Do Uniform Schemes of Legislation Undermine State Sovereignty?

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State sovereignty has been the subject of significant debate since Australia became a federation. In this paper state sovereignty is investigated in terms of how in an era where there is a need for intergovernmental cooperation, the development, enactment and implementation of uniform schemes of legislation are potentially undermining state sovereignty. In doing so this paper hopes to further inform this debate and illuminate the issues that need to be resolved before cooperative governance can be fully effective.

Introduction

Although largely independent, each component of the federation did not possess absolute sovereignty until the nation's relationship with the Imperial Parliament effectively ended. Through the delegation of the power of the ultimate sovereign, 'the people', both the Commonwealth and the States now hold absolute sovereignty over their allocated constitutional powers within the bounds of the Constitution. Although some of these powers may be enumerated, concurrent powers and duplication can exist. This together with the constitutional restrictions on legislating unilaterally and the requirement for a national approach on global issues, means there is a need for intergovernmental cooperation and the enactment of uniform schemes of legislation.

Although formal intergovernmental cooperation in the form of intergovernmental forums, intergovernmental agreements and uniform legislation has been one created to reduce duplication and increase efficiency in the national interest, there is an effect on state sovereignty. Through the analysis of several uniform legislation mechanisms this paper will examine how state sovereignty is affected by the way uniform legislation is developed and scrutinised and how the functional capacity of the respective jurisdictions further impacts upon this interaction. A number of indicia of sovereignty will be utilised to ascertain if and how sovereignty is undermined and whether there are sufficient elements within the current federal structure and the mechanisms of uniform legislation that will protect the sovereignty of the States, irrespective of the nature of its relationship with the Commonwealth.

It will therefore be observed that sovereignty is indeed undermined by some schemes of uniform legislation during the phases of development, enactment and implementation. This places the States in a position of conflict wherein they need to achieve a balance between upholding sovereignty and the need for uniformity. This conflict means that there is a need for an improved democratic process for uniform legislation that mediates the dominance of the Commonwealth and enables the States to exercise their legislative power as 'the people' intended. However, even if state sovereignty can still be undermined by the process of uniform schemes of legislation, the sovereignty of the States and Commonwealth cannot be destroyed and are forever entwined and supported by the Constitution.

Sovereignty

Since Dicey described the powers of 'uncontrolled' Parliaments as being 'sovereign'[1] the British Imperial Parliament has been considered to have the supreme legal authority whereby they

> …may make or unmake any law whatsoever; and secondly that the law does not recognise any other person or body as having the right to override or set aside that legislation.[2]

However the 'correctness of the doctrine of parliamentary sovereignty has been increasingly questioned'[3] as to whether it truly applies in Australia.[4] It is argued 'that the Australian Parliaments are not sovereign law makers in the classic Westminster sense'.[5] This is because prior to federation the constraints of the *Colonial Laws Validity Act* did not enable the notion of absolute sovereignty for the colonies and post-federation[6] any degree of sovereignty attained was restricted by the continued links to the Imperial Parliament. However, the evolution of the Australia's constitutional independence[7] has meant that by the time the *Australia Acts* were passed there was a complete 'end of the legal sovereignty of the Imperial Parliament' and the recognition that the 'ultimate sovereignty resided with the Australian people'[8]

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[1] A.V Dicey in Introduction to the Study of the Law of Constitution (10th ed, 1959), 39-40; cf Sue v Hill (1999) 199 CLR 462 at 492 [64] in Justice Michael Kirby Deep Lying Rights – A Constitutional Conversation Continues Robin Cooke Lecture 2004 Wellington November 2004 http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_25nov04.html

[2] A.V Dicey (1886) as cited in Marilyn Warren ' Unelected Does not Equate with Undemocratic: Parliamentary Sovereignty and the Role of the Judiciary' (2008) *Deakin Law Review* 13(2) 3 http://heinonline.org.ezproxy.utas.edu.au/HOL/Page?handle=hein.journals/deakin13&id=1&size=2&collection=journals&index=journals/deakin

[3] Marilyn Warren, above n 2, 3

[4] Gleeson CJ 2003 argues that 'there has never been, in Australia, a sovereign Parliament' in Warren, above n 3, 3

[5] Galligan 1995 in John Alvey ' Parliament's Accountability to the People, The Role of Committees: A Queensland View (2007) (Paper presented to the Australian Study of Parliament Group Conference Adelaide August 2007) 4-5 http://www.parliament.wa.gov.au/web/webpages.nsf/WebFiles/ASPG+2007+-+Alvey/$FILE/Alvey.pdf

[6] The structure of the former colonial, now state parliaments, was left undisturbed at federation and essentially a new separate level of government was placed over the top of the existing system of state governments. Michael Stokes 'Australian Federalism' (unpublished)

[7] Geoff Lindell 1986 in Jennifer Clarke, Patrick Keyzer, James Stellios Hank's Australian Constitutional Law 8th Ed LexisNexis Butterworths Chatswood Australia 2009 56

[8] Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 cited in Jennifer Clarke, Patrick Keyzer, James Stellios, above n 7, 56

in that they are the source of validity for the Australian Constitution.[9] The delegation of this sovereignty by the people to the parliaments therefore confirms an absolute sovereignty within the bounds of the Constitution for the Commonwealth in terms of their express powers[10] and the States in terms of their residual powers.

In support of this the High Court has held that within the sphere of their federal limitations (that is, within their jurisdictions and competence) the Australian Parliaments have full and plenary powers[11] 'as large, and of the same nature as those of the Imperial Parliament itself'.[12] Both Commonwealth and State governments,[13] therefore have the same power[14] to make laws for the 'peace, welfare and good government'[15] or 'peace, order and good government'[16] in their respective sphere.[17] That is, they are 'separate distinct 'sovereigns' governing distinct spheres.' [18]

[9] Geoff Lindell 1986 and Tony Blackshield 1994 in Jennifer Clarke, Patrick Keyzer, James Stellios, above n 8, 56

[10] The powers contained in section 51 of the Australian Constitution

[11] Dawson J, with Brennan CJ and McHugh J In *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 said (at 75-6) '… *It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.'* Jennifer Clarke, Patrick Keyzer, James Stellios, above n 9, 81-82

[12] *R v Burah* (1878) 3 App Cas 889, the Privy Council said of the Indian legislature (and the same was regarded as true of the Australian legislatures: *Powell v Appollo Candle Co* (1885) 10 App Cas 282) that, when acting within the limits which circumscribe its powers, it had plenary (not subject to limitation or exceptions) powers of legislation as large, and of the same nature as those of the Imperial Parliament itself. Jennifer Clarke, Patrick Keyzer, James Stellios above n 11, 76

[13] Under s122 of the Constitution, the Commonwealth can make laws for the Territories. The Commonwealth has passed a law that allows The Northern Territory, The Australian Capital Territory and Norfolk Island to form a Parliament and make their own laws in a similar manner to the States. As these powers are defined in the Commonwealth the Commonwealth can alter or revoke them at any time.

[14] Four members of the High Court in *Durham Holdings Ltd V New South Wales* (2001) 205 CLR 399 at 409 citing *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.upheld that the 'State Parliaments in Australia enjoy all the legislative powers that the Westminster Parliament possessed, subject only to the Australian Federal Constitution.' Justice Michael Kirby above n 1, 8

[15] This phrase appears in the State Constitutions of New South Wales and Queensland

[16] This phrase appears in the Commonwealth Constitution and The State and Territory Constitutions of Western Australia South Australia, Northern Territory and The Australian Capital Territory. The Tasmanian Constitution does not state these words specifically but it is implied through supporting legislation that this is the legislative power that is granted to the Parliament. The Victorian Constitution has a similar approach.

[17] Jennifer Clarke, Patrick Keyzer, James Stellios, above n 12, 76

[18] This was reiterated by Nicholas Aroney 1999 with reference to *Re Wakim; ex parte McNally* (1999) 163 ALR 270 in Graham Williams, 'Cooperative Federalism and the Revival of the Corporations Law: Wakim and Beyond' (2002) 20 *Company and Securities Law Journal 69* http://legalonline.thomson.com.au.ezproxy.utas.edu.au/subscribed/static-fs/journals/CSLJ/LAWREP-020-CSLJ-JL-0160.pdf?sessionId=8280af750ade6d04066975207b1f4a93

Essentially in Australia there exists a 'divided sovereignty', with 'the people' in each state linked to two independent levels of government with whom they have formed an 'agreement' and in which 'the government' is 'the agent' of 'the people'. Each tier of government is granted a mandate by which they can exercise their powers under the Constitution[19] and each member of government must

> ... exercise their legislative and executive powers as representatives of the people.[20]

Therefore in the most quantifiable sense, sovereignty is the legislative power which the States and the Commonwealth exercise on behalf of the people. For this to work there have to be a series of normative principles and rules that ensure that when they exercise this power they remain the agent(s) of the people. In other words the Commonwealth and the States should not be able to give this legislative power away[21] or if it does delegate it to another jurisdiction, it must be able to get it back.[22] Both must be truly representative of the people[23] in that they participate in and are accountable within the democratic process.[24] Additionally they must be able to maintain their institutional integrity [25] in that they should not take steps to exceed the constitutional limitations of their powers or act in a way that would destroy themselves or another jurisdiction. In effect these indicia are conventional rules underpinning Australia's democratic constitutional system and are fundamental

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[19] Andrew Parkin & John Summers 'The Constitutional Framework' (2010) in Government, Politics, Power and Policy in Australia ed Dennis Woodward, Andrew Parkin, John Summers 2010

[20] *Australian Capital Television Pty. Ltd v Commonwealth of Australia* (No.2) 1992 108 ALR 577 at 594. in Western Australia Legislative Assembly Standing Committee On Uniform Legislation and Intergovernmental Agreements ' Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles" 10th Report (1995) August 1995 15 http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/3A95DE1EFE7BB319482566D600260D4C/$file/No_10.pdf (SCULIA 10th Report 1995)

[21] When power is permanently handed over and not able to regained or revoked – ie power has been abdicated.

