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Paper

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A rightful place—the representation and participation of First Nations Peoples in the political process

Australia's Aboriginal and Torres Strait Islander First Nations Peoples (FNPs) are not formally recognised in the Australian Constitution.

On 14 October 2023, the Australian people voted in a federal referendum to: (i) constitutionally recognise its FNPs; and (ii) enshrine an Aboriginal and Torres Strait Islander Peoples (ATSI) Voice to Parliament in the Constitution. The referendum was unsuccessful and the *status quo* remains.

This paper argues that the failure of the 2023 Voice to Parliament referendum was not just a result of a destructive six-month campaign characterised by bitter political debate, character assassination, disinformation and misinformation, but is more a result rooted in the legacy of the past. Australia's road to constitutional recognition and a Voice for its FNPs has been fraught because, as a nation, we have never come to terms with the injustices of our colonial past. This paper also compares Australia's experience with those of two other Commonwealth jurisdictions—Aotearoa (New Zealand) and Canada—that share a similar, but contrasting, colonial heritage to Australia. These two journeys, as viewed through a sovereignty conceptual framework, although not without their challenges, differ markedly from the Australian experience.

[Key words: First Nations Peoples; referendums; representation; participation; voice; recognition]

A rightful place—the representation and participation of First Nations Peoples in the political process

Introduction

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Extract—Uluru Statement from the Heart¹

The representation and participation of First Nations Peoples (FNPs) in political processes and decision making is essential for democracy. Inclusiveness in the context of a democracy can be measured by the extent to which FNPs are: (i) recognised (and the terms of that recognition); and (ii) able to self-determine²—that is, engage with and participate in policy development and decision-making by government institutions and elected representative bodies, such as parliaments and legislatures, on legislation and policy matters that affect their communities.

In 2017, after decades of work³ towards constitutional recognition for its FNPs, Australia’s Aboriginal and Torres Strait Islander (ATSI) Peoples—who are Australia’s FNPs—issued the *Uluru Statement from the Heart*—asking for formal recognition of their Peoples in the Australian Constitution and the establishment of a constitutionally enshrined Indigenous Voice to Parliament. This proposal was given to the Australian people as an invitation from Australia’s First Peoples to walk with them to a better future for Australia as a nation and democracy. The Australian people voted on this proposed constitutional recognition and voice in a federal referendum held on 14 October 2023. The ‘Yes’ campaign in the 2023 Voice referendum was unsuccessful and from a federal point of view the *status quo* remains. Further detail on the proposed constitutional alteration and referendum question is at **Appendix A**.

If the 2023 Voice referendum had been passed, it would have provided substantive recognition for Australia’s FNPs by acknowledging and honouring the ATSI Peoples as Australia’s FNPs in the Constitution and, within that context, also provided a substantive mode of parliamentary representation and participation for its FNPs—in the form of a Voice to Parliament.

¹ The Uluru Statement from the Heart (2017) can be found at: <<https://ulurustatement.org/the-statement/view-the-statement/>>.

² Self-determination is the principal right in the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP). The right to self-determination is also enshrined in international law under Article 1 of the *International Covenant on Civil and Political Rights* as well as the *International Covenant on Economic, Social and Cultural Rights*. Importantly, while many traditional human rights are concerned with individual members of a society, self-determination is a collective right exercised by ‘peoples’.

³ This period refers to a contemporary body of work that culminated in the *Uluru Statement from the Heart* and the work following that culminated in the referendum held on 14 October 2023.

This paper seeks to explore what the 2023 Voice referendum outcome tells us about Australia. It is argued that the failure of the referendum was not just a result of a destructive six-month campaign characterised by bitter political debate, character assassination, disinformation and misinformation⁴, but is more a result rooted in the legacy of the past. Australia’s road to constitutional recognition and a Voice has been fraught because, as a nation, we have never come to terms with the injustices of our colonial past.

In comparing Australia’s experience of constitutional recognition and representation with those of two other Commonwealth jurisdictions—Aotearoa (New Zealand) and Canada—while the respective journey for each of these two countries has not been without its challenges they differ markedly from the Australian experience.

The 2023 Voice referendum campaign was destructive and divisive.⁵ However, the extent to which the ‘No’ campaign was able to gain traction and impact—was largely due to the process adopted by the Government to support and manage the referendum. This paper advances that flaws in the process coupled with some unique features associated with the mechanism for altering the Australian Constitution allowed the negative campaigning to capitalise on entrenched inaccurate views and misrepresentations that are held by some Australians about Indigenous Australians and their place in Australian history. These views and misrepresentations are reflective of a failure to fully understand, own and reckon with our colonial past and the rightful place that our First Peoples should hold in our country.

This paper is structured in three parts:

- Part one—sets out the constitutional recognition journey for Australia’s First Peoples—including a comparative analysis with Aotearoa (New Zealand) and Canada.
- Part two—sets out the mechanism and requirements for amending the Australian Constitution together with some history on Australian referendums; and detail on the outcome of the 2023 Voice referendum.
- Part three—outlines and analyses the flaws in the 2023 Voice referendum process and their potential impact.

Throughout the paper the term ‘indigenous people/s’ is used interchangeably with the terms, tribe/s, first people/s, first nations people/s and aborigine/s.

⁴ The Australian Electoral Commission (AEC) has no powers to check misinformation, it says “The AEC is not responsible for fact-checking claims about the Yes or No case for a referendum, and we do not seek to censor debate in any way”. However, the AEC had a ‘Disinformation register’ for the Referendum process where it listed “prominent pieces of disinformation the AEC has discovered regarding the announced referendum on the Voice to Parliament”. Refer: <<https://www.aec.gov.au/media/disinformation-register-ref.htm>>.

⁵ While the “destructive and divisive” principally applied to the ‘NO’ campaign, there were elements that applied to the ‘YES’ campaign. Such as, the ‘NO’ campaign claimed the ‘YES’ campaign was divisive because the FNP’s wanted a voice that other minorities didn’t have and it would divide the country.

Part One: The journey for Constitutional recognition for Indigenous People

Formal recognition of Indigenous Peoples

There are an estimated 476 million Indigenous people worldwide that comprise 6 per cent of the world's population.⁶ The United Nations (UN) observes that First Nations (Indigenous):

...communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.⁷

Formal recognition of Indigenous peoples is about: (i) recognition and acknowledgement of First Peoples as the bearers of a country's first history, which in some jurisdictions can encompass thousands of years⁸; (ii) the unique historical, cultural, and political relationship between Indigenous People and the respective country⁹; and (iii) an act of "historical fairness and practical benefit to law-makers, governments", a country's people and its First Peoples¹⁰.

Australia's First and Second histories

Australia's first and second histories are important for understanding the journey for Constitutional recognition for its First People. It is also important for understanding how Australia's journey differs from that of other Commonwealth countries.

The First History

Australia's first history is that of its First Peoples—before European explorers sailed into the South Pacific. Archaeological evidence supports the view that Aboriginal people have occupied mainland Australia for at least the last 65,000 years. It is widely accepted that this predates the modern human settlement of Europe and the Americas. This makes Australia's Aboriginal people "the world's oldest continuous living culture".¹¹

⁶ UN [online] Indigenous Peoples, Department of Economic and Social Affairs, accessed 14 October 2023 <<https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health.html>>.

⁷ Ibid.

⁸ French, R. and Lindell, G. (2023). The Voice—A Step Forward for Australian Nationhood, *Australian Law Journal* 97(6).

⁹ Australian Law Reform Commission (ALRC). (2009). *Review of the Royal Commissions Act 1902 and related Issues—Making Inquiries: A New Statutory Framework*, Report No. 111, p. 9. <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC111.pdf>>.

¹⁰ French, R. and Lindell, G. (2023). The Voice—A Step Forward for Australian Nationhood. *Australian Law Journal* 97(6).

