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Harmonising police cooperation laws in Australia and the European Union: the tension between local/national and national/supranational interests

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This article gives a background to police cooperation approaches in both Australia and the EU. Cooperation strategies are divided into Australian Federal/European Union strategies and regional (Australian state and territory and EU member states) cooperation strategies. Examples are highlighted where cooperation is hampered by national or state and territory sovereignty interests. Problems are discussed in relation to both entities, such as the different legal regimes, lack of trust, media attention and funding, the importance of the ‘personal factor’ and education. This article focuses in particular on the role of the practitioner. Practitioners, on the one hand, may overcome the negative attitude of their organisations and develop personal networks which transcend borders. On the other hand, a practitioner can embody the obstructive attitude of the organisation he/she represents. The article concludes by giving recommendations for future legislative and practical responses to the existing problems.

Keywords: police; cooperation; comparative law

1. Introduction

While Australia and the European Union (EU) have different structures of governance, different histories, and different geographical dimensions, both entities face similar problems in relation to police cooperation across borders. Australia is divided into nine different criminal jurisdictions. Each jurisdiction is policed by its own police force¹. As each police force is only competent within its own territory, with the exception of the Australian Federal Police (AFP), problems of border-crossing, information exchange and joint investigations arise. These problems have intensified in the 20th century with globalisation and the increased mobility of offenders. Several strategies, both legal and administrative, have necessarily been developed to promote effective policing across borders and secure inter-state borders, which can be compared with the situation in the EU².

A prominent impediment to police cooperation in the EU is the lack of a harmonised legal regulation in the area of criminal procedure. State sovereignty of the member states and jurisdictional differences inhibit a high degree of harmonisation in this field. This can to a similar degree also be observed in relation

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to states and territories in Australia. This article, based on interviews with law enforcement personnel in Europe and Australia, compares existing problems in the areas of cross-border incursions, information exchange and joint investigations, and outlines possible solutions for the European and the Australian situations. The value of legal harmonisation is discussed as a crucial development in advancing existing cooperation strategies in both systems.

The article begins by giving a background to police cooperation approaches in both Australia and the EU. Cooperation strategies are divided into Australian Federal/European Union strategies and regional (Australian state and territory and EU member states) cooperation strategies. Next, examples are noted in both systems (first Australia then the EU) where cooperation is hampered by national or state and territory sovereignty interests. Problems are discussed in relation to both entities, such as the different legal regimes, lack of trust, media attention and funding, the importance of the 'personal factor' and education. This article focuses in particular on the role of the practitioner. Practitioners, on the one hand, may overcome the negative attitude of their organisations and develop personal networks that transcend borders. On the other hand, a practitioner can embody the obstructive attitude of the organisation he/she represents. As the legal frameworks regulating cooperation are still embryonic, practitioners in both Australia and the EU have considerable discretion as to whether or not they will share information, participate in joint investigation teams and conduct cross-border incursions. A main factor in whether or not successful cooperation is taking place is therefore the participating practitioner and his/her attitude towards other organisations and cooperation in general.

This article relies predominantly on fieldwork conducted for a PhD study on police cooperation in Australia and the EU. Police practitioners with experience in cooperating with other EU member states/Australian states and territories were questioned as to their own attitudes, but also in relation to the responses they experienced from other organisations with which they cooperate. The article concludes by pointing out the potential benefits of harmonisation in the field of police cooperation and the development of a more transparent framework to reduce, in part, the problems presented by the wide discretion presently exercised by police. A further advantage of harmonising police cooperation guidelines could be the creation of a common identity in relation to cross-border policing.

2. Background

Both Australia and the EU have experienced a considerable rise in the importance of cross-border police cooperation in the last 20 years. This part of the article outlines the increasing necessity of cooperation, some of the strategies that have developed, and the problems that have arisen. The focus is on the conflict between national versus supra-national interests in the EU, and state and territory versus Federal interests in Australia.

2.1. EU

The EU has faced an increasing need for cross-border police cooperation in the 20th century. This emerged most clearly with the intensification of integration in the 1980s and the commitment to realise a Single Market by 1992³. With the prospect of increased mobility of people and trade (and therefore opportunities for crime) across

borders, more effective police and customs cooperation was required. This was led largely by the Benelux countries, France and Germany and their efforts, initially outside the framework of the EU, to promote cooperation through the Schengen Agreement of 1985 and the subsequent Convention Implementing the Schengen Agreement of 1990 (Schengen Convention) (OJ 2000 L 239).

Criminal justice cooperation initially stood outside EC competence. The inclusion of EU criminal law and justice and home affairs within the EU framework led to the adoption of the three pillar structure of the EU under the 1992 Maastricht Treaty. This structure was necessary as the field of justice and home affairs was too sensitive from a domestic sovereignty perspective to be included in the first pillar, which was mainly subject to qualified majority voting and a supranational structure³. The newly created third pillar was therefore subject to predominantly unanimous decision-making and adopted a more intergovernmental legal framework³. Since the Treaty of Lisbon (2007) criminal justice cooperation has been integrated into the first pillar, however, exceptions to majority voting exist and it remains to be seen whether harmonised EU legal regulation will now emerge more easily³.

