
IMPLEMENTATION OPTIONS
FOR
NATIONAL LEGISLATIVE SCHEMES
IN
PUBLIC HEALTH

REVISED FINAL PAPER

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1. Introduction

1.1 *Brief*

We have been commissioned by the Legislation Reform Working Group (LRWG) to prepare a policy paper on the constitutional issues around the implementation of national legislative schemes in public health. The paper was required to provide:

- a description of the current constitutional framework for legislation in the area of public health;
- an analysis of the options available for the implementation of national legislative schemes in the area of public health; and
- recommendations on the best methods to achieve nationally uniform legislation in the area of public health.

1.2 *Product*

We understand that the paper may be used as part of a “Legislators’ Toolkit” to be created by the LRWG. The Toolkit will provide model legislative mechanisms for national legislation in particular public health areas. It will be available to officers in government departments who are responsible for the review of public health legislation. It should be noted that not all of the mechanisms discussed in this paper will involve legislation. Some mechanisms designed to achieve lesser levels of uniformity are canvassed and will also have their place in the options available to policy-makers.

1.3 *Definitions*

For the purposes of this project, we understand the term ‘public health’ to mean those systems and processes which affect the health of the population at large. The recent Discussion Paper on the review of the *Health Act 1958* (Vic) described ‘public health’ as “the organised response by society to protect and promote health, and to prevent illness, injury and disability”.¹ On this basis, the term covers a very broad subject matter, including disease prevention, health education and health promotion, all with differing needs as far as levels of policy and legislative co-operation is concerned.

1.4 *Purpose of the Paper*

The purpose of the paper therefore is to provide a clear and comprehensive outline of the framework in which intergovernmental arrangements may have some application in the public health area, and to provide a guide for future decision-making and policy implementation.

¹ *Review of the Health Act 1958 Discussion Paper* (November 1998), Melbourne: Department of Human Services, 1998, drawn from Tony McMichael, *Public Health Research, A Continuing Need*, Public Health Education and Research Program Network Newsletter, July 1998. See also *Memorandum of Understanding between the Commonwealth of Australia, New South Wales, Victoria, Queensland, South Australia, Tasmania, Northern Territory, Australian Capital Territory and Western Australia to establish a National Public Health Partnership* (1996) Preamble, para 4.

2. Making assessments and decisions

2.1 *Uniformity not an end in itself*

Australia is a *federal* system. One of the hallmarks of such a system is difference. In designing and operating a federal system, a key task is to balance the twin goals of *unity* and *difference*. This needs to be borne in mind when considering what level of national uniform coverage one might want to achieve in policy areas such as public health, and the options available for implementation.

It is important to be aware that there can be an *assumption*, often unconscious, that uniformity is an end in itself. There will be a number of public health matters where uniformity may be demonstrably desirable. However, it is a necessary consequence of a federal system that *some diversity is to be expected*, and even to be welcomed. The antagonistic language of ‘centralism’ and ‘States’ rights’ is rarely helpful. It is essential instead to *evaluate the issue and circumstances at hand and consider what level of uniformity and co-operation is necessary* to achieve the public health goal in question.

2.2 *Working through problems and options*

Every public health policy issue brings with it its own *particular political and cultural context and special issues*. In considering how best to achieve policy outcomes, it is critical to be familiar with the *processes and structures* which are available to implement those policies, and the consequences of choosing any particular one. There is no one ‘best way’.

This can be demonstrated by considering different types of issues.

- Some public health issues will need to be able to *initiated quickly* in response to a new, perhaps life-threatening, or politically or legally charged issue, while others can afford a *longer-time frame*, with plenty of opportunity for discussion and accommodation of parties’ interests.
- The nature of some public health issues will be such that *only core provisions* or standards need to be made uniform, while other issues may not be satisfactorily dealt with unless *all aspects* of the solution are uniform.
- Ensuring levels of harmonisation achieved are maintained may be more important where *cross-border trade or movement* relies heavily on the assumption of uniformity or mutual recognition, rather than with issues where local matters are more pervasive.
- Allowing participating jurisdictions *control* over matters such as the form of legislation, the amendment and the administration process of the policy may be more important where the issue has, for example, a history of strong and distinctive State control, and less important where a new issue arises.

Any of the schemes described in this paper, lying as they do along an extensive *spectrum of uniformity*, may be the most appropriate option for the problem at hand.

2.3 *An approach to the issue*

One method to be used when approaching such issues might therefore be:

- (1) *Identify* the problem to be dealt with and decide what *outcomes* are to be achieved in dealing with the problem.
 - It is important to identify the issue or problem first *before* considering the question of uniformity or harmonisation.
 - Characterisation of the issue, its history, its current status, any current legal regime, the current political climate, the funding available or required, will assist with the considerations to be made in stage (2).
- (2) Look at this guide, and make a *prima facie* decision about:
 - the *degree of uniformity which might be needed* to deal with the problem and achieve the outcomes.
 - the *costs* in terms of efficiency, rule of law, and federal values which might be incurred, and what you are *prepared to pay* in terms of those costs; and
 - the option (legislative or otherwise) which seems *best suited* to the circumstances.
- (3) Think about whether, in order to implement your chosen option, you will need:
 - legislation;
 - a ministerial council;
 - an intergovernmental agreement;
 - a centralised administrative body.
- (4) If you need *legislation*, consider:
 - how should the desired level of uniformity or harmonisation be achieved for
 - *primary* legislation;
 - *associated* legislation;
 - *subordinate* legislation;
 - how should the *initial* legislation be *drafted*?
- (5) If you need a *ministerial council*, consider:
 - do you want to use an *existing* one or a *new* one (if a new one is possible)?
 - *decision-making*: what rules will govern voting, majorities, and chairing?
 - *membership*: should New Zealand or other neighbouring country have membership on the Council, and, if so, of what nature?
 - how *cross-portfolio issues* will be dealt with within or between Ministerial Councils.

- (6) If you want an *intergovernmental agreement*, consider:
 - *legal status*: is it to be binding or not? If not, what provisions are needed to deal with breaches of the agreement?
 - *amendments*: how will these be proposed? implemented?
 - *duration*: how long should it run? should there be a sunset clause?
 - *withdrawals*: can parties withdraw? if yes, can the agreement continue with the rest of the parties?
 - *review*: when and how should it be reviewed?

- (7) If you want a *centralised administrative body*, consider its role:
 - do you want it to create a *central agency* solely to provide policy advice?
 - do you want a *central administrator* delegating day-to-day administration to other agencies?
 - do you want a central administrator directly responsible for all administration?

- (8) Once you have done all this, consult with *Parliamentary Counsel* on processes, drafting issues and implications on the *prima facie* choices made thus far.

3. Current constitutional framework for legislating in the area of public health

3.1 *Divided power & responsibility in a federal system*

Power and responsibility are divided by the Australian Constitution between the Commonwealth and the States. Functions may also be devolved to local government. Following the United States model, the Constitution lists the powers given to the Commonwealth primarily in section 51 (see Annex One) and leaves all unspecified powers to the States.

Most of the heads of power given to the Commonwealth in section 51 are *concurrent powers* and so can be exercised by the States as well (section 107). The States therefore have power to do anything that is not specifically withdrawn from them. Power may be withdrawn if it is given exclusively to the Commonwealth or denied to both the Commonwealth and the States.

Two examples of the latter have some potential relevance in the area of public health:

- the guarantee of the absolute freedom of interstate trade, commerce and intercourse in section 92 of the Constitution; and
- the prohibition on discrimination against residents of other States in section 117.

State power can effectively be negated also where there is an *inconsistency* with Commonwealth law. Section 109 provides that in cases where a State law is inconsistent with a valid Commonwealth law, the latter prevails. The High Court has taken a broad approach to what constitutes ‘inconsistency’. Section 109 applies in circumstances where the Commonwealth intends to ‘cover the field’ as well as in cases of direct inconsistency.

There are also a few *inherent limits* on State legislative powers. Particularly relevant for present purposes are limitations on a State to legislate *extraterritorially*. Under current doctrine, a State Parliament can only pass laws relating to people or things outside Australia or in another State if the subject matter of the law is sufficiently connected to the territory of the State. The *Australia Acts* 1986 allow each State to make laws which have an extraterritorial operation but they must still be laws for the peace, order and good government of the State in question. This raises possible limitations on State power addressing cross-border health problems.

Section 51 does not give the Commonwealth a specific power to make laws with respect to ‘health’ generally. That general power therefore falls within the ambit of the States. There are some Commonwealth powers which specifically refer to matters relevant to health policy, however. There are also powers which indirectly allow the Commonwealth to legislate on, or to regulate, health-related matters. These powers have not been fully used by the Commonwealth in relation to health. There is an important difference between the existence of legal power and the political decision to use it.