¹¹ Australian Human Rights Commission [online] Historical context—Ancient History, accessed 14 October 2023 <<https://bth.humanrights.gov.au/significance/historical-context-ancient-history>>

Contrary to the views of the European settlers that the Aboriginal people were largely nomadic hunters and gatherers, Aboriginal people established robust, semipermanent settlements that were managed in accordance with their traditional laws and customs¹²:

Living primarily along the foreshores of the harbour, they fished and hunted in the waters and hinterlands of the area, and harvested food from the surrounding bush. Self-sufficient and harmonious, they had no need to travel far from their lands, since the resources about them were so abundant, and trade with other tribal groups was well established. Moving throughout their country in accordance with the seasons, people only needed to spend about 4-5 hours per day working to ensure their survival. With such a large amount of leisure time available, they developed a rich and complex ritual life – language, customs, spirituality and the law – the heart of which was connection to the land.¹³

The First Peoples of Australia are today referred to as the Aboriginal and Torres Strait Islander peoples. The Torres Strait region is located between the top of Cape York and Papua New Guinea and is made up of over two hundred islands. Seventeen of these islands are inhabited.¹⁴

Australia is made up of many different and distinct Aboriginal and Torres Strait Islander groups, each with their own culture, language, beliefs and practices. At the time Europeans were making claim for the island continent, it is estimated Australia was inhabited by at least 400 different Indigenous nations or groups.¹⁵

The Second History

Australia's second history began when Australia was claimed by Great Britain in 1770 with Captain James Cook declaring the land he had called New South Wales (NSW) to be the property of King George III. Cook ignored that the land was populated, and did not enter into any negotiations with the Aboriginal peoples about claiming the land. This was despite being given instructions by the King to only take possession if the land was uninhabited, or with the consent of the natives, if it was occupied. This began the legal fiction that Australia was *terra nullius*—land unoccupied.¹⁶ In practical terms, Australia was claimed without any negotiation or founding Treaty of Settlement.

Its colonising began in early 1788 with the arrival of the First Fleet in January that year under the command of Captain Arthur Phillip. Phillip's mission was to establish a penal colony in NSW and take control of *Terra Australia*. This was followed by the establishment of a further five British colonies in Tasmania (Van Diemen's Land at that time), Queensland, Victoria, Western Australia and South Australia. Like NSW, Tasmania and Queensland were originally established as penal colonies.

¹² Aboriginal History Office [online] A brief Aboriginal History, accessed 15 October 2023, <<https://www.aboriginalheritage.org/history/history/>>; AIATSIS [online] Australia's First Peoples, accessed 15 October 2023, <<https://aiatsis.gov.au/explore/australias-first-peoples>>.

¹³ Aboriginal History Office [online] A brief Aboriginal History, accessed 15 October 2023, <<https://www.aboriginalheritage.org/history/history/>>.

¹⁴ Aboriginal History Office [online] A brief Aboriginal History, accessed 15 October 2023, <<https://www.aboriginalheritage.org/history/history/>>; Australian Constitution Act 1901; UK Parliament 1931 Statute of Westminster; Encyclopedia Britannica [online] Australia, accessed 15 October 2023, <<https://www.britannica.com/place/Australia/History>>.

¹⁵ Refer AIATSIS. [online] Map of Indigenous Australia <<https://aiatsis.gov.au/explore/map-indigenous-australia>>.

¹⁶ The myth of *terra nullius* was perpetuated from 1770 until a successful challenge in the High Court by Mabo in 1992—more than 200 years after the first settlement in 1778.

Until the arrival of the First Fleet in 1788:

Aboriginal people had lived on mainland Australia undisturbed in any major way. The arrival of the First Fleet had a catastrophic impact on the original inhabitants of this country. It marked the beginning of the dispossession of their land. When Arthur Phillip established a foothold at Sydney Cove on 26 January 1788, which began the British occupation, he was under instructions from King George III that he should open up a dialogue with the 'native' inhabitants and encourage all to live in 'amity and kindness' with them. However, the policy of friendship and kindness did not last long. Within the first year Phillip had an Aboriginal man captured in order to force a dialogue with the 'natives' and two years later he had ordered a punitive expedition against the local Aboriginal people for the spearing of a convict. A new policy was now in place—one of retribution if Aboriginal people resisted the occupation.¹⁷

Australia later became a dominion—when its state colonies united as the Commonwealth of Australia in 1901. It became fully independent in 1942 when it adopted the UK 1931 Statute of Westminster.¹⁸ The final step to full independence or sovereignty as a nation was the passing of the *Australia Act 1986* in the UK. The Act removed the right of the British Parliament to make laws for Australia and ended any British role in the government of the Australian States. It also removed the right of appeal from Australian courts to the British Privy Council in London. Most importantly, the Act transferred full control of all Australia's constitutional documents into Australian hands.¹⁹

However, for its First Peoples—Australia's second history is one of the colonisers having obtained sovereignty of *Terra Australis* through acquisition on the basis of a falsehood—namely that the land was unoccupied or uninhabited. This acquisition disregarded the fact that *Terra Australis* was already occupied by Indigenous or Sovereign peoples that governed the land in accordance with their own system of laws and customs and their unique relationship with the land, such as those upholding a knowledge system that is described in the *Uluru Statement from the Heart* as an “ancient sovereignty”.

Journey for Constitutional recognition

Australia's journey for Constitutional recognition differs markedly from that of Canada and Aotearoa (New Zealand). The First Peoples of Australia, unlike those of the other two countries, are still waiting to be formally recognised. This situation is fundamentally related to Australia being settled by its colonisers without any negotiation or founding Treaty of Settlement.

¹⁷ Egan, R. (2012). *Neither AMITY nor KINDNESS—Government policy towards Aboriginal people of NSW from 1788 to 1969*, Paddington, p. 1.

¹⁸ Aboriginal History Office [online] A brief Aboriginal History, accessed 15 October 2023, <<https://www.aboriginalheritage.org/history/history/>>; Australian Constitution Act 1901; UK Parliament 1931 Statute of Westminster; Encyclopedia Britannica [online] Australia, accessed 15 October 2023, <<https://www.britannica.com/place/Australia/History>>.

¹⁹ Commonwealth Network [online] "History of the Commonwealth". Commonwealth of Nations. Accessed 15 October 2023, <<https://www.commonwealthofnations.org/commonwealth/history/>>; The Commonwealth [online] Our History <<https://thecommonwealth.org/history>>.

Canada

Recognition

The First Peoples of Canada²⁰—are formally recognised across a number of parameters. Section 35(1) of the *Constitution Act 1982*²¹ (‘the Act’) states that:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

Section 35(1) also confers the protection of constitutional law on: historic and modern treaties; and native title (“aboriginal rights”). Section 25 provides that other constitutional rights and freedoms are not to be interpreted in ways which abrogate or derogate from aboriginal rights and freedoms. Further, the Canadian Government is also held by the courts to have a fiduciary duty to protect aboriginal rights—this duty has not been established in Australia.

While Section 35 recognises “aboriginal rights”—it did not create them—as they existed before Section 35 came into effect. Aboriginal rights “in general are based on the continued occupation of lands by Aboriginal peoples since before European settlement”.²² While Section 35 does not define “aboriginal rights”—they have been “interpreted to include a range of cultural, social, political, and economic rights including the right to land, as well as to fish, to hunt, to practice one’s own culture, and to establish treaties”.²³

The history to the drafting of Section 35 is important as the Canadian Government at the time:

...did not initially plan to include Aboriginal rights so extensively within the constitution when the Act was being redrafted in the early 1980s. Early drafts and discussions during the patriation of the Canadian Constitution did not include any recognition of those existing rights and relationships, but through campaigns and demonstrations, Aboriginal groups in Canada successfully fought to have their rights enshrined and protected.²⁴

Self-determination

Parliamentary seats

Canada does not have codified, indigenous-specific representation in or to its Parliament, but section 35.1 of the Act requires that “representatives of the aboriginal peoples of Canada” must be consulted before any alteration to sections 25 or 35 of the Act.

²⁰ The “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada (refer section 35, *Canadian Constitution Act 1982* <https://laws-lois.justice.gc.ca/eng/const/const_index.html#>).

²¹ The Canadian Constitution is comprised of the *Constitution Act of 1867* (formerly the British North America Act, 1867) and the *Constitution Act of 1982*. The *Constitution Act 1982* contains the Canadian Charter of Rights and Freedoms and other provisions, including the rights of Indigenous peoples and the procedures for amending the Constitution of Canada (refer: Government of Canada—Constitutional Documents <https://laws-lois.justice.gc.ca/eng/const/const_index.html#>; and Brian Mulroney Institute of Government—section 35 of the *Constitution Act 1982* <<https://www.mulroneyinstitute.ca/node/3191>>).

²² Hanson, E. (2009). *What is Section 35 of the Constitution Act?, First Nations & Indigenous Studies*. The University of British Columbia <https://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/>.

²³ Ibid.

²⁴ Ibid.

