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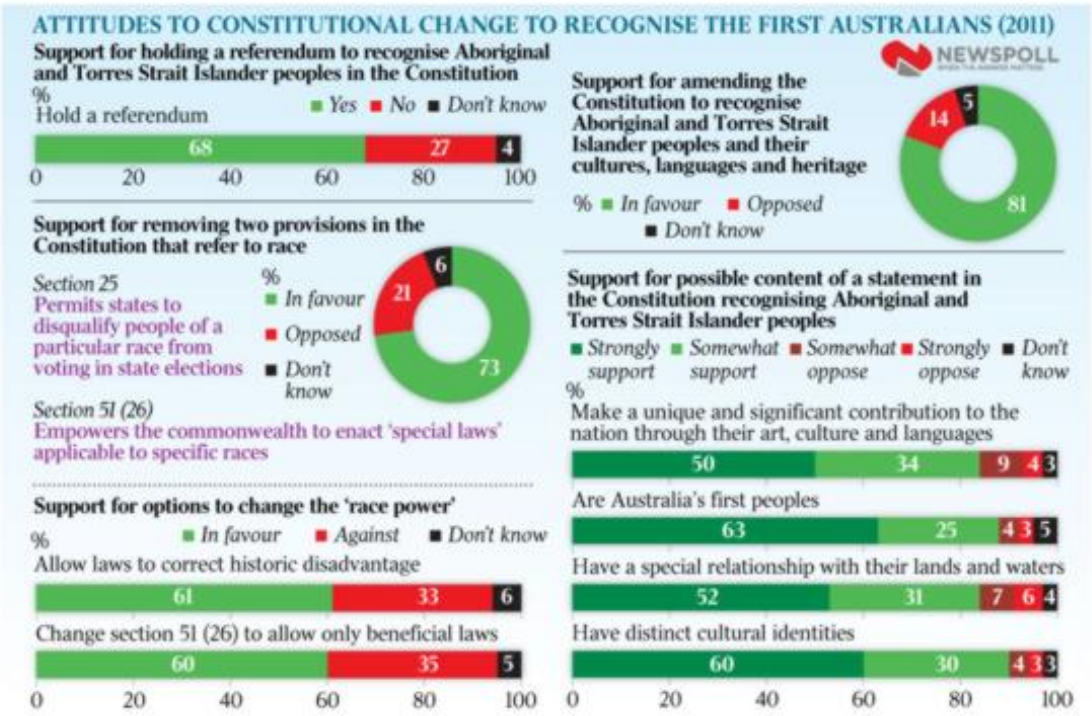
Throw off the right number of sandbags and indigenous recognition might fly

GREG CRAVEN THE AUSTRALIAN AUGUST 23, 2014 12:00AM



Attitudes to change. Source: TheAustralian

MOST "national questions" are nothing of the sort. They are political dirigibles, pumped up for the occasion by supporters, punctured by opponents and vanishing from history before anyone has even noticed.

But, every now and then, something real arrives. The thing distinguishing them from the dross of day-to-day controversy is that, if they fly, the gains are enormous. If they crash, the consequences are dreadful.

Constitutional recognition of Australia's indigenous people is one of those deeply challenging, profoundly real issues.

If we get this right, we can make a textually modest amendment to the most effective governing document in the world, with no constitutional fallout but a massive moral payload.

If we bungle it, we can lose a referendum in such a way that it virtually repudiates the gains of the 1967 constitutional amendment that did so much to promote trust between indigenous and non-indigenous people.

Anyone with either a heart or a head acknowledges it would be better not to put such a referendum than lose it, and rightly so.

But the hard question must be: what does it say about us if we cannot attempt what we feel is right for fear we are unequal to the task?

We need to be clear at the outset why we are contemplating doing this. It is not enough to run indigenous recognition up the nearest flagpole and expect everyone reflexively to salute.

The case for indigenous recognition proceeds from the most conservative principles of constitutional design. A constitution must engage with the fundamental realities of its society. If, with time, portions become problematic, they should be carefully adjusted. Absolutely nothing should be done that would imperil the integrity of the constitution as a whole.

On the first point, our constitutional arrangements celebrate, with deep appropriateness, our timeless heritage of British parliamentary democracy, federation, and the rule of law. But they pass over millenniums of pre-European struggle and achievement. Calmly, clinically, this is an omission which should be addressed.

