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SPECIAL ISSUE ARTICLE

The Voice: constitutional relationship between peoples in a shared polity

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Abstract

Before there can be deliberation between peoples, there must be recognition and a mechanism through which deliberation can occur. In 2023, Australians voted on whether to create an advisory body – a Voice – enabling Aboriginal and Torres Strait Islander peoples to make representations to Parliament and government. The Voice was to be both recognition and deliberation mechanism. This article explores the Voice proposal as a means for peoples to come together in constitutional relationship. First, we establish that First Nations and non-Indigenous peoples have long met, though this meeting has not yet been formally recognised in the Constitution. We situate the Voice within the necessary constitutional history and trajectory of Indigenous claims. The Voice is presented as being an institutional response to the problem of recognition and constitutional identity, offering a platform for a more meaningful relationship between different peoples within a shared polity. Finally, we explain how the Voice was designed to work within existing constitutional arrangements to create a constitutional intersection. The referendum's rejection does not resolve the enduring challenge of constitutional relations.

Keywords: constitutional identity; constitutional relationships; deliberation; Indigenous peoples; recognition

Introduction

This article contributes to debates about contestation and deliberation in multinational polities, by addressing a condition precedent for deliberation between Indigenous and non-Indigenous people. We do this through examining the Voice constitutional amendment proposal in Australia, put to electors in 2023. That proposal, importantly called for by First Nations themselves,[1] was to provide structural recognition through a formal body which would make representations to the national Parliament and executive government on matters relating to First Nations. This article concerns reforming constitutional systems to enable better representation, broader deliberative inclusion of affected minority peoples and pluralistic approaches to orthodox, singular sovereignties. The key claim in this article is that before people can deliberate meaningfully within multinational

[1]Referendum Council, *Final Report of the Referendum Council* (Department of the Prime Minister and Cabinet, 2017) 30–2.

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polities, two conditions must be met. First, they must be recognized, a process which creates its own issues born from power imbalances and the limitations of formal, legalized rights to address the greater claims of minority or Indigenous people.

This article more closely addresses what we say is another condition precedent for deliberation. That is, mechanisms through which deliberation can occur and have legitimate and substantive effects on the polity within which it occurs. The risk, otherwise, as the experience of many Indigenous people demonstrates, is that without mechanisms to formally ground a constitutional relationship between peoples, those deliberations are determined by the vagaries of power imbalances which favour dominant groups who find their preferences reflected in pre-existing constitutional structures. We consider the attempt to retrofit a constitutional structure through which First Nations in Australia can deliberate with the state, and in so doing bring peoples together in a recognized and formal relationship but on a more meaningful and fairer basis than in the pre-existing settings.

This article also contributes to considerations of constitutional identity. Identity and constitutions interact in multiple ways. The formal written text of a constitution and the ways in which it establishes structures of governance indicate one aspect of identity – that of the framework of the state. Constitutions also interact with the identity of the people or peoples governed by that framework – by providing recognition of status of inclusion and exclusion. But whose identity is being defined, and how? This article uses the Voice constitutional amendment proposal as a focal point to consider constitutional identity and deliberation at the intersections between First Nations as Indigenous people and the Constitution in the Australian context. This Australian story is one iteration of the construction of postcolonial identity – a challenge across the world where Indigenous peoples and state apparatus negotiate existence over time. We demonstrate how the Voice was designed as a means to establish constitutional relations, and how in doing so it would recognize the constitutional identity of Aboriginal and Torres Strait Islander peoples (herein referred to as First Nations) as peoples within the shared polity known as Australia.

The Voice proposal would have inserted a new s 129 into the Constitution, with the following words:

> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
>
> (1) There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
> (2) The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
> (3) The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

The Voice proposal was an attempt to retrofit an institutional mechanism to provide recognition of the 'First Peoples of Australia' while also establishing a constitutionally guaranteed advisory institution which could make representations directly to Parliament and government.[2] These two elements of the Voice were drafted to address the local

[2]*Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Act* (Cth).

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character of an otherwise global experience of injustice faced by Indigenous peoples through dispossession, violence and racist exclusion and denial. That is, recognition of the fact of First Nations as Indigenous people having legal and political claims to sovereignty, land and culture as such, while also democratically being able to influence the laws and policy decisions uniquely made about them.

The recognition character of the Voice proposal is important. It marks the Australian experience differently to other engagements with Indigenous people. Unlike most former British colonies, the Australian state and its constitutional order were developed without any positive recognition of, or agreement with, the Indigenous people whose dispossession 'underwrote the development of the nation'.[3] While agreements in other jurisdictions have not been guarantees of better treatment, they have minimally established a baseline of recognition entrenched in constitutional orders.[4] There is no such baseline in Australia. As the Australian state has progressed, despite First Nations claims always existing, the state's attitude toward the exclusion and inclusion of Indigenous people has changed. The dominant state narrative over the last several decades has involved a movement away from previously racist exclusions and denials, towards an expectation that the Australian state has to 'accommodate' or make exceptions and 'special measures' for First Nations, rather than relating to First Nations as peoples within a shared polity.[5] This accommodation framing fits with a focus on formal equality of individuals. This structuring has severely limited the ability of the Australian state to meaningfully accommodate the full extent of First Nations' claims for recognition as peoples, particularly in light of the non-Indigenous people's position of majoritarian political control. That control includes the mechanism for constitutional amendment. In order for the text of the Constitution to be altered, s 128 requires that the Parliament pass a Bill proposing a change and then both a majority of electors nationally and a majority of electors in a majority of the 6 States approve the change. First Nations people are an extreme minority in Australia, currently constituting approximately 3–4% of the Australian population.

While the Voice did not meet the significant threshold for constitutional amendment, it is nevertheless an example of the ongoing need and difficulty of enabling other engagements beyond accommodation within Australia's constitutional structure.[6] The Voice experience also provides lessons for a global audience concerned with how constitutions may provide institutional grounds for the meeting of different peoples within shared polities. Fundamentally, the Voice proposal was built upon this relational point. There are – as a factual matter – existing interrelations between First Nations and

[3]*Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69 (Brennan J) ('*Mabo (No 2)*').

[4]See, eg, A Harmon and J Borrows (eds), *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (University of Washington Press, 2012).

[5]For example, targeted programs are made available under positive discrimination measures, including singling-out Indigenous communities for negative restrictions such as alcohol restrictions to address 'legitimate' policy aims, under s 8(1) 'special measures' of the *Racial Discrimination Act 1975* (Cth). See *Maloney v The Queen* (2013) 252 CLR 168. Other targeted accommodations include preferential employment practices under various state and federal employment and anti-discrimination laws and cultural heritage and native title recognition and protection under state and federal laws. These are adapted to fit and be accommodated within Australian law and society, rather than Australian law and society recognizing and relating to Indigenous people and claims as emanating from sovereign polities.

[6]See G Appleby and M Davis (eds), *The Failure of the Voice Referendum and the Future of Australian Democracy* (Anthem Press, 2026).

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the broader Australian community that do not disappear despite the failure of constitutional recognition or the ongoing contestations otherwise claiming formal equality for all people which deny the particularity of Indigenous claims.

