

Polarising forces threaten to derail bid for indigenous recognition

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The political poison Andrew Bolt, above, injects into the recognition debate could gain traction. Picture: Steve Tanner. Source: News Corp Australia

Plagued by vague hopes of goodwill and a failure in the public debate to identify the issues at stake, the proposal for a history-making indigenous recognition referendum faces the prospect of defeat without a political rescue mission.

To this stage the Abbott government has not prioritised this task. The vacuum has been filled by two polarising elements — the political progressives who seek a radical constitutional change and the conservative populists who reject the entire idea of a recognition referendum as racist.

The danger is that Australia faces a debacle in the campaign to recognise Aboriginal and Torres Strait Islanders in the Constitution. The fear is that the

indigenous referendum will suffer the same defeat as the republic referendum 15 years ago. This time the consequences would be more serious.

The idea that the Constitution should recognise more than 60,000 years of indigenous life on this continent and the place of indigenous peoples in our national life has a deep moral and political momentum. The goodwill on the subject is tangible.

At the 2013 federal election exit polling by Recognise in 20 marginal seats found 84 per cent of voters supported indigenous recognition. This included 76 per cent, or three in four, Coalition voters. The test is to turn that goodwill into a yes vote. Tony Abbott has signalled he wants the referendum in May 2017, on the 50th anniversary of the 1967 referendum that recorded a huge 90 per cent-plus vote.

Four successive prime ministers have backed the concept. The referendum in principle has almost universal support within the federal parliament. It enjoys, in theory, bipartisan Coalition-Labor support.

The idea was taken to the 2007 election by John Howard under the influence of Noel Pearson, who told him that “failure to settle this issue will in the long run lead to prolonged social, political, cultural, spiritual and economic losses and problems.” It was embraced by Kevin Rudd and Julia Gillard in office.

Abbott has a personal commitment to the referendum. He says it is essential to remove “the stain on our soul”. As Prime Minister, he announced on January 1 last year his vision for a referendum that would “complete our Constitution rather than change it”.

To this stage the two threats to success are obvious. The lesser of the two is resistance from conservative populists — not so much politicians but commentators, the most prominent being News Corp Australia columnist Andrew Bolt, who probably has the widest reach of any journalist in the country.

Abbott believes he can carry the conservative base. Yet it has become more problematic. Referendums fail when an extreme position takes hold, and Bolt argues an extreme position: he says the referendum is racist and that it will divide the nation by race.

Bolt has prejudged the issue, saying earlier this month the effect of the referendum is “to divide Australians by our ‘race’, each with different constitutional standing” depending on our ancestors. He has previously called the proposed referendum “immoral”, branded it “not just fundamentally

wrong but socially dangerous”, and said that Abbott’s crusade “must be defeated”.

This is an intellectually flawed position, to say the least, since the actual constitutional change is yet to be determined. It is hard to judge whether the political poison Bolt injects into this debate will gain traction. He may appeal to only rusted-on believers yet the risk should not be underestimated given the xenophobic potential on the populist Right.

This provokes the necessary question: who really seeks to divide the country on racial lines? Is it the four PMs who have backed this referendum in principle, along with most of the current federal parliament, or is it Bolt, given the explicit racial nature of his complaint and his manifest prejudging of the issue?

The risk is that two opposing positions will fragment the conservative vote. Abbott’s moral vision is that the true conservative path lies in constitutional recognition of the indigenous peoples, given they were on this continent 60,000 or more years before Europeans. The alternative is a flawed and mean-spirited ideology that seeks to deny permanently such recognition on the spurious grounds that it must be racist.

The arguments deployed in the latter cause are tortuous and bizarre. Bolt, for instance, says the effort by indigenous Australians to seek recognition because their ancestors were “first” on this continent is actually a racist position.

In itself, this idea is not racist. Indeed, it merely seeks recognition of a historical truth. If our polity denies recognition of this truth in our Constitution then Australia probably faces a bleak future. This raises another question: as the referendum advances, how much liberty will be extended to Bolt by his editors to continue his campaign in their newspapers?

