



30th April, 2021

To whom it may concern,

My great-great grandfather, Sir Samuel Griffith, was one of the primary authors/drafters of the Australian Constitution. This submission in support of enshrining an Indigenous Voice to Parliament in the Constitution is written as a letter to Sir Samuel Griffith.

It is an extract from the book 'Unsettling Australian histories: Letters to ancestry from a great-great-grandson'.

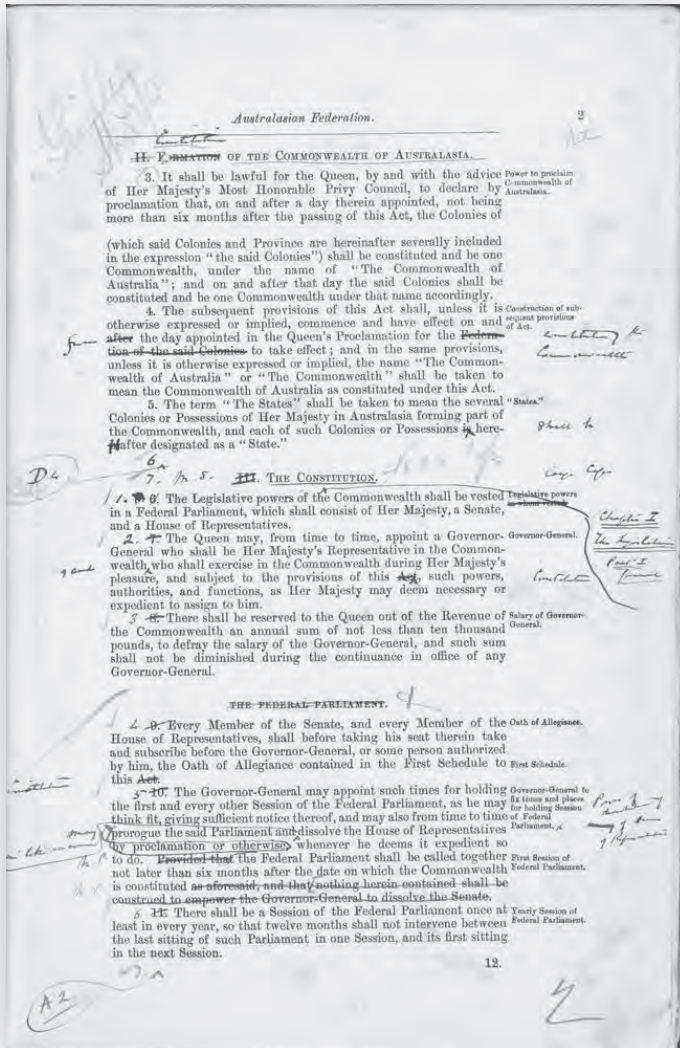
Yours sincerely,

David Denborough
Dulwich Centre Foundation

<https://dulwichcentre.com.au/product/unsettling-australian-histories/>

Dear Samuel,

Your name is most often mentioned these days in relation to the Australian Constitution, and your role in drafting and redrafting it.



Handwritten comments on Samuel Griffith's first proof of the Australian Constitution. State Library of New South Wales.

In 1891, while the shearers' strike was in full swing in Queensland, you were intensely involved in creating a draft of the Australian Constitution. From 23 to 25 March, in what has been described as 'an astonishing spurt of creativity, working late into the night', you produced a significant draft.¹¹²

there were no focus groups, no research papers, no staffers, no public servants, no secretaries, no proofers, no parliamentary counsel, no research assistants. A determined and able man simply picked up his pen, examined his colleagues' models, and wrote ... Of the Bill, Deakin remarked: 'as a whole and in every clause the measure bore the stamp of Sir Samuel Griffith's patient and untiring handiwork, his terse, clear style and force of expression.'¹¹³

Subject to other changes made in 1897–1898, it is true to say, as J. A. La Nauze said, that the 'draft of 1891 is the Constitution of 1900, not its father or grandfather.' Like Griffith's contemporaries, La Nauze considered that the major force behind the 1891 draft was Griffith. For his own part, Griffith praised Clark's draft as laying the 'original groundwork', and praised as well the drafting of Barton and Kingston.¹¹⁴

The reason the Constitution is under discussion now is because it's a matter of conscience:

At Federation in 1901, Aboriginal and Torres Strait Islander peoples were excluded from the

Constitution because we were considered to be a dying race. But in more recent times, Australia's conscience has begun to stir.¹¹⁵

Samuel, the last time our nation collectively engaged with the Constitution you drafted was in 1967. That was when the 'race powers' that you included in the Constitution were removed:

During the 1897 debates, the provision that came to be known as the races power was referred to as 'Sir Samuel Griffith's clause. He had a special knowledge of the matter,' and it was Griffith who proposed the inclusion of the provision.¹¹⁶

These provisions ensured that Aboriginal people were not counted in the populations of the states and that only the states (and not the Commonwealth Government) could legislate in relation to Aboriginal people.

