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Modello Westminster nel mondo

Australia Votes 'No' to Constitutional Recognition of its First Peoples

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Australia Votes 'No' to Constitutional Recognition of its First Peoples**

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Abstract (Ita): Il 14 ottobre 2023 il popolo australiano ha votato no al riconoscimento della propria popolazione indigena all'interno della Costituzione Australiana. Seppur traumatico per molti al di fuori dell'Australia, ciò non è stata una sorpresa per coloro che hanno seguito la campagna, né per coloro che hanno interesse per la storia della diseguaglianza e discriminazione indigena in Australia. Pertanto, lo scopo di questo contributo è fornire un contesto al risultato referendario, dando a coloro che hanno meno familiarità con l'ordine costituzionale australiano una breve introduzione sul retroterra storico e politico che ha portato all'indizione del referendum su questo tema, e approfondendo le radici politiche, sociali e costituzionali di questo risultato.

Abstract (Eng): On 14 October 2023, the Australian public voted 'No' to recognising its Indigenous population in the Australian constitution. While a shock to many outside Australia, it was not such a surprise to those who followed the campaign, nor to those who have an interest in the history of Indigenous disadvantage and discrimination in Australia. As such, the purpose of this article is to provide context to the referendum result. To give those less familiar with the Australian constitutional order a brief introduction to the historical and political background to the decision to call a referendum on this issue, and to consider some of the political, social, and constitutional ramifications of the outcome.

Parole chiave: diritto costituzionale; democrazia liberale; referendum; popoli indigeni; diritti delle minoranze

Keywords: constitutional law; liberal democracy; referenda; indigenous peoples; minority rights

Sommario: Introduction; Conclusion

Introduction

Australia, the oft' forgotten continent at the bottom of the planet, and my home, held a referendum on 14 October 2023 on the question of whether its First Peoples, the Aboriginal and Torres Strait Islander peoples, should be formally recognised in the Australian Constitution. The result was a decided 'No', with every state and territory as well as the overall popular vote going against the proposed amendment[1]. While a shock to many outside Australia, public opinion polls suggested throughout the campaign that the referendum was unlikely to end with a positive outcome[2]. Part of the purpose of this article, therefore, is to provide readers who may be unfamiliar with the Australian political and constitutional scene some additional context to the result – to provide historical background, set out the wording of the question put to the Australian people, and provide a taste of the arguments run by the 'Yes' and 'No' campaigns.

** Contributo sottoposto a double blind peer review.

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[1] Australian electoral commission, '*National Results*', https://results.aec.gov.au/29581/Website/ReferendumNationalResults-29581.htm, accessed 1 February 2024.

[2] N. EVERSHED & J. NICHOLAS, '*Voice referendum poll tracker: latest results of polling on support for yes and no campaign*' The Guardian Australia, 13 October 2023 <https://www.theguardian.com/news/datablog/ng-interactive/2023/oct/13/indigenous-voice-to-parliament-referendum-2023-poll-results-polling-latest-opinion-polls-yes-no-campaign-newspoll-essential-yougov-news-by-state-australia> accessed 1 February 2024.

As you will no doubt observe as you make your way through this piece, while the constitutional question put to the Australian people had a specifically Australian flavour, the nature and tone of the campaign and its aftermath speak to the wider challenges other liberal democracies face around the world when it comes to issues such as: the conveying of complex information to a disengaged electorate; dealing with matters of indigeneity in former colonies; the effectiveness of campaigns that weaponise misinformation; and the benefits and pitfalls of constitutional referenda mechanisms designed to make constitutional change very difficult. Therefore, in addition to providing context to the result, there will be a brief discussion of some of the structural questions that have been raised, post the campaign, that relate to the global discourse on the future of constitutional democracies more generally.

In terms of structure, the article will first address the history of the relationship between Indigenous Australians and the Constitution of Australia. It will then go on to lay-out the process that led to the posing of the referendum question put to the Australian people. There will then be a discussion of the conduct of the campaign, and brief analysis of the result. The final section will explore some of the political, social, and constitutional ramifications flowing from the result, with a couple of comments in summation to conclude.

