THE UNIVERSITY OF MELBOURNE

House of Representatives Standing Committee on Legal and Constitutional Affairs
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17 March 2006

Submission to Inquiry into Harmonisation of Legal Systems

I apologise for the lateness of this submission. I hope that the Committee is willing to consider the submission notwithstanding its lateness. Unfortunately, it only recently came to my attention that the Committee's enquiry was ongoing.

This submission is made in my personal capacity. For identification purposes, I am Director of the Centre for Comparative Constitutional Studies at the University of Melbourne. I research and teach in the field of constitutional law.

Summary

This submission focuses on the legal concerns and constitutional obstacles to cooperation between governments.

Any attempt to harmonise legal systems between jurisdictions will require some form of intergovernmental agreement. Recent experience with intergovernmental agreements in Australia demonstrates that they pose risks to the central constitutional values of democratic law-making, transparency, accountability and responsible government. In order to ensure that these values are respected in the process of harmonisation, we therefore recommend that:

1. Unless there are exceptional circumstances, governments should circulate exposure drafts of intergovernmental agreements and implementing legislation to allow for public scrutiny and discussion before any intergovernmental agreement is reached.
2. To ensure that parliaments are not cut out of the law-making process by agreement between executive governments – unless there are exceptional circumstances, intergovernmental agreements should be considered by parliamentary scrutiny

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committees in each jurisdiction at the exposure draft stage and at the tentative agreement stage.

3. The existing register of intergovernmental agreements be improved to with a view to cataloging all agreements requiring legislative implementation, in order to facilitate public access to information about the existence and content of intergovernmental agreements.

1. Harmonisation and the federal system

Within the existing Australian federal system, there are essentially three possible 'levels' of harmonisation of legal systems.

1. Parallel uniform laws

Different jurisdictions can ensure that their laws are, as nearly as possible, identical. This can be achieved through the States and the Commonwealth enacting uniform, parallel legislation, or through the use of a Commonwealth 'template' which is automatically adopted by the States.

However, this approach has several drawbacks. It relies on the States enacting the same laws as the Commonwealth resulting in costly duplication of administering bodies and greater scope for procedural divergence. It may also be difficult politically, especially in relation to maintaining uniformity of legislation over time.

2. 'Federalisation'

Alternatively, Australia's federal units can agree to a system whereby the provisions of the identical laws are administered and enforced, as far as possible, by the same body, deriving its powers from all participating jurisdictions, but accountable to only one (usually the Commonwealth). Sometimes referred to as 'federalisation', this model provides a much higher level of uniformity across Australia's legal systems.

Regrettably, recent judicial decisions suggest that models of this kind face significant constitutional barriers. Following the High Court's decision in *Re Wakim; ex parte McNally* (1999) 198 CLR 511, it is clear that any vesting of federal courts with jurisdiction to hear matters arising under State laws will be unconstitutional. The High Court's decision in *R v Hughes* (2002) 202 CLR 535 suggests that there are also limits on the extent to which State laws can be administered by Commonwealth officers.

3. Referral of State Powers

Under section 51(xxvii) of the Constitution, the States may refer any of their legislative power to the Commonwealth. This is the model which has underpinned the Commonwealth's corporations and securities legislation since the High Court's decisions in *Wakim* and *Hughes*.

However, it has several drawbacks. States may be reluctant to refer power in relation to broadly described areas because it is unlikely that they will be able to prevent the Federal Parliament from using the broad referral to legislate in ways that were not contemplated (or allowed) by the supporting agreement. (Their only recourse will be to revoke the referral.) Equally, a referral of a specific legislative text will sometimes be less than ideal because of the rigidity involved. Furthermore, it seems likely that referrals can be revoked at any time; and conversely when referrals are expressly time-limited, States can hold-out for concessions on unrelated areas when it comes time to renew the referral.

Constitutional Reform?

In light of these shortcomings with the existing mechanisms, Professor George Williams has suggested both in his submission to the inquiry and elsewhere[1] that the existing political and constitutional barriers to Commonwealth-State cooperation are so significant that the only effective solution may be constitutional amendment. Professor Williams suggests that a possible amendment could allow two propositions:

1. The States may consent to federal courts being invested with jurisdiction to hear matters arising under the laws of a State or Territory, including the common law of that State or Territory; and
2. The States may consent to federal agencies administering these laws.