European regional police cooperation between neighbouring states could already be observed in the 1950s and 1960s. The Benelux countries (Belgium, The Netherlands and Luxemburg) established some of the earliest European practices of police cooperation, predating the Schengen Agreement. The Nordic countries have an even longer history of police cooperation than the Benelux and therefore have established some of the most advanced strategies long before EU borders started to vanish⁴. In addition, the Nordic cooperation extends beyond the EU member states, to include Norway.

The Schengen Agreement (1985) not only led to the gradual abolition of border controls between its signatories, but also provided through the Schengen Convention of 1990 a framework of legislation for cross-border enforcement between these states. However, as the actual conduct of cross-border operations is still a matter of national laws, the Schengen Convention had to be implemented by EU member states to be applicable. So far, not all member states have implemented the Convention entirely, such as, for example, the UK, while states that are not part of the EU, such as Norway and Iceland, are nevertheless parties to the Convention. The Schengen Convention can therefore be qualified as a multilateral treaty that has been integrated into the EU legal framework to create harmonised aims of police cooperation. Although the part of the Schengen Agreement dealing with police cooperation is implemented by all EU member states plus Norway and Iceland, the differences in its interpretation, implementation and translation continue to complicate cooperation, leading to patchwork rather than unified cooperation strategies⁵.

In Europe, cooperation is hampered not only by the different legal frameworks applying to law enforcement agencies in each jurisdiction, but European police forces are also governed by different organisational structures and operate in different languages. It follows that only some of the jurisdictional problems relating to police cooperation are shared by Australia and the EU. These common problems will be the focus of this article.

2.2. *Australia*

Since the Federation of the Australian colonies in 1901, Australia has not had border controls between its states and territories. The nine different jurisdictions all work

- ① under their own criminal and criminal procedural laws as well as police directives¹. These competences of Australian states and territories are grounded in the Constitution (The Commonwealth of Australia Constitution Act, Chapter V, Section 108). Thus, the absence of any plenary power to enact federal laws means that federal criminal laws, to be valid, must be related to a head of power or have been subject of a referral of powers from the states, as happened in the field of terrorism laws. Drug importation, therefore, may be proscribed under federal law under two heads of power: the trade and commerce power and the external affair power, respectively ss51(i) and 51(xxix). Federal Parliament can regulate imports and exports (including narcotics) under trade and commerce, but also because of the myriad of international treaties that Australia has signed to suppress drug trafficking⁶.

Subject to federal jurisdiction, the Australian Constitution recognizes state autonomy in relation to legislative powers. The overlapping federal and state legislative competences raise similar challenges to those experienced in the EU where member states jealously guard their jurisdictional power over criminal law. By cooperating with other nations/states – for example, by exchanging information or allowing foreign police on one's territory – sovereignty in relation to national jurisdiction and law enforcement is perceived to be endangered⁷. For these political reasons, it seems similarly unlikely in Australia as in the EU that effective harmonisation of substantive and procedural criminal laws will take place in the near future⁸. Therefore, both entities rely on practices of police cooperation to overcome the lack of patrolled borders. Owing to relatively undeveloped police cooperation guidelines and laws in this area, the goodwill of practitioners is crucial.

2.3. *Comparative aspects*

The comparison between the Australian and the EU system is interesting in several ways. In response to the jurisdictional sovereignty of the EU member states and Australian states and territories in relation to criminal matters, both Australia and the EU have taken steps towards developing uniform legislation and enhanced intergovernmental cooperation. The EU, despite not being a conventional federation of states, had to develop mechanisms of cooperative federalism comparable with Australia to overcome jurisdictional differences⁸. On this basis, legislative processes and resulting cooperation strategies can be compared.

Despite the comparability of both entities on the legislative level, the comparability on the executive or intergovernmental level is more unbalanced. The two systems differ considerably in relation to their population size and ranges of historical, cultural and organisational diversity. The EU has a long history marked by alliances and wars, fusions and separations of cultures, and the establishment of the common and the civil law systems. When EU member states engage in police cooperation, they therefore have to consider cooperation within an array of legal cultures and organisational structures that do not exist to the same extent in Australia.

First, there are civil and common law countries within the EU, which need to cooperate with each other. Second, even among the civil law countries there are major differences in legal culture, but also in organisational structures of police. While some countries have a distinction between military and civil branches of the police, other countries have as many different police forces as they have regions.

Third, while some EU member states are centralised, others are decentralised. This complicates cooperation as the chain of command is differently organised⁹. All of these features do not exist in Australia.

All Australian police organisations were modelled after the Anglo-Irish system¹⁰. ② The only legal culture applying is the common law system and no major wars or alliances have torn or formed the country since Federation. Australia should therefore have fewer practical problems hindering police cooperation. However, when it comes to the specific conduct of cross-border investigations, even these similar police organisations have not found ideal solutions.

