Cross-border police co-operation: Traversing domestic and international frontiers

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Cross-border police co-operation has increased significantly in recent decades. Law enforcement co-operation is now a global enterprise, no longer limited to neighbouring states or members of the same federal or regional political alliance. Considering that policing and criminal justice are matters located at the heart of national sovereignty, this evolution is striking. Closer examination of modes of co-operation focused on local rather than global networks of exchange, reveals a complex picture of legal, organisational and communication challenges. This article therefore explores practices of police co-operation not in the global, but within the Australian context, highlighting in particular the interaction of formal and informal co-operation mechanisms. A particular focus lies on assessing the impact of formal legal frameworks regulating police co-operation in the European Union in contrast with the informal mechanisms that have predominately characterised cross-border police co-operation in Australia.

INTRODUCTION

Policing historically has been limited to a defined legal territory. This territory could be the national territory, state territory (within a federation), or even (at the lowest level) a municipality within a constituent state. Tied to these territories were law enforcement agencies, such as federal police and intelligence agencies, state police forces, or, as in some European countries, separate “metropolitan” and “regional” police services. These diverse, sometimes overlapping, territorial divisions were prominent until the late 19th century.¹ Since then, cross-border police co-operation has evolved significantly, from unilateral cross-border incursions in pursuit of political agitators in late 19th century Europe, to the sophisticated systems of information and intelligence exchange enabled by international agencies today.²

Between these two points in time, the nature and scale of police co-operation was shaped by political conditions including the heightened desire for international co-operation generally in post-war periods, as well as by particular cultural and organisational imperatives at the local level. Between neighbouring nation states and within regional political alliances, advanced systems of police co-operation started to develop informally, as well as through bilateral and multilateral legal frameworks from the 1950s onwards. One of the first (and, until today, most successful) examples is the co-operation scheme established between the Nordic countries, which entered into a customs union and police co-operation agreement in the mid-1950s.³ Other successful regional co-operation mechanisms include the 1968 Cross Channel Intelligence Conference between the United Kingdom, France, Belgium and the Netherlands; the 1962 Treaty on Extradition and Mutual Legal Assistance in Criminal Matters between the Benelux countries; and a number of Police and Customs Co-operation

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Centres (PCCC)\textsuperscript{4} as established in several border regions of the European Union (EU).\textsuperscript{5} These diverse regional (formal and informal) strategies created a patchwork of co-operation mechanisms, but provided the platform for the 1990 Schengen Convention, the most comprehensive legal framework on police co-operation in the EU. Since the 1990s, the shift towards such frameworks was further enhanced by the establishment of the EU agency, Europol. At the international level, the events of 9/11 in 2001 intensified global efforts to promote cross-border police co-operation, for example, by re-interpreting Art 3 of the Interpol Convention to enable co-operation in the investigation of terrorism, a category of “political crime” that had traditionally stood outside this legal framework governing criminal justice co-operation.\textsuperscript{6}

Despite these developments, police co-operation at the international and regional level still faces an abundance of challenges. Cross-border investigations are hampered by the fact that common policing methods, such as covert surveillance or controlled operations, are subject to different legal regimes at the national level.\textsuperscript{7} The physical crossing of jurisdictional borders by police officers is hampered by national sovereignty and territoriality concerns even within regions with common legal frameworks, such as the EU governed by the Schengen Convention. It remains within the sovereign power of individual nation states to determine the precise conditions upon which “foreign officials” are permitted to exercise police powers on their territory. Also, the common EU policing agency Europol initially faced serious challenges in securing levels of acceptance among practitioner communities and EU member states to enable the facilitation of significant information exchange in the field of counter-terrorism.\textsuperscript{8}

Many police co-operation strategies have developed internationally and regionally to overcome cross-border policing challenges. The mutual recognition of laws has emerged globally as the preferred method for facilitating cross-border co-operation. This strategy has been predominantly pursued because of the difficulties involved in reaching the consensus necessary for the harmonisation of criminal procedure legislation and policing standards. With the exception of the EU examples above, most mechanisms developed globally are not embedded in international agreements or regional legal frameworks. Much international and EU police co-operation continues to be carried out on an informal “agency-to-agency” basis, and while police practitioners praise the virtues of informal co-operation mechanisms, the lack of legitimacy and accountability of these solutions is manifest.

