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30 September 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into nationhood, national identity and democracy

The Law Society of NSW appreciates the invitation to provide a submission to the Senate Legal and Constitutional Affairs References Committee ("the Committee") inquiry into nationhood, national identity and democracy ("the inquiry"). This submission has been informed by the Law Society's Public Law Committee.

Having regard to the breadth of the inquiry's terms of reference, the Law Society's comments will focus on the following issues:

- The changing national make-up and notion of national identity;
- The role of the media in shaping public debate and Australia's national identity;
- The impact of inequality on social cohesion and national identity; and
- Promises, politics and restoring public trust.

The changing national make-up and notion of national identity

National identity can be understood as the answer to the question: 'who are we as a nation?' It is a concept that has often been defined in the negative, by considering who 'we' are not, and setting strict parameters of 'otherness'.[1] Law and policy have historically played a role in propagating and reinforcing exclusionary notions of national identity in Australia: early examples being the exclusion of Aboriginal and Torres Strait Islander peoples from the census prior to 1967,[2] and the White Australia Policy established by the *Immigration Restriction Act 1901*.[3]

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[1] See, eg, Hüsamettin İnaç and Feyzullah Ünal, 'The Construction of National Identity in Modern Times: Theoretical Perspective' (2013) 3(11) *International Journal of Humanities and Social Science* 223, 223; Anna Triandafyllidou, 'National Identity and the 'Other'' (1998) 21(4) *Ethnic and Racial Studies* 593, 596; Young Chul Cho, 'State Identity Formation in Constructivist Security Studies: A Suggestive Essay' (2012) 13(3) *Japanese Journal of Political Science* 299, 299-300.

[2] Christopher Kelen, 'How Fair is Fair? The Colour of Justice in Australia's Official Anthem' (2002) 5(3) *M/C: A Journal of Media and Culture*.

[3] Barry York, Social Policy Group, 'Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources' (Research Paper, Parliamentary Library, Parliament of Australia, 16 June 2003) 2; See, eg, Timothy Kendall, 'Within China's Orbit? China through the Eyes of the Australian Parliament', (Research Library, Parliamentary Library, Parliament of Australia, 2007) ch 1

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National identity is also a concept that is constantly in flux in Australia, both influencing and being influenced by the make-up of the population. Following the Second World War, the Government set a target of 1% annual increase in population annually and coined the slogan "populate or perish". With the White Australia Policy still in force, preference at this time was given to migrants from Great Britain and eventually western, northern and southern Europeans, who were expected to conform to the norms and identity of the existing majority.[4] In 1966, the Government increased access for non-European migrants, including refugees fleeing the Vietnam War, and in 1973 the Government formally dismantled the remnants of the White Australia Policy. This shift was accompanied by a new social policy in Australia – multiculturalism – which encouraged a change in Australia's national identity whereby diversity was accepted[5] and celebrated. In more recent times, with continued migration and the arrival of refugees from countries as varied as Lebanon, Vietnam, Chile and Somalia, Australia's national identity has continued to evolve and diversify.

Since 2013, the Scanlon Foundation has conducted annual surveys on the proposition that "multiculturalism has been good for Australia".[6] Results indicate the level of agreement with the proposal has been consistently high, averaging between 83%-86% of respondents, and most recently in 2018 was reported at 85%.[7] However, the development of national policies demonstrating openness to change in our national make-up have not been uncontested. The Australian Human Rights Commission noted that around one in five Australians have experienced racism in the form of "verbal abuse, racial slurs or name-calling".[8] The "Speak Out Against Racism" survey conducted in 2017 found that almost a third of the 4600 participating school students reported having experienced racial discrimination. Students from non-Anglo and non-European backgrounds were also twice as likely to experience some form of discrimination at least once.[9]

The Law Society welcomes initiatives that promote the diverse, multicultural society that exists today, whilst also celebrating our indigenous heritage. The continuing success of our nation depends on the conscious inclusion of all people and cultures who make up modern Australia. Organisations like the Law Society have a role to play in achieving this objective. As one recent example, the Law Society was pleased to collaborate with the NSW Department of Communities and Justice, Legal Aid NSW, and the NSW Police Force to organise open days at Fairfield and Liverpool Courthouses for 500 multicultural students in July and August 2019. The students came from a variety of backgrounds including Iraq,

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<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/APF/monographs/Within_Chinas_Orbit/Chapterone>.

[4] See, eg, Joy Damousi, '"We are Human Beings, and have a Past": The "Adjustment" of Migrants and the Australian Assimilation Policies of the 1950s' (2013) 59(4) *Australian Journal of Politics and History* 501.

[5] In addition to the *Race Discrimination Act 1975* (Cth), early examples are from the Minister for Immigration Al Grassby's, 'A Multi-Cultural Society for the Future' speech made at the Cairnmillar Institute's Symposium Strategy: Australia for Tomorrow, 11 August 1973; and from a 1974 speech to Federal Parliament by the Opposition spokesman for Labour and Immigration Malcolm Fraser, which contained the term "multi-cultural society': M Fraser, 'Matters of public importance: Australia's immigration policy', House of Representatives, Debates, 20 March 1974, p. 634. In 1979, the Fraser Government established the Australian Institute of Multicultural Affairs (AIMA), whose objectives included raising awareness of cultural diversity and promoting social cohesion, understanding and tolerance.