The reality of the existence of different people within a shared polity leads to a necessary focus on institutions and practices of accommodation and relationship in order to allow for deliberation, such that any analysis of the Voice proposal along identity lines must involve the relational aspect of identity and how the institutions of Australian society inhibit and encourage relationality. The First Nations claim seen in the Voice proposal was for a relationship with the Australian community, but as First Nations. Not inclusion and erasure within a singular and monolithic Australian polity as has otherwise been practiced throughout Australian history.[7] First Nations claims as people are fundamentally constitutional. Not just because they address the foundations of Australian society, but by their very existence they speak beyond the formal and monolithic claim implicit in Australian constitutional ordering of the identity of the constitutional subject. The claims are also an instance of the challenge of pluralism within the Australian context – where the settler state has struggled to recognize, understand and intersect with the pre-existing and ongoing Indigenous legal orders.[8]

We write this article as two legal scholars, with diverse lived experiences, meeting in our shared polity. One – a Wamba Wamba man, deeply involved in the Uluru Statement process which resulted in the Voice proposal. Another – a non-Indigenous woman of migrant heritage. We do not address how the Voice proposal was received by the Australian community,[9] except to note that the referendum vote followed a fractious and politicized debate reflective itself of the implications of a constitutional order established as it was on the inclusion and exclusion of certain people.[10] While the outcome of the referendum was a rejection of the Voice proposal – in each State and nationally[11] – as we explore at the end of this article, that outcome does not determine the future of constitutional or other interrelations between First Nations and the broader Australian community. Rather, the necessity of institutional space for the meeting of

[7]See R McGregor, *Indifferent Inclusion: Aboriginal People and the Australian Nation* (Aboriginal Studies Press, 2011); E Synot and D Lino, 'The Recognition and Protection of Indigenous Rights' in M Groves, J Boughey and D Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 247–64.

[8]For a recent consideration of pluralism within the Australian and New Zealand contexts, see: E Arcioni and K Gover, 'Can Private International Law Methods Facilitate Indigenous-Settler Legal Pluralism?: Possibilities in Australia and Aotearoa' (2025) 11(1) *Comparative Constitutional Studies* 207.

[9]See analysis at: N Biddle et al, *Detailed Analysis of the 2023 Voice to Parliament Referendum and Related Social and Political Attitudes* (ANU Centre for Social Research Methods, 2023); Australian Electoral Commission Tally Room, 'Referendum Downloads', available at <https://results.aec.gov.au/29581/Website/ReferendumDownloadsMenu-29581-Csv.htm>.

[10]For analysis and description of the debate and campaigns, see: Australian Government, 'Your Official Yes/No Referendum Pamphlet', available at <https://www.aec.gov.au/referendums/files/pamphlet/your-official-yes-no-referendum-pamphlet.pdf?>; G Appleby, S Brennan and P Kildea, *Expert Analysis of the 'Official Yes/No Cases' published by the Australian Electoral Commission* (Gilbert + Tobin Centre of Public Law Indigenous Law Centre, 28 August 2023); Rule of Law Education Centre, 'Voice: Legal Realities and Both Sides Debate' (20 September 2023), available at <https://www.ruleoflaw.org.au/voice-legal-realities-and-both-sides-debate/>; T Graham, 'Exploring a Post-truth Referendum: Australia's Voice to Parliament and the Management of Attention on Social Media' (2024) 198(1) *Media International Australia* 152.

[11]The national count was 60% No, 40% Yes, with a turnout of 90% registered voters. The No vote was dominant in each of the States (with No votes ranging from 54% to 68%). For details, see Australian Electoral Commission Tally Room, '2023 Referendum', available at <https://results.aec.gov.au/29581/Website/>.

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different peoples, importantly including the First Nations of the Australian continent, remains. Not only is that space necessary, it is one which shapes the identity of the Australian constitutional people and state in a way which also asks key questions of representative, constitutional democracies regarding transparency, accountability and decision-making between different people, especially between majority and minority populations. As will become clear, the Voice proposal is illustrative of how identity interacts with the Constitution, and how mechanisms for participation beyond normal electoral politics are required for meaningful deliberation. These insights can only be made clear when the broader history and social context is part of the story.

The necessary history

The constitutional history explored in this section is a necessary foundation to understand how the Australian context came to be. This is especially so for those outside of Australia developing an understanding of the treatment and constitutional position of First Nations in Australia which, while similar, is importantly different due to the lack of formal recognition of First Nations as Indigenous people as noted above. The contemporary experience, similar to many other Indigenous people, is one of extreme numerical minority status of First Nations (noted above) and ongoing inter-generational impacts of the physical violence and dispossession of colonialism. The structural challenge of establishing a basis for relationship between people against and beyond this history however exists because of the racist assumptions of the state regarding the presumed eventual 'disappearance' of First Nations, followed by a contemporary progressive narrative of being subsumed within formal equal individual citizen status.

Rather than directly addressing this historical-cum-structural issue and its effects, Australian constitutional history is often introduced by a brief acknowledgement First Nations have existed on the Australian continent and adjacent islands for millennia. It then proceeds by acknowledging the British colonized the territory now known as Australia from the late 1700s, establishing six colonies which then federated in 1901 – under a written Constitution. That narrative, relatively uncomplicated by major conflict while celebrating achievements such as the secret ballot and universal suffrage, is not only incorrect in its triumphant partiality, but performative of a constitutional identity tied to the myth of an egalitarian democracy free from conflict, exclusion and division.[12] That trajectory, or its failure to address First Nations directly, helps explain the ongoing claims of recognition by First Nations.

What we highlight against this starting point is that the arrival of the British onto the Australian continent involved a meeting of different peoples that is not so easily subsumed under a universal and developmental story of British subjecthood or Australian citizenship. That first meeting and its subsequent iterations are marked by racism through the mechanisms of exclusion. When understood against the triumphant construction of Australian constitutional history, this story of the meeting of different peoples points to the necessity of addressing the constitutional implications of how these people still have not met in a formally recognized manner, and the challenges that arise

[12]See B Kapferer and B Morris, 'The Australian Society of the State: Egalitarian Ideologies and New Directions in Exclusionary Practice' (2003) 47(3) *Social Analysis* 80, 84–90; D Lino, 'The Australian Constitution as Symbol' (2020) 48(4) *Federal Law Review* 543.

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from the factual meeting being largely structured around a monolithic concept of the people. The details of the establishment of Australia's colonial settlements beyond those drawn on here, and the subsequent frontier warfare including the more explicit details of this history across the continent, are well documented.[13] We however emphasize the early colonial period to highlight how early meetings between First Nations and colonialists exemplify the denial of First Nations as people and how that exclusion structured and authorised fundamental, institutional elements of Australian society and the identity of the Australian people.

The colony of New South Wales, the first of the British colonies established on the Australian landmass, formally began on 26 January 1788 as a penal colony.[14] That was the day Captain Arthur Phillip, leading the First Fleet which had arrived earlier between 18 and 20 January at Botany Bay, landed at Port Jackson and performed British ceremonies of possession without concern for First Nations' interests.[15] Relationships with First Nations began immediately. They were also already informed by Lieutenant James Cook's earlier voyage in 1770. The negative reporting of Cook's voyage toward First Nations, especially from his own writing and testimony of Joseph Banks, informed British planning and attitudes toward the settlement of New South Wales and what response there might be from First Nations.[16]

The meeting between First Nations and the British occurred in different ways from 1788 onwards, building on these first structures in different places. More often than not, however, violence and conflict accompanied these meetings.[17] There were of course moments of conciliation.[18] Large tracts of the continent were practically inaccessible to British settlers and explorers without the knowledge and assistance of First Nations to facilitate the early clearing and cultivation of the land.[19] This centrality of demand for land to the meeting of First Nations and the British is key to understanding the early relationship and – later – the manner and extent to which First Nations were included and excluded in colonial and Australian society.

