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Poetic injustice as bid for Indigenous Recognition stalls

David Marr

The stalled Indigenous Recognition campaign needs more than pretty words to fix the damage of the 1967 referendum.

Seven years down the Recognition track and nobody knows what we're talking about. The government is silent. Labor is prevaricating. Indigenous leadership is splintering. Effigies are being burnt in the street. Ideologues of the radical right are threatening hellfire. The crowd is drifting away.

"My chagrin about where we are at the moment," says Noel Pearson, "is that I can't discern a strategy here." He doesn't underestimate the difficulties ahead but wonders if Tony Abbott and his government have what it needs to pull off a successful referendum that recognises the place of the Aboriginal and Torres Strait Islander peoples in Australia.

"We don't have Lyndon Johnsons around this country," says Pearson. "If you have ambitious agendas you've got to have that kind of political arsenal, that kind of capability, that kind of means. I'm concerned that I can discern no priority being given at the centre of the government to the construction of a very deliberate political plan for success."

Bare recognition is easy. Hardly anybody but Andrew Bolt opposes slipping a few lines of poetry into the constitution to acknowledge that Aboriginal and Torres Strait Islander peoples were the first inhabitants of this continent, possess an ancient culture and have a continuing relationship with the country, its lands and waters. A referendum about only that would be a pushover.

But Indigenous Australians want more. They want the discrimination of the past to be recognised, too, and plain guarantees to prevent it happening again. That calls for real change, for patching and welding the machinery of the constitution.

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"Whatever it is it's going to be substantive for the Aboriginal people," says Pat Dodson, former priest and former chairman of the Council for Aboriginal Reconciliation. "It can't be some wishy-washy, half-baked idea. Otherwise people will walk and it will fail and we as a nation will be ridiculed forever and a day."

Everyone involved in this process is afraid of failure. They know it would mean grotesque embarrassment. The national brand might never recover. But failure comes easy when trying to change the Australian constitution: in more than a century, 44 attempts have yielded only eight successes.

The iron rule of referenda Down Under is that we agree to change only when political leaders unite in assuring us there is nothing to fear and change will do us good. Bipartisan support is not always enough but it's absolutely necessary. That gives the Coalition and Labor each a power of veto.

But this time it's different. Offer Indigenous Australians only the bare minimum – a little poetry and scouring the constitution of racist language – and their leaders will walk. "You would have people like me campaign against it," says Dodson. "Quite seriously. In my view it would fail." The players, black and white, all agree: at this referendum, Indigenous Australia has a veto, too.

Lessons from 1967

Nineteen sixty-seven was a cock-up. It took a while for this to become clear, but cock-up it was. Though its leaders may be shy to put it quite this way, what Indigenous Australia wants from the next referendum is to fix the mess left by 1967.

True, it was a triumph of goodwill and political management. Hardly anyone, from coast to coast, voted against it and the original peoples of this continent were brought into the constitutional fold. But the power handed to the Commonwealth to make laws for "the people of any race" in 1967 proved to be a power that could be turned *against* Aborigines and Torres Strait Islanders.

The lesson took 30 years to be learnt in one of the great legal, media and political shit fights in the history of the Commonwealth, known as the Hindmarsh Island affair. This was provoked by the Howard government – with Labor's help – passing an act to override heritage objections by the Ngarrindjeri women of the Coorong to the building of a bridge to service new holiday homes on the island.

Once the High Court upheld the Hindmarsh Island Bridge Act, John Howard was free to gut the vastly expanded native title rights recognised by the same court's historic Wik decision. The long road that's leading some day to the Recognition referendum began with the "bucketloads of extinguishment" of Aboriginal rights Howard was able to deliver to the bush in 1998.

Embarrassed perhaps, Howard suggested some fine words about Aborigines and Torres Strait Islanders inhabiting the continent since time immemorial in the preamble put to the 1999

republic referendum. That failed. As he was about to leave politics, he promised yet another referendum, this time focused just on recognition. That might have died with him except that Julia Gillard failed to win a majority in 2010 and the independents made holding the referendum a condition of their support.

Dodson was co-chairman of the expert panel of lawyers, academics, businessmen, politicians and community leaders Gillard appointed to draft options for the referendum. Pearson was one of its 22 members. Fractious Indigenous leaders buried their differences. In a busy year of intense consultations, teams visited about 250 communities across Australia.

They discovered, particularly in the bush, little burning desire to be recognised. Many Indigenous felt the job had largely been done by 1967 and Kevin Rudd's apology to the Stolen Generations. What they wanted a referendum to do, reports panel member and Indigenous academic lawyer Megan Davis in the current *Quarterly Essay*, was "to ameliorate the unintended (or intended) consequences of the drafting of the 1967 amendment".

Pearson argued for a guarantee to be given in the constitution that the governments of Australia would not discriminate on the basis of race. Similar provisions are found in the constitutions of New Zealand, South Africa, India and Canada. Such a guarantee would square with Australia's obligations under international treaties.

But the panel was not convinced it was feasible. They feared it would provoke conservative critics to savage the referendum for the undemocratic ambition of planting human rights in the constitution. The argument is that this removes important issues from elected politicians and leaves them in the hands of appointed judges. Critics of these ideologues say they worship untrammelled power. Lately they have had the clout to see off all attempts to give Australia a national bill or charter of rights along American or European lines.

