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Uphold & Recognise

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Discussion about constitutional recognition of Aboriginal and Torres Strait Islander peoples often focusses on righting the wrongs of the past, but there is also an obligation to uphold the traditions of Australian history—constitutional, legal and moral traditions. There can be no doubt that it is important to uphold the legacy of Sir Samuel Griffith and Sir Edmund Barton, which is a legal and constitutional tradition that dates from the colonial era. But it is no less important to uphold a moral tradition from that era, the legacy of Richard Windeyer. Australian public life has been afflicted, for some time, with the convict-era hardness of heart that Windeyer sees as the root problem in relations between Indigenous and non-Indigenous peoples in Australia. In our pursuit of unity, and the movement for recognition, non-Indigenous Australians need to alleviate this convict-like and unchristian hardness of heart and thereby satisfy the imperative issued by King George III back in 1787, namely "to live in amity and kindness with the natives."[i]

The Windeyer family

The Windeyer family enjoys a long and illustrious history in the Australian legal profession, and has produced lawyers including a colonial magistrate, a member of the New South Wales Legislative Assembly, a King's Counsel, an Attorney-General of New South Wales (twice-over), two judges of the Supreme Court of New South Wales, a High Court Justice, a Chancellor and a Deputy-Chancellor of the University of Sydney and several barristers and solicitors.

All Australian lawyers will be familiar with the name of the family's most illustrious member, Major General the Right Honourable Sir William John Victor Windeyer KBE CB DSO ED QC. Born in 1900, he is remembered for his contributions as a soldier, educator and Justice of the High Court of Australia. Among other academic accomplishments at the University of Sydney, he won the university medal for history. His book, *Essays in Legal History* (1938), was a staple of the curriculum at Australian universities for years.

Following the outbreak of the Second World War, Windeyer volunteered for overseas service and joined the Second Australian Imperial Force. He saw active service in the North African campaign at the siege of Tobruk and at El Alamein, in the New Guinean campaign and Borneo, and was twice awarded the Distinguished Service Order in recognition of gallant and distinguished services in the Middle East. In 1945, he was created a Commander of the Order of the British Empire. In 1950, he was promoted to Major General and was given command of the Second Division in New South Wales. In 1953, he was appointed Companion of the Order of the Bath for his military service to the Empire.

Upon returning to Australia after the war, Windeyer continued to practise as a barrister in Sydney, and was appointed to the High Court in 1958. He sat on the constitutional cases of *Browns Transport Pty Ltd v Kropp*[ii] and *Commonwealth v Butler*,[iii] his judgments in which have been cited frequently and approvingly since. Thus, the influence of his considerable jurisprudential intellect was felt, and he provided a well-known *obiter dictum* in the *Payroll Tax Case*.[iv] He was sworn of the Privy Council and appointed to the Judicial Committee in 1963, and sat on the High Court until his retirement on 29 February 1972.

Sir Victor's great great-grandfather, Charles Windeyer, was born on 1 July 1780 in Staffordshire, England. Following some training in law, Charles became a journalist and published the weekly *Law Chronicle and Estate Advertiser*. He became a parliamentary reporter for *The Times* and, later, the *Representative* (which soon ceased publication). By 1827, Charles had ten children to his wife Ann Mary, née Rudd of Rochester, of which Richard was the eldest. His career in journalism coming to a stall, Charles's thoughts had turned to New South Wales, where his friend, James Dowling, had been made a judge. In 1828, Charles left for Sydney with his wife and children; Richard stayed behind in England to complete his legal studies. Charles was eventually appointed senior police magistrate in 1839. Upon the birth of Sydney as an incorporated city in 1842, he was appointed its first Mayor.

Richard Windeyer, son of Charles, emulated his father's legal successes. Born in London, his early career was in journalism, writing for the *Morning Chronicle,* the *Sun*, and the *Mirror of Parliament*. He was admitted to the Middle Temple in 1829 and was called to the Bar on 23 May 1834. He was also, at that time, the London correspondent for *The Australian*.

