Queensland Government

The Honourable Rod Welford MP

Attorney-General
Minister for Justice

In reply please quote: 2005/01915a

- 3 MAY 2005

The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper

Re: Inquiry into Harmonisation of Legal Systems

I note that the Committee is to inquire into and report on the lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand. The Committee is to have particular regard to those differences that have an impact on trade and commerce and is to focus on ways of reducing costs and duplication. I note that the Committee will also examine particular areas of the law including the statute of limitations, evidence and partnership laws.

In making this submission I have had the benefit of considering the Committee's Background Brief and the submissions by Professor George Williams of the University of New South Wales Faculty of Law and the Attorney-General for Western Australia, the Honourable J McGinty MLA.

Firstly, like the Western Australian Attorney-General, I have presumed that your Committee is not interpreting its terms of reference to exploring the scope of Commonwealth legislative power in specific areas with a view to recommending Commonwealth legislation to override State laws. If I am incorrect in this presumption, please advise me accordingly.

Australia's federal system mandates the need for ongoing co-operation between the Commonwealth, States and Territories to ensure firstly, harmonisation within Australia's legal system and then secondly, harmonisation between the legal systems of Australia and New Zealand. Ongoing discussion, consultation and negotiation between the jurisdictions should be seen as a manifestation of the need for all jurisdictions to put forward their diverse interests and special needs. Different legislative schemes may be appropriate or otherwise as a result of the size, regional

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nature or urbanisation of a jurisdiction. Co-operative schemes may be devised creatively in order to take differences into account.

While the States have, on occasion, been prepared to make a reference of power to ensure harmonisation within Australia's legal system (for example, in relation to custody and related issues concerning ex nuptial children and, more recently, corporations), co-operative schemes are the preferred approach because they are more consistent with the principles of a federal system. Australia's Constitutional scheme is based on a division of powers and responsibilities between the States, Territories and the Commonwealth. Governments in the States and Territories are elected to provide a broad range of services and should be allowed to provide for those services without undue interference from an encroachment of Commonwealth influence. I trust that this Inquiry is not a precursor to such an approach.

It is my view that there are already forums in place which facilitate harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand. By and large these forums have developed co-operative schemes to facilitate harmonisation. However, as noted above they have, when necessary, agreed to a reference of power to ensure harmonisation. These forums are established to address a specific issue or are standing forums addressing a range of issues.

An example of the first type of forum is the recent development of tort law reform procedure. The Treasurers established a series of Ministerial Forums on Insurance to deal with the issues around the affordability and availability of public liability insurance and to ensure a consistent approach for the majority of the country. At the same time the matter was also being considered by the Standing Committee of Attorneys-General so there were two senior ministerial forums overseeing the project and ensuring its timely completion. This demonstrates that the Commonwealth and the States can react to emergent issues which require urgent harmonisation responses by forming an appropriate group at the time. Of course, during the same period, Premiers would meet and discuss these issues at the Council of Australian Governments.

Uniform Professional Standards Acts, providing for caps on professional liability and a number of other initiatives came out of the same cooperative processes.

The Ministerial Council for Consumer Affairs, the Ministerial Council for Corporations and the Standing Committee of Attorneys-General are examples of standing forums whose work has, and continues to, focus upon harmonisation. The following are some examples of the important work of these forums in providing harmonisation of legal services.

Ministerial Council for Consumer Affairs: Product Safety Reform

The Ministerial Council is discussing reform of Australia's consumer product safety system. In particular, Ministers are aiming to achieve greater harmonisation and consistency in product safety laws; to enable the consumer product safety system to

better detect and assess safety hazards faced by consumers; and to enhance product safety research and information.

Options for reform of the consumer product safety system will be developed in the areas of: harmonisation of regulation and enforcement; establishiment of a more proactive system; and improving product safety research and information.

Ministerial Council for Corporations: Co-ordination of Business Law between Australia and New Zealand

As you are aware, the framework for the co-ordination of business law between Australia and New Zealand is set out in the Memorandum of Understanding between the Government of Australia and the Government of New Zealand on the Coordination of Business Law (the MOU). The Ministerial Council is kept informed on issues examined and arising under the MOU. Some of the issues being examined under the auspices of the MOU include: court proceedings and regulatory enforcement, accounting standards, cross recognition of company registration requirements, cross border insolvency and the mutual recognition of offer documents.

Standing Committee of Attorneys-General: Defamation

Each of the States and Territories currently has different defamation laws. This leads to practical problems for the media and the increasing number of individuals in the community who publish across borders. In November 2004, the States and Territories announced they had reached agreement on draft uniform defamation law provisions and released a model Bill. The agreement followed more than two years of review and negotiation conducted under the auspices of the Standing Committee of Attorneys-General.

Standing Committee of Attorneys-General : Personal Property Securities

The current system of regulating personal properties securities is inconsistent, costly and lacks certainty about the priority of competing secured creditors. There are different registration requirements in different jurisdictions.

At its November 2004 meeting, the Standing Committee of Attorneys-General discussed personal property securities law reform, in particular noting the recent New Zealand *Personal Properties Securities Act 1999* as a possible model for reform. In March of this year, the Standing Committee agreed to form an officers' working party to examine the possible options for reform and develop proposals for consideration by Ministers. The support of the financial sector generally is important for the success of any reform proposal in this area.

