
Talk of a treaty is not going to disappear quietly

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Bill Shorten may have sidetracked the recognition debate, but the issue remains

Just a few months ago a leading indigenous voice in the constitutional recognition movement gently harangued me to do more to amplify the debate. This week, in the wake of Bill Shorten's treaty intervention, that same leader rejected my invitations to comment for this article - "We really don't want to give it any oxygen." This is what the Opposition Leader has done - by design or not. He has forced a passionate, optimistic and troubled campaign for constitutional recognition on to the back foot. Activists and advocates who were seeking more attention from the media and both sides of politics now want radio silence until the election blows over.

The recognition cause was fraught enough without the added complication of treaty aspirations thrust into the spotlight of a federal campaign. Yet Shorten was only giving voice to a conversation that has been recurring in indigenous circles and was always going to enjoin the recognition debate.

Victoria's Labor government is already in treaty negotiations with indigenous representatives. Its Aboriginal Affairs Minister, Natalie Hutchins, says it is clear her state's indigenous people want a treaty considered. "As we work on issues of self-determination and treaty," she said in March, "we need to make it clear that these things can coexist with the current range of agreements made with Victorian Aboriginals and should not distract from the national debate on constitutional recognition and reconciliation between the Aboriginal and non-Aboriginal community." Early stages in one state, sure. But in our federation there was no way this development could go ignored at the national level for very long. It is surprising the issue hasn't been elevated sooner.

For some months there has been well-intentioned concern at the highest levels of the Turnbull government that the treaty push may derail the recognition process. There were fears an extra level of complexity might jeopardise a bipartisan outcome. This explains why Malcolm Turnbull was quick to spot the risks in Shorten's comments. Politicians on both sides believed the surprise nomination of Aboriginal activist Pat Dodson in March as a Labor senator would add heft to the treaty movement. Sure enough, he upped the ante within a week of entering parliament. "We know treaty is a big discussion in the community, we know constitutional recognition is a big discussion in the community," Dodson said. "They're not mutually exclusive matters." For all the heat generated this week, such views are not radical in indigenous politics. Former ALP national president Warren Mundine was Tony Abbott's choice as chairman of the Prime Minister's Indigenous Advisory Council before being reappointed by Turnbull. On Australia Day 2014 he deliberately revived the treaty debate. "Each indigenous nation who signs on to a treaty would formally recognise Australia and its right to exist," he said, expounding not one treaty but a series with individual indigenous groups as has occurred in the US and Canada.

"An indigenous nation who signs a treaty must be prepared to draw a line in history and allow Australia as a whole to move on from a clean slate." So the trajectory of the debate has been clear, and the intersection between recognition and treaty was inevitable. That they should collide in an election campaign perhaps is not surprising.

Shorten's intervention probably was not deliberate or partisan. Even one of his most entrenched Coalition opponents anonymously reflected that neither the way he made his comments nor their tone indicated a political strategy. Shorten was flushed out - or stumbled into the controversy - on ABC TV's Q&A. "Do I think that we should have our first Australians mentioned in the national birth certificate, the Constitution? Yes," said Shorten after a questioner mentioned recognition and a treaty. "Do I think we need to move beyond just constitutional recognition to talking about what a post-constitutional recognition settlement with indigenous people looks like? Yes I do." Host Tony Jones then asked whether this could "look like" a treaty. "Yes," said Shorten.

When asked to respond the following day, Turnbull was stuck between a rock and a hard place. His rebuke for Shorten was pointed but gentle. "Well I was disappointed in Mr Shorten's remarks last night," he said before talking about the difficulty of delivering bipartisan constitution reform. "Now to introduce another element, a treaty, adds a level of uncertainty that puts at risk the constitutional recognition process." On first blush, this seems self-evident. However, it would be heroic to imagine the T-word could be kept out of the recognition debate until after a referendum was passed. Just last month the joint campaign director for Recognise, Tanya Hosch, who is also a member of the Referendum Council on constitutional recognition, delivered a Reconciliation Week speech that attempted to reconcile recognition and treaty.

"For me and so many other Aboriginal and Torres Strait Islander peoples who support treaty and constitutional recognition, we know that this is not an either-or choice," Hosch said. "I strongly reject the false choice that is promoted by some when it comes to constitutional recognition and treaty. We should not be asked to choose. If you leave with just one thing today - that is really important to understand - treaty and constitutional recognition can coexist. We can work for both." Well-known and respected activists Lowitja O'Donoghue, Noel Pearson, Mick Gooda and Stan Grant have aired similar views.