Duty to consult

The Canadian government is obliged to consult with Indigenous peoples before making decisions or passing laws that impact on their interests. This ‘duty to consult’ forms part of a broader legal doctrine known as ‘the Honour of the Crown’²⁵, developed by the courts to accompany the constitutional guarantee provided by section 35 of the Act.

To act honourably, for example, the Canadian provincial and federal Crowns must consult with Indigenous communities before making decisions or passing laws that affect their rights, even where those rights are claimed but not yet proven.²⁶

Indigenous self-government

The Canadian government has embarked on a process of advancing Indigenous self-government. This process is not only about addressing issues arising from and due to the *Indian Act 1876*²⁷ but to reckon with its “long history of colonialism and the scars it has left” through a process of reconciliation.²⁸

The overarching objective for this reform is a process of the Government working:

...in partnership with Indigenous peoples to undo federally imposed systems of governance and administration in favour of Indigenous control and delivery. Canada is working with Indigenous peoples to support them in their work to rebuild and reconstitute their nations, advance self-determination and, for First Nations, facilitate the transition away from the *Indian Act* and toward self-government.²⁹

The Government of Canada has publicly recognised that its Indigenous peoples have an inherent right of self-government and this is guaranteed in section 35 of the *Constitution Act 1982*. The Government codified its approach to the implementation of the inherent right and the negotiation of Aboriginal self-government with a guide to self-government negotiations with Indigenous communities first launched in 1995.³⁰

²⁵ The courts in both Canada and Aotearoa (New Zealand) have applied this doctrine.

²⁶ Gover, K. (2018, June 17). “Duty and honour at the heart of Indigenous recognition”, *Pursuit*. <<https://pursuit.unimelb.edu.au/articles/duty-and-honour-at-the-heart-of-indigenous-recognition>>.

²⁷ At the time of its introduction, and which continues today, the Indian Act imposes a colonial governance system on First Nation communities where authority rests with the federal Minister. Notwithstanding limitations of the Indian Act, the historic treaties of Canada and those of more contemporary times with its First Peoples demonstrate that the status of Indigenous peoples as peoples and as property-holders was recognised to varying extents.

²⁸ Government of Canada. (2020). Self-government—Learn about Indigenous self-government in Canada, [online] accessed 15 October 2023, <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>.

²⁹ Ibid.

³⁰ Government of Canada. (1995). The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government [online] <<https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>>.

Negotiated agreements of this kind place decision-making power in the hands of Indigenous governments who make their own choices about how to deliver programs and services to their communities. This acknowledges that Indigenous communities have different goals and priorities and that there cannot be a single model of self-government. Negotiations and associated arrangements will consequently take many forms and will be influenced by the different historical, cultural, political and economic circumstances of the Indigenous governments, regions and communities involved.³¹

Aotearoa (New Zealand)

Recognition

Regarding recognition—the Māori—as Aotearoa (New Zealand)’s First Peoples are formally recognised across a number of “strong” parameters. This includes: Treaty and political representation in the form of guaranteed parliamentary seats.

Aotearoa in comparison with other democratic states does not have a specific written Constitution or “rule book”. It shares this unique circumstance with Britain and Israel. While these countries may not have written Constitutions *per se*, their Constitutional frameworks comprise many written rules from ancient statutes to more contemporary Acts.³²

Treaty of Waitangi

The Treaty of Waitangi was signed in 1840 between officials of the British Crown and over 500 Māori tribal leaders. It consists of two language versions, one in Māori and one in English, which are not exactly the same. For example, where the Māori version guarantees ‘tino rangatiratanga’ (Māori powers of chieftainship) and the Crown’s right to govern, the English version guarantees Māori property rights and the Crown’s sovereignty.

It is believed that there was no exact Māori equivalent word to some of the English terms in the English-language version. Also, it has been advanced that for some Māoris, their understanding of the Treaty was not consistent with what they were actually signing—and because of this only 39 of the Māori chiefs signed the English-language version. This has resulted in discrepancies between the meanings of the two versions which have led to controversy in the interpretation of the Treaty and the application of its principles.

³¹ Different forms of governance or self-government have been negotiated in Canada. One example is the Nunavut Agreement, a modern treaty (comprehensive land claim agreement) where the self-government aspirations of Inuit are expressed through public government. This self-government agreement is unique due to the fact that the Nunavut government represents all the people residing in its territory. Another form of self-government is where law-making power is negotiated with an Indigenous group in only 1 or 2 key areas such as the Education Agreement in Nova Scotia and the Anishinabek Nation Education Agreement in Ontario (refer: Government of Canada. (2020). Self-government—Learn about Indigenous self-government in Canada, [online] accessed 15 October 2023 <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>).

³² Wright, T. (2013). *British Politics—A very short introduction* (2nd edn.), Oxford University Press: Oxford, pp. 18–19.

The overarching purpose of the Treaty was to:

...protect Maori interests, to promote settler interests in acquiring land and to secure the Crown's position in New Zealand. For the Maori people, the Treaty was intended to require the British Crown to preserve law and order between the Maori and Pakeha (European settlers), to protect Maori trade, and to guarantee Maori control of land and other resources. This was clear in the Maori text of the Treaty, which gave limited rights of governorship to the British Crown. In contrast, the English-language version gave full sovereignty to the British Crown.³³

In practical terms, the Treaty granted a right of governance to the British over their subjects, promised that Māori would retain ‘tino rangatiratanga’ (self-determination or full authority) over their lands, resources and other treasures and conferred the rights of British citizens on Māori. There have been concerns raised about the limitations of the legal status of the Treaty (or Te Tiriti), and that at times the protection of Māori rights can be dependent upon political will and *ad hoc* recognition of the Treaty.³⁴

Notwithstanding, the issues arising due to discrepancies between the meanings of the two versions of the Treaty and other limitations, in 2010, the UN Special Rapporteur on the Rights of Indigenous Peoples visited New Zealand. In their subsequent report they stated that the “Treaty settlement process in New Zealand, despite evident shortcomings, is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples, and settlements already achieved have provided significant benefits in several cases”.³⁵

Self-determination

Māori Parliamentary seats in Aotearoa (New Zealand)

Guaranteed Māori Parliamentary seats have been in place since 1867. While the motivations underpinning this form of recognition were initially designed to disenfranchise Māori, today they are regarded as performing well in protecting their interests.³⁶

Duty to consult

The right to self-determination for Māori is evidenced in a powerful duty to consult provision that is actioned across a number of practical mechanisms.

³³ Agreements Treaties and Negotiated Settlements [Online] The Treaty of Waitangi. <<https://www.atns.net.au/treaty-nz>>.

³⁴ International Work Group for Indigenous Affairs. [online] Indigenous peoples in Aotearoa, accessed 15 October 2023 <<https://www.iwgia.org/en/>>.

³⁵ Quoted in Finlayson, C. and Christmas, J. (2021). *He Kupu Taurangi—Treaty Settlements and the Future of Aotearoa New Zealand*. Huia Publishers: Wellington, p. 1.

³⁶ Iorns-Magallanes, C.J. (2005). Indigenous Political Representation: Identified Parliamentary Seats as a Form of Indigenous Self-determination. In B.A. Hocking (ed.) *Unfinished Constitutional Business? Rethinking Indigenous Self-determination*, (pp. 106–117). Aboriginal Studies Press.

The Aotearoa/New Zealand Crown is obliged to make informed decisions by consulting with Māori on major issues affecting the Treaty partnership, as part of its duty to act “reasonably, honourably and in good faith” in its dealings with Māori. This ‘duty to consult’ forms part of a broader legal doctrine known as ‘the Honour of the Crown’, developed by courts in Aotearoa/New Zealand to accompany the constitutional guarantees provided by the Treaty of Waitangi.³⁷ Importantly, a legislative duty to consult—is not a duty to ensure a particular outcome—it is a duty to consult a particular group that is significantly affected.³⁸

In the parliamentary context, Ministers submitting bills to Parliament are required to highlight any implications of proposed law for the principles of the Treaty of Waitangi. This is to ensure that new laws affecting Māori are debated by Māori MPs. Further, the Aotearoa/New Zealand Parliament has a Māori Affairs Committee Select Committee that is tasked with examining business related to Māori affairs and Treaty of Waitangi negotiations.³⁹

Australia

Recognition

The journey for constitutional recognition of Australia’s First Peoples together with debate about how best to recognise Australia’s First history—that is, prior to colonisation the land was occupied—extends over a century.