It is difficult to describe to a non-Englishman the grip that Australia has on the imagination of a Londoner. The promise of sunny days and the "long lapse and drift" of Sydney social life, as described by D. H. Lawrence in *Kangaroo*, appeals to many that are subjected to London's dreary, rain-streaked skies. In 1835, Richard joined the rest of the Windeyers in Sydney. He built a successful practice as a barrister and established his reputation in the (now defunct) area of *Nisi prius*.[v]

The capital from Richard's legal success established his agricultural holdings in the Hunter Valley. By 1842, he held almost 120 square kilometres of land that supported cattle, horses and pigs. Richard was heavily involved in the social fabric of the New South Wales colony, not just as a lawyer, a pastoralist and member of the local agricultural society, but also as a member of Sydney Mechanics' School of Arts, the New South Wales Temperance Society, the committee of the Benevolent Society, the Australian School Society, and the Sydney Debating Society. He was also concerned about the relationship between the Colony of New South Wales and its Indigenous inhabitants, and he played a key role in the formation of the New South Wales Aborigines Protection

Society. This society was formed to provide a forum for discussions about the treatment of Indigenous people. Notices from meetings were frequently published in the *Sydney Gazette* and the *New South Wales Advertiser*. These meetings regularly hosted eminent guests to report on their work towards the improvement of the treatment of Aboriginal groups.

Richard Windeyer and the law's early encounters with Aborigines

The formation of the Aborigines Protection Society by Richard Windeyer and his colleagues reflects the historical mistreatment of Aboriginal people at the hands of the early colonial settlers. To explain this *merely* as an expression of a historically racist public culture is accurate, but it is not to the point. Following the Myall Creek Massacre of 1838, Windeyer defended the stockmen who were accused (and later convicted) of murdering Aboriginal women, children, and elders. But to appreciate the nature of his involvement, we shall first canvas a little of the early judgments in the legal history of colonial New South Wales.

The first record of an Aborigine being tried for murder in a colonial court is the case of *R v Hatherly and Jackie*, heard in the Supreme Court of New South Wales.[vi] The victim, John M'Donald, was guarding a Crown tobacco plantation at Nelson's Plain, 22 miles from the Settlement of Newcastle. M'Donald's corpse was found in a nearby lagoon, mangled and "exhibiting marks of a native atrocity."[vii] Two local Aboriginal men confessed. The question for the Court was whether the prisoners' admissions could be construed as confessions. It was held that they could not. The common law rules of evidence prohibited unsworn testimony.[viii]

As the related court papers of the time had it, the question was whether the confessions were admissible because non-Christian Aborigines could not give sworn testimony, being unable to swear on the Bible.[ix] This is consistent with Judge Advocate Atkins's infamous *Opinon*, in which he states that "the evidence of persons not bound by any moral or religious tie can never be considered or construed as legal evidence."[x] And this reasoning was confirmed in subsequent cases where the evidence offered by Aborigines could not be offered in court.[xi]

In *R v Ballard or Barrett*, an Aborigine known as 'Dirty Dick' was accused of murdering an Aborigine named Ballard.[xii] Forbes CJ delivered a judgment that Dirty Dick ought be released for want of jurisdiction, a view that Dowling J held was "most consentaneous with reason and principle."[xiii] Despite Dowling J's assessment, Forbes CJ's judgment relies entirely on "general principles," that is, theories of Man and natural justice that were in vogue in the nineteenth century. Lauren Benton describes Forbes CJ's judgment as expressing a "weak pluralism" that delegitimised Aboriginal customs and laws.[xiv]

It is at this point that we see Windeyer's first direct engagement with Aborigines, when he appeared in *R v Jack Congo Murrell*,[xv] in 1836. This is not, however, the case which made his involvement in Aboriginal affairs famous. In arguments from Counsel, the basis of the legal personality of Aborigines, and their relationship with the sovereignty of the Crown, finds its origins in social-contractarian theory. While acknowledging that encounters with settler law always result in Aboriginal persons being "deprived of their Aboriginality," Windeyer argued that the basis of the jurisdictional question lies in the lack of a reciprocal relationship of being "bound by laws that protect [Aborigines]" and having its basis in questions of sovereignty.

This reasoning is an echo of arguments in *Ballard*, where the social-contractarian language is clear as day:

> English law shall govern the colony, as well as interactions between settlers and the indigenous population, except when it is attempted to enforce the laws of a foreign country amongst a race of people, *who owe no fealty to us*, and over whom we have no natural claim of acknowledgement or supremacy.