[22] A Parliament must always retain the capacity to revoke a power that it delegates and assume the power to itself. This limitation is based upon the legal principle that Parliament cannot abdicate its powers. Gerard Carney, 'Separation of Powers in the Westminster System' (Information Paper present to Australasian Study of Parliament Group (Queensland Chapter) 13 September 1993) 5 http://www.parliament.qld.gov.au/aspg/papers/930913.pdf

[23] As per the fundamental premise of responsible government - the accountability of the government to the Parliament and hence the people.

[24] This includes the ability to be able to debate, scrutinise and debate and amend legislation and the ability to be able to hold the executive to account and be accountable to 'the people'.

[25] In that the existence of the states and Commonwealth is not destroyed or destabilised through issues relating to manner and form, the granting or taking of more power than granted under the Constitution and by 'the people' or through binding themselves or other jurisdictions.

aspects of the exercise of state and commonwealth sovereign power that if undermined, also undermine or potentially terminate 'the agreement' between 'the government' and 'the people'.

The Effect of Divided Sovereignty

Although the legislative powers allocated to the Commonwealth may be enumerated in the Constitution[26] and it is well accepted that the States have the power over whatever remains (the residual), there is also a concurrency of power over a variety of matters. This concurrency as well as the fact that 'governments share many functions but not their powers'[27] cause significant overlap, duplication and contradiction between the laws created in the respective jurisdictions.[28] Consumers and businesses therefore face difficulties in terms of inefficiency, cost and uncertainty as to rights and obligations.[29] If the inconsistency is between Commonwealth and state laws it can be resolved through s109 of the Constitution,[30] however with other situations most

> ...administrative and policy cooperation is left to the political devices and administrative ingenuity of 'co-equal' legislatures and executives.[31]

Subsequently a more coordinated and formal approach to intergovernmental cooperation[32] has been identified as a necessity to deal with issues such as health, education and the environment, particularly with globalization mandating a more nationalised approach to some key issues.[33] A general increase in the number of

[26] In s51 of the Constitution

[27] In other words they cannot act unilaterally with respect to some matters. Galligan 1995, 1997 in Martin Painter 'Public sector reform, intergovernmental relations and the future of Australian Federalism' 1998 *Australian Journal of Public Administration*, 57(3) 1998 53 http://search.informit.com.au.ezproxy.utas.edu.au/fullText;dn=990302262;res=APAFT

[28] For example matters relating to issues such as education, health, road rules etc.

[29] Western Australia Legislative Council Standing Committee On Uniform Legislation and General Purposes ' Uniform Legislation and Supporting Documentation' Report 19 2004 http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/BD4B1C86307C354A48256EFD0008D9CE/$file/ug.iga.040823.rpf.019.xx.a.pdf (SCULGP Report 19 2004)

[30] Australian Constitution s109 '*When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and former shall, to the extent of the inconsistency, be invalid'* Australian Constitution

The application of the covering field test to s109 of the Constitution means that the High Court considers the intention or policy of the Commonwealth law. This in effect gives the Commonwealth Parliament the power to exclude the States from particular subjects and impose uniform regulation. Michael Stokes, above n 6

[31] Martin Painter, above n 27, 53

[32] Also known as Cooperative federalism

[33] For example social policy, and environment issues

Ministerial Councils since the first in 1935[34] is indicative of this increased need for intergovernmental agreement and uniform legislation across a number of policy areas.

However the push for intergovernmental cooperation has created conflict between those that see the need for and want to 'emphasise the need to cooperate and harmonise' and those who want to 'emphasise the need to safeguard and foster distinctiveness so as to preserve the separate systems of democratic accountability embodied in dual government' and to be able to service their own regional needs.[35]

This desire to 'safeguard and foster distinctiveness' emanates from the concern that through the process of intergovernmental cooperation individual governments

> open themselves to a loss of autonomy to other governments which have greater functional capacity.[36]

This is particularly true for the States as it is a well accepted doctrine that the 'greater functional capacity' in the federal relationship lies with the Commonwealth. This is largely due to the vertical fiscal imbalance[37] that has been created between the Commonwealth and the States due to the loss of a number of State taxes[38] and the resulting dependency on the increasing number of 'voluntary'[39] and 'conditional'[40]

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[34] 'The use of Ministerial Councils as joint decision making forums commenced in 1923 when the Loans Council was established as an informal arrangement between Commonwealth and the States.' 'In 1934 the Australian Agriculture Council was established as the first functional Ministerial Council' Stephen Jones ' Cooperative Federalism?: The Case of the Ministerial Council on Education, Employment, Training and Youth Affairs' (2008) The Australian Journal of Public Administration 67(2) 162

[35] Martin Painter, above n 31, 53

[36] This includes money, knowledge, personnel etc Martin Painter, above n 35, 53

[37] This is disparity between the taxing capacity and the revenue needs of the two tiers of government whereby the money that is raised by each does not come close to the matching their constitutional expenditure responsibilities.

[38] These include custom and excise duties, income tax, and the taxes that were relinquished due to the implementation of the Goods and Services Tax (GST). Subsequently the States have only a limited range of taxes, such as payroll tax and stamp duty, which are usually politically sensitive.

[39] The High Court has insisted that any grant arrangement under s96 is voluntary *The State of Victoria v The Commonwealth* (1957) 99 CLR 575 Second Uniform Tax Case Cheryl Saunders 'Constitutional and legal aspects' in Intergovernmental Relations and Public Policy Allen & Unwin North Sydney 1991 Ed Brian Galligan; Owen Hughes; Cliff Walsh 1991 46-47 (Cheryl Saunders 1991)

[40] Commonwealth conditions on SPPs show considerable variation and may include performance reports, specified targets, matching funding, agreed access to services and Commonwealth approval for programs. Ross Garnaut and Vince FitzGerald, 'Background Paper: A review of the allocation of Commonwealth Grants to the States and Territories.' (2001) Melbourne: Review of Commonwealth-State Funding 24-25 http://www.abe.org.au/papers/Federalism_Background.pdf

Commonwealth grants[41] made by the Commonwealth to the States under s96 [42] of the Constitution.[43]

This financial dominance together with favourable High Court decisions [44] in relation to issues including taxation,[45] and the interpretation of Commonwealth powers,[46] have given the Commonwealth 'a free hand'. [47] In effect it has given the Commonwealth the tools with which to pressure the States to develop intergovernmental agreements, enact uniform legislation and by doing so involve themselves in an increasing number of matters that are considered to be within the constitutional jurisdiction of the States. It is observed the Commonwealth has been provided the means by which to exercise

> …supremacy over a State Parliament when it enters into agreements that, in practical terms, bind a State Parliament to enact legislation to give effect to national uniform schemes or an intergovernmental agreements.[48]

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[41] These include specific purpose payments (SPPs), also known as conditional or tied grants, first paid in 1923 for roads. Back then they represented less than 2% of the total grants to the States. Specific Purpose Payments in 2000-01 they represented nearly 41% of total grants. Ross Garnaut and Vince FitzGerald, above n 40, 10-11

[42] Australian Constitution s96 *During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.*

[43] John Summers, 'The Federal System', Dennis Woodward, Andrew Parkin, John Summers (eds) *Government, Politics, Power and Policy in Australia* 8th Ed Pearson Education, Frenchs Forest, 2006 Ch 7 156

[44] In such decisions, however, the High Court has tended to favour Commonwealth powers over state ones as in *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 12 except where there are 'express words in the Constitution to strike down particular legislative endeavours' as in *Australian Communist Party v Commonwealth* (195 1) 83 CLR 1
Robert van Kreiken ' The sovereignty of the governed and contemporary constitutionalism' 2006 8 http://ses.library.usyd.edu.au/bitstream/2123/917/1/Sovereignty.pdf

[45] Of note are the two Uniform tax cases (First Uniform Tax Case - S*outh Australia v The Commonwealth* (1942) 65 CLR 373 and the Second Uniform Tax Case - *The State of Victoria v The Commonwealth* (1957) 99 CLR 575) which sought to challenge the Commonwealth scheme that had been implemented during WW11 for the purposes of funding wartime and had effectively ended the State's ability to levy income tax. Ross Garnaut and Vince FitzGerald, above n 41, 10

[46] This includes the significant impact of the High Court's treatment of the words, 'with respect to' in s51 of the Constitution. Their decisions have broadened each of the powers in this section fractionally, 'by attaching an "incidental" power to them to do anything that is necessary to make the main power fully effective'
Cheryl Saunders in *The Australian Constitution*, Constitutional Centenary Foundation, Carlton, 1997 in Scott Bennett ' The politics of the Australian Federal System' Research Brief No 4 2006-7 December 2006 4 http://www.aph.gov.au/library/pubs/rb/2006-07/07rb04.pdf

[47] John Summers, above n 43, 57

[48] SCULGP Report 19 2004, above n 29

Justice Kirby [49] sees this as 'opportunistic federalism,'[50] which is 'contrary to the text, structure and design of the Constitution'[51] and a threat to a state's institutional integrity and therefore its sovereignty.

However, the concern for state sovereignty in terms of a complete erosion of power is unwarranted due to the protections that have been afforded to the States in the Constitution and the *Australia Acts*. The constitutional protections were given judicial support in *Melbourne Corporation v The Commonwealth* [52], wherein the High Court declared that the Commonwealth may not place a disability or burden on a state or states [53] nor destroy or curtail the existence of the States or their ability to exercise their powers or operations.[54] This means that the institutional integrity of the States is protected by these constitutional powers and their sovereignty can never be destroyed. In support of this, there are provisions within the *Australia Act* that will not allow either the Commonwealth or the States to unilaterally repeal the Constitution.[55] As it is unlikely that both the Commonwealth and States will collectively want to abolish the Constitution it means that the features of the Constitution that protect the autonomy and sovereignty of the States[56] will remain.