2. Brief history of the relationship between Indigenous Australians and the Australian Constitution

The Indigenous peoples of Australia have inhabited the Australian continent for approximately 65,000 years[3]. Indigenous Australians possess the oldest continuous living culture in the world, with 145 surviving indigenous language groups (of approximately 250 pre-settlement)[4], complex systems of customary law[5], art, spiritual traditions, and land management practices[6]. Prior to colonisation, it is estimated that the Indigenous population of Australia, at various times, numbered in the millions[7].

In 1770, Captain Cook, on behalf of the British Crown, landed in what is now known as Sydney. A British flag was planted, with the whole of the east coast claimed and named 'New South Wales'. Despite Cook and his crew encountering Indigenous people on their voyage up the east coast of the Australian continent, they relied-upon the legal doctrine of terra nullius (land belonging to no one) to justify their declaration of possession[8]. The doctrine of terra nullius, a mix of Locke-ian economic and Blackstone-ian legal principles,

[3] S. Mawson, *The Deep Past of Pre-Colonial Australia*, in *The Historical Journal* 1477, vol. 64, n. 5, 2020, p. 1478.
[4] N.M Nakat, *Indigenous languages and education: Do we have the right agenda?*, in *The Australian Educational Researcher*, vol. 51, n. 4, 2023 https://doi.org/10.1007/s13384-023-00620-0, accessed 1 February 2024.
[5] R. Mclaughlin, *Some Problems and Issues in the Recognition of Indigenous Customary Law* in *Aboriginal Law Bulletin*, vol. 3, n. 82, 1996.
[6] H. Ross, E. Young, L. Liddle, *Mabo: An Inspiration for Australian Land Management*, in *Australian Journal of Environmental Management*, vol. 1, n. 1, 2018.
[7] C.J.A. Bradshaw et al (eds.), *Stochastic models support rapid peopling of late Pleistocene Sahul*, in *Nature Communications*, vol. 12, n. 244, 2021.
[8] R.J. Miller, J. Ruru, L. Behrendt, T. Lindberg, *The Doctrine of Discovery in Australia*, in Id. et al (eds.), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, Chapter 6.

contended that if the indigenous people of a territory failed to possess discernible legal or agricultural systems, then these people could be determined to be living in a state of nature, with no established claim to the land they occupy[9]. Consequently, this land could 'legitimately' be claimed by a colonial power and settled without the need for a treaty with the indigenous occupants[10]. This legal fiction then served as the basis for the establishment of a penal colony in Sydney in 1788.

The period between 1788 and Australia's federation in 1901 was defined by colonial expansion and Indigenous decline. By the time of the constitutional conventions in the late 19th century, in states such as Tasmania, close to 100 per cent of the Indigenous population had been wiped out by disease, dispossession and frontier conflict[11]. Similar instances of conflict, cultural destruction, dispossession and population decline occurred in the various other states that came into being throughout the 19th century[12]. Given this background, it is no surprise that Indigenous Australians were excluded from the constitutional conventions that took place in the 1890s, and that no mention is made of their existence in the preamble to the final document signed by Queen Victoria in 1900. Indeed, as originally drafted, the constitution provided that Indigenous people were to be subtracted from the total number of Australians counted as part of the national census, which informed the determination of the allocation of House of Representatives seats and the raising and distribution of taxes[13].

