

Inquiry into nationhood, national identity and democracy A submission responding to the second discussion paper

Summary

Thank you for the opportunity to make a submission in response to the second discussion paper on the implications of COVID-19 for nationhood, national identity and democracy.

Civil Liberties Australia (CLA) has been concerned about the rise of populist approaches in Australia and the effect it is having on the electorate's faith in political institutions. This submission focusses on the lessons governments can take away from times of crisis to ensure they can maintain the trust of Australians. CLA recommends:

that the Australian Government commits to implementing a Federal Civil and Political Rights Act with enforceable rights and a genuinely Independent Commission against Corruption as the first steps to sustainably restoring the electorate's trust in Australia's political institutions.

COVID-19 laid bare the global failure of populism, but the public health response to the pandemic's first wave in Australia demonstrated the value of agreeing to a common context for decisions and making sure that the political conversation is mediated by third party experts. The response showed that, at that moment, our democracy was committed, and accountable, to us.

Australians responded with trust. That response provides a case study for rebuilding the public trust that has been reduced by the rise of populism in Australian politics and that continues to damage our political institutions.

Implementing a Civil and Political Rights Act (CPR) enforced through a Commission, and implementing a genuinely Independent Commission Against Corruption (ICAC) follows the model demonstrated by the public health response to COVID-19 and is a first step to sustainably restoring the electorate's trust in Australia's political institutions.

The origins of a broken leadership model: the rise in voter cynicism

The doctrine of responsible government articulated by Sir Robert Menzies argues that Australia's basic freedoms are adequately protected by the common law and by the good sense of Executive government as checked by voters at elections and by Parliament at all other times. This doctrine has been under sustained attack from populists: they are "anti-elitists" and "anti-pluralists" who argue that their view represents the will of the people and the single source of truth: anything external to their view is both untrue and immoral.

Populists reduce governing to rewarding, and pandering to the fears of, their tribe at the expense of the rights of others. But, when everybody says “trust no one but me”, then there can be no trust in political institutions. Parliament cannot check Executive government when Parliament and the Executive no longer agree on a single set of external values or, in many cases, a single set of facts, on which the performance of each can be judged.

Public debate on policy and behaviour by Executive government was once a means of testing the validity of government planning and action. More recently, populists have reduced public debate to theatre, an opportunity for participants to generate a sugar rush of outrage for the pleasure of their constituency with no pretence at delivering a better national outcome.

It is a theatre that plays to isolated and shrinking political bases, surrounded by a sea of disengaged and cynical electors. The trend has led to the electorate’s declining faith in political institutions and leadership.

That decline reached its nadir in early 2020, when a study of the 2019 federal election by the ANU showed that only 59% of Australians are satisfied with how democracy is working, just 1 in 4 of us trust our political leaders and institutions and only 1 in 10 of us believe that government is run for all the people.

The origins of a broken leadership model: the effects of cynical populism

If populists are in power and disagreement is performance, then the powerless quickly become stigmatised:

- Sudanese gangs keep Melbourne diners from their evenings out;
- organised labour is the bane of modern business at best and systemically criminal at worst;
- social security recipients cheat as a matter of course;
- Islamic communities don’t take responsibility for extremists in their midst;
- LGBTQI community members should be excluded from certain types of employment;
- and
- Aboriginal connection to land is social security fraud.

Any response from the stigmatised or those who speak for them is easily dismissed by populists as the whingeing of an ungrateful minority, the kneejerk of a culture war elite embittered by their lack of electoral success...or simply un-Australian. More generally, this populist approach shifts the balance of decision-making power away from the impartial judiciary and the public service to Executive government and leaves the latter virtually unrestrained.

The overt argument is that it would be undemocratic to give unelected judges and officials the power to question the judgement of Parliament. In practice, the above shift reduces scrutiny of Executive government, avoids the external rules that hold it accountable and throws away the traditional balanced equivalency between the Executive, Legislature, and Judiciary. The outcome is a public service reduced to implementing decisions that are increasingly partisan and a judiciary denied the flexibility to adapt the law to individual circumstances because common law rights and freedoms are overridden by statute and regulation.

With diminished externally imposed accountability, government becomes less about doing the right thing, and more about doing what the Executive can get away with, leading to an ethical decline that feeds both electoral cynicism and the appeal of populist leaders promising to drain the swamp.

Reduced accountability and the zero-sum logic of populist decision-making also encourages the trading of rights and accountability for security and control. Despite promises that the rights suspended in the crisis following 9/11 would be reinstated, about 100 pieces of security legislation passed following 9/11 are still in place 19 years later. There is no historic track record to suggest promises to reinstate rights suspended in the COVID-19 crisis will be kept.

There are also questions arising from outside Australia about the increasing gap between who we say we are and what we do.

