The Aftermath: What if The Voice Referendum Does Not Succeed?

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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.

INTRODUCTION

The *Uluru Statement from the Heart* is a generous invitation extended by First Nations peoples for constitutional reform.[1] It offers a fair and truthful relationship for the people of Australia based on justice and self-determination. The impending Voice referendum presents a unique opportunity for a distinctive and historic legal impact, promoting national unity and demonstrating our common humanity. It represents a moral choice that First Nations peoples are owed recognition and consultation about matters that affect them. The Voice is premised upon hope and empowerment for First Nations peoples. If successful, it would create the structural reform that is an essential precondition for further steps, including a Makarrata between First Nations peoples and the Australian nation, and truth-telling.

For these reasons, proponents and supporters of the Voice may not wish to contemplate the potential negative consequences if the seemingly unthinkable happens: that is, the referendum on enshrining a First Nations Voice into the *Australian Constitution* is not passed and the chance for large-scale reform is missed. These potential negative consequences should not be ignored. Indeed, they should be factored into the analysis of the referendum process. At the outset, I affirm my commitment to the *Uluru Statement* and make a public declaration that I will be voting yes in the referendum.

It is necessary to state clearly that First Nations peoples have never ceded sovereignty, and there has always been, and will continue to be, even in the event of an unsuccessful referendum, a complex system of First Nations laws and governance.[2] These exist alongside the *Australian Constitution*, and this manifestation of legal pluralism will persist, as can multiple conceptions of sovereignty.[3] Watson has argued forcefully that:

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Acknowledgement: I acknowledge Kombumerri country on which this article was envisioned and developed. The Kombumerri people are custodians of the land, sea, flora, and fauna, and I admire their wisdom and sharing of knowledges. I recognise all First Nations peoples across the continent now known as Australia, and I accord my profound respect to Elders past and present.

[1] *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

[2] See generally Peter Kilduff and Asmi Wood, "Determining Sovereignty: Through Law? Or a Political Option?", (2021) 50 *Australian Bar Review* 476.

[3] See generally Gabrielle Appleby, Ron Levy and Helen Whalan, "Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis" (2023) 46(3) *University of New South Wales Law Journal* 1.

> [T]here is true law – law of the land and the sea. We walked and sang the law, becoming beings of law.[4] … We were here first, we are still standing, and the laws of this continent always were, and always will be.[5]

First Nations peoples in Australia have demonstrated enduring strength and tenacity in the face of injustice, trauma, and disappointments. However, should the referendum not receive support from an overall majority of voters and a majority of voters in a majority of states, it would have a profound impact at a personal level for First Nations peoples.

The decline of the invitation to listen to the Voice and "walk with us in a movement of the Australian people for a better future" would be interpreted as a large-scale rejection. It would mean that Australian voters did not take up – or explicitly rejected – the opportunity for "political listening".[6] The *Uluru Statement* was a carefully crafted request derived from 12 months of consultation and design by First Nations peoples based on deliberation through a series of First Nations designed and led dialogues. Rejection would mean that the structural nature of the problem faced by Aboriginal and Torres Strait Islander peoples would remain unresolved.[7]

An unsuccessful referendum would be traumatic for First Nations peoples – not just in Australia but worldwide. The strength of the commonalities between First Nations peoples generally was given substance in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP).[8] After initial resistance, Australia became a signatory to *UNDRIP* in 2009.[9] In doing so, Australia committed to listening and engaging with Aboriginal and Torres Strait Islander peoples. For example, Art 19 of *UNDRIP* states:

> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

If the referendum was unsuccessful, it would fly in the face of obligations that Australia has already accepted. But an unsuccessful referendum would reach beyond the personal and impact negatively on our nation. The nation as a whole would suffer the loss. It would expose divisions and perpetuate a belief that fundamental national change is too hard to achieve. This would engender despondency, demonstrate a lack of confidence in our reform processes and make us vulnerable to criticism on the world stage that we do not have the resolve to face up to our history and plan for the future.