3.2 *Direct Commonwealth powers relevant to 'health'*

The Commonwealth has *direct power* to make laws with respect to *three* public health areas:

- “quarantine” (section 51(9));
- “old age and invalid pensions” (section 51(23)); and
- “the provision of maternity allowances, widows’ pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances”(section 51(23A)).

“quarantine”

Since 1908 the Commonwealth has exercised the quarantine power to provide for the quarantine of persons, goods, vessels, animals and plants for the purpose of preserving and maintaining the public health. Under the *Quarantine Act* 1908 (Cth), “quarantine” covers prohibition of the importation into Australia of any plants or pests, as well as the removal of any plants or pests from Australia; declaration of areas as quarantine areas, and of any vessel, person, animal, plants or goods to be subject to quarantine; prohibition or restriction of the importation of plants and articles likely to introduce infectious or contagious disease; prohibition of the introduction of noxious insects or pests, disease germs or microbes, and viruses. Some of these powers, where they may relate to plants and animals or relevant diseases in a State, may only be exercised where the Governor-General is satisfied that the exercise is necessary for the purpose of preventing the spread of the disease or pest beyond the boundaries of that State.²

“old age and invalid pensions”

“Old age and invalid pensions” covers payments made in the form of pensions to the elderly and those designated as ‘invalid’. While restricted to those types of recipients alone, it is not restricted to payments provided by the Commonwealth directly, and so allows the Commonwealth to authorise laws with respect to the provision of invalid and old age pensions made by others. The Commonwealth’s *Superannuation Industry (Supervision) Act* 1993, for example, allows a superannuation fund to become a “regulated fund” if it has as its sole or principal purpose the provision of old-age pensions.³

“the provision of maternity allowances...”

Section 51 (23A) was added by constitutional amendment in 1946. It gives the Commonwealth a more extensive social security power, and covers schemes such as Medicare and Austudy. The power was added after the High Court held that the Commonwealth could not provide for the payment of pharmaceutical benefits. It is a wider power than first might appear. As a power to ‘provide’ a range of allowances and other personal payments, it gives the Commonwealth a significant level of control over the terms on which the payments can be made and thus the power to impose regulatory standards.

² *Halsbury’s Laws of Australia* [330-3010], Sydney: Butterworths, 1999.

³ *Laws of Australia* [144], Sydney: LBC, 1999.

For example, the section enables the Commonwealth to fund people to stay in nursing homes, but only in those nursing homes which meet Commonwealth standards⁴.

3.3 Indirect Commonwealth powers

McMillan⁵ has identified fourteen other specific heads of Commonwealth power in section 51 which have some relevance to health. Two of these have particular relevance for the regulation of public health:

- *trade and commerce with other countries and between the States* (section 51(1)): eg regulation of the importation of drugs;
- *foreign corporations and trading and financial corporations formed within the limits of the Commonwealth* (section 51(20)): eg regulation of product labeling, food production and of therapeutic goods, manufactured or produced by relevant corporations.

Also of relevance are:

- *taxation* (section 51(2)): eg power to levy health insurance contributions; potentially also to levy payments which discourage certain types of activities injurious to public health (such as taxes on sale of leaded petrol, cigarettes etc); and
- *external affairs* (section 51(29)): eg power to implement within Australia international agreements relating to health to which Australia is a party.

An indirect power of a different kind is the power to make *grants* to the States under section 96. Section 96 permits the Commonwealth to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'. This section now provides the only effective constitutional base for the redistribution of revenue from the Commonwealth to the States. Two main types of payments are made pursuant to this power:

- *general revenue grants* are paid to the States in recognition of the imbalance in revenue available to the States from their own sources; and
- *specific purpose payments*, which are made on condition that the money be spent on particular areas or that the recipient implements specific policies.

Specific purpose payments are the most significant in terms of extending the Commonwealth's policy influence. There is virtually no limit to the 'terms and conditions' which the Commonwealth can impose. The use of this power to regulate health is significant. In the 1997-98 Budget Papers, the Medicare-related programmes listed as receiving special purpose grants included palliative care, sexual health, public patients' hospital charter, and national public health programmes included influenza vaccinations for the aged, alternative birthing services, breast cancer screening, a range of drug and alcohol programmes, women's health, rural obstetrics and youth suicide

⁴ *Re: Alexandra Private Geriatric Hospital Pty Ltd & Blewett and Willett* (1984) 56 ALR 265.

⁵ John McMillan, *Commonwealth Constitutional Power over Health*, Lyons, ACT: Consumers' Health Forum of Australia, 1992, 6-8. See also John McMillan, "The Constitutional Power of the Commonwealth in Public Health" in Australian Institute of Health Law and Ethics, *Public Health Law in Australia: New Perspectives*, Canberra: Commonwealth of Australia, 1998, 105-134.

prevention.⁶ In the 1999-2000 Federal Budget, 51% (or over \$6.5 billion) of specific purpose payments made to the States are in the health area.⁷

3.4 *Incidental Commonwealth powers*

The Constitution gives the Commonwealth a power to make laws with respect to “matters *incidental* to the execution of any powers vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth” (section 51(39)). This allows the Commonwealth to make laws on matters incidental to the carrying out of any power that the Constitution gives to the Commonwealth government or courts as well as to the Commonwealth Parliament.

The importance of the incidental power in section 51(39) is lessened by the High Court’s acceptance that each head of power includes an ‘incidental’ power which enables the Commonwealth to do whatever is needed to make the main grant of powers ‘effective’.

While the incidental power and broad judicial interpretations give the Commonwealth considerable breadth and flexibility in the exercise of its direct and indirect powers, Commonwealth legislative power necessarily is *restricted*, by the Constitution and the concept of federalism itself. Although the Constitution allows the Commonwealth to ‘*cover the field*’ in areas over which it has concurrent power with the States, in some cases the Commonwealth may be unable satisfactorily to cover an entire field of conduct where national action is appropriate. One example is *therapeutic goods*. Given the national trade in such goods, it might be seen as an obvious area in which the Commonwealth might want to regulate. However, the Commonwealth’s reach extends only to trade and commerce in such goods which occurs between States, or between Australia and other countries, or to manufacturers which fall within the power to legislate with respect to ‘foreign, trading or financial corporations’. The Commonwealth therefore cannot ‘cover the field’ in therapeutic goods.

3.5 *Interpretation*

The constitutional powers of the Commonwealth Parliament are subject to *interpretation and application by the High Court*. The scope of the powers is, like any other provision, limited by the particular words used. The High Court has held that words of the Constitution must be given a “literal and natural” reading “in the light of the circumstances in which it was made”.⁸ In cases where there is ambiguity the High Court has been reluctant to develop artificial limits on Commonwealth power. The High Court has interpreted

⁶ Commonwealth of Australia, *Budget Paper 3: Federal Financial Relations 1997-1998*, Canberra: Australian Government Publishing Service, 52-55; Federal-State Relations Committee, *Register of Specific Purpose Payments received by Victoria* (2 vols), Fourth Report on The Inquiry into Overlap and Duplication, Melbourne: Parliament of Victoria, 1999 generally, and on Medicare-related payments 105-121 and public health programme payments 125-161.

⁷ Commonwealth of Australia, *Budget Paper 3: Federal Financial Relations 1999-2000*, Specific Purpose Payments, Chart 8, Canberra: Australian Government Publishing Service.

⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129 at 145, 150.

'trade and commerce' in section 51(1) *broadly*, for example, so that it now includes almost all manner of goods and services, transportation, communication and other intangibles. 'External affairs' in section 51(29) now clearly covers treaties whose subject matters extend beyond those otherwise within Commonwealth legislative power. The meaning of 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' in section 51(20) has also been broadly defined, and the Commonwealth has legislated on a range of matters under this head of power, including regulation of trade practices and some industrial relations matters. Section 96 has been interpreted literally by the High Court, which allows the Commonwealth to impose almost any condition it chooses on a grant.

3.6 Intergovernmental co-operation and arrangements

While the Constitution divides powers between the Commonwealth and the States, it also contemplates *co-operation* between them. In section 51, for example, the Commonwealth is given power to legislate on matters referred to by State Parliaments (section 51(37)) and the Commonwealth and States together are empowered to achieve those results which before Federation could only have been achieved by the United Kingdom (section 51(38)). The Commonwealth is also able to confer federal jurisdiction on State courts under section 77(3), thus enabling the whole of any legal dispute to be determined by a single court. Following the High Court decision in *Re Wakim; ex p. McNally* (1999)⁹, it is clear that no reciprocity is possible and that original State jurisdiction cannot constitutionally be conferred on federal courts.