While there have been positive political and constitutional developments with respect to the treatment of Indigenous Australians in the past 122 years – a referendum in 1967 removed the abovementioned exclusion and gave the federal parliament the right to make laws for the benefit of Indigenous Australians[14], and a High Court decision in 1992 rejected the legal fiction of terra nullius and established native title rights for Indigenous Australians –[15] progress has been slow and chequered. The right to vote in Federal elections was not granted to all adult Indigenous Australians until 1962 (in Queensland the right to vote in state elections was not granted until 1965)[16]. Anti-discrimination legislation was passed at the Federal level in 1975 (the Racial Discrimination Act), but it took many of the states and territories decades to pass similar laws: Queensland (1991), Northern Territory (1996) and Tasmania (1998). Indeed, the 2023 referendum was not the first refe-

[9] R. Webb, *The Birthplace of Native Title – From Mabo to Akiba*, in *James Cook University Law Review*, vol. 23, 2017, pp. 31-32.
[10] T. Libesman, *Dispossession and Colonisation*, in L. Behrendt, C. Cunneen, T. Libesman, N. Watson, *Aboriginal and Torres Strait Islander Legal Relations*, Oxford, Oxford University Press, 2019, pp. 1-19.
[11] See a good explanation of the concept in the landmark High Court decision, *Mabo v Queensland* (No 2) [1992] HCA 23.
[12] R. Taylor, *Genocide in Van Diemen's Land (Tasmania)*, in N. Blackhawk, B. Kiernan, B. Madley, R. Taylor, *The Cambridge World History of Genocide*, Cambridge, Cambridge University Press, 2023, Chapter 20.
[13] E. Arcioni, *Excluding Indigenous Australians From 'The People': A Reconsideration of Sections 25 and 127 of the Constitution*, in *Federal Law Review*, vol. 40, n. 3, 2012, p. 2.
[14] E. Arcioni, *op. cit.*
[15] *Mabo v Queensland* (No 2) [1992] HCA 23.
[16] P. Hamilton, *60th Anniversary of Aboriginal and Torres Strait Islander Citizens being granted the right to vote in Federal elections*, in *Parliamentary Library of Australia*, 2022, pp. 1-3.

rendum posing a question relating to the constitutional recognition of Indigenous Australians. In 1999, the Australian public voted down a proposal to amend the preamble to the Constitution to include a statement of recognition. There has been change, but it has been gradual and hard fought.

Part of the impact of this chequered political and constitutional history on the lives of Indigenous Australians is reflected in the gulf that has long existed between the wellbeing indicators of Indigenous and non-Indigenous Australians. As at the time of the 2023 referendum, the average life expectancy of Indigenous Australians was 8.6 years less than that of non-Indigenous Australians[17]. Nearly half of all Indigenous men over 15 years of age have been formally charged by the police for some form of criminal offence[18]. The Indigenous incarceration rate was 14 times that of non-Indigenous Australians[19], making them the most incarcerated people in the world[20]. High school completion rates among Indigenous Australians were between 6 and 50 per cent lower than those of non-Indigenous Australians depending on geographical location[21]. The unemployment rate for Indigenous Australians was four-times higher than that of non-Indigenous Australians[22]. While most of these figures are an improvement on the situation that existed decades prior, they are indicative of the human cost of discrimination and dispossession.

3. Immediate context to the referendum campaign and designing the referendum question

The road to the 2023 referendum was a long one. Beginning in 2007 on the back of a speech delivered by former Prime Minister John Howard[23], there was an exhaustive bipartisan consultation and reporting process during the tenures of different governments, which included: the establishment of an Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution (2010); a Parliamentary Joint Select Committee Inquiry on Constitutional Recognition of Aboriginal and Torres Strait Islander People (2013-15); the First Nations Constitutional Convention and associated 'Regional Dialogues', which resulted in the 'Uluru Statement from the Heart' (2017); a further Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (2018); the Indigenous Voice co-design process (2019 –

[17] Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander: Health Performance Framework Summary Report 2023*, Canberra, Summary Report, 2023, p. 21.
[18] Ibid, p. 59.
[19] Ibid.
[20] A. Leigh, *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, in Australian National University Centre for Economic History, Discussion Paper n. 2020-01, 2020, p. 12.
[21] National Indigenous Australians Agency, *Closing the Gap Report 2020*, Report, Department of Prime Minister and Cabinet, 2020, pp. 37-44.
[22] National Aboriginal Commission Controlled Health Organisation, *The Nature and Extent of Poverty in Australia*, Submission to the Australian Senate, February 2023, p. 5.
[23] J. Howard, *The right time: constitutional recognition for Indigenous Australians*, Speech to the Sydney Institute, 11 October 2007.