Police forces in Australia have limited interoperability. Despite the superficial similarities of Australian state and territory police organisations, police cooperation in Australia is still hindered by differences in laws in each state and territory. One of the most prominent examples concerns the fields of controlled operations (e.g. controlled deliveries of illegal drugs) and electronic surveillance. A detailed account of the changes envisaged is given by the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime 'Cross-Border Investigative Powers for Law Enforcement' November 2003.

Another problem that Australia and the EU have in common is the tension between local and national/supra-national interests. In Australia, these involve state and territory against Federal interests and in the EU these are member states against Union interests. As EU member states and Australian states and territories have the law-making competence in the fields of criminal law and procedure, as well as police guidelines, police cooperation relies on their flexibility in relation to sovereignty. Laws and guidelines regulating police cooperation are still very broad and the more detailed regulations differ from jurisdiction to jurisdiction. Whether cooperation can be achieved still depends on the organisational culture and often the attitude of individual practitioners. Rather than examining in detail the laws applying to cooperation, this article will therefore focus on the display of national/state/territory or Union/federal interest in the approach to cooperation by police practitioners.

3. The Australian situation

It must be stressed that sovereignty of Australian states and territories and sovereignty of EU member states are located on different levels: one within a nation-state, the other between nation-states. However, the protective attitude towards a jurisdiction, whether state or nation-state, can be observed in both entities and has similar effects.

While the problems resulting from the differences in the legal regimes are still the most prominent, cooperation is also hindered by other factors, such as lack of trust, personal jealousies, differences in education and protection of one's own organisation.

3.1. The challenge of different legal regimes

A case that demonstrates the tension of local and national interests is the Falconio case¹¹. In this case, a backpacking couple had been attacked in 2001 by a man in the Northern Territory and one of the backpackers, Peter Falconio, was killed. The investigation of what first appeared to be an abduction and later turned out to be a murder case was led by the Northern Territory (NT), Western Australia (WA) and

South Australia (SA) police forces, but also involved assistance by other Australian law enforcement agencies such as New South Wales (NSW) and Queensland police. The offender was arrested in 2003 by the SA police, and was extradited to the NT for trial. Like EU member states, Australian states and territories need to undertake an extradition process to try an offender when arrested in another jurisdiction. Unlike in the EU, there are no facilitated procedural rules, as established by the European Arrest Warrant (EAW)¹². Australian states and territories safeguard their autonomy by keeping the extradition process even more formal than EU member states. This is a risk factor for conflict on several levels of cooperation (justice and police).

The Falconio case also included a problem of DNA recognition. Bloodstains were found on the T-shirt of the female backpacker, Joanne Lees, and as they were not of the male murder-victim, there was a strong possibility that it could identify the offender. A suspect in the case was living in NSW and therefore his DNA sample was requested by the NT police. NSW law at the time, however, did not allow the transfer of information regarding DNA into jurisdictions with obviously different laws. NSW legislation therefore needed to be adapted to make the information exchange possible, as had occurred in the *Crimes (Forensic Procedures) Act 2000* (NSW). After extensive political pressure, an agreement on DNA exchange was concluded between NSW and NT. The DNA was finally compared, but no match was found.

The advent of CrimTrac has helped overcome impediments to cooperation. Information exchange through CrimTrac has become an Australian success story. Unlike the problems that existed during the times of the Falconio case, since 2009 full matching occurs also in relation to DNA between all Australian states and territories (see *On Trac* 2009;2(1):11). A disadvantage perceived in relation to CrimTrac is the exclusive distribution of information upon requests and the bureaucratic process still involved (Interview #11). However, CrimTrac is an example of the gradual surrender of sovereignty in the name of necessity.

Despite the success of CrimTrac, the different jurisdictional regimes continue to make the legal situation confronting police in Australia less transparent. In relation to privacy and data protection, the differences in, for example, spent conviction schemes can have an impact on the speed and practicability of information exchange¹³. Without going into much further detail considering all state and territory spent conviction schemes, it can be noted that, for example, NT and NSW apply spent convictions schemes only to sentences of less than 6 months (*Criminal Records (Spent Convictions) Act 1992* (NT) and *Criminal Records Act 1991* (NSW)) while Commonwealth and Queensland legislation provide a spent convictions scheme for sentences below 30 months (*Criminal Law (Rehabilitation of Offenders) Act 1986* (QLD) and Part VIIC *Crimes Act 1914* (Cth)). This means that while a conviction has been spent and is not to be given out under the last two jurisdictions, it could still be valid and on the record in one of the first two jurisdictions. This creates uncertainty in relation to which information can/cannot be exchanged. It can be concluded that good knowledge of all state and territory laws is important to facilitate information exchange while safeguarding the rights of suspects. As long as states and territories are insisting on their individual models, cooperation will remain a difficult task that can only be facilitated by practitioners with a thorough knowledge of all state and territory laws.