There is a *myriad intergovernmental arrangements* of other kinds, for which the Constitution does not specifically provide. The High Court has recognised that:

*...as a result of co-operation...the Commonwealth may achieve objects that are beyond the constitutional competence of the Commonwealth. Similarly, as a result of joint legislation, a State and the Commonwealth may achieve an object that neither could achieve by its own legislation.*¹⁰

But the principle of co-operation will not supply authority where none exists. This was demonstrated by the decision in *Re Wakim*. The challenge to the validity of the conferral of State jurisdiction on federal courts was upheld on two grounds. The first was that sections 75 and 76 of the Constitution were an exhaustive statement of the jurisdiction that could be conferred on federal courts. The second was that the Commonwealth lacked power to consent to the conferral of State jurisdiction on federal courts so long, at least, as the "consent" itself amounted to conferral.

The implications of *Re Wakim* for the validity of co-operative schemes in which two or more jurisdictions confer authority on a single administrative body or regulator (as opposed to the conferral of jurisdiction on a court) is not clear. The decision in *Wakim* may prove to be dependent on the finding about the exclusive nature of the Judicature chapter of the Constitution and to have limited implications for other schemes.

⁹ (1999) 73 ALJR 839.

¹⁰ *Re Wakim...*, at 852 (McHugh J).

On the other hand, *Wakim* draws attention to a potential problem in schemes in which the Commonwealth establishes an agency and specifically authorises other jurisdictions to confer authority on it, in order to overcome the effect of section 109 of the Constitution. The anti-section 109 provision must itself find support in a head of Commonwealth constitutional power and *Wakim* suggests that any deficiency in power will not be overcome by appeal to an underlying constitutional principle of co-operation.

This difficulty, such as it is, is most likely to manifest itself in schemes in which the administrative agency is established by Commonwealth legislation relying on the Territories power alone. Ways of *minimising* it include:

- basing the Commonwealth legislation on other heads of power as well: for example, the interstate trade and commerce power, in s.51(1);
- drafting the section in a way that makes it clear that it represents only Commonwealth consent to the conferral of power by other jurisdictions, or an expression of Commonwealth intention not to cover the field, rather than a conferral of power on the body by the Commonwealth itself.

No problem of this kind arises where a *State*, rather than the Commonwealth, enacts the *primary legislation*. In this case, however, other difficulties of a political nature may emerge, as the example of the non-bank financial institutions scheme showed.

Other less structured forms of co-operation between spheres of government also take place. For example, heads of government meet at least annually, in the Council of Australian Governments. The Treasurers meet in the Loan Council. Other ministers meet in the Ministerial Council relevant to their portfolio.

3.7 *International standards and obligations*

Quite apart from measures which may be taken nationally by way of co-operation, uniformity may effectively be *imposed* on national governments and member governments in a federation as a result of *international treaty obligations* and the creation of *international standards*. Australia is a party to numerous international treaties concerned with public health. These include broad statements which seek to improve the health of people in general terms, such as the International Covenant on Economic, Social and Cultural Rights 1966 and the World Health Organisation's goal of "Health for All" by the year 2000 which Australia endorsed in 1981.

Other treaties create *regulatory regimes* in specific areas. In 1993, for example, Australia acceded to the Convention for the Mutual Recognition of Inspections in Respect of the Manufacture of Pharmaceutical Products (1970) which states in its preamble that in the interest of public health pharmaceutical products whether exported or not should be produced according to appropriate standards. However, the terms of a treaty do not have effect in Australian law until its provisions are implemented in domestic law. This has been done to some extent, for example, in the Commonwealth *Narcotic Drugs Act* 1967, *Psychotropic Substances Act* 1976, and *Crimes (Traffic in Narcotic and Psychotropic Substances) Act* 1990.

The expansion of international trade means that standards set by *international organisations* such as the United Nations, or by trading partnerships such the European Union, can be highly effective in producing uniformity across jurisdictions, as non-conformity may result in exclusion from a desired export market. The International Food Standards set by the United Nation's Codex Alimentarius Commission, for example, are increasingly being used as benchmarks for *food standards* around the world, including Australia. Although the standards are not binding, the exportability of Australia food may depend on compliance with at least minimum standards set by the Commission. The recommendations on food standards set by Australia's regulatory food authority, the Australia and New Zealand Food Authority (ANZFA), take into account the Codex standards.

4. Options for the implementation of national legislative schemes

4.1 *A spectrum of uniformity*

For ease of understanding and reference, the options available to implement national uniform schemes can be placed on a *spectrum of uniformity*, covering *higher, moderate* and *lower levels of uniformity*.

In public health, where the Commonwealth has limited power, the options include a range of co-operative arrangements of various kinds, designed to achieve lesser or greater uniformity. Some are designed to simulate as nearly as possible the effects of an exercise of general power; others are directed to co-ordination or harmonisation; others are concerned with the implementation of common standards or broad principles, with some flexibility on matters of detail.

The choice for policy-makers becomes a question of the *level of uniformity* and co-ordination which is *desired*, which is *appropriate*, and which is *achievable*.

4.2 *What the spectrum covers*

At each end of the spectrum are the extremes:

- *complete uniformity* of law and policy (which might be achieved in a number of ways);
- *no uniformity* at all, with member governments separately pursuing their own policies as far as they can.

In between, the options broadly cover:

- harmonisation;
- reciprocity;
- co-ordination of policy and/or legislation;
- exchange of information between governments.

4.3 *Specific options*

Specifically the options, categorised under their respective level of uniformity, are:

High Levels of Uniformity

- *Option 1: Unilateral exercise of power by the Commonwealth*
- *Option 2: Reference of power to the Commonwealth*
- *Option 3: Incorporation by reference*

Moderate Levels of Uniformity

- *Option 4: 'Roll back' schemes*
- *Option 5: Complementary legislative schemes*
- *Option 6: 'Alternative consistent' legislative schemes*
- *Option 7: Reciprocal legislative schemes*

Lower Levels of Uniformity

- Option 8: *Agreed legislation/policies*
- Option 9: *Exchange of Information*

Relevant to all options is the use of *money* as a means of obtaining or encouraging various levels of uniformity.

4.4 'Gaps'

Even when co-operative schemes which result in a high degree of uniformity are put into place, some '*gaps*' are inevitable. Even with effective uniformity of all principal and subordinate legislation as enacted and amended, for example, a schemes will inevitably be less than uniform if the *administration* of the scheme is not uniform. A comparable problem arises if there is not uniformity of associated legislation, such as *Acts Interpretation Acts*, and of ombudsmen legislation, administrative and judicial review and judicial interpretation.

Judicial interpretation can also play a role in preserving the uniform application of national legislative schemes. When such schemes are in place, practices regarding the operation of precedent come into play: in interpreting national uniform legislation, courts in one jurisdiction should generally follow the interpretation of an intermediate appellate court in another.¹¹

It is possible to achieve this complete level of uniformity in a co-operative scheme, by what has been termed '*federalising*' it. Regulation of corporations is one such example. The latest co-operative scheme, established in the 1990s, attempts to 'federalise' the corporations law and regulations of each jurisdiction so that the applied law operates as, and has the characteristics of, Commonwealth rather than State law. It does this by means of machinery or 'covering' provisions in the Commonwealth's *Corporations Act* 1989 which are designed to make the corporations law operate as a single national law, by making 'Commonwealth' the interpretation and application of the law, the manner of citing the law, the enforcement and administration of the law, and the jurisdiction and procedure of courts.¹²

4.5 Support mechanisms

Whatever options are to be considered, it is possible, and even likely, that three intergovernmental support mechanisms might be involved, and it seems helpful to introduce them here:

- *ministerial councils*;
- *intergovernmental agreements*; and
- *central administrative bodies*.

¹¹ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

¹² *Halsbury's Laws of Australia* [120-240], Sydney: Butterworths, 1999.

4.6 Ministerial Councils

Ministerial Councils have been a feature of intergovernmental co-operation of over 50 years. They have been defined as:

*A formal meeting of Ministers of the Crown from more than four jurisdictions, usually including the Commonwealth, the States and the Territories of the Australian Federation, which meet on a regular basis for the purpose of intergovernmental consultation and co-operation, joint policy development and joint action between Governments. Ministerial Councils may include representatives of the Australian Local Government Association and the Government of New Zealand (or other Regional Governments) by invitation.*¹³

The *role* of Ministerial Councils is to:

- facilitate consultation and cooperation between Australian governments;
- develop policy jointly; and
- take joint action in the resolution of issues which arise between governments.