Along with instructions which included the direction 'to endeavor by every possible means to open an Intercourse with the natives… and report your opinion… in what manner our intercourse with their people may be turned to the advantage of this country', Phillip was instructed to immediately begin 'the survey of lands, to make surveys of, and

[13]L Ryan et al, *Colonial Frontier Massacres in Australia 1788–1930* (University of Newcastle, 2024), available at <https://c21ch.newcastle.edu.au/colonialmassacres>.

[14]See G Karskens, *The Colony: A History of Early Sydney* (Allen & Unwin, 2010). It was at that time referred to as New Holland, on account of the Dutch having visited previously and mapping the Western coast of Australia

[15]See T Keneally, *Australians: Origins to Eureka Volume 1* (Allen & Unwin, 2009) 65; G Karskens, 'The Early Colonial Presence, 1788–1822' in A Bashford and S Macintyre (eds), *The Cambridge History of Australia: Volume 1 Indigenous and Colonial Australia* (Cambridge University Press, 2013) 91.

[16]Keneally (n 15) 14–33; B Douglas, 'Voyages, Encounters, and Agency in Oceania: Captain Cook and Indigenous People' (2008) 6(3) *History Compass* 712–37.

[17]See P Dwyer et al (eds), *Empires of Violence: Massacre in Revolutionary Age* (Bloomsbury, 2025).

[18]See K Darian-Smith and P Edmonds (eds), *Conciliation on Colonial Frontiers: Conflict, Performance, and Commemoration in Australia and the Pacific Rim* (Routledge, 2019).

[19]See G Blyton, 'Aboriginal Guides of the Hunter Region 1800–1850: A Case Study in Indigenous Labour History' (2016) 9(3) *History Australia* 89–106; H Goodall, 'Negotiating Survival: Aborigines, Settlers and Environmental Knowledge on Sydney's Botany Bay and Georges River' (2017) 39(1) *Australian Zoologist* 76–80; A McLaren, 'No Fish, No House, No Melons: The Earliest Aboriginal Guides in Colonial New South Wales' (2019) 43 *Aboriginal History* 33–55.

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mark out in lots such lands upon the said territory as may be necessary for their use'.[20] That was for the use of the colony itself and for grants to soldiers, free men and emancipated convicts, not First Nations.[21] This instruction, and its inherent presumption of claim to the land despite First Nations' presence, became the fuel of conflict between First Nations and the British. Land remains central to not only this foundational meeting but the later constitutional development of New South Wales, the other colonies and the Australian federation itself. Indeed, much conflict today between First Nations and other Australians remains focused on, or informed by, conflicts over land.

The early power and wealth gained by those granted large swathes of land within the colony, and by squatters which took up even larger holdings beyond the limits of the colony, especially in the early 1800s, shaped domestic policy and irritations in the British Colonial Office along with conflict with First Nations.[22] What was supposed to be a penal colony[23] of punishment through transportation developed generationally into parochial networks of commercial development tied to land speculation.[24] The eventual 'squattocracy' made up of individuals, organizations and their agents who squatted on land outside the early colonial limits became so powerful they controlled colonial legislatures and elite society, informing an Australian, 'native born' identity against the control of the British Colonial Office.[25]

These developments often occurred against the wishes and control of colonial authorities who battled through different phases of attempted control, including the introduction of land fees to both legitimate squatter holdings and publicly fund the colony, but importantly the inability to control violent conflict with First Nations that resulted.[26] This early to mid-1800s period of frontier conflict is important for understanding attitudes more broadly toward First Nations that shaped domestic colonial policy and the inclusion and exclusion of First Nations based on race beyond federation.

Following the British abolition of slavery during the 1830s, many turned their attention to the conditions of Indigenous people in British dominions and their 'protection'. Reports of violent and punitive expeditions against First Nations caused concern in

[20]Phillips' final instructions carried with him are lost. The available instructions cited are draft instructions held as part of the Colonial Office records by the National Archives in the United Kingdon, dated 20 April 1781, CO 201/1 ff 29-45v. Another version is available in F Watson (ed), *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Ser 1 Vol 1, 1914) 13–14.

[21]'To every male shall be granted 30 acres of land, and in case he shall be married, 20 acres more; and for every child who may be with them at the settlement at the time of making the said grant, a further quantity of 10 acres, free of all fees, taxes, quit rents, or other acknowledgements whatsoever, for the space of ten years' Watson (n 20) 14.

[22]See JC Weaver, 'Beyond the Fatal Shore: Pastoral Squatting and the Occupation of Australia, 1826 to 1852' (1996) 101(4) *The American Historical Review* 981–1007.

[23]Noting that South Australia was established as a free settler colony, but its non-penal origins do not erase discrimination against First Nations in that territory.

[24]See Z Laidlaw, *Colonial Connections 1815–45: Patronage, the Information Revolution and Colonial Government* (Manchester University Press, 2013) 39–58; E Synot and R de Silva-Wijeyeratne, 'Cooper v Stuart (1889) 14 App Cas 286' in N Watson and H Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 36–53.

[25]See A Woollacott, *Settler Society in the Australian Colonies* (Oxford University Press, 2015) 98–122.

[26]See L Ryan, 'Untangling Aboriginal Resistance and the Settler Punitive Expedition: The Hawkesbury River Frontier in New South Wales, 1794–1810' (2013) 15(1) *Journal of Genocide Research* 219–32; R Wood, 'Frontier Violence and the Bush Legend: The Sydney Morning Heralds Response to the Myall Creek Massacre Trials and the Creation of Colonial Identity' (2016) 6(3) *History Australia* 67.1.

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the Colonial Office and British society more generally. Yet this early and developing focus of attitudes toward First Nations still emphasized their inevitable death and ultimate absorption through elevation from savagery to ultimately assimilation through civilization and Christianity.[27] This was clearly explained by the terms of reference for the House of Commons Parliamentary Select Committee on Aboriginal Tribes (the Aboriginal Tribes Committee), which reported in 1837.[28]

The Aboriginal Tribes Committee, which included future, four-time Prime Minister of the United Kingdom William Ewart Gladstone, was tasked with making recommendations on engagement with First Nations, not dissimilar to Phillip's original instructions, that would 'secure to them the due observance of Justice and the protection of their Rights; to promote the spread of Civilization among them, and to lead them to the peaceful and voluntary reception of the Christian Religion'.[29] In making their recommendations, the Aboriginal Tribes Committee found First Nations in New South Wales to have been 'the most degraded of the human race'.[30] Despite being 'apt to class them under the sweeping term of savages, and perhaps, in doing so, to consider ourselves exempted from the obligations due to them as our fellow men', the Aboriginal Tribes Committee noted this 'assumption does not however… alter our responsibility'.[31]

Despite this felt responsibility, the practice of engagement with First Nations throughout the British dominions was shot through with sociobiological racism and had been 'unless when attended by missionary exertions, a source of many calamities to uncivilized nations' meaning 'their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilization impeded'.[32] For First Nations in Australia, this was particularly dire.[33] The Aboriginal Tribes Committee was keen to assure 'Great Britain' had no role in the 'sanction of unfair dealing' which had become apparent in New South Wales.[34] Making recommendations for the establishment of a 'Protector of Natives', the Committee listed a number of tasks essential for this new policy and position to engage.[35] Protectors were to assist in discouraging and preventing what was by then well-known and documented atrocities committed against First Nations.