Australia has no specific constitutional recognition for its Indigenous peoples and no negotiated treaty at the National level. The referendum on the Voice to Parliament was the first step in seeking to address this. It is also acknowledged that work underpinning forms of recognition, treaty and truth-telling have commenced in all Australian states and territories—all are at different stages of progression. While all respective state and territory constitutions have been amended to recognise Indigenous Australians, all have a sub-clause in differing forms stating that this recognition is of no legal effect. Further, state and territory constitutions are Acts of Parliament and do not require a vote of the people. However, the referendum outcome has impacted some state-level commitments to treaty and truth-telling. The Saturday paper reported:

Within days of the referendum outcome the Queensland and New South Wales governments, both centre-left, retreated from commitments to truth-telling and treaty. These decisions show how spooked Labor governments are by the referendum result.

Even in Victoria, where the truth and treaty process is furthest advanced, the opposition is ruminating on opposing truth and treaty as a way of harvesting support ahead of the state election.⁴⁰

The referendum held on 14 October 2023 sought to amend the Australian Constitution to formally recognise Australia’s First Peoples and to create a constitutionally enshrined Indigenous Voice to Parliament.

³⁷ Gover, K. (2018, June 17). ‘Duty and honour at the heart of Indigenous recognition’, *Pursuit* <<https://pursuit.unimelb.edu.au/articles/duty-and-honour-at-the-heart-of-indigenous-recognition>>.

³⁸ Australian Law Reform Commission (ALRC). (2009). *Review of the Royal Commissions Act 1902 and related Issues—Making Inquiries: A New Statutory Framework*, Report No. 111 <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC111.pdf>>.

³⁹ Refer: <<https://www.parliament.nz/en/pb/sc/scl/maori-affairs/>>.

⁴⁰ James, D. (2023, October 28–November 3). The ‘Yes’ case reponds: ‘It’s a white flag from Labor’ (pp. 1; 4). *The Saturday Paper*.

Self-determination

The proposed Indigenous Voice to Parliament would have created a dedicated mechanism for the First Peoples of Australia to have a say in policy and legislation that affected their daily lives. It could also have provided a means for exercising the right to self-determination. In order for the Voice to be consistent with the right to self-determination, it would have needed to be truly representative and accepted as such by Indigenous peoples. Its accompanying design principles⁴¹ indicated that this would be the case. Further detail on the 2023 Voice referendum design principles is at **Appendix B**. By contrast, the Aotearoa/New Zealand and Canadian governments have a legal duty to consult with Indigenous peoples before passing laws or making decisions that directly affect them. This fundamental deficiency in Australian law—the enforcement of the right to self-determination—was what the *Uluru Statement from the Heart* sought to address.⁴²

As to parliamentary representation—unlike in Aotearoa/New Zealand where there has been guaranteed Māori representation in parliament since 1867, there is no guaranteed representation for First Peoples in Australia’s political institutions.⁴³ Any representation is through the general electoral ballot. The first Indigenous Australian to become a member of an Australian Parliament occurred in 1971—when Neville Bonner entered the Australian Senate as a Senator for Queensland—193 years after colonisation. There are 8 senators and 3 members of the House of Representatives in the current Federal parliament⁴⁴ who identify as an Aboriginal or Torres Strait Islander. There are also an estimated 18 state and territory members of parliament who identify as an Aboriginal or Torres Strait Islander.⁴⁵

While there has been some progression to land rights via the High Court Mabo decision and the enactment of Aboriginal land rights legislation federally and across the states, more work is needed. Also, much more needs to be done to progress political rights to support the right to self-determination.

⁴¹ The Australian Government committed to establish the Voice to Parliament in accordance with a set of Design Principles agreed by the Referendum Working Group (in the event the referendum was successful). The design principles for the Voice were published on 23 March 2023 (refer: <<https://www.pm.gov.au/media/press-conference-parliament-house-canberra-9>>).

⁴² Ibid.

⁴³ Gover, K. (2018, June 17). “Duty and honour at the heart of Indigenous recognition.” *Pursuit* <<https://pursuit.unimelb.edu.au/articles/duty-and-honour-at-the-heart-of-indigenous-recognition>>.

⁴⁴ As of July 2022.

⁴⁵ APH Library. (2020). *Aboriginal and Torres Strait Islander parliamentarians in Australia: a quick guide*. August. Canberra: Australian Parliamentary Library.

Part Two: Amending the Australian Constitution

Background

The 1901 Australian Constitution—the founding document of Australia—brought the six British colonies together to form one nation—the Commonwealth of Australia. It was drafted at two conventions held in the 1890s with delegates from the colonies. There were no Indigenous peoples or women representatives in attendance.

The interests and aspirations of Indigenous Australians and their prior occupation were not recognised in the Constitution. According to Williams (2023) “[t]he operative provisions of the Constitution were premised upon their exclusion, and even discrimination against them...This then was the legal foundation upon [which] Aboriginal people were made part of the Commonwealth of Australia on 1 January 1901”.⁴⁶ Further, a provision was inserted that specifically stated:

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

The exclusion of Indigenous Australians from the Constitution was on the basis that the drafters were of the view they were a dying race and would eventually die out. Three sections⁴⁷ were inserted in the terms of the Constitution that were discriminatory and racist in their application to Indigenous Australians. Notably, in these sections, Indigenous peoples were not referred to as people, but as “aboriginal natives”. While there has been amendment to some of these sections since 1901, sadly Williams (2000) observes that Australia:

...holds the dubious distinction of being perhaps the only country in the world whose Constitution still contains a ‘racist power’ [section 51(xxvi)] that allows the Parliament to enact racially discriminatory laws.⁴⁸

⁴⁶ Williams, G. (2023, April 3). *The Voice to Parliament—The Legal Realities* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

⁴⁷ s. 25 recognised that the States could disqualify people from voting in the elections on account of their race; s. 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to “the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws”. This was the so-called, “racist power”. This section was inserted into the Constitution to allow the Commonwealth to discriminate against sections of the community on account of their race. Edmund Barton, the Leader of the 1897–1898 Convention and later Australia’s first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to “regulate the affairs of the people of coloured or inferior races who are in the Commonwealth”; and section 127 went further in providing: “In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted”. Significantly, neither provision spoke of Indigenous peoples as people, but in the latter case as “aboriginal natives”.

⁴⁸ HRC, p. 10; Williams, G. (2000). The Races Power and the 1967 Reference, unpublished article developed from ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) *Osgoode Hall Law Journal*, 38, p. 643.

Williams (2010) argues that “the story of our nation is incomplete without the histories of the peoples who inhabited the continent before white settlement”.⁴⁹ Further, it has also been argued that the failure at the time of settlement and the ongoing failure—to acknowledge the prior occupation of Aboriginal and Torres Strait Islander peoples—“the current Constitution works to perpetuate the myth of *terra nullius* (no man’s land)”.⁵⁰

The 2023 Voice Referendum unsuccessfully sought to address this.

The mechanism and requirements for amending the Australian Constitution

The requirements for altering the Australian Constitution make it one of the hardest Constitutions to change in the world. Section 128 of the Constitution details the process which entails two steps for amendment—one federal and one state—a double majority is needed. To be successful, a proposal has to be supported, firstly—by a majority of the voters overall and secondly—by the majority of voters in a majority of the states (i.e. majorities are required in at least four of the six states).

The convention debates show that the framers of the Australian Constitution believed there should be an alteration mechanism and that the power of amendment should be two-fold, vested directly in the people and/or indirectly via the states “that comprised the federation, rather than in the institutions that preceded or were formed as a result of Federation. This was a departure from the Canadian approach, which left the power of amendment to the Imperial Parliament”.⁵¹

Alfred Deakin, who became Australia’s 2nd Prime Minister, was the “first to propose that the people themselves be permitted to vote on any alteration or amendment”.⁵²

The double majority requirement was a compromise reached by the drafters to ensure an appropriate balance between stability and flexibility was achieved to guarantee the Constitution’s robust and enduring operation. The amendment procedures were designed to ensure that the document could not be changed too easily and, on any whim, but also that it could be altered to meet and address changing circumstances so that the Commonwealth could keep pace with an evolving world. The constitutional debates demonstrate “that there was broad agreement from the very beginning that the referendum mechanism should be strict” and it was necessary to provide appropriate measures to safeguard it from being hastily amended.⁵³

The requirement for a majority of voters in a majority of states has been regarded by some as a troublesome barrier to constitutional change. However, it is solely responsible for only five out of the total of 36 unsuccessful proposals.

