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Harmonisation and Regional Cooperation in Cross-Border Policing:  
Comparing European and Australian Frameworks

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# **Harmonisation and Regional Cooperation in Cross-Border Policing: Comparing European and Australian Frameworks**

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## **I. The Problem: Harmonisation versus Regional Police Cooperation Strategies in Australia and the European Union**

Australia and the European Union (EU) face similar problems in relation to police cooperation across borders. In Australia the problems take place within a federal system constituted of 6 States and two Territories overlaid with a federal criminal jurisdiction. The fact that Australia is divided in nine different criminal jurisdictions is a product of the history of colonisation, rather than intelligent design. The effect however is that each of these jurisdictions is policed by its own police force (Finnane 1994: 7). As each police force is only competent on its own territory, with the exception of the Australian Federal Police (AFP) which has competence across the Australian continent and beyond, jurisdictional problems of border crossing, information exchange and joint investigations arise. These problems have intensified in the 20<sup>th</sup> century with globalisation and the increased mobility of offenders. Several strategies, both legal and administrative, have necessarily developed to promote effective policing across borders and to secure inter-state borders (Etter 2001: 25).

Likewise the EU has faced an increasing need for cross-border police cooperation. This emerged most clearly with the intensification of integration in the 1980s and the commitment to realise the ambitions of a Single Market by 1992 (Mitsilegas 2009: 5-9). With the prospect of increased mobility of people and trade (and therefore crime) across borders, more effective police and customs cooperation was required. This was led largely by the Benelux countries (Belgium, The Netherlands and Luxemburg), together with France and Germany, and was part of their efforts – initially outside the framework of the EU – to promote cooperation through the Schengen Agreement of 1985 and the Convention Implementing the Schengen Agreement of 1990 (OJ 2000 L 239).

With a view to the competences of the EU, 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 sovereignty-sensitive to be included in the first pillar which was mainly subject to qualified majority voting and a supranational structure (Mitsilegas 2009: 9). The newly created third pillar was therefore subject to predominantly unanimous decision making and adopted a more intergovernmental legal framework (Mitsilegas 2009: 9).

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

When comparing a federal system with a Union of states, a major challenge is overcoming the difference between the autonomy of federal states and the sovereignty of nation-states. As the comparison takes place on the one hand within a nation-state and on the other hand between sovereign nation-states, a common denominator needs to be found. As pointed out above, a common factor that can be addressed in relation to both entities is the existence of different jurisdictions. This paper will therefore focus on jurisdictional issues related to cross-border cooperation, rather than explaining the extent to which sovereignty concerns might impede this cooperation.

An important question to be asked in relation to solving the problems of police cooperation in Australia and the EU is whether the harmonisation of criminal procedure and legal frameworks governing police cooperation would be beneficial for cross border law enforcement or whether regional cooperation is the best way to proceed. In the EU as well as in Australia, problems of cross border cooperation are apparent across all jurisdictions, but can also be very localised to only one part of a border region. Regions

that are dealing with special problems at their borders are for example the German, Dutch, Belgium border region in relation to drug offences (Spapens 2008: 225) and the remote South Australian (SA), Western Australian (WA), Northern Territory (NT) border region in Australia.

In the German, Dutch, Belgium border region, also called 'Meuse-Rhine Euroregion', drug importations, tourism and major cities on the German side of the border create problems centred on casual and frequent border crossing. The strategies developed and the multilateral agreements applied in that region are highly specialised to deal with these issues and therefore differ from approaches in other European regions (Spapens 2008: 225). Cross border cooperation strategies for this region are laid out in the Benelux Cooperation Treaty, the Treaty of Enschede and the Prüm Convention, as well as several other bilateral agreements. According to these legal frameworks, police in the Meuse-Rhine Euroregion are allowed to cross the borders in 'hot pursuit', to carry weapons in other jurisdictions, and to make use of their weapons when crossing into another jurisdiction. Furthermore, they are exceptionally allowed to exercise certain powers on foreign territory, for example in cases of an emergency and can even exchange physical evidence directly with their counterparts. Information exchange between these states takes place directly between the criminal investigation departments. The borders and main transport routes are patrolled by Joint Hit Teams (JHTs) consisting of law enforcement personnel from both sides of the border (Spapens 2008: 226-229).

