GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

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Committee Secretary
Select Committee on the Reform of the Australian Federation
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

Inquiry into Reform of the Australian Federation

Thank you for the invitation to make a submission to the Committee's inquiry into the Reform of the Australian Federation.

We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to contact us.

Yours sincerely,

Mr Paul Kildea
Director, Federalism Project

Dr Andrew Lynch
Centre Director

Professor George Williams
Foundation Director

SYDNEY 2052 AUSTRALIA
Email: p.kildea@unsw.edu.au
Telephone: +61 (2) 9385 9654

Priorities for reforming the Australian Federation

The Committee's inquiry is a timely opportunity to review the functioning of the Australian Federation. The federal system, while having many strengths, is not working as well as it should be. The Committee's terms of reference canvass a wide range of areas for potential reform, including the distribution of roles and responsibilities, financial relations, and the position of local government. We support the breadth of the Committee's inquiry, and agree that several useful reforms could be made in each of the listed areas.

Our submission focuses on one particular area for reform that we believe is the highest priority in terms of improving our federal system: that is, enhancing the capacity of the Commonwealth and the States to work together cooperatively. This is the case for two reasons. First, some of the nation's most pressing problems, including health care, education and water management, are not the responsibility of any single tier of government, and so require effective collaboration between Commonwealth and State governments. If optimal policy outcomes are to be achieved in these areas, then a stronger framework for federal collaboration needs to be established. Another reason to treat cooperative federalism as a priority is that many substantial reforms can be accomplished either by agreement or through statute, and so avoid the difficulty of achieving formal constitutional change. Having said that, it should also be recognised that reforming the Australian Federation will also involve tackling more difficult change through constitutional amendment.

In what follows, we propose reforms in the following areas:

1. The enhancement of cooperative federalism, by
    a. Formalising COAG's legal status
    b. Improving COAG's governance arrangements
    c. Improving COAG's democratic accountability and transparency
    d. Removing barriers to cooperative legislative schemes
    e. Better clarifying the operation of Commonwealth-State referrals
2. The holding of a Convention on the Federation.

1. Enhancing cooperative federalism

a. Formalise COAG's legal status

The Commonwealth, State and Territory parliaments should pass legislation to give the Council of Australian Governments (COAG) a firmer legal foundation.

Currently, COAG has no formal status under Australian law. It was established by agreement between the Prime Minister, Premiers and Chief Ministers in 1992 but enjoys legal recognition neither in the Constitution nor by statute. While this has not prevented COAG playing an influential policy role from time to time, its existence necessarily remains tenuous.

Statutory recognition would give COAG a more secure place in the Australian federal framework, delivering greater certainty and imbuing COAG with a status in keeping with its influential role in federal governance. Moreover, giving COAG a statutory basis would instil COAG with a stronger democratic legitimacy and help to improve awareness in the general community of its role in policy making.

Statutory recognition of COAG would be simple to achieve, requiring only the passage of complementary legislation by the Commonwealth, State and Territory parliaments.

b. Improve COAG's governance arrangements

COAG's governance arrangements should be revised to improve its ability to function as a vehicle of cooperative federalism. These new arrangements should be enshrined in a special Intergovernmental Agreement on COAG.[1]

At present, COAG's basic structure and processes are undefined and largely subject to Prime Ministerial discretion. In practice, this means that the operation of COAG relies substantially on the interests and agenda of the Commonwealth. This is problematic as it renders the States unequal partners within the cooperative framework, and undermines the capacity of COAG to act as a truly federal body. The Commonwealth's control of the COAG process is apparent in the following areas:

- Frequency and timing of meetings: the Prime Minister determines both the frequency and timing of meetings, meaning that the Commonwealth need only consult the States at a time that suits its own policy timetable, irrespective of the interests of the States. For most of COAG's existence, meetings have been infrequent: from 1992-2007 it met, on average, once a year, and many of these meetings lasted only a few hours;
- Meeting agenda: the Prime Minister controls the meeting agenda. This makes it more likely that COAG will address matters of interest to the national government. Further, the agenda is sometimes only finalised days before a meeting, giving the States minimal time to prepare;
- Chairing of meetings: the Prime Minister chairs all COAG meetings; and
- Location of secretariat: the COAG secretariat is located within the Department of the Prime Minister and Cabinet.

For COAG to operate more effectively as a truly cooperative body, the Commonwealth, State and Territories should commit to a revised set of governance arrangements in the form of an IGA. This Agreement should:

- Establish a regular schedule of biannual meetings, with the option of holding additional meetings as required;
- Establish a process that gives States and Territories greater input into the setting of meeting agendas;
- Commit the parties to the sharing of hosting duties; and
- Establish an independent secretariat.