⁴⁹ Williams, G. (2010, September 14). ‘Old-style racism still in constitution’, *Sydney Morning Herald* <<http://www.smh.com.au/action/printArticle?id=1924860>>).

⁵⁰ Australian Human Rights Commission. (2023). *Voice Referendum: Understanding the referendum from a human rights perspective*. Sydney: Australian Human Rights Commission. p. 11 <https://humanrights.gov.au/sites/default/files/document/page/voice_referendum_-_understanding_the_referendum_from_a_human_rights_perspective_pdf>; Winterton, G. (1997). A New Constitutional Preamble. *Public Law Review*, 8, pp. 186–187.

⁵¹ Hobbs, H. and Trotter, A. (2017). The Constitutional Conventions and Constitutional Change: Making sense of multiple interventions. *Adelaide Law Review*, 38, p. 56; refer also British North America Act 1876 (Imp).

⁵² Hobbs, H. and Trotter, A. (2017). The Constitutional Conventions and Constitutional Change: Making sense of multiple interventions. *Adelaide Law Review*, 38, p. 56.

⁵³ *Ibid.*, p. 57.

There was also a clear intent that the framers wanted a mechanism to be provided for alteration of the Constitution and they wanted the power for this alteration to be in the hands of the people, not the British and not by any institutions that would be created after Federation. The framers chose the referendum method from the Swiss.⁵⁴ British constitutional theorist A.V. Dicey describes the referendum as “the people’s veto”, because it rests on the “weight of the nation’s common sense” to safeguard against “the fanaticism of reformers”.⁵⁵

In Australia, constitutional change encompasses a process of formulating reform proposals, submitting them to Parliament through draft legislation, approval by Parliament, popular support and approval from the people, and obtaining Royal Assent from the Governor-General. The procedure for amending the Australian Constitution is summarised in **Appendix C**.

Some history on Australian referendums

The 2023 referendum on a First Nations Voice to Parliament was the 45th constitutional referendum held since federation in 1901. Since 1901—only eight of the 45 proposals put to the people have been successful. All successful referendums have had bipartisan support from the government and the opposition.

The 2023 referendum joined the 36 other referendum proposals put to the people which have been defeated.

Where citizens determine the outcome of a referendum, the extent to which they are familiar with the nature of a referendum and its processes is important. Some in the literature have referred to this as a ‘referendum culture’. Kenny (2021) defines ‘referendum culture’ as:

...a broadly-shared but loose collection of behaviours of voters, politicians and other actors that help guide and control the conduct of referendums.⁵⁶

It is useful to consider some further data surrounding Australian referendums to determine the extent to which a “referendum culture” may or may not exist in Australia.

The last referendum passed by the people in Australia was held in 1977—making it forty-six years since Australia has changed its Constitution. This is the longest period the Constitution has gone without amendment—with the next longest being 21 years between the 1946 and 1967 referendums. In practical terms, given Australia lowered the minimum voting age to 18 years in 1973, this means that an Australian who voted ‘Yes’ in the last successful referendum was at least 63 or 64 years of age in 2023—hence, a couple of generations have passed in Australia since a referendum vote has been successful. As to referendums initiated across the major parties—26 of the 45 proposals have been put by Labor governments with only one (or four per cent) being successful—the 1946 (Social Services)

⁵⁴ Twomey, A. (2023, November 28). *Australia after the 2023 Referendum* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/blog/anne-twomey-paul-kelly-australia-after-the-2023-referendum/>>; and Hobbs, H. and Trotter, A. (2017). The Constitutional Conventions and Constitutional Change: Making sense of multiple interventions. *Adelaide Law Review*, 38, pp. 49–85.

⁵⁵ Dicey, A.V. (1883). The Referendum. *The National Review*. W.H. Allen: London, Vol.23, pp. 65–72.

⁵⁶ Kenny, D. (2021). The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution? In Maria Cahill, Seán Ó Conaill, Colm O’Cinneide, Conor O’Mahony (eds.). *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland*, (Chapter 11, pp. 1–26). Routledge.

referendum. In comparison, seven out of the remaining 19 proposals (37 per cent), which were put by conservative governments, have been successful.⁵⁷

Apart from it being in the national interest that some constitutional change does occur⁵⁸, this record is problematic in terms of its contribution towards the development and maintenance of a constitutional culture in Australia that has implications for the success of referendums. It is argued that due to the infrequency of referendums in Australia—a “referendum culture” has never developed in Australia. Research from Ireland has shown that the development of a “referendum culture” can be one of the most important factors in the relative success of a referendum. In the last three decades, Ireland has had “very frequent constitutional change referendums”. Since 1937⁵⁹ successful amendments made to the Irish Constitution have numbered thirty in total, with more than two thirds of these occurring in the past three decades.⁶⁰ The content of the referendum proposals have ranged from minor changes to significant reforms.⁶¹

Also, the research from Ireland suggests that the development of a “referendum culture” can serve as a safeguard against some of the worst features and characteristics that come to be associated with referendums. In Ireland:

...referendums to change the Constitution are regularly held and are extremely popular. They do not display many of the worst traits that critics fear. Experts are generally respected; there have not been widespread problems with misinformation; civil society groups and citizens’ assemblies play major roles. There is evidence of voters adopting nuanced views and being wary of unclear proposals. These positive features exist in spite of, not because of, Ireland’s formal referendum regulation, which is skeletal at best. Ireland’s relative success is a function of a ‘referendum culture’ which has developed over time and exists as a set of unspoken cultural assumptions that guide people, politicians and campaigners and seemingly produce positive results.⁶²

⁵⁷ Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>; Williams, G. and Hume, D. (2010). *People Power: The History and Future of the Referendum in Australia*. UNSW Press; Lino, D. (2010). Power People: The History and Future of the Referendum in Australia by George Williams and David Hume—Book Review. *Indigenous Law Bulletin* 7(21), p. 44.

⁵⁸ Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>; Williams, G. (2023, August 3). *The Voice to Parliament—The Legal Realities* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

⁵⁹ Articles 46 and 47 of the Constitution of Ireland 1937 provide that the Constitution can only be amended by referendum (there was an initial period of three years where amendment was allowed by ordinary legislation, and the First and Second Amendment Acts were passed in this period). A Bill to amend the Constitution must be passed by both houses of the Oireachtas by majority vote; it is then put to the people in a referendum, and it is passed if a majority of those voting on the day vote in favour.

⁶⁰ A further eleven proposals put to the people have been rejected.

⁶¹ Kenny, D. (2021). The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution? In Maria Cahill, Seán Ó Conaill, Colm O’Cinneide, Conor O’Mahony (eds.). *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland*, (Chapter 11, pp. 1–26). Routledge, pp. 5–6.

⁶² Kenny, D. (2021). The Risks of Referendums: ‘Referendum Culture’ in Ireland as a Solution? In Maria Cahill, Seán Ó Conaill, Colm O’Cinneide, Conor O’Mahony (eds.). *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland*, (Chapter 11, pp. 1–26). Routledge.

Referendums—relevant to Australia’s FNP’s

Prior to the 2023 Voice referendum—three other referendums relevant to Australia’s FNP’s have been held (1944; 1967; and 1999). Only the 1967 referendum has been successful. A summary of the three is set out Table 2.