The legislative power which remained exclusively with the States was utilised by a number of States, including most notably Western Australia, to pass appalling and egregious laws which discriminated against Aboriginal people. Those laws had many disastrous consequences, including the separation of Aboriginal children from their parents – a phenomenon which has become known as the Stolen Generations.¹¹⁷

Of course, as Helen Irving described:

there is no reason to believe that Commonwealth governments over this century would have passed more progressive laws in respect of the Aboriginal people than did the states (since they controlled the Northern Territory and still failed to do so until the 1970s).¹¹⁸

Samuel, three years before I was born, in 1967, the Australian people had a chance to vote on changes to the Constitution in the hope of improving the lives of Aboriginal people. As Larissa Behrendt has described, the result was overwhelming:

one thing that remains true is that never has a referendum had such an overwhelming ‘yes’ vote. The fact that 90.77 per cent of Australians voted for a change they believed would improve the lives of Indigenous people is something we should celebrate.¹¹⁹

After the 1967 referendum, the only two places where Aboriginal people were mentioned in the Constitution were removed. Which leads us to where we are now, Samuel: a national Constitution that is completely silent in relation to the original peoples of this land. It’s a situation that cannot last, and now, for the first time, a constitutional convention has been held by Aboriginal and Torres Strait Islander peoples. The result of this convention was the creation of the *Uluru Statement from the Heart*.¹²⁰ I think the best way for me to convey its significance is by quoting Thomas Mayor, a Torres Strait Islander man:

The *Uluru Statement from the Heart* was made through a process that imbued it with unprecedented cultural authority.¹²¹

The Referendum Council ran thirteen regional constitutional dialogues. The dialogues were managed, chaired and facilitated by locals. Dialogue participants were invited in accordance with a formula that required 60 per cent to be Traditional Owners for their cultural authority.¹²²

After travelling the country and involving over 1200 Aboriginal and Torres Strait Islander delegates, a national convention was convened:

Importantly, each dialogue would elect delegates to attend the culmination of the dialogues, one big national constitutional convention in the heart of the country at Uluru.¹²³

It was at this convention that the *Uluru Statement from the Heart* was endorsed as representing the views of the First Nations people of this land.

Samuel, I find it poignant to contrast the care and the inclusive process of the generation of the *Uluru Statement from the Heart* with the process of voting to determine whether Federation took place. That was an overwhelmingly white male affair. In the Federation referendums of the late 1890s, the only women and the only Aboriginal people who voted were in South Australia.

Several hundred Aboriginal men and women at Point McLeay Mission (now restored to its original name, Raukkan) were the only Aboriginal people to vote at the Constitution Bill referendums in the late 1890s.¹²⁴ I wonder if some of their descendants participated in the constitutional convention at Uluru?

No other Aboriginal people participated in any way in the process of generating the original Australian Constitution and issues pertaining to Indigenous Australia were hardly even discussed.

But now, over a century later, the First Nations of this land have spoken, and *The Uluru Statement from the Heart* makes three calls:

We call for the establishment of a First Nations Voice enshrined in the Constitution.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations

and truth-telling about our history.¹²⁵

Three ways forward: voice, agreement-making and truth-telling.

Samuel, if you are wondering how we got to this place, let me tell you about how the High Court, which you presided over as its first chief justice, has provided leadership far beyond that offered by political leaders.

I think about the Mabo decision and Wik decision. Samuel, I wish you could have been around on the days of those decisions. I would love to talk with you about both of them. I can almost imagine taking a walk with you out of the High Court and along the shores of Lake Burley Griffin in Canberra and hearing your reflections on those two monumental legal decisions.

Perhaps I can catch you up through the words of Henry Reynolds, the historian whose research assisted Eddie Koiki Mabo's case. From Henry Reynolds' perspective, the High Court's Mabo decision in 1992 was a 'legal revolution':

[The Mabo decision] overturned 200 years of settled jurisprudence ... The judgment was of crowning importance because it looked both forward and back ... The decision of the British Government to regard Australia as terra nullius was one of the most portentous in Australian history. The reverberations reached everywhere. The courts in both Britain and Australia maintained the fiction that Australia was acquired as a desert and empty land. It had not been gained by conquest or by cession and transfer of sovereignty by way of a treaty. All of this was to change in 1992 ...

The impact of [the Mabo decision] ... was manifest and immediate ... The Aboriginal tribes, the judges determined in a six-to-one majority, owned their

traditional lands. When they met invading settlers they were engaging in legitimate defence of their property rights. The settlers were not moving onto empty land. They were initially trespassers and ultimately usurpers. Aboriginal attacks were a means of legitimate resistance to theft ...