2021); followed by a further committee and consultation process in the immediate lead-up to the vote in 2023[24].

In the end, the question put to the Australian public centred on the message contained in the Uluru Statement from the Heart, which was that Indigenous people wanted recognition in the form of a constitutionally enshrined Voice to Parliament. The wording of the proposed amendment was scrutinised by a Referendum Working Group, which included a constitutional expert sub-group, made up of Australia's most eminent constitutional scholars. While there was some disquiet over the insertion of 'executive government' in addition to 'parliament' as the two branches to whom the Voice could provide advice, a clear consensus of legal opinion coalesced around the appropriateness of representations being made to the branch that is responsible for undertaking the detailed policy formulation and implementation work[25].

As per the established process of holding a referendum in Australia, the final text of the proposed constitutional amendment was passed by the Federal Parliament before going to the general electorate for a vote, with the wording of the new chapter reading as follows[26]:

Aboriginal and Torres Strait Islander Voice

«*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 binary 'Yes'/'No' question put to the people on 14 October 2023 (also agreed to by the Parliament) read as follows:

«*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?»

In essence, the proposal was to insert a new chapter into Australia's constitution. This chapter included a statement recognising Indigenous Australians as the First Peoples, and wording that would establish a new institution called 'Aboriginal and Torres Strait Islander Voice'. While the Voice would be constitutionally enshrined, the Federal Parliament would maintain ultimate authority over the composition, functions, powers, and procedures of the institution. The purpose of the Voice, as set out in the proposed

[24] An overview of the process leading up to 2023 can be found in S. Mcnicol, J. Haughton, *Indigenous Constitutional Recognition and Representation*, in Parliamentary Library Briefing Book, 2022, https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/BriefingBook47p/IndigenousConstitutionalRecognitionRepresentation, accessed 1 February 2024.

[25] Parliament of Australia, *Advisory Report on the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023*, Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, May 2023, pp. 17-19.

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

amendment, was to provide solicited and unsolicited advice to the Government (ministers and their departments) on policy issues and legislative proposals specifically relating to the lives and experiences of Indigenous Australians[27].

4. **The referendum process in Australia**

Voting in Australia is compulsory[28]. Under section 128 of Australia's Constitution, for a referendum to be successful, a double majority must be obtained – a majority of the overall population of the country, and a majority of the people in a majority of the states. Australia has six states and two territories. Interestingly, despite over 500,000 Australians living in the Northern Territory (where indigenous Australians make up a significant portion of the population) and the Australian Capital Territory (the city of Canberra) their votes only count towards the national vote.

Given these procedural hurdles, the task was always going to be a difficult one for the 'Yes' campaign. Indeed, prior to the defeat of 2023 referendum, only 8 of the last 44 referenda had been successful[29]. Since 1937 there have been five referenda that won national majorities but failed to win a majority of the states[30]. The most recent successful amendment related to the imposition of a mandatory retirement age for judges amongst other technical tweaks (1977). The most recent defeat was on the question of whether Australia should become a Republic (1998). No referendum has been successful without bipartisan political support.

5. **The campaign**

After 16 years of relatively consistent bipartisanship on the issue of Indigenous constitutional recognition, the beginning of the campaign was marred by the opposition coalition parties, the Liberal and National Parties, coming out against the concept of the Voice[31]. Given the abovementioned history regarding the importance of bipartisanship to achieving a successful referendum result, there was some discussion as to whether the referendum should go ahead[32]. In the end, the Prime Minister and his Government decided that as the referendum had been an election commitment, and given the modesty of the proposal, that the referendum would continue as planned[33]. Indeed, once the legislation est-