Beyond these deeply personal, national, and international impacts, this article speculates that an unsuccessful referendum would have three problematic legal consequences for public law, which go to the heart of Australian democracy and federalism.

THERE WILL BE A CONTINUING SILENCE IN THE AUSTRALIAN CONSTITUTION AND A LOSS OF CONSTITUTIONAL CONFIDENCE

The first public law consequence of an unsuccessful referendum would be the continued silence within the *Australian Constitution* about First Nations peoples. Our *Constitution* is the foundational document of Australia in that it establishes the systems that govern our society. For it to contain no mention of

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[4] Irene Watson, "Aboriginal Recognition: Treaties and Colonial Constitutions, 'We Have Been Here Forever …'" (2018) 30(1) *Bond Law Review* 7, 17. See also Irene Watson, "Aboriginal Laws of the Land: Surviving Fracking, Golf Courses and Drains Among Other Extractive Industries" in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017).

[5] Watson, "Aboriginal Recognition", n 4, 18.

[6] See generally Gabrielle Appleby and Eddie Synot, "A First Nations Voice: Institutionalising Political Listening" (2020) 48 *Federal Law Review* 529.

[7] Shireen Morris, "The Torment of Our Powerlessness: Addressing Indigenous Constitutional Vulnerability Through the Uluru Statement's Call for a First Nations Voice in Their Affairs" (2018) 41(3) *University of New South Wales Law Journal* 629, 630.

[8] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, UN Doc A/RES/61/295 (2 October 2007).

[9] Megan Davis, "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 *Australian International Law Journal* 17, 18.

First Nations peoples is a gaping omission. Section 25 (dealing with persons of any race disqualified from voting) and s 51(xxvi) (dealing with special laws for people of any race) would persist in the *Constitution*, but they do not specifically refer to First Nations peoples. These arcane and anachronistic provisions would endure as the only, albeit indirect, mention of the existence of First Nations peoples. This can be compared to two examples of countries with written constitutions and an affinity with Australia. The first is the *Canadian Constitution* with its commitment in s 35 that:

> (1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.[10]

The second is within the Pacific region, where the *Vanuatu Constitution* has an entire chapter dedicated to the National Council of Chiefs (in addition to those covering the traditional separation of powers – the Parliament, the judiciary, and the Executive). There the National Council of Chiefs has a constitutionally enshrined role to be consulted on any matter related to tradition and custom.[11]

Another potential repercussion of the referendum not succeeding is troubling in a different way. It is possible that the current or a subsequent government, could decide to pivot and attempt to legislate a form of the Voice rather than engage in structural reform via the *Constitution*. Such an action would be in direct conflict with the *Uluru Statement*'s request for a permanent, enduring structural change enshrined in the *Constitution*. It would also recall the bitter experience First Nations peoples had when the government abolished the legislated, and elected, Aboriginal and Torres Strait Islander Commission (ATSIC).[12] The action of an elected government removing a legislated mechanism for First Nations self-determination was extensively analysed at the time, and rightly seen as "silencing Indigenous voices".[13] The scars from that experience remain. Many First Nations peoples would be deeply and rightfully sceptical that a legislated Voice, created in the wake of an unsuccessful referendum, could be an enduring solution rather than something subject to the vagaries of the preferences of the political party in power at any given time in the future. First Nations peoples are unlikely to be supportive, given their bitter familiarity with the repeal of the legislation establishing ATSIC,[14] and its predecessors,[15] and the clarity with which a permanent, constitutionally entrenched role in the democratic decision-making of the nation has been sought.

Another negative scenario which conceivably could come to pass, particularly if the Voice referendum was unsuccessful by a slim margin (in either not obtaining a majority of yes votes overall or succeeding overall but in fewer than four States), is a second referendum.[16] Under these circumstances, the current or future government may respond by reformulating the referendum question to address the concerns which motivated no voters. This could place the government's political capital at risk and run the peril of

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[10] *Constitution Act 1982*. See also Benjamen Franklen Gussen, "A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples" (2017) 40(3) *Melbourne University Law Review* 867, which contains comparisons with Canada, New Zealand, Ecuador, and Bolivia.