In addition to enshrining specific governance arrangements, the Agreement might also set down principles and protocols to guide parties in advancing collaborative action.

It would also be possible, and indeed desirable, for many of the governance arrangements agreed to by the Commonwealth, State and Territory governments in a new IGA to be given legislative force in an enactment of the type described in the preceding section.

c. Improve COAG's democratic accountability and transparency

The Commonwealth, State and Territory governments should commit to higher standards of democratic accountability and transparency with respect to decisions made through the COAG process.

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[1] Here we draw on a proposal put forward in Wanna, J., Phillimore, J., Fenna, A. and Harwood, J. (2009) *Common Cause: Strengthening Australia's Cooperative Federalism*, Council for the Australian Federation, Brisbane, pp 15-16.

The COAG process currently undermines traditional forms of democratic accountability by sidelining the role of parliaments. At COAG meetings, members of the executive commit their respective governments to positions that may or may not have received parliamentary endorsement. Where those decisions require legislative implementation, individual parliaments are able to provide some scrutiny but this often occurs too late in the process to have any real effect. For example, the outcomes of intergovernmental agreements are often presented to parliaments in the form of mutually-agreed template legislation, leaving little or no scope for parliamentary deliberation and amendment of such bills.

Democratic concerns also arise from the fact that COAG's operation is rarely transparent. Its deliberations occur behind closed doors, and its decisions are announced in a press release or communiqué with few details. Little effort is made to provide the public with detailed information about meeting outcomes or the reasoning behind them. Given the inter-jurisdictional nature of COAG, these practices cannot be adequately defended through attempts to analogise it with Westminster cabinet government.

The Commonwealth, State and Territory governments should work to overcome these democratic short-comings by:

- Requiring that all IGAs be tabled in the parliaments of affected jurisdictions;
- Expanding the scope for individual parliaments to scrutinize IGAs, including through referral to parliamentary committees; and
- Publishing a complete register of IGAs negotiated by COAG.

These commitments could be included in an intergovernmental agreement negotiated by the parties as advocated above. Similar commitments could be made with respect to Ministerial Councils, which have similar shortcomings with respect to accountability and transparency.

These suggestions are in line with the recommendations of the 2006 Inquiry into the Harmonisation of Legal Systems, undertaken by the House Standing Committee on Legal and Constitutional Affairs. In its report, the Committee recommended that:

> *Recommendation 26*
>
> The Committee recommends that the Australian Government raise, at the Council of Australian Governments or other appropriate forum:
>
> - The circulation of draft intergovernmental agreements for public scrutiny and comment;
> - The parliamentary scrutiny of draft intergovernmental agreements; and
> - The augmentation of the COAG register of intergovernmental agreements so as to include all agreements requiring legislative implementation
>
> With a view to the implementation of these reforms throughout the jurisdictions.

In 2009, the Committee reiterated its concerns about COAG's democratic accountability in its Inquiry into Constitutional Reform. It recommended that:

> *Recommendation 1*
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> The Committee recommends that the Australian Government introduce the requirement for intergovernmental agreements to be automatically referred to a parliamentary committee for scrutiny and report to the Parliament.

d. Remove barriers to cooperative legislative schemes

The Constitution should be amended to remove existing barriers to cooperation between the Commonwealth and State governments.

Effective policy making in a federal system will often require that the national and State governments engage in cooperative legislative schemes. Under these schemes the different tiers of government frequently aim to pool their respective law-making powers so as to achieve shared goals. They commonly provide for a single national regulator and body for dispute resolution, rather than in each instance requiring six or more bodies around Australia.

Unfortunately, decisions of the High Court over a decade ago identified a flaw in the Australian Constitution that can undermine and even prevent such schemes.[2] The Court found that the sharing of judicial and enforcements powers between the Commonwealth and the States, which is central to the effectiveness of the schemes, is unconstitutional. This has caused problems in a range of areas, including family law, GST price monitoring by the Australian Competition and Consumer Commission, competition law and in new fields such as the regulation of gene technology. The problems can sometimes be circumvented by a referral of power (about which, see more below), or by accepting that matters arising under a harmonised scheme will be heard by the several State courts and regulated by separate enforcement agencies in each State. Both options are second best solutions that can make cooperation politically unachievable or practically worthless. As a result, there exist significant legal obstacles to effective federal-state cooperation, even where there is bipartisan support for cooperation across all jurisdictions to achieve an outcome in the national interest.

Removing these obstacles will require an amendment to the Constitution. The Constitution should be amended to entrench two legal propositions:

- the States may consent to federal courts determining matters arising under their law; and
- the States may consent to federal agencies administering their law.