[27] For a good overview, see N. Aroney, P. Gerangelos, *Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum*, in *SSRN*, 2023, https://dx.doi.org/10.2139/ssrn.4558329, accessed 1 February 2024, pp. 2-5.
[28] *Commonwealth Electoral Act 1918*, s 245(1).
[29] H. Hobbs, *A First Nations Voice to Parliament*, in *Verfassungsblog*, 2023, https://verfassungsblog.de/a-first-nations-voice-to-parliament/, accessed 1 February 2024.
[30] P. Williams, *Historical Referendums and constitutional change*, in *Griffith University Law School Blog*, 2023, https://enlighten.griffith.edu.au/historical-referendums-and-constitutional-change/, accessed 1 February 2024.
[31] M. Ortolan, *Peter Dutton opposes the voice to parliament – but not all Liberal leaders agree*, in *ABC News Online*, 4 September 2023, https://www.abc.net.au/news/2023-09-05/peter-dutton-voice-to-parliament-yes-no-vote-referendum/102797582, accessed 1 February 2024.
[32] J. Guenzler, *PM slams Liberals; 'absurd' proposal to delay the Voice referendum*, in *National Indigenous Times*, 4 April 2023, https://www.abc.net.au/news/2023-09-05/peter-dutton-voice-to-parliament-yes-no-vote-referendum/102797582, accessed 1 February 2024.
[33] J. Guenzler, *op. cit.*

ablishing the referendum process and question had passed the Parliament, the referendum had to be held within a specified period.

Spearheaded by a range of Indigenous leaders and the Federal Labor Government, the 'Yes' campaign focused its attentions on the substance of the proposed constitutional amendment, emphasising the advisory nature of the Voice, the continued supremacy of the parliament, and the potential for the institution to engender more extensive and streamlined indigenous input into the policy making process. The amendment was pitched as a unifying moment for Australia[34]. A necessary and modest first step towards the eventual development of a treaty between the Commonwealth Government and Indigenous Australians.

The 'No' campaign was split between 'Progressive No' and 'Conservative No' groupings. The Conservative No campaign was the more substantial of the two no campaigns. Those on the Progressive No side argued that the proposal didn't go far enough. That Australia's constitutional efforts should be focused on treaty formation rather than the establishment of an advisory body within the confines of what they contend to be a colonial constitution. Those on the Conservative No side adopted the tactic of sowing doubt and confusion in the electorate, capitalising on the relative lack of constitutional knowledge/experience of the average Australian. They adopted the campaign slogan: «*if you don't know, vote no*»[35]. Led by two prominent Indigenous Australians that are members of the major conservative parties, the proposed constitutional amendment was attacked for: being an elitist idea that would insert race-based division into the constitution; the potential for it to increase the level of bureaucracy in Indigenous affairs; the potential for the Voice to provide advice on issues other than those specifically relating to Indigenous Australians (Defence policy, for instance); the potential for ongoing litigation on the powers of the Voice; and the fact that the constitutional amendment was too brief, meaning the electorate couldn't really know what they were voting for if they voted in favour. A summary of the formal arguments of both sides of the campaign can be found in the official referendum booklet produced by the Australian Electoral Commission[36].

At every stage of the campaign, it was as if the two sides were referring to completely different constitutional proposals. This played into the hands of those opposed to the amendment, as the tenor of the debate was aggressive, divisive, and confused. The lack of general constitutional knowledge in the public allowed the Conservative No campaign to run blatantly false constitutional claims in support of their position. For instance, one of their cut-through arguments centred on the proposition that the Australian constitution is

[34] Yes23, *Why vote yes?*, in *Yes23 Referendum Campaign*, https://www.yes23.com.au/vote_yes, accessed 1 February 2024.

[35] H. Manns, *Voice referendum: "If you don't know, vote no" – an old slogan for modern politics*, in *Monash University 'Lens'*, 24 October 2023, https://lens.monash.edu/@politics-society/2023/10/24/1386245/voice-referendum-if-you-dont-know-vote-no-an-old-slogan-for-modern-politics, accessed 1 February 2024.