In terms of problems hatched by the passage of time, we have two provisions with unfortunate racial connotations, section 25 permitting the disqualification of members of designated races from voting, and section 51 (26) authorising the commonwealth parliament to make laws directed towards particular races. As a matter of constitutional interpretation, both provisions theoretically could be directed against indigenous people.

In fact, these provisions have a slightly less disreputable history than might be imagined, and, as a matter of reality, neither is likely to be used for racially nefarious purposes. But that is not the test. Conservatively, constitutionally they are otiose and jarring and may be removed without any violence to the Constitution.

Which is the final and fundamental point. Frankly, if the only way to achieve indigenous recognition and remove racially problematic provisions were to undermine the entire Constitution, we would face real difficulty. But we do not. This technical drafting operation can be achieved under a local anaesthetic.

The real challenge is not the Constitution but the constituency. Referendum politics has a history of rancour in Australia that transforms debate over perfectly arguable proposals into bitter struggles over dubious symbolic propositions.

This already has begun in the present context, and on both sides. It is not racist to oppose indigenous constitutional recognition because you worry about its wider effects on constitutional interpretation. But worse, branding such a worrier a racist almost certainly precludes convincing them of a careful but profound proposal that would reveal their concerns as unfounded.

Correspondingly, characterising sensible indigenous recognition as introducing racial divisions into the Constitution is plain wrong.

In the first place, the guts of any proposal will be to fix the two existing provisions, which do indeed effect a distinction on the basis of race.

Second, a dignified, careful measure of indigenous recognition is not fundamentally about race: it is about reflecting reality, in the same way that we already reflect in the Constitution such realities as the crown, the indissolubility of our federation and our British governmental tradition.

Perhaps most important of all, people of goodwill do not have the luxury of fighting each other in this debate. There will be more than enough trouble and argument to share around.

Indeed, the national discussion is already extremely complex. We have the 2012 report of an Expert Panel that includes unsaleable proposals for a sweeping constitutional ban on racial discrimination and recognition of indigenous languages. There is a parliamentary committee due

to report next year, which is at least playing with similar constitutional combustibles. Former deputy prime minister John Anderson heads another panel assessing public support for recognition.

But the fundamental reality is that any attempt to achieve indigenous constitutional recognition will have to pass the mashing jaws of the Australian referendum process. This is where supporters need to be ruthlessly pragmatic, and appreciate they will need every friend they can get.

The political laws of referendum are brutal and immutable. They apply to every proposal, no matter how much you or I may happen to like it.

The measure must have comprehensive bipartisan support. In fact, there must be virtually no respectable, organised opposition. Any semi-plausible argument will frighten an electorate knowing it already has an excellent constitutional bird in the hand. For every degree of complexity, count on a whole peck of trouble.

And if you have any doubts, cast your eyes on the wreck of the republic, mouldering on the beach of history this last decade and a half.

Amid all this gloom, there is one distinct ray of sunlight for recognition.

Constitutionally conservative Australians are inherently more likely to be persuaded of constitutional change by a committed conservative prime minister. In Tony Abbott, whatever his sins, we have a prime minister passionately committed to the cause. In this respect, at least, there will never be a better time.

But none of this changes the iron laws of referendum. If Abbott is to champion a proposal it must be careful, defensible at every point, and enjoy comprehensive political air cover.

This automatically rules out an entire range of options. For example, the previous government's Expert Panel proposed as part of indigenous recognition that a general ban against discrimination on the grounds of race, colour or ethnic origin be inserted into the Constitution. Australians will never vote for such a one-line bill of rights, giving the courts a vague and sweeping power to remodel society.

This is where Bill Shorten needs to think through his position carefully. Labor's support for any proposal will be indispensable.

There is no reason to suppose the Opposition Leader's support for indigenous recognition is other than completely sincere. But his recent musings that such a step might include a general constitutional ban on racial discrimination, if pursued, would doom the entire project.

First, it needs to be observed that a racial discrimination ban is not an intrinsic part of indigenous recognition simply because it would apply to indigenous people along with everybody else, just like a guarantee of free speech or equality. If indigenous recognition is worth the candle, it is worth its own candle.

Much worse, a constitutional ban on racial discrimination would immediately activate vast political controversy. It would threaten everything from policy on asylum-seekers to recently announced security measures. Whatever your view on either issue, the resulting political maelstrom would harm indigenous recognition irretrievably.

Shorten needs to be clear on this. He can be a vital part of a successful push for indigenous

recognition or he can have a politico-constitutional argument about racial discrimination. He cannot have both. For someone genuinely committed to recognition, such as Shorten — as for Abbott — this is a moral, not just a political, choice.

