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Dr Ian Holland
Secretary
Select Committee on the Reform of the Australian Federation
Parliament House
CANBERRA, 2600 ACT

Dear Dr Holland,

Please accept the following submission with respect to your inquiry on the Reform of the Australian Federation. I appreciate the Committee's extension for the receipt of submissions so that the outcome of the federal election could be taken into account. Given that the outcome of that election remains uncertain, and may do so for a period of time, I make this submission in ignorance of who is likely to be governing Australia for the next parliamentary term and upon what conditions government is formed.

Distribution of powers and responsibilities

It has been well recognised that the distribution of powers and responsibilities between the levels of government in Australia needs reform. Australia, unlike most federations, has a very high level of shared responsibilities. This gives rise to the risk of 'a blurring of government responsibilities – from cost and blame-shifting among government levels, wasteful duplication of effort or under-provision of services, and a lack of effective policy co-ordination'.¹ Some progress on better allocating and defining shared responsibilities has recently occurred through the COAG working groups, but it is arguable that more substantial reform is needed.

It would be worthwhile for an independent body to conduct a broader review of the different functions of government, how they relate to each other and which level of government is most appropriate to exercise these functions. (See the large amount of literature on the principle of subsidiarity and how it is applied in other federations.)

¹ OECD, *Economic Surveys: Australia* (Paris, 2006), p 82.

For example, the Howard Government's National Commission of Audit recommended in 1996 as follows:

The Commonwealth should negotiate the following delineation of roles with the States:

- States – preschool, primary and secondary education, with Commonwealth funding of secondary education transferred by untied grants to the States.
- Commonwealth – vocational education and training, and higher education, with State funding of VET [Vocational Education and Training] transferred to the Commonwealth through a reduction in general purpose grants.²

This would avoid the current problem where bodies, such as universities, effectively have two masters and have the administrative burden of dealing with both. It would also allow public and private schools to be funded by the one government in a rational and consistent manner, rather than the current idiosyncratic and unsatisfactory approach.

It is not always the case, however, that clear lines can be drawn between different functions of government. Many functions are connected, particularly in the areas of health, aged care and disability services, making it difficult to impose dividing lines. In those cases, the relevant responsibilities of each level of government need to be better delineated.

Some governmental functions are best dealt with at the national level to achieve uniformity. Others may best be dealt with at the State level to achieve competition and accommodate local differences, while still others may best be dealt with at a shared cooperative level to achieve both State and Commonwealth involvement.

It must also be remembered that centralising power at the Commonwealth level is not the only way of achieving a degree of uniformity in those subject areas where it is desirable. Indeed, complete uniformity may not always be necessary or in the best interests of the country. In some cases the declaration of minimum national standards might be appropriate, leaving each State the option of building on those standards or implementing them in different ways. The national curriculum is a good example. It should focus upon ensuring that minimum standards are met (eg that all eight year olds know how to multiply and know their times tables). If, however, a single prescriptive curriculum applies across the country, it is likely that it will settle at the lowest common denominator and set a standard of mediocrity. In the absence of competition, there will be no spur for improvement and no objective evidence that it is needed. At present, national testing of students shows which States are falling behind and which States are successful. This forces States with poor results to look to those achieving better results to see how to improve. It also rewards successful innovation. The pressure is on governments to compete and improve. A single national curriculum provides no such competitive pressure, no innovation and no evidence of the need to improve. A better approach is to set minimum standards to ensure that students meet core competency levels and allow the States to compete to improve student results above and beyond those standards.

² National Commission of Audit, *Report to the Commonwealth Government*, (AGPS, Canberra, June 1996), pp 58-9. The proposal was not adopted.

Financial relations between federal, state and local governments

There is a close connection between inter-governmental financial relations and the allocation of functions and responsibilities. There is no point in a level of government having responsibilities that it cannot fulfil because it does not have access to the financial resources to do so. The biggest problem in the federal system is the Commonwealth's use of its superior financial position (achieved through greater access to tax revenue) as a means of interfering in State functions and responsibilities through the imposition of conditions on funding. This has been partially ameliorated through the reforms to specific purpose payments. However, the new system of national partnership payments appears to be a backdoor way for the Commonwealth to interfere again in areas of State policy through the placement of conditions on payments. As time goes by, it is likely that specific purpose payments will shrink, national partnership payments will increase and we will be back to where we started with precisely the same problems in terms of excessive administration costs, duplication, waste and blame-shifting.

Part of the problem here is the fact that there is an inadequate delineation of the functions and responsibilities of the Commonwealth and the States in the mind of the public, resulting in the view that it is the Commonwealth's 'responsibility' to come in and 'fix' any perceived problems. A very recent example is Mr Andrew Wilkie reportedly raising with the Prime Minister the issue of poker machine limits during negotiations on who should form government at the Commonwealth level. The Commonwealth, of course, has no legislative power with respect to gambling and the issue of limits on poker machine betting is something that should be raised at the State level. Federalism should not be a system of forum-shopping, where if you don't like the policy of one government you get a different government to change it. Each government should be responsible to the people for its own functions.