A vast amount of policy regulations regarding what information can/cannot be exchanged is distributed to police in an indigestible form (Interview #13). This lack

of clear laws and guidelines in relation to information exchange seems to complicate cooperation. A practitioner interviewed reported that a frequent reason given for a refusal of information exchange is the legal situation and in particular privacy laws (Interview #11). According to interviews with practitioners it appears that officers refusing to give out the relevant information often do not know the rules applying to that information in enough depth to make an informed decision; when in doubt, the information is not exchanged (Interview #11, #13). The practitioners interviewed therefore expressed that more education on existing laws and more transparent guidelines as to what information can or cannot be exchanged should be promoted. A higher level of uniformity should especially be sought in the fields of data protection and privacy laws.

It can be concluded that several problems arise from the differences in legal regimes. First, procedures are too formal and therefore time consuming (e.g. extradition, information exchange). Secondly, cooperation is hindered by the lack of transparency due to the multitude of existing laws and policies. Police officers in Australia seem to rather refrain from cooperation than risking the breach of a local law or policy. The power of discretion that police have and freely exercise in other areas of policing is not to the same extent apparent, or at least not taken advantage of, in cooperation within and between organizations.

Further problems arise from different procedural laws relating to covert operations and controlled deliveries when it comes to actual border crossing and investigations in different states by police (Standing Committee of Attorney General and Australasian Police Ministers Council, Joint Working Group on National Investigations, 'Leaders Summit on Terrorism and Multijurisdictional Crime – Cross-Border Investigative Powers for Law Enforcement: Report' (Australian Government, Canberra, 2003)). A conflict exists between the states and territories wanting to safeguard their legal systems against the Federal government and the practitioners trying to work across systems. While some practitioners therefore decide to exercise their discretion widely in favour of cooperation others do not and cooperation is therefore not guaranteed (Interview #11). The different attitudes of practitioners, which can either help to overcome the differences of legal systems or impede cooperation, are addressed in the next section.

3.2. *Lack of trust*

A major parameter in Australian and EU police cooperation is trust. Formal and informal information exchange would not be possible without trust, even if the law would allow it. According to the practitioners interviewed, major differences prevail between information exchange with known and unknown officers. It was reported that in cases where the officer asking for information was unknown, information was more frequently withheld. When the officer on the other side was known, problems were less likely. Informal information exchange with known counterparts in the other organisations was reported to work very well (Interviews #11, #4, #5, #6). However, trust in other organisations as a whole was not reported to exist generally. There is trust in a colleague where that trust has been established over time, but unknown colleagues from other organisations were, according to the interviews, still treated with wariness.

Another factor impacting on trust reported in the Australian scenario is the fear that one organisation attracts more media attention than another and/or attracts

more funding. In addition, the suspicion that another organisation is corrupt or is prone to 'leaks' was, according to the interviews, an impediment to police cooperation in Australia, especially in relation to information exchange (Interviews #4 and #11).

One of the major organisations gathering information in Australia is the Australian Crime Commission (ACC). Information sharing under the ACC framework is regulated through the Australian Criminal Intelligence Databases (ACID) and the Australian Law Enforcement Intelligence Network (ALEIN). According to the ACC website (http://www.crimecommission.gov.au/our_work/acid_alein.htm) ACID and ALEIN make a significant contribution to the sharing of criminal information and intelligence between Australian federal, state and territory police. The perception by state and territory police, however is that the ACC is quite reluctant to share information and intelligence (Interview #11). Although the information could be available to other police legally, practitioners feel that the ACC holds information back due to 'secrecy concerns', despite not being an intelligence agency like, for example, ASIO (Interview #11). It appears to practitioners that the ACC wants to distinguish itself from other police agencies and by doing so hinders the cooperation process. There seems to be a lack of trust on the side of the ACC in relation to other police agencies. One could say that the protectionist attitude that has been observed in relation to state and territory police does also exist within this federal agency. This makes cooperation within Australia even more complicated as not only the attitude of the states and territories, but also of Federal agencies tend to impede cooperation. Problems do also appear in the cooperation between state and territory police and the AFP, and are fostered by prejudices and jealousies among the organisations (Interviews #4, #5, #6, #11).

3.3. *Media attention and funding*

Competition between state and territory police forces and federal agencies can occur in major investigations, such as drug or terrorism cases. These types of investigations have in common that jurisdictional competences of the state and federal agencies frequently overlap. Each force wants the media attention to themselves rather than sharing it with other police organisations and agencies and therefore tries to assert its jurisdiction rather than promoting cooperation (Interviews #11, #4, #5, #6). However, competition between state and territory forces during joint investigations is usually not prominent as their competences are clearly defined. Competition can more frequently be seen as an impediment to cooperation between state/territory police forces and the AFP (Interviews #11, #4, #5, #6, #7). Perceptions that the AFP are not 'real police' and that they are eager for media attention rather than operational successes, do hamper cooperation. Although attempts have been made to counter these perceptions by regular meetings (Interview #7), they seem to persist in general (Interviews #11, #4, #5, #6). An example for a joint operation that caused disappointment in the Victoria Police was operation Pendennis¹⁴. While this major terrorism investigation under the cooperation of Victoria Police (VicPol), New South Wales Police (NSW Police), AFP and ASIO had been initiated by VicPol, the officers felt that most of the media attention was focused on the AFP and NSW Police (Interview #11). These incidents do cause less enthusiasm in the police forces to cooperate and reinforce 'organisational pride' rather than 'cooperation pride'.

