# 4

# Federal – State relations

## Introduction

4.1 This chapter reviews the main issues raised at the roundtable session on Federal-State relations. It outlines:

- the nature of federalism as envisaged by the original drafters of the Constitution;
- how federalism has operated in practice; and
- possible areas for reform including:
  - ⇒ identifying areas for reform;
  - ⇒ methods of implementing reform; and
  - ⇒ gaining support for reform.

## The history of Federal-State relations

4.2 The original drafters of the Australian Constitution were careful to preserve as many existing State powers as possible by establishing equal representation in the Senate, specifying the powers of the Commonwealth (primarily in s. 51), providing for considerable legislative powers for States in residual areas and recognising State constitutions, powers and laws. It was expected that the States would

continue to serve as the primary mechanism of government in Australia.[1]

4.3 However, the nature of federalism has changed considerably since federation. There has been a gradual shift in the balance of power towards the Commonwealth. This shift results from constitutional amendments, the Federal government's increased use of special purpose or tied grants to the States, High Court decisions changing interpretations of key constitutional provisions, and the increasing diversification and overlap of areas subject to public policy at all levels of government.

4.4 While historically federalism has been seen to 'work' in Australia, there has also been a growing concern that it could work much better. Some of the criticisms levelled at the current arrangements include:

- policy and regulatory duplication, inconsistency and overall complexity generated by the State and Federal levels of government;
- the high cost of compliance with multiple jurisdictions which imposes an excessive regulatory burden on the community and business;
- public confusion about which level of government is responsible for what service (or aspect of service) especially where there are overlapping responsibilities; and
- the tendency of governments to shift the blame for policy failures to a different level of jurisdiction.

4.5 Governments have created new cooperative mechanisms to coordinate and target policy and overcome inconsistencies between and jurisdictions. For example, since the 1990s the Council of Australian Governments (COAG) has given its attention to harmonising efforts across a number of areas including improving national efficiency and competitiveness and developing national regulation systems. Other major areas for national cooperation have included rail, electricity, food standards and environmental protection.

1 See J McMillan, G Evans and H Storey, *Australia's Constitution: Time for Change*, Allen and Unwin, Sydney, 1983, pp. 39-48.

4.6 As a consequence, Australia now has a system of government that relies on hundreds of complex agreements between Federal and State authorities made through inter-governmental forums that have no formal authority under the Constitution.

4.7 In her opening statement to the roundtable, Professor Saunders expanded on some of the criticisms of federalism:

> It is clear from much of the debate in Australia in recent years that individual Australians and groups of various kinds – for example, the Business Council – want more laws to be harmonised and want many areas of decision making to be streamlined, and a lot of the studies that have been produced have identified costs associated with what are seen to be inefficiencies, although sometimes they are just the consequences of having a federal system of government.[2]

4.8 Professor Williams highlighted a recent finding by the Organisation for Economic Cooperation and Development (OECD) in relation to the dysfunctional nature of Australia's federal system:

> [T]he Australian system of government has the highest levels of unnecessary government duplication amongst all OECD nations in terms of the basic amount of taxpayers' money that is being wasted.[3]

4.9 Professor Behrendt noted that the problems of federalism are felt acutely by Indigenous communities:

> There is no doubt that since the 1967 referendum [granting the Commonwealth legislative power in Indigenous affairs] the unintended consequence of that was that the split between federal and state governments of responsibility for Indigenous affairs has created one of the biggest structural barriers to our ability to effectively deal with some of the pressing needs of the Indigenous issues.[4]

4.10 Family law is a particular area where both Indigenous and non-Indigenous Australians have to confront the problem of multiple jurisdictions, as Ms Thomas explained:

> [I]n my day-to-day work as a family law practitioner I have to explain to people why it is that they have to bring their

2 Professor Saunders, *Transcript of Evidence*, p. 34.
3 Professor Williams, *Transcript of Evidence*, p. 44.
4 Professor Behrendt, *Transcript of Evidence*, p. 43.

> de facto law application in one court but all the married people get to have their children's and property matters dealt with in one jurisdiction. When it affects them in a negative way, having to explain to the broader community why that is is very difficult. It does not make sense to them why one group or class of people get treated better than they do.[5]

4.11 These current Federal-State arrangements are not consistent with the intentions of the original drafters of the Constitution, and nor do they meet public expectations for the appropriate and effective delivery of government programs. Federalism in practice and the need for reform are considered further in the sections below.