Apart from the differences in the legal agreements establishing this cooperation, institutions facilitating police cooperation in this border region have also been created. The Euregional Multimedia Information Exchange (EMMI) and the Euregionales Polizei-Informations-Cooperations-Centrum (EPICC) are two examples. Due to the particular needs in this densely populated border area, cooperation is very advanced compared to other EU regions. Another particular problem in this region results from the more tolerant approach to 'soft' drugs in The Netherlands which is based on the regulation of the supply of cannabis through 'coffee shops' (Korf 2002: 852). This difference in criminal legislation in the Euroregion creates a further need to cooperate across borders and has

led to several initiatives to deal with the issue. However, cooperation is still hampered by the fact that it is fragmented. Strategies in the case of the Treaty of Enschede for example only apply at certain parts of the border, rather than uniformly. Looking at the applied strategies more closely, it also becomes apparent that they could be used in other parts of the border or even at all internal borders within the EU to improve police cooperation.

In the Australian scenario, aboriginal people movement across borders and the long distances between aboriginal settlements are the major challenge for police forces in the SA, WA and NT border regions. Problems that arose particularly in this region, the Ngaanyatjarra Pitijantjatjara Yankuntjatjara (NPY) lands, relate to domestic violence, child abuse, sexual abuse, substance abuse, and other forms of offending behaviour. The cooperation measures created for this region are probably the most advanced of all Australian border regions, although they still need to be tested in practice. The WA Cross-Border Justice Act and the SA and NT Cross-Border Justice Bills allow police to exercise their powers (within certain limits) in each of the three jurisdictions under recognition of the laws of their state/territory. In other Australian border regions a police officer must be sworn into the other system to exercise his/her power in the other jurisdiction (typically they are assigned the powers of a 'special constable' as in *Police (Special Provisions) Act 1901* NSW). Similar to the European example above, Australian cooperation in a particular border region is more advanced than cooperation models applying between Australian states and territories generally. The WA, SA and NT legislation on mutual recognition of enforcement powers, although developed here to solve a particular border enforcement problem, could also help to improve police cooperation between all states and territories.

The two case studies demonstrate that a uniform harmonisation of police cooperation strategies, which is often considered the best strategy, might not always be the optimal solution when it comes to tackling specific regional problems. Regional differences may require adaptation of laws and cooperation strategies. However, these differences do not stand in the way of the harmonisation of basic criminal procedural laws to facilitate cross-border police cooperation, which practitioners also demand. The principal concern

about harmonisation of cooperation laws is that harmonised laws tend towards the 'lowest common denominator', particularly in relation to the protection of human rights and accountability measures. Highly advanced measures ensuring human rights protection will very probably not be accepted in all jurisdictions. This is a valid argument, as the Queensland use of the public interest monitor in application for surveillance devices shows. The Queensland public interest monitor makes submissions during warrant applications in the public interest, thereby ensuring accountability and human rights protection. However, no other Australian jurisdiction has so far accepted this strategy.

The preferable approach is that harmonised police cooperation laws should incorporate scope for particular regional practices. The legal frameworks created in the EU and at the Australian federal or national level should always leave room for police practices to tackle particular border problems while striving for the highest level of harmonisation possible. Furthermore, the highly evolved practices in certain border regions are not always strategies exclusively necessary in that region. Highly advanced European cooperation strategies, such as NeBeDeAGPol (a Dutch, Belgium and German Border Region Police Cooperation under the form of a public limited company) and the Benelux cooperation have for example been incorporated into the Schengen Agreement (Fijnaut 1987: 126). This shows that regional strategies can be taken into account in the harmonisation process to stimulate new ideas and further police cooperation throughout the whole system.

