

# PUBLIC LAW REVIEW

Volume 34, Number 2

2023

## Special Issue on the Aboriginal and Torres Strait Islander Voice

*Guest Editor: Harry Hobbs*

COMMENT – *Editor: Dan Meagher*

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**The Proposal for the Voice to Parliament: Placing the Referendum Proposal  
in Context** – *Sophie Rigney*

This article examines the proposed amendment to the Australian Constitution to provide for an Aboriginal and Torres Strait Islander Voice to Parliament and the executive government. This article provides a summary of the history that has given rise to this proposed constitutional change, and examines the drafting history of the proposed amendment. The article particularly examines three issues related to the proposed amendment: the use of the word “may” in the proposed amendment; the Voice speaking to both Parliament and executive government; and the ability of the Parliament to determine the design of the Voice. The article explains where the proposal has come from, why it appears in the form it does, and outlines some of the strengths and challenges of the proposal. .... 110

**On Representation and the Politics of Aboriginal and Torres Strait Islander Voice** –  
*Sana Nakata and Daniel Bray*

This article analyses the proposed Aboriginal and Torres Strait Islander Voice to Parliament through the lens of democratic theory and the concept of representation. We outline two conceptions of representation, the dyadic and constitutive perspectives, and argue that the constitutive perspective better illuminates the democratic value and political power of an institutionalised Voice to Parliament. From a constitutive perspective, the political power of Indigenous representation is grounded in existing fields of representation that both precede and exceed the Australian State. On this perspective, the political power of the Voice lies not only in the ability to directly affect political decisions, but also in the way that authoritative representative claims can shape public attitudes, values and decision-making by setting agendas, attracting the views of affected communities and shaping the terms of debate. We argue that the Voice to Parliament expands and empowers existing fields of Indigenous representation by acting as “connective tissue” between Indigenous peoples and state institutions that cannot be politically severed. Its representative power emanates not just from its legal authorisation but also from its political function as a new communicative lever with the potential to transform the national public and political discourse. .... 120

**The Voice as Politics** – *Laurel Fox and Graeme Orr*

The 2023 referendum to embed an Aboriginal and Torres Strait Islander Voice in the Constitution animates questions about the potential of such an institution as an agent for the further development of a national Indigenous politics. This article explores those questions, within their theoretical and historical context. This context includes the nature of political representation given Indigenous diversity and the history of formal, national Indigenous representative bodies in Australia. A representative Voice would at a minimum be a centring conduit; necessarily so given its purpose of speaking into the behemoth that is government at the Commonwealth level. Lessons from the past illuminate challenges for the future design of any Voice, a sensitive issue given tensions between localism and centralism, and between the demotic and existing Indigenous structures. Ultimately, to be transformative within Indigenous and mainstream discourse, the Voice must be sufficiently public, representative and accountable: in short sufficiently political. .... 129

**The Voice as a Strategy for Advancing Aboriginal and Torres Strait Islander Rights and Interests on Climate Change Mitigation and Adaptation** – *Heidi Norman*

A new and meaningful relationship between Indigenous peoples and political institutions, as the Voice intends, is needed to address climate change adaptation and mitigation. Indigenous peoples in Australia, and globally, are already experiencing the impact of climate change. With rights and interests recognised over their land, this land estate is increasingly vital to addressing the immediate term net-zero targets and longer-term reduction of carbon in the atmosphere along with advancing Indigenous knowledges in new economies and rights to country. .... 139

**Ko wai tātou? Reflecting on Constitutional Transformation in Aotearoa New Zealand** – *Claire Charters and Amelia Kendall*

This article traces the constitutional development in Aotearoa New Zealand from the Indigenous first law of tikanga Māori to our current arrangements and towards our future aspirations. Notably in 2016, He Whakaaro Here Whakaumu Mō Aotearoa: the report of Matike Mai Aotearoa envisioned indigenous constitutional transformation to reconceptualise current constitutional arrangements. Post-2016, constitutional transformation has been limited by Crown politics, with recent initiatives failing to enact true partnership between state and tāngata Māori. As Indigenous peoples around the globe grapple with how to effectively initiate and conduct constitutional discussions within colonial state systems, the Indigenous experience of tāngata Māori in Aotearoa New Zealand will hopefully provide some insights that may positively contribute to meaningful constitutional change. .... 148

**The Aftermath: What if The Voice Referendum Does Not Succeed?** – *Narelle Bedford*

The Uluru Statement from the Heart is an invitation to all Australians. However, should the referendum to amend the Australian Constitution to establish an Aboriginal and Torres Strait Islander Voice be unsuccessful, it would have three problematic legal consequences for public law. This is beyond the inevitably deeply personal, national, and international impacts. The first public law consequence is the continuing silence in the Australian Constitution about First Nations people and a loss of Constitutional confidence. The second is the drift away from co-operative federalism. The third is the sustained absence of expert cultural advice in government decision-making. Great change is not without risk. But that risk is not a reason for retreating fearfully and not trying to do something that matters. .... 156

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