



Reform of the Australian Federation

To Senate Select Committee on the Reform of the Australian Federation

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Introduction

1. The Law Council is pleased to make a submission to the recently established Senate Select Committee on the Reform of the Australian Federation (the Committee).¹
2. The Law Council represents around 56,000 Australian lawyers through its Constituent Bodies, which are the State and Territory Law Societies and Bar Associations, as well as the Large Law Firm Group. Further details of the members and aims of the Law Council are at Attachment A.
3. The Law Council notes that the Committee's Terms of Reference for its inquiry are very broad, namely to:
 - (a) Inquire into key issues and priorities for reform of relations between the three levels of government within the Australian federation; and
 - (b) Explore a possible agenda for national reform and to consider ways it can best be implemented in relation to, but not exclusively, the following matters:
 - (i) The distribution of constitutional powers and responsibilities between the Commonwealth and the states (including territories),
 - (ii) Financial relations between federal, state and local governments,
 - (iii) Possible constitutional amendment, including recognition of local government,
 - (iv) Processes, including the Council of Australian Governments, and the referral of powers and procedures for enhancing cooperation between the various levels of Australian government, and
 - (v) Strategies for strengthening Australia's regions and the delivery of services through regional development committees and regional grant programs
4. The Law Council also notes that the motion establishing the Committee provides that it has power to appoint sub-committees and can refer any matter which it is empowered to examine to such sub-committees.²
5. The Law Council suggests that the Committee should establish sub-committees to consider the various broad-ranging matters outlined in paragraph (b) of its terms of reference.
6. Further, the Law Council suggests that the Committee and any sub-committees it establishes should examine high level processes for wider consultation with relevant stakeholders and the Australian community on these broad-ranging and detailed matters.
7. In the time available to make this submission, the Law Council can provide only preliminary comments on some of the issues which could be addressed through

¹ The Committee was established at the conclusion of the Senate Select Committee on the National Broadband Network, which reported on 17 June 2010. The motion to establish the Committee had been moved by Liberal Senator Marise Payne and passed by the Senate on 17 March 2010. See Senate Hansard, 17 March 2010 at p 2109

² *ibid*

further consultative processes. The Law Council would be pleased to contribute to any such processes once they are established.

The Need for Reform

8. The Law Council and a number of distinguished commentators have examined the need for reform of the Australian federation in recent years.³

9. In 2008, the Law Council's International Law Section held a conference on the future of federalism. A number of international speakers examined the operation of federalism in Europe and a number of academics, judges, and lawyers examined the challenges for the Australian Federation. Federal Court judge, the Honourable Justice French (as he then was) speaking extra judicially said:

*What used to be local has expanded to become national and in that sense the federation has shrunk. The forces driving contraction are various. The harsh economics of global markets, the complicated array of international obligations and relationships which Australia has developed, the creation of an electronic environment in which many transactions are negotiated and completed and internally the rapid movement of the people, goods and services across the country are all transforming the local to the national in a variety of fields of human activity. The responses which they demand test the ability of a Constitution based upon a division of legislative powers to accommodate national approaches to subjects not directly under Commonwealth legislative competency.*⁴

10. The conference also examined various mechanisms currently being used to meet the challenges posed to the Australian Federation by the types of social changes outlined above. Several of these mechanisms are referred to, directly or indirectly in the terms of reference for the Committee. Such mechanisms include:

- (a) Co-operative legislative schemes involving the Commonwealth, States and Territories;
- (b) Inter-governmental agreements (IGAs) between the Commonwealth, States and Territories; and
- (c) The development of the Council of Australian Governments (COAG), which comprises the Prime Minister, the State Premiers, the Territory Chief Ministers and the President of the Australian Local Government Association⁵

11. Issues raised by each of these mechanisms will be examined below.

12. The conference also examined other possible reforms to meet the challenges posed by the social changes identified above. These other reforms are also related to the terms of reference for the Committee and include:

³ See http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=BE416ED6-1E4F-17FA-D216-4DF8C16482A7&siteName=lca;
http://www.anzsog.edu.au/userfiles/files/ANZSOG_Nwsltr_Oct_08_web.pdf;
<http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>; <http://www.bca.com.au/Content/100802.aspx>;