Treaty is a powerful word on both sides of the debate. In 1988 then prime minister Bob Hawke accepted a bark petition at the Northern Territory's Barunga Festival. The Barunga Statement contained an extensive list of claims and aspirations concluding with this punchline: "And we call on the commonwealth parliament to negotiate with us a treaty recognising our prior ownership, continued occupation and sover-eignty and affirming our human rights and freedom." Hawke famously agreed to push for a treaty. But a few years later Labor let it slide in favour of a process of reconciliation.

This process has continued through the Mabo and Wik court cases and legislation, the apology to the Stolen Generations and now the push for constitutional recognition. So the revival of the treaty debate conjures something of a virtuous circle.

Treaty never really went away. In the early 1990s Yothu Yindi took the excitement of Hawke's words and turned them into an international hit and indigenous anthem -

"Well I heard it on the radio, and saw it on the television, back in 1988 all those talking politicians 'Treaty yeh, treaty now.'" Most indigenous leaders will tell you about the passion aroused by this word - it holds promise and pride. Conversely, the same two syllables generate broad suspicion and resentment in the non-indigenous community.

John Howard dismissed the idea in the late 1990s, saying a nation did not make treaties with itself. "I don't like the idea of a treaty because it implies that we are two nations," he said. "We are not, we are one nation. We are Australians before anything else, one indivisible nation." Conservative commentator and recognition opponent Andrew Bolt leapt on this week's debate to suggest recognition would lead to a treaty and claims for separate sovereignty - "to the logical goal of apartheid".

This underscores the divisiveness that stalks this debate from both sides, hinting at the perils ahead.

Yet, according to the polls, most Australians are receptive to recognition. The question is the model and whether talk of a treaty will scare them away.

In the opening chapter of *The Forgotten People* (a book published earlier this year containing liberal and conservative approaches to recognition) I argued in favour of Pearson's proposed model, which consists of removing redundant race provisions from the Constitution, embracing a statement of recognition outside the Constitution and mandating an indigenous advisory body to the federal parliament. But I argued recognition needed to provide some sort of institutional end point: "It should not be the precursor to a treaty, or be seen as presaging indigenous seats in parliament." This is a complicated and difficult debate and the point is that the public will be unlikely to engage it and support change if they know it resolves little. If a treaty is unacceptable to voters, so too will they be suspicious of recognition if it is merely the precursor to a treaty debate. Would it not be better to consider the totality of the debate at once?

This week wasn't the first time Shorten had been accused of derailing recognition. Two years ago when he spoke at Arnhem Land's Garma Festival it seemed he had raised the stakes impossibly high. "Constitutional recognition has to involve more than a token gesture," Shorten told the festival crowd. "We need substantive and substantial change. Symbolic change is not good enough - preambular change will not suffice." He was backing the model endorsed by the government's expert panel to include a racial non-discrimination clause in the constitution. Conservatives see this as introducing a partial bill of rights into the document, favouring one right above others. Regardless of the merits of this legal argument, the political heat generated would most likely doom the referendum to failure.

To the credit of Shorten and his Coalition opponents, he has been able to quietly leave those words behind as the debate has crab-walked in search of consensus.

Crucially, an ambitious agenda such as the one Shorten was then endorsing might lessen the impetus for a treaty. But if the minimalist, symbolic recognition were to succeed, it might be inevitable that the treaty push continues.

This is perhaps another argument for the Pearson hybrid model. By minimising the legal changes and authority in the constitution, it should satisfy the conservatives. By embracing the Statement of Recognition (first proposed by Julian Leeser and Damien Freeman) it goes some way to providing the sort of statement envisaged in the Barunga Statement. And if some way could be found to mandate an indigenous

advisory body - not unlike the present informal version - without frightening the conservatives or disappointing the activists, there would be a meaningful ongoing reform to contribute to consultation and governance.

Think of what has transpired since Hawke flirted with a treaty. Native title has been adjudicated and legally enshrined. The nation has offered a formal apology for past deeds. And there is widespread bipartisan support for some form of constitutional recognition. In total this is perhaps more than could have been imagined at Barunga in that Bicentennial year.

Indigenous disadvantage continues to be our national shame. These legal, symbolic and constitutional changes have their own importance but a settlement could only help the nation focus on redressing practical disparity.

Treaty is a word that makes indigenous hearts soar while it worries many non-indigenous Australians. But seen in this broader context of reform it is merely a word (and one prevalent in indigenous affairs in New Zealand, Canada and the US).

As one indigenous leader told me this week; "It's no big deal to blackfellas, we've been talking about treaties all along. When politicians say the word can't be used in the debate, it doesn't just tell us we can't have a treaty, it tells blackfellas: 'We'll decide what is appropriate and what you are even allowed to talk about.' "Shorten fairly stumbled into this imbroglio. His Q&A intervention was clumsy and almost certainly unintentional. But if it forces us to consider an issue inevitably material to the recognition debate, it can't have been unhelpful - unless we lack the maturity for sensible discussion.