Considering the serious impediments to international police co-operation in a globalised world, the experience of Australian State/Territory\textsuperscript{9} and federal police co-operation provides lessons (both positive and negative) for addressing common problems in cross-border policing at both the regional and international level. In examining specific strategies of co-operation developed to overcome jurisdictional diversity in Australia, this article highlights the importance of the interaction between formal and informal co-operation mechanisms, drawing a comparison to the EU developments outlined above. The last part of the article focuses on Australian strategies in the light of international police co-operation mechanisms. As the challenges for law enforcement are too numerous to be

\textsuperscript{4} PCCCs are by now a crucial cross-border policing strategy in the EU. About 40 PCCCs and about 16 “joint police facilities” (with less operational influence) have been established throughout the EU today. The first Centre was established between France and Germany and became operational in 1999. Almost simultaneously a Centre was developed between the Netherlands and Belgium.

\textsuperscript{5} See, for example, Fägersten B, “Bureaucratic Resistance to International Intelligence Co-operation – the Case of Europol” (2010) 25(4) Intelligence and National Security 500.


\textsuperscript{7} In relation to The Netherlands, Belgium and Germany, see van Dale D and Vangeebergen B, Criminalité et Répression Pénale dans l’Euregio Meuse-Rhin (Intersentia, 2009) pp 567-571.

\textsuperscript{8} See, for example, Fägersten B, “Bureaucratic Resistance to International Intelligence Co-operation – the Case of Europol” (2010) 25(4) Intelligence and National Security 500.

\textsuperscript{9} Hereafter referred to collectively as “States”. 
discussed comprehensively in this article, four particular areas have been selected for analysis: legal problems resulting from jurisdictional diversity, the physical crossing of borders by law enforcement personnel, regional police co-operation, and common databases.

Before examining these specific challenges, it is desirable to place police co-operation between State and federal agencies in context, specifically the implications for law enforcement co-operation flowing from the spectacular growth of non-geographic jurisdiction in contemporary criminal law. The next part of the article addresses the corollary of this growth, namely the inevitable “clash of jurisdictions” in the Australian context, as well as identifying other challenges for cross-border law enforcement practice.

**THE IMPACT OF NON-GEOGRAPHIC JURISDICTION ON AUSTRALIAN LAW ENFORCEMENT**

Territoriality has significant implications for the making and breaking of criminal laws and cross-border law enforcement in Australia. The Australian model of federalism established in 1901 did not significantly disturb the sovereign power of States to legislate in the field of criminal law and procedure.10 Like the EU, the Commonwealth was granted the power to enact federal laws in fields in which the Commonwealth Parliament possessed the constitutional power to legislate, either expressly or incidentally, or in cases where the States agreed to refer their legislative powers to the Commonwealth. The result is that valid federal laws are directly applicable within the States. These powers are not limited to minor regulatory offences but extend to serious crimes, such as terrorism and national security offences.

Jurisdiction is more complicated in Australia than in other regions of the world because of the shared and overlapping legislative competences in the criminal law.11 As a result of the expansion of Australian federal criminal law in the past two decades, which has only intensified with the fight against terrorism, transnational and organised crime since 2001, jurisdictional overlap and the potential for conflict has grown exponentially.12 However, the new national political priority attached to terrorism, transnational and organised crime has also produced some degree of legal harmonisation at the federal and State level.13

The “patchwork” of Australian jurisdictions and the overlapping nature of federal and State competences adversely affects policing and police co-operation. Recent research, based on interviews undertaken by the author with frontline police practitioners, reveals that federal offences pose serious challenges for police co-operation between State police and the Australian Federal Police (AFP).14 The most challenging area identified was drug law enforcement. While the AFP has the competence to investigate drug importation and trafficking offences, State police retain the competence to enforce other drug-related crime. The distinction between “importation” offences and all other drug-related offences becomes particularly challenging since drugs like heroin and cocaine are presumed to be “imported” drugs,15 a statutory presumption rather than one based on proven facts.16 The result is that every investigation related to these proscribed drugs potentially falls under the competence of the AFP. Thus the act of possession of such a prohibited narcotic constitutes a serious federal importation