Ministers carry the *authority of their Governments*, and those Ministers convened as a Ministerial Council may determine to finality all matters in their field of concern. In national policy or legislative schemes, the Councils provide opportunities for exchange of information, and forums for approvals to any proposed changes. They *do not*, however, *regularly report to Parliaments* on the outcomes of their meetings or proposals. Some Ministerial Councils have their basis in legislation but most do not. Ministerial Councils usually have sub-committees made up of officials from each jurisdictions which also meet.

Ministerial Councils proliferated on an ad-hoc basis until the system was *rationalised* in the early 1990s. Councils were reduced from 45 to 21 largely by combining groups of related Councils, after considering portfolio structures, common membership and overlap of responsibilities.¹⁴

Examples relevant to health include:

- Australian Health Ministers' Conference;
- Australian New Zealand Food Standards Council;
- Ministerial Council on Drug Strategy (comprising Ministers for Health and for Law Enforcement);
- Council of Australian Governments;
- Standing Committee of Attorneys-General; and
- Leaders' Forum (comprising Premiers and Chief Ministers).

(See Annex Two for examples of Ministerial Council activities).

¹³ Department of the Prime Minister and Cabinet, *Compendium of Commonwealth-State Ministerial Councils*, May 1994, i.

¹⁴ The Western Australia Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements listed 32 Ministerial Councils in its Nineteenth Report on *Ministerial Councils* (June 1997).

The role that a Ministerial Council plays in co-operative legislative scheme will vary.

Issues which will need to be determined include:

- which portfolio(s) will be represented?
- what will the voting arrangements be?
- what role will the Council play in approving initial legislation and future amendments?
- who will chair the Council?
- who will service the Council?

4.7 Intergovernmental agreements

Intergovernmental agreements are “*political compacts*”¹⁵ which set down the understanding between the parties involved, including the role, functions and processes for a Ministerial Council, the terms of the arrangements and the provisions to be included in any subsequent legislation.

There can be doubt as to whether an intergovernmental agreement is legally binding.¹⁶ In some cases this may be overcome by specific prescription in the agreement. Agreements which require the parties to enact legislation cannot be binding, however. And, in practice, political sanctions may be more useful than legal ones to secure compliance with agreements. Agreements do not themselves need to have a legislative base, but there will usually be legislation running parallel with an agreement, to implement terms for which parliamentary action is required.

Examples of existing intergovernmental agreements include:

- Intergovernmental Agreement on the Reform of Commonwealth-State Relations (1999), which deals with tax-sharing arrangements in light of the proposed GST and which also created a new Ministerial Council; this agreement is likely to be renegotiated later in 1999;
- Agreement on National Competition Policy and Related Reforms (1997);
- Commonwealth-State Housing Agreement (1996);
- Intergovernmental Agreement on Rail Safety (1996);
- Intergovernmental Agreement on Mutual Recognition (1992) (see Annex Two);
- Agreement on the Adoption of Uniform Food Standards (1991) (see Annex Two).

Agreements between governments may assume different degrees of *formality* and may be made at different stages in the co-operative process. The National Public Health Partnership, for example, was established under a Memorandum of Understanding, signed by Commonwealth, State and Territory Health Ministers. The Memorandum states as its purpose:

a wish on the part of signatories to introduce a new working arrangement to plan and coordinate national public health activities, provide a more

¹⁵ Western Australia Legislative Assembly, Statutory Committee on Uniform Legislation and Intergovernmental Agreements, *Uniform Legislation*, 21st Report, 1998, 4.

¹⁶ *South Australia v Commonwealth (Railway Standardization case)* (1962) 108 CLR 130 at 149 per McTiernan J.

*systematic and strategic approach for addressing public health priorities and provide a vehicle through which major initiatives, new directions, and best practice can be assessed and implemented through a National Public Health Partnership.*¹⁷

4.8 Intergovernmental agreement check-list

Whether planning or analysing an intergovernmental agreement, a general checklist of the following key terms can be a useful tool.

Intergovernmental agreement check-list

- who are the parties to the agreement?
- when does the agreement come into operation?
- what is the duration of the agreement?
- when and how is the agreement to be reviewed?
- can a party withdraw from the agreement?
 - if yes, can the agreement continue with the rest of the parties?
- what is its legal status? does it bind the parties?
- how are breaches of the agreement to be dealt with?
- what are the arrangements for consultation on the formulation of any legislation to flow from the agreement?
- how are amendments to be proposed? implemented?
- how is administrative responsibility divided between the parties?

Specific options outlined in the following sections will attract their own specific terms and these will be highlighted under the various option headings.

4.9 Central administrative bodies

Once a scheme designed to make more a law or policy more uniform has been established, some mechanism is needed to *harmonise or make uniform the administration* of the scheme. A common feature of co-operative schemes is therefore a central administrative body or national authority. Typically such a body is set up by legislation of one jurisdiction and invested with power by the others. A greater degree of uniformity in the operation of law is likely if administration is centralised in this way. In establishing such bodies, the parties must act consistently with the Constitution, as the invalidation of the cross-vesting legislation demonstrated: see the discussion at 2.6.

¹⁷ *Memorandum of Understanding between the Commonwealth of Australia, New South Wales, Victoria, Queensland, South Australia, Tasmania, Northern Territory, Australian Capital Territory and Western Australia to establish a National Public Health Partnership* (1996) Preamble, para 1; see Annex 2.

Such a body's tasks may range from simply *administering* the scheme and legislation to *setting standards*. *Political responsibility* for the body may rest with one government or may be retained by a Ministerial Council.

Current *examples* of bodies established for this purpose include:

- Australian and New Zealand Food Authority;¹⁸
- National Registration Authority for Agricultural and Veterinary Chemicals;¹⁹
- Australian National Training Authority;²⁰
- Therapeutic Goods Administration.²¹

Alternatively, the administration of a scheme may rely on *co-ordination* between existing separate State and Territory bodies. One example of this is the National Companies and Securities Commission which was established as part of the co-operative companies scheme in the 1970s. The Commission used State-based Corporate Affairs Commissions to administer the scheme at State level.

4.10 *Analysing the different options*

As noted above, before any scheme is initiated, a judgement must be made that the existing arrangements do not adequately secure public health goals.

A useful way of then looking at which scheme might best secure those goals, is to consider it by reference to the following three public policy considerations, in addition to the suitability of the scheme for achieving the overall public health goal:

- (1) how each scheme works in terms of its mechanics and processes and the *impact* of those characteristics *on public policy concerns* such as regulatory efficiency;
- (2) the effect it has on the *health of the system of parliamentary democracy* and responsible government; and
- (3) the effect a scheme has on the broader issue of the *federal balance*, which is critical to the nature of this study.

Schemes do not operate in a vacuum, and an analysis of their costs and benefits on these grounds ensures an informed decision can be made as to each scheme's appropriateness to the issue in hand and in the context in which it is operating.

The options described will be analysed therefore using three broad grounds:

- (1) *efficiency*, which includes consideration of:
 - the *speed* at which the scheme can be *initiated*;
 - the *speed* and *ease* with which it can be *amended*;
 - the *reliability* with which the *level of uniformity* can be maintained;

¹⁸ *National Food Authority Amendment Act 1995* (Cth).

¹⁹ *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth).

²⁰ *Australian National Training Authority Act 1992* (Cth).

²¹ Not a statutory authority, but a Division of the Commonwealth Department of Health and Aged Care.

- (2) *rule of law*, which includes consideration of:
- the *simplicity* of the scheme;
 - the *transparency* of the decision-making process, at the outset and during the scheme's operation;
 - the *accountability* of the decision-makers;
- (3) *federal values*, which includes consideration of:
- the scheme's *place on the spectrum* between unity and diversity;
 - the *nature of the participation* of State/Territory Governments and/or Parliaments;
 - the implications for *innovation and variation* at State/Territory level;
 - the implications for *local application* of law/policy.

(1) *Efficiency*

The term covers important issues surrounding national schemes. Schemes often arise in response to a new policy problem or issue where a reasonably rapid response is required. Once some level of uniformity or national coverage is achieved, it is important to be aware of how easily and effectively that level can be maintained. However important efficiency considerations are, they will always need to be balanced with the other two grounds. There may be instances where policy-makers will be prepared to have a less efficient scheme if it delivers other benefits, or ensures that all relevant players will be able to come on board.