Table 2: Summary of Referendums—relevant to Australia’s FNP’s

Date	Proposal	Result
The 1944 referendum (19 August 1944)	Part of 1944 Referendum on Post-war Reconstruction and Democratic Rights—also known as the ‘14 powers’ referendum. ⁶³ The 14 th power sought by the Commonwealth at this referendum was a proposal: - to give the federal government power over a period of five years, to legislate on a wide variety of matters including the ability to legislate for Indigenous Australians. ⁶⁴	Obtained a majority in only two states (WA, SA) and obtained only 45.99% of the national vote. ⁶⁵ Not carried
The 1967 referendum (27 May 1967)	After many years of campaigning by Aboriginal and Torres Strait Islander leaders and organisations—a proposal was put to the people to amend the Constitution to: - give the federal parliament the power to make laws in relation to Aboriginal and Torres Strait Islander people (amending s 51(xxvi)); and - allow for Aboriginal and Torres Strait Islander people to be included in the census (removing s 127). ⁶⁶	Most successful referendum result to date. Obtained 90.77% of the national vote and a majority in all states voted to support the referendum. ⁶⁷ Carried
The 1999 referendum (6 November 1999)	Following significant public debate and a Constitutional Convention on whether Australia should become a republic—a proposal was put to the people for two amendments: (i) alter the Constitution so that Australia became a republic; ⁶⁸ and (ii) insert a new preamble. ⁶⁹	A no vote resulted for both amendments. On the question of a republic—54.87% of the people voted against the proposal. On the question of the preamble—60.7% of the people voted against the proposal. There was no majority in any of the six states vote for either question. ⁷⁰
The 2023 referendum (14 October 2023)⁷¹ (refer to Appendix A)	After almost two decades of contemporary campaigning, advocacy and significant work by Aboriginal and Torres Strait Islander leaders and organisations—a proposal was put to the people to amend the Constitution to: - recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. ⁷²	+ 60.06% of the people voted against the proposal. + There was not a majority, or close to a majority, in any of the six states. + A majority vote was obtained only in the Australian Capital Territory. ⁷³

⁶³ Hocking, J. (2018). ‘A transforming sentiment in this country’: The Whitlam government and Indigenous self-determination. *Aust J Publ Admin*, 77, S5–S12.

⁶⁴ Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth).

⁶⁵ The Australian Electoral Commission, Referendum Dates and Results 1906–Present <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

⁶⁶ Constitution Alteration (Aboriginals) Bill 1967 (Cth).

⁶⁷ The Australian Electoral Commission. (n.d.). Referendum Dates and Results 1906–Present <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

⁶⁸ Constitution Alteration (Establishment of Republic) Bill 1999 (Cth).

⁶⁹ Constitution Alteration (Preamble) Bill 1999 (Cth).

⁷⁰ The Australian Electoral Commission, Referendum Dates and Results 1906–Present <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

⁷¹ Australian Electoral Commission Tally Room. (2023). 2023 Referendum <<https://results.aec.gov.au/29581/Website/ReferendumNationalResults-29581.htm>>.

⁷² Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd080>.

The 1967 Referendum

Given the 1967 Referendum has been the most successful in Australia's history, constitutional lawyers, academics and other experts have given consideration as to what elements or features could account for its success. The following interrelated reasons have been suggested:

- The proposals had bipartisan support at the Federal level—as a result, there was no official ‘No’ case against the proposals;
- The proposals had support at the state level—all State governments were supportive—as a result, no state campaigned against the proposals;
- There was a unique national convergence in support of the referendum proposals;
- The proposed changes had been examined and discussed at the national level for many years—resulting in an informed public comfortable with the proposals; and
- A state of “general national uniformity in Indigenous affairs law and policy” at the time, and as the Government at the time “was not seeking to make changes in Indigenous affairs, the reform proposals were not viewed as particularly threatening or major”.⁷⁴

Part Three: Flaws in the Referendum process and their potential impact

The 26th Prime Minister of Australia—the Hon. Paul Keating—was known to use and often repeated the following saying that “good policy will be good politics”. To which constitutional lawyer, Frank Brennan added in the context of the Voice referendum:

...that good process is necessary to produce good policy, which might then produce good politics, which might then produce popular support. My chief argument tonight is that the process we have at the moment has all but broken down. We're seeing it in some of the very vindictive exchanges which are now being publicly made. Inevitable, because of a breakdown in process.⁷⁵

Constitutional lawyers, George Williams and David Hume (2010) in their seminal book on the history and future of Australian referendums observe that referendum success “is not just a matter of having good ideas, but of getting the process right”.⁷⁶ They also identified some important elements or pillars that are critical to successful constitution change⁷⁷—including: bipartisanship; popular ownership/support; and popular education.

⁷³ The Australian Electoral Commission, Referendum Dates and Results 1906–Present, <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

⁷⁴ Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>; Lino, D. (2010). Power People: The History and Future of the Referendum in Australia by George Williams and David Hume—Book Review. *Indigenous Law Bulletin* 7(21), p. 44.

⁷⁵ Brennan, F. (2023, March 1). *A legal-lite, Watertight Indigenous Voice to Parliament* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

⁷⁶ Williams, G. and Hume, D. (2010). *People Power: The History and Future of the Referendum in Australia*. UNSW Press, p. viii.

⁷⁷ Williams, G. and Hume, D. (2010), *People Power: The History and Future of the Referendum in Australia*. UNSW Press, Chapter 7; Lino, D. (2010). Power People: The History and Future of the Referendum in Australia by George Williams and David Hume—Book Review. *Indigenous Law Bulletin* 7(21), p. 44; Aboriginal and Torres Strait Islander Social Justice Commissioner. (2011). *Constitutional reform: Creating a nation for all of us*. Australian Human Rights Commission, pp. 18–25 <<http://www.humanrights.gov.au/constitution/>>.

As noted previously, this paper argues that flaws in the process adopted by the Government to support and manage the Referendum coupled with some unique features associated with the Australian Constitution allowed negative campaigning to capitalise on entrenched inaccurate views and misrepresentations that are held by some Australians about Indigenous Australians and their place in Australian history.

These flaws and their potential impact are detailed below and are organised using Williams and Hume's elements considered critical for successful constitutional change. It is also noted that the elements are not mutually exclusive and some overlap occurs.

Bipartisanship

Support across Australia's major political parties at federal and state levels is all-important for the successful passage of any referendum. However, history has shown that it may not guarantee success but no referendum has been successful without it. Also, the double majority mandate for change means that bipartisan support at both the state and federal level is also necessary.

This support must not be solely at the outset of a proposal but must be maintained throughout the process. In the years leading up to the 2023 Voice Referendum, there appeared to be bipartisanship support and considerable public support for *some* sort of constitutional 'recognition'. However, as the process progressed and the detail for the proposal firmed up, the level of bipartisan support declined.

A key turning point in shifting support occurred when the newly elected Labor Prime Minister—the Hon. Anthony Albanese stated, as part of his election victory speech in May 2022, that he would put the proposal for an Indigenous Voice to a referendum. This proclamation made the proposal a “party political issue” which became further entrenched by the Government's refusal to engage in “formal bi-partisanship co-operation” with the Opposition to “maximise the prospect of Coalition support for the referendum”⁷⁸ and a “failure to compromise on the wording”⁷⁹ for the proposal.

By the time a parliamentary committee was established in April 2023 to allow people to have their say on the proposed words to amend the Constitution—the Federal National (28 November 2022) and Federal Liberal (5 April 2023) parties had respectively announced their support for a 'No' vote and the wording for the proposed amendment to the constitution was all but finalised.

The failure to achieve bipartisan support at the federal level also resulted in an official 'No' case. This provided a framework for an organised opposition at both federal and state levels and gave greater prominence and funding for arguments against the proposal. This coupled with how Australian's view constitutional change and the double majority requirements for passing amendments has resulted in Australians being very reluctant and “weary about changing the Constitution, they won't do so if there is any kind of organised opposition and any group that is able to seed doubt and sow fear”.⁸⁰

⁷⁸ Brennan, F. (2023, September 2–3). 'Why I'll Vote Yes, despite the flaws', *The Weekend Australian*, pp. 20–21; Brennan, F. (2023, March 1). *A legal-lite, Watertight Indigenous Voice to Parliament* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

⁷⁹ Twomey, A. (2023, November 28). *Australia after the 2023 Referendum* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/blog/anne-twomey-paul-kelly-australia-after-the-2023-referendum/>>.

⁸⁰ Ibid.

Popular ownership/support

*...the government's novel approach of going alone...was never going to work—it was always going to end in disaster.*⁸¹

Paul Kelly, 23 November 2023

Popular ownership and support for proposed constitutional change can be achieved through public consultation, genuine opportunities to participate, plebiscites etc. According to Williams (2022), a failure to achieve popular ownership and support for a referendum proposal can be “as deadly as partisan opposition is to constitutional reform”.⁸²

The importance of ensuring popular support is even more paramount in Australia due to its constitutional design reform process. All proposals for reform are initiated by the Executive and go through the federal parliament. This risks proposals for reform being labelled as a “politicians’ proposal” and “of being perceived as self-serving”.⁸³

This default position needs to be mitigated by a drafting process and a campaign that maintain an “ongoing connection between the community and the referendum proposal”.⁸⁴ This should include at a minimum some form of public cross-party consultation.