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10 Commonwealth of Australia Constitution Act 1900 (Cth), Ch V, s 108, read in conjunction with s 51.
12 Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth); Bronitt and McSherry, n 11, p 91.
13 There is no one model of legal harmonisation in Australia. In relation to terrorism, federal law predominates, and has involved the referral of powers by the States to the Commonwealth. That said, the federal definition of “terrorism” has been incorporated into legislation enacted to combat terrorism at the State level. In relation to the federal serious and organised crime laws introduced by the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth), these have been promoted to the States as a “model law” to criminalise conduct that falls outside the jurisdiction of the “federal” form of the offence.
14 The interviews used to inform this article were conducted for the PhD study by the author, Hufnagel, n 1; Interviews conducted with Australian Federal Police (2009) and Victoria Police (2009) and (2010).
16 Bronitt and McSherry, n 11, p 904.
offence as well as a (less serious) possession offence under the relevant State law. As a result, multiple law enforcement and prosecution authorities have competence to investigate and prosecute, sometimes triggering a struggle over jurisdictional competence.\(^{17}\) It is, of course, impractical for the AFP to assert such jurisdiction. Competences are therefore “negotiated” between the different police forces involved, and the working rule in relation to all minor offences is that the AFP exercises its discretion not to proceed with federal importation offences, in effect ceding its competence to the State police to prosecute under their respective possession offences. While the negotiation of competences solves the problem in practice, it creates challenges at the trial level, since the penalties for the offence of possession under State laws and for drug importation offences under federal law differ: for example, in *Ridgeway v The Queen*,\(^ {18}\) the penalty for a person being involved in the importation of heroin was life imprisonment under federal law, while the South Australian possession of a prohibited substance or drug of dependence carried only two years imprisonment (though possession for the purpose of sale or supply carried life imprisonment).

The jurisdictional separation of States and the non-geographic nature of the AFP’s jurisdiction that traverses internal and external borders, not only produces struggles over competences (fuelled by the need for media recognition and government funding), but can also lead to unjust outcomes in the criminal justice sphere. However, this division between local police and the AFP – what may be termed as “vertical” co-operation – is not the only challenge in the Australian system. The next section reveals the challenges of “horizontal” co-operation at the State-to-State level.

**OVERCOMING CLASHES OF JURISDICTIONS AND OTHER CHALLENGES: INFORMAL AND FORMAL CO-OPERATION STRATEGIES**

As the AFP is only competent to police a select number of serious federal offences across all jurisdictions, strategies have been developed to overcome jurisdictional differences at the State level for all other offences. Australia lacks national legislation or inter-jurisdictional legal agreements harmonising police powers and practices; furthermore, there is no federal control of the State police. That said, there are a number of national forums in which police Commissioners, police ministers and others come together voluntarily to discuss policing and security issues of national importance. The earliest and probably most significant informal Australian police co-operation strategy was the 1903 Conference of Australian Police Commissioners, which was developed under constraints similar to the international co-operation initiatives of the time.\(^ {19}\) This regular meeting of regional senior law enforcement officials continues to this day, but has changed its name and constitution several times. Most recently it has been rebadged from the “Conference of Commissioners of Police in Australasia and the South West Pacific Region” to the “Australia and New Zealand Police Commissioner’s Forum”.\(^ {20}\) The next part of the article explores whether there is a growing trend towards (and practitioner acceptance of) legally binding initiatives to enhance co-operation. This latter trend, which could result in the establishment of bilateral and multilateral legal frameworks, is politically sensitive because it necessarily involves the ceding of sovereignty rights between the participating States.

For the purposes of this article, the categorisation of “informal” co-operation encompasses multilateral, regional, police-to-police and agency-to-agency co-operation that occurs in the absence of explicit – or in some cases *any* – framework of legal regulation. As the history of the Police Commissioners’ Conference indicates, this type of “police leaders” high-level forum was attractive in the early years of federation since it was not legally binding and thereby preserved State autonomy.

\(^{17}\) Interview with AFP (2010).


\(^{20}\) See Australia and New Zealand Police Commissioner’s Forum, http://www.anzpaa.org.au/governance/governance-and-relationships viewed 30 October 2011. Today it includes participation of the New Zealand Police Commissioner (since the late 1930s), police leaders from Papua New Guinea and many Pacific states (since the 1960s), and police leaders from South-East Asia (since 2000): Finnane and Myrtle, n 19 at 3.
and respected the independent status of the Commissioners. Police co-operation, in that informal sense, relied predominantly on trust and the initiative of individual police chiefs and officers, which made it very dependent on situational and contextual factors rather than on adherence to an agreed uniform approach to force-force collaboration.21

Alongside these horizontal (inter-jurisdictional) informal modes of co-operation, Australia developed institutions through which vertical formal co-operation could take place “top down”. This latter model was formalised through the establishment of distinct federal policing and security agencies, such as the AFP and the Australian Crime Commission, with legal powers and responsibilities to work across State borders. Vertical modes of co-operation rest on federal legal frameworks that can limit the powers of the States.22 However, examining the constitutional division of powers between the States and the Commonwealth, combined with the legal diversity that exists between the States, one wonders how new federal institutions managed to secure significant degrees of co-operation.