The language of "owing fealty" is the issue upon which the question of Aboriginal testimony rests. It is also explicitly social-contractarian, drawing on the reciprocal relationship between fealty and protection. Aborigines owe no fealty to the English law, and from the perspective of the judiciary of the early colonial courts in New South Wales, these judgments could not therefore be allowed to continue as a matter of settled principle and were quickly overturned.[xvi]

The solutions that colonial courts arrived at, in order to regain jurisdiction over Aborigines, are highly strange. In *R v Lowe*, the Court was faced with the murder of an Aboriginal man, Jackey Jackey, who died whilst in military custody of Nathaniel Lowe, a colonial captain.[xvii] The defence argued that the Court had no jurisdiction to hear the case. The Court rejected this argument, however, on the basis that the murder took place in a colonial gaol: Lisa Ford suggests that Lowe's actions fell within the jurisdiction of the Court because "the crime was committed within the borders of the colony; or alternatively because, as a soldier, he was a servant of the Crown."[xviii] The outcome was that Lowe was acquitted on the basis of witness testimony. Yet the reasoning of the Court regarding jurisdiction over Jackey was far from clear: he was "a native under the protection of his Majesty … nor was there any fact from which the Court were to infer but that he was a subject of his Majesty," despite the precedents of *Ballard* and *Jackie*. The lack of clarity in the Court's reasoning, especially on the subject of Jackey Jackey's subjection to the Crown based on *lex loci*, meant that the jurisdiction of the Crown over Aborigines remained uncertain.

This ambiguity is exacerbated in *Kilmeister No 2,* where the Supreme Court of New South Wales attempted to resolve the jurisdictional problems regarding Aborigines.[xix] *Kilmeister No 2* was the second trial relevant to the

Myall Creek Massacre of 1838. A free settler, John Fleming, along with eleven accomplices went out to Myall Creek station with the intention of massacring the local Aboriginal people who lived there.[xx] Myall Creek sat upon the land of the Wirrayaraay people, at least two dozen of whom were butchered for no apparent reason. Myall sat far away from the proprietary interests of any of the murderers, and the Wirrayaraay people enjoyed an amiable relationship with Charles Kilmeister, who employed them, but who ultimately tuned on them and participated in the atrocity. Seven of the eleven accomplices, who were convict stockmen, confessed to the crimes after they were found guilty. Along with Kilmeister himself, they were then hanged for murder.

Windeyer appeared in defence of the accused. Initial newspaper clippings show that public support for the accused was high. Following the conviction of the stockmen, the judgment handed down by Burton J was published in the *Sydney Gazette* and drew significant public attention. It began by directly addressing the prisoners, "you are well acquainted with the law which says whoever is guilty of murder shall suffer death."[xxi] Burton J invoked the condemnation not only of the common law, but of divine law:

> This is no conventional law, no common rule of life formed for human purposes; it is founded on the law of God, which was laid down of old—"Whoso sheddeth man's blood, by man shall his blood be shed." No human legislature could dare depart from a law originating in the Deity, which has existed in its full force since the days of Adam.[xxii]

Moreover, his Honour later states that the seriousness of the crime was exacerbated by its being committed on the Sabbath, "the day which should be hallowed by all"—implying that this were somehow relevant to the murderer's guilt. Their killing is a "crime against God" and their punishment depends upon "natural justice" not "the laws that man has made for man," but "the common rule of life formed for human purposes."[xxiii]

It is important to note that contemporary obituaries of Richard Windeyer portray him as a humanitarian and friend of the Aboriginal peoples, despite his defence of the instigators of the Myall Creek Massacre. While his professional obligation as a barrister obliged Windeyer to represent any litigant who could pay the fee, his salary during the trial was paid by wealthy landowners who publically supported the murderers.

Burton J's judgment went far to redefine public morality about attitudes towards Aboriginal people. The judgment of Burton J communicated something that we would today accept as common sense: Aboriginal people were in need of protection from the murder and rapine of the settlers. Perversely, the public executions galvanised the New South Wales colony in the belief that all human life should be respected. And while massacres would occur well into the twentieth century,[xxiv] this was the beginning of what Windeyer would later refer to as the "whispering" in our hearts that change was needed. Indeed, in 1838, the year of the Myall Creek Massacre, Windeyer helped found the Aborigines Protection Society. The Society was formed soon before the two Kilmeister trials. It aimed to counter public support for the accused men.

