

Tuesday, 1 October 2019

Submission to the Senate Legal and Constitutional Affairs References Committee

Professor Alexander Reilly
Law School
University of Adelaide

The role of constitutional change in discussions of national identity

At the beginning of the 21st century, Australian citizenship has taken a new direction. The 20th century perception of the nation as under-populated has been replaced by questions over sustainable population. The dramatic increase in temporary residents - workers, students, working holiday makers and undocumented migrants - has challenged the perception Australia as a place of permanent settlement. The desirability of multiculturalism has been challenged by new global divisions along religious lines and the rise of Islamic extremism.

Benedict Anderson's description of nations as 'imagined' has particular resonance in Australia.¹ The mixture of our Aboriginal origins, British white colonialism and the multicultural turn has created a nation of people who understand their place in Australia very differently. Add regional differences of those in the country and those in the city, and differences in religion, culture and class, and it would seem that if we are united at all, it must be *in* (and not despite of) our differences.

There are a number of particular, tangible challenges to Australian identity which are the subject of proposals for constitutional change. Through the Uluru Statement from the Heart, Aboriginal Australians have articulated a clear and positive vision for their place in the nation and how this place can be incorporated in the institutions of government.

A second call for institutional change emerged in late 2017 when, under s 44(i) of the Constitution, fifteen members of the Commonwealth Parliament were found ineligible to be representatives because they were dual citizens.² Section 44(i) harks back to a time when the concept of foreign allegiance was simpler, when the architects of the Australian Constitution could not conceive of foreign nationals outside the British Empire running for Parliament in Australia. But in the early 21st century, the diminished political status of dual citizens strikes at the very heart of Australia's multicultural identity.

These two substantial challenges to Australia's identity are consistent with a third push for constitutional change; transforming Australia into a republic, with a Constitution and legal system that is fully independent of the United Kingdom. There is great symbolic force in separating from the United Kingdom. It is a break from the colonial mind set and its establishment of a white British colony in complete disregard for the rights of Aboriginal and

¹ Benedict Anderson, *Imagined Communities* (2006).

² *Re Canavan* [2017] HCA 45; *Re Gallagher* [2018] HCA 17.

Torres Strait Islander peoples in Australia. It frees Australia to forge an identity as a modern, multicultural nation with its own place in a highly interconnected world.

All three proposals to amend the Constitution have at their heart the question of Australian national identity and membership. With anxiety building about economic and social well-being in a rapidly changing climate, uncertainty about the demands other nations and peoples will place on Australia in the new world order, and fear over personal and national security, presenting a positive vision of the Australian state and its core values may help draw the people together to face the uncertainties in the future.

The Committee's discussion paper expresses a concern that there is a rise of more extreme political beliefs and expression in Australia. On the Right are the 'populist, conservative nationalist, and nativist' and on the Left 'eco-fundamentalists' and 'post-modernists'. The paper seems reluctant to accept this polarisation in mainstream politics, hoping implicitly that strengthening our democratic political institutions will bring these groups back to the more moderate centre.

It is important to acknowledge that these new voices on the Left and Right are a natural expression of the climate crisis, and the polarisation is only going to increase as the crisis grows in intensity, and the implications for the nations of the world is fully realised. On the one hand, in a world with food and water scarcity, rising numbers of forced migrants, and most likely increased conflict, it makes sense to advocate for strong borders, and to focus on the national interest in preference to the global interest. This vision is consistent with tightening the rules for citizenship, defining international refugee obligations as narrowly as possible, broadening the basis upon which permanent residents can lose their visas for being of 'bad character', and state-centric responses to climate change.

On the other hand, from a global perspective, this move to strengthen the independence of the nation is self-defeating. If the nations of the world look inwards at their own self-interest, unwilling to do more than their share in response to climate change, then a crisis will not be averted. If what is in the national interest narrowly defined is in conflict with what is in the global interest, Australia will find itself increasingly isolated, and in the long run this will be to our detriment.

For a growing portion of the population, climate change is an existential crisis. It matters not whether this categorisation is right or wrong. It is a perception that is created by an interpretation of the science of climate change that predicts, with a high degree of confidence, that ecosystems will change dramatically in the near future, that extreme weather events will increase, and that millions of people will be displaced as a result. And there is the rational fear that warming will reach a point at which feedback loops make it uncontrollable. This is the new normal for young Australians, who will shape the Australian political landscape in the coming decades.

New environmental protest movements are a response to this perception of an existential crisis. There is an urgency to these movements not seen before because what is at stake is not a mere distribution of wealth, or a balance of power between employers and workers, or participation in an unworthy war, or land rights. What is at stake is the continuation of human civilisation as we know it. Also, the movements are backed up by incontrovertible scientific evidence in the face of which government inaction seems particularly perverse and in need of challenge.

The growing protest movement demanding urgent government action to mitigate carbon emissions offers a new challenge to the institutions of government. The movement is directed at the mainstream, prepared to disrupt the capitalist economy that is perceived as a central cause of the unfolding environmental crisis.

In response to a polarising electorate, the Committee is right to focus on the robustness of Australia's institutions of democratic government, and its commitment to freedom of political communication, in particular. Difficult questions will need to be faced:

- To what extent will the state tolerate peaceful but disruptive protest?
- How will it manage the polarisation of political discourse in mainstream and online media? How will mainstream political parties with their focus on mainstream concerns of economic growth and employment opportunities manage the polarised debate about national identity?
- Is there a middle ground, or will parties be forced to choose a nationalist or a globalist perspective?

Australian national identity is reaching an apotheosis. Past versions of nationhood built on the defence of the nation in conventional war, or on building the nation's wealth in a world of unlimited potential, no longer serve us. With globalisation questioning the very concept of the nation,³ what sense of purpose can we draw on to define the Australian nation and its people?

Using constitutional change as a vehicle to achieve a positive national identity

Effective democratic government remains our best hope of negotiating difficult questions of identity. A national conversation around values and identity is critical to responding positively to the impending global challenges. The process of constitutional change is a highly effective way to engage the polity in this conversation. Unfortunately, the referendum process has been sorely neglected in recent times. We have not held a referendum in 20 years, despite a number of important proposals for constitutional change being ripe for consideration.

The benefit of interrogating issues of national identity through constitutional change is that the whole community has a tangible stake in the proposal and its outcome through the requirement to vote in the referendum. A referendum is our only formal exercise of direct democracy. It is the only process by which the Australian people are forced to consider their position on issues of national significance. If the referendum process is managed well, it has the potential to provide a platform for a productive discussion about Australian identity at the national level. With the people engaged in building their national identity, other pressing national issues such as the crisis of climate change, might also engage this broader civic audience.

If we are to find a coherent image of Australia to rally around for the future, it must emerge from the people. Constitutional change offers a vehicle for the people's voices to be heard. It is time to re-engage with this mechanism of democratic governance.

Professor Alexander Reilly

³ Aihwa Ong, '(Re)Articulations of Citizenship', 697–699.