However, there is nothing to stop the Commonwealth from incrementally eroding state powers as long as it does not contravene the Melbourne Corporation Doctrine. The existence of s109 and the decisions regarding state immunities and reserved powers articulated in *Amalgamated Society of Engineers v Adelaide Steamship Co*

[49] In *New South Wales v Commonwealth 2006* (2006) 81 ALJR 34, per Kirby J at [543]. also known as the Workchoices case

[50] Kirby J sees 'opportunisitic federalism' as arising where policy-makers seek to achieve their political and policy goals regardless of the traditional boundaries of behaviour and institutional responsibility. Anne Twomey & Glenn Withers, ' Federalist Paper 1 Australia's Federal Future' A Report for the Council For the Australian Federation (2007) 33 http://www.dpc.vic.gov.au/CA256D800027B102/Lookup/FederalistPaperAustralia%27sFederalFuture/$file/Federalist%20Paper%20Australia%27s%20Federal%20Future.pdf,

[51] Anne Twomey & Glenn Withers, above n 50

[52] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31

[53] This was supported by Dixon J in the Engineers Case stated that the Commonwealth could not enact 'a law which discriminates against the states or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers'. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 79

[54] This was supported by Starke J in the Engineers Case stated that 'neither Federal nor States Governments may destroy the other nor curtail in any substantial manner the exercise of its powers or obviously interfere with one another's operations' *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 74

[55] The power to repeal the Statute of Westminster and the Australia Acts as well as the Commonwealth of Australia Constitution Act 1900 is held by the Commonwealth and State Parliaments collectively under s15 of the Australia Acts 1986.

[56] See Australian Constitution s106, s107, s108

Ltd, [57]although effectively limited by the Melbourne Corporation Doctrine, are indicative of the strength that is attributed to the Commonwealth by the Constitution and therefore supports Deakin's assertion:

> 'Our Constitution may remain unaltered, but a vital change will have taken place in the relations between the states and the Commonwealth. The Commonwealth will have acquired a general control over the states, while every extension of political power will be made by its means and go to increase its relative superiority.' [58]

Therefore the increase in the centralisation of power, in favour of the Commonwealth, may in fact be a mechanism by which the roles and responsibilities of the Commonwealth and the States are being adjusted on a continuum which moves between decentralised and centralised divisions of legislative power in order to meet the needs of the global environment. If this is so there is in fact no opportunistic grab for power by the Commonwealth.

Subsequently the fundamental institutions and powers of state sovereignty may be protected constitutionally but state sovereignty still has the capacity to be undermined. By examining intergovernmental cooperation in terms of the various means of developing, enacting and implementing uniform schemes of legislation it can be determined how this can occur and how or if these actions impinge on the constitutional protections that have been afforded to the States.

Uniform Legislation and State Sovereignty

Uniform schemes of legislation in which 'each participating jurisdiction promulgates legislation to facilitate the matter of common concern'[59] are the one of the most formal means of intergovernmental cooperation. They usually stem from intergovernmental agreements[60] formed by intergovernmental bodies such as the Council of Australian Governments (COAG)[61] and the more than forty Ministerial

[57] See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129

[58] Deakin in David Solomon, The Political High Court : How the High Court Shapes Politics Allen & Unwin St Leonards Australia 1999 63

[59] John Ledda 2001 in Marina Farnan, Commonwealth-State cooperative schemes – issues for drafters (Paper presented at the 4th Australasian Drafting Conference 2005) 3 <http://www.pcc.gov.au/pccconf/papers/17-Marina-Farnan.pdf>.

[60] Some intergovernmental agreements are scheduled to legislation, some are approved by legislation, whilst others are ratified or authorised by legislation and given the force of law. Some are required to be tabled, in some or all Parliaments. Some are never brought before the Parliaments at all. Cheryl Saunders 1991 above n 39, 46

[61] COAG was created in 1992 as a result of Prime Minister Hawke's impetus for a 'new federalism initiative aimed at achieving microeconomic reform through national cooperation' A.Twomey & G Withers 2007 in Gareth Griffith, ' Managerial Federalism – COAG and the States' (2009) NSW Parliamentary Library Research Service Briefing Paper No 10/09 7 http://www.parliament.nsw.gov.au/Prod/parlment/publications.nsf/0/EA81EA9E1CEBA3FACA256786000120C0/$File/BP%2010-09%20COAG%20and%20States.pdf

Councils[62] which are composed of executive representatives[63] from the Commonwealth and the States and Territories.

The majority of intergovernmental agreements that are developed by these forums are non-justiciable and participating governments are not obliged to enact or implement the contents of the agreements, including any requirement to form uniform legislation.[64] However, they do tend to be significant in terms of the 'political pressures, cooperation and mutual assistance which they bring to bear on the parties to the federal compact'[65] as the Western Australia Legislative Council Standing Committee On Uniform Legislation and General Purposes reports:

> …there may be a fiscal imperative to pass a uniform bill and considerable pressure placed on State Parliaments to enact uniform legislation by making funding contingent on compliance with the agreement.[66]

Uniform legislative schemes can therefore take many forms which vary in terms of their consistency, uniformity, adaptability, flexibility and permanence.[67] The most common forms of uniform legislation that are encountered are 'mirror legislation', 'complementary schemes (applied or non applied)' or 'references to the

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[62] Most Ministerial Councils consist of Commonwealth and State Ministers or their representatives. Although most operate on an informal basis, others acquire a more formal status through national legislative schemes as their functions are set out in the agreements and referred to in the legislation. Andrew Hede 'Reforming the Policy Role of Inter-governmental Ministerial Councils' in 'Policy Making in Volatile Times' Ed Andrew Hede & Scott Prasser, Hale & Iremonger Sydney Australia 1993 204
Western Australia Legislative Assembly Standing Committee On Uniform Legislation and Intergovernmental Agreements ' Ministerial Councils' 19th Report (1997) http://www.parliament.wa.gov.au/parliament%5CCommit.nsf/%28Report+Lookup+by+Com+ID%29/F68FA8475BCF2A63482565EC00244F43/$file/No19-ul.pdf (SCULIA 19th Report 1997)

[63] The various forums can involve the Prime Minister, State Premiers, Territory Chief Ministers, the President of the Australian Local Government Association (ALGA), relevant Commonwealth and State department ministers.

[64] Brian R. Opeskin, Mechanisms for intergovernmental relations in federations International Social Science Journal 53(167) http://www.forumfed.org/libdocs/IntConfFedBk99/ICFE9911-int-Opeskin-bg.pdf ; Martin Painter, above n 36, 58; SCULGP Report 19 2004, above n 48

[65] Brian R. Opeskin, above n 64, 131

[66] SCULGP Report 19 2004, above n 64, 11

[67] SCULGP Report 19 2004, above n 66; The Legislative Council of Western Australia under Standing Orders 230A defines a uniform Bill as a 'Bill that
(a) ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party;or
(b) by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.'
SCULIA 19th Report 1997, above n 62; Legislative Council of Western Australia Standing Orders 2007 http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Standing+orders

Commonwealth.'[68] Each of these forms will be discussed below, although it should be noted that regardless of the exact form of the uniform legislative scheme, each has an effect on state sovereignty.

At one end of the spectrum is the 'complete relinquishment of a State's sovereignty over a certain subject matter to the Commonwealth Parliament' which can occur through a referral of powers and 'at the other extreme is an undertaking by each State to endeavour to ensure *"consistency"* with an agreed legislative scheme'[69] which can occur with mirror legislation. Complementary applied legislation sits in the middle and enables a temporary delegation of power to another Parliament.[70]

Referral Schemes

Section 51 (xxxvii) of the Constitution[71] provides a means by which the States can refer any matter within their jurisdiction to the Commonwealth and the Commonwealth may then legislate in regard to it.[72] The legislation created by the Commonwealth then operates in the referring States 'as a Commonwealth law'.[73]

This method of enacting uniform legislation enables the Commonwealth to enact laws for matters of agreed national significance, particularly when there is a need for uniform legislation and administration in areas that do not fall within the jurisdiction of the Commonwealth or as a means of ensuring a national scheme will operate without the necessity of repealing, amending or modifying all inconsistent State or Territory legislation.[74]

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[68] John Ledda (2001) in Marina Farnan, above n 59, 3

[69] Barry House, When a Nod and Wink Amounts to an Intergovernmental Agreement – Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation' (2010) (Paper presented at 41st Presiding Officers and Clerks Conference, Darwin 7 July 2010) 3 http://www.nt.gov.au/lant/parliament/41%20Conference%20POC%20July/15.%20WA%20-%20Barry%20House%20-%20Issues%20faced%20by%20the%20Leg%20Council%20of%20WA.pdf, http://www.nt.gov.au/lant/parliament/41 Conference POC July/15. WA - Barry House - Issues faced by the Leg Council of WA.pdf

[70] Barry House, above n 69, 3

[71] Australian Constitution s51 (xxxvii) *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*

[72] John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, ' Common Cause: Strengthening Australia's Cooperative Federalism (Final Report To The Council For The Australian Federation May 2009) <http://www.caf.gov.au/documents/FP3%20-%20final.pdf>

[73] Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia 'Scrutiny of National Schemes of Legislation - Position Paper' (1996) 49 (Working Party 1996)

[74] Brian R. Opeskin, above n 65

The process is for states to refer matters through a referring Act which can be framed by either 'specifying a particular subject matter',[75] or 'by reference to a particular text'[76]

When the States specify a particular subject matter, they give the Commonwealth an almost unlimited ability (plenary power) to legislate as it sees fit on that particular matter to the exclusion of state government power. Such a broad power can 'avoid problems with the roles of Commonwealth agencies and federal courts in relation to State and Territory powers'[77] but it effectively restricts further state involvement in the matter referred despite the fact that it is their 'authority on which the regime rests.'[78]

When the States make a text based reference they can dictate the scope and extent of the Commonwealth's ability to legislate on a matter that is being referred, including the ability to enact retrospective legislation.[79] This more limited referral is restrictive in terms of the outcomes that can be achieved but the option is more palatable for the States as they can often enact concurrent legislation within the bounds of s109 of the Constitution[80] and in theory have more control over what the Commonwealth does with the legislative power through 'roadblock' provisions such as [81]

- the extent to which the referral applies (ie. referring States, adopting States, the scope and extent of the ability of the Commonwealth to legislate).
- the expiry date of the referral/time limitation (ie. sunset clauses).
- that the referral ceases when some executive act occurs (ie. a proclamation).
- the mechanism for amendment (either Ministerial Council or regulatory body)

A high profile example of the use of the reference power was the *Criminal Code Amendment (Terrorism) Act 2002* which was enacted as a result of an

[75] See Meat Inspection Act (Cth) 1983

[76] See the reference of power by Queensland and New South Wales in their respective Mutual Recognition Acts 1992. Working Party 1996, above n 73, 49; Marina Farnan, above n 81, 4

[77] Law Council of Australia, Reform of the Australian Federation 2010 (Submission to Select Committee on the Reform of the Australian Federation 2010) <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=EA808BE6-FA73-2578-4E5C-5529721984B9&siteName=lca>.