Amendment of the Constitution by referendum is costly and difficult. On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure on courts because the cross-vesting of matters is not possible, which also increases the associated costs for parties to litigation. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes when cooperative schemes based upon a referral of power are not politically achievable.

Similar amendments have been recommended by the Constitutional Commission (1988), the Standing Committee of Attorneys-General (2002) and the Business Council of Australia (2006). This proposal has also received the unanimous, cross-party support of the House Standing Committee on Legal and Constitutional Affairs in its report on the Harmonisation of Legal Systems (2006):

> *Recommendation 1*
>
> The Committee recommends that:
>
> - The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;
> - The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;
> - A dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that

[2] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

- Any referendum on the constitutional amendment should be held at the same time as a federal election.

e. Better clarify the operation of Commonwealth-State referrals

Section 51(xxxvii) of the Commonwealth Constitution empowers the Commonwealth Parliament to legislate with respect to:

> **(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.

As stated above, the constitutional capacity of the States to refer areas of their own legislative competence to the national legislature so as to ensure the efficacy of cooperative schemes is extremely significant. However, while s 51(xxxvii) appears to be straightforward, in truth the power suffers from uncertainty in key respects. Despite its evident contemporary importance – as demonstrated by its role in the creation of laws of great national significance in the last decade regulating corporate entities, preventing terrorism and extending the Commonwealth's industrial relations system to most Australians working in the private sector – the High Court has been presented with very few opportunities to offer an authoritative judicial exposition on a range of ambiguous issues which persist in respect of the referral power. While that situation may change, the central importance of the power as a crucial mechanism of cooperative federalism means that a case can be made for government to take the initiative in proposing constitutional amendment of s 51(xxxvii) so as to clarify its operation and limitations.

In addition to the desirability of resolving perennial uncertainty over the ability of the States to withdraw or narrow a referral upon which the Commonwealth has relied, and the effect of this upon Commonwealth law, an issue of particular importance is the means by which the States may most effectively constrain the Commonwealth's powers to subsequently amend legislative text that has been referred to it for enactment. States will only be willing to hand over areas to Commonwealth control if they can be confident that sufficient safeguards are in place to prevent over-reaching or misuse of those powers by the national legislature. In recent referrals, efforts to contain the scope of possible Commonwealth exploitation of the power to amend the initial text reference have depended on largely similar, though not identical, semantic formulations. This has introduced increasing complexity and ambiguity to the underpinning legislation. In the case of the anti-terrorism referrals supporting Part 5.3 of the Commonwealth Criminal Code, this problem was compounded by an attempt to give statutory force in Commonwealth law to an approval process more typically confined to the terms of an underlying intergovernmental agreement.[3] A little light, none of it terribly positive, was shed on this development by the High Court in *Thomas v Mowbray* (2007).[4] This suggests that constitutional amendment of the power itself will be necessary if its full potential as a facility of ongoing cooperative federalism is to be reached.

That these are all issues calling for better understanding is beyond doubt. Greater use of the referral facility is seen by many as the means through which real reform of the Australian federal system might be achieved without large-scale resort to the referendum mechanism in s 128. There is a certain irony in the suggestion then, that s 51(xxxvii) itself might profit from formal amendment under the latter. However, doing so may be a far more effective and focused way of securing the conditions for the future development and evolution of Australia's federal system than attempts to obtain public approval of a sweeping range of other changes to the text of the Constitution affecting the relative powers and responsibilities of the Commonwealth and States.

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3 *Criminal Code Act 1995* (Cth) sch 1, s.100.8.

4 (2007) 233 CLR 307.

2. Hold a Convention on the Australian Federation

The Commonwealth government should organise a Convention on the Australian Federation to consider future priorities for reform of the federal system.

Conventions are an accepted way of debating changes to Australia's Constitution and system of government. A Convention on the Australian Federation would signal serious intent to deal with major questions concerning the future shape of our federal system. It would also do so in a way that brought together a range of voices, and focused media and popular attention on the reform agenda. Importantly, it would also have the potential to produce momentum for reform.

It would be important for this Convention to have a clear and specific agenda. COAG will be the most effective body for framing the agenda, determining which issues can best be resolved at the Convention and which are best left for resolution in other forums. The types of matters that should be placed on the Convention agenda should include many of the matters listed in this inquiry's terms of reference, including the division of roles and responsibilities, fiscal relations, and the position of local government. COAG should also determine the rules of the Convention, its composition and all other matters connected with its operation.

The idea of a Convention of the Australian Federation has widespread support. It has been championed by a broad section of interests, including the Council for Australian Federation, the Victorian and West Australian Governments, and the Business Council of Australia.