Despite repeated calls for public consultation by prominent Australians including constitutional lawyers, the Government failed to establish genuine opportunities for public consultation. The Prime Minister chose not to establish any constitutional convention or a parliamentary sponsored process for public participation in the design of the proposed amendment to the constitution. Instead, the PM made the decision to rely on a ‘hand-picked’ referendum working group and an appointed constitutional expert group that were required to negotiate in confidence.⁸⁵ As noted previously, by the time a parliamentary committee consultation process had been established—the major opposition parties had declared their support for ‘No’ and the wording for the proposed referendum amendment had been finalised.

Where consultation is run exclusively through executive initiated processes it also risks promoting “elite ownership” rather than “popular ownership” of proposals. The decision by the Prime Minister to abandon any kind of constitutional convention or commission or other processes for public involvement in favour of “the government’s novel approach of going alone with a handpicked group of [*Prime Ministerial*] advisers was never going to work—it was always going to end in disaster”.⁸⁶

⁸¹ Kelly, P. (2023, November 28). *Australia after the 2023 Referendum* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/blog/anne-twomey-paul-kelly-australia-after-the-2023-referendum/>>.

⁸² Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Kelly, P. (2023, November 28). *Australia after the 2023 Referendum* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/blog/anne-twomey-paul-kelly-australia-after-the-2023-referendum/>>.

Constitutional lawyer, Anne Twomey highlights how different consultation processes can foster either popular or elite ownership of referendum proposals:

Constitutional commissions or other expert bodies may also be the subject of suspicion because they are invariably appointed by governments. An elected constitutional convention, on the other hand, gives people a positive role in initiating constitutional reform. On this basis, they (the people) might be more likely to approve, or at least give serious consideration to, the products of its deliberation.⁸⁷

Popular education

*There is a need to educate our fellow Australians about the Constitution and constitutional change. For the average voter, the Australian Constitution is a boring document, little known or understood especially by new Australians and yet it can be amended only by a super-majority of the people.*⁸⁸

Frank Brennan, February 2024

Poor civic education and understanding

Surveys show a worrying lack of knowledge and understanding among the Australian public about the Australian Constitution and government *per se*. In practical terms, as opposed to having engaged and active citizens, this situation gives rise to disengagement and citizens with limited knowledge about how their system of government works and limited understanding of the nature of any proposed reforms.

This situation is problematic for referendums, in particular where limited knowledge can result in voters being unable to discern between truthful and misleading claims and be in an empowered position to refute false claims. Williams (2022) emphasises that:

These problems can be telling during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, a potential to be manipulated by the “Yes” or “No” cases and even an unwillingness to consider change on the basis that “don’t know, vote No” is the best policy.⁸⁹

The extent to which citizens are familiar with the nature of a referendum and its processes is important. As stated in Part 2 above, some in the literature have referred to this as a “referendum culture”.

No regulation of social media/or other advertising

This was the first referendum held in the age of social media. Considerable misinformation and disinformation was disseminated using these platforms.

There was no fact checking of claims that were being made by each campaign, in particular, the ‘No’ campaign. There is no rule that campaigners need to be truthful. It was legal to spread misinformation and disinformation and tell outright lies about the proposed constitutional amendment.

⁸⁷ Quoted in Brennan, F. (2024, February 7). Lessons from the referendum. *Eureka Street* 34(2). <<https://www.eurekastreet.com.au/article/lessons-from-the-referendum>>.

⁸⁸ Ibid.

⁸⁹ Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

Notably, the disinformation started straight after the Uluru Statement was handed down in 2017, with some sitting opposition politicians claiming that the Voice would lead to a third chamber in the Parliament for indigenous people.⁹⁰

In January 2023, Parliament's Joint Standing Committee on Electoral Matters rejected calls to introduce federal truth in political advertising laws for the referendum campaign, although the same committee recommended in June that Australia adopt federal truth in political advertising laws that would apply to all future federal elections and referendums.

The only exception is that it is unlawful to mislead voters about how to fill in the referendum ballot form. The Australian Electoral Commission has an online referendum process disinformation register. This is focused on disinformation about the referendum process rather than fact-checking claims made about the Voice to Parliament.

A number of media outlets in partnership with universities⁹¹ sought to address this gap in factual information and published articles fact-checking claims made about the Voice.⁹²

While both the 'Yes' and 'No' campaigns engaged in advertising—the 'No' campaign concentrated on online advertising through social media and also focused its messaging on the States with smaller populations (as an Australian referendum requires support in a majority of States to succeed).⁹³

In the absence of regulation—social media very effectively spread many conspiracy theories, including that the Voice referendum: would result in people losing their homes and backyards to Indigenous claimants; was a plot by the United Nations to take control of Australia; would give effect to a coup to put in place an un-elected Indigenous monarchy and apartheid; would establish a separate tier of Indigenous government (the third chamber); or would turn Indigenous Australians into British subjects and strip them of their land rights.⁹⁴

Importantly, no specific Federal legislation exists to allow the Australian Electoral Commission to prevent misinformation and disinformation being used in social media or other forms of advertising in Federal election or referendum campaigns.

As mentioned previously, while the AEC has some examples of the disinformation about the referendum process used in the 2023 Voice referendum campaign on its website more could have been, and should have been done, to mitigate against misinformation and disinformation being used in social media or other forms of advertising.

⁹⁰ Remeikis, A. (2019, July 18). 'Barnaby Joyce 'apologises' for calling Indigenous voice a third chamber of parliament'. The Guardian <<https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament>>.

⁹¹ Including: ABC Fact Check; AAP Fact Check; RMIT Fact Lab; and AFP Fact Check.

⁹² Beck, L. (2023, July 10). 'Why is it legal for politicians and voice to parliament campaigners to lie to you?'. The Guardian <<https://www.theguardian.com/commentisfree/2023/jul/10/voice-to-parliament-referendum-politicians-campaigns-lies>>.

⁹³ Twomey, A. (2023, November 28). *Australia after the 2023 Referendum* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/blog/anne-twomey-paul-kelly-australia-after-the-2023-referendum/>>.

⁹⁴ Ibid.

However, in the aftermath of the 2023 Voice referendum loss, three bills addressing this lack of legislation and also the lack of transparency regarding financial disclosures to electoral and referendum campaigns have been put before Parliament by the crossbench—two of which are each sponsored by an independent member of the House of Representatives⁹⁵ and the other sponsored by a group of independent⁹⁶ and minor party⁹⁷ senators. It is telling that there has been nothing yet from the Government or the Opposition to address this significant flaw in the referendum and electoral process in Australia, given that a Federal election is scheduled for later this year.

The Bill introduced by the independent member, Zali Steggall MP (13 November 2023) and read a first time seeks to amend “the *Commonwealth Electoral Act 1918* to prohibit misleading or deceptive electoral or referendum matter”.⁹⁸ The Bill introduced by the independent member, Kate Chaney MP (25 March 2024) and read a first time seeks to amend:

...the *Commonwealth Electoral Act 1918* in relation to: lowering the disclosure threshold to \$1,000; real-time disclosure of donations; prohibiting misleading or deceptive electoral or referendum matter; broadening the definition of gift; funding disclosure requirements; introduction of a major-donor donation cap; prohibiting certain political donations; limiting pre-election government advertising; and postal vote processes; and *Commonwealth Electoral Act 1918* and *Do Not Call Register Act 2006* to provide that registered independent candidates are treated the same as political parties.⁹⁹

The Bill sponsored by independent and minor party crossbench senators on 25 March 2024, and read a first time, mirrors that of the proposed amendments to the *Commonwealth Electoral Act 1918* set out in the Bill introduced by Kate Chaney MP in the House of Representatives on the same day.¹⁰⁰

The Referendum Machinery Provisions Act 1984

*...we have referendum machinery legislation that is not only old, outdated and inadequate but is actually not even well drafted to provide a level and fair playing field or to educate Australians with the neutral and credible information they need to make an informed decision – to assess the yes and no arguments.*¹⁰¹

George Williams, August 2022

While the Constitution specifies what is needed for a referendum to succeed, it is silent on a how a referendum should operate or be run except to say that the referendum “shall be taken in such manner as the Parliament prescribes”. The *Referendum (Machinery Provisions) Act 1984*—an electoral act for the holding of referendums—regulates the referendum procedure and all matters related to the vote. The Act gives parliament significant latitude to decide how a referendum will be run.