[6] The Scanlon Foundation was established in 2001 to enhance and foster social cohesion within Australia. It formed the view that for Australia to continue to advance as a prosperous and welcoming nation, monitoring and supporting social cohesion is vital: 'Our Foundation', *The Scanlon Foundation* (Web Page) <https://scanlonfoundation.org.au/about-us/>.

[7] Andrew Markus, The Scanlon Foundation, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2018* (Report, 26 November 2018) 3 <https://scanlonfoundation.org.au/wp-content/uploads/2018/12/Social-Cohesion-2018-report-26-Nov.pdf>.

[8] 'No Place for Racism', *Australian Human Rights Commission* (Web Page) <https://www.humanrights.gov.au/our-work/no-place-racism>.

[9] N Priest et al, Centre for Social Research and Methods, Australian National University, *Findings from the 2017 Speak Out Against Racism (SOAR) Student and Staff Surveys* (CSRM Working Paper No. 3/2019, 2019) 4 < https://csrm.cass.anu.edu.au/sites/default/files/docs/2019/8/CSRM-WP-SOAR_PUBLISH_1.pdf>.

Syria, Vietnam, Burma and Afghanistan. The open days were an opportunity for the newly-arrived migrants and refugees to learn about legal services in NSW, and to understand how courts operate.

The role of media in shaping public debate and Australia's national identity

Public debate can be understood as the public dissemination of government policies and the concomitant conversations in the public sphere that transpire from and in turn inform policy development. Such debate is an important component of the right to political participation contained in Article 25 of the *International Covenant on Civil and Political Rights*. The media in Australia – both news media and other means of mass communication – has traditionally played an important role in enabling public debate on issues such as: foreign policy; immigration policy; anti-terrorism and border protection; multiculturalism; urban or regional growth; and education. In this way, the media shapes and reflects public views on these policies and the boundaries of Australian national identity.

The rise of social media is an important factor to consider in the context of Australia's national identity, with an increasing number of people looking to social media as their primary news source.[10] The latest *Digital News Report: Australia 2019* notes that Australians are accessing news and information through "online sites that are liked, recommended and shared by [their] social media groups, rather than relying...upon... traditional journalism".[11] However, this is tempered by the fact that 62% of respondents were worried about whether information on the internet is truthful and many are adopting fact-checking behaviours to counter their concern: 36% checked several different sources to assess the accuracy of a story; 26% have started to use more reputable sources of news; 22% have stopped using unreliable sources; and 22% decided not to share a story about which they were unsure.[12]

The impact of inequality on social cohesion and national identity

Political engagement in a liberal democracy is closely entwined with economic participation. A December 2018 report by Stoker et al, *Democracy 2025 Report*, which was informed by a representative sample of 1021 Australians and 20 focus groups, found that "[t]he lower your income [in Australia] the less satisfied you are with how democracy works".[13] The authors concluded that "there is evidently a significant relationship between a sense of economic wellbeing and satisfaction with the way democracy works", suggesting that:

> The connection between income and democratic satisfaction is not perhaps that surprising, especially... as one of the attributes that gives citizens a reason for supporting democracy is that it provides for economic security and social welfare.[14]

Commentators have observed the close nexus between political disengagement and economic stressors.[15] They note the growing public discourse on globalisation, increasing wages and inequality, declining manufacturing and prospects in smaller towns, and the

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[10] Caroline Fisher et al, News and Media Research Centre, University of Canberra, *Digital News Report: Australia 2019* (Report, 2019) <https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia-2019>.
[11] Ibid 92.
[12] Ibid 10.
[13] Gerry Stoker, Mark Evans and Max Halupka, *Democracy 2025 Report No. 1: Trust and Democracy in Australia: Democratic decline and renewal*, (Report, December 2018) 25–26 ('*Democracy 2025 Report*').
[14] Ibid 25.
[15] See, eg, Dani Rodrik, 'Populism and the Economics of Globalization' (2018) 1(1-2) *Journal of International Business Policy* (2018) 12.

nation's general exasperation with politics.[16] They note the rise in populist political party support and possible influence of economic factors on this trend.[17]

We note that the inquiry's terms of reference refer to the responsibility of the state to its citizens in both national and international law. Examples of the impact of social injustice on national identity and nationhood are abundant in the international context: the Malayan Emergency was a clear struggle for national identity; and the more recent long-running insurgency in Southern Thailand is a particularly illustrative example of tensions arising between the traditional Thai nation and marginalised Malay Muslims. In that context, there is considerable anecdotal evidence of a widespread perception among the Malays that they have been left behind by Bangkok and therefore robbed of any collective identity within Thailand. Conversely there is anecdotal evidence that Thai Buddhists feel they are at risk of losing are at risk of losing their traditional identity as a nation state as a result of the long-running insurgency in the Deep South and the resulting human rights violations being caused by the actions of the insurgents on the one hand and the security forces on the other.[18]