The Aboriginal Tribes Committee report was dispatched to New South Wales Governor Sir George Gipps by the Secretary of State for War and the Colonies Lord Glenelg on 31 January 1838.[36] The early 1800s were a particularly gruesome period of frontier violence, 1838 especially so. Major James Nunn, head of the New South Wales Mounted Police, had been sent on a punitive expedition against First Nations for the alleged killing

[27]See S Furphy and A Nettlebeck (eds), *Aboriginal Protection and Its Intermediaries in Britain's Antipodean Colonies* (Routledge, 2020).

[28]House of Commons, *Report from the Select Committee on Aborigines (British Settlements)* (Parliamentary Papers, Vol. 7 No. 425, 1837). Aborigines Protection Society, *Report of the Parliamentary Select Committee on Aboriginal Tribes: British Settlements: Reprinted with Comments by the Aborigines Protection Society* (Parliamentary Papers, William Ball, 1837).

[29]Aborigines' Protection Society (n 28).

[30]Aborigines' Protection Society (n 28) 10.

[31]Aborigines' Protection Society (n 28) 1.

[32]Aborigines' Protection Society (n 28) 3.

[33]Aborigines' Protection Society (n 28) at 10, 125

[34]Aborigines' Protection Society (n 28) 2.

[35]Aborigines' Protection Society (n 28) 126–27.

[36]F Watson (ed), *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Ser 1 Vol 19, 1923) 252.

https://doi.org/10.1017/S2045381726100446

of stockmen. Nunn and his men cornered a large group of First Nations at Waterloo Creek and proceeded to massacre between 40 and 50 Gamilaraay First Nations. No investigation took place.[37] In June, there followed the Myall Creek Massacre.[38] John Henry Fleming, a squatter and stockman, led a gang of 11 men to the Myall Creek pastoral station owned by Henry Dangar where they proceeded to slaughter approximately 28 Wirrayaraay First Nations men, women and children before burning their remains. The slaughter was described as 'a war of extermination'.[39]

The feverish clamour for land occupied and owned by First Nations according to their own laws, customs and traditions, and their resistance to invasion, fuelled these denials and depravations. It was the exact example of the kind of event the Aboriginal Tribes Committee sought to distance itself from. The difficulty of controlling this behavior and its effect on early Australian constitutional structures is highlighted by the New South Wales colonial society's overwhelmingly negative reaction to the conviction and hanging of seven white men for having committed the Myall Creek Massacre. While Gipps' response to the massacre is often held up as an early and pivotal moment of justice and reconciliation, the response from colonial society demonstrates the broader colonial attitudes toward First Nations and the commitment of many to simply go underground or be quiet about their actions.[40] Two trials were required for a guilty judgment, after the jury in the first declared all defendants not guilty. Community sentiment was largely with the accused, and the trials caused significant difficulty for Gipps in prosecuting further depravations. Dangar, the station owner, was involved with other wealthy landowners and influential colonialists in establishing the 'Black Association' which resourced a formidable legal defense and exerted public pressure against jurors and others in favor of the accused.[41] After all, this was a society invested in First Nations dispossession and oppression.

Frontier conflict continued throughout the 1800s and well into the 1900s. While many First Nations in the Southeast of the Australian continent toward the late 1800s were restricted to government reserves and church run missions, many in the Northern, Central and Western parts were encountering settlers for the first time and facing the violence of frontier conflict. This temporal and geographic structuring of Australian colonialism results in fraught identity issues continuing to today.

Ongoing recognition issues because of this history are highlighted by the landmark decision of Australia's apex court – the High Court – *Mabo (No 2)* in 1992, where the court determined that the common law of Australia recognized native title rights and interests of First Nations.[42] That recognition is, however, predicated on proof of cultural connection to a time before settlement. Thus, recognition itself is made more difficult in the geographic areas which encountered colonization earlier than others. Thus, native title

[37]See R Milliss, *Waterloo Creek: The Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales* (UNSW Press, 1994).

[38]See J Lydon and L Ryan (eds), *Remembering the Myall Creek Massacre* (UNSW Press, 2018).

[39]See P Withycombe, 'The Twelfth Man: John Henry Fleming and the Myall Creek Massacre' (2018) 20 *Journal of Australian Colonial History* 103–22.

[40]Wood (n 26).

[41]See M Sturma, 'Myall Creek and the Psychology of Mass Murder' (1985) 9(16) *Journal of Australian Studies* 62–70; L Ryan, 'Establishing a Code of Silence: Civilian and State Complicity in Genocidal Massacres on the New South Wales Frontier, 1788–1859' in M Adhikari (ed), *Civilian-Driven Violence and the Genocide of Indigenous Peoples in Settler Societies* (Routledge, 2019).

[42]*Mabo v Queensland (No 2)* (1992) 175 CLR 1.

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has more easily been afforded to First Nations in the northern parts of the country who are able to make out more successful and complete claims, having been less impacted by the ravages of colonization.[43] Native title has also in more recent times been linked to constitutional membership of 'the people' through the case of *Love and Thoms* decided in 2020, where the Court adopted a definition of Aboriginality derived from the *Mabo (No 2)* judgment.[44] The operation of that decision has resulted in some government decisions being limited to those individuals who can demonstrate a native-title type continuation of community.[45]

What becomes apparent across the centuries since 1788 is that from the first meetings between First Nations and the British, to continuing interactions with the Australian state today, First Nations and non-Indigenous Australians have interacted in many ways, ultimately structured by a distinct inequality marking their contestations and deliberations reflected in Australian constitutional ordering and identity. This is not a new relationship or issue for constitutional identity and structures that is simply overcome by recognition or accommodation within 'Australia', albeit both are important. Rather, the structures and practices of the Australian Constitution and identity are deeply embedded in and have been formed against the vagaries of this unequal relationship.

First Nations across Australian history have been approached as an issue to be addressed, erased, dispersed, protected, assimilated and accommodated within a dominant constitutional ordering and identity, rather than being related to meaningfully as peoples with rights as such within a shared polity. While frontier killings are not the same as assimilation within neo-liberal rationalizations of welfare provisions to individuals with the same rights, responsibilities and obligations, they otherwise – across generations – speak to a similar structural emphasis on making the treatment of the 'Indigenous issue' work for the dominant status quo, emphasizing and including the parts which support its triumphant narrative of success, and denying and excluding the substantive parts otherwise which challenge this narrative. The account of history above is the necessary context for understanding the Australian Constitution – its silences and its operation, its formal text and broader social and cultural existence and how the Voice was to be a new institution to retrofit a meaningful relationship between peoples.

Constitutional primer

The process of drafting and enactment of the Australian Constitution was one engaged in over the later decades of the 1800s, and which involved non-Indigenous Australians writing and voting on a draft Bill enacted by the Imperial Parliament in London with effect from 1 January 1901.[46] The Constitution established a federal Commonwealth – the six existing British colonies became States who in general terms retained their pre-existing institutions. Each of those colonies had already established self-government in the later

[43]See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[44]*Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.