The main reason why the Commonwealth is called upon to 'fix' matters is not because it is a more effective or better run government – its many inadequacies in the areas of defence procurement, immigration detention and roof insulation show that it is not. The reason is that the Commonwealth has an excess of money and the States are not sufficiently funded to fulfil their responsibilities. Hence the Commonwealth can 'fix' things by throwing money at them. The Commonwealth has no interest in properly funding the States because it would rather be seen as the saviour, getting the public appreciation for saving the day with what it incorrectly regards as 'its money'.

The more rational approach is not for the Commonwealth to keep taxpayers' money for itself and fix matters once problems arise, but to allocate the money appropriately so that all functions are adequately funded and leave each government to live or die upon the way in which it manages its clearly delineated functions and responsibilities without interference by another level of government. It is the constant interference which blurs the lines of political responsibility and undermines the effectiveness and efficiency of government.

Ideally, all Commonwealth revenue would be pooled and allocated, without conditions, according to clear and transparent criteria related to the functions to be fulfilled by each level of government.

Recognition of local government

While the issue of recognition of local government in the Constitution is often discussed, it remains unclear as to what it is intended to achieve. If it is purely symbolic – effectively a pat on the head to make local government feel important and appreciated – it would be a waste of money and effort. A previous constitutional amendment along these lines failed miserably at a referendum and it is doubtful that another one would fare any better.

If it is intended to achieve something substantial, then a great deal of care would need to be taken because once such a provision is included in the Constitution, it will be extremely difficult to alter in the future. It will, in effect, become frozen in time. Hence anything prescriptive in nature concerning local government funding or the way in which local governments can be established or abolished may become more of a problem than a benefit in the future when circumstances change.

Constitutional amendment – referral of matters and enhanced cooperation

The provisions in the Constitution that support cooperative federalism need to be reviewed and renewed. At the moment they do not adequately serve our needs. They are quite limited in their scope and the High Court has neither been prepared to interpret them broadly nor to interpret the Constitution as supporting other cooperative measures which the Constitution does not explicitly permit or prohibit. In the words of Justice McHugh, ‘co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.’³

One consequence has been that the cooperative cross-vesting scheme, which allowed State jurisdiction to be vested in federal courts to complement the vesting of federal jurisdiction in State courts, was struck down as invalid by the High Court in *Re Wakim; Ex parte McNally*.⁴ The ability to use Commonwealth officers to enforce cooperative legislative schemes was left in doubt after the High Court’s judgment in *R v Hughes*, as the Commonwealth may not have the necessary legislative power to impose such obligations upon its officers.⁵ The ability of State Parliaments to refer matters to the Commonwealth under s 51(xxxvii) on the condition that the States retain a say in the amendment of laws enacted pursuant to the reference, was also thrown into doubt by comments made in *Thomas v Mowbray*.⁶

There are two main ways these problems could be tackled. First, specific technical amendments could be made to the Constitution to permit cross-vesting, allow the conferral of State functions on Commonwealth officers (where the relevant governments agree) and clarify the application of s 51(xxxvii), particularly concerning the capacity to revoke references and the manner in which references (and laws supported by a s 51(xxxvii) reference) may be amended.

³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556 (McHugh J).

⁴ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

⁵ *R v Hughes* (2000) 202 CLR 535, 553-4 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁶ (2007) 233 CLR 307, [212] (Kirby J); [456] (Hayne J) and [605]-[607] (Callinan J).

Secondly, a broader provision could be inserted in the Constitution to support inter-governmental cooperation. It could, perhaps, be modelled on s 105A of the Constitution and permit the making of agreements between the Commonwealth and the States concerning matters within their legislative, executive and judicial powers. It could confer the power to legislate to give effect to such agreements and deal with how those agreements could be altered or rescinded and the effect that such changes to the agreements would have on existing legislation that implemented them. The machinery for inter-governmental cooperation could also be upgraded, perhaps by clearing the inter-state commission provisions out of the Constitution and creating a new independent body with the role of monitoring the implementation of agreements and adjudicating upon disputes between governments on the operation of inter-governmental agreements.⁷ In short, a new architecture supporting cooperative federalism could be created.

The risk with this latter approach, however, is that it is a very wide target for scare campaigns during any referendum campaign. While on the one hand, it is likely that the Australian people would support the facilitation of cooperation between the different levels of government, on the other hand there might be too many possibilities and uncertainties involved in this broader option. Hence a more cautious approach might be to deal with the specific technical amendments that need to be made.

Regional grant programs

While support for rural and regional Australia is important, great care should be taken with regard to introducing regional grant programs. Too often these become simply means for government to indulge in pre-election pork-barrelling.⁸ Any scheme, if it were to exist, should be strictly scrutinised and subject to close over-sight by the Auditor-General.

Yours sincerely,

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⁷ *Australia 2020 Summit – Final Report* (May 2008), pp 343-4.

⁸ See, eg: ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1).