But in October 2011 when the panel commissioned Newspoll to assess public response to a long list of possible referendum proposals, they found to their surprise that the most popular of them all was a constitutional guarantee against racial discrimination: 80 per cent of those polled were in favour, with 64 per cent strongly so. This extraordinary level of support crossed all party lines.

The constitutional guarantee was also welcomed by Indigenous communities. Davis found few Aboriginal people who subscribed to the ideological contempt for constitutional rights. Even when she reminded them how often judges defer to politicians, "they still had more faith in the High Court than parliament: because it is expert, independent, unelected".

So along with poetic rhetoric celebrating Indigenous occupation and culture, and technical reworking of old clauses, the panel's recommendations published in January 2012 included a proposal for a new clause 116A: "The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin."

It was plain, direct and popular. It would protect all races, even the Dutch among us. But ever since those 21 words were put on the table, the recognition process has been in trouble. Along the ramparts of the right – Melbourne think tanks, the opinion pages of News Corp papers and talk-show television – warriors thundered against this privilege being offered to Indigenous Australians.

The panel was shocked by the savagery of the response. Gillard ducked and wove. She didn't disown but never quite backed 116A. She promised a referendum and then reneged. Delay did not disappoint the panel. They had urged her not to rush. There were those on the panel who believed that even by this point – less than two years into her prime ministership – Gillard didn't have the authority to take the nation with her on this.

There is a second iron law of referenda that comes into play here: conservative parties have only ever backed one Labor proposal to change the constitution. They fought and defeated all the rest. In the grimly combative atmosphere of Canberra as the 2013 election loomed, Abbott was reckoned more than likely to tear the referendum to shreds. Better to wait for his time to come.

No answer in sight

Talking the talk has never been Abbott's problem: "We have never fully made peace with the First Australians. This is the stain on our soul." At the launch of his 2013 campaign, he promised to put Indigenous recognition at the centre of his first-term agenda. He promised we would by now have what everyone acknowledges is necessary for the referendum campaign to *begin* to gain traction: the words of the changes proposed.

That hasn't happened. Abbott still has to decide what he and his government mean by recognition: poetry, protection or both? And there is no sign a hard answer to that is anywhere in sight.

Abbott has ruled nothing out. "We have some reservations about anything that might turn out to be a single-issue bill of rights," he remarked when the expert panel released its recommendations. But he has not rejected guarantees against discrimination outright. There are ideologues in the Coalition who oppose the whole recognition process, who despise human rights guarantees or loathe Aborigines. And perhaps all three. Yet 116A is still on the table, still a possibility.

Only the Greens are unequivocally backing the guarantee. Bill Shorten is pussyfooting on the issue just as Gillard did. "We need substantive and substantial change," he told the crowd at this year's Garma Festival in north-east Arnhem. "Symbolic change is not good enough." But he pointedly didn't endorse 116A.

What he delivered instead was poetry: "Imagine striking out old laws tainted by imperialism and prejudice – and replacing them with a safeguard against racial discrimination. What an uplifting moment for all Australians – not just our Aboriginal and Torres Strait Islander brothers and sisters…"

Those brothers and sisters, meanwhile, are left to watch white politicians dither. Indigenous Australia told the expert panel what it wanted. The panel responded with 116A. There is no sign Indigenous Australia has changed its mind. But they are not being consulted about alternative proposals.

"It would be a terrible thing for us not to know where the blackfella stood on the question," says Pearson. "I think that would be a shadow on any achievement."

Pearson is a lawyer. He reckons the ideological objection to judges deciding questions of human rights is nonsense. It comes out of the American right, has gained great influence in the world but sits uneasily in a country such as Australia with its "naturally benign English common heritage of judge-made law. You don't have Mabo if you don't have a heritage of judge-made law."

But his political reading is that the objections of the constitutional conservatives to guaranteed rights "will be quite serious if not fatal". So he is developing what he sees as an equally attractive alternative: a body elected by Indigenous Australians under the constitution to review – but not veto – all Commonwealth legislation that affects them.

For this Pearson is being accused of setting back the recognition cause, joining the "solo artists" and muddying the waters. His effigy was burnt in the Brisbane streets by angry black demonstrators during the G20. Also on the pyre that day were Warren Mundine and Marcia Langton.

The elders of Abbott's party know that 1967, though celebrated as a great popular triumph, was achieved by ruthless political management. Harold Holt silenced opponents on his own side of politics who bitterly resented the Commonwealth asserting any power over Aborigines and Islanders. He shut Queensland up. Among leaders across politics and across the states there was no open dissent and more than 90 per cent of Australians supported the referendum.

Abbott now has to manage this. Dodson isn't confident. "He has found himself outflanked within his own party." Dodson can't square the man's fine words with the new government's harsh budget cuts in Indigenous affairs. "There is obviously a conundrum between saying we're going to recognise Aboriginal people and then on the other hand these public policy positions."

Pearson is scarcely less forgiving. He sees this complex, infinitely important political challenge being handled by Abbott's office as if it were just another item of retail politics. Yet Pearson has no doubts where Abbott's heart lies.

"I think that he wants to do the best on this. He genuinely wants to do the best. That is all he and I have ever talked about. I'm sufficiently worldly to assess whether his sentiments about this are genuine or not and I accept they are genuine."

So where are we now in the recognition game? "Still in the first quarter."

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