In the following sections, this article explores the challenges State policing agencies face on the “horizontal” State-to-State level. A particular focus is on assessing whether their co-operation strategies are based on formal or informal frameworks and whether this is beneficial for cross-border co-operation, particularly from the perspective of police practitioners.

MANAGING LEGAL DIVERSITY IN POLICE POWERS AND PROCEDURES: MUTUAL RECOGNITION OR LEGAL HARMONISATION?

The first challenge explored flows from the constitutional set up of Australian States and relates directly to legal diversity. Cross-border police operations are problematic for Australian interstate as well as international policing operations because police powers and procedures differ from State to State. In Australia, significant attention has been placed on the development of model laws. Australian model laws in the area of criminal procedure were not ostensibly directed to improving the quality or promoting uniformity of laws per se, but rather the model laws project sought to establish a sufficient “level playing field” to permit mutual legal recognition of the different procedural laws across-borders.

Model laws in the area of cross-border police operations have been adopted in relation to forensic procedures and search warrants. Further model laws were developed by a Joint Working Group (JWG) on National Investigative Powers and published in a Report of the Leaders Summit on Terrorism and Multijurisdictional Crime: Cross-Border Investigative Powers for Law Enforcement in November 2003. The JWG had envisaged a much broader range of model laws extending beyond mutual recognition of forensic procedures and search warrants to include surveillance devices and controlled operations.

While not aiming at legal harmonisation, this initiative has led to improvements in law enforcement co-operation and can be seen as a useful model for international and in particular EU police co-operation mechanisms. Under the proposed laws, the principle of mutual recognition would be taken much further than under the previous models. The new principle would be that police officers could obtain a warrant (in relation to any of the investigative powers subject to the model law framework) from courts in their own jurisdiction with the effect that this power would apply in another jurisdiction without further action.23 In the absence of such a framework, State police investigating across borders would need to request the co-operation from the relevant other State police in order to apply for a warrant within their jurisdiction. A problem of this approach was that

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22 For example, Australian Federal Police Act 1979 (Cth), establishing the AFP.

only “reciprocating States” could apply for such warrants, that is, those States whose criminal laws (offences) are recognised by another State. Although the criminal laws across Australia are not strikingly different, according to the JWG, this level of diversity had caused problems and was one of the reasons why mutual recognition was favoured as a strategy for promoting cross-border co-operation.

Even when dealing with a “reciprocating State”, the police in the requesting State had to ask the other State police service to “take over” the investigation, with the effect that no unauthorised exercise of power occurred across borders. In relation to forensic procedures, this was similar, although the warrant could be issued in the requesting State. However, the warrant would then be executed by the police of the other State. Under the new model legislation for forensic procedures, the warrant could be obtained in the “requesting” State and executed in another State by the “requesting” State’s police. This model obviously represents significant inroads into sovereignty of Australian States, which may explain why implementation has been slow in many jurisdictions. However, in some areas of criminal procedural law, the new model laws on criminal investigation have had a harmonising effect. This is most profound in the field of forensic evidence.

The development of model laws and their implementation by States does not necessarily foster common standards of police practice in Australia. Processes would further need to be put in place to encourage police to interpret and apply such model laws uniformly. The “formal” approach of creating model laws and legal frameworks can be a facilitator of co-operation, but the power to “bring them to life” (in effect, to operationalise the law) lies in the hands of frontline practitioners. The next sections will therefore discuss the more “hands on” strategies to promote police co-operation in Australia and moves further into examining informal areas of co-operation.

**Facilitating Physical Border Crossings: Hot Pursuits and “Special Constables”**

The sovereignty of Australian States in relation to criminal law means that State police officers, though they may freely cross the border into another State, cease to exercise the special powers and duties of a police officer the moment they enter another jurisdiction and become a “normal” citizen. For example, if police officers in hot pursuit cross the border exceeding the speed limit, there is potential liability for a traffic infringement (subject to any general defence that might be available). To legally facilitate the hot pursuit of criminals and other necessary cross-border incursions across State borders, many jurisdictions have resorted to the appointment of police officers from other forces as “special constables”.