[45]The legal definitions of Aboriginality are multiple – having changed over time and being dependant on the precise legal context in which Aboriginality may be relevant. The challenges and details of Indigenous identity under Australian law and administrative practice are beyond the scope of this article, but suffice to say they are problematic and complex – due to the hundreds of First Nations existing across the Australian landmass, the federal nature of the Australian state and the combinations of self-identification, community recognition and descent which have contributed to the variable legal rules over time.

[46]JM Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).

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half of the 1800s, along Westminster lines – a representative Parliament, a responsible Executive and an independent Judiciary. The Constitution replicated that three-part government structure at the national level, with a Parliament representative of both the national people (in the lower House), and the States (in the Senate); a responsible federal Executive government headed by a Governor-General as representative of the British monarch, and a federal Judiciary.

The relevant aspects of the drafting history for the purpose of this article include how First Nations were excluded from participation and marginalized as subject matters of the constitutional text. Exclusion and marginalization are common experiences of Indigenous peoples within colonial states, as well as common to the experience of other minorities (whether numerical or not) such as immigrants and women.

The colonial era described above incorporated assumptions regarding the eventual demise of First Nations. That is, the expectation that there would not be any Indigenous people, and any temporary challenges in relating to such people were to be matters addressed at the local State level, not a consideration for a national federal Constitution and its related national institutions. Yet the demographic reality of Australia proves those assumptions to have been wrong, with a resultant constitutional text ill-equipped to address the reality of ongoing First Nations, and a silence as to the relationship between them and the state. The formal written Constitution exists over a territory in which the First Nations and then the colonial and Australian people live, but where the relationship between those peoples has not been recognized constitutionally. The Voice was a proposal to establish a constitutional structure for that relationship.

The Constitution is marked as much by silence as it is by what is explicitly included. The Constitution was written in an era dominated by a lack of explicit rights language, with the assumption that the Westminster system of government and the common law would be adequate sources of rights protection. The constitutional text does not contain a Bill of rights, although there are some sporadic references which have a rights-like aspect.

The constitutional identity of the nation at federation was based on race – specifically white, British and anti-Asian – but this was not crystallized into the constitutional text. Australia remained part of the British Empire, and while a majority of the colonies adopted racist immigration practices, Britain would not tolerate explicit racial restrictions, resulting in the adoption of dictation test to act as a proxy for racial entry restrictions. The same approach continued with the drafting of the Constitution. Powers would be conferred on the new federal Parliament in order to facilitate racist laws, without making plain that 'the people' were understood to be racially defined. A particular silence is worth emphasizing at this point – First Nations were not directly considered in the context of this racial definition of the state, due to the assumption that they were a 'dying race'. Thus, as noted above, First Nations were to be left to the States to be governed, regulated, administered.

The only sections of the Constitution which did refer to First Nations were exclusionary. Section 51(xxvi), known as the races power, conferred power on the federal Parliament to make laws for 'The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. Section 127, which determined constitutional calculations for – amongst other things – the number of representatives to be elected in each State for the lower house of federal Parliament, 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.'

In 1967, both sections were amended by referendum – s 51(xxvi) amended to remove the exclusionary words 'other than the aboriginal race in any State', therefore expanding

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federal legislative power to include them. Section 127 was deleted, thus removing the calculation exclusion. Those changes were made with the highest Yes vote in any Australian referendum, with rhetoric surrounding the vote referring to rights, equality and citizenship. Yet formal legal citizenship was already conferred on Aboriginal people automatically, as for any non-Indigenous people born in Australia. Legal rights were formally equal before the 1967 referendum. Race nevertheless remained as a mechanism for legislative action and administrative decision-making, there being no requirement that laws be beneficial, and while formal equality prevailed with the amendments in 1967, the Constitution became completely silent with respect to First Nations peoples. Fast forward to 2023, and the proposal for the Voice was to provide a positive indication of a constitutional relationship between First Nations and the Australian state. That relationship being a necessary structure in order to allow for deliberation between the peoples making up the shared polity of Australia.

Uluru Statement from the Heart

The Voice was one of the three pillars of the Uluru Statement from the Heart. The Uluru Statement from the Heart is the most immediate source of the Voice proposal. That Statement was both a refusal of symbolic recognition and an invitation for structural reform, aiming to reshape Australia's constitutional and cultural foundations. The Uluru Statement itself can be understood as an assertion of identity. Identity of First Nations, extending an invitation to the Australian people. But including within it a constitutional expression that there was already a relationship, and providing a means for continuing to develop that relationship. It expresses what a responsible community is and should be. A community which should face the reality of its shared history, and then move forward in a way which provides a clear structure for ongoing negotiation and development of a relationship.

The Uluru Statement called for 'constitutional reforms to empower our people and take a rightful place in our own country', with 'aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.'[47] The three reforms were 'a First Nations Voice enshrined in the Constitution' and 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.' Voice, Treaty, Truth.

We identify the Statement as the source of the Voice proposal, but it was not the first assertion of identity by First Nations, nor the first claims by Aboriginal Australians for involvement and intersection with the Anglo-Australian settler state constitutional institutions.[48] To understand the Statement in a broader historical context of claims[49] one can see colonial examples of petitions from Tasmanian Aboriginal people to Queen Victoria in 1846 and Wurundjeri Elder William Barak petitioning in relation to the Victorian Aboriginal Protection Bills of the 1880s. After federation, examples include

[47]These reforms can be contrasted with those proposed in countries in South America in relation to the respective Indigenous peoples of Ecuador, Bolivia, Chile.

[48]Parts of this section are drawn from the transcript developed by Elisa Arcioni, for the purpose of an educational video regarding the Voice proposal – produced by the Deputy Vice Chancellor (Indigenous) Media Team – E Arcioni, 'Voice Referendum,' posted June 8, 2023, by University of Sydney, YouTube, 27 min., 4 sec., available at <https://www.youtube.com/watch?v=pS1O2zsvEAQ>.

[49]The Uluru Statement, 'Our Story', available at <https://ulurustatement.org/our-story/>.

https://doi.org/10.1017/S2045381726100446

Ngarrindjeri man David Unaipon calling for autonomy. In the 1930s and 40s, there were multiple calls for representation in federal Parliament – including petitions from Yorta Yorta man William Cooper to King George V, a petition from Dharawal man Joe Anderson known as King Burraga, and the work of the Australia Aborigines League. Later examples arise in particular from the Yolgnu in Arnhem land, including the Yirrkala Bark Petition in 1963 and the Barunga Statement in 1988 calling for treaty.