## Federalism in practice

4.12 There was consensus among roundtable participants that the Constitution no longer reflects the way Australia is actually governed in relation to Federal-State relations. Informal conventions of inter-governmental approaches through COAG, ministerial councils and working groups have attempted to respond to cross-jurisdictional issues by various means including mutual recognition between States of their differing legislative provisions.

4.13 However, this approach, known since the 1960s as 'cooperative federalism', brings with it additional problems. For example, inter-governmental bodies have no formal status, are slow in responding to complexity, often do not generate legislative responses and generally lack accountability and transparency.

4.14 Professor Saunders noted that there are literally hundreds of inter-governmental agreements in Australia. Closer relations with New Zealand also mean that many agreed arrangements include an international dimension. Professor Saunders pointed out that the Commonwealth has no tradition of scheduling inter-governmental agreements to Acts of Parliament, nor is there any specific arrangement for parliamentary scrutiny of inter-governmental agreements, although such schemes exist for legislative instruments and international treaties.[6]

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5 Ms Thomas, *Transcript of Evidence*, p. 49.

6 Professor Saunders, *Transcript of Evidence*, p. 36

4.15 Cooperative schemes are also vulnerable to High Court interpretation because the concept of 'cooperative federalism' is not part of the Constitution.[7] This point was illustrated by the decisions of the High Court in *Re Wakim* and *R v Hughes*.[8] For example, in *R v Hughes*, the High Court indicated that Commonwealth officers cannot exercise duties under a cooperative arrangement unless the duty is also supported by a specific head of Commonwealth legislative power. Dr Twomey noted:

> [I]n one of the High Court judgments, one of the judges said, 'There is nothing in the Constitution requiring cooperative federalism. Cooperative federalism is just a slogan'… we need to put something in the Constitution that allows for and supports cooperative federalism at the judicial, the legislative and the executive levels so that it deals with the cross vesting problem, with the Hughes problem and with making section 51 (xxxvii) [regarding state referrals to the Commonwealth] an effective procedure[9]

4.16 According to Professor Saunders, the lack of accountability and transparency is a major problem with current Federal-State relations:

> It is manifested in all sorts of ways – in the conditions attached to grants, in the accessibility of intergovernmental agreements and in the transparency of intergovernmental debates on questions of public policy, which might enable the public to understand and evaluate competing views. If people understood a lot better how these arrangements worked, more pressure might be put on politicians to ensure that they work quicker and more effectively.[10]

4.17 Professor Lavarch also considered that there is need for reform to facilitate cooperative federalism:

> Certainly some improved architecture around intergovernmental arrangements, agreements and transparency is I think quite valuable and would be a signpost to the way in which we would like our Federation to operate.[11]

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7 Dr Twomey, *Transcript of Evidence*, p. 40.

8 *Re Wakim; ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

9 Dr Twomey, *Transcript of Evidence*, p. 40.

10 Professor Saunders, *Transcript of Evidence*, p. 36.

11 Professor Lavarch, *Transcript of Evidence*, p. 44.

## Areas for reform

4.18 In recent years there has been much discussion about the need to 'fix federalism', however there has been little consensus on the very nature of the problem to be fixed. Professor Craven commented on the 'fix federalism' rhetoric:

> I worry about the 'fix federalism' rhetoric. The verb can be problematic. When my father talked about 'fixing the dog', it did not mean something nice. I am happy to look at federalism. I am happy to refine federalism and all those sorts of things, but I think we do need to think about whether we like federalism or whether it is a problem. A lot of what is said now says to me 'federalism is a problem', which I do not agree with. It seems to me that federalism is a good system of government. [12]

4.19 There may be some areas such as water management or industry regulation where the Commonwealth could take a much greater role in responding to national challenges. However, it is difficult to generalise what aspects of public policy could be better served through greater centralisation or decentralisation, as Professor Saunders noted:

> How we go about dealing with harmonisation and streamlining depends on the area in question and on identifying these areas accurately. I think that to have a study that actually does identify the areas that need harmonisation and streamlining is a first priority in this area. There are lots of generalisations that are thrown around, but they need to be properly probed. [13]

4.20 It is also important not to devalue the role of the States. Professor Saunders reflected on the value of decentralisation within the Federation:

> There are many ways in which our attitudes to the federal system waste opportunities for experimentation and innovation, waste opportunities to further deepen our democracy and, in some respects I think, jeopardise our attitudes, not just to federalism but also to parliamentary

12 Professor Craven, *Transcript of Evidence*, p. 41.

13 Professor Saunders, *Transcript of Evidence*, p. 34.

> democracy, as we continually erode the states and their capacities and therefore their levels of performance. [14]

4.21 Mr Black suggested that there are two steps in determining possible areas for reform. The first is to identify the very specific concerns for which there is likely to be bipartisan support:

> There is then that second step, which might be the need to think boldly … which could involve a longer term consideration and debate about exactly what we do want our federal system to be in the 21st century.[15]

4.22 Some participants noted that local government is a major area omitted from the Constitution and neglected in current debates on Federal-State relations. Professor Williams advocated a more in-depth look at the role of local government and warned that a referendum on simple recognition of local government would be a waste of time and entrench 'something that appears to give little but carte blanche to the High Court to determine the meaning of what such a provision would achieve'.[16]

4.23 Dr O'Donoghue argued that local government is important to Aboriginal people and should be part of a discussion on federalism:

> The two levels, federal and state, are always at loggerheads with each other, particularly about our issues. And local governments are much closer to our people, and our people are very involved in local government …and local government is much more involved with our people…[17]

4.24 If a consensus could be reached on particular areas for reforming Federal-State relations, the question then becomes one of how such reform could be implemented. There are a number of means possible including the referral of State power to the Commonwealth, cooperative legislation and constitutional amendment. Participants noted some issues with those methods.

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14 Professor Saunders, *Transcript of Evidence*, p. 34. A similar view was also expressed by Professor Flint, *Transcript of Evidence*, pp. 42-43.

15 Mr Black, *Transcript of Evidence*, p. 47.

16 Professor Williams, *Transcript of Evidence*, p. 45.

17 Dr O'Donoghue, *Transcript of Evidence*, p. 42.

4.25 The Constitution enables Commonwealth legislative authority over matters that are referred to it by States. Section 51 (xxxvii) provides Commonwealth power with respect to:

> … matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

4.26 In relation to the reference power, Professor Saunders observed that:

> [T]he reference power sits quite neatly with our system of federal parliamentary government. It can be used in a way that does not create significant accountability problems.[18]

4.27 However, Professor Saunders and Dr Twomey advised that some questions had recently arisen about the operation of section 51 (xxxvii).[19] Recent statements by the High Court have given rise to doubts about the usefulness of the reference power and uncertainty about whether a reference of power can be revoked; how section 109 (inconsistency) works in relation to the use of referred powers; and how the States can influence the way in which their referred power is used.[20]

4.28 The need for codification of Federal-State relations through constitutional amendment should be carefully considered. According to Professor Lavarch:

> What is unwritten about the way our system of government operates is as fundamental as what is written, and no document can ever fully capture the reality of the way in which the system operates, nor could it endeavour to capture all the nuances that the system of conventions and understandings and practices allow.[21]

4.29 Professor Williams advised that, in principle, reform should be achieved without a referendum unless it is absolutely essential:

> We ought to recognise that, in federal-state relations, many of the problems are fixable to a large extent by other means… It

18 Professor Saunders, *Transcript of Evidence*, p. 35.

19 Dr Twomey, *Transcript of Evidence*, p. 40.

20 Professor Saunders, *Transcript of Evidence,* p. 35.

21 Professor Lavarch, *Transcript of Evidence,* p. 44.

> is possible, without a referendum, to reallocate powers and responsibilities through accepted constitutional means. [22]

4.30 He suggested that issues of accountability and transparency of current federal arrangements could be an example of matters that would be better addressed by legislation, rather than constitutional change.[23]

4.31 Professor Saunders warned that a new provision may make the Federal-State arrangements even more incomprehensible and stressed that any constitutional amendment on inter-governmental relations must be done in a way that is clear and understandable.[24]

4.32 Professor Craven argued that it is neither possible nor desirable to reflect every aspect of how government works in the Constitution.[25] He went on the say that:

> … once you start mucking around with things on which you have some sort of functional consensus and trying [to] write them down explicitly, you can get into very significant problems. [26]

4.33 However, Professor Williams also noted that some aspects of federalism, which are structural in nature, do require constitutional change. For example, he argued that a constitutional amendment is needed to establish:

> ... a suitable framework for agreements and the like, that simply enables cooperation to be achieved for mutual judicial enforcement and to enable things like a national regulator. No-one gets any more power; it simply fixes a flaw, enabling us to deal with cooperation. [27]

4.34 Where particular areas for federal reform are identified for codification through constitutional amendment, the problem then becomes one of how to achieve change through a referendum. The possibilities of achieving change in Federal-State relations through constitutional referenda are explored further below.