The whispering in Windeyer's heart

At the time of the Society's foundation, Windeyer proclaimed, "If we have no right to be here, we have nothing to do but to take ship and go home." There was no middle ground for Richard when it came to Indigenous land rights, which we would now describe as 'native title,' and not simply because, by 1838, his family had been significant colonial land owners for ten years.

According to the 18 October 1938 edition of the *Sydney Gazette*, Richard held that the Aboriginal peoples did not have exclusive right to all of the Australian lands. He instead thought that the right "devolved upon him who should first cultivate it." This Lockean reasoning was, and remains, generally consistent with the broader jurisprudence of property law: those who work and improve the land have best title to it. Recall that this was more than a century before the High Court would consider the arguments put forward by counsel in the *Mabo* decision,[xxv] which departed from almost four hundred years of authority on the subject.

Indeed, the native title legislation following from Mabo is utterly beyond the legal imagination of Richard's day. Even his great-grandson, Sir Victor Windeyer, whose career on the High Court spanned more than a decade until 1972, was well before the time of native title jurisprudence. Jim Windeyer notes that Sir Victor's thinking does not radically depart from that of his forebear, which is apparent in Sir Victor's marking of passages in his personal copy of Sir Richard Blackburn's judgment in *Milirrpum v Nabalco Pty Ltd*[xxvi] and in his own judgment in the *Randwick Corporation Case*,[xxvii] in which he said:[xxviii]

> On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became vested in the Crown… The Colonial Act, 6 Wm. IV No.16 (1836), recited in its preamble that the Governors by their commissions under the Great Seal had authority "to grant and dispose of the waste lands"—the purpose of the Act being simply to validate the grants which had been made in the names of the Governors instead of the Sovereign. And when in 1857 a bold argument, which had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir Alfred Stephen CJ: *The Attorney-General v Brown*.[xxix]

In 1842, Richard participated in a debate on the advertised subject of "the rights of the Aborigines of Australia."

The next year, his political career began, with his successful election for the first New South Wales Legislative Council. (Windeyer polled 122 votes to Ogilvie's 77 and Lang's 55.)

The rights of the Aborigines of Australia

In 1844, Richard delivered a lecture, entitled "On the Rights of the Aborigines of Australia." Windeyer's argument is consistent with Justice Burton's judgment in *R v Murrell*.[xxx] According to Burton J, application of the common law in the colony was just on condition of two assumptions:

1. Australian land was "unappropriated by anyone" at the time of colonisation. Property rights thus support the application of the common law.
2. Aboriginal customs were "contrary to Divine Law." Divine Law, by implication, supports the common law.

Windeyer closely adhered to Burton J's judgment. He argued that colonial Australia did not (and could not possibly) infringe upon Aborigines' rights—the rights that Aborigines were "assumed to have in the soil of this country, in its wild animals and in the enjoyment of their own laws and customs"—because the common law was just on account of Christianity and Aboriginal customs were unjust. British colonists, according to Windeyer, promised "to render this continental island the abode of civilisation and Christianity."[xxxi]

Windeyer cited two conditions required for Aborigines to become proper legal subjects: an Enlightenment education, through which one forms a responsibility to "Man", and religion, through which one learns of one's responsibility to "God."[xxxii] "Man" and "God" are Windeyer's exact terms. This dualistic theme is repeated at the essay's conclusion, when Windeyer asks, "How is it our minds are not satisfied? What means this whispering in the bottom of our hearts?" The mind, in this context, is a thing formed via an Enlightenment education; the heart is explicitly religious. The colonists' hearts allegedly whispered, for even though their Aboriginal "brothers" lacked property rights, they nonetheless possessed "the great birth right of all," that is, an "immortal spirit." Windeyer believed that it was the colonists' "duty" to make their Aboriginal brothers *become* conscious of their dignity and thereby affirm "the holiness of the Mind," as distinct from the "unenlightened" mind.[xxxiii]