Standing Committee of Attorneys-General: Evidence

Following consideration by the Standing Committee of the Australian Law Reform Commission's Report on this subject, a number of jurisdictions in the mid to late 1990s (the Commonwealth, New South Wales and Tasmania) enacted uniform evidence laws. The Australian and New South Wales Law Reform Commissions are

currently reviewing certain aspects of the uniform evidence laws. The Queensland Law Reform Commission has a reference for the purpose of inputting into this review and with a view to subsequent Queensland consideration of the enactment of the uniform evidence laws.

Standing Committee of Attorneys-General: Professional Standards

Through the Standing Committee of Attorneys-General, all Australian jurisdictions, including the Commonwealth, are currently engaged in negotiations for appointment of Professional Standards Councils with a nationally consistent composition under each piece of professional standards legislation. As a result, it is envisaged that there will be harmony between jurisdictions as to the types of service standards required to be accepted as professional conduct within each unique discipline.

Standing Committee of Attorneys-General: Legal Profession Reform

The national model laws for the regulation of the legal profession developed through the Standing Committee of Attorneys-General are being progressively implemented by the States and Territories. The purpose of the model laws is to facilitate national legal practice and provide a consistent framework for the regulation of the profession nationally. The model laws are comprehensive covering the following matters:

- admission;
- national practice;
- conduct rules;
- complaints and discipline;
- external administration;
- fidelity fund;
- incorporated legal practices and multi-disciplinary practices;
- registered foreign lawyers;
- trust accounts; and
- client agreements and costs review.

Jurisdictions have agreed those areas where uniformity is necessary so as to not adversely affect national practice and those where jurisdictional variations can apply. This agreement is underpinned by a memorandum of understanding to ensure ongoing consistency.

The Legal Profession Joint Working Group (which contains representatives from all Australian jurisdictions and the Law Council of Australia) has been established under the memorandum of understanding to monitor the model laws and their implementation and to advise the Standing Committee should changes to the model laws be needed over time.

New Zealand legal practitioners are currently admitted and issued with practising certificates based on the Trans-Tasman mutual recognition legislation. New Zealand practitioners will benefit from this consistent national regulatory framework when they engage in legal practice in Australia. Should New Zealand wish to raise areas where a greater alignment between the regulatory approach in Australia and New

Zealand would be desirable, this could be instigated by the New Zealand representative on the Standing Committee.

Standing Committee of Attorneys-General: Co-operative Schemes - Constitutional Amendments

I am of the view that this is the most important consideration by the Standing Committee of Attorneys-General towards the achievement of harmonisation of legal systems within Australia.

The High Court decisions of Re Wakim; Ex parte McNally (1999) 198 CLR 511(Wakim) and R v Hughes (2000) 202 CLR 595 (Hughes) have, as Professor Williams has indicated in his submission, undermined co-operative schemes designed to achieve harmonisation of legal systems. These co-operative schemes involve the Commonwealth enacting a law under section 122 of the Constitution that the States then legislate to adopt. As Professor Williams has indicated in his submission, this is the best model to achieve harmonisation because "...it does not depend upon a transfer of power, allows for change over time and is built upon Commonwealth-State co-operation."

At its March 2002 meeting, the Standing Committee agreed for Commonwealth officers, in consultation with State officers, to develop constitutional amendments for consideration:

- allowing or requiring Commonwealth authorities to perform duties or functions, or to exercise powers, conferred by State laws (the Hughes amendments); and
- allowing federal courts to exercise State jurisdiction under co-operative legislative arrangements (the Wakim amendments).

It is my view that once these amendments have been settled by the Standing Committee, the Commonwealth should make every effort to facilitate the necessary constitutional change. Greater harmonisation of legal systems within Australia will only occur when the constitutional bases for various co-operative schemes is ensured.

Summary

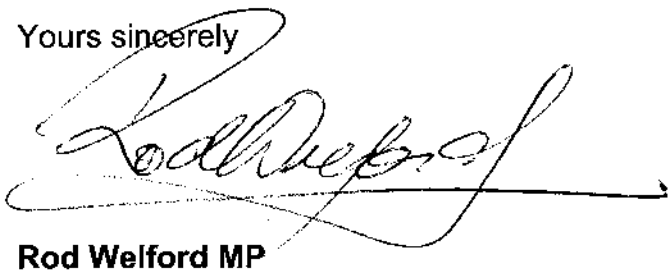
In summary then:

- your Committee should not be exploring the scope of Commonwealth legislative power in specific areas with a view to recommending Commonwealth legislation to override State laws;
- co-operative schemes are the preferred approach to achieving harmonisation within Australia's legal system;
- the Ministerial Council for Consumer Affairs, the Ministerial Council for Corporations and the Standing Committee of Attorneys-General have been, and will continue to be, appropriate and workable forums to address the lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand; and

- greater harmonisation of legal systems within Australia can only occur when the constitutional bases for various co-operative schemes is ensured. The Commonwealth should, as soon as the abovementioned amendments have been settled by the Standing Committee of Attorneys-General, make every effort to facilitate the necessary constitutional changes.

Thank you for the opportunity to make a submission to this inquiry. Please keep me informed of the Committee's work on this inquiry.

Yours sincerely



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