(2) *Rule of law*

The ground called *rule of law* raises a critical public policy issue. As the Working Party of Representatives of Australian Scrutiny of Legislation Committees noted in its 1996 Position Paper, national legislative schemes have been perceived by some as a threat to the system of parliamentary democracy. Here is an extract from comments made by Members of Parliament at a conference of Scrutiny of Legislation Committees in 1995:

*It really concerns me that ... laws are being created which are not really genuine products of the democratic process; they are not genuinely products of the Parliaments. ... I do know that in certain cases we have had uniform legislation created without Members of Parliament really examining and understanding what that legislation is all about. Obviously on the face of it we see what it is about but no-one has scrutinised it in any detail.*²²

* * * * *

*Our concern then ...is the process by which parliaments are being excluded from the job that history and their constituents give them.*²³

²² Hon Ray Groom MLA, Premier of Tasmania, Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p1 quoted in Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation: Position Paper*, October 1996, Fyshwick: Commonwealth of Australia, 1996, 10.

²³ Hon Phillip Pendar MLA, Chairman, Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements, Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p39 quoted in Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny...*, 10.

Intergovernmental agreements and Ministerial Councils create problems for *accountability*. This is inevitable to some extent, as the traditional mechanisms for enforcing accountability in Australian system of government involve the relationship between Parliament and the Executive within each level of government. They are not designed for co-operative arrangements.

Accountability issues which may arise are:

- limitations on parliaments to affect the form of legislation;
- restriction on the power of parliaments to scrutinise intergovernmental agreements and proposed primary and subordinate legislation;
- potential for confusion of lines of responsibility for decisions;
- lack of information and openness;
- the inapplicability of traditional avenues of review, such as through Freedom of Information legislation, Ombudsmen, judicial review of administrative action and so on.

According to one submission to the Working Party, some members of the Executive branch of government have felt differently:

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. ²⁴

As will be seen from the descriptions of the schemes below, different types of arrangements seeking different levels of uniformity will have *different implications* for this issue, a point noted by a submission to the Working Party.²⁵ The process, as well as the outcome, is highly relevant. This is an important consideration when assessing the value and relevance of a particular scheme to solve a particular problem.

There have been suggestions made about how these perceived problems might be *alleviated*. These include:

- tabling of exposure drafts of proposals for uniform legislation, including those made by Ministerial Councils;
- creating uniform terms of reference for the scrutiny of primary national legislation;
- referring documents relating to intergovernmental agreements and proposed uniform legislative measure to parliamentary committees;
- tabling intergovernmental agreements in the relevant parliaments;

²⁴ Submission from Ministerial Policy Adviser, Office of the Minister for Justice Attorney-General and Minister for the Arts, Queensland, p2, quoted in Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny...*, 11.

²⁵ Submission from the Commonwealth Attorney-General's Department, p2, quoted in Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny...*, 11.

- establishing registers of existing and proposed uniform legislation and intergovernmental agreements.²⁶

(3) *Federal values*

The third ground, *federal values*, reflects the fact that a successful federal system requires a balancing of unity and diversity, and needs to support attitudes and processes which help maintain that balance. Consideration of the advantages of a uniformity approach to legislation or policies needs to be tempered with consideration of the implications of such a scheme for the federal system and its members. The Working Party also reported concern by Members of Parliament on this front. The former Tasmanian Premier again:

*I seriously believe that the process by which we arrive at uniform legislative schemes carries with it threats to our Federal system... .*²⁷

The Victorian Parliament's Federal-State Relations Committee recently attempted to articulate what it sees as federal virtues and federal principles:

- federal virtues:
 - decentralised decision-making which permits diverse responses to regional needs;
 - a competitive environment for public policy solutions;
 - multiple points of access to government for citizens;
 - unity where necessary without central domination;²⁸
- federal principles:
 - mutual respect for authoritative decision-making at each level of government;
 - significant areas of autonomous decision-making and administration at each level of government;
 - matching of legislative responsibility with fiscal capability;
 - acknowledgement of the importance of intergovernmental relations in maintaining a balanced federal system.²⁹

These ideas offer a useful starting point from which to consider the merits and value of a uniform scheme.

The types of public health issues which may arise and a method for assessing which option may be most appropriate will also be examined.

²⁶ Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny...*, 14-19; Western Australia Legislative Assembly, Statutory Committee on Uniform Legislation and Intergovernmental Agreements, *Uniform Legislation*, 21st Report, 1998, Recommendations 1, 2, 5 & 6.

²⁷ Hon Ray Groom MLA, Premier of Tasmania, Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p2 quoted in Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny...*, 12.

²⁸ Federal-State Relations Committee, *Australian Federation: The Role of the States*, Second Report on The Inquiry into Overlap and Duplication, Melbourne: Parliament of Victoria, 1998, Findings 1, 14.

²⁹ Federal-State Relations Committee, *Federalism and the Role of the States: Comparisons and Recommendations*, Third Report on The Inquiry into Overlap and Duplication, Melbourne: Parliament of Victoria, 1999, paras 7.8- 7.11.

5. Options achieving HIGHER levels of uniformity

5.1 Option 1: *Unilateral exercise of power by the Commonwealth*

The most simple way to achieve *maximum uniformity* is for the Commonwealth to legislate.

There are two ways this could be done.

(1) *Indirect heads of power*

The first, based on the current constitutional framework, would see the Commonwealth rely on indirect heads of power, relating principally to interstate and overseas trade and commerce (section 51(1)) and foreign, trading and financial corporations (section 51(20)), as well as any other relevant indirect or incidental powers.

(2) *New head of power*

A second way would be to create a new head of power, covering ‘health’, for the Commonwealth, by means of an alteration to the Constitution passed at referendum, as occurred with section 51 (23A). Commonwealth law has a strong unifying effect because, under covering clause 5 of the Constitution, all federal laws are binding on the courts, judges, and people of every state and of every part of the Commonwealth.

5.2 Option 2: *Reference of power to the Commonwealth*

Section 51(37) envisages some or all of the States referring power to the Commonwealth from time to time, or adopting Commonwealth legislation on a reference of power. Once a ‘matter’ is referred to the Commonwealth, the *Commonwealth is able to legislate* in the same way as any other head of Commonwealth power.

If *all the States refer power*, the effect is comparable to a *new head of Commonwealth power*, unless and until the references come to an end.

If *all States fail to refer power*, the effectiveness of this mechanism is correspondingly reduced. There has often been a *reluctance* on the part of the States to refer power in the past.

The *scope* of the reference of power is *flexible*: it may be broad or quite specific, covering the heads of the anticipated Commonwealth legislation or the actual legislation itself. It may be:

- limited in duration;
- may involve one or more States; and
- may be subject to conditions, a breach of which may trigger the revocation of the reference.

Terms governing the reference of power or the bill itself could be spelt out in an *intergovernmental agreement*.

Intergovernmental agreement check-list

- who are the parties to the agreement?
- when does the agreement come into operation?
- what is the duration of the agreement?
- when and how is the agreement to be reviewed?
- can a party withdraw from the agreement?
 - if yes, can the agreement continue with the rest of the parties?
- what is its legal status? does it bind the parties?
- how are breaches of the agreement to be dealt with?
- what are the arrangements for consultation on the formulation of any legislation to flow from the agreement?
- how are amendments to be proposed? implemented?
- how is administrative responsibility divided between the parties?

If an intergovernmental agreement were to be used, then this would need to be *negotiated and signed* by the relevant parties, and the relevant State Parliaments would then be required to *enact the referring legislation*.

It should be noted that a referred power is a *concurrent* and not an exclusive power. The States therefore retain the power to legislate in the area, subject to the constitutional provisions relating to the supremacy of federal law in the event of inconsistency.

Examples in the public health area include the references by Victoria and NSW in respect to meat inspection in the 1980s, and those relating to mutual recognition (see below 6.4). It is worth noting that the reference by Victoria in relation to meat inspection was withdrawn when Victoria set up its own industry-based system of inspection in 1993.³⁰

5.3 **Option 3: Incorporation by reference**

This scheme is also referred to as ‘template’, ‘co-operative’, ‘applied’, ‘adopted complementary’ and ‘application of laws’ legislation.

One jurisdiction enacts legislation, which contains all the substantive provisions, and this legislation is *adopted and applied* in legislation enacted by the other jurisdictions in the scheme. Sometimes participating jurisdictions may also be obliged not to submit to their Parliaments legislation which will conflict with or negate the operation of the uniform legislation.

A *Ministerial Council*, possibly through an *intergovernmental agreement*, would determine the content of the host legislation and the processes for amendment and review.

³⁰ Established by the *Meat Industry Act* 1993 (Vic).

Intergovernmental agreement check-list

- who are the parties to the agreement?
- when does the agreement come into operation?
- what is the duration of the agreement?
- when and how is the agreement to be reviewed?
- can a party withdraw from the agreement?
 - if yes, can the agreement continue with the rest of the parties?
- what is its legal status? does it bind the parties?
- how are breaches of the agreement to be dealt with?
- what are the arrangements for consultation on the formulation of any legislation to flow from the agreement?
- how are amendments to be proposed? implemented?
- how is administrative responsibility divided between the parties?