⁴ Justice French, The future of federalism: The incredible shrinking federation – voyage to a singular state?, (FCA) [2008] FedJSchol 8 available at <http://www.austlii.edu.au/au/journals/FedJSchol/2008/18.html>

⁵ See <http://www.coag.gov.au/>

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- (a) Reconsidering the division of powers and responsibilities between the Commonwealth, State and Territory Governments;
 - (b) Reconsidering the financial arrangements between the Commonwealth, the States and the Territories; and
 - (c) Constitutional amendments
13. The conference also considered recommendations of the 2020 summit (the Summit) which had been held earlier that year. In particular, the conference examined the recommendations of the Future of Australian Governance stream of the Summit which brought together 100 eminent Australians and considered the creation of a modern federation among other matters. These recommendations included the following:
- (a) Reinvigorate the federation to enhance Australian democracy and make it work for all Australians by reviewing the roles, responsibilities, functions, structures and financial arrangements at all levels of governance (including courts and the non-profit sector) by 2020;
 - (b) Initiate a three stage process with:
 - (i) An expert commission to propose a new mix of responsibilities;
 - (ii) A convention of the people, informed by the commission and by a process of deliberative democracy;
 - (iii) Implementation by intergovernmental cooperation or referendum.⁶
14. These recommendations will also be examined below.
15. The need for reform has also been expressed by the Business Council of Australia, academics and political leaders.⁷

Division of Powers and Responsibilities

16. The Law Council notes the growing consensus across politics, business and the community that there needs to be a reallocation of powers in the Australian Federation as referred to in a recent report for the Council for the Australian Federation.⁸
17. The report suggests that the principle of subsidiarity could be used for such a reallocation. Under this principle, functions should be undertaken by the States and Territories or local government unless this is not practicable. Circumstances in which such allocation is not practicable and allocation should be made to the Commonwealth include where the subject matter is of national interest, such as defence, foreign affairs, trade, monetary policy and immigration or where national standards based on equity are required, such as social security. Other important

⁶ See http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.pdf

⁷ See http://www.anzsog.edu.au/userfiles/files/ANZSOG_Nwsltr_Oct_08_web.pdf; <http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>; <http://www.bca.com.au/Content/100802.aspx>; http://www.premier.vic.gov.au/index.php?option=com_mymedia&Itemid=51&lang=en&media_id=324&task=next

⁸ See A Twomey and G Withers, *Australia's Federal Future*, April 2007 available at <http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>

factors include whether several jurisdictions are involved, whether economies of scale can be achieved and whether harmonisation is needed to achieve efficiency.⁹

18. Another way in which the principle of subsidiarity is expressed is that where possible, the responsibility for a particular function should reside with the level of government most accessible, responsible and accountable to the community. Where a policy does not have significant effect beyond a State, Territory or local area, it should be the responsibility of that State, Territory or local government.¹⁰
19. The Law Council suggests that a high level process such as a convention be established to examine all government functions in Australia in the light of factors such as those outlined above. Any proposed reallocation of powers and responsibilities arising from such a process could be implemented through a referendum for constitutional amendment or co-operative legislative schemes or IGAs in appropriate circumstances.

Co-operative Legislative Schemes

20. Some of the mechanisms currently used to respond to the need for national responses to the social changes identified above include co-operative legislative schemes. The Law Council has made submissions on a number of such schemes, which use different approaches, including model or template legislation; applied legislation; complementary legislation and referral of powers.¹¹
21. Model or template legislation involves each jurisdiction passing separate but consistent legislation on a matter. An example is the existing State and Territory legislation which attempts to deal with regulation of the legal profession on a national basis.¹²
22. An advantage of model or template legislation in each State and Territory is that it avoids the difficulty of a Commonwealth agency attempting to exercise State and Territory powers, which has been held to be problematic by the High Court.¹³ However, a significant disadvantage is the potential for divergence by State and Territory jurisdictions both upon enactment of the legislation and over time. Such