[11] *Constitution of the Republic of Vanuatu 1980*, Ch 5, ss 29–32.

[12] William Jonas and Darren Dick, "Ensuring Meaningful Participation of Indigenous Peoples in Government Processes: The Implications of the Decline of ATSIC" (2004) 23 *Dialogue* 4.

[13] Sue Richardson, "The Abolition of ATSIC: Silencing Indigenous Voices?" (2004) 23 *Dialogue* 1.

[14] See generally Joan Cunningham and Juan I Baeza, "An 'Experiment' in Indigenous Social Policy: The Rise and Fall of Australia's Aboriginal and Torres Strait Islander Commission (ATSIC)" (2005) 33(3) *Policy and Politics* 461.

[15] These include the Movement for Aboriginal Advancement; the Federal Council for the Advancement of Aborigines and Torres Strait Islanders; the National Aboriginal Consultative Committee; and the National Aboriginal Conference. See generally Julie Fenley, "The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981" (2011) 42(3) *Australian Historical Studies* 372; Sally Weaver, "Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies?" (1983) 54(2) *Oceania* 85.

[16] The Australian Electoral Commission has prepared a summary of outcomes for every referendum, detailing both the national vote and recording which states had a majority yes vote: Australian Electoral Commission, *Referendum Dates and Results* <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm>. Of the 36 unsuccessful referenda, five secured a national majority but not a majority of States, while the other 31 did not secure either a majority of voters or a majority of States.

annoying voters by asking them to vote on the same issue for a second time.[17] Such an approach could see the Voice model watered down, angering proponents of the proposal without necessarily winning over a majority.

An unsuccessful Voice referendum would also have grave consequences for the prospects of reconciliation with First Nations peoples. Noel Pearson addressed the pressing need for true and long-lasting reconciliation in his 2022 Boyer Lectures titled "Who We Were and Who We Can Be".[18] Linda Burney has said the consequences of an unsuccessful referendum would amount to a "major blow" and be "damaging" to the reconciliation cause, while noting it would not be fatal but deeply injurious.[19] Thus, the impact of an unsuccessful referendum would not be contained to constitutional implications but extend to core challenges facing our nation such as reconciliation.

Not only would the *Constitution* remain silent and inadequate on the recognition of, and a Voice for, First Nations peoples, but an unsuccessful referendum would also erode confidence in constitutional reform. The difficulty of achieving a successful referendum, on any topic, would yet again seem insurmountable and there would likely be a significant time delay before another attempt at constitutional change. After all, Australia has had to wait 24 years since the last (unsuccessful) referendum. Likewise, the mantra that constitutional change can only occur in Australia with clear bipartisan support by the major political parties would take deeper root, potentially deterring other attempts to change various aspects of the *Constitution*. This outcome would leave the flaws in the nation's foundational document preserved in aspic; Australia would remain, as Geoffrey Sawer concluded, constitutionally speaking a "frozen continent".[20] This resonates with the conceptualisation of movement in Australia's *Constitution* and the tension with it stagnating.[21] If the public and political parties lose confidence in our ability to change the *Constitution*, it will inevitably extend the period of inertia.

In 1999, a referendum to insert recognition of First Nations peoples into the Preamble of the *Constitution* (and for Australia to become a republic) failed.[22] The Preamble insertion was resoundingly rejected by the Australian voters. In fact, the national vote in favour of the Preamble question, at just under 40%, was the tenth worst result of all the 44 referendum questions which have been placed before Australian voters.[23] All similar suggestions of a constitutional statement, in the Preamble or elsewhere in the *Constitution*, have since been repeatedly rejected by First Nations peoples as empty, symbolic, and performative measures without substance. Any subsequent attempt by an Australian government to attempt preambular reference to First Nations peoples is again likely to be rejected by the very people it is seeking to include.