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22 Professor Williams, *Transcript of Evidence*, p. 37.
23 Professor Williams, *Transcript of Evidence,* p. 37.
24 Professor Saunders, *Transcript of Evidence*, p. 42.
25 Professor Craven, *Transcript of Evidence,* pp. 40, 41.
26 Professor Craven, *Transcript of Evidence*, p. 47.
27 Professor Williams, *Transcript of Evidence,* p. 38.

## The impetus for change

4.35 Chapter 2 addressed some of the main issues discussed at the roundtable in relation to mechanisms for altering the Constitution. The following section discusses the particular problems of changing the structure of Federal-State relations through the Constitution.

4.36 Four of the eight successful referenda since Federation expanded the power of the Commonwealth with regard to State debts (1910 and 1928), social security benefits and health services (1946) and Indigenous affairs (1967). However, the majority of attempts to expand Commonwealth power through constitutional amendment have failed.[28]

4.37 The roundtable discussed the lack of public engagement and interest in federalism and constitutional matters. It is often said that Australians simply do not care which level of government provides a service, as long as the service is delivered in an efficient and effective manner.

4.38 Professor Flint argued that Australians are less engaged in their Constitution than Americans because self-government was given to the colonies whereas the United States fought a War of Independence.[29]

4.39 Mr Black suggested that young people generally are disengaged because they are disillusioned with politicians and the political process. He considered that it may, in part, be a generational problem and the election of younger people to the Parliament might improve the situation.[30]

4.40 On the other hand, Professor Behrendt argued that young people are engaged in politics in quite different ways compared to older generations:

> [W]e sometimes think, 'Where are all the young people?' But you go home and find you have been invited to join 50 groups on Facebook. Perhaps they are just not as visible to us in some ways … [younger people have] a whole different way of talking about these issues and a whole different way of activism, and that is where I think there is actually a lot of

28 Professor Craven, *Transcript of Evidence*, p. 41.

29 Professor Flint, *Transcript of Evidence*, p. 50.

30 Mr Black, *Transcript of Evidence*, p. 48.

> promise for re-engaging younger people with the Constitution.[31]

4.41 Interest in federalism and constitutional change could also be generated through civics education and experiments in deliberative democracy. Professor Charlesworth spoke of her experience with the use of deliberative polling in public consultation on a Human Rights Act for the Australian Capital Territory. That deliberative polling process involved the provision of information from all sides of the issue, and discussion and debate.[32] Although it may not be possible to use deliberative polling on a regular basis, Professor Charlesworth considered that it offered some lessons for public education on constitutional matters.[33]

4.42 Professor Williams considered that the *ad hoc* nature of referenda has meant that thinking about constitutional issues is not part of Australian political life. The nature of the referenda process can also alienate people because the development of ideas is dominated by politicians. The experience of most Australians is that they are simply asked to vote 'yes' or 'no' but rarely have an opportunity to participate in the development or debate of ideas.[34]

4.43 A proposal advanced by Professor Williams is to establish a regular cycle of engagement based on particular issues about our democracy. A constitutional convention on Federal-State relations in 2009 would develop a more informed debate on federalism and build momentum for change.[35] Expanding on the proposal, the Professor argued:

> Once you have held a convention, you have the possibilities of developing bipartisan support, providing a democratic framework for reform and providing expectations that something will happen. If a convention is held, the odds are that we will get reform to fix the Federation that will go beyond putting out the bushfires in health, education and the like, which are critically important, but none of which tend to go to the longer term structural problems that are giving rise to those issues in the first place.[36]

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31 Professor Behrendt, *Transcript of Evidence*, p. 51.
32 Professor Charlesworth, *Transcript of Evidence*, p. 50.
33 Professor Charlesworth, *Transcript of Evidence*, p. 50.
34 Professor Williams, *Transcript of Evidence*, p. 48.
35 Professor Williams, *Transcript of Evidence*, p. 38.
36 Professor Williams, *Transcript of Evidence*, p. 39.