⁹ Ibid, p 46; See also Submission by the Australian Chamber of Commerce and Industry to the Senate Select Committee on the Reform of the Australian Federation at

http://www.aph.gov.au/Senate/committee/reffed_cte/reffed/submissions.htm

¹⁰ See Submission by Australian Chamber of Commerce and Industry to the Senate Select Committee on the Reform of the Australian Federation at

http://www.aph.gov.au/Senate/committee/reffed_cte/reffed/submissions.htm

¹¹ For example, see http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=66FEF714-1E4F-17FA-D210-CC476871925D&siteName=lca;

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca;

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4015491C-1E4F-17FA-D2A7-4B981554F67A&siteName=lca;

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A22AD45-1C23-CACD-22BE-4444EBC78C0F&siteName=lca;

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A19CDBA-1C23-CACD-2286-614D8138815D&siteName=lca;

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76EAF-1C23-CACD-22EF-2601499732CC&siteName=lca

¹² *Legal Profession Act 2006 (ACT)*; *Legal Profession Act 2004 (NSW)*; *Legal Profession Act 2006 (NT)*; *Legal Profession Act 2007 (Qld)*; *Legal Profession Act 2008 (WA)*; *Legal Profession Act 2007 (Tas)*; *Legal Profession Act 2004 (Vic)*. South Australia is the only jurisdiction which has failed to pass the model legislation.

¹³ See *R v Hughes* (2000) 202 CLR 535s

divergences have characterised the legislation relating to regulation of the legal profession. The problems caused by this divergence have led to the Law Council advocating that COAG address national regulation of the legal profession through a new co-operative scheme. The COAG process in this regard is currently underway.¹⁴

23. Applied legislation involves one jurisdiction enacting legislation which is applied by other jurisdictions, which also apply amendments to the original legislation. This approach was used in the national corporations law scheme adopted in the 1990s by the Commonwealth, States and Territories.¹⁵ An advantage of such a scheme is that it allows for uniform changes to be made over time. Disadvantages for such a scheme which involves the Commonwealth as well as the States and Territories are the problems caused by the High Court decisions that federal courts cannot determine disputes arising under State and Territory applied legislation and that Commonwealth authorities cannot exercise powers given to them under State and Territory laws unless those powers are also related to Commonwealth responsibility under the Constitution.¹⁶
24. Complementary legislation involves the Commonwealth legislating to establish a national regulator with States and Territories legislating to give the regulator powers in relation to State and Territory matters. An example of complementary legislation is the current gene technology regulation scheme.¹⁷ An advantage of such a scheme is that it allows for the operation of a national regulator. A disadvantage is that it may infringe the principles established by the High Court in relation to the roles of Commonwealth authorities and federal courts unless carefully drafted.
25. Referral of powers involves the States and Territories referring legislative powers to the Commonwealth which then passes legislation that applies to the referring States and Territories. The current corporations law scheme is an example of Commonwealth legislation enacted pursuant to a referral of powers and applied to the States and Territories.¹⁸ An advantage of such a scheme is that it avoids the problems with the roles of Commonwealth agencies and federal courts in relation to State and Territory powers, provided the terms of the referral are broad enough. A disadvantage of such a scheme is that limitations are usually contained in the referral, such as sunset clauses applying to the referral.
26. At the Law Council's conference on the future of federalism, the Hon Justice French (as he then was) suggested that referral of powers offered the best solution to the current challenges for the Australian Federation as it provided clear accountability and protections for States and Territories in relation to future changes.¹⁹
27. The Law Council suggests that any high level process for broader consultation on the challenges posed by social change to the Australian Federation should include examination of the advantages and disadvantages of current co-operative legislative schemes.

¹⁴ See <http://www.ag.gov.au/legalprofession>

¹⁵ See *Halsbury's Laws of Australia*, 'Corporations' [120-130]

¹⁶ See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) CLR 535

¹⁷ See *Gene Technology Act 2000 (Cth)*; *Gene Technology Act 2003 (ACT)*; *Gene Technology (New South Wales) Act 2003 (NSW)*; *Gene Technology (Northern Territory) Act 2T04 (NT)*; *Gene Technology Act 2001 (Qld)*; *Gene Technology Act 2001 (SA)*; *Gene Technology Act 2001 (Tas)*; *Gene Technology Act 2001 (Vic)*; *Gene Technology Act 2006 (WA)*.