[78] Cheryl Saunders 1991, above n 60, 50

[79] Gerard Carney, 'Uniform Personal Property Security Legislation for Australia: A Comment on Constitutional Issues' (2002) 14(1) Bond Law Review http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1222&context=blr ; Marina Farnan, above n 111

[80] Pamela Tate, 'New Directions in Cooperative Federalism: Referrals of Legislative Power and Their Consequences '(Paper presented at the 2005 Constitutional law Conference in Sydney on 18 February 2005) http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_PamelaTate.pdf.

[81] Pamela Tate, above n 80; Marina Farnan, above n 59,

intergovernmental agreement[82] negotiated at a Leader's Summit in April 2002. In relation to terrorism, this agreement included a decision to:

> …take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation…[83]

This legislation was required to cover the gaps in constitutional support[84] that had been identified in counter-terrorism laws that had been enacted earlier in 2002.[85] As the Commonwealth Constitution does not give the Commonwealth power to make laws with respect to 'terrorism',[86] or general policing, 'in legislative terms this meant that the Commonwealth needed the States.'[87] The Criminal Code Amendment (Terrorism) Bill 2002 was then proposed to alter the Criminal Code[88] to re-enact federal counter-terrorism offences so that they had comprehensive national application.[89]

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[82] Commonwealth and States and Territories Agreement on Terrorism and Jurisdictional Crime signed by The Commonwealth, New South Wales, Victoria, South Australia, Western Australia, Queensland, Tasmania, The Australian Capital Territory, The Northern Territory

[83] Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisidictional Crime 5 April 2002 1 http://www.coag.gov.au/coag_meeting_outcomes/2002-04-05/docs/terrorism.pdf

[84] It was impossible to rule out the unforseen gaps in constitutional support and gaps in the coverage that may become a focus of litigation. This would have been particularly true where 'terrorist activity was entirely state-based and did not have any Commonwealth element in it or foreign element in it' Attorney Generals Doorstop Interview in Department of the Parliamentary Library Information and Research Services 'Criminal Code Amendment (Terrorism) Bill 2002' Bills Digest No. 89 2002-03 4 http://www.aph.gov.au/library/pubs/bd/2002-03/03bd089.htm (Bills Digest No. 89 2002-03)

[85] The most prominent of those laws were the Security Legislation (Terrorism) Act 2002, the Supression of Terrorist Bombings Act 2002 and the Supression of the Financing of Terrorism Act 2002 some of which were enacted as part 5.3 of the Criminal Code Act 1995.

[86] The existing offences were enacted relying on an extensive but complex 'patchwork' of existing constitutional powers, including the 'defence, external affairs, aliens and trade and commerce powers'. Gregory Rose & Diana Nestorovska, Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms *Criminal Law Journal*, vol. 31, February 2007, 23 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=%28Id:library/jrnart/chpn6%29;rec=0

[87] Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) UNSW Law Journal 31(2) 501-2 http://search.informit.com.au.ezproxy.utas.edu.au/fullText;dn=200811140;res=APAFT

[88] The Criminal Code was enacted largely as a model for States and Territories to follow for the purpose of achieving uniform criminal laws across all jurisdictions in Australia. Gregory Rose & Diana Nestorovska, above n 86, 24

[89] The substance of the current offences was not affected and was in the same terms as the current offences, but for the constitutional 'reading down' (reducing ambiguity) provisions.
The Parliament of the Commonwealth of Australia House of Representatives Criminal Code Amendment (Terrorism) Bill 2002 Explanatory Memorandum 2002 1

The Criminal Code Amendment (Terrorism) Bill 2002 was implemented by the Commonwealth once the States enacted reference legislation[90] that referred the 'text' of the new federal terrorism offences in Part 5.3 of the Criminal Code, together with a power to amend those offences.[91] The referral not only included amendment provisions, roll-back mechanisms[92], termination provisions,[93] and concurrency provisions[94] but also articulated pre-conditions that had to be met before any amendment could be made.[95] These pre-conditions, particularly s100.8 (2):

> An express amendment to which this section applies is not to be made unless the amendment is approved by:
> (a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and

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http://www.austlii.edu.au/au/legis/cth/bill_em/ccab2002331/memo1.html (Explanatory Memorandum 2002)

[90] The legislation enacted by the States and Territories included the following:
Terrorism (Commonwealth Powers) Act 2002 (NSW); *Terrorism (Northern Territory Request) Act 2002* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); and *Terrorism (Commonwealth Powers) Act 2002* (WA)

[91] 'To use the Victorian legislation *Terrorism (Commonwealth Powers) Act 2003* (Vic) as an example, the following matters are referred to the Parliament of the Commonwealth:
(a) matters to which the referred provisions relate, but only to the extent of the making of laws with respect of those matters by including the referred provisions in the Commonwealth Criminal Code in the terms, or substantially in the terms, of the text set out in Schedule 1 [restatement of amended section 5.3 of the Commonwealth Criminal Code]; and
(b) the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments of the terrorism legislation or the criminal responsibility legislation.'
Jessica Wyndham, 'Commonwealth Anti-Terrorism Legislation' (Briefing paper prepared for the Human Rights Council of Australia, March 2003) 6-7 http://www.hrca.org.au/terrorism.htm

[92] 's100.7 provides a regulation-making mechanism to 'roll-back' aspects of the new Part 5.3 of the Criminal Code to accommodate certain State and Territory legislation.' Explanatory Memorandum 2002, above n 89, 5

[93] These termination provisions enable the Governor to fix a day as the day on which the references will terminate (three months notice needed) (NSW, SA and Tas Acts). WA is different it that it requires a resolution of termination to be passed by both Houses of Parliament. Bills Digest No. 89 2002-03, above n 84

[94] Section 100.6 provides for the concurrent operation of State legislation (where there is no indirect inconsistency) The Parliament of the Commonwealth of Australia House of Representatives Explanatory Memorandum 2002, above n 92, 5

[95] Section 100.8 reflects an agreement between the Commonwealth and the States and Territories that amendments will not be made without the approval of a majority of the States and Territories (and at least 4 States). This process was further formalised via an intergovernmental agreement in 2004. Explanatory Memorandum 2002, above n 94, 6 ; Bills Digest No. 89 2002-03, above n 93

> (b) at least 4 States.[96]

were crucial in ensuring the scrutiny of future counter-terrorism legislation, particularly legislation proposed in 2005 which applied to control orders and preventative detention.[97]

Despite the inclusion of provisions to control the use of the power by the Commonwealth, the effectiveness of a number of them is found to be limited by other sections of the Act. This includes the previously mentioned provision that allows state input with regards to amendments that may be made by the Commonwealth. In this example this provision was in effect made to only apply to 'express amendments' and the Commonwealth was delegated the power to enact regulations unilaterally. Consequently, not only will the regulations not be exposed to any state parliaments because no part of the legislation on the matter referred will ever enter a state parliament, but the regulations could also avoid the Commonwealth parliament's scrutiny and accountability process as it is a form of delegated legislation.[98]

Even more limiting in its nature is that fact that although this a provision has been included in the legislation that allows the termination of a reference to the Commonwealth, in this particular example it was offset by another clause in the legislation that clearly indicated as per s100.2 (4),

> A State is a referring State even if a law of the State provides that the reference to the Commonwealth Parliament of either or both of the matters covered by subsections (2) and (3) is to terminate in particular circumstances.[99]

Essentially terminating a reference would not end a states involvement in the scheme as a 'referring state' nor would it terminate the scheme.

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[96] *Criminal Code Amendment (Terrorism) Act* 2003

[97] In 2005 the Commonwealth proposed to enact more controversial anti-terrorism laws that included provisions concerning control orders and preventative detention. Because of the intergovernmental agreement, in order to do this they had to seek the agreement of a majority of the States and Territories which was achieved at COAG in September 2005 with the future condition that certain safeguards be inserted into the Bill.' Gregory Rose & Diana Nestorovska, above n 88; Anne Twomey & Glenn Withers, above n 51, 17

[98] Although 'authority to legislate emanates from Parliament, it can and does delegate the exercise of legislative power to subordinate bodies, not as agents of the Parliament, but as delegates, law-makers in their own right and of their own initiative within the ambit of the parent Act.' The Minister, agency or public body therefore has the authority outside the normal parliamentary accountability process to make the detailed regulations and ordinances that give operational effect to the legislation. The High Court through *Victorian Stevedoring & General. Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73 has upheld such delegations of power.
Peter O'Keefe 'Deregulation, Merits Review and the Withering of Parliamentary Sovereignty' (1988) Papers on Parliament No 3 December 1998

[99] *Criminal Code Amendment (Terrorism) Act* 2003

This appears to contradict the obligation for Parliament to be able to retain the capacity to revoke a power that it delegates and assume the power to itself.[100] Subsequently there is a possibility that a State, by making a referral to the Commonwealth, 'could bind all subsequent Parliaments of that State'[101]and effectively undermine its institutional integrity.