More recently, federal politicians entered the fray, suggesting constitutional recognition of First Nations. Prime Minister John Howard proposed a symbolic recognition in the preamble in 1999 – that would mention Aboriginal and Torres Strait Islanders, the nation's First peoples.[50] There are stark conceptual and relational differences between the unilateral proposal by John Howard and the proposals by First Nations people for active engagement with state structures. Symbolic recognition proposed by the non-Indigenous leader of a government, with no legal force or impact upon relations between peoples, is in no way equivalent to calls for political representation, treaty and agreement making. The 1999 proposal was defeated at referendum[51] and the idea of a symbolic recognition with no legal force was rejected by First Nations. What followed over the subsequent 15 years was a series of inquiries and proposals by legal experts but where there was no agreement by Parliament and no consensus on what form recognition would take.[52]

With no clear path forward, a representative group of First Nations leaders drawn from across the country met with Prime Minister Malcolm Turnbull and Opposition Leader Bill Shorten and issued the Kirribilli Statement in 2015.[53] The delegation sought clarity from the Prime Minister and Opposition Leader as to the parameters of what they would support in relation to constitutional recognition, while making clear what was needed to meaningfully engage First Nations in the reform. Professor Megan Davis AC, Co-Chair of the Uluru Dialogue, explains that the Kirribilli Statement made it clear the First Nations community would not accept 'minimalist' reform or 'constitutional housekeeping'.[54] The delegation emphasized the need for ongoing dialogue between First Nations and the Government. In December that year, 2015, Prime Minister Turnbull announced the establishment of the Referendum Council that would oversee a deliberative process designed and led by First Nations, providing a structure through which First Nations could propose meaningful constitutional reform.[55]

What followed was a series of 13 dialogues across the country with First Nations, resulting in the Uluru Statement. The Dialogues[56] were a deliberative process in 2016–7,

[50]*Constitution Alteration (Preamble) 1999* (Cth), Schedule – Preamble to the Constitution.

[51]In which the voting pattern regarding the Preamble resembles the outcome of the referendum on the Voice proposal. For voting results, see Australian Electoral Commission, '1999 Referendum Reports and Statistics' (2011), available at <https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/summary_preamble.htm>.

[52]See Department of Prime Minister and Cabinet, *Australia 2020 Summit: Final Report* (2008); Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (2018).

[53]'Statement Presented by Aboriginal and Torres Strait Islander Attendees at a Meeting Held with the Prime Minister and Opposition Leader on Constitutional Recognition' (2015) 8(19) *Indigenous Law Bulletin* 26.

[54]M Davis, 'Constitutional Recognition: Two Decades On' (1 March 2021), available at <https://www.indigconlaw.org/home/constitutional-recognition-two-decades-on>.

[55]Davis (n 54).

[56]Referendum Council (n 1) 32.

https://doi.org/10.1017/S2045381726100446

run by First Nations for First Nations, bringing together the largest and most extensive consultation process of First Nations – one could argue that it was a process that was more consultative than any other political process in our nation's history. The representatives of those Dialogues then met at Uluru – at the National First Nations Constitutional Convention. The delegates at the Convention endorsed the Uluru Statement as the culmination of the regional Dialogues process held across the country.

The Uluru Statement in 2017 was therefore the result of a First Nations-led process to identify what First Nations wanted from constitutional recognition, as the latest in a long history of calls for a say over the law and policy that applies to, and so often disadvantages, Aboriginal and Torres Strait Islander peoples. The answer to what First Nations want, as set out in the consensus position of the Uluru Statement – is Voice, Treaty and Truth.

The Statement is an assertion of pre-existing and ongoing identity distinct from what is seen within the constitutional arena. Asserting the possibility of that identity intersecting with the existing arrangements and going beyond the formal equality narrative that had dominated public discourse regarding the place of Aboriginal and Torres Strait Islander people. The Statement ends with 'In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.'

From formal equality to substantive recognition – coming together in relationship

The reference to 1967 of 'being counted' is a reference to the referendum in 1967 noted above. The constitutional changes in that year have been lauded as historically significant – both because of the very high Yes vote and the way in which the rhetoric of the campaign focused on citizenship and equality. Without diminishing the significance of the changes made, we agree with others[57] that the changes were the removal of express discrimination to accord with the formal equality approach of the era. What was left unaddressed by those changes was the achievement of substantive equality or recognition of First Nations as peoples.

The Australian state, and Australian people more generally, have proven much more comfortable with the language of formal equality in their treatment of First Nations, than with any engagement with the specific claims of First Nations as peoples to achieve substantive equality and recognition as such.[58] This has proven true throughout Australian history as it moves away from racist exclusion and denial centered on the provision of equal civil rights – such as voting and citizenship – but eschewing greater First Nations claims to land, culture and sovereignty as being divisive and even racist in creating separations between First Nations and other Australians.[59] Even the most recent iteration of equality language – seen in the Closing the Gap movement to address social, educational, economic and health metrics of disadvantage, is premised around the idea that Aboriginal Australians will enjoy the same rights, obligations and opportunities as

[57]D Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018).

[58]Synot and Lino (n 7).

[59]E Synot, 'Finding Justice Between Accommodation and Refusal' in C Kirkby, W Sadurski and K Walton (eds), *Law, Politics, and Responding to Injustice* (Routledge, 2024).

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other Australians. Underpinning this idea of what it is to be an Australian as part of the community is formal equality.[60]

This Australian focus on formal equality is an instance of a widespread position that participation in democratic politics and therefore inclusion in deliberation occurs through the franchise. That is, ensuring a right to vote is sufficient to engage all people within a polity. However, a focus only on political rights of voting obscures systemic exclusion and marginalization and does not guarantee that everyone's voice will be heard. The Voice proposal in Australia was to respond to that structural challenge in relation to First Nations who did have the franchise, but whose minority status and distinct but unrecognised claims mean that a vote at the ballot box is not sufficient to have their voice heard in the political arena.

In contrast to the emphasis on formal equality, the Uluru Statement is an invitation to walk together for a better future. It is the Australian people with First Nations, not one or the other. The Voice then is the reality of First Nations community speaking back against the assumptions and expectations of (only) formal equality. And, beyond that, an invitation to develop a relationship by knowing each other. Pat Anderson AO, Co-Chair of the Uluru Dialogue – a key elder central to the development of the Uluru Statement from the Heart, referred to this challenge. Elders at the Uluru Dialogues would ask – why do these people not want to know us? We"ve got so much to share, do they not want to be part of this?[61]

The Uluru Statement is an expression of identity speaking to the Australian community. An expression and a statement of the reality of that identity against or despite what is held up as being legally and formally and politically the reality. In terms that have constitutional elements, but not as a formal, state-sanctioned proposal. It was spoken from First Nations to the Australian people. Davis explained:

> 'We'd invited the Prime Minister and the opposition leader to accept the Uluru Statement as a bark painting, like the politicians always have. But our old people out at Uluru said,
>
> > "No, they're going to take it and put it on the wall in Parliament House and they're not going to implement what's in there. We have to go out on the red dirt, stare down the camera and invite Australians to walk with us, like they did in 1967, in a movement of the Australian people for a better future."'[62]

[60]Joint Council on Closing the Gap, National Agreement on Closing the Gap (July 2020), available at <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>; D O'Sullivan, 'Self-Determination, Participation and Leadership' in *Indigeneity, Culture and the UN Sustainable Development Goals* (Springer, 2023) ch 8; JC Altman, 'Beyond Closing the Gap: Valuing Diversity in Indigenous Australia' (Centre for Aboriginal Economic Policy Research, 2009, CAEPR Working Paper No 54/2009), available at <https://cipr.cass.anu.edu.au/files/docs/2025/6/CAEPRWP54_JA.pdf>.