⁹⁵ Zali Steggall MP and Kate Chaney MP

⁹⁶ Senator David Pocock and Senator Lidia Thorpe.

⁹⁷ Senator Jacqui Lambie and Senator Larissa Waters.

⁹⁸ Refer: Commonwealth Electoral Amendment (Voter Protections in Political Advertising) Bill 2023, <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7101>.

⁹⁹ Refer: Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024, <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7168#>.

¹⁰⁰ Refer: Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024 (No. 2) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1414>

¹⁰¹ Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.

While addressing the gap in civics knowledge by Australians is a long-term goal—its prevalence was known in the lead-up to the Voice Referendum and there were measures that could have been taken to potentially counter its undue influence during the campaign. Primarily, these measures would have been supported by changes to the *Referendum Machinery Provisions Act 1984*.

Some amendments to the Referendum Act for the 2023 Voice Referendum could have been made to institute measures that would have assisted in supporting popular education and strengthening popular ownership—enhancing the effectiveness of arrangements for the conduct of that referendum. These relate to social media, improving public education by establishing an independent Referendum Panel and reconsidering the official pamphlet, regulating private donations to campaigns, including spending caps; and removing restrictions on Commonwealth expenditure to enable government resourcing of public education initiatives and 'Yes'/'No' campaign committees.

Further, the Bills introduced by the independent member, Kate Chaney MP (25 March 2024) and the independent and minor party senators (25 March 2024) seeking to amend the *Commonwealth Electoral Act 1918* to support fair and transparent elections and referendums includes: lowering the disclosure thresholds to \$1,000; real-time disclosure of donations; broadening the definition of gift; funding disclosure requirements; introduction of a major-donor donation cap; and prohibiting certain political donations.¹⁰² These proposed amendments (if passed) will strengthen the integrity, transparency and accountability of electoral and referendum processes.

Conclusion

Across the world there are a variety of examples of how nations with First Peoples have instituted in their domestic political arrangements substantive recognition mechanisms to accommodate the voices of their First Peoples and in doing so give full expression to their right to self-determination.¹⁰³

It is also clear that substantive recognition—first and foremost—to ensure a rightful place at the table for its First Peoples requires a nation to truly reckon with its past, meaningfully acknowledge its failings and heal the scars left on the landscape by the injustices that occurred during colonisation. Only when this happens can substantive recognition occur. After this, the journey towards addressing the structural disadvantage and intergenerational dispossession and disempowerment endured by First Peoples can begin.

If the 2023 Voice referendum had been successful, it would have provided substantive recognition for Australia's FNPs and, within that context, also provided a substantive mode of parliamentary representation and participation for its FNPs—in the form of a Voice to Parliament.

This paper has sought to explore what the 2023 Voice referendum outcome tells us about Australia. It argues that the failure of the referendum was not just a result of a destructive six-month campaign characterised by bitter political debate, character assassination and disinformation, but is more a result rooted in the legacy of the past. Australia's road to constitutional recognition and a Voice has been fraught because, as a nation, we have never come to terms with the injustices of our colonial past.

¹⁰² Refer: Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024, <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7168#>.

¹⁰³ Davis, M. (2014). A rightful place—Correspondence. *Quarterly Essay*. November.

All Australians have a role to play in ensuring a rightful place at the table for our First Peoples. This starts with understanding the full history of Australia and ensuring the exercise of our civic responsibilities in an engaged and informed way. In the words of a former Prime Minister—in the absence of proper recognition and self-determination for our FPs—“All of us are diminished”.¹⁰⁴

¹⁰⁴ Whitlam, G. (1972, November 13). ALP Policy speech for the federal election. Australian Labor Party <<https://www.mabonativetitle.com/info/allOfUsAreDiminished.htm>>; Whitlam, G. (1997). *Abiding Interests*. University of Queensland Press.

Appendix A Proposed Constitution Alteration

Subsection A.1 Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill

The Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill was passed by an absolute majority of each House of the Australian Federal Parliament on 19 June 2023.¹⁰⁵

The Bill proposed an alteration to the Constitution to recognise the First Peoples of Australia ‘by establishing an Aboriginal and Torres Strait Islander Voice to make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples’.¹⁰⁶

Subsection A.2 The Referendum Question for the 2023 Voice Referendum

The Referendum question was:

“A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Do you approve this proposed alteration?”

Voters were asked to vote ‘yes’ or ‘no’ on the above question.¹⁰⁷

Subsection A.3 Constitutional amendment

The proposed law that Australians were asked to approve at the referendum would have inserted a new Chapter (Chapter IX)¹⁰⁸ in the Australian Constitution as follows:

After Chapter VIII

Insert:

Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- (ii) 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;

¹⁰⁵ Refer: Parliament of Australia, Parliamentary Business—Bills and Legislation: Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019>

¹⁰⁶ Ibid.

¹⁰⁷ Refer State Library Victoria—Indigenous Voice to Parliament referendum—The Referendum Question,

<<https://guides.slv.vic.gov.au/c.php?g=961514&p=6982612#>>

¹⁰⁸ Refer: Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill

<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019>

(iii) the Parliament shall, subject to this Constitution, have power 21 to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

Appendix B 2023 Voice Referendum design principles

In the event the 2023 Voice referendum was successful, the Australian Government committed to establish the Voice to Parliament in accordance with a set of design principles as agreed by the First Nations' Referendum Working Group. The design principles were published on 23 March 2023.¹⁰⁹

The design principles of the Voice to Parliament were:

1. The Voice will give independent advice to the Parliament and Government.
2. The Voice will be chosen by Aboriginal and Torres Strait Islander people based on the wishes of local communities.
3. The Voice will be representative of Aboriginal and Torres Strait Islander communities, gender balanced and include youth.
4. The Voice will be empowering, community-led, inclusive, respectful and culturally informed.
5. The Voice will be accountable and transparent.
6. The Voice will work alongside existing organisations and traditional structures.
7. The Voice will not have a program delivery function.
8. The Voice will not have a veto power.

More information about the design principles of the Aboriginal and Torres Strait Islander Voice is at the Uluru Statement homepage <<https://ulurustatement.org/design-principles/>>.

¹⁰⁹ Refer: Prime Minister, Minister for Indigenous Australians, Attorney-General and Special Envoy for Reconciliation and the Implementation of the Uluru Statement from the Heart. 2023. Press conference—Parliament House, Canberra, 23 March 2023<<https://www.pm.gov.au/media/press-conference-parliament-house-canberra-9>>.

Appendix C Amending the Australian Constitution

Procedure for amending the Australian Constitution¹¹⁰

Step 1	+ Every proposal must be made and initiated through parliament. + The proposed changes to the Constitution are set out in a Bill to Parliament. + The Bill must be passed by both houses of Parliament. Alternatively, if there is disagreement between the houses that has lasted for three months over the proposal, the referendum as originally proposed in either house may proceed. + A Bill passed by one House twice will also satisfy the requirement for approval by Parliament (though this option is untried).
Step 2	+ If the Parliament so decides it can amend the <i>Referendum (Machinery Provisions) Act 1984</i> (Cth). + While the Constitution specifies what is needed for a referendum to succeed, it is silent on a how a referendum should operate or be run except to say that the referendum “shall be taken in such manner as the Parliament prescribes”. + The <i>Referendum (Machinery Provisions) Act 1984</i>—an electoral act for the holding of referendums—regulates the referendum procedure and all matters related to the vote such as, who can vote, when do we vote.
Step 3	+ The referendum is held between two and six months after the Bill is passed by Parliament.
Step 4	+ The referendum proposal is submitted to the people. + A majority of voters nationwide, plus a majority of voters in a majority of States (four out of six) must approve the referendum. This is known as the ‘double majority’.
Step 5	+ After approval by the people/voters, the proposed alteration to the Constitution requires Royal Assent by the Governor General.

¹¹⁰ Refer: *Referendum (Machinery Provisions) Act 1984* (Cth); refer Chapter VIII—Alteration of the Constitution, Australian Constitution <[ausconstitution.gov.au](https://www.ausconstitution.gov.au)>; Australian Electoral Commission—Referendums <<https://www.aec.gov.au/Elections/referendums/index.htm>>; Williams, G. (2022, August 3). *Referendums—Then and Now* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>; Williams, G. (2023, April 3). *The Voice to Parliament—The Legal Realities* [Address]. The Sydney Institute, Sydney, NSW, Australia <<https://thesydneyinstitute.com.au/>>.