A further issue related to funding is that each police force receives equipment and benefits from particular providers. Harmonisation of police equipment has therefore proven to be difficult as the existing commercial relationships are hard to break due to the benefits involved. This leads to problems when the equipment is crucial to cooperation, such as computer systems and programs and other technical equipment (Interview #11).

3.4. The importance of the 'personal factor'

Joint Investigation Teams (JITs) are another example of operational differences of state and territory police forces. However, they are mostly overcome due to the very great need for cooperation in those settings. In a joint investigation team, all officers usually recognise that they are working toward the same goal and although the approach to problem-solving is slightly different from agency to agency, they work together without apparent problems (Interview #11). An issue that remains is the 'personal factor'. An example where this factor is of particular importance is the leadership role in JITs. A JIT leader is usually provided by the organisation closest to the crime. If, as has happened previously, this leader is not respected by all participating agencies, cooperation within the JIT becomes problematic (Interview #11). According to the interviews it seems to be most important that when establishing a JIT, the person chosen to lead the team is senior in experience and respected by all members of the team. Otherwise, protectionist attitudes by team-members can emerge and prevent effective cooperation.

3.5. Education

Another issue that was stressed in interviews in Australia as well as in Europe was the different standards of education of members of the different police forces (Interviews #1, #4, #5, #6, #7, #11, #12). While at the higher level of policing and in the AFP the education of officers is often at University level, this is not necessarily the case at the lower levels of state and territory police forces. While the higher education level is an advantage when it comes to high-level police cooperation, which can generally be said to be working well, it is a disadvantage at the lower level. Problems are particularly apparent between the AFP and state/territory police. AFP members tend to have a higher level of educational attainment. This does not win the respect of state/territory police who consider themselves to have more experience and do not value education higher than experience (Interviews #1, #4, #5, #6, #7, #11, #12).

To enhance cooperation, the acknowledgement of both experience and education need to be fostered. A higher level of education needs to be promoted in all police forces, while experience should be adequately recognised. This could reduce jealousies in order to foster cooperation.

On the one hand the problems summarised above show that states and territories do have a protectionist attitude towards each other as well as towards Federal Police agencies. On the other hand, the examples of the ACC and AFP show that federal agencies can also have reservations and a protectionist attitude when it comes to cooperation. CrimTrac, however, can be seen as a model for harmonisation and the creation of networks on the federal level that can improve police cooperation in practice. Protectionist attitudes need to be overcome to enhance cooperation. This can be achieved through a higher level of harmonisation, fostering relationships

between the different agencies and their practitioners, and promoting a higher standard of education while also recognising experience. The assessment of interviews has highlighted prominently that the promotion of police cooperation in the Australian scenario needs to rely simultaneously on legal, but also on sociological/psychological measures and strategies to result in sustainable improvements.

4. The European situation

The strategies of police cooperation that have developed in the EU – both on the supranational as well as on the bilateral and multilateral level – are numerous. A focus therefore lies on the perceptions and problems that arise from the conflict between national interests and supranational interests.

4.1. Different legal regimes

Similar to Australia, information exchange in the EU is hampered by different legal regimes – in particular relating to privacy laws and data protection – and protectionist attitudes of practitioners. Both systems struggle with the physical crossing of borders when necessary for hot pursuit and covert operations. Unlike Australian states and territories, EU member states do not have ‘special constables’ (e.g. *Police (Special Provisions) Act 1901 NSW*) that can cross borders and have enforcement powers in other jurisdictions. They therefore rely on special agreements, like at the Dutch-German and French-German border, to exercise (at least partly) their powers on foreign territory. The existing agreements are not harmonised throughout the EU and every border region has particular agreements that allow such operations¹⁵.

These different regional cooperation schemes have led to a patchwork system of cooperation developing throughout Europe, similar to Australia. The European patchwork system can further be criticised for being ‘elitist’. Countries with well-established links, common cultures and common interests cooperate well and have developed advanced regional strategies, as exemplified by the first five Schengen states, the Nordic cooperation scheme, or the Cross Channel Intelligence Conference^{15–17}. However, new EU member states, such as for example the Baltic states, do not have similarly advanced cooperation schemes in place (Interview #8) and ‘old’ EU member states are more hesitant to cooperate with them due to fear of corruption and information ‘leaks’ (Interview #8).