[61]'We Are a Sovereign People, an Ancient People, We Have Knowledge and We Are of Value' – Aunty Pat, 'Pat Anderson's Long Journey Has Important Steps to Come' *National Indigenous Times*, 2 June 2023, available at <https://nit.com.au/02-06-2023/6224/pat-anderson>; 'Constitutional Recognition of Australia's First Nations People Is "not a project of identity politics" But One of "justice, unity and inclusion", Noel Pearson has Declared.' – C Williams, 'Push for Indigenous Voice to Parliament Is about Justice and Unity, Not Identity Politics, Noel Pearson Says' *ABC News*, 28 October 2022, available at <https://www.abc.net.au/news/2022-10-28/noel-pearson-first-nations-voice-to-parliament/101584974>.

[62]The Uluru Statement, 'Professor Megan Davis Explains Why Uluru Statement Was Issued to Aussies and Not Politicians' (2023), available at <https://ulurustatement.org/professor-megan-davis-explains-why-uluru-statement-was-issued-to-aussies-and-not-politicians/>.

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> 'We explain to Australians that we wanted to avoid politicians just taking the invitation and not acting on it, like the many calls for policy and structural changes that have come before. That's why the Statement was issued to the Australian people, not the politicians, because First Nations Peoples have faith in their fellow Australians.'[63]

Relationships – intersections versus refusal

The Voice proposal addresses identity and deliberation by making a claim on the fundamental constitutional structure and identity of the Australian state. It does so by emphasizing the existence of different people, or polities, within a shared system that otherwise purports to hear or provide for a uniform understanding of who the Australian people are. In this sense, the Voice proposal has been described as a claim for recognition. This is true in that recognition is connected to identity, and that without said recognition *within* the Australian constitutional system, many people, especially those in minority positions such as First Nations, live politically non-existent lives.[64] The Voice is a claim to enable the development of a more equal relationship between peoples rather than one based on accommodation or recognition within a system of formal equality which denies Indigenous reality in favour of a dominant, status quo. In the context of considering deliberation with complex societies, the Voice is a necessary precondition for deliberation – a method of recognizing people otherwise invisible to the constitutional structure, in order to allow for relationship.

What the Voice points to is the necessity for genuine engagement and going beyond accommodation within the frame of formal equality. The Voice aims beyond the status quo formality of the constitutional order while also being grounded in the fact of shared existence, despite the failures of recognition and non-recognition. That is, the Voice is an investment in the potential to be organized differently and more meaningfully to reflect and realize a more equal relationship between peoples and polities.

This brings us to the nebulous and challenging concept of sovereignty. In Australia, there are 'two competing claims to sovereignty by right of heredity over this continent: that of the Crown and of Indigenous peoples.'[65] The Crown's assertion of sovereignty has never been questioned within the frame of the constitutional system – and it is unlikely that it ever will be in any effective manner. At the same time, First Nations have never ceded sovereignty. And no treaty was engaged in between First Nations and the British Crown. Despite this ongoing dilemma of multiple claims to sovereignty, the practical reality is that the constitutional system built upon colonial foundations exists, operates and – as one of us has written:

> Short of a coup or an entire rewriting of the Australian nation – neither desirable nor realistic – there is no stepping outside of those authorities. It is constitutionally impossible. These are the political and legal realities we must accept as First Nations.

[63]The Uluru Statement, 'Yes Campaign Leader Megan Davis: How Reading Uluru Statement Changes Voice Critics' Minds' (2023), available at <https://ulurustatement.org/strong-yes-how-reading-uluru-statement-changes-voice-critics-minds/>.

[64]Synot (n 59).

[65]E Synot, 'What We Mean When We Say "sovereignty was never ceded"' *The Conversation*, 28 November 2022, available at <https://theconversation.com/what-we-mean-when-we-say-sovereignty-was-never-ceded-195205>.

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> No matter how strong the belief in our sovereignty or how just our claims, those facts will never change. Technical points of law and principles of fairness count for little in the face of history. This is the context within which we must frame our response.[66]

Outright disengagement here through refusal risks replicating the violence of the settler state and forecloses the transformative potential within constitutional arrangements.

We therefore indicate the pragmatic need to avoid refusal – in the sense of refusing to engage with the imposed constitutional system. Yet that generous attitude must be reciprocated by the recognition that any re-imagined institutions must allow for equal participation in shaping structural rules, not just formally equal participation within established structures that do not account for inequality or distinct claims. There must be genuine engagement, a commitment to dialogue and mutual transformation, not dominance or denial.[67] Once we understand that we as peoples have already met, and that our institutions are not terminally doomed but can be recalibrated in response to the challenge issued by the necessity of different people and polities within shared spaces, then comes the need to determine the terms of our relationship. The Voice was a mechanism to negotiate those terms. In order to consider that relationship, we take a position regarding the constitutional reality such that – as one of us has written – we must avoid refusal.[68]

The Voice as a structure within an existing structure

The Voice was designed to intersect with the existing constitutional structures, while also allowing for a new institution to provide constitutional recognition of a relationship and a way for it to develop over time. As explained above – the Australian Constitution was drafted to establish British-style institutions incorporating a representative legislature and a responsible executive, with an independent judiciary. The Voice was designed to exist within those existing structures, to take advantage of the underlying constitutional mechanisms and loci of power while allowing for an innovative institution to establish constitutionally recognised relations.

As noted above, the proposal was to insert a new s 129, to be placed at the end of the existing constitutional text, making no amendments to any pre-existing sections or powers of existing institutions. The design of the Voice and its operation was to be consistent with the way in which other institutions were established by the Constitution. The new section was to state:

> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
>
> (1) There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
> (2) The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;

[66]E Synot, 'What We Mean When We Say "sovereignty was never ceded"' *The Conversation*, 28 November 2022.
[67]Synot (n 59).
[68]Synot (n 59).

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

The opening preambular statement was to be a formal recognition of Aboriginal and Torres Strait Islander peoples, the first time the Australian Constitution would make an explicit recognition statement. Sub-national texts have done so already.[69] However, the recognition was to occur not only through those words, but through the existence and operation of the Voice itself.

The Voice was to be an advisory institution, with the constitutional ability to make representations to the core institutions of political and legal power within the Australian constitutional system – namely the Parliament and the Executive. Thus, First Nations could communicate directly and formally with the core of the state, to provide advice on matters affecting them. The Parliament and Executive could then determine how they would respond, if at all, and therefore how the relationship between them and First Nations would develop over time. The Parliament would retain its ability to make laws, with the validity of such laws not affected by the Voice representations, but the political processes of representation and deliberation by the Parliament would allow for the representations to form part of those pre-existing processes. The Executive would retain its ability to determine policy and practice, and to engage in executive power. The representations would form part of the material to be considered by the Executive, and the responsible nature of the Executive would mean it would be accountable in the ordinary ways for its actions – answerable through democratic means regarding whether and how the Executive had considered the representations made by the Voice.

The very design of the Voice was also consistent with existing constitutional practices, as well as building a new institution reflecting self-governance and democratic practices. In the same way as for the existing institutions established by the Constitution – the existence and core function of the Voice was to be guaranteed by the text – 'there shall be a Voice', and it 'may make representations'. The final part of the proposal then makes plain that – like other constitutional institutions, the Parliament would determine the details of the institution, so that its composition, method of choosing members, and other matters would all be established by legislation, rather than included in the Constitution itself. This is similar to the way in which the details of federal Parliamentary elections, even the numbers of members of Parliament, is subject to legislative change so as to respond to relevant social changes and expectations. The Australian Government had provided design principles to inform public discussion for the referendum that explained that members of the body would be selected by Aboriginal and Torres Strait Islander people, which would help to ensure that its representations to the Parliament and Government were based on the experience of local First Nation's communities.