¹⁸ See *Halsbury's Laws of Australia*, 'Corporations'[120-130]

¹⁹ See note 2

Inter-governmental Agreements

28. At the Law Council's conference on the future of federalism, constitutional lawyer and academic, Professor Cheryl Saunders identified a trend in Australia to pursue uniformity and centralism through IGAs. Such IGAs often underpin co-operative legislative schemes. However, Professor Saunders suggested that the IGA system is complex and opaque, particularly as not all IGAs are published, although publication was recommended by the House of Representatives Legal and Constitutional Affairs Committee in 2006.²⁰
29. The Law Council notes that the submission by the Gilbert and Tobin Centre for Public Law to this Committee also suggests that all IGAs should be tabled in the parliaments of affected jurisdictions; that individual parliaments should be able to scrutinise IGAs, including by referral to parliamentary committees and that a complete register of IGAs negotiated by COAG should be published.²¹
30. The Law Council supports these suggestions for increased transparency and accountability in relation to IGAs. The Law Council also suggests that the role of IGAs in responding to the challenges posed by social change to the Australian Federation should be subject to further consultation through a high level process as outlined below.

COAG

31. At the Law Council's conference on the future of federalism, Professor Cheryl Saunders also noted the increasing influence of COAG in the Australian Federation.
32. At the Australian and New Zealand School of Government's conference, *Making Federalism Work* in 2008, the Premier of Victoria, John Brumby also noted as unprecedented the impact of COAG since 2007 in necessary areas of reform for the Australian Federation.²² He suggested that to further this reform agenda, the status of COAG needed to be elevated. He called for a new IGA relating to COAG which would provide for regular meetings; an effective and independent Secretariat and the right for States and Territories to place items on the agenda.
33. The Law Council notes that the submission by the Gilbert and Tobin Centre for Public Law to this Committee makes similar suggestions about a new IGA for COAG.²³
34. The Law Council supports suggestions to increase the effectiveness of COAG. The Law Council also suggests that the role of COAG be subject to further consultation by a high level process as detailed below.

²⁰ See http://www.vicbar.com.au/WebData/GeneralFiles/Federalism%20Conference%20brochure_lr.pdf

²¹ See submission at http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/submissions.htm

²² See

http://www.premier.vic.gov.au/index.php?option=com_mymedia&Itemid=51&lang=en&media_id=324&task=ext

²³ See submission at http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/submissions.htm

Constitutional Amendment

35. As outlined above, any reallocation of powers and responsibilities between the Commonwealth, States and Territories may require Constitutional amendment.
36. Other areas of suggested Constitutional amendment which the Law Council has addressed recently are in the areas of human rights and Indigenous rights.
37. The Law Council's policy on a Charter of Rights for Australia states that:

*Ideally, either all rights recognised as warranting protection by law or at least a subset of those rights should be constitutionally entrenched and thus protected from interference or abrogation by any future parliament. However, recognising that achieving constitutional reform of this kind in the short term is highly unlikely, in the interim the articulation and protection of rights under ordinary statute is regarded as providing an improved form of rights protection.*²⁴
38. The Law Council's has also welcomed the recent commitment by the major political parties to fully recognise Indigenous Australians in the Constitution and called on the parties, in consultation with Indigenous Australians to commit to a referendum in the next term of Government to decide on the form of words to be used in the Constitution.²⁵
39. The Law Council suggests that other possible areas of Constitutional amendment should be subject to further consultation through a high level process as detailed below.

Financial Arrangements between the Commonwealth, States and Territories

40. The Law Council notes that a number of commentators have raised the need to address both vertical fiscal imbalance and horizontal fiscal equalisation in any reform of the Australian Federation.²⁶
41. Vertical fiscal imbalance involves the disparity between the taxing and spending powers of the Commonwealth, the States and the Territories. The Commonwealth raises the vast majority of taxes collected but the States and Territories are responsible for most Government expenditure. The States and Territories are therefore heavily dependant on the Commonwealth as the shortfall in their own revenue is made up by grants from the Commonwealth, which typically have stringent conditions tied to them and allow the Commonwealth to provide direction to

²⁴ See http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=91B1110E-1E4F-17FA-D2B8-5CB2E8FEAF92&siteName=lca