The world is beginning to suspect that Australia is less open, less tolerant. We secretly imprison our own citizens and bring the full weight of the law to bear on journalists and lawyers who might embarrass us. We keep refugees outside our jurisdiction so they cannot access what rights our law would otherwise provide, and we hide them from people who want to tell the truth about how we treat them.

We abuse children we have placed in juvenile jail. We assume that social security recipients are criminals and treat them accordingly. We protect the powerful from scrutiny as they rip off the powerless. We increasingly assume that the poor deserve to be poor. We marginalise Australia's First Nations, deny them their history and their culture, jail them in unprecedented numbers and turn our backs on their offer of forgiveness and reconciliation.

The populist response is that these are uninformed criticisms of isolated acts arising in specific circumstances, that they are unrepresentative of the "real Australia", the land of mateship and the fair go.

But these acts are real enough to those who suffer them and the rest of the world notices, and draws its own conclusions. Nations condemn us, as we condemn other nations who offer the same defence as they abuse their vulnerable citizens.

COVID-19 as a case study of a populist response to a real crisis

COVID-19 is unaffected by scapegoating, scaremongering, outrage or alternative facts, and this has pushed populist leaders around the world into a consistent pattern of behaviour. The disaster provides a real-time lesson in the danger of the populist approach.

Populist leaders made blandly optimistic statements minimising the pandemic's effects, followed by assurances their regimes were ready in the hope that they would never be tested. As infections rose, populists implemented policies aimed at protecting the economic interests of their base and, finally, committed to the health of their citizens more broadly at the expense of economic interests after the point where the progress of the virus could only be mitigated rather than met head on.

This behaviour was accompanied by increasingly martial rhetoric as populists jumped on the bandwagon of ideas previously implemented by others, reducing accountability to a distant memory and wrapping draconian constraints on civil rights in the national flag.

By taking this approach, populists gave questions about the timing and necessity of those constraints a whiff of treason. Finally, they returned to the rhetoric of populism once the crisis shifted from health to economics.

Yet public trust did briefly return to the political sphere in Australia. The public health aspects of COVID-19 created an external set of facts and a common context. The political conversation about how to deal with them was open and effectively mediated by third party health experts. As a result, the electorate's trust in political institutions increased.

This newfound trust will not be sustained without support.

As the crisis shifts from health to economics, Executive governments and Parliaments, trapped by their pre-pandemic positions, are abandoning the idea of a common context and are sliding back into pre-COVID-19 behaviour. Public policy debate, which was briefly a refreshing means of testing the validity of government plans and actions, is returning to the sterile theatre of outrage that drove public trust in political institutions to its nadir in the first place.

While the COVID-19 response has shown us the value of a democracy that the electorate feels is committed, and accountable, to them, better governance should not have to rely on an external threat. We need to find a process that can deliver trust in political institutions sustainably.

The first step toward sustainable trust

A federal government can take two small steps to start this process of restoring public trust without the need for a virus. It can promise to deliver:

- a genuinely Independent Commission against Corruption (ICAC); and
- a Civil and Political Rights Act (CPR) with enforceable rights mediated through the Australian Human Rights Commission.

An ICAC-with-teeth is designed to ensure that Executive government and the administration govern and act for everyone when spending our money and shaping our lives. A CPR articulates the government's obligation to be humane to the powerless, and gives individuals a chance to hold public power to account. Learning the lessons from CPRs already operating in the ACT, Victoria, Queensland and across the world, an effective national CPR would:

Ensure:

- obligations on Australia arising from the family of UN human rights instruments it has ratified are fully implemented in Commonwealth law;
- Parliament only passes laws compatible with Australia's human rights obligations;
- Decision-makers balance rights and civil liberties when they are in conflict;
- the Australian Human Rights Commission can conciliate claims brought by individuals on possible rights breaches by public bodies; and

Provide:

- harmonised human rights protection for all Australians by reference to one law;
- enforceable remedies for citizens where a public body has breached their rights; and
- a cause of action to a court/tribunal under which Australians can challenge laws and government actions inconsistent with people's rights, liberties and freedoms.

Implementing an ICAC and a CPR would apply the COVID-19 lesson of an external set of principles and a common context for all government decisions because they apply directly to the lives of individual citizens. As the ICAC and CPR would be mediated through expert third parties, they are also a promise to an electorate that is already starting to disengage that our democracy is committed, and accountable, to us.

At the federal level, a CPR would also provide a common set of standards against which statements and actions that pander to the fears of one part of the electorate at the expense of the rights of another can be judged.

Enacting a federal ICAC and a national CPR is not all of the answer to rebuilding trust in political institutions in the wake of cynical populism, but it will start to change the culture of government and Australians' perception of it. The government – or opposition – that promises to implement them is stepping beyond Menzies' broken governance model to demonstrate its accountability credentials to both a disengaged electorate and a wary international community.

CLA does not believe that progress towards sustainable trust in Executive government ends with a federal CPR and ICAC, but we do strongly believe that the process of restoring sustainable trust is now impossible without them.

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