For this reason, one can cast doubt on a racial supremacist reading of Windeyer's distinction between "the Superior Intellect" and the "Inferior." It is an explicitly theological distinction. According to Windeyer's overall argument, it is not White that is superior to Black; but the legal institution and its subjects that are supported by "Divine Law" and Christianity that are superior to customs and proto-subjects that are "contrary to Divine Law" and unable to affirm "the holiness of the Mind."[xxxiv]

Australia's first Catholic Vicar-General, William Ullathorne, arrived in 1833, just a decade before Windeyer's lecture. He believed that the Indigenous population were less "monstrous" than the convict settlers. The need to remedy the plight of the Aborigines was inextricably linked, in his mind, to the need to remedy that of the convicts. It was thus not a racial concern; it was a theological, universalist concern—a matter of concern to "the whole human race," as Cardinal George Pell writes.[xxxv] The concern survives to this day: one of the Australian Catholic Church's mandates is to make known "to Aboriginal and Torres Strait Islander people the saving love of Jesus Christ for them" and to draw them "as brothers and sisters into the Kingdom of God's love and peace."[xxxvi] As Cardinal Pell explains, this mandate is consistent with the Church's defence of dignity, namely the dignity of God's Creation. "This whispering in the bottom of our hearts" is the voice of universal dignity.[xxxvii]

It is worth noting that James 'Jim' Brereton Windeyer, a great-great-grandson to Richard, published Richard's 1844 lecture together with extracts from reports of the Aborigines Protection Society. In his preface to those works, Jim discusses the publication in 2011 of Bill Gammage's *The Biggest Estate on Earth: How Aborigines Made Australia*. In this, Jim notes, Gammage asserts that Aborigines managed the land and the movement of both plants and animals within it, thereby calling into question the conclusion put by Richard. The focal point of Richard's legal argument in the 1844 lecture is that title to the land and animals was dependent on one's managing them by one's labour and that the Aborigines had not done this. According to Jim:

> Gammage reveals what a 19th Century English-trained lawyer based in Sydney in the 1840s, although someone with considerable land holdings, did not see. Perhaps [Richard] Windeyer did not want to see it but he did not shy away from the significant conclusion that the situation as he saw it imposed great moral obligations on the settlers.[xxxviii]

That is an important observation: despite his position of wealth, despite his historical position, and despite his defence of the Myall Creek murderers, Richard saw that the situation needed to change.

Richard Windeyer's 1844 lecture has received a number of contemporary citations. Historian Henry Reynolds's 1998 book, *This Whispering in Our Hearts*, takes its title from Windeyer's expression. In 2001, the short film, "Whispering in Our Hearts,"[xxxix] focussed on the stories of the people murdered at Mowla Bluff near Broome in Western Australia in 1916. The film makes extensive use of police documents and oral testimony. It draws on the theme of Richard's moral imperative by engaging the issues of murder, and the need to respond to murder by acknowledging the loss felt by Indigenous communities that suffered at the hands of settlers. In the film, an elder sits and describes (to the camera) the roles of the murdered people, who they were related to as siblings, parents,

grandparents. Often in the historical record of massacres, the victims are nameless and faceless. This was literally so, in the case of the Myall Creek massacre, where the stockmen beheaded their victims as a sign of disrespect. The human loss caused by massacres, because of the scale and acuity of such senseless violence, is obscured by the lack of public information that would do justice to the dignity of each victim. As the audience listens to the names of the massacred and the role they occupied in their mob, their identities become a litany of anguish. This gives back identity to the victims, giving names to the nameless. The volume of the elder's whispering belies the depth of the wound that it has inflicted on the heart of Australia's history.

Uphold & Recognise

In 2015, Damien Freeman and Julian Leeser, now federal member for Berowra, established Uphold & Recognise. It prosecutes the case that upholding the Constitution and recognising Indigenous peoples are desirable and complementary objectives. Part of this proposal has involved finding a solution that would give effect to Indigenous aspirations whilst anticipating and addressing the concerns of constitutional conservatives. Uphold & Recognise therefore works in the moral tradition of Richard Windeyer. It also operates in the constitutional spirit of Sir Samuel Griffith and Sir Edmund Barton, in that it seeks to ensure that any proposals to recognise Indigenous peoples within the Constitution would not disturb the way in which the Constitution operates, and would instead make Australia a more united and complete commonwealth than before.