Aside from any included explicit provision governing termination, the States ability to revoke the referral is affected by the fact that the Commonwealth law still exists when the power is revoked unless the Commonwealth itself wishes to revoke the law. Justice R.S French, has stated extra-judicially, that:

> …absent any other provisions, it would be expected that such a law would continue in force for there is nothing in the grant of the power which makes the laws under it self-terminating upon revocation of the referral.[102]

Although some have disagreed with this perspective,[103] in the absence of a clear High Court determination and the inclusion in the Constitution of provisions that enable the States to regain their sovereignty over the matter referred [104] once a matter is referred from a State to the Commonwealth the Commonwealth has the power as McTiernan clearly noted in *Graham v Paterson*:

> A power which is defined…terms [of s.51(xxxvii)] cannot be a State legislative power that has become vested in the Commonwealth. It is truly a Commonwealth power[105]

and the States are permanently subject to all relevant provisions within the Constitution including that in s109.

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[100] Gerard Carney, above n 22, 5

[101] Lathan CJ in *Graham v Paterson* (1950) 81 CLR 1, [11] quoted in Pamela Tate, above n 81, 12

[102] Justice Robert S French, The Referral of State Powers, University of Western Australia Law Review, (2003) 31(1) 33 in Jason Arditi, 'Industrial Relations: The Referral of Powers' Powers (Briefing Paper No 7/09 NSW Parliamentary Library Research Service 2009) 12 <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/D0213A22DC6DA011CA25763100201CF1/$File/Briefing%20Paper,%20Industrial%20Relations%20-%20The%20Referral%20of%20Powers.pdf>

[103] For example Windeyer J in *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1

[104] If the 1984 referendum question that asked for a change to the Constitution to enable States and the Commonwealth to voluntarily refer matters to each other had been passed it would have put in place a legal process that could be followed in order to fully revoke a referral and regain the delegated power. Australia. The Senate, Session 1983-84 Bills http://www.aph.gov.au/library/intguide/LAW/docs/1984referendumbillsinterchangeofpowers.pdf

[105] *Graham v Paterson* (1950) 81 CLR 1 at 22 quoted in Pamela Tate, above n 101, 14

Consequently this change in the Commonwealth's constitutional powers amounts to a change in the Constitution without the change going to a referendum,[106] and as there is the additional risk that the power might be applied in other areas outside the contemplation of the referring State, particularly if amendments or regulations confer an even broader power on the Commonwealth,[107] there appears to be general expansion of Commonwealth power in excess of constitutional limitations on power. The state legislative power over a matter (or part of a matter) in this particular scheme of legislation has been effectively given away to the Commonwealth, and subsequent state parliaments could be bound over a matter 'the people' had deemed was theirs to legislate on. It is clear that with this particular mechanism of uniform legislation, sovereignty of the referring states has been undermined on a number of levels.

Mirror Legislation

At the other extreme of uniform legislative schemes is mirror legislation. This scheme 'may be used when there is uncertainty as to the extent of the constitutional power of the Commonwealth'[108] or when jurisdictions wish to establish a national regulatory body. It is also relevant when flexibility is needed so that local concerns and different drafting styles can be accommodated.[109]

Form a sovereignty viewpoint mirror legislation is the least disadvantageous structure for a State[110] as the 'legislation and any amendments are always within the control of each jurisdiction's own Parliament.' [111] Each state and territory collectively agrees to the terms of a detailed draft statute (model) which is then passed separately as a law enacted in similar terms in each jurisdiction.[112]

This process avoids the difficulty of Commonwealth agencies attempting to exercise state and territory powers but can risk the divergent application of the legislation by the State and Territory courts due to the lack of an effective system for 'cross vesting' of jurisdiction.[113] Even if mechanisms are put in place, through an intergovernmental

[106] s128 of the Constitution requires a referendum to be held in order for a change to the Constitution to be made.

[107] Graham Williams, above n 18, 160 ; Working Party 1996, above n 76, 49

[108] Working Party 1996 above n107, 46

[109] John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, above n 72

[110] Barry House, above n 70, 6

[111] Barry House, above n 110, 6

[112] Brian R. Opeskin, above n 74 ; John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, above n 109

[113] There is no effective system for the conferral or 'cross-vesting' of jurisdiction with regard to the cooperative scheme in a single court system. This means that while States and Territories may have identical statutory provisions, the interpretation of those provisions by State and Territory courts (who are not bound to follow the decisions of the courts of another State or Territory) may result in divergent

agreement or Model Bill, which are aimed at keeping laws consistent there is high risk of inconsistency in the application, amendment and implementation of this legislation, largely because these mechanisms are non-justicable and the participating jurisdictions cannot be compelled to abide by them.

A prominent example of the use of mirror legislation is the *Defamation Act* which was enacted to overcome the contradictory criterion that applied to defamation claims across eight different jurisdictions.[114] This was becoming 'particularly problematic given the national nature of the media in Australia and the speed of electronic means of communication' through the internet and other such media.[115]

The issue was identified as far back as 1979 by the Australian Law Reform Commission (ALRC) who recommended that there should be a codified uniform law of defamation in Australia as the current defamation law was

> 'inefficient in vindicating reputation…and unduly impedes the flow of information on public affairs.[116]

However it was not until 2003[117] that, irrespective of the fact that would not be able to 'cover the field,'[118] the Commonwealth attempted to force the States into action through the Federal Attorney General, The Hon. Phillip Ruddock who

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application of the legislation. John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, above n 112

[114] Prior to 2005 each state and territory had different laws governing the tort of defamation. Tasmania and Queensland codified their civil law of defamation whilst the other jurisdictions retained the common law. Some supplemented this with differing statutory provisions. The States and Territories also had different laws governing the offence of criminal defamation. Defamation Bill 2005 (Qld) Explanatory Notes 2005 1 http://www.legislation.qld.gov.au/Bills/51PDF/2005/DefamationB05Exp.pdf

[115] Standing Committee on Uniform Legislation and Statutes Review 'Defamation Bill 2005' 2005 3 http://parliament.wa.gov.au/Parliament/commit.nsf/28Report+Lookup+by+Com+ID29/6109EF19C648173C482570A000152606/$file/us.def.051017.rpf.004.xx.a.pdf (SCULSR 2005)

[116] Australian Law Reform Council *Unfair Publication (1979) i*n Angus Martyn The Commonwealth plan for reforming defamation law in Australia Research Note No 4 2004-5 Law and Bills Digests Section 21 July 2004 Parliament of Australia Parliamentary Library 1 http://www.aph.gov.au/library/pubs/rn/2004-05/05rn04.pdf

[117] There were attempts in the period between that failed due to a lack of agreement between the participating states.

[118] The Commonwealth would have to use powers under the Commonwealth Constitution 'including its communications, trade and commerce and corporations powers.' Such a proposal would 'cover most defamation proceedings including those published via the media but it would be unable to matters involving one individual against another, which would have to be regulated by the States and Territories.' Commonwealth Attorney-General's Department (2004) in SCULSR 2005, above n 115, 3-4 ; Angus Martyn, above n 116

> …declared that the States and Territories should take concrete steps to harmonise defamation laws as quickly as possible or the Commonwealth would enact a national defamation law. [119]

An 'Outline Paper' for a possible national defamation law based in Commonwealth legislation was subsequently tabled by the Federal Attorney General[120] and the States and Territories responded by documenting a proposal for uniform defamation laws which rejected the Commonwealth proposal. This action was taken largely due to concerns about the coverage of any legislation involving the Commonwealth and the irretrievable power the Commonwealth would have over the 'balance between freedom of expression and the protection of personal reputation'.[121]

The State and Territory proposal was articulated in a draft model Defamation Bill and enacted by Australian States and Territories in 2005,[122] supported by The Model Defamation Provisions Intergovernmental Agreement.[123] The Commonwealth signed the agreement but indicated that

> 'it would not insist on their format and would only implement their own law if it was in the public interest.'[124]

By requiring parties to enact the clauses of the Model Bill, the intergovernmental agreement proposed a high degree of uniformity and consistency in an attempt to prevent the efficacy of the agreement being undermined[125] but the inclusion of a substantial number of non-core provisions[126] and a flexible approach to amendments meant that there was and is a high risk that inconsistency in the legislation could develop between the jurisdictions. Additionally, although the statute is

[119] C Merritt 2003 in SCULSR 2005, above n 118, 4

[120] This paper, *Outline of a possible national defamation law*, was tabled by the Federal Attorney General The Hon. Phillip Ruddock in 2004 and after further consultation another one, *Revised outline of a possible national defamation law*, was tabled later that same year.

[121] The Commonwealth cannot 'completely 'cover the field' in this area' and subsequently any Commonwealth legislation would in effect add another layer and complexity to defamation legislation rather than simplify it. SCAG Working Group of State and Territory Officers 2004 in SCULSR 2005, above n 119, 4

[122] The legislation was enacted as the following: *Defamation Act* 2005 (NSW); *Defamation Act* 2005 (Vic); *Defamation* Act (NT); *Defamation Act* 2005 (Qld); *Defamation Act* 2005 (WA); *Defamation Act* 2005 (SA); *Defamation Act* 2005 (Tas); *Civil Law (Wrongs) Act* 2002 (ACT)

[123] The Intergovernmental Agreement was signed by the Attorneys-General of New South Wales, Victoria, South Australia, Western Australia, Queensland, Tasmania, The Australian Capital Territory, The Northern Territory and the Attorney General of the Commonwealth of Australia in the event that the Commonwealth agrees to become a party to this agreement. SCULSR 2005, above n 121, 4

[124] B Nicholson 2005 in SCULSR 2005, above n 123, 5

[125] SCULSR 2005, above n 124

[126] Provisions that could be enacted in line with the States own local needs

comprehensive, the general law applies except to the extent that the Act provides otherwise which means that there will always be a risk that the legislation will be applied divergently across the jurisdictions.[127]

With the high level of flexibility and the option for states to withdraw from the agreement without terminating the agreement for the remaining participants, it is clear that this scheme of legislation allows the States to maintain sovereignty over the legislative process with regards to provisions, amendments and the 'manner and form'[128] of the agreed legislation. In effect there is no delegation of power to another government and the flexibility granted to the participating parliaments can be to the extent that it can be completely up to a participating jurisdiction as to whether they follow the model legislation at all.[129] In this sense there is much to suggest that mirror legislation may not in practice be identifiable as such by state parliaments.[130] There is therefore a risk that this legislation may bypass the full attention of many state parliaments although ironically it the very scheme of uniform legislation that could be subjected to the full democratic process.