The next part of the paper will describe the particular situation in relation to harmonisation of police cooperation laws in both Australia and the EU. Particular strategies that have evolved in both systems will be compared with a view to determining their potential to further police cooperation. A brief description of my research investigating the problem of harmonising police cooperation laws in Australia and the EU will assist in identifying best practice models of police cooperation and promote policy learning across both systems.

## **II. The Australian situation**

Since the Federation of the Australian Colonies in 1901, Australia does not have enforced border controls between its states and territories. The eight different jurisdictions all work under their own criminal and criminal procedural laws as well as police directives (Finnane 1994: 7). 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. Thus, drug importation, for example, 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). The federal parliament can regulate imports and exports (including narcotics) under trade and commerce, but also because of the myriad international treaties which Australia has signed to suppress drug trafficking (Bronitt and McSherry 2005: 810-824).

Subject to federal jurisdiction, the Australian Constitution recognises autonomy in relation to legislative powers for the states. The overlapping federal and state legislative competence raises 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 (or in the Australian example territorial autonomy) in relation to national jurisdiction and law enforcement is perceived to be endangered (Sutton and James 1996: 100-104). 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 future (Gani 2005: 265-266). Therefore, both entities rely on practices of police cooperation to overcome their border control problems.

It must be stressed that autonomy 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 very similar effects.

Of course some of the major problems hindering police cooperation in the EU – most prominently the differences in culture, structure and history (as well as language) of police organizations – are not as apparent or even non-existent in Australia. Police in Australia are all, broadly speaking, based on a common British colonial model of policing and were all established at about the same time. However, the different state and territory police forces are all governed by different laws and developed their own cultures and practices in the process of their evolution (Finnane 1994: 14-23).

A very prominent case revealing the problems resulting from the differences in criminal procedure laws of Australian states and territories is the Falconio case (Gans 2007: 415). In this case a backpacking couple was attacked by a man in the Northern Territory and one of the backpackers, Peter Falconio, was killed in 2001. The investigation in what first appeared to be an abduction and later turned out to be a murder case was led by the NT, WA and SA police forces, but also involved assistance by other Australian law enforcement agencies like 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) (Council Framework Decision 2002). 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, a strong possibility was given 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, like for example the *Crimes (Forensic Procedures) Act 2000* (NSW). After extensive political pressure was exercised upon NSW, NSW and NT concluded an agreement on DNA exchange, regulating information exchange over CrimTrac and the DNA was finally matched – in the Falconio case unsuccessfully.



This case illustrates that a need for harmonisation in relation to criminal procedure law exists in Australia. Rather than creating bilateral agreements on for example DNA data exchange, states and territories should find a common solution. The downside of bilateral agreements is, like the Euroregion example shows, fragmentation. It seems highly impractical that DNA should be exchanged under different requirements between each Australian state and territory.

To establish frameworks enhancing police cooperation, policy makers could take into account existing advanced regional strategies, like for example the special laws relating to NT, WA, SA police cooperation.

### **III. The European situation**

The Benelux countries established some of the earliest European practices of police cooperation, predating the Schengen Agreement. However, European cooperation is not limited to the Schengen states. Indeed, Nordic countries have a longer history of police cooperation than the Benelux and therefore have established some of the most advanced strategies even before EU borders started to vanish (Takala 2004: 131). Also, 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 the EU member states signatories, but also provides a framework of legislation for cross border enforcement between these states. However, as the actual carrying out of cross border operations is still a matter of national laws, the Schengen Agreement must be implemented by EU member states to be applicable. Some member states, such as the UK, have not implemented the agreement entirely. States that are not part of the EU, as in Norway and Iceland, are nevertheless part of the Schengen Agreement. It 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 make cooperation difficult by leading to patchwork, rather than unified, cooperation strategies (Joubert and Bevers 1996: 130-134).