A groundswell of support for practical change towards this more complete commonwealth has developed in the Australian Parliament for some years. In 2012, the Final Report of the Expert Panel on Constitutional Recognition of Indigenous Australians was presented to the Prime Minister, Julia Gillard. The Expert Panel's key recommendation of a racial non-discrimination clause was, however, roundly rejected. That same year, on the other side of the political spectrum, Tony Abbott, then Leader of the Opposition, contributed to the Second Reading debate regarding the *Aboriginal and Torres Strait Islander Peoples Recognition Bill*. Mr Abbott said:

> our challenge is to do now, in these times what should have been done 200 or 100 years ago to acknowledge Aboriginal people in our country's foundational document. In short, we need to atone for the omissions and for the hardness of heart of our forebears to enable us all to embrace the future as a united people.

The hardness of our hearts—convict-like and unchristian—is a crucial metaphor. The need to remedy this hardness is something that eminent Australians on both sides of the political spectrum now appreciate. As Lyle Shelton points out, the hardness is perhaps attributable to the early settlers' frontier mentality.[xl] There are other

honourable exceptions to this frontier mentality. John Forrest was Western Australia's first premier and great-great uncle of Andrew Forrest. In 1897, Forrest successfully advocated for the establishment of the position of Chief Protector as head of a new Western Australian Department of Aborigines responsible to the executive government.[xli] Forrest told the first Chief Protector, Henry Prinsep, to "get a firm grip on the question [of the treatment of Aboriginal people] and attend to it," in the belief that the new position would embody the benevolent paternalism of established, patrician settlers such as himself.[xlii] Various chief protectors spoke at the meetings of the Aborigines Protection Society, and the Chief Protector of Victoria, George Robinson, described their role thus:[xliii]

> That it is no less our interest than our duty, to raise their Moral and Civil Condition, by which alone mutual aggressions, which lead to the commission of the more revolting and atrocious crimes, can be restrained.

During the meeting at Sydney in 1838, Windeyer referred to Robinson, saying "the formation of this society [the Aborigines Protection Society] would induce the present local Government to protect them … by making *every magistrate* a protector," suggesting a particular role the judiciary might play in the protection of Aborigines, aside from the official office of Protector.[xliv] Windeyer also expressed a hope that Robinson might suggest a plan to the Government for the protection of Aborigines, and that it was "our duty to make the attempt."[xlv] Sadly, Windeyer failed to persuade Robinson, or even the Society, to such action. Robinson's handling of the protectorate's affairs was famously weak; the response of the Aborigines Protection Society was tepid.

Like his great-great nephew, John Forrest favoured the restricted interference in Aboriginal communities by the State, preferring to limit its role exclusively to protection. Reflecting on this history at an event held by Uphold & Recognise with Christian Porter and Ben Wyatt in early 2017, Andrew Forrest said that "to consult with Indigenous people," in short, "is to right that small wrong, which over time has become a very large wrong, of the failure to recognise Indigenous peoples in the original Constitution."[xlvi]

Hardness of heart and statements from the heart

After the Expert Panel's final report, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established to provide a parliamentary response to recommendations. Ken Wyatt, the first Indigenous member of cabinet, tabled its final report to Parliament on 30 June 2015. The Chair's foreword to the Report was consistent with Andrew Forrest's historical observation above, particularly the following passage:

> When the Constitution was drafted, the exclusion of Aboriginal and Torres Strait Islander peoples was remarkable for the time, as Aboriginal and Torres Strait Islander peoples were not considered citizens and had minimal rights and protections. However, the continued constitutional silence maintained by this exclusion *is* remarkable.[xlvii]

The Committee ultimately recommended that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Constitution to end that silence.

The Prime Minister, Malcolm Turnbull, and the Leader of the Opposition, Bill Shorten, established the Referendum Council in December 2015. Building on the work of the Expert Panel and the Joint Select Committee, the role of the Referendum Council has been to provide advice to the Prime Minister and Leader of the Opposition as to the most appropriate steps to take towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

The Uluru Statement from the Heart, released on 26 May 2017, in anticipation of the Council's report, was the result of the Referendum Council's consultations at least 1,200 Aboriginal and Torres Strait Islander leaders between 2016 and 2017. The meeting produced a historically unprecedented consensus: Indigenous peoples of Australia would like to speak. It articulated this desire through the call for "the establishment of a First Nations Voice enshrined in the Constitution,"[xlviii] as well as the formation of a Makarrata Commission to supervise a process of agreement-making and truth-telling about our history. Indigenous people maintain that they need to be heard and to be allowed to participate in the development of laws and policies that are made about them, and that this requires an amendment to the Constitution to create a guarantee that the future will be different from the past.