These problems could be reduced if police cooperation strategies were to a greater extent harmonised at EU level. However, practitioners from the ‘elite’ states fear that harmonisation would lead to an agreement on the lowest common denominator and that cooperation with their established partners would suffer (Interviews #1, 3, 8, 11, 12). They therefore prefer regional practices and arrangements of cooperation with certain states rather than enlarging lower level EU concepts towards all states. This shows that, unlike Australia, the reluctance to give up sovereignty to the EU level is not linked to a general refusal to give up national interests. It is more a sign that states want to protect their high cooperation standards with selected member states. Protectionism therefore becomes more regional protectionism while in Australia protectionism is situated on the local (state/territory) level.

Even within the established cooperation schemes, differences in laws and legal cultures make cooperation difficult. An example is The Netherlands–German border cooperation. While Germany is working under the ‘principle of legality’, The Netherlands are working under the ‘principle of opportunity’. German police have far less discretion than the police in The Netherlands¹⁸. This can hamper cooperation in regions where German and Dutch police have effective enforcement powers on both sides of the border (Interview #3)¹⁵. While the German police have to charge offenders for every breach of the law but petty offences, Dutch police are only obliged to investigate more serious offences. This leads to confusion and unjust outcomes for suspects as they will be charged by German officers where officers from The Netherlands could have exercised discretion in their favour (Interview#3)¹⁹.

Different laws applying to controlled deliveries and investigations across borders are a further impediment to cooperation. In relation to technical equipment, it is very difficult to determine what can be done once a border has been crossed. Even in the first five Schengen states, which have the longest experience in border crossing and can be characterised as one of the ‘elite’ regional cooperation schemes, these problems exist. Some of the Schengen states do not permit the interception of conversations with a private character, while others permit it. Some states prescribe that when the tape is given to foreign police the private part of the conversation must be excised²⁰. In controlled deliveries this is particularly important as some countries allow visual observations, while others do not²⁰. These differences in criminal procedure can seriously endanger operations.

These examples highlight the need for harmonisation. As the harmonisation of EU member states’ criminal procedure is not yet realistic, strategies as to how successful practices can be harmonised and new frameworks encompassing all EU member states created have to be addressed first.

An example of a harmonised strategy to counter the problem of fragmentation in relation to information exchange, similar to CrimTrac, is Europol. Although the ‘elite’ cooperation schemes already had very advanced information exchange strategies, other EU member states at the time were still merely relying on Interpol. Europol was therefore an effort to include all member states in a more advanced and harmonised system of information exchange²¹. It was legally established in its current form in 1999 under the ‘Europol Convention’ (signed by the EU member states on 26 July 1995, and came into effect on 1 July 1999), which since 2009 has been replaced by the Europol Decision. Europol handles criminal intelligence, although it lacks law enforcement powers. A main, but certainly not exclusive, driving force in its establishment was the then German Chancellor Helmut Kohl²². As there was no pressing practical need for the institution at the time of its establishment, practitioners have sometimes criticised Europol as being superfluous and it was partly hampered by the reluctance of member states to engage in information sharing²³.

Initially, the Europol Convention limited Europol’s remit to combating organised crime. In 1998, this function was extended to terrorism. The terrorist attacks of 2001 triggered a further move of EU policy coordination in the direction of the responsibilities of Europol²⁴. The second and third Protocol to the Europol Convention (2003)²⁵ give Europol the power to participate in joint investigation teams and to obtain wider access to the personal data held in the Europol information system (among other powers) (OJ C 2 of 06.01.2004 and OJ C 312 of 16.12.2002). The Protocols entered into force in 2007.

Police intelligence information, which formerly would have been regarded as highly sensitive and classified data, is now being exchanged through the Europol liaison network, which exists in addition to the database. The exchange of such information requires a high level of trust, not only between the member states, but also between the individual officers on the ground. To build and maintain this trust, the personal relations between individuals have to be encouraged. Therefore, the liaison officers of all member states are based in one building and have established close working relationships. These liaison officers are also not directly supervised by Europol, which gives them considerable freedom to cooperate informally. From a practical point of view, the liaison network has been perceived as more successful than the database²⁶.

It can be concluded that information exchange between practitioners is enhanced by Europol. In relation to the exchange of liaison officers, Europol is a continuation of already existing member state practice albeit within an EU governance framework. In relation to the liaison officer network, Europol is therefore a good example for a successful cooperation practice spreading and becoming an accepted harmonised strategy. With a view to the initial reluctance of practitioners to accept the Europol database, the example also shows that practitioners need to be involved in the lawmaking process, to insure that only relevant, accepted and necessary practices and institutions are created at the EU level. It follows that the harmonisation process could be furthered by integrating practitioners' views and by analysing existing strategies with a view to creating EU law.

4.2. *Lack of trust*

Examples from the Dutch–German and French–German border regions show that there can be a lack of trust between EU member states (Interview #3). This lack of trust can be fostered by incidents where sovereignty has been infringed, which can have a long-lasting impact on bilateral and multilateral relations.