²⁵ See <http://www.lawcouncil.asn.au/media/news-article.cfm?article=5E6F444E-027E-6160-8244-E0E9447E7227>

²⁶ See A Twomey and G Withers, *Australia's Federal Future*, April 2007 available at <http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>; Business Council of Australia, *Reshaping Australia's Federation: A New Contract for Federal-State Relations*, 2006 at <http://www.bca.com.au/Content/100802.aspx>

the States and Territories in areas which are not within Commonwealth responsibility under the Constitution.²⁷

42. Horizontal fiscal equalisation is a principle applied by the Commonwealth Grants Commission in its advice on the allocation of GST revenue between the States and Territories. It seeks to ensure that each State and Territory has the capacity to provide services at national average levels. It is based on the concept that citizens in different States and Territories should have access to equal standards of Government services regardless of the size of the State or Territory.²⁸
43. Both vertical fiscal imbalance and horizontal fiscal equalisation are seen as affecting the balance of power between the Commonwealth, States and Territories in the Australian Federation.
44. The Law Council supports the examination of vertical fiscal imbalance and horizontal fiscal equalisation in further consultation through a high level process as outlined below.

Rural, Regional and Remote Issues

45. The Law Council notes that one of the terms of reference for the Committee relates to strategies for strengthening Australia's regions.
46. The Law Council has been concerned for some time about access to justice in Rural, Regional and Remote (RRR) areas, particularly as numbers of lawyers in those areas are declining.
47. In 2008, the Law Council conducted a national survey of lawyers in RRR areas and found that:
 - (a) 43% of legal practices do not have enough lawyers to service the legal needs of their RRR communities
 - (b) 42% of lawyers in RRR areas do not intend to be practising in 5 years time
 - (c) 71% of principal lawyers in RRR areas cite succession planning as their biggest concern, followed by attracting additional lawyers (58%) and attracting lawyers to replace departures (51%)
 - (d) Younger lawyers (20-29 years) in RRR areas indicated that they only intended to practise in RRR areas for less than 2 years
 - (e) 64% of lawyers in RRR areas provide pro bono legal services and 51% provide legal aid services

²⁷ See submissions by the Australian Commerce of Chamber and Industry and by A Zimmerman and L Finlay to the Senate Select Committee on the Reform of the Australian Federation at http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/submissions.htm

²⁸ See Department of the Parliamentary Library Research Note No 1 20 August 2002 at <http://www.aph.gov.au/library/pubs/rn/2002-03/03rn01.pdf>

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48. The Law Council is developing strategies to address these issues and has welcomed Commonwealth Government funding initiatives to improve access to justice in RRR areas.²⁹
 49. The Law Council is aware of similar problems of shortages of other professionals in RRR areas and suggests that these issues be subject to further consultation through a high level process as detailed below.³⁰

A Process to Reform the Australian Federation

50. As noted above, the 2020 Summit recommended that the Commonwealth Government Initiate a three stage process with:
 - (a) An expert commission to propose a new mix of Commonwealth, State and Territory responsibilities;
 - (b) A convention of the people, informed by the commission and by a process of deliberative democracy;
 - (c) Implementation by intergovernmental cooperation or referendum³¹
51. The Law Council notes that the submission of the Gilbert and Tobin Centre for Public Law to the Committee also recommends that the Commonwealth Government should organise a Convention on the Australian Federation to consider future priorities for reform of the federal system. It recommends that COAG frame the agenda for the Convention and notes that the idea of a Convention has widespread support, including from the Business Council of Australia and the Council for the Australian Federation, which includes all State and Territory Governments.³²
52. The Law Council supports the suggestions for further consultation through a high level process to address the issues raised in the Committee's terms of reference. The Law Council suggests that it may be necessary to conduct more than one convention to deal with each of the detailed issues identified above. The Law Council would be pleased to be involved in such further consultation processes.

²⁹ See <http://www.lawcouncil.asn.au/media/news-article.cfm?article=7047639A-1E4F-17FA-D2A5-BAB1505F0F9D>

³⁰ See <http://www.health.gov.au/internet/otd/Publishing.nsf/Content/program-RuralHealthWorkforceStrategy-lp>

³¹ See http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.pdf

³² See submission at

http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.pdf

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.