The reason why police cooperation became a much more prominent issue after the introduction of the Schengen Agreement is the abolition of border controls. Before the Schengen regime, a suspected criminal could not enter another country without the risk of being apprehended at the border. After these changes, suspected criminals could enter neighbouring countries with greater ease and were able to avoid detection. By crossing the border suspected criminals entered into another jurisdiction in which it was much harder for the police pursuing them to obtain an arrest warrant, gain permission to continue the pursuit or solicit general assistance of the police from the country they had entered. It follows that to pursue transnational criminals effectively and to fight the threats of criminality and terrorism, the national police must increasingly rely upon efficient cooperation with the police and law enforcement authorities of their neighbouring countries. With only limited experience in cross border police cooperation – countries traditionally relying upon the protection of their territorial borders – problems have inevitably arisen due to different laws as well as divergent cultures, structures and the histories of the various police organisations (Storbeck 1995: 175).

A major reason for the EU level efforts to enhance police cooperation was the fear of an increase in international crime and terrorism with the abolition of borders. Generally, this fear has not proven valid. Despite the growth in internationally related crimes, it is very hard to link the rise in crime levels directly to the abolition of borders in the EU. However, it was agreed at the EU level that strategies for catching criminals crossing borders had to change significantly to compensate the lack of checks and the possibility of apprehension at some of the inner EU borders (Occhipinti 2003: 73).

The strategies of police cooperation that have developed in the EU – both at the EU as well as the bilateral and multilateral level – are numerous. This paper will therefore focus

on some strategies related to border crossing, information exchange and cross-border investigations, that can be compared with strategies applied in Australia.

#### **IV. Comparability of the Australian and the EU system**

The comparison between the Australian and the EU system can be justified in several ways. In response to the jurisdictional sovereignty of the EU member states and the jurisdictional autonomy of 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. It can be concluded that despite not being a conventional federation of states, the EU had to develop mechanisms of cooperative federalism comparable with Australia to overcome jurisdictional differences (French 2006: 11). On this basis, legislative processes and resulting cooperation strategies can be compared between both systems.

Despite the comparability of both entities on the legislative level, the comparability on the executive or intergovernmental level is more unbalanced. Both objects of the comparison differ considerably in relation to their population size and ranges of historical, cultural and organisational diversity.

The European Union 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 face police cooperation, they therefore have to consider cooperating with an array of legal cultures and organisational structures that do not exist in the Australian context.

Firstly, there are civil and common law countries within the EU which need to cooperate with each other. Secondly, 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. Thirdly, while some EU member states

are centralised, others are decentralised which makes it very hard to cooperate as the chain of command is differently organised. (Fijnaut 1994: 600-603) Self-evidently, these features can only be observed to a lesser extent in Australia.

All Australian police organisations were modelled on the British/Irish system. The only legal culture applying is the common law system and no major wars or alliances have torn or formed the country apart from federation. One therefore has to assume that Australia should have less practical problems hindering police cooperation. On the surface this is probably true, but when it comes to the specific carrying out of cross-border investigations even these similar police organisations have not found optimal solutions.

Despite the 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 concerning the need for more unified laws and practices of cross-border investigations are the fields of controlled operations (e.g. controlled deliveries of illegal drugs to uncover organised crime), assumed identities and electronic devices, but can also be seen in many other examples as outlined above. 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* (2003).

Coming back to the question whether harmonisation or regional strategies should be applied to further police cooperation it can be concluded that both systems have similar problems and have applied both types of strategies: harmonisation and regional cooperation. It is therefore possible to compare the relative advantages and disadvantages of the harmonisation strategies in both the Australian and the EU settings.