The special constable, which is recognised by legislation in every Australian jurisdiction, is a well-established statutory office for persons who are not regular members of a police force. Police working in border areas can under this provision be sworn into multiple systems and can exercise law enforcement powers in every jurisdiction into which they have been sworn. This is not, however, a harmonised initiative. The general acceptance of special constables in federal and State law can be traced to the early English policing models and the peculiar conditions of Australian colonial policing. Special constables played a significant role in bolstering the strength of police forces, particularly in remote and frontier areas where the numbers of full-time, paid constables were limited. The pedigree of “specials” is apparent in the early history of policing in New South Wales. The establishment of the first professional police force followed the passage of the *Sydney Police Act 1833* (NSW), which was

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24 JWG Report, n 23, p vi.

25 See, in relation to controlled deliveries, where the problem becomes even more prominent: JWG Report, n 23, pp 1-5.

26 See, for a detailed historical description of the office of “special constable”, New South Wales Legislative Assembly, Parliamentary Debates, Motion Police Legislation Amendment (Recognised Law Enforcement Officers) Bill (22 June 2010) p 13357; see also Swanton B, *The Police of Sydney 1788-1862* (2nd ed, Australian Institute of Criminology, 1984), who throughout his book notes the constant complaints from governors about the lack of persons (free or emancipated) willing to assume the position of constable.
modelled on the 1829 Metropolitan Police Act (UK). This Act made provision for appointment of special constables, which was mirrored in subsequent Acts establishing colonial police forces. “Specials” were therefore also included in the first Victorian Police Act, the Act for the Legislation of the Police Force of 1853, which became a model for police legislation in Australia generally. Despite the changes to police legislation in all Australian jurisdictions since 1853, the provision for appointment of “special constables” has survived through to the present-day, though with some modifications. In New South Wales, for example, industrial reform has recently resulted in an equalisation of terms and conditions of employment for special constables as “recognized law enforcement personnel” in the Police Legislation Amendment (Recognised Law Enforcement Officers) Act 2010 (NSW) (NSW Act).

There are currently more than 4,100 officers in New South Wales with recognised enforcement powers in more than one jurisdiction. Approximately half are serving police officers from other jurisdictions, followed by New South Wales Police Force employees and employees of other New South Wales law enforcement bodies and government agencies such as Royal Society for the Prevention of Cruelty to Animals (RSPCA) inspectors, councils and Area Health Services.

The Parliamentary Debates preceding the introduction of the 2010 reforms in the NSW Act highlighted (as one of few official documents to do so) the importance of police co-operation between States in Australia. The debate stressed the underlying purpose of the Act, particularly its importance in providing clarity and certainty in relation to cross-border policing in New South Wales. Areas highlighted in this context were crisis assistance, joint patrols in border areas and the joint work on specific investigations. The examples mentioned by the sponsors of the legislation introducing cross-border enforcement powers are reminiscent of various regional EU co-operation initiatives.

Despite a lack of federal leadership or initiative in this field and some differences in terminology, de facto legal harmonisation in relation to the role and function of special constables has occurred. The downside of this development is that its uniform implementation relies on the action (and resourcing) by States to enable it to occur and in this respect, policies, practice and funding commitment to the model differ in various Australian jurisdictions. To be able to conduct effective cross-border policing, special constables must be sworn (and trained) to operate in both systems. This creates, in an indirect way, a system of mutual recognition of police powers. The challenges with this model were highlighted recently at the Queensland-New South Wales border, when it appeared that all New South Wales police officers had been sworn as special constables in Tweed Heads, while only 44% of Queensland officers were sworn on the Coolangatta side of the border. This example shows that the effectiveness of cross-border policing strategies depends on the level of political support and resources available in policing the border region. Harmonised legislation in different States will hence not necessarily translate into harmonised practice. If cross-border enforcement is to be enhanced, strategies must go beyond the establishment of harmonised legislation and encompass the uniform implementation of strategies to enhance police co-operation. The recent problems on the Queensland-New South Wales border also underscore the need for more formal bilateral co-operation agreements. Such agreements could standardise practices, for example, by prescribing that all officers working in a specified border area must be sworn in as special constables. The recent NSW Act, discussed in more detail below, may become a model of bilateral legislation that furthers co-operation and creates uniform practice in all adjacent States. However, its impact is yet to be seen.

