a third chamber, nor reserved seats. The proposal is for an indigenous voice to parliament – an institution set up in legislation, constitutionally guaranteed a say in indigenous affairs.' (Pearson, 2017).

[5] The committee kept both constitutional amendment and statute options open by observing as follows: '3.136 It is very important to state clearly that a process of co-design neither precludes nor mandates either the legislative or constitutional option. The process of co-design also provides time for constitutional and legislative options to be further refined and for further and necessary public support to build for the constitutional option.'

[6] The committee acknowledged that local and state-based consultation and advisory options ought to be put in place, but no specific recommendations were made. '2.302 Above all, the Committee's consultations have highlighted a demand for local and regional voices, as well as for a national voice.'

[7] The committee noted that it did not receive adequate detailed submissions to enable a firm recommendation with regard to these issues: '2.296 The Committee notes that it received far fewer submissions responding in detail to the questions set out in the interim report than it had anticipated. Given the poor response it is difficult to provide detail for the structure and operation of The Voice or voices without a process of co-design.'

[8] See, for example, the recently concluded Noongar settlement which the author regards as the most ambitious and potentially far-reaching agreement yet with an Aboriginal community (De Villiers, 2019(b)).

[9] Until 1967 only Maori candidates were eligible for election to the reserved Maori seats, but that limitation was removed by the Electoral Amendment Act of 1967.

[10] It must be noted that the electoral arrangements for Maori voters have gone through several phases, for example: at first an elector who was more than one-half Maori *had to* register on the Maori list (1893); thereafter *all* Maori electors were obliged to register for the Maori list (1956); and finally, since 1974, Maori voters can *elect* whether they register on the general or the Maori list (Bromell, 1982).

[11] The *Maori Affairs Amendment Act 1974* changed the definition of Maori from one based solely on bloodlines or percentage of Maori ancestry, to one of cultural self-identification. This was amended into electoral legislation by the *Electoral Amendment Act 1975*. Prior to this legislative change, the electoral definition of Maori was a person belonging to the aboriginal race of New Zealand and included 'half-castes' and people intermediate in blood between 'half-castes' and persons of pure descent from that race. A Maori (other than a 'half-caste') was not qualified to be registered as an elector of any European electoral district.

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