[36] Australian Electoral Commission, *Referendum booklet*, https://www.aec.gov.au/referendums/files/pamphlet/referendum-booklet.pdf, accessed 1 February 2024.

non-asymmetric by design (blind to difference)[37]. They argued that to recognise Indigenous Australians by creating a new chapter and establishing the Voice would insert difference into a document that currently, according to them, is completely neutral when it comes to the creation and distribution of power. Of course, like most federations, the Australian constitution and political system possesses a range of inbuilt formal and informal asymmetrical features: State and Territory Senate representation is not proportionate to population; Territory Parliaments can have their legislative decisions overridden by the Federal Parliament while this cannot be done to the States; and there is a clear vertical fiscal imbalance between the States and Territories and the Federal Government (the former having more of the responsibilities and the latter more of the taxation power). The Conservative No argument also ignored the fact that Indigenous Australians were deliberately excluded from being a part of the drafting of the original document. Difference is baked into the text and context of the Australian Constitution as it currently stands.

6. **The result**

With voter turnout for the referendum sitting at 90 per cent, the outcome on the night was decisive[38]. All six of Australia's states recorded a majority 'No' vote, with the Australian Capital Territory the only jurisdiction to record majority support for the proposed amendment (which, as explained, didn't count towards the state-based component to the double majority). The Australia-wide vote split 60 per cent against and 40 per cent in favour of the proposal. The 'No' vote was highest in rural and regional Australia. The 'Yes' vote the highest in the inner metropolitan regions of Sydney and Melbourne[39].
Interestingly, due to the concentration of Indigenous populations in certain geographical locations, post-referendum analysis suggests that in those communities with majority Indigenous populations there was a clear vote in favour of the referendum proposal[40]. This being the case, as most Indigenous Australians live in metropolitan areas, it is difficult to extrapolate such a finding to the entire Indigenous Australian population[41].

7. **Social, Constitutional and Political Ramifications**

The referendum outcome for those Indigenous Australians who played an active part in the 'Yes' campaign, many of whom have long been involved in the struggle for Indigenous rights in Australia, has been profound. A period of mourning was announced immediatel-

[37] A. Twomey, *A Frozen Constitution in a Sunburnt Country*, in *Verfassungsblog*, 14 November 2023, https://www.theguardian.com/commentisfree/2023/oct/15/going-by-no-voice-campaigns-arguments-federation-itself-would-have-been-defeated>.
[38] Australian Electoral Commission, *2023 federal referendum*, https://www.aec.gov.au/Elections/referendums/2023.htm, accessed 1 February 2024.
[39] N. Biddle, M. Gray, I. McAllister, M. Qvortrup, *Detailed analysis of the 2023 Voice to Parliament referendum and related social and political attitudes*, in *ANU Centre for Social Research and Methods*, Executive Summary, 2023.
[40] N. Biddle, M. Gray, I. McAllister, M. Qvortrup, *op. cit.*, pp. 23-24.
[41] N. Biddle, M. Gray, I. McAllister, M. Qvortrup, *op. cit.*

y after the result was announced[42]. While victory was never certain, the conclusion drawn by many of the 'Yes' supporters is that if a proposal as modest in scale and scope as the one put to the Australian people cannot be passed, then there is little hope for the rest of what the Uluru Statement from the Heart called for: treaty and truth telling. This being the case, it must be recognised that not all Indigenous Australians were in favour of the proposal, and that the justifications offered by those who voted against the proposal are varied and complex – general wariness of constitutional change, racial prejudice, confusion, different conceptions of equality and equity, and the general mood of the electorate towards the government of the day[43]. This means that it is difficult to draw concrete conclusions regarding the broader ramifications of the result for the reconciliation process in Australia.