## **V. Comparison of strategies**

### ***1. The Example of Mutual Recognition***

An example where an Australian strategy in relation to police cooperation is in the process of being harmonised and could help solve problems in the EU is the application of mutual recognition. In 2003, an intergovernmental initiative on mutual recognition of cross-border investigative powers was commenced in Australia through the Standing Committee of Attorney-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers. The purpose of the study and model laws proposed was to explore how laws in one jurisdiction – for example in relation to controlled operations – should be recognised in another to make the evidence gained admissible in the other system. Also, the Joint Working Group (JWG) explored the legal status of ‘covert police officer’, proposing that it should be recognised by other systems through mutual recognition. The previous state of the law only recognised covert officers in the system they were sworn into which inevitably led to problems. When an officer was for example committing offences related to his status of covert agent in another jurisdiction he or she would (in theory) be amenable to prosecution in that other jurisdiction – the immunity conferred in one jurisdiction by an authorisation certificate did not extend across borders. To counteract those problems, many states and territories, like for example Victoria and Queensland have implemented legislation mutually recognising warrants related to controlled operations, assumed identities and electronic devices and most states and territories have agreed to recognise them (see *Surveillance Devices Bill* 2004). South Australia is currently implementing legislation while Tasmania has already adopted it, but not yet brought it into practice.

Mutual recognition of laws is a strategy used in Australia to enhance police cooperation between states and territories. It is a strategy used in relation to judicial cooperation, but not commonly used in police cooperation between EU member states. The mutual recognition of warrants in states and territories could therefore also be applicable in Europe and solve current problems.

However, one could even go further than the uniformly applied cases of mutual recognition. Looking at the cooperation scheme that applies between the NT, WA and

SA, it has to be stated that the mutual recognition measures applying to this specific border region are much broader and more advanced than the specific recognition schemes following the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime (2003). The Cross Border Justice Scheme between SA, WA and NT includes for example the enforcement of fines imposed by courts of summary jurisdictions to eliminate inconsistencies with State bail legislation, the interstate taking of evidence by audio or video link under State and Territory legislation, warrants issued by parole boards and similar bodies to be executed interstate and applications for summary judgement against interstate defendants.<sup>ii</sup> It would therefore be advantageous to harmonise this regional recognition scheme in Australia and also consider similar schemes in the EU.

## ***2. The example of Europol***

To assess whether harmonised laws regulating police cooperation on the EU and the Australian Federal level can be created without losing effective regional policing strategies, the influence of already harmonised strategies on existing practices needs to be analysed. An example of such a strategy is Europol. It was legally established in its current form in 1999 under the 'Europol Convention' (signed by the EU member states on 26 July 1995, came into effect on 1 July 1999). Europol handles criminal intelligence, though it lacks law enforcement powers. A main, but certainly not exclusive, driving force in its establishment was the then German Chancellor Helmut Kohl (Woodward 1993: 7).

At the time of its establishment there was no pressing practical need for the institution, which explains why practitioners have often criticised Europol as being superfluous and why it is still hampered by the reluctance of member states to engage in information sharing (Sheptycki 2002: 43). As Europol was not established by practitioners or designed to cater for their practical needs in relation to police cooperation, it experiences a lower level of acceptance than Interpol (Interview with Europol Official, June 2006). Also, at the time of its establishment, there were already so many systems of information-sharing in place that practitioners considered it more of a burden than a benefit to

participate in yet another information sharing system (Wilzing and Mangelaars 1993: 77-79).

Initially, the Europol Convention limited Europol's remit to 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 competences of Europol (Puntscher Riekman 2008: 23-28). The 2<sup>nd</sup> and 3<sup>rd</sup> Protocols to the Europol Convention (2003) give Europol the competence to participate in joint investigation teams and to obtain wider access to the personal data held in the Europol information system (among other competences) (OJ C 2 of 06.01.2004 and OJ C 312 of 16.12.2002). The Protocols entered into force in 2007.

When analysing how the legal establishment of Europol has influenced EU police cooperation practice, one has to distinguish between the Europol database and the Europol liaison network. In relation to the database, it is remarkable that since 2006 all member states automatically load their data on subjects and investigations into the Europol information system regardless of political security concerns. Twenty years ago such procedures would not have been imaginable because of national sovereignty concerns over cross border cooperation, in particular between such a large number of states (Occhipinti 2003: 61).

Policing intelligence and information, which formerly would have been regarded as highly sensitive and classified data, is now being exchanged through the Europol liaison network. 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 can be perceived as being more successful than the database. Although the data exchange through Europol has

increased significantly, it still does not reach the numbers attained through Interpol (Occhipinti 2003: 61).