Permanent informal police co-operation exists in all border regions. In response to cross-border policing problems at the Queensland-New South Wales border, there have recently been calls that

30 New South Wales Legislative Assembly, n 26, p 24520.
co-operation should be formalised through legislation. The Victorian-New South Wales Chief Executives of Police Meeting has also initiated formalised co-operation in the form of common Cross-Border Policing Principles, a Police Working Group Agreement and an Agreement on the Policing of the Murray River. The aim was to standardise existing practices, to provide consistent decision-making, and to resolve or minimise any inter-agency conflicts. However, while the Victorian and New South Wales Ministers for Police had planned to execute a Cross-Border Policing Agreement in 2008, the signing of that agreement has not yet taken place. Reasons given for this delay, as noted by one of the Ministers in recent Parliamentary Debates, related to the need to clarify the powers of “special constables” and make necessary amendments to legislation in both jurisdictions.

An outcome of the negotiations on the New South Wales-Victorian Agreement is the NSW Act. During the passage of this legislation, it was noted that positive outcome was not merely the product of intergovernmental negotiation alone. The Hon Greg Aplin, Member of the New South Wales Parliament for the border region of Albury, underscored the important role local police play in establishing the value of cross-border powers to the local affected electorates:

I note that it is due only to the professionalism of our local police in both New South Wales and Victoria that they continued to work so well together to overcome some border issues while we were waiting for action from the New South Wales Government to formalise these arrangements. I asked the Minister what joint operations would be introduced or facilitated under the proposed agreement and in 2008 the Minister responded and said that the cross-border policing agreement aimed to formalise and standardise existing practices to provide consistent decision-making in response to incidents or emergency situations, particularly in remote areas, and to resolve or minimise any conflicts that may arise.

From this example, the current problems of harmonisation in Australia are brought into sharper focus. Practitioners continue to struggle to develop effective cross-border policing in the Albury-Wodonga area (New South Wales-Victoria) and while achieving some success (similar to EU regional initiatives and advanced bilateral legislative initiatives), the respective State governments are only weakly committed. Worse still, even when good cross-border co-operation practice is formalised, there is clear opposition to extending these “experiments” to other regions. The following statement from the local backbencher representing the border region in New South Wales Parliament hints further at the challenges police co-operation has to face in Australia:

Subsequently, I asked the Minister whether it was intended that the cross-border policing agreement would be extended to other border areas after a trial period. The answer was an emphatic “No”. I think that with the Police Legislation Amendment (Recognised Law Enforcements Officers) Bill 2010 the Minister may well consider extending that cross-border agreement because when this bill is enacted he will have the authority to note the powers of the special constables. I would like to think that the cross-border policing agreement could be extended to all borders of New South Wales to enable the police to operate that much more effectively with their neighbouring police forces in the other jurisdictions. I do not oppose this bill. I look forward to its implementation in the border region where my electorate lies.

Notwithstanding the emphatic ministerial “no”, the legislative basis for the pilot project inspires hope. The legislation adopted in New South Wales to promote more effective co-operation with Victoria might provide the incentive and template for the establishment of further legal frameworks on cross-border police co-operation in Australia.

The interviews conducted by the author revealed that there is considerable police practitioner support for the introduction of common legal frameworks in Australia, which could assist in

52 Nofke, n 31.
54 New South Wales Legislative Assembly, n 26, Statement by Greg Aplin (Albury), p 24522.
55 New South Wales Legislative Assembly, n 26, Statement by Greg Aplin, p 24522.
establishing some basic rules of police co-operation. This practitioner support became particularly apparent with a view to recent events in the New South Wales, Victoria and Queensland border regions. That said, as long as informal modes of co-operation work well, there is little motivation among politicians or police themselves to formalise arrangements, applying the adage “if it ain’t broke, don’t fix it!” However, there will be cases where informal co-operation, for either political or practical reasons, will break down. This can result from the employment of new and inexperienced staff unaware of the “informal norms” and lacking established contacts in the co-operating jurisdiction, or, in the Queensland-New South Wales example, relative understaffing and under-resourcing of cross-border co-operation on one side of the border. When the informal tacit arrangements break down, calls for legal frameworks surface. The need for cross-border co-operation frameworks becomes particularly apparent in the recent calls for more regulation of police co-operation by local New South Wales Members of Parliament responsible for electorates in border areas.