Complementary Applied Schemes

In between the previous two extremes of uniform legislative schemes are complementary applied schemes of legislation which can be used for matters that are either within the States' legislative powers or within the Commonwealth's legislative powers.[131] The process involves one jurisdiction 'the host' enacting legislation to establish the scheme. This legislation contains all the substantive provisions that are to be enacted in the final draft of the legislation and once these provisions and the terms are agreed to 'the host' enacts legislation that is to be applied by it and the other jurisdictions as a uniform law.[132] All participating jurisdictions 'then pass legislation giving that law force in their jurisdictions'.[133]

[127] Although the common law can differ between the states the High Court as the supreme common law court has served to minimize inconsistencies by providing appellate directions on the mechanisms and process by which defamation is proved.

[128] As per s6 of the *Australia Act* 1986 wherein 'a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.'

[129] Parliamentary Counsel's Committee 'Protocol on Drafting National Uniform Legislation – Third Edition (2008) http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf

[130] This is an issue that was identified by the Western Australian Legislative Council Uniform Legislation and General Purpose Committee in SCULGP Report 19 2004, above n 67

[131] Parliamentary Counsel's Committee, above n 129, 2

[132] Marina Farnan, above n 81, Brian R. Opeskin, above n 112

[133] John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, above n 113, 18

This legislation cannot be amended by anyone except the host jurisdiction and the agreement of a portion of, if not all of the scheme participants is required in order for it to proceed.[134] On the other hand any jurisdiction can unilaterally terminate their involvement in the scheme as long as conditions articulated in any intergovernmental agreement are met.

This method is used when no jurisdiction can act unilaterally to achieve the desired objective or where there is conflict in state legislation, however it does mean that the States and Territories have to repeal, amend or modify existing inconsistent legislation before the law can be enacted. There can also be difficulty if the Commonwealth is involved in the agreement as the Commonwealth cannot exercise powers given to them under state and territory laws unless those powers are also covered under Commonwealth responsibilities as articulated in the Constitution.[135] In addition there is again a risk that there will be divergent application of the legislation by State and Territory courts due to the lack of an efficient 'cross vesting' system.[136]

Other issues that can eventuate from such a scheme of legislation stem from the nature of the intergovernmental agreement. If unanimous agreement is required from all jurisdictions in order to make amendments there is a risk that agreement may not be reached. On the other hand if unanimous agreement is not required it is more likely that the States (including the host) could find themselves forced to enact legislation that they do not agree with and may have even voted against.

The recent *Health Practitioner Regulation National Law Act* is an example of the use of a complementary applied legislation scheme. This legislation was enacted in response to recommendations made to COAG in a 2006 Productivity Commission Report.[137] It was enacted to govern the establishment and development of a national

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[134] In Complementary Non-Applied schemes jurisdictions have their own ability to make amendments or have control over text but this can introduce inconsistency in legislation across jurisdictions.

[135] If the scheme involves the Commonwealth as well as the States and Territories consideration has to be taken regarding High Court decisions (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) CLR 535) '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.'
Law Council of Australia, Reform of the Australian Federation 2010 (Submission to Select Committee on the Reform of the Australian Federation 2010) 7 <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=EA808BE6-FA73-2578-4E5C-5529721984B9&siteName=lca>.

[136] The lack of an effective system for the conferral or 'cross-vesting' of jurisdiction with regard to the cooperative scheme in a single court system. This means that while States and Territories may have identical statutory provisions, the interpretation of those provisions by State and Territory courts (who are not bound to follow the decisions of the courts of another State or Territory) may result in divergent application of the legislation. John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, above n 133

[137] Productivity Commission Report - Australia's Health Workforce - released 2006 http://www.pc.gov.au/projects/study/healthworkforce/docs/finalreport

scheme[138] that would encompass registration and accreditation for health professionals in a number of health professions.[139]

As the Commonwealth was unable to enact the legislation unilaterally the Queensland Parliament was nominated as 'the host' who was to debate and enact a National Law that would be ultimately debated and adopted by the other States and Territories with 'minor jurisdiction-specific consequential and transitional provisions.'[140] This occurred with the exception of Western Australia who instead of adopting the legislation enacted corresponding legislation 'substantially similar' to the agreed model due to a state policy wherein the state chooses not to apply or adopt any other states' legislation.[141]

After each state and territory repealed, amended or modified existing laws covering the functions to be performed by the new system[142] the enactment of the Health Practitioner National Law Act was undertaken in three phases[143] supported by the Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions signed in 2008.[144] Each phase involved consultation,[145]

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[138] 'COAG agreed to establish by 1 July 2010:

… a single national scheme, with a single national agency encompassing both the registration and accreditation functions.' Gareth Griffith, above n 61, 33

[139] These professions initially included physiotherapy, optometry, nursing and midwifery, chiropractic care, pharmacy, dental care, medicine, psychology and osteopathy. Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions 2008 http://www.ahwo.gov.au/documents/National%20Registration%20and%20Accreditation/NATREG%20-%20Intergovernmental%20Agreement.pdf (Intergovernmental Agreement 2008);

[140] Community Affairs Legislation Committee Health Practitioner Regulation (Consequential Amendments) Bill 2010 [Provisions] Report May 2010 3 http://www.aph.gov.au/senate/committee/clac_ctte/health_practitioner_reg/report/report.pdf (CALC 2010)

[141] This method is akin to that seen in Mirror legislation and stems from the fact that Western Australia has taken a policy decision that it will not generally adopt the legislation of other jurisdictions when applied laws legislation is used for national uniform legislation, Western Australia subsequently enacts consistent legislation and introduces amendments through subsequent amending legislation. Parliamentary Counsel's, Committee, above n 131, 2

[142] CALC 2010 above n 140; Community Affairs Legislation Committee National registration and accreditation scheme for doctors and other health workers Report August 2009 http://www.aph.gov.au/senate/committee/clac_ctte/registration_accreditation_scheme/report/report.pdf (CALC 2009); Australia's Health Workforce Online National Registration and Accreditation Scheme http://www.ahwo.gov.au/natreg.asp (AHWO);; Department of the Parliamentary Library Information and Research Services Health Practitioner Regulation (Consequential Amendments) Bill 2010 Bills Digest No 132 2009-10 http://www.aph.gov.au/library/pubs/bd/2009-10/10bd132.htm (Bills Digest No 132 2009-10)

[143] CALC 2009, above n 142; CALC 2010, above n 142; Bills Digest No 132 2009-10, above n 142; AHWO, above n 142

[144] The Intergovernmental Agreement was signed by The Commonwealth of Australia; The State of New South Wales; The State of Victoria; The State of Queensland; The State of Western Australia;

Senate Inquiries[146] and parliamentary debate. The process concluded with the States and Territories debating and passing legislation to apply the National Law.[147] The Commonwealth did not need to apply the Act for the National Law but within its own jurisdiction it did have to make consequential and transitional amendments to Commonwealth legislation in order to recognise and support the scheme.[148]

To maintain some uniformity of approach the legislative scheme contained the provision that it could only be amended by agreement of the statutory Ministerial Council which would then require the Queensland Parliament to 'bring it into force' within an agreed timeframe.[149] Provision was also made for this Council to be 'empowered to make regulations for the purposes of the legislative scheme'[150]under the guidance of a regulatory authority.[151]

The State of South Australia; The State of Tasmania; The Australian Capital Territory; and. The Northern Territory of Australia.

[145] Following passage of this first piece of legislation, the Australian Health Ministers' Advisory Council set up the National Registration and Accreditation Implementation Project (NRAIP) to consult on the matters to be included in consequential legislation. CALC 2009, above n 143; CALC 2010, above n 143; Bills Digest No 132 2009-10, above n 143; AHWO, above n 143

[146] The Senate inquiries were held in March 2009 and August 2010. CALC 2009, above n 145; CALC 2010, above n 145;

[147] Each piece of state legislation was enacted by July 2010 as follows:.

Health Practitioner Regulation National Law Act 2009 (Qld); *Health Practitioner Regulation Act* 2009 (NSW); *Health Practitioner Regulation National Law (Victoria) Act* 2009 (Vic); *Health Practitioner Regulation National Law (ACT) Act* 2010 (ACT); *Health Practitioner Regulation (National Uniform Legislation) Act* 2010 (NT); *Health Practitioner Regulation National Law (Tasmania) Act* 2010 (Tas); *Health Practitioner Regulation National Law (South Australia)* Act 2010

[148]This was done through the Health Practitioner Regulation (Consequential Amendments Bill 2010) and included modernising and aligning definitions so they are consistent with the National Law and making amendments to the Health Insurance Act (HIA) to ensure that medical practitioners continue to retain the same Medicare billing eligibility from 1 July 2010.