In 2010 Gillard set up a representative expert panel to recommend the content of the referendum. In 2012, after more than 250 consultations, it produced a constructive but flawed report. In the end Gillard postponed any - referendum until after the 2013 election.

The key to the success of the referendum is known from research conducted so far. It shows people are favourably disposed to recognising the history of the indigenous peoples and removing the racial references in the Constitution. But they will be immediately suspicious of special treatment for any group based on race. This will guarantee failure.

In late 2013 the parliament agreed to a joint select committee to recommend the actual question. Its chairman and deputy are indigenous parliamentarians, Ken Wyatt (Liberal) and Nova Peris (Labor). It produced an interim report in mid-2014 with a final report due next month. Much depends on this final report.

The Abbott government must then decide on the terms of the referendum. This will be the initial make-or-break moment. No referendum can be put without significant indigenous support. Given the history of referendum defeats, this demands a trade-off between the ideal and the achievable.

This leads directly to the more serious threat to the referendum — it comes from the progressive side and it goes to the nature of the question. A coalition of progressives among indigenous leaders, the Labor Party and civil society believes the referendum must contain “a constitutional prohibition on laws that discriminate on the basis of race”. This was the view of the expert panel.

A similar view was expressed by the select committee in its interim report. The committee said it had heard “unequivocal evidence” of public support for a constitutional prohibition. ALP leader Bill Shorten has given encouragement to this position.

Such a provision will doom the referendum. This is one reason Pearson changed his mind on this point. It would turn a referendum on constitutional recognition and the elimination of racial clauses into something else — a radical change to our Constitution and system of governance.

A constitutional ban on racial discrimination would reignite the debate about a charter of rights considered and rejected by the Rudd government. It would mean virtually every major law about indigenous Australians would finish in the High Court, where policy would be determined.

The referendum would not be about indigenous recognition. It would become a struggle over constitutional rights. As Anne Twomey, professor of law at the University of Sydney, has said: “Those opposed to the constitutionalisation of rights — because it freezes rights, or because it gives too much power to the judiciary, or because it undermines the role of parliament in adjusting between competing and conflicting rights — would be likely to oppose the referendum.”

Many people backing indigenous recognition in the Constitution would vote no.

In reality, Australia either has a charter of rights in its Constitution or it doesn't. It should not contemplate a constitutional ban on racial discrimination but leave out discrimination on the basis of sex, age or religion. Beyond that, there is no justification for enshrining in courts, rather than parliaments, powers to decide whether laws limiting grog purchases to protect the rights of women and children are valid or not.

If the issue is about rights, then bipartisanship is finished. Abbott, in fact, would never sponsor such a referendum. It would be defeated in every state.

The risk, however, is that progressives may decide the referendum is not worthwhile without this provision. Such an outlook would be tragic and self-defeating.

This leads to the issue of the so-called race power. It is accepted the referendum should remove the racial references in the Constitution. But what happens after this? There is an expectation that a new power be inserted allowing the commonwealth to legislate in relation to Aborigines and Torres Strait Islanders.

Yet this creates an immediate problem. It is making laws defined solely by race. Indeed, it goes to the point raised by Bolt. Is the referendum designed to eliminate the notion of race in the Constitution or to entrench the idea of race, even with a provision saying the power cannot be used "adversely" against the indigenous peoples?

Indigenous leaders might insist on such a proposal. But the dangers are too obvious. Why should the Constitution offer the indigenous peoples such protections that are not extended to other Australians? This opens the door to a destructive no campaign.

The test is whether the referendum changes will authorise laws on a racial basis, thereby giving credibility to the campaign waged by Bolt. Everybody is being put on notice. It is noteworthy that Pearson has said: "Today we understand there are no distinctions to be made among peoples on the basis of race." Pearson has made no more important remark about the referendum.

One possible way around this dilemma, as suggested by Twomey, is to authorise laws in relation to native title, indigenous culture, and heritage — issues part of the legal system now — thereby avoiding laws on a racial basis. There is one certainty: the path ahead between competing political poles will not be easy.