Everybody, Abbott and Shorten included, must appreciate just how difficult it will be to get up even a carefully calibrated measure of indigenous recognition. There is a temptation to believe "my" referendum will prove uniquely popular, or even to drag down "his" referendum because mine will be put and succeed immediately thereafter.

Here, we never should forget the efforts of that indefatigable constitutional tick Phil Cleary, who helped derail the republican referendum by arguing a no vote to the Turnbull model would ensure an immediate vote on an alternative model for a directly elected president. Fifteen long years later we are still waiting, and Prince George thrives.

What this means is any package for indigenous recognition must be bang on target, first time off. Regardless of exact form, it will require two characteristics.

First, it needs to work with our constitutional system, not against it. Constitutional conservatives,which is code for the vast majority of Australians, will never accept a radical proposal that goes against the grain of fundamental concepts such as parliamentary government and a common national identity.

Second, proponents of recognition need to understand that the real dividend of success will lie in a potent symbolism, not constitutional law.

Remember: in legal terms, the 1967 referendum was a 16-pound weakling, tweaking arrangements around the census and adjusting the powers of Canberra so it could legislate for Aboriginal people. Symbolically, it was a super-hero, forever changing the moral equation between indigenous and non-indigenous Australians.

This lesson must be grasped and applied. Indigenous recognition does not require massive, technical constitutional amendment to succeed. What matters is the moral cargo, not the constitutional vehicle.

This reveals much about the type of amendments needed to achieve indigenous recognition. Fundamentally, less will be more, not only because this will minimise opposition, but because the real action will be all around, not merely inside the Constitution.

Imperatively, we need to remove the provision allowing us to disqualify members of a particular race from voting. Constitutionally, it is offensive, and practically, it is redundant.

We also need to deal with the power of the commonwealth to legislate for people of a particular race, by sanitising or possibly removing it altogether.

Even within the wretchedly chancy politics of referendum, these adjustments are eminently achievable. What is the argument against them?

We might want to chance our hand at also amending the preamble — effectively the poem at the start of the Constitution — to celebrate indigenous people. Or even attempt a separate mini-preamble on the same subject.

But we should be extremely careful. Preambles are vague, expansive and liable to be misused by judicial innovators. Every inch of imprecision will be negatively exploited in a referendum.

There will be some indigenous people, and others, who will respond that this is all too little, too late. But this ignores the mighty lesson of 1967. As a matter of ink, it was negligible. As a matter of spirit, the words were the hook on which hung the beginning of a nation formally striving towards reconciliation in its creation document.

The generational challenge is to pursue this moral and political commitment not merely within the narrow confines of contested constitutional politics but inside an atmosphere of dignified, modulated, wider constitutional aspiration.

Indigenous people have just ambitions to pursue such questions as empowerment, language and culture. But such broad terms would fit uneasily in a constitution such as Australia's, simply because their very breadth makes their interpretation unpredictable, incidentally dooming them at referendum.

Yet there is no reason they should not be solemnly enshrined in a very special extra-constitutional document — something in the nature of a declaration of recognition — perhaps solemnly enacted by the commonwealth and every state parliament.

Nor is there anything to prevent that declaration routinely being printed in the government publication containing the Constitution, which already includes a select number of other vital pieces of governance legislation. The declaration's stature would reflect the company it kept.

A declaration would operate not to constrain Australia's parliamentary sovereignty but in association with it, as a beacon and guide against which future legislative and executive action could by freely assessed by Australia's own parliament and Australia's own people.

Indeed, a very simple single-sentence constitutional amendment could complete the circle of constitutional integrity, authorising parliament itself to create a small indigenous council to report to legislature and executive on the consistency of proposals with the declaration. That body would be able neither to veto nor delay measures but would be a powerful, dignified and permanent voice, contributing significantly to the quality of Australian political and cultural debate. It could not simply be ignored.

We should be quite clear about the basic, surrounding, constitutional realities. To enthusiasts for indigenous recognition, a proposal of this type realistically represents the high-water mark of constitutional achievability.

The choice is not between it and something more, but between this and nothing. Nothing lasts a long time.

To constitutional conservatives, potentially worried by constitutional adventurism or racial division, the course proposed here is one of moderation.

It constrains no one. It divides no one. It mandates no particular result. But it usefully augments the processes of a constitution that has withstood every test of time.

To both groups, it offers a rare and profound chance, amid the customary bile of Australian politics, to agree to agree.

Greg Craven is vice-chancellor of Australian Catholic University.

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