CALC 2009, above n 146; CALC 2010, above n 146;Bills Digest No 132 2009-10, above n 145; AHWO, above n 145

[149]Any amendments are to be proposed to the other parties, considered by the Australian Health Workforce Ministerial Council and if agreed Qld 'will:

- submit to its Parliament a bill in a form agreed by the Ministerial Council which has the effect of amending the legislation in the manner agreed; and
- take all reasonable steps to secure the passage of the bill and bring it into force in accordance with a timetable agreed by the Ministerial Council.' Intergovernmental Agreement 2008, above n 139, 8

If the amendment is passed the other States and Territories will incorporate the changes by applying the amendment as a law of those jurisdictions. In WA agreed amendments will be carried out via changes to the corresponding WA legislation and ensure as much consistency with the national scheme. Intergovernmental Agreement 2008, above n 139, 8

[150] Gareth Griffith, above n 138, 35

[151] The Australian Health Practitioner Regulation Agency in conjunction with the Australian Health Workforce Advisory Council

As alluded to with referral schemes the delegation of a power to make regulations outside the democratic process places in doubt the 'authority of a State government to respond to, or distance itself from, the actions of a joint Commonwealth and State regulatory authority and the effect of executive pressure upon Parliaments to merely ratify the legislation.'[152]

In a similar fashion to the referral scheme we see that provisions within the legislation can be contradictory. Of particular note is the provision articulated in s246 (1) (a)

> A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction…[153]

This provision has been contradicted by the fact there is 'no effective mechanism (such as tabling in the Parliaments) provided for in the legislation to bring regulations to the attention of the affected Parliaments.'[154] Additionally if a disallowance was proposed the regulation would only 'cease to have effect in that jurisdiction if the same regulation was disallowed 'in a majority of the participating jurisdictions'.[155] Subsequently some states may be forced to proceed with a regulation it feels is inappropriate simply because other states may have felt they could proceed with such a regulation or simply did not see it as a priority issue.

This limits the ability for the state to participate in and be accountable within the democratic process. The fact that Western Australia adopts a different means of enacting the required legislation may stem from the fact that it wants to be able to enact effective provisions to review the powers of and/or regulations made by these Commonwealth endorsed regulatory bodies and therefore limit the potential loss of sovereignty by way of the fact that it can fully participate in the democratic process.

Western Australia may also have concerns regarding 'manner and form' issues that could arise when 'the host' drafts legislation that could potentially contradict the 'manner and form' provisions of a state in which it is to be applied and effectively bind that state to 'the host'. As this example indicates provisions that enable the States to make their own adjustments and amendments to the legislation in order to enable local requirements to be met, including local drafting requirements, should in theory overcome this concern. However, if a state does not take this into consideration and simply applies the act in its entirety the state in question puts at risk the 'constitution,

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[152] Health Practitioner Regulation National Law Bill 2009 Explanatory Notes 7 http://www.legislation.qld.gov.au/Bills/53PDF/2009/HealPraRegNLB09Exp.pdf

[153] *Health Practitioner Regulation National Law Act* 2009

[154] Barry House, above n 111, 5

[155] Gareth Griffith, above n 150, 35; Barry House, above n 154, 5

powers and procedure of its parliament'[156] and therefore undermines its own sovereignty by eroding its institutional integrity.

The delegation of power that occurs in order to allow 'the host' to draft and enact legislation[157] is not permanent as it can be fully retracted through the ability of each jurisdiction to fully terminate their involvement in the scheme such that there is no residual power left with 'the host.' The scheme essentially becomes 'null and void' and

> …responsibility for the registration and accreditation of the health professions covered by the scheme…revert[s] to individual States and Territories. [158]

This is in line with the requirement that Parliament must always retain the capacity to revoke a power that it delegates and assume the power to itself[159] although it may more appropriate to describe this delegation of power as a temporary delegation of administrative power rather than legislative power.

Commonwealth Involvement in Mirror and Complementary Applied Schemes of Legislation

As these mirror and complementary applied schemes of legislation illustrate, even if the Commonwealth may not actually be a participant in the legislative component of the scheme it is evident that they have the opportunity to affect the States in a number of ways. One way they do this is through their involvement in Ministerial Councils in which they have an opportunity to formulate amendments, regulations and policy direction on matters that they would normally not have any or complete jurisdiction over.

As Ministerial Councils are largely controlled by the executive branch of the Commonwealth in terms of setting agendas, administration and policy direction they tend to have more influence as to what is discussed and decided in these forums. This effectively restricts the ability of the States to contribute as an equal policy partner to the decision making process, even in issues directly relevant to their sovereignty.[160] As such it has been said that:

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[156] *Australia Act* 1986

[157] Albeit with jurisdiction specific consequential and transitional provisions. CALC 148 , 3

[158] Except as otherwise agreed to by the Ministerial Council. Intergovernmental Agreement 2008, above n 149, 8-9

[159] Gerard Carney, above n 100, 5

[160] This is suggested as being the reason for the creation of the Council of the Australian Federation (CAF) which is made up of the Premiers and Chief Ministers of the States and Territories. It aims to facilitate constructive engagement, communication and collaborative agreement on issues that cross state borders as well as deal with issues 'where a Commonwealth imprimatur is unnecessary or has not been forthcoming'

> …whatever their intrinsic merits…the effect [of these councils] has been to interpose national-level policy and program priorities into areas within State constitutional jurisdiction. [161]

As the Commonwealth is almost always a signatory to the intergovernmental agreement, even if they are not enacting legislation, they have the option, if they thought it was in the public interest, to formulate legislation. Even though it may not be able to 'cover the field' it could upset the balance that had been established by original enactment of the relevant legislation between the States. This type of involvement by the Commonwealth may be mitigated by the fact the Commonwealth cannot exercise state powers if the legislation is to do with matters under state constitutional control, and the fact that many intergovernmental agreements and ministerial councils are non-justicable. But the concerns arise when the agreements and councils are statutory as there is a potential risk, in both manifestations of Commonwealth involvement, whereby the States could inadvertently give away their legislative power over a matter without it 'clearly being acquired by the Commonwealth'[162] through Constitutionally appropriate processes such as a referral or a referendum.

Uniform Schemes of Legislation and Democratic Accountability

Once a proposal for a uniform scheme of legislation has been approved, developed and drafted, the relevant Ministers in each state are required to sponsor the Bills through their respective Parliaments[163] and the legislation should proceed in the same way 'all proposed legislation affecting the people of Australia should proceed through the Parliament'[164] before it is sent to the Crown for assent.[165] Consequently the

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Twomey & Withers 2007 in John Summers & Jan Lowe 'The Federal System' (2010) in Government, Politics, Power and Policy in Australia ed Dennis Woodward, Andrew Parkin, John Summers 2010 160/161; Council for the Australian Federation http://www.caf.gov.au/

[161] A Parkin & G Anderson (2008) in Gareth Griffith, above n 155, 35

[162] Cheryl Saunders 'The constitutional, legal and institutional foundations of Australian federalism' (2008) (Paper presented at the Centre for Independent Studies Forum 5 May 2008) 6 http://www..edu.au/__data/assets/pdf_file/0019/206506/saunders-foundations.pdf (Cheryl Saunders 2008)

[163] Once a Ministerial Council has approved a proposal (in principle) for a uniform scheme of legislation the matter is referred to a working party for detailed development and drafting of the legislation. After consultation the working party makes recommendations to COAG or the Ministerial Council[163] and once agreed the proposed scheme proceeds 'through the participating Ministers to sponsor Bills through individual Parliaments.' Working Party 1996, above n 108; SCULGP Report 19 2004, above n 130

[164] Apart from Queensland and the Territories Parliament is a bicameral systems composed of a lower and upper house.

[165] This is not stated explicitly in the Constitution, but s1, s53, s57 and s58 of the Commonwealth Constitution 'leave room for no other inference' as does the relevant provisions in each States constitution. Jennifer Clarke, Patrick Keyzer, James Stellios, above n 17, 923-4

respective Commonwealth and State Parliaments should have the opportunity to scrutinise uniform legislation in accordance with the fundamental premise of responsible government[166] and in line with their sovereign duty to:

> ...make laws for the peace, order, and good Government of the State [Commonwealth][167]

However, in addition to the difficulties that are faced when there is unilateral enactment of regulations, all uniform schemes of legislation affect state sovereignty in terms of the ability for a state to be part of the democratic process and therefore be truly representative of the people. This is largely because of a lack of information, restrictions on parliamentary debate, the limitations on committee scrutiny and a significant lack of ministerial accountability in addition to the general issues faced by the increasing power of the executive through closure motions (gags), the 'guillotine', delegated legislation and strong political party discipline.

It is still maintained that Parliament can in fact take an active role in the legislative process where national schemes of legislation are concerned without affecting the sovereignty of the Parliament:

> Clearly, recourse to national uniform scheme legislation does not derogate from the sovereignty of State Parliaments. The fact of what is essentially an agreement entered into in an executive-related forum does not necessarily bind the legislature whose scrutiny mechanisms should, of course, still be applied.[168]

But it has been asserted that 'it can be politically incorrect to question uniform legislation of national agreements' [169] and this assertion has been supported by the Department of the Attorney General:

> ...such schemes, it is true, give almost no room to manoeuvre for individual Parliaments.[170]

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[166] The fundamental premise of responsible government is its accountability to the Parliament and hence the people.