While we agree that such an amendment would remove many of the constitutional impediments to effective cooperative federalism, our submission focuses on machanisms for harmonisation under the existing constitutional framework. Whatever its merits, constitutional reform in this area is not likely even in the medium term.

2. Intergovernmental Agreements

Absent constitutional reform, attempts to harmonise legal systems at a federal or international level involve a degree of coordination between governments which is often achieved through intergovernmental agreements. These agreements may take a vast array of forms and vary greatly in formality and complexity.[2] Significant examples include the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999, the Corporations Agreement 2002, and the more recent Intergovernmental Agreement on a National Water Initiative 2004.

A system of scrutiny and consultation is required to ensure the agreement making process is subject to the principles of transparency and accountability in government. These concerns are not limited to harmonisation schemes, which may indeed be subject to a greater level of scrutiny and consultation than many other arrangements between governments.

Transparency

Public information about the existence of intergovernmental agreements is scarce, and access to their substantive content is difficult and *ad hoc*. There is currently no comprehensive repository of intergovernmental agreements. The Council of Australian Governments website acknowledges the importance of these agreements to the practical operation of the Australian federation but it has links to only nine of the many hundreds of agreements currently in force.[3] As a result, many Australians may be unaware of the existence of agreements with immense practical significance for Australian law and politics. This is clearly contrary to the rule of law ideals of transparency and accessibility of legal materials. It stands in contrast to the existing arrangements for a public register of international treaties to which Australia is a

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[1] George Williams, 'Cooperative Federalism and the Revival of the Corporations Law: Wakim and Beyond' (2002) 20 *Companies and Securities Law Journal* 160, 168-171.

[2] For a thorough survey of the variety of intergovernmental agreements in Australia, see Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power', forthcoming.

[3] Council of Australian Governments, <http://www.coag.gov.au/guide_agreements.htm> accessed 13 December 2005.

party (the Australian Treaties Library, supported by DFAT) and a public register of Commonwealth legislative instruments.

Therefore, we **recommend that intergovernemntal agreements be recorded on a central register, to enable public access to their contents and promote openness and transparency in agreement making**. This requirement should apply to all agreements requiring legislative implementation. The Council of Australian Governments is an obvious choice for overseeing these arrangements, as it operates through cooperation at the State and Federal levels.

Intergovernmental agreements raise significant obstacles to the effective operation of representative and responsible government.

Two of the central planks of the Australian constitutional order are representative and responsible government. Both can be undermined by intergovernmental agreements aimed at harmonisation of laws.

Representative government requires that the peoples' representatives in parliament make the laws that bind the people, not the executive government.

Responsible government requires that the peoples' representatives in parliament be able to require an account of the administration of the law from the executive government.

The ability of State and Federal Parliaments to scrutinise the executive government in relation to intergovernmental agreements is limited. The deficiencies of the current system are well documented.[4] Agreements are typically formed by senior members of the Executive, often at fori such as the Ministerial Councils. There is little opportunity for Parliamentary input into the details of agreements or for members of the executive to account for their contents, until draft legislation is presented to parliaments on a take-it-or-leave -it basis. This constitutes a serious 'democratic deficit' that is compounded when the agreement underlying the proposed legislation not well publicised. In a real sense, the law is made by the executive government, with limited scope for independent consideration by the peoples' representatives in parliament.

Accordingly we **recommend that, as an absolute minimum, all formalised agreements that contemplate legislative implementation be tabled in parliament in a timely fashion after they are made**.

Additionally, we **recommend that unless there are compelling exceptional circumstances, exposure drafts of intergovernmental agreements (and where possible proposed implementing legislation) should be made publicly available and circulated to all parliaments for scrutiny at the pre-agreement stage**. This would facilitate greater transparency and in agreement making and implementation. Several Australian parliaments already have general Scrutiny of Bills Committees; others have specialist Scrutiny Committees for uniform legislation.[5] While these committees perform a valuable function,

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[4] See the Position Paper on Scrutiny of National Schemes Legislation put out by a Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia (October 1996).

[5] See generally Legislation Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, 'Position Paper on Scrutiny of National Schemes Legislation' (October 1996).

their work would be all the more useful if they were able to consider agreements and Bills earlier in the process, much as the Joint Standing Committee on Treaties scrutinises treaty action at the earliest possible stage.

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Thank you for the opportunity to make a submission to this inquiry.[6]

Yours sincerely

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[6] The late Mr Daniel McCluskey, Centre for Comparative Constitutional Studies Law Reform and Public Policy Intern contributed to the initial draft of this submission.