On land that had not been alienated from the Crown – and there was a great deal of it – Aboriginal rights could be presumed to exist as long as the traditional claimants could establish that they had maintained their association with the land. The Wik case of 1996 established that vestigial property rights could exist on land held under pastoral leases, which covered much of the great grasslands that had seen the enduring scenes of bloodshed during a large part of the 19th century.¹²⁶

Now that the High Court has established that this land was not terra nullius, and that Aboriginal and Torres Strait Islander people's legal rights were not extinguished by colonisation, having a Constitution that has no reference to First Peoples makes no sense*.

* I don't mean to romanticise the Mabo and Wik decisions. As Irene Watson (2015) describes, they left a great deal unanswered:

Post-*Mabo* there remains a limited understanding of the law-filled Aboriginal relationship to the natural world. While the High Court recognised an Aboriginal relationship to land, that recognition was translated at being at the lowest end of the property rights hierarchy, simply a beneficial right to use the land, and one which is open to extinguishment by the state. The High Court did not consider the sovereignty of Aboriginal law. (Watson 2015, 37)

But these realms are not only about logic or sense. The *Uluru Statement from the Heart* represents something much more to me. It represents an invitation to partnership, as Galarrwuy Yunupingu conveyed:

What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take that a step further and recognise us for who we are, and not who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.¹²⁷

Samuel, I experience the *Uluru Statement from the Heart* as an invitation to partnership:

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.¹²⁸

This invitation, I believe, is a chance for those of us alive to do our duty in relation to you, our ancestors. It is a chance for

us to work to redress histories, and we can't do this without partnerships.

The partnerships that shape all the work I am involved with are influenced by the ideas of Taimalieutu Kiwi Tamasese and the Just Therapy Team from Aotearoa, New Zealand:

we have developed partnerships across issues of culture and gender ... These are partnerships that are based on values of humility, respect, sacredness, reciprocity and love. They are also based on structures of accountability ... we have found it helpful to agree to creative forms of accountability that address our ... histories and consequent biases.

... These relationships sustain me. Sometimes there are difficulties but we all know that these are long-term committed relationships to one another. We know that in time the difficulties will be sorted out ...

These partnerships are urgently needed. Throughout the world, women and men from Indigenous cultures and from less developed countries are creating lives severely restricted by the effects of racism and grossly unjust distribution of resources ... Creating working partnerships across culture and gender is one way forward.¹²⁹

Such partnerships mean the world to me. As does the collective invitation offered by the First Nations of this land in the form of the *Uluru Statement from the Heart*.

Samuel, what's actually more confronting than facing the actions of my ancestors are the times when we, in the present, show complete lack of respect to First Nations people. It is beyond my comprehension that our government of the day – having established a process to explore constitutional recognition and requested Indigenous people to consult over its direction – completely disregarded the *Uluru Statement from the Heart*. What's more, this act of brutal disrespect was not done through a justification that Aboriginal people are a 'dying race', and nor was it done in any genuine fear – as my settler ancestors lived in genuine fear during the times of Frontier War. No, this act of banal racialised violence had little justification other than it was not seen by the Government as desirable or capable of winning acceptance at referendum.¹³⁰

Fortunately, the First Nations people of this land are wise, as Rachel Perkins explained:

The one thing we have learnt is not to give these statements to the government. They haven't earned the respect to receive them. When they rise to the aspirations in the *Uluru Statement*, then it may be given to them.¹³¹

The *Uluru Statement from the Heart* was not addressed to political leaders; it was addressed to us – the Australian people. So it is up to us to embrace it and accept its offer of partnership.

In doing so, perhaps we can leave different legacies for the future. Some are now dreaming of a new republic. Aboriginal historian Victoria Grieve-Williams has written about this dream in a journal, *Griffith Review*, that bears your name:

The time is ripe for a shift in activism to the achievement of a new Republic of Australia based on the sovereignty of Aboriginal people, the values and ethics embedded in their philosophy and the inherent value of their ways of living on this continent.¹³²

Samuel, at this time of profound opportunity, I will end this letter with two quotes. First, a quote from the *Uluru Statement from the Heart*. Second, a transcript from the National Australasian Convention Debates of 1891.

2017:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago. This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.¹³³

1891:

Sir SAMUEL GRIFFITH: We have to devise a constitution that will work, that will have within its bounds sufficient scope to allow of any developments.

... it is well to have a constitution so elastic as to allow of any necessary development that may take place.

Mr DEAKIN: Capable of being amended!

Sir SAMUEL GRIFFITH: Everything is capable of being amended.¹³⁴

Your words echo down the ages.

Your great-great-grandson, David