[167] Constitution Act 1889, Western Australia in Working Party 1996, above n 163, 7

[168] Ministerial Policy Adviser, Office of the Minister for Justice and Attorney-General and Minister for the Arts, Queensland submission received 8 November 1995 in Working Party 1996, above n 167, 11

[169] Former Tasmanian Premier, the Honourable Ray Groom MHA - Transcript of Conference of Scrutiny Committees, Hobart 8 December 1995 in Working Party 1996, above n 168, 11

[170] Comment submitted in reference to national schemes of legislation which when developed as an integrated package, would fail if one of the key components was changed. Commonwealth Attorney-Generals Department Submission dated 5 October 1995 in Working Party 1996, above n 169, 12

Even if scrutiny via questions and debate was encouraged it has been noted that Parliament is not given adequate notice or detailed information about the operation of or negotiations within Ministerial Councils. Subsequently Members of Parliament are unlikely to have sufficient time or information in order to be able to formulate questions about a Minister's activity and the details of the legislation.[171] Essentially there is a

> ...chronic absence of information about all aspects of intergovernmental relations: the existence and operations of ministerial councils, the conditions of grants legislation, the substance of intergovernmental agreements,[172]

which stems from the fact that 'Ministerial Councils do not regularly report to Parliament after meetings on intergovernmental matters'[173] and discussions in these meetings, although often informal, are largely considered to be confidential.[174], Additionally intergovernmental agreements are usually 'not scheduled to legislation to which they relate even where…the agreement throws light on how the legislation is expected to work'[175] and non-one in Parliament can access this information to inform the process. Subsequently who is accountable for decisions in formulating uniform legislation can be very unclear and

> …where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.[176]

This is not assisted by the fact that the development of uniform legislation via the Ministerial council decision-making process

> …blur[s] the lines of responsibility of individual ministers and that participating government to their Parliament.[177]

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[171] SCULGP Report 19 2004 above n 163

[172] Cheryl Saunders 1991, above n 78, 48; By way of instructive contrast, explanatory memoranda that accompany bills into Parliament; can be publicly access and there is a system for the scrutiny and publication of all forms of delegated legislation; as well as an extensive data base on treaties to which Australia is a party to. Cheryl Saunders 2008, above n 162, 5

[173] SCULGP Report 19 2004, above n 171, 10

[174] Usually the only documentation that is made available is 'a 'communiqué' or summary of the decisions made at a meeting. Barry House, above n 155, 10; SCULIA 19th Report 1997, above n 67, 8

[175] Cheryl Saunders 2008, above n 172, 5

[176] SCULGP Report 19 2004, above n 173, 11

[177] SCULIA 10th Report 1995 in SCULGP Report 19 2004, above n 176, 31

This is despite the fact the 'doctrine of ministerial responsibility holds that a Minister is responsible to Parliament for his or her portfolios and departments which, by extension, should also cover their participation in Ministerial Councils.'[178] Ministers, like Ministerial councils, seem to 'fall outside the normal parliamentary accountability chain.' They have no apparent accountability to anyone for what they do and in the majority of circumstances are not required to inform Parliament of their discussion and negotiations in relation to uniform legislation.[179] Ministers can therefore essentially disown responsibility for decisions and commitments made in these meetings.[180] This accountability is reduced further, according to Fraser (1989), 'by the dynamics of councils which may force ministers to go along with decisions they would otherwise oppose' [181] or do not have the authority to commit their governments to.

In principle the power of committees to receive explanations and further information from government as well as review performance should be able to overcome some of these issues and assist Parliament to act as an effective legislature. However, the Western Australian Legislative Council is the only State Parliament to have established a standing committee, the Uniform Legislation and Statutes Review Committee,[182] that specifically reviews uniform legislation.[183]

Although it does seek to consider

> …whether in practical terms an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill, derogates from the sovereignty of the State, and in particular the State Parliament.[184]

[178] SCULIA 19th Report 1997, above n 174, 10

[179] SCULIA 19th Report 1997, above n 178, 10

[180] It also 'provides legitimacy for problematic decisions and actions.' 'Both levels of government have found that decisions made in the summit like atmosphere of COAG can provide cover for decisions that otherwise might cause political problems if adopted unilaterally.' Geoff Anderson, above n 87, 504

[181] Fraser 1989 in Andrew Hede, above n 62, 200

[182] The Western Australia Legislative Council Uniform Legislation and Statues Review Committee previously known as Western Australia Legislative Assembly Standing Committee On Uniform Legislation and Intergovernmental Agreements and the Western Australia Legislative Council Uniform Legislation and General Purposes Committee was established in order '…to scrutinise, monitor and review intergovernmental agreements and uniform legislative schemes, and the decisions of Ministerial Councils relating to such schemes

[183] In federal and other state jurisdictions committees have been formed that look at uniform legislation but they do this as part of a terms of reference that examines primary and delegated legislation of all types and usually on in terms of human rights and inappropriate delegation.

[184] Western Australia Legislative Council Standing Committee on Uniform Legislation and Statutes Review 'Report 55 - Trade Measurement Legislation (Amendment and Expiry) Bill 2010' 20 http://www.parliament.wa.gov.au/Parliament%5CNews.nsf/(Report+Lookup+by+Com+ID)/482569F400245ECB482577D8002B3A13/$file/us.tml.101111.rpf.001.xx.pdf

the Committee, like the chambers of parliament are faced with[185] a lack of information, fiscal pressure and restrictive time limits. The Committee is also not able to 'point out aspects of Bills that breach [their] Terms of Reference or point out errors in the legislation' which could initiate an amendment, because they are

> 'often told that the legislation cannot be varied because it has been carefully worked out by the relevant Ministerial Council and has national significance.'[186]

Therefore as the process of developing uniform schemes of legislation is excluding parliaments 'from the job that that history and their constituents give them'[187] the 'role of Parliament' and the sovereignty of the States is 'diminished'.[188] In effect

> ...laws are being created which are not really genuine products of the democratic process; they are not genuine products of the Parliaments...no one has scrutinised it in any detail.[189]

Consequently when enacting uniform schemes of legislation and in order for state sovereignty not to be undermined 'the general principle of accountability of government to the Parliament and ultimately to the people' needs to 'be affirmed'.[190] If the issues in relation to accountability, scrutiny and transparency were 'resolved or ameliorated the effectiveness of intergovernmental arrangements almost certainly would be enhanced…and in the process, the constitutional questions might be avoided'.[191] This would involve 'casting as much light as possible upon' the uniform legislation decision-making process and the documentation that supports the 'implementation, justification, understanding and interpretation of uniform legislative schemes'.[192] Federal and State scrutiny committees are best placed to identify and implement acceptable mechanisms to ensure proper scrutiny and ministerial

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[185] Kelly Paxman ' Referral of Bills to Senate Committees: An Evaluation' (1998) *Papers on Parliament No. 31*, June 1998 http://www.aph.gov.au/senate/pubs/pops/pop31/c07.pdf

[186] SCULIA 10th Report 1995, above n 20, 15

[187] Chairman of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements, the Honourable Phillip Pendal MLA – Transcript of Conference of Scrutiny Committee Hobart 8 December 1995 in Working Party 1996, above n 170, 10

[188] Cheryl Saunders in Barry House, above n 174, 4

[189] Former Premier of Tasmania, the Honourable Ray Groom MHA - Transcript of Conference of Scrutiny Committees, Hobart 8 December 1995 Working Party 1996, above n 187, 10

[190] Former Premier of Tasmania, the Honourable Ray Groom MHA in Working Party 1996, above n 189, 8

[191] Cheryl Saunders 2008, above n 175, 5

[192] Barry House, above n 188, 15; SCULGP Report 19 2004, above n 177, 17

accountability[193] as well as to determine where an appropriate balance between the advantages to a State in enacting uniform laws, and the degree to which a Parliament loses sovereignty[194] should lie. In essence to ensure the States are truly representative of the people and the undermining of state sovereignty is limited

> ... further work should be undertaken to determine whether modifications could be made to the present system which could increase the role of Parliament in considering uniform legislation without unduly fettering the effectiveness of government to govern.[195]

Conclusion

Uniform schemes of legislation are needed in a federation whose Constitution contains concurrent as well as divided powers for the Commonwealth and the States however they do have an impact on the state sovereignty that was gleaned post federation. As this paper has indicated sovereignty can be affected through the giving away of legislative power, the erosion or undermining of institutional integrity or through the limitations placed on key elements of the democratic process that in effect bind and undermine the ability of state parliaments' to truly represent 'the people'.

As uniform schemes of legislation are reliant on intergovernmental cooperation the practical involvement of the States is essential. However, the same schemes of legislation are subject to the effects of a much greater Commonwealth functional capacity wherein the Commonwealth has the ability to exert financial, administrative and political pressure on the States in order to circumvent some aspects of the democratic process. This means uniform schemes of legislation are not subject to an adequate level of parliamentary scrutiny and there is little transparency in relation to the ministerial council process and ministerial accountability. This is illustrated by the fact that in a number of uniform schemes of legislation the Commonwealth has the majority of control over the enactment of regulations irrespective of whether it is actually a participant in the legislative enactment component of the scheme. These actions incrementally undermine the sovereignty of the States even when the fundamental institutions and powers of a state's sovereignty are protected by the Constitution.

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[193] Legislative councils in the Commonwealth and the States have discussed potential procedures frameworks for routine scrutiny of intergovernmental relations including a national scrutiny committee and uniform terms of reference, but there are few signs of any real challenge from this direction with many of these recommendations having been made in the mid to late 90s and no action having yet been taken. Two current inquiries involving the Senate Scrutiny of Bills Committee, however, may initiate some changes at a federal level.

[194] SCULGP Report 19 2004, above n 192

[195] Former Premier of Tasmania, the Honourable Ray Groom MHA in Working Party 1996, above n 190, 8

Even though possible issues of manner and form and issues with the identification of uniform legislation as it passes through parliament are also encountered, the States are able to successfully terminate their involvement in mirror and complementary applied schemes of uniform legislation and effectively regain and maintain a degree of sovereignty. However, despite the jurisdictional issues that it may overcome, the legislation that is formed via a states constitutional reference of power to the Commonwealth thwart state efforts to terminate their involvement in the scheme and their attempts to regain their legislative power. The States are subsequently restricted in their ability to affect the legislation and they are placed in a position where they are effectively binding successive state parliaments to the discretion of the Commonwealth who have in essence gained power in excess of that granted by 'the people'. There is no doubt that state sovereignty is irrecoverably undermined in these circumstances.

Subsequently there is a definitive need to improve the integrity of the various processes involved in developing uniform legislation and to appropriately balance the need for uniform schemes of legislation with the effect on state sovereignty so that the States can remain as effective agents of 'the people'. However, it is of note that no matter how much the federal structure is 'trammeled and distorted' from that intended or envisaged at Federation, the Constitution will ensure that 'sovereignty in Australia' will remain 'vested collectively in the Commonwealth and the States'.[196]

[196] Anne Twomey 'The States, the Commonwealth and the Crown – The Battle for Sovereignty' 2008 Senate Occasional Lecture Series 2008 9
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