There Will Be a Drift away from Co-operative Federalism

The second public law outcome of an unsuccessful referendum would be a significant cleavage between the Australian States and Territories on questions of First Nations rights and a drift away from

[17] While Ireland may be an example of a different outcome being achieved on the same constitutional referendum topic (abortion) over time, the nature of the questions posed in 1983 and 2018 was substantially different. See generally Luke Field, "The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date" (2018) 33(4) *Irish Political Studies* 608. Sometimes mischaracterised as referenda, in 1916 and again in 1917, the then Australian Prime Minister, Billy Hughes, conducted two plebiscites on conscription, despite the government having legal authority for conscription. In both plebiscites, the no campaign triumphed narrowly.

[18] Noel Pearson, "Noel Pearson Is Hopeful for Indigenous Recognition through a Voice to Parliament in Boyers Lecture", *ABC News*, 6 November 2022 <https://www.abc.net.au/news/2022-11-06/boyers-2022-noel-pearson-indigenous-recognition-voice-parliament/101607224>.

[19] Linda Burney, "Reconciliation Will Be Damaged if Voice Fails", *The Age* (Melbourne), 20 November 2022.

[20] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

[21] Jonathan Crowe, *Australian Constitutional Law: Principles in Movement* (OUP, 2022).

[22] See generally Helen Irving, "The Republic Referendum of 6 November 1999" (2000) 35(1) *Australian Journal of Political Science* 111, 111.

[23] Irving, n 12, 111. See also AEC, *AEC 1999 Referendum Reports & Statistics* <https://www.aec.gov.au/elections/referendums/1999_referendum_reports_statistics/summary_preamble.htm>.

co-operative federalism towards competitive federalism. Following any unsuccessful Constitutional referendum, public, academic, and media attention would inevitably focus on which jurisdictions supported the proposal and which did not. In fact, such analysis was conducted even following the successful 1967 referendum question on First Nations peoples, to determine where the "heaviest no vote" was in Australia.[24] Similarly and more recently, the Australian Electoral Commission published a detailed analysis of the voting in the 1999 Preamble referendum, which revealed Queensland as the State with the lowest yes vote (32.81%) and then moved beyond the State level to detail the vote in every federal electoral division.[25]

The exposed distinction between supporters and opponents of the Voice could perhaps call into question the coherence of our federation,[26] and render stark the differences between us. Following the Australian Marriage Law postal survey (also known as the same sex plebiscite) held in 2017, sophisticated analysis was published that matched voting outcomes in each federal electorate with data available from the national census.[27] This data-matching, reflecting what is done now after national and State elections, enabled conclusions to be drawn about the social characteristics which exerted a strong influence on the voting outcome.[28] Those States and Territories, and even electorates, in which a majority of voters did not support the Voice would be plain for all to see. What would it mean for young Aboriginal and Torres Strait Islander men and women, boys and girls, to discover that many of their neighbours voted no?

In the wake of an unsuccessful referendum vote, some States and Territories might pursue, or continue, reforms. This has the worrying potential of resulting in First Nations people in different parts of the country potentially being accorded different rights, causing inconsistency.

Those States and Territories which did pursue reform would become the leading sites for innovation, evidenced through the treaty processes already underway in some jurisdictions.[29] Such a development would echo the contention advanced by Dani Larkin, Harry Hobbs, Dylan Lino, and Amy Maguire that the Australian States, rather than the Commonwealth, have become the main sites for law reform advancing First Nations interests.[30] State and Territory reforms are significant and valuable, but they lack the enduring force of federal constitutional enshrinement and could not help develop a coherent national narrative. Additionally, Megan Davis has argued:

> The uncoordinated pursuit of treaty across the federation creates a quandary for Aboriginal and Torres Strait Islander peoples. There is a real risk of further embedding the current power imbalance that the *Uluru Statement from the Heart* singled out as *the torment of our powerlessness*.[31]

This fracturing of a national approach is exceptionally impactful for First Nations Peoples as Davis has explained. The disadvantages faced by those in slower-paced States and Territories is doubly harsh. The drag of a defeated referendum might even sap energy and aspiration from State and Territory treaty processes. They could merely become a vehicle for service delivery in return for community commitments, extending the recent trend of providing social security payments in return for "mutual obligations". Such a pattern would need to be guarded against.