PLUS for Option 3

- what are the terms governing the reference of power?

The *level of uniformity* able to be achieved and maintained is *flexible* to some extent, as variations can be made to accommodate the different requirements of the various parties.

The *uniform consumer credit laws scheme*, for example (see Annex Two), which allows the use of this model, has host legislation which participating jurisdictions apply, but the scheme allows them freedom to go their own way in matters not considered essential, such as the jurisdiction of courts and tribunals, maximum interest rates, and licensing or registration of credit providers.³¹

The *choice of host* may often be dictated by political considerations. Two popular hosts in the past have been the *Commonwealth* and *Queensland*: the Commonwealth because of its ability to pass a law for a Territory (usually the ACT) under section 122 of the Constitution, and Queensland because it is the only unicameral State legislature in Australia, and therefore the only State whose executive government can guarantee passage of the agreed law through parliament without alteration.

There is also some flexibility in the way on which the *amendments* are handled. Amendments can be adopted automatically by stating in the applying legislation that the host legislation applies, ‘as amended from time to time’ and thus ensure a greater degree of uniformity. This is not a necessary feature of this type of scheme - the intergovernmental agreement may state that amendments will be enacted separately by participating jurisdictions - but it is a usual one.

³¹ Consumer Credit (Victoria) Bill, Legislative Assembly, Parliament of Victoria, Second Reading Speech, Attorney-General Hon Jan Wade MP, 4 May 1995, *Hansard*, 1233-4.

Where the Ministerial Council is empowered to *vote* on amendments, then the nature of approval, whether by all members, by a special majority, or by an ordinary majority, needs to be spelt out. The Council may act as a purely consultative body, with no final vote taken on amendments. If this is the case, then amendments would become the sole responsibility of the host jurisdiction.

A *central administrative body* is likely to be created to implement and oversee the legislation.

One *version* of the option which achieves high levels of uniformity can be found in the *national corporations scheme*. The primary legislation for that scheme is printed in one volume as a code or law of the participating States in order to ensure accessibility.

Another *example* is the legislative arrangement which establishes the National Registration Scheme for *agricultural and veterinary chemicals*. Before 1995, the Commonwealth was responsible for the evaluation and assessment of agricultural and veterinary chemicals and their clearance for registration, while the States and Territories were responsible for their registration and control. All governments agreed in 1991 to bring the registration of such chemicals under one national umbrella. The Commonwealth then passed legislation in 1992 establishing a statutory authority, the National Registration Authority.³² It then passed the *Agricultural and Veterinary Chemicals Code Act 1994*, which applies in the ACT, and which contains the operational provisions for the scheme. Each of the States and Territories then enacted legislation to apply the Commonwealth provisions as a law of each State and the Northern Territory.

In the health arena, another *variation* of this method has been used to establish *uniformity of food standards*. While each jurisdiction's primary legislation on food, whether a Food Act or a Health Act, may currently be different, the jurisdictions have uniform food standards, which are set by a statutory authority (Australian and New Zealand Food Authority) responsible to a Ministerial Council and adopted by reference, and without amendment, by each State and Territory. Although they are only standards, they can be applied as subordinate legislation (regulations). Section 4 of the NSW Food Standards Code (Incorporation) Regulations 1995 states, for example, that "the Food Standards Code, as in force from time to time, is incorporated in this Regulation and applied as a law of NSW".

In another example of adoption of standards, the *uniform scheduling of drugs and poisons* is not established by a separate legislative scheme but by the adoption by the States and Territories into their own legislation of standards (SUSDP) set by the National Health and Medical Research Council and published by the Australian Health Ministers' Advisory Council. The standards themselves do not have legal status. The scheduling standards affect the packaging, labelling, availability and advertising of drugs and poisons.³³

³² *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth); see Annex Two.

³³ Eg *Drugs, Poisons, and Controlled Substances Act 1981* (Vic) sections 4 and 12 (label and container specifications in the SUSDP); *Poisons Act 1964* (WA) sections 46 and 50; *Poisons Regulations* (WA) (a person must not store, supply or transport a poison unless labelling complies with the SUSDP).

5.4 Analysis

(1) Efficiency

Options 1, 2 and 3 ensure a *substantially uniform approach* to issues.

Commonwealth legislation, whether made pursuant to a head of power or a referred power, is able to *cover the field* as far as it can, and could replace piecemeal State and Territory legislation. A Commonwealth approach can be well-suited to dealing with issues which cross State borders and may require a rapid response. Having *one jurisdiction in control* means ease of initiation and amendment, and maintenance of uniformity is not an issue. It can also make it easier to establish a centralised administration, which would ensure increased uniformity of interpretation and application.

However, in the *public health area*, the current array of indirect powers would still leave the Commonwealth with *gaps*, which it may not be able to fill. Attempts to legislate in uncharted areas may run the risk of a constitutional challenge. This would, of course, be solved by a new head of power being established. It is *highly improbable* that a *referendum* on this issue would be contemplated, in view of the concerns one might expect from State Governments, the political sensitivities involved, the current referendum agenda, and the poor record of constitutional proposals lacking clear support from both sides of government, and which may be seen as centralising power.

In the unlikely event that a general power on health, or a more specific health-related power, was given to the Commonwealth, it is important, as noted earlier, to be aware that *having power* does *not* necessarily carry with it a corresponding *obligation to use that power*.

The involvement of *intergovernmental agreements* in **Options 2 and 3** means that *time* will be needed for drafting and negotiations, and *care* to be taken as to the terms and nature of the agreement and decisions made about the nature of the decision-making process arrangements.

(2) Rule of law

In the hands of *one jurisdiction*, as in **Options 1 and 2**, policy implementation would be straightforward and as primary legislation, it would also be as *transparent* as legislation can be. If an additional head of power is granted to the Commonwealth by a referendum then no issue would arise about legitimacy. A uniform approach ensures that all Australians have the same laws to protect them, and makes it easier for those operating under them to access, understand and comprehend them.

The issues of *accountability* raised earlier need to be considered again here. There could be concerns that **Option 3** makes those Parliaments applying the host legislation compromise

their sovereignty, by essentially delegating some of its powers to the host jurisdiction. The option of allowing amendments to go to the applying jurisdictions' Parliaments for consideration returns at least some aspects of the legislation to the Parliaments, which may alleviate those concerns to some degree.³⁴ However, this may cut away at uniformity quite quickly. We are not aware at this stage of an intergovernmental agreement that allows for independent State amendment within an incorporation by reference model, but that there is no reason why this could not be done.

(3) *Federal values*

With the options involving only Commonwealth action, as in **Option 1**, there is no necessary involvement of other spheres of government.

With *reference of power schemes*, States need to decide whether to refer power, but for the life of the reference, there will be no other State involvement. Similarly, once an incorporation by reference scheme is adopted, the scheme can be changed without reference to State Parliaments, although there may be some reference to a Ministerial Council.

Therefore with **Options 2 and 3**, there is at least *initially a degree of State involvement*, but once each scheme is up and running, the continuing level of involvement is dependent on the details of the scheme itself. These options would not necessarily give States the opportunities to reflect the particular needs of their citizens, nor local matters such as climate, regulatory culture, industry standards. It may be that the advantages of unity of law, policy or administration outweigh losses to diversity.

A *marginally lower level of uniformity*, which can be achieved through *intergovernmental agreements* and a *Ministerial Council* working to tight rules on unanimity, can create more opportunities for discussion and negotiation which reflects better the *diversity* of the members of the federal system.

³⁴ See Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation: Position Paper*, October 1996, Fyshwick: Commonwealth of Australia, 1996, 48.

6. Options achieving MODERATE levels of uniformity

The next level of uniformity *relies more heavily on co-operation* between governments, and may result more in harmonisation of laws and/or policies, where laws may differ but act in a complementary fashion with each other.

The lower guaranteed level of uniformity can be offset by the *flexibility* given to members governments and the potential involvement of the parliamentary systems.

6.1 Option 4: ‘Roll back’ schemes

‘Roll back’ schemes offer a way of achieving a reasonable level of uniformity through the establishment of *minimum standards* by the Commonwealth on matters over which the Commonwealth and the States have concurrent power.

One example is the *native title* scheme. The Commonwealth's *Native Title Act* 1993 (as amended) provides for the recognition and protection of native title, and a mechanism for the determination of native title and the validation of past dealings inconsistent with it. The Act states that it is not intended to affect the operation of any State or Territory law. State and Territory native title legislation seeks in varying degrees to complement the Commonwealth's legislation, recognising native title and validating past dealings, and, in some cases, establishing State-based mechanisms for hearing native title claims. Such legislation is, however, only valid in so far as it is capable of operating concurrently with the Commonwealth's own native title legislation.

