Editorial

As these words are being written in the morning of 30 August 2023, news reports indicate that later today Prime Minister Anthony Albanese will announce the date of the referendum on whether Australia should establish a First Nations Voice to Parliament in the Constitution. By the time you are reading this, the outcome of the referendum will be known. At this stage, one thing seems certain: the Voice referendum, whether it passes or fails, will be a notable historical event. It will join the 1967 referendum, the Yirrkala bark petitions, the National Apology, the Closing the Gap framework, and many others on the long and still evolving timeline of interactions between Australia and the First Nations Peoples who have called it home since time immemorial.

On that timeline, the Stolen Generations stands as one of the greatest injustices. For a period of over half a century, children of Aboriginal and Torres Strait Islander descent were involuntarily removed from their families, stripped of their cultural connections to country, forbidden to practice customary folkways and spirituality, forcibly converted to Christianity, and often treated with neglect and abuse. In 1997, legal redress for the incredible traumas faced by the Stolen Generations was sought in the High Court in what became known as the *Stolen Generation Case*.[1] The High Court denied all of the plaintiffs' claims.

The 25th anniversary of the *Stolen Generation Case* passed last year, and one of its many unfortunate lingering effects has been in the area of law and religion. When the plaintiffs argued that the guarantee of freedom of religion in s 116 of the Constitution was violated by the Commonwealth and Northern Territory through their involvement in suppressing Indigenous spiritual beliefs and practices, a majority of the High Court held that only laws with the *purpose* of prohibiting freedom of religion could be found invalid under that provision. The decision has been widely condemned by lawyers and scholars on every side of the political spectrum for essentially neutering one of the few explicit rights guarantees in the Australian Constitution — and more so, a right that is fundamental to the well-being of a pluralist democracy.

A combination of the Voice referendum and the anniversary of the *Stolen Generation Case* made it natural that the Special Topic Forum for this instalment of the *Australian Journal of Law and Religion* would be 'Indigenous Spirituality and the Law'. In this issue, Darshan Datar highlights the shortcomings of the High Court's approach to s 116 and suggests that, if passed, the Voice could provide a 'disaggregated' way for Indigenous spiritualities to be protected in Australia through legislative (instead of judicial) means. Ivan Ingram writes about First Nations' spirituality in the context of native title as recognised by the High Court in *Mabo*.[2] He makes the crucial point that the existing native title system can add to the invidious legacy of colonialism by denying recognition to a First Nations' People *because* so much of their cultural knowledge has been destroyed during colonisation. Laura Rademaker provides an insightful contribution about how Australian law has treated the compatibility of Christianity with Indigenous spirituality. Moving to Indonesia, Samsul Maarif discusses a landmark court decision which insisted that Indigenous spiritual beliefs should be given equal legal treatment alongside the country's six "official" religions—but also how enforcing that court decision has not been easy. Together, these contributions make it clear that even in the 21st century, the legal systems of the two countries have a long way to go in recognising and protecting the cultural and spiritual beliefs and practices of Indigenous Peoples.

[1] See *Kruger v Commonwealth* [1997] HCA 27 ('*Stolen Generation Case*').
[2] See *Mabo (No 2)* [1992] HCA 23.

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The research articles in this issue display the breadth of scholarship that fits conceptually into the interdisciplinary scholarly area of 'law and religion.' Ysabel Andrea Abordo and Alex Deagon discuss the conceptual distinction between freedom of religion and freedom from religious discrimination, using the national controversy over the Morrison Government's Religious Discrimination Bill for context. Guy Baldwin's article will be of particular interest to constitutional lawyers, as he critiques the recent trend of arguments in support of using proportionality analysis for s 116. Samuel Blanch suggests that the common academic understanding of legal pluralism needs revision in his piece on Islamic law in Australia. Barristers David Goodwin and Paul Reynolds present an impressively detailed analysis of historical trusts, using Victoria as a case study, to illustrate how doctrinal and organisational differences between religious movements and denominations can affect property rights. Evidence and criminal law scholar Andrew Hemming covers the challenging legal issues that have arisen over the high-profile prosecution of the leaders and members of a small religious group in Queensland over the death of a child. With the addition of book reviews by Myriam Hunter-Henin and Benjamin Saunders, we are confident you will find something that merits your attention in the pages that follow.

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