4.44 Professor Craven agreed:

> It would be good to get discussion into a group of people where there were multifarious points of view and you could talk about both productivity and division of powers.[37]

4.45 Professor Saunders also supported the concept of periodic constitutional conventions but stressed again the need for debate to be focussed on real problems:

> If you really want a discussion on federalism, identify what it is that you want to talk about, or at least begin the process by identifying what you think the real problems are, and then put in place a process for producing solutions for dealing with them.[38]

## Committee comment

4.46 In 2006 the Legal and Constitutional Affairs Committee of the 41st Parliament considered the problems of federalism as part of inquiry into the harmonisation of law within Australia and with New Zealand. The Committee recommended that the Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court in *Re Wakim* and *R v Hughes*. The Committee also recommended that:

- the Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;
- a dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that
- any referendum on the constitutional amendment should be held at the same time as a federal election.[39]

37 Professor Craven, *Transcript of Evidence*, p. 41.

38 Professor Saunders, *Transcript of Evidence*, p. 42.

39 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia And New Zealand*, Canberra, November, 2006, p. xv.

4.47 In relation to federalism and issues of transparency and accountability, the Committee recommended:

- the circulation of draft intergovernmental agreements for public scrutiny and comment;
- the parliamentary scrutiny of draft intergovernmental agreements; and
- the augmentation of the COAG register of intergovernmental agreements so as to include all agreements requiring legislative implementation

with a view to the implementation of these reforms throughout the jurisdictions.[40]

4.48 The Committee also heard first-hand the intense personal cost of jurisdictional inconsistencies in its 2007 inquiry into older people and the law. The inquiry drew attention to the critical need for national approaches to decision making mechanisms in the areas of powers of attorney, advance health care planning, and guardianship and administration procedures.[41]

4.49 Australian Government responses to both these reports have yet to be released.

4.50 The Committee also notes the proposal put forward by the governance section of the 2020 Summit. The idea put forward was to 'create a modern federation' by reinvigorating 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.

  A three-stage process was proposed with:

  ⇒ an expert commission to propose a new mix of responsibilities;

  ⇒ a convention of the people, informed by the commission and by a process of deliberative democracy; and

  ⇒ implementation by intergovernmental cooperation or referendum.
- drive effective intergovernmental collaboration by establishing a national cooperation commission to register,

40 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia And New Zealand*, Canberra, November, 2006, p. xx.

41 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Canberra, September 2007.

monitor and resolve disputes concerning intergovernmental agreements.

- engage the Australian community in the development of an ambitious long-term national strategic plan that delivers results.[42]

4.51 The Committee notes the similarity of the themes raised in its previous inquiries into Federal-State relations and the 2020 Summit and roundtable discussions. They all suggest that Australia's experience of federalism is a muddle of complex routes around the Constitution, supported by governments choosing a 'path of least resistance' which in turn leaves the public confused and disengaged.

4.52 The Committee acknowledges that the current practical functioning of Australia's Federal-State governance arrangements is far removed from the intention of the Constitution. However, gaining consensus for particular areas of Constitutional reform of Federal-State relations is a daunting task, particularly given the low success rate of referenda in Australia.

4.53 Ideas such as a periodic constitutional convention are worthy of further consideration. Mechanisms to increase the accountability and transparency of inter-governmental agreements should also be pursued.[43] These initiatives may assist in laying the foundation for a more cooperative federalism and more importantly for a public expectation of greater accessibility and accountability in our governance structures.

4.54 The Committee recommends that a requirement is introduced to automatically refer intergovernmental agreements to a parliamentary committee for scrutiny and report to the Parliament. This is similar to the requirement for treaties and would introduce the appropriate oversight that is currently lacking in intergovernmental agreements.

### Recommendation 1

**The Committee recommends that the Australian Government introduce the requirement for intergovernmental agreements to be automatically referred to a parliamentary committee for scrutiny and report to the Parliament.**

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42 Department of Prime Minister and Cabinet, *Australia 2020 Summit – Final Report*, May 2008, p. 308, <australia2020.gov.au/final_report/index.cfm> accessed 13 June 2008.

43 See Professor Saunders, *Transcript of Evidence*, p. 36.