The legislation³⁵ gives States and Territories the capacity to replace rights and procedures, including the right to negotiate, available under the Commonwealth legislation with alternative rights and procedures legislated and administered by the States and Territories. The Commonwealth Minister may make a determination that the State or Territory provisions comply with the relevant Commonwealth provisions. The ‘roll-back’ comes into play because the determination is a ‘disallowable instrument’ for the purposes of the Act. This means that it, and by implication, the relevant State or Territory legislation, is subject to possible disallowance by the Senate, allowing the Parliament to reject alternative provisions if they are not seen as complying with the Commonwealth scheme.

In August 1999, the Senate disallowed the Commonwealth Attorney-General's determinations that the Northern Territory's native title legislation complied with the Act.³⁶

³⁵ See sections 43 and 43A (see Annex Two).

³⁶ Disallowed 31 August 1999: Native Title (Right to Negotiate; Alternative Provisions) (Northern Territory Lands Acquisition Laws) 1999; Native Title (Right to Negotiate; Alternative Provisions) (Northern Territory Mining Laws) Determination 1999; Native Title (Right to Negotiate; Alternative Provisions) (Northern Territory Petroleum Laws) Determination 1999.

6.2 Option 5: Complementary legislative schemes

This option relies on the Commonwealth and States *working together* to achieve legislative coverage of a particular policy area.

A typical scenario prompting such a scheme would see the Commonwealth *lacking complete control* over a policy area (such as health), and so needing the State to pass complementary legislation to achieve the desired object. The Commonwealth and all participating States would pass *separate, but totally consistent* (although not necessarily identical) pieces of *legislation*.

An *intergovernmental agreement* is likely to be used to set out the terms and understandings on which the scheme is based.

Intergovernmental agreement check-list

- who are the parties to the agreement?
- when does the agreement come into operation?
- what is the duration of the agreement?
- when and how is the agreement to be reviewed?
- can a party withdraw from the agreement?
 - if yes, can the agreement continue with the rest of the parties?
- what is its legal status? does it bind the parties?
- how are breaches of the agreement to be dealt with?
- what are the arrangements for consultation on the formulation of any legislation to flow from the agreement?
- how are amendments to be proposed? implemented?
- how is administrative responsibility divided between the parties?

The possibility for *variation* is obviously greater here. While the intergovernmental agreement may require an agreed version of the Bill to be introduced into each Parliament, each Parliament has an opportunity to consider and amend the bill, and local concerns or drafting practices may have some influence on the final version.

A good *example* of this option in the health area is the regulation of *therapeutic goods*.

As noted earlier, the Commonwealth's power under section 51(1) does not extend to intra-State trade and commerce, nor does its power under section 51(20) extend to unincorporated businesses. As a result, therapeutic goods manufactured by individuals, small unincorporated businesses or partnerships, and sold only within the boundaries of one State or Territory, escape Commonwealth regulation. State and Territory legislation is needed to fill the gap. The States, therefore, enacted corresponding legislation of different types to pick up the manufacturers missed by the Commonwealth's legislation.

Victoria, for example, passed its own corresponding legislation (see Annex Two). As a consequence, the laws of Victoria must be amended each time the Commonwealth law is changed. This process can lead to erosion of the initial level of harmonisation. Currently, for example, Victoria is some number of amendments behind the Commonwealth in the therapeutic goods area.

NSW, on the other hand, enacted legislation which applies the law of the Commonwealth, as amended from time to time, to NSW, and specified that it applied to products produced by manufacturers not otherwise caught by the Commonwealth law as amended. This is a variation on **Option 4**, incorporation by reference. That method normally is assumed to involve a law of the host jurisdiction which is applied to a particular *geographical* area, and picked up and applied in other geographical areas by laws of the participating jurisdictions. In the case of therapeutic goods, the host legislation was enacted by the Commonwealth, using its substantive power, and picked up and applied by NSW to cover aspects of the *subject-matter* which the Commonwealth legislation could not reach.

There is also a variation of this scheme called ‘*mirror*’ schemes. These are less generally relevant but should be noted. Their value arises where there may be some doubt as to which level of government, State or Commonwealth, has the power in relation to a particular matter. Each level passes identical legislation, which ensures that there can be no effective challenge to the law or scheme in issue. If the State law is challenged then the Commonwealth’s law fills the breach, and vice versa. This was done in relation to the off-shore petroleum scheme.

6.3 **Option 6: ‘Alternative consistent’ legislative schemes**

An ‘alternative consistent’ legislative scheme is a *variation* of **Option 3**. In this version, rather than pass legislation which applies template legislation enacted by a host jurisdiction, participating jurisdictions can *pass their own legislation* which can be identical to, but can also *be less extensive* than, the host legislation. This also applies to amendments. The *uniform consumer credit laws scheme*, principally an **Option 3** scheme, also gives jurisdictions the option to pass alternative consistent legislation instead of adopting Queensland’s host legislation.

6.4 **Option 7: Reciprocal legislative schemes**

The next point on the spectrum includes those schemes which *recognise* other jurisdiction’s legislation or *undertake not to be inconsistent* with them. Reciprocal schemes allows a jurisdiction to recognise, on a reciprocal basis, a status given by another jurisdiction. Their principal *purpose is to extend national coverage* rather than to achieve uniformity, although in practice they may prove to have an homogenising effect.

The best *example* of this is the *mutual recognition* scheme developed in the early 1990s.

Members of the scheme either referred power to the Commonwealth or adopted Commonwealth mutual recognition legislation under section 51(37) (see Annex Two).

They were then subject to, and obliged to recognise, fellow members' standards for goods and occupations. This means that goods and people in particular occupations which met their own local standards could be sold or be able to have their qualifications recognised in other jurisdictions without having to meet any additional standards set by those other jurisdictions. Public health and safety issues were considered when drafting the scheme: temporary exemptions of certain goods from the scheme are permitted and permanent exemptions were set for a range of goods, including fireworks and firearms.

The inter-State mobility of numerous health professionals, such as nurses, doctors, optometrists, pharmacists and physiotherapists, has improved as a result of the operation of the scheme.

6.5 Analysis

(1) Efficiency

While the schemes outlined in **Options 4, 5, 6 and 7** occupy a useful mid-point on the uniformity spectrum, the involvement of *intergovernmental agreements* means, as noted earlier, that they will take *time* to initiate. *Terms* need to be very clear and the issues raised earlier will need to be decided by all parties.

The *potential erosion of uniformity* through allowing flexibility or options with the introduction of amendments will score lower on the efficiency measure but potentially higher on the federal values measure.

(2) Rule of law

These schemes allow for a *high degree of control by member parliaments*, and emphasise *co-operation*, and achievement of different ends, if by different means. Each parliament therefore has the opportunity to scrutinise legislation and to introduce amendments that are adapted to local circumstances and constituencies.

(3) Federal values

Reciprocal schemes outlined in **Option 7**, such as mutual recognition and complementary legislative schemes score highly in terms of federal values. They enable individual States to *develop their own standards* and have *control* over their own legislation, while allowing a significant measure of national coverage. There were concerns at the time the mutual recognition scheme was introduced that it might have the effect of pushing standards down, but there is some sense now that it has had the effect of raising some standards, while still allowing for diversity. In a small federation like Australia, the possible *variations are inherently limited*.

7. Options achieving LOWER levels of uniformity

7.1 *Option 8: Agreed legislation/policies*

The second-last point on the spectrum is where governments in question agree to implement *similar legislation or policies*, which be implemented by local legislation.

The agreement in 1996 by the Australasian Police Ministers' Council on the regulation of *firearms* after the Port Arthur shootings is one *example* (see Annex Two). The Council produced detailed resolutions which each State and Territory was to implement in legislation. The format of the specific legislation was left up to individual States and Territories, but the key provisions were set by the Council and had to be included.

A non-legislative and more broad-ranging and longer-term approach can also be seen with the *National Public Health Partnership*. Having developed out of regular discussions between Chief Health Officers, State, Territory and Commonwealth Ministers now work collaboratively on a broad public health agenda (see Annex Two).

7.2 *Option 9: Exchange of information*

Here, Ministers and/or public servants would meet on a more or less regular basis to *exchange information* about their relative experiences with policy initiatives and regulatory structures.

The *first phase of the National Public Health Partnership*, when Chief Health Officers were meeting would be considered an *example* of this. Such discussions by Ministers or public servants may lead to initiatives in one jurisdiction being picked up and applied in others.