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[24] "Heaviest No Vote From Country", *The Sydney Morning Herald*, 29 May 1967 <https://aiatsis.gov.au/sites/default/files/catalogue_resources/21470.pdf>.

[25] AEC, n 23.

[26] See generally Stephen McDonald, "Federalism and a First Nations Voice" (2023) 34 PLR (forthcoming).

[27] Ian McAllister and Feodor Snagovsky, "Explaining Voting in the 2017 Australian Same-Sex Marriage Plebiscite" (2018) 53(4) *Australian Journal of Political Science* 409.

[28] See, eg, Adrian Beaumont, "Final 2022 Election Results: Coalition Routed in Cities and in Western Australia – Can They Recover in 2025?", *The Conversation*, 28 June 2022 <https://theconversation.com/final-2022-election-results-coalition-routed-in-cities-and-in-western-australia-can-they-recover-in-2025-184755>.

[29] For example, in Victoria the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) was Australia's inaugural First Nations Treaty law, while South Australia has become the first State to legislate the establishment of a First Nations Voice to Parliament with the *First Nations Voice Act 2023* (SA).

[30] Dani Larkin et al, "Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States" (2022) 41(1) *University of Queensland law Journal* 35.

[31] Megan Davis, "Voice, Treaty, Truth", *The Monthly*, July 2018.

While past failed referendums have not meant the government that proposed it was voted out at the next federal election, a weakening of the unity of purpose in Australia would be damaging for our federation and national narrative. The result would demonstrate that people in different States and Territories approach issues related to First Nations differently, undermining a sense of national cohesion and shared purpose.

There Will Continue to Be a Sustained Absence of Expert Cultural Advice in Government Decision-making

The third public law outcome of an unsuccessful referendum is the continuation of the sustained absence of structured, expert cultural advice in government decision-making. Thus, there are administrative as well as constitutional law implications, which would flow from an unsuccessful referendum. The need for culturally informed advice to the Executive will not abate if the referendum is unsuccessful. It is the Executive who maintains primary responsibility for the formulation and delivery of programs for First Nations peoples.

One of the goals of administrative law is improved government decision-making. Ideally, best practice decision-making about any particular group in society should only occur after extensive consultation with diverse representatives of that group. This can be articulated as "not about us without us". The Voice provides the means for an enduring arrangement to ensure that First Nations peoples are always included and can provide advice about decisions which affect them. The *Uluru Statement* was signed by over 350 delegates from more than 100 nations, following a regional dialogue process engaging approximately 1,300 First Nations peoples, 60% of whom came from traditional owner groups.[32] To lose the opportunity of this significant consultative mechanism would not obviate the need for consultation. It simply means that an alternative would need to be developed. Inevitably, any alternative would not be as diverse, representative, and so well supported by the communities it would be seeking to embody.

Linda Burney has explained that one of the design aims in the creation of the Voice to advise both the Parliament and the Executive is "to make sure the decisions that we make are better decisions".[33] Thus an unsuccessful referendum will result in a weakened normative impact as the promise of enhanced, tailored, and culturally responsive First Nations decision-making would not be realised.