Promises, politics and restoring public trust

The Law Society agrees with the suggestion in the inquiry's discussion paper that "[t]he loss of trust in democratic institutions... [has] the potential to weaken Australia's liberal democracy". In this regard, we note that in a speech to the Centre of Comparative Constitutional Studies 2019 Constitutional Law Conference in July of this year, the Hon. Kenneth M Hayne AC QC commented on the loss of faith in the political establishment, stating that "trust in all sorts of institutions, governmental and private, has been damaged or destroyed".[19] Justice Hayne further reflected on the "opaque" and "skewed" nature of government decisions, which are influenced by those "powerful enough to lobby governments behind closed doors."[20]

The *Democracy 2025 Report*, cited above, defined political trust as a relational concept that is about "keeping promises and agreements".[21] To that extent, the *Democracy 2025 Report* places at the core of this erosion of trust an individualised relationship between elector and elected, in which the former is fundamentally disenchanted with the latter by the failure of both parties and individual politicians to keep those promises and implement those policy platforms in which the elector had once had faith. The authors of the report assert that "trust above all is defined as keeping promises and that is where politics is seen as failing".[22]

We note that the discussion paper prepared by the Committee refers to the Grattan Institute report of March 2018, *A Crisis of Trust: The Rise of Protest Politics in Australia*. This report suggests that:

[16] David Marr, 'The White Queen: One Nation and the Politics of Race' (2007) 3 *Quarterly Essay*.
[17] Tim Colebatch, 'Where Does One Nation Get Its Support?' *Inside Story* (Web Page, 26 July 2017) <https://insidestory.org.au/where-does-one-nation-get-its-support/ >.
[18] Marte Nilsen, 'Negotiating Thainess: Religious and National Identities in Thailand's Southern Conflict', (PhD Thesis, Lund University, 2012)<https://www.lunduniversity.lu.se/lup/publication/2a599cd2-6465-4fb2-84ff-e63126caa979>.
[19] K M Hayne, 'On Royal Commissions' (Conference Paper, Centre for Comparative and Constitutional Studies Conference, 26 July 2019) 6.
[20] Ibid 5.
[21] *Democracy 2025 Report* (n 17) 15, quoting Marc Hetherington, *Why Political Trust Matter* (Princeton University Press, 2005).
[22] *Democracy 2025 Report* (n 17) 37.

[T]rust and [social] cohesion can be improved with an extended period of under-promising and quiet over-delivery [from politicians and the political class]. And improving the integrity of the system can help to reduce the incidence of trust-sapping scandals.[23]

Having regard to the findings of the Grattan Institute report, the Committee may wish to take into consideration the role of politicians and the political process in damaging trust, and as the basis of rebuilding that trust.

Despite constitutional issues becoming the subject of increasing public and political debate over the past few years, including constitutional recognition of Aboriginal and Torres Strait Islander peoples, constitutional recognition of local government, and the ongoing concerns with parliamentarian's compliance with section 44 of the Constitution, the following statement from a 2011 article by Professor George Williams remains valid.

Rather than being engaged and active citizens, many Australians know little of even the most basic aspects of government. This is often a reflection of the fact that disengaged citizens tend to have less knowledge about their system of government and any reform being proposed.[24]

In an effort to increase not only knowledge of the Constitution, but also of how it can be used to empower citizens, the Law Society proposes consideration of the establishment regular constitutional conventions, made up of political representatives from all levels of Government, community leaders, members of the legal and academic profession, and citizens. Such conventions could depoliticise the process of constitutional reform by making it part of the political landscape. This process would empower a diverse range of stakeholders to have their say on their system of government rather than relying on constitutional debate through the news cycle.

Further, a structured and regular constitutional convention process would ensure that Australia's constitutional framework remains under regular review. Any problems with the current structure could be identified and addressed proactively, so the framework reflects modern Australia and its aspirations.

In additional to a formal constitutional convention process, the Committee may wish to consider opportunities to empower citizens to engage with their elected officials outside of the election cycle. Facilitating engagement between representatives and citizens on political issues on an ongoing basis may allow constructive conversation on policy and may improve political discourse and – potentially – trust in our politicians. We note in this regard that periodic elections are only one component of the right to political participation; the UN Human Rights Committee clarified in a 1996 General Comment that "citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves."[25]

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[23] Danielle Wood and John Daley, Grattan Institute, *A Crisis of Trust: The Rise of Protest Politics in Australia* (Report, March 2018) 89 <https://grattan.edu.au/wp-content/uploads/2018/03/902-a-crisis-of-trust.pdf>.
[24] George Williams, 'Recognising Indigenous Peoples In The Australian Constitution: What The Constitution Should Say And How The Referendum Can Be Won' (2011), *Land, Rights, Law: Issues of Native Title*, 13.
[25] UN Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN Doc CCPR/C/21/Rev 1/Add 7 (12 July 1996).

Thank you again for the opportunity to contribute to the Committee's Inquiry. If you have any queries in relation to this submission, please contact Claudia Elvy, Policy Lawyer, on (02) 9926 0354 or at claudia.elvy@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President