As has been noted elsewhere³⁷, *examples* of this in the public health area include Victoria's *Tobacco Act 1987*, the provisions of which relating tobacco advertising and sponsorship was used as a model for other jurisdictions, and its *Health (Immunisation) Regulations 1990* which also are seen as a useful regulatory model.

7.3 *Analysis*

(1) *Efficiency*

Option 8 can provide a means to a *rapid and effective response* in a situation where individual governments have *strong local interests and concerns* to consider. It requires *political commitment*, and relies heavily on the broad principles being broad enough to include all parties, but detailed enough to ensure some measure of effective uniform response.

³⁷ Brian R Opekin, "Harmonisation of Public Health Law in Australia" in Australian Institute of Health Law and Ethics, *Public Health Law in Australia: New Perspectives*, Canberra: Commonwealth of Australia, 1998, 88.

It may mean deciding what are to be *core provisions* and what are to be *optional*, and to be clear that the administration of the policy does not undermine its intended effect.

There is a significant *risk of not being able to maintain the uniformity*, as was evidenced when the Victorian Government threatened in 1998 to alter an aspect of the agreed firearms policy.

Option 9 brings *no guarantee of uniformity* at all. However, it may be an *important starting point* which may lead to future actions which may result in increase harmonisation of law. Its lack of structure may allow a wider range of issues to be discussed more freely than in a more structured arrangement.

(2) *Rule of law*

Both **Options 8** and **9** require *far less formal and legal arrangements* to be brought into effect, and the transparency and accountability of each government is very clear.

There is a *useful balance* in **Option 8** between the role of Ministers in agreeing to broad policy initiatives or outcomes, and then each *facing their respective Parliaments* with their specific provisions, drafted by local Parliamentary Counsels and drawing on local knowledge and contexts.

(3) *Federal values*

These approaches in **Options 8** and **9** lie clearly in the side of *diversity* rather than unity. It allows the *maximum opportunity for experimentation* by various jurisdictions, which may prove useful as either positive or negative models by other jurisdictions, while still allowing for joint approaches to significant issues.

8. Money

Having developed a sense of the spectrum of uniformity, a key issue to be raised now is the role that money plays in all this.

8.1 *Extension of Commonwealth power*

As noted above, the Commonwealth's power under *section 96* to make conditional payments to the States presently gives it considerable power over a number of policy areas outside its heads of power, including health. Limited independent sources of revenue for the States make special purpose payments critical to State budgets and States *heavily dependent on Commonwealth funds*. The reach of these payments in policy terms is such that it has been referred to as the instrument of 'coercive harmonisation'³⁸ of laws and policies.

The Commonwealth's conditional funding of programmes is able to be used *to impose degrees of uniformity* in a number of ways.

(1) *Sanction*

It may be used as a *sanction*, and an adjunct to the intergovernmental schemes described above, as it was in the Agreement on National Competition Policy and Related Reforms (1997) resulting from the Hilmer Report. States not meeting competition targets as set out in the Agreement would not get access to the available Commonwealth funds.

(2) *Uniformity of administration*

It may be used to impose *uniformity of administration*. Specific projects may be funded which involve the *contracting of third party service providers*. One of the conditions may be that the contracts with third parties or any bilateral agreements between States, have uniform terms, thus ensuring uniformity of administration.

8.2 *When likely to be relevant*

Either as a sanction, a carrot or as a means of controlling the manner of delivery, Commonwealth money is likely to be most relevant in those schemes in which *a budget item programme* is in issue. For *example*, money will have more relevance where a meals-on-wheels or palliative care programme is in issue, than it will where the issue is food standards.

It is also more likely to be brought into play where the scheme involves *a new unbudgeted costs* to the States, as was the case with the gun buy-back scheme which was integral to the firearms agreement made following the Port Arthur shootings. The Commonwealth agreed to fund the scheme, via an additional Medicare levy, relieving the States of any potential financial burden.

38 *Ibid*, 75-76.

8.3 *Potential detriment*

The *potential detrimental impact* of the use of conditional grants on broader health policy and programme delivery has been recently noted and should be kept in mind.

In its May 1999 report to the Victorian Parliament, the Federal-State Relations Committee heard evidence from witnesses of the following difficulties caused by the grants:

- the Commonwealth tends to fund its own programmes in preference to those administered by the States;
 - conditional funding can result in fragmentation of funding across programmes;
 - the division of financial responsibilities between governments creates opportunities for cost-shifting.³⁹
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³⁹ Federal-State Relations Committee, *Register of Specific Purpose Payments received by Victoria* (2 vols), Fourth Report on The Inquiry into Overlap and Duplication, Melbourne: Parliament of Victoria, 1999, vol 1,47-51.

Further Reading

Australian Institute of Health Law and Ethics, *Public Health Law in Australia: New Perspectives*, Canberra: Commonwealth of Australia, 1998.

Ian Bidmeade and Chris Reynolds, *Public Health Law in Australia: Its current state and future directions*, Canberra: Commonwealth of Australia, 1997.

John McMillan, *Commonwealth Constitutional Power over Health*, Lyons, ACT: Consumers' Health Forum of Australia, 1992.

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Standing Committee on Uniform Legislation and Intergovernmental Agreements, *First Annual Report: A Year's Experience*, Perth: Legislative Assembly, Western Australia, 1995.

Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation: Position Paper*, October 1996, Fyshwick: Commonwealth of Australia, 1996.

Annex One: Extracts from the Commonwealth Constitution

Legislative powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

- (i.) Trade and commerce with other countries, and among the States:
- (ii.) Taxation; but so as not to discriminate between States or parts of States:
- (iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
- (iv.) Borrowing money on the public credit of the Commonwealth:
- (v.) Postal, telegraphic, telephonic, and other like services:
- (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
- (vii.) Lighthouses, lightships, beacons and buoys:
- (viii.) Astronomical and meteorological observations:
- (ix.) Quarantine:
- (x.) Fisheries in Australian waters beyond territorial limits:
- (xi.) Census and statistics:
- (xii.) Currency, coinage, and legal tender:
- (xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:
- (xiv.) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
- (xv.) Weights and measures:
- (xvi.) Bills of exchange and promissory notes:
- (xvii.) Bankruptcy and insolvency:
- (xviii.) Copyrights, patents of inventions and designs, and trade marks:
- (xix.) Naturalization and aliens:
- (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
- (xxi.) Marriage:
- (xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
- (xxiii.) Invalid and old-age pensions:

(Inserted by No. 81, 1946, s. 2.)

- (xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:
- (xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
- (xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

(Altered by No. 55, 1967, s. 2.)

- (xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:
- (xxvii.) Immigration and emigration:
- (xxviii.) The influx of criminals:
- (xxix.) External affairs:
- (xxx.) The relations of the Commonwealth with the islands of the Pacific:
- (xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
- (xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
- (xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
- (xxxiv.) Railway construction and extension in any State with the consent of that State:
- (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
- (xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:
- (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:
- (xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:
- (xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws-

- (i.) Defining the jurisdiction of any federal court other than the High Court:
- (ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
- (iii.) Investing any court of a State with federal jurisdiction.

Trade within the Commonwealth to be free.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Distribution of surplus.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

Financial assistance to States.

96. 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.

Agreements with respect to State debts.

(Inserted by No.1.1929, s.2.)

105A.-(1.) The Commonwealth may make agreements with the States with respect to the public debts of the States, including-

- (a) the taking over of such debts by the Commonwealth;
- (b) the management of such debts;
- (c) the payment of interest and the provision and management of sinking funds in respect of such debts;
- (d) the consolidation, renewal, conversion, and redemption of such debts;
- (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
- (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2.) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3.) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4.) Any such agreement may be varied or rescinded by the parties thereto.

(5.) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6.) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.

Saving of Power of State Parliaments.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Inconsistency of laws.

108. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Rights of residents in States

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Annex Two: Examples

1. Examples of Ministerial Council activities, extracted from *Intergovernmental News* (vol 9, no 1, April 1997)
2. *Intergovernmental Agreement on Mutual Recognition* (1992)
3. *Agreement on the Adoption of Uniform Food Standards* (1991)
4. *Consumer Credit (Victoria) Act* 1995
5. *Agricultural and Veterinary Chemicals (Administration) Act* 1992 (Cth)
6. *Native Title Act* 1993
7. *Therapeutic Goods Act* 1989 (Cth)
Therapeutic Goods Act (Victoria) 1994
8. *Mutual Recognition (Queensland) Act* 1992
9. Australasian Police Ministers' Council, Special Firearms Meeting, *Resolutions*, 10 May 1996
10. *Memorandum of Understanding to establish a National Public Health Partnership for Australia* (1996)