Other administrative law consequences of an unsuccessful referendum could arise from the common law evolving to oblige consultation by the government with First Nations peoples on decisions and issues affecting them. This duty to consult, and where possible to accommodate First Nations peoples, has been increasingly recognised by the Canadian Supreme Court as an essential part of the requirements of procedural fairness.[34] Procedural fairness compels a government to consult and facilitate the participation of those affected by government decisions.[35] The duty of procedural fairness is context specific and highly nuanced.[36] Considered broadly, it may extend to requiring responsive action or the adaptation of proposed decisions.[37] The Voice was designed as an integral part of institutional machinery to advise the government, and its absence would leave a continuing void in government decision-making processes that would need to be addressed in some way. Alternative mechanisms for consultation with First Nations peoples would be necessary, but concerns would remain as to whether an alternative body or process would be a permanent feature of our Australian public law landscape.

A final administrative law consequence of an unsuccessful referendum would be the lost opportunity for improved accountability of government decisions. As Megan Davis has explained "a Voice …

[32] Davis, n 31.

[33] Burney, n 19.

[34] See *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 and *R v Sparrow* [1990] 1 SCR 1075.

[35] *Kioa v West* (1985) 159 CLR 550; Justice Alan Robertson, "Natural Justice or Procedural Fairness" (2016) 23(3) AJ Admin L 155, 156.

[36] *Kioa v West* (1985) 159 CLR 550; James Edelman, "Why Do We Have Procedural Fairness?" (2016) 23 AJ Admin L 144, 144.

[37] Andrew Edgar, "Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step towards Public Consultation" (2014) 33(1) *University of Tasmania Law Review* 56.

will not be another layer of bureaucracy", rather a Voice "will hold the bureaucracy to account", it "will reduce waste and make sure policies actually work".[38] Government accountability is a key driver of administrative law and public law more generally. In the area of decisions affecting First Nations peoples, the already existing accountability mechanisms (potentially judicial review, merits review, Ombudsman, and freedom of information) would have been augmented by the creation of the Voice. Should the referendum not succeed this additional forum for accountability will not be realised.

Further, without the structural reform of the Voice, Australia's general ad-hoc approach to consultation would continue to be out of step with international law and international practice. This is specifically regarding the *International Convention on the Elimination of Racial Discrimination* (*CERD*),[39] and the need for consultation when implementing "special measures" – such as those implemented with respect to First Nations peoples. The need to consult pursuant to the *Racial Discrimination Act 1975* (Cth) was explicitly rejected by the High Court in *Maloney v The Queen*,[40] on the basis that the requirement was set out in the *CERD* Committee's non-binding recommendations, rather than in the Convention.[41] This interpretation means that Australia's current practice on consultation is out of step with international law and international best practice.[42]

Progress towards the other two aspects of the *Uluru Statement* – Treaty and Truth – could conceivably continue without an embedded structural foundation, but the alternative underpinning foundation to support these initiatives would be weaker. For this reason, I uphold the sequencing in the order proposed as a core first step. Similarly supporting the sequencing laid out in the *Uluru Statement*, was Justice Francois Kunc, writing as editor of the *Australian Law Journal*, who stated:

> Constitutional amendment and then legislation of the Voice can be done much more quickly than the processes around treaty and truth-telling. For example, the work of a Makarrata Commission will take years.[43]

Should the referendum not succeed, yet again, First Nations peoples would be unwillingly placed in the position of ultimately relying on the benevolence of government for the future progress of long-term structural reform. However, the appetite of any future government to undertake even more ambitious reforms, such as a national Treaty, would likely be diminished by the apparent lack of popular support implied by the referendum's lack of success. Additionally, as a nation, Australia could lose some energy and drive for reform in complex matters generally. Federal governments have at times been wary about taking on big reforms, fearing that complex changes that require time to explain and implement will only alienate voters. An unsuccessful Voice referendum would likely reinforce this overly cautious approach, leaving important challenges unaddressed.