EMERGING REGIONAL CO-OPERATION STRATEGIES: NYP LANDS POLICING

It follows from the above discussion and from EU legal harmonisation developments, such as the Schengen Convention, that formal police co-operation schemes successfully developed in one Australian border region could become a model for co-operation in other regions, leading gradually to the establishment of a common legal framework for Australian law enforcement co-operation. In EU police co-operation, strategies developed from multilateral cross-border policing initiatives were subsequently adopted at the EU level and applied to all member state police. But as yet, there have been no Australia-wide initiatives aiming to create comparable national harmonisation of police procedures. A recent (and so far the only) Australian multilateral cross-border initiative is the Ngaanyatjarra Pitjantjatjara Yankunytjatjara lands (NPY lands) co-operation between the Northern Territory, Western Australia and South Australia policing agencies. This initiative involved the ceding of sovereignty rights and territorial jurisdiction in law enforcement between these three jurisdictions. The impetus for this initiative lay in the particular challenges faced by policing domestic violence, child abuse, sexual abuse, substance abuse and other forms of offending behaviour within Aboriginal communities in remote border areas. Significantly, this innovative model of police co-operation was initiated by the Aboriginal communities themselves, specifically those women living within the border region, who had experienced difficulties accessing police assistance in remote regions.

The impetus for this initiative outlines the unique set of challenges faced by Australian police forces. Each force must adapt its policing strategies to cater for requirements of cities, regional centres and rural, remote bush communities. Further, specifically Australian challenges include, in contrast to the EU, that jurisdictions include significant indigenous communities and cover vast geographical areas. With regard to the NPY lands initiative it is important to note that in 2008 the Western Australian Police Service (WAPOL) policed a geographical area of 2.5 million square km, which is more than half of the total geographic region covered jointly by EU member states, and employed a
Law enforcement in the NPY lands is therefore a complex challenge for policing vast areas, across multiple State lines and cultural differences, for all the agencies involved.

NPY lands co-operation is new and still needs to be tested in practice. Preliminary research by the distinguished police scholar Professor Jenny Fleming raises notes of caution about the practicability of the NPY lands project. Due to the remoteness of the border area, it may prove difficult to attract and retain police officers to the region and to motivate them to collaborate consistently across borders and cultures. While these practical problems need to be resolved, it remains the case that the model developed for this region is the most advanced of all those operating in Australian border regions. A distinctive feature is that the NPY model is firmly grounded in “mirror” legislation in the three participating jurisdictions: the Cross-border Justice Act 2009 (NT), Cross-Border Justice Act 2008 (WA) and Cross-Border Justice Act 2009 (SA) allow police officers to exercise their powers (within certain limits) in each of the three jurisdictions, which are recognised under the respective laws of their State. In other Australian border regions, by contrast, individual police officers must be sworn into the other system (typically, as a special constable) in order to exercise powers in the other jurisdiction.

In relation to NPY lands, this model was developed and adopted swiftly (relatively speaking) in the three jurisdictions. It took only six years from the start of the initiative in 2003 to the passage of the implementing legislation in each participating jurisdictions in 2009. The NPY lands co-operation has replaced a minimalist, ad hoc and largely informal regional co-operation with a general legislative framework of police co-operation based on mutual recognition. In this respect, NPY lands co-operation is therefore comparable to EU regional co-operation initiatives. The genesis of NPY lands came not from the police, but through women in the NPY lands demanding more effective policing in remote communities, demonstrating that community-based initiatives can play a key role in triggering law reform in cross-border co-operation in the Australian context.

**Facilitating Information Exchange**

Much police co-operation is brokered through the use of agency-to-agency memoranda of understanding (MOU). MOUs are used to facilitate ad hoc bilateral and multilateral co-operation, for example, authorising the formation of joint investigation teams between State and federal policing agencies. But there are also permanent MOUs. The most prominent MOU in Australia relates to CrimTrac. CrimTrac is the Australian common police database that brings together a growing number of different types of information (fingerprints, DNA, criminal records, etc) with a view to enable its exchange between the different police forces. Practitioners interviewed by the author favour further formal legal regulation of CrimTrac, and the codification of the existing MOU into legislative form is actively under consideration. The move towards more formal legal regulation may be a reaction to the recurrent challenges faced by practitioners occasioned by the incompatibility of federal and State legislation on the use of information obtained through CrimTrac.

A major challenge for CrimTrac at the time of its establishment, which continues today, is the overcoming of the diversity of applicable rules and regulations. This is particularly apparent in the field of forensic DNA procedures, specifically the taking of DNA samples, destruction of samples and privacy requirements, which vary widely amongst the States. Northern Territory police officers are,
for example, authorised to take and retain DNA samples from all arrested persons, even those who are not convicted, whereas in Victoria, the police can take samples from persons only upon conviction consequent to a court order. The samples must be destroyed if the person is not convicted and has a clear (expunged) criminal record. When it comes to the exchange of DNA information, for example, through CrimTrac, police need to be aware of these differences to ensure that the evidence is obtained legally and remains admissible in court procedures. To facilitate DNA data exchange through CrimTrac, a move towards harmonising the different legislation relating to DNA evidence through bilateral mutual recognition agreements has been undertaken, which led to the partial introduction of mirror legislation in Australian States.