An incident where these problems became acute was a covert operation in The Netherlands–German border region. German police officers were involved in a drug investigation that led to the main dealer in The Netherlands. The operation was to take place in The Netherlands where the German officers pretended to buy a large quantity of drugs from the Dutch dealer. Unfortunately, they did not contact the Dutch police about this investigation, their planned activities and the border-crossing. Without knowledge of the Dutch police they entered The Netherlands and bought the drugs – from Dutch covert investigators (Interview #3). This clear breach of sovereignty is just one example where national interests harm international cooperation. Sovereignty concerns have also played a prominent part in French–German police cooperation (Interviews #1 and #12). This is displayed in the hesitant approach by the French police when establishing the German–French Centre for Police and Customs Cooperation and in their interpretation of the Schengen Convention, which is still more restrictive than the German interpretation. It can also be observed in the fact that German sovereignty allowed for French officers to cross into Germany and carry out official law enforcement duties far earlier than the French allowed for German police to carry out these activities in France (Interviews #1 and #12).

The general trend however can be perceived as positive. In interviews, European senior police officers, prosecutors and Europol officials display pride in relation to

their cooperation with other European countries and a prominent interest in enhancing police cooperation (Interviews #1, #2, #3, #8, #9, #10, #12). Unlike in Australia, European police were very happy to talk about their work and forthcoming in relation to participating in interviews. The focus of their accounts was always – without being uncritical – on successes in police cooperation. The problem most frequently mentioned was not the attitude of other organisations or the cultural differences, but the legal agreements applying that were not fit or advanced enough to support cooperation strategies envisaged by police. The culture of protectionism that became apparent in Australia was not apparent in the EU. More prominently, a culture of cooperation could be observed. However, as was stressed by a Senior Norwegian police officer, cooperation in Europe works much better with different nations than within the member states as ‘You always behave better when you are not at home’ (Interview #8).

4.3. Media attention and funding

Conflicts in relation to how different police organisations deal with the media also exist in the EU context. An incident reported between The Netherlands and the German Police involved the handing over of information to journalists by the German police while the police in The Netherlands were still investigating and did not want any information to be handed out (Interview #3). However, whether these incidents are mainly related to the attracting of attention by the media or whether they result from different cultures and practices is unclear. According to the interviews, there needs to be better understanding and communication in common investigations to prevent these incidents. It might also be beneficial to create a basic framework relating to the police–media relationship on the EU level.

Problems relating to funding are infrequent in the EU context, as police forces are funded by the member states and it is rare that EU funding is provided. However, police can enter into competition and apply for grants related to cooperation. Some of those funding opportunities are STOP (OJ L 322, 12/12/1996), AGIS (OJ L 203 01/08/2002) and ISEC (OJ L 058, 24/02/2007). Usually related to a certain topic, EU member states could or can apply for funding for the creation of multilateral education and cooperation schemes. Conflicts relating to the competition for grants were, however, not reported by interviewees.

The member states fund EU police cooperation – at least in the regional context – far better than the EU. The German–French Centre for Police and Customs Cooperation in Kehl, for example, is entirely funded by the French and German governments and does not receive EU support despite advancing EU policy relating to cooperation most prominently and serving as example for many other cooperation schemes (Interview #1).

4.4. The importance of the ‘personal factor’

The importance of the personal factor is very apparent in the French/UK police cooperation efforts, which led to the establishment of the Cross Channel Intelligence Conference between the UK, France, Belgium and the Netherlands¹⁷. The initiation of this professional network would have been impossible without the efforts and leadership of Sir Dawnay Lemon, the Chief Constable of the Kent police. While the previous Constables of the Kent Police had experienced difficulties in cooperating

with their French counterparts across the Channel, Sir Dawnay changed this relationship and became the main driving force of the conference, which still continues today²⁷. As this example reveals, the development of multilateral cooperation relies not only on police-to-police cooperation, but on influential and charismatic practitioners who change the attitude of organisations and pave the way for the conclusion of multilateral agreements in this field. This shows, as in Australia, that personal qualities, in particular in leading positions, are crucial to advance police cooperation.

4.5. *Education and training*

Similarly to Australia, cooperation is fostered by common education and training in the EU. The European Police College (CEPOL), the Police Ministers Conferences and exchanges of police officers (they can work for a limited amount of time in other countries and learn about another system) are very important to foster cooperation. As the Australian example has shown, police who know each other work better together. In addition, knowledge of the other system is crucial to overcome the differences in criminal procedure when it comes to border crossing, information exchange and joint investigations. Common training can therefore be seen in both systems to positively influence cooperation.

5. *Conclusion*

Protectionism is apparent in Australia on the 'local level' between different state and territory police forces and federal police agencies. In the EU, protectionism takes place on a regional level by clusters of states that have established good cooperation towards member states that are not part of the clusters. The question that needs to be answered is how these protectionist attitudes can be reduced to enable a more uniform and enhanced police cooperation in both the Australian and EU systems. The research into the different systems and in particular the interviews with practitioners have shown that a way of fostering understanding and cooperation would be to promote regular meetings of practitioners not only on the higher level of policing, but also on the lower levels involving training and common education. It is important to put common databases in place and to choose personalities as leaders of joint teams that are respected by all parties. Furthermore, a common level of education in all police forces should be achieved and the recognition of both education and experience as highly valued assets should be promoted. The attitude towards media and funding needs to be changed from organisational pride to cooperation pride, as is visible in EU cooperation (Interviews #1 and #12).