If the proposal for the Uluru Statement's First Nations Voice is to win the day, it must be legally elegant enough not to disturb the operation of the Constitution, while also being practical and modest enough to honour the Australian tradition of only allowing practical reform to pass the double-majority test at a referendum. This presents the key problem identified by Australian Catholic University's Vice-chancellor, Professor Greg Craven:

> In a historical context where Indigenous voices have never carried on the political wind, how do we structure the parliamentary system itself so they are routinely heard, if not reflexively obeyed?[xlix]

Craven leant support to Noel Pearson's advocacy for an Indigenous advisory body in *A Rightful Place*.[l] "Pearson's essay rightly lays great stress on the concept of responsibility," Craven stated, "the lack of which constantly has undermined the true destiny of Australia's Indigenous people."

The proposal for First Nations representation, authority and a voice in their affairs has in fact been viewed favourably for decades by Indigenous leaders. The idea of an Indigenous voice to Parliament was advocated by Fred Maynard, William Cooper, Doug Nicholls, the Bark Petitions, the Barunga Statement, the Larrakia Petition and many more, long before Noel Pearson came to prominence. It is a proposal with a long tradition of collaboration, vindicated by the consensus of the Indigenous leadership in the Uluru Statement from the Heart. Not all Indigenous people see this as the right way forwards; but the consensus at Uluru is something that hardened hearts can no longer afford to ignore.

Uphold & Recognise rallies goodwill in support of this eminently practical and modest amendment to the Constitution. Liberal MP Tim Wilson expressed his support in a way that upholds Windeyer's moral tradition and spurns convict-like disregard. "Throughout the journey I have been on with constitutional recognition," he said at an Uphold & Recognise event in May 2017, "I looked primarily at the issues of silence and illegitimacy that pervade our society."[li] On the importance of empathy as a unifying force in Australian public life, Wilson stated, "The process of constitutional recognition isn't simply about getting recognition of Aboriginal and Torres Strait Islander Australia; it is reciprocal. It goes both ways and provides a foundation for recognising European settlement from the past." Constitutional recognition thus designates a way forward for "our entire country."[lii]

As Julian Leeser writes, an Indigenous voice to Parliament "is the kind of machinery clause Griffith, Barton and their colleagues might have drafted, had they turned their minds to it. A machinery clause like this can sensibly sit in the Constitution, where it can have its intended practical effect."[liii] The proposal to recognise Indigenous peoples by giving them this voice in the parliamentary process, while also upholding the way in which the Constitution operates, has proven to be a popular one. Prosecuting the case at a referendum, however, will require that Australians see this as not only a practical way of redressing Indigenous disadvantage but also as an unprecedented opportunity to remedy our hardened hearts.

Conclusion

Richard Windeyer believed that the Aborigines had no native title rights but, nevertheless, the colonists had a moral obligation to Aborigines—an obligation that derived explicitly from Christian, universalist doctrine. Lyle Shelton traced this obligation back to 1768. That year, the President of the Royal Society of London, James Douglas, wrote to Captain James Cook and argued that to kill any indigenous population that the British might encounter "is a crime of the highest nature." "They are human creatures," Douglas asserted, "the work of the

same omnipotent Author, equally under His care with the most polished European."[liv] Shelton uses this to argue that both Enlightenment reason and the Divine, not just the former, are conditions of justice. He criticises "the prideful children of the Enlightenment who are happy to see God kept safely upstairs."[lv]

When Aborigines met Pope John Paul II at Alice Springs in 1986, they prayed to God as the Father of us all in the following words: "We ask You to help the people of Australia to listen to us and respect our culture. Make the knowledge of You grow strong in all people, so that You can be at home in us and we can make a home for everyone in our land." Major General Michael Jeffery, former Governor General, expressed hope that contemporary Australians will regain a connection to "the Judeo-Christian values of Western civilisation" *and* come to appreciate the "deep spiritual dimension" in Aboriginal cultures.[lvi]

As Cardinal Pell put it, the role of history is not to shame us, though it may sadden us to reflect on the acts of our forebears.[lvii] The role of history is to ask us to reflect on where we are *now*. "The time has come," His Eminence writes, for us to ensure that Australia and its Parliament listen to our Indigenous peoples and to ensure that they can feel at home in our land and in our Constitution. For this we must continue to pray. But we must also work earnestly to make it happen in our day." We will never become a complete commonwealth until we remedy our hardened hearts and start to listen.