The issue of Treaty has featured prominently in the public debate surrounding the Voice referendum. The *Uluru Statement* calls for a Makarrata Commission to be established "to supervise a process of agreement-making between governments and First Nations and truth-telling about our history". While

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[38] Josh Butler, "Final Voice Referendum Wording and Constitutional Amendment 'Very Close'", *The Guardian Australia*, 22 March 2023 <https://www.theguardian.com/australia-news/2023/mar/22/final-voice-referendum-wording-and-constitutional-amendment-very-close>.

[39] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[40] *Maloney v The Queen* (2013) 252 CLR 168; [2013] HCA 28.

[41] See Simon Rice, "Case Note: Joan Monica Maloney v The Queen [2013] HCA 28" (2013) 8(7) *Indigenous Law Bulletin* 28; Patrick Wall, "Case Note: The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in Maloney v The Queen [2013] HCA 28" (2014) 15(1) *Melbourne Journal of International Law* 228.

[42] Rachel Gear, "Commentary: Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of Maloney v The Queen" (2014) 21 *James Cook University Law Review* 41, 64; Harry Hobbs, "First Nations, Settler Parliaments, and the Question of Consultation: Reconciling Parliamentary Supremacy and Indigenous Peoples' Right to Self-determination" (2021) 58(2) *Osgoode Hall Law Journal* 337, 359, 362.

[43] Justice Francois Kunc, "As the Debate Continues, Some Observations about The Voice to Parliament" (2023) 97 ALJ 155, 155–156.

the creation of this body could occur independently of the referendum outcome, structural initiatives would still be needed.[44] For example, it would be necessary for a representative body of First Nations peoples to be established so that it could speak with authority in negotiations for a Treaty. Coherence in the institutional landscape would be at risk. As State and Territory treaties develop, it is possible that these treaties might recognise different rights and express obligations differently to other treaties, leading to a confusing and inconsistent overall result.

Likewise, the *Uluru Statement* request for "truth-telling about our history" could occur without constitutional enshrinement of the Voice. The sequencing in the *Uluru Statement* was deliberate, with truth-telling intentionally listed as the last of three reforms. This is because there have been official attempts at truth-telling in the past, such as the Royal Commission into Aboriginal Deaths in Custody,[45] and the *Bringing Them Home* report which concentrated on the Stolen Generations.[46] First Nations peoples want the truth not only to be told, but more importantly, to be acted upon.[47] That there are unimplemented recommendations from both of these reports remains a source of frustration and disappointment, hindering the healing of First Nations peoples.[48]

Perhaps then if the Voice was not created, the better approach might be to focus on truth-telling by First Nations peoples themselves, rather than relying on more government initiated and led processes.[49] Yet another option, would be a First Nations led formal truth and reconciliation commission such as those in South Africa and Canada.[50] Done well, these processes can assist in healing and confronting the truths of past actions and policies. But these forums take time and to be meaningful, all calls for action must be adhered to.

Conclusion

The *Uluru Statement* has been ascribed by Dani Larkin and Kate Galloway with the status of being an "important part" of Australia's public law,[51] moulding into a "central pillar in a truly pluralistic Australian public law".[52] They assert it amounts to "a vital opportunity to integrate Indigenous law into an otherwise settler legal system".[53] But should the referendum not succeed, the Voice could enter the public law lexicon as an example of a failed public law reform. According to Larkin and Galloway:

> As long as Australia maintains institutional structures designed to exclude the voices of Indigenous communities, we remain ill-equipped to support communities to solve the complex problems they face.[54]

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[44] Shireen Morris and Harry Hobbs, "Imagining a Makarrata Commission" (2022) 48(3) *Monash University Law Review* (Advance Online) 1, 6–7.

[45] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). See also Patrick Dodson, "25 Years on from Royal Commission into Aboriginal Deaths in Custody Recommendations" (2016) 8(23) *Indigenous Law Bulletin* 24; Elena Marchetti, "The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody" (2006) 33(3) *Journal of Law and Society* 451.

[46] RD Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997).

[47] Gabrielle Appleby and Megan Davis, "The Uluru Statement and the Promises of Truth" (2018) 49(4) *Australian Historical Studies* 501, 502.