Following on from the above, while undoubtedly a setback to efforts to bridge the divide between Indigenous and non-Indigenous Australians, it has long been a feature of the Australian Federation that when either the states or the federal jurisdiction is dragging the chain on more progressive social, political, and economic causes, the other jurisdiction(s) tend to pick-up the slack. To this end, it is worth noting that state and territory-based Voices to Parliament exist in Victoria and the Australian Capital Territory, with South Australia launching its own model in 2024. It is also worth noting that Victoria, New South Wales, Queensland and South Australia have amended their state constitutions to recognise the Indigenous peoples living in their jurisdictions[44]. In addition to the creation of State and Territory-based advisory bodies, much work has also been done at this level to advance the process of negotiating treaties between these jurisdictions and their Indigenous constituents: Victoria is expected to start treaty negotiations in 2024, New South Wales has committed to a path to treaty negotiations, as have the governments of Queensland, South Australia, and Tasmania. Although Western Australia has not committed to treaty negotiations, the Noongar native title claim, signed in 2015, covering 200,000 square kilometres of that State, has been referred to as Australia's first Indigenous treaty[45].

From a constitutional perspective, various scholars have raised important questions about the extent to which the current model for the holding of referenda remains sound. With only 8 successful referenda out of the last 45 (including the 2023 result), Professor Twomey, for instance, has suggested that the amendment process set out in the

[42] C. Sibthorpe, *Voice to Parliament: Indigenous leaders enter 'week of mourning' following referendum result*, in *News Online*, 14 October 2023, https://www.news.com.au/national/politics/voice-to-parliament-indigenous-leaders-enter-week-of-mourning-following-referendum-result/news-story/2a8e5636afae6407268ebf97f8039938, accessed 1 February 2024.

[43] N. Biddle, M. Gray, I. McAllister, M. Qvortrup, *op. cit.*, above fn 38.

[44] B.F. Gussen, *A comparative Analysis of Constitutional Recognition of Aboriginal People*, in *Melbourne University Law Review*, vol. 40, 2017, pp. 877-978.

[45] H. Hobbs, G. Williams, *The Noongar Settlement: Australia's First Treaty*, in *Sydney Law Review*, vol. 40, n. 1, 2018, p. 1.

Constitution has left Australia with an immovable constitutional document[46]. While recognising the necessary inbuilt protections against majoritarian attempts at radical constitutional change, Professor Twomey argues that formal constitutional change is fundamental to the health of any constitutional order[47]. Indeed, that without it, we risk not only ending up with a foundational legal document lacking in legitimacy for a large minority of Australians, but also a system that is more and more reliant on informal, non-democratically determined change (convention), or, creative judicial interpretation to make that document work in our contemporary world[48]. In the new era of social media-driven news and opinion consumption, with a polarised, non-civically minded portion of the polity willing to weaponise misinformation for electoral gain, Professor Twomey suggests that if the current political climate were to be applied to the time in which the federation debates were taking place, it is possible that Australia would never have federated, and we would still be living in «*six squabbling British colonies*»[49].

The chilling effect of the result on other floated constitutional reforms is an additional important flow-on effect of the 2023 referendum. At the last election the now Labor Government promised to give Australians another opportunity to consider the question of whether Australia should become a republic. Because of the 2023 result, it looks highly unlikely that a constitutional change as big as this will be put to the Australian public in the foreseeable future, leaving the King of the United Kingdom as Australia's Head of State[50]. Indeed, a number of basic, long-proposed constitutional reforms will likely remain on the backburner, including: removing the prohibition against dual citizens from being able to serve in parliament (Australia being one of the most multicultural countries in the world); setting parliamentary term limits (the Prime Minister has almost complete discretion as to when an election can be called within the maximum three year term); requiring elections for the House of Representatives and the Senate to take place at the same time; recognising the office of Prime Minister (despite having the power to call an election, the position doesn't even feature in the Constitution); removing the 'Races Power' as a specific policy domain (race being a scientifically redundant concept), amongst a host of others[51].

Another important constitutional and political consideration to have arisen out of the referendum campaign, is that of the appropriateness of putting questions relating to the

[46] A. Twomey, *Changing the Australian Constitution is not easy. But we need to stop thinking it's impossible*, in *The Conversation*, 27 May 2022, https://theconversation.com/changing-the-australian-constitution-is-not-easy-but-we-need-to-stop-thinking-its-impossible-183626, accessed 1 February 2024.