Endnotes

1. See the introduction to D. Freeman and S. Morris (eds.), *The Forgotten People* (MUP, 2016), p. 3.
2. (1958) 100 CLR 117.
3. (1958) 102 CLR 465.
4. *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1.
5. *Nisi prius* is an obsolete term historically used at common law to denote a matter tried before a judge of the King's Bench Division in the nineteenth century, and in the early twentieth century for actions tried at assize by a judge given a commission.
6. *R v Hatherly and Jackie* [1822] NSWKR 10 (1 January 1823).
7. *Sydney Gazette and New South Wales Advertiser*, No 998, 2 January 1823.
8. L. Ford, *Settler Sovereignty* (Harvard University Press, 2010), p. 53.
9. Court of Criminal Jurisdiction, *Informations, Depositions and Related Papers, 1816-1824*, State Records NSW, SZ800 (no.1), p. 1.
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A NEW CALL to remember the moral tradition of Richard Windeyer

In this essay, David Allinson argues that although discussion about recognition of Indigenous Australians in the Australian Constitution often focusses on righting the wrongs of the past, there is also an obligation to uphold the traditions of Australian history. Whilst conservatives frequently assert the importance of upholding the legacy of Sir Samuel Griffith, which is a legal and constitutional tradition that dates from the colonial era, it is no less important to uphold the legacy of Richard Windeyer's 1844 lecture, *On the Rights of the Aborigines of Australia*, which is witness to a moral tradition that dates from the same era, and which can still inspire advocates for constitutional recognition of Indigenous Australians today.

DAVID ALLINSON is the Executive Officer of Uphold & Recognise. He was educated at St Peter's Lutheran College, Brisbane, the University of Queensland, from which he graduated with the degree of Bachelor of Arts with first class honours in philosophy, and the University of Melbourne, where he recently completely the requirements for the degree of Juris Doctor. He has previously served as an Aurora Project legal intern at Western Australia's Miriwoong Gajerawoong Aboriginal Corporation and a policy officer in the Queensland Government's Department of Aboriginal and Torres Strait Islander Partnerships, and has lectured and tutored on bioethics, philosophy, and practical ethics at the University of Sydney and the University of Notre Dame Australia.

UPHOLD & RECOGNISE is a non-profit organisation committed to its charter for upholding the Australian Constitution and recognising Indigenous Australians. It was established by Julian Leeser MP and Damien Freeman when Noel Pearson launched their monograph, *The Australian Declaration of Recognition: Capturing the nation's aspirations by recognising Indigenous Australians* on 13 April 2015. It strives to find an approach to constitutional recognition of Aboriginal and Torres Strait Islander peoples that addresses the concerns of commentators on the right and centre-right of the political spectrum. This approach is developed in *The Forgotten People: Liberal and conservative approaches to recognising indigenous peoples* (MUP, 2016), which is edited by Damien Freeman and Cape York Institute's Shireen Morris, and was launched by the Hon. Jeff Kennett AC on 1 June 2016. The second paper in the Uphold & Recognise Mongraph Series, Warren Mundine's *Practical Recognition from the Mobs' Perspective: Enabling our mobs to speak for country*, was launched by Tim Wilson MP on 19 May 2017. For more information, visit www.upholdandrecognise.com or contact the Executive Officer, David Allinson.

This Whispering in Our Hearts is the fourth paper in the Uphold & Recognise Monograph Series. It and the first three papers, Freeman and Leeser's *The Australian Declaration of Recognition,* Mundine's *Practical Recognition from the Mobs' Perspective*, and Sean Gordon's *Claiming the Common Ground for Recognition* can be downloaded from the Uphold & Recognise website.