The Voice would have allowed for mechanisms to exist but without requiring any particular outcomes, without predetermining the ways in which the constitutionalised relationship would develop over time. The nature of the role and the power of the Voice would not dislodge the dominant representative government and political nature of constitutional power, such that its role was not to overtake existing structures but to allow a way in which a new structure could interact with the operation of existing ones.

[69]See eg *Constitution Act 1975* (Vic) s 1A.

https://doi.org/10.1017/S2045381726100446

The Voice was designed to intersect with the existing constitutional structures, retaining ultimate power in the hands of the elected representatives in Parliament. The Parliament would have had the power to determine the details regarding the operation of the Voice, its powers and the manner of its exercise. The advisory function of the Voice would mean that the decision as to what, if any, response to the Voice's advice would remain in the hands of the political powers – the executive and Parliament. Thus, the Voice can be seen as a modest proposal in terms of legal constitutionalism – lacking veto power, lacking law-making power.

To this extent, the Voice would not have provided an intervention in constitutional authority to overcome structural inequalities. Yet we can agree that a more interventionist proposal shifting the locus of formal authority is another way of approaching the challenge of lack of recognition and meaningful participation in a polity. In the Australian context, however, such a change would have been politically non-viable and therefore unsuccessful. Given the criticisms levelled at the Voice proposal in spite of its lack of formal priority in relation to existing institutions, discussions of any further reform would have been futile. Instead, the Voice was structured as a way to make a first intervention in the operation of constitutional politics, so as to open the way for more ambitious reforms in the future.

The power of the Voice was designed to be the way in which it could provide a structure for First Nations and the broader community to negotiate an ongoing relationship – with all the challenges and imperfections in any relationship. Whether and how that relationship would change over time would depend on the actions and communications of the parties. It would be expected that there would be ebbs and flows of antagonism, negotiation and conciliation. The very process of receiving advice, deciding how to respond – those interactions would result in relations, whether acrimonious or amicable. But through those interactions, the relationship would continue. The Voice as a structure to develop constitutional relations is an example of what are foundational, structural, institutional elements that can be designed, in order to organize people to come together, relate and interact with one another. As a way to meet by establishing the necessary structures through which to deliberate and develop constitutional relationships.

The core of the Voice proposal was to allow for a structure completely consistent with the way in which structures are embedded and set out in the formal Constitution, and open to a mechanism that does not pre-determine how a relationship may develop over time. Of course there are dangers to that approach – in that one cannot guarantee perfect representation, or listening, or true listening. Yet embedding the structure is one starting point to set up the negotiation, to be able to take the first step.

Conclusion – the ongoing relevance of relationship to enable deliberation

The Voice was a proposal to establish the necessary conditions for deliberation between First Nations and the Australian state. To establish a constitutional relationship to enable the deliberation between peoples which is yet to occur in any structural sense in the Australian constitutional context. The form of deliberation which the Voice would have enabled was that of communication and dialogue between formally recognised entities – First Nations through the Voice, engaging with the pre-existing institutions of political and legal power under the Constitution: the representative Parliament and the responsible Executive. As we explore above, that form of deliberation was to exist within pre-

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existing structures, to intersect with the constitutional setting of the state. The details of the representative nature of the Voice, and its mode of operation, were to be negotiated through legislation after the embedding of the structure within the Constitution. The ways in which the dialogue would occur were not set in stone but left to be a process of development – so as not to foreclose the ways in which deliberation could manifest over time.

The fact that the Australian electors did not by the necessary double majority approve the proposed amendment is not the end of the challenge posed by the co-existence of peoples on the Australian landmass but without recognition of First Nations. As Sakata and Bray have stated, the 'defeat … transforms the political subjugation of Aboriginal and Torres Strait Islander peoples from a historical legacy into the contemporary choice of the nation.'[70] While 'the Voice's defeat closes off one pathway for structural reform',[71] it does not resolve the existing challenge. The challenge of coexistence does not disappear. To assume otherwise is to accept that one of us disappears – and given the operation of public power in Australia, it would not be the non-Indigenous majority of Australian society.

The Voice sits within a much longer history: more than 237 years of coexistence. Throughout this time, First Nations have survived and continued to seek participation and recognition. The challenge of how peoples come together within the Australian nation – how we relate to one another – is not going away. Coexistence remains an ongoing reality. Calls for inclusion are not new. William Cooper advocated for recognition as an Aboriginal Australian a century ago. Eddie Synot's grandmother, born in 1930, lived through a time when her children could have been removed because of their Aboriginality until the late 1960s. The demand for recognition persists. These issues cannot simply be 'put to bed'. They will endure as long as different peoples share the same space. The notion that one can just say 'no' and assert a unitary, formalized idea of constitutional identity does not hold up – it does not work. As many Indigenous people say, 237 years is just a blip.

Even if the Voice had succeeded, it would have been a mechanism for identities to continue evolving in relation to one another – without losing what William Cooper called for: inclusion as Aboriginal Australians. It would not have been the last word. The Voice was a proposal at the national level. Steps already taken at the sub-national level indicate the potential to revisit a national structure, or at least ways to proceed with the underlying calls for Voice, Treaty, Truth arising from the Uluru Statement. The State of Victoria is the most advanced, having established a representative First Peoples Assembly, engaged in a process of truth-telling through the Yoorook Commission and having concluded their first Statewide Treaty. South Australia has established a State-level Voice. The geographic, demographic and political differences across the continent demonstrate a diversity of developments across Australia. The potential for developments along the lines of Voice, Treaty and Truth in other parts of the nation are dependent on those localised politics.

Overall, the disconnect between formally equal legal status and substantive differential lived experience continues for Aboriginal and Torres Strait Islander peoples. Even though explicitly discriminatory laws are gone, the current dominant political language is that only of economic empowerment rather than substantive recognition as First Nations. The unaddressed challenge of coexistence remains. The Uluru Statement reform agenda

[70]S Nakata and D Bray, 'Understanding the Voice' in G Appleby and M Davis (eds), *The Failure of the Voice Referendum* (Anthem Press, 2026) 245, 252.

[71]Nakata and Bray (n 70) 253.

https://doi.org/10.1017/S2045381726100446

remains as a path to pursue to enable contestation, norm contention, dialogue, towards the ultimate aim of developing relationship between the peoples in the shared polity of the country called Australia.

The Australian story of the Voice proposal is distinct to the experience on the Australian landmass of multiple First Nations, British colonialism and settler states developing into an independent nation. Yet the story also speaks to the global challenge of bringing peoples together in multinational polities, and the possibility of constitutional structures as a means to establish an evolving constitutional relationship. Constitutional structures are not only about institutions of governance, articulation of specific rights and establishment of a nation state. Constitutions inevitably intersect with identity and people. While imperfect and – in this Australian example – ultimately unsuccessful, constitutional reform is one avenue worth considering as a way to establish the necessary pre-conditions for deliberation. Whether the reform be constitutional or at a legislative or executive level, the Voice proposal gives an instance of how to establish a formal relationship between peoples through an institution that is aimed at communication and dialogue – essential components and preconditions for deliberation.

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