While being a federal “top-down” initiative, a strategy used by CrimTrac to generate interest and promote acceptance among practitioners and State governments is to establish regular meetings on the “horizontal” inter-jurisdictional level with all agencies engaged in information sharing. This includes, primarily, the board of management (representing the police ministers of all jurisdictions) but also other actors involved in putting these initiatives into practice. These meetings can be compared to the successful informal strategies to enhance police co-operation in Australia, such as the above-mentioned Conference of Australian Police Commissioners. According to interviews conducted by the author, the strength and acceptance of CrimTrac lies in the fact that it has never been perceived as a “top-down” federal initiative; this is the result of its governance structure, which involves equal representation of all State police agencies in the board of management. According to practitioners interviewed by the author, CrimTrac’s governance arrangements have ensured a high level of trust and countered the concern that new harmonised structures and initiatives undermine state sovereignty in the field of criminal justice. To this extent, CrimTrac can be seen as a model for overcoming police practitioner distrust and State sovereignty concerns. Due to the intergovernmental decision-making structure, States are fully recognised and given high levels of “ownership” over the initiative. This approach within CrimTrac has ensured acceptance by both practitioners and participating jurisdictions, with the effect that this has stimulated debate on the merits of further legal formalisation of a national data sharing agency. It is therefore an example of a federal “vertical” co-operation mechanism that uses an informal “horizontal” governance structure to achieve a higher degree of legal harmonisation and formalisation of police co-operation in the Australian context.

CONCLUSION

In Australia, cross-border law enforcement co-operation between the States remains largely informal, reliant on personal contacts and regular interactions to co-ordinate law enforcement efforts in specific border areas.

In the last decade, some degree of formalisation of co-operation has occurred through the development of model laws in the field of criminal procedure. However, their impact has been uneven, with varying degrees of harmonisation achieved in relation to laws governing police powers potentially crossing borders. This process of harmonisation has been driven largely by the desire to widen the scope of mutual legal recognition rather than harmonising legislation, creating common legal frameworks, reforming or improving the quality of cross-border policing.

At both the political as well as the practitioner level, the standardisation of existing police practices and promoting of consistent decision-making has been recognised as a means of minimising jurisdictional conflict. However, interviews with practitioners conducted by the author reveal that police co-operation “successes” are still mainly attributable to informal practitioner initiatives and
establishing trusted networks of “good-will” to facilitate co-operation. The question remains how this positive engagement of police practitioners can be sustained and secured. While politicians seem less worried about the continuity of co-operation efforts, pointing to the track-record of success in cross-border co-operation, frontline police practitioners point out that this co-operation rests on fragile foundations, and potentially could deteriorate with a changing political environment and the change of key personnel within the agencies. Practitioners therefore support calls for a common legal framework that encapsulates the principles of “good co-operation” and develops new mechanisms to facilitate effective collaboration with other jurisdictions.

Even though models for such frameworks already exist, such as the implementation of “special constable” provisions under the NSW Act or the recently established NPY lands co-operation scheme, there remains continuing reluctance at the political level to broaden such “experiments” to the national level. A template for formalising co-operation in this respect is the national information exchange agency, CrimTrac. Through its informal intergovernmental structure and regular meetings of all State and federal agencies it has gained a high level of acceptance and support, despite being a federal “top-down” initiative. Discussions are now occurring to legally formalise this agency under a multilateral legally binding agreement, to replace the existing MOU.

Apart from this development, not much seems to have changed in relation to preferences for co-operation since the establishment of the Conference of Australian Police Commissioners in early years of federation. While many of the Australian initiatives reviewed here appear to be more advanced than EU frameworks, in particular the recent moves towards extensive mutual recognition in the area of criminal procedure and expanding federal legislation, the EU seems to have a clear advantage through its establishment of a common legal framework of police co-operation. To that extent, Australia could in fact learn from an international system. The current moves towards “firming up” the legal foundation for police co-operation through CrimTrac, inspires hope that such federal initiatives will foster, rather than inhibit, best practice in cross-border policing nationally. It is, however, interesting to note that the success of this federal initiative seems to rely on informal, horizontal and intergovernmental co-operation mechanisms that have proven successful throughout Australian history.