[47] A. Twomey, *Reforming Australia's Federal System*, in *Federal Law Review*, vol. 36, n. 1, 2008.

[48] A. Twomey, *op. cit*. Also see, S. Stephenson, *The Challenge for Courts in a Moderately Rigid Constitution*, in *Melbourne University Law Review*, vol. 44, n. 3, 2021.

[49] A. Twomey, *Going by no voice campaign's arguments, federation itself would have been defeated*, in *The Guardian online*, 15 October 2023, https://www.theguardian.com/commentisfree/2023/oct/15/going-by-no-voice-campaigns-arguments-federation-itself-would-have-been-defeated, accessed 1 February 2024.

[50] A. Twomey, *A Frozen Constitution in a Sunburnt Country*, in *Verfassungsblog*, 14 November 2023, https://www.theguardian.com/commentisfree/2023/oct/15/going-by-no-voice-campaigns-arguments-federation-itself-would-have-been-defeated>.

[51] D. Elder, *House of Representatives Practice*, in *Australian House of Representatives*, 7th edn, 2018, Chapter 1, 'Constitutional alteration'.

recognition and protection of specific minority groups to a majority vote; or in this case, a double-majority vote. Here, in effect, the question rejected by the Australian public was: should Indigenous Australians be recognised in the constitution in the form they have asked to be recognised? While the method followed is the only one available to effect constitutional change in Australia, it facilitated the unfortunate scenario of a majority determination being made as to the 'rightful' place of Indigenous Australians in our foundational legal document. Similar such issues were raised with respect to the non-binding plebiscite held in 2016 on the question of whether Australia should legalise same sex marriage, which saw a more positive outcome for that yes campaign. These kinds of group specific campaigns would potentially be less of a feature of the Australian constitutional and political order if a universal bill or charter of rights was put before the Australian people and passed (Australia has neither). Such a debate would likely be focused on the moral virtues associated with the granting of rights, rather than on the worthiness of certain groups being the major beneficiaries of their protection[52].

Conclusion

The result on 14 October 2023 is but another example of what seems to be an established feature of democratic politics across the globe in the 21st century: the difficulty of engaging an electorate in the task of meaningful, thought-through constitutional reform. While formal constitutional change is meant to be difficult, it should not be, as it has become in Australia, near impossible. Without an achievable mechanism for formal constitutional amendment, we run the risk of further fraying the relationship between the electorate and the elected, as we rely more and more on our judges and politicians to decide how to fill the gaps that inevitably emerge between what our foundational legal documents say and how they are interpreted and implemented over time. Indeed, ironically, the anti-majoritarian justification for making formal constitutional change so difficult, can be viewed as having the effect of further feeding a political climate that has been exploited by populists around the world. This is because, without a constitutional order possessing a release valve, we risk seeing majoritarian pressures boiling over and coalescing around calls for more radical non-constitutionally enshrined means of change.

While Australia is seemingly some way off what has been described above, there is no doubting that for many Indigenous Australians, the rejection of such a modest proposal will lead to more radical calls for reform. The Australian Constitution, as it stands, is an ahistorical document, imposed on the Australian community, part of whom, although present at the time of its drafting, were both explicitly prevented from participating in its creation and were harmed by its contents. The ongoing reforms at the State and Territory levels to actively engage Indigenous Australians in policy making and treaty formation may go some way to quelling the simmering anger and despondency flowing from the refe-

[52] Drawing on the work of B. Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia: The Discussion We Need*, Sydney, Springer, 2020.

rendum result, but given the symbolic potency of Australia's foundational legal document, this is unlikely to be enough.

While a rather glib final remark given the ramifications of the result for many, there is much to be learned from the referendum result for Australians and non-Australians alike, whether they be political scientists, constitutional scholars, or those engaged in ethnographic and historical studies. Here's hoping that we harness these lessons and put them to use, to make sure future attempts at much needed constitutional change are more successful than the one that was attempted on 14 October 2023.