[48] Appleby and Davis, n 47, 508.

[49] A contemporary example of truth-telling on an individual level might be the *Dark Emu* book by Bruce Pascoe, which detailed historical practices of First Nations peoples. See Bruce Pascoe, *Dark Emu* (Scribe Publications, 2018).

[50] In South Africa, refer to the seven volumes of the Truth and Reconciliation Commission's Final Report <https://www.justice.gov.za/trc/report/index.htm>. In Canada, refer to the various reports issued by the Truth and Reconciliation Commission <https://nctr.ca/records/reports/#trc-reports>.

[51] Dani Larkin and Kate Galloway, "Uluru Statement from the Heart: Australian Public Law Pluralism" (2018) 30(2) *Bond Law Review* 335.

[52] Larkin and Galloway, n 51, 336.

[53] Larkin and Galloway, n 51, 336.

[54] Larkin and Galloway, n 51, 344.

The failure of the Voice referendum would inevitably have negative ramifications. This article has set out how these negative impacts could unfold in legal terms. However, these should not be considered as a justification for not pursuing the Voice now, but rather should be thoughtfully considered as part of the referendum debate. The Voice referendum is not a binary choice between practical reconciliation with First Nations peoples and structural reform. It is possible, and indeed necessary, to act on simultaneous fronts. Equally, claims that the process is being rushed or that not enough detail is available, do not accord with the public record of First Nations appeals and the long history of expert consideration.[55]

The referendum process itself could have a positive normative benefit by providing civic information and stimulating public debates. This could in turn improve knowledge about Australia's true history and enhance public literacy about our constitutional structures. It must be said that the debate could also see the spread of misinformation, clouding rather than illuminating the issues at hand.

All will not be lost should the referendum not succeed. As explained by Mary Graham, First Nations cultures are founded in relationality, both to other people, the land, sea, animals and plants.[56] This will endure. The next generation of First Nations people who are "wave makers" (as described by Watson) will need to move to the front and drive change.[57] They will build on the work of Elders who have accomplished great things, but who will feel the brunt of a lost referendum. For example, Noel Pearson has publicly stated that he will return to country, "fall silent", and step away from the national scene in the event of an unsuccessful referendum.[58] In a similar vein, Marcia Langton has said she will stop agreeing to deliver Welcomes to Country.[59]

Great change is not without risk. But that is not a reason for retreating fearfully and not trying to do something that matters. If the necessary support is not attained and the referendum is unsuccessful, Australia could lose some of its cohesion, our institutions and processes would require re-examination, and our reputation on the international stage would be tarnished.

Sometimes a nation is given a chance to do something meaningful which will have a lasting impact and help address longstanding and deep wrongs. As a legal academic and a proud Indigenous woman, I hope we do not miss this chance.

[55] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People, *Final Report* (Commonwealth Parliament, 2015); Referendum Council, *Final Report of the Referendum Council* (Commonwealth of Australia, 2017); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Commonwealth Parliament, 2018).

[56] Mary Graham, "Aboriginal Notions of Relationality and Positionalism: A Reply to Weber" (2014) 4(1) *Global Discourse* 17.

[57] Watson, "Aboriginal Recognition", n 4, 18.

[58] Noel Pearson, "Noel Pearson Says He Will 'Fall Silent' if Voice Referendum Fails", *ABC*, 20 February 2023 <https://www.abc.net.au/news/2023-02-20/pearson-says-he-will-fall-silent-if-voice-referendum-fails/102000768>.

[59] Marcia Langton, "Vote No and You Won't Get a Welcome to Country Again", *The Weekend Australian Magazine*, 18 April 2023 <https://www.theaustralian.com.au/weekend-australian-magazine/marcia-langtons-fight-to-be-heard-reaches-its-crescendo-with-indigenous-voice-to-parliament/news-story/c49338fbc21b72a9c012d65bc8eafda4>.