The findings reported here reveal that the development of regional cooperation practices contributes to formalising harmonised cooperation strategies in both Australia and the EU. In Europe, several informal regional practices have been transformed into harmonised legal agreements, such as Schengen, which then contributed to the improvement of police cooperation between all EU member states and even non-member states. The Treaty of Prüm (Prüm Convention, Council Document 10900/05, Brussels, 7 July 2005) can similarly be seen as a regional practice that has led to a more harmonised practice. This shows the importance of regional cooperation in enhancing wider police cooperation throughout a system of sovereign states.

In Australia, this incremental harmonisation process could also be applied. Some of the advanced regional strategies, such as the SA, WA, NT cooperation, could help the promotion of uniform practices and laws. In doing so, the creation of federal law in Australia could be enhanced without infringing state sovereignty. These laws would also follow the highest common denominator ('best' practice) rather than reducing cooperation to the most basic common strategies. Good regional cooperation can be the first step in the process of developing new laws on the federal/EU level. Harmonisation should therefore not be a process that impairs or stifles innovation in regional practices, but that takes these advanced practices into account and benefits from them.

The lessons learned from both systems reveal the complexity of the lawmaking and policy formation in systems where powers and responsibilities are shared across tiers of government. Three further findings have emerged from this research. First, the development of cross-border police cooperation laws requires strong participation of practitioners in the law and policy development. Second, the enactment of model laws will be made easier if they are based on existing practices. Third, model laws should be compatible with the different laws and traditions in all jurisdictions concerned. As mentioned above, the cross-border laws should always allow for special regional practices to remain, consistent with the principle of subsidiarity (as defined in Article 5 EC Treaty, the principle is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level) to enable the law to cater and respond to the individual situations and distinctive crime problems in particular border regions. An example for a legal framework taking these considerations into account is the Schengen Convention. In its Article 39.5 it specifically provides for the establishment of bilateral and multilateral initiatives: 'The provisions of this Article shall not preclude more detailed present or future bilateral agreements between Contracting Parties with a common border.' This harmonised framework therefore explicitly allowed, if not encouraged, the establishment of further regional legal regulation in the field of police cooperation. If all the requirements discussed above are being adhered to, the development of innovative regional strategies can continue. These strategies could then be taken up by higher levels of government and a harmonisation process could be considered without infringing sovereignty.

Harmonisation of criminal procedure in Australia and the EU is at the present stage not very advanced and rather an ambitious project for the future. In the meantime a focus has to lie on strategies compensating this lack of harmonisation, like for example CrimTrac, or on the EU side Europol. A further aspect that needs to be considered in both systems with a view to enhancing cooperation on the police-to-police level is police discretion. While some cooperation strategies, for example cross-border incursions, are regulated by laws in both systems and seem to be mostly removed from police discretion, other strategies, such as information exchange, still heavily rely on the 'good will' of practitioners. There are situations in Australia and the EU where this broader discretion leads to insecurities and hesitation in the field of information and intelligence exchange, rather than fostering it (Interviews #11, #1). While these problems seem less prominent in the EU than in Australia (Interviews #1 and #12), both systems could potentially benefit from common legal regulations and guidelines determining the exercise of discretion in the field of information exchange.

The differences between practitioner attitudes towards police cooperation in the EU and Australia could be explained by the 'unfair advantage' of the EU. This advantage results from the fact that the EU deals with nation states that want to maintain good international relations and obey to the basic rules of diplomacy. In addition, the fact that the EU was united after the war and through a strong political will at the time make it less likely that parochialism and jealousy will complicate cooperation.

Australia as a federal nation state does not need to display the same amount of diplomatic courtesy towards and between states and territories. Promoting cooperation towards other agencies in Australia will rarely be enforced by the international community and also seems not to be enforced by the federal state. As 'one always behaves worse at home than when being a guest', the fact that one system compared is a federal state and the other a union of states creates prominent differences on the psychological and sociological levels of the comparison.

As Gallagher noted in 2002, the 'cultural, legal, procedural and linguistic differences' between EU member states can be an advantage for police cooperation. The existence of differences increases the efforts attributed to overcoming them, for example by creating common frameworks, which do not exist in Australia. In Australia, differences between jurisdictions are not as apparent and not taken as seriously. Therefore efforts to overcome them are not as enthusiastic. Moreover, cooperation with foreign nations is still more 'exciting' and well regarded in the public eye than cooperation within one country. However, as in the EU, the creation of a common legal framework regulating police cooperation in Australia, while not leading to legal harmonisation, could nevertheless enhance cooperation by promoting the positive attitudes of police practitioners.

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