It can be concluded that the exchange of information between practitioners is being enhanced through Europol. In relation to the exchange of liaison officers, Europol is simply a continuation of already existing member state practice albeit within an EU governance framework. The fact that information exchange through liaison officers is perceived as being successful, while the establishment of a further database is perceived as a bureaucratic burden, leads to two conclusions in relation to the EU law-making and policy process. First, practitioners need to be involved in the lawmaking process to ensure that only relevant and necessary practices and institutions are created at the EU level. As explored above, this can also be achieved by harmonising existing regional practices which tend to have developed from a practical need at the 'grass roots' operational level. Second, if a practice like the use of liaison officers is already common between member states, it is much easier to promote its adoption at the EU level and institutionalise it. It follows that the harmonisation process could be furthered by integrating practitioner's views and by analysing existing regional strategies that could become EU law.

## **VI. Conclusion and Future Research**

The research presented here forms part of my doctoral research comparing cross border law enforcement strategies in the European Union (EU) and in Australia. The primary aim of the research is to find solutions to police cooperation problems existing in both the Australian and the European systems, firstly by evaluating successful police cooperation strategies that exist in one of the two systems with a view to their possible application in the other system; and secondly by evaluating elements of strategies that exist in both systems with a view to their possible improvement.

The research analyses the practicability of existing legislation applying to cross-border police cooperation in both systems. 'Practicability' means that the strategy established under the existing legislation is the least time consuming, uses the least amount of



resources and requires the least amount of bureaucratic effort while achieving the desired level of success in meeting policing objectives. To find out what police practitioners consider most workable, interviews have been conducted in most of the European and all of the Australian state jurisdictions with officers at both the high, leadership level and the lower functionary level. Further interviews were conducted with practitioners at the EU (Europol) and the Federal (AFP) level.

The interviews focused on the necessity and efficiency of chosen practices of cooperation, and the perception of what constitutes 'best' practice. I was particularly interested in whether or not Federal or EU law and mutual recognition contribute to this best practice and the extent to which the practitioners influence the creation of EU and Federal laws and the push towards mutual recognition. Importantly, do the practitioners feel that their views are taken into account in the establishment of Federal or EU laws?

The thesis will also analyse whether the lawmaking process at the EU and the Australian Federal level is actually beneficial to police cooperation. With a view to a more harmonised cooperation in the future, it has to be determined which approaches on the Union and Federal level actually lead to more harmonised laws and practices. Institutions and practices such as Europol, Joint Investigation Teams (JIT's) and The Police Chief's Taskforce will be taken as examples for EU top-down legal approaches to cooperation and will be assessed as to their effect on the harmonisation of EU police cooperation practice. In Australia, CrimTrac, the AFP, Police Commissioners and Ministers conferences and JIT's will be similarly assessed. Laws relating to police cooperation have to fulfil specific requirements to be accepted and applied by practitioners. To achieve this aim it is crucial that the new laws are practical, necessary and transparent. It will therefore be outlined what law-making processes are most likely to create laws fulfilling those requirements and how future harmonisation should be conducted.

The preliminary findings of my research reveal that the development of regional cooperation practices is valuable in formalising harmonised cooperation strategies in both, Australia and the EU. In Europe, several informal regional practices have been

transformed into harmonised legal agreements, like Schengen which then contributed to the improvement of police cooperation between all EU member states and even non member states. The Treaty of Prüm can similarly be seen as a regional practice that has become a more harmonised practice. This shows the importance of regional cooperation in the harmonisation process. In Australia, this harmonisation process should also be applied as some of the advanced regional strategies, like the SA, WA, NT cooperation, could help the promotion of uniform practices and laws. In doing so, the harmonisation process in Australia would follow the highest common denominator ('best' practice). Regional cooperation and harmonisation are not mutually exclusive strategies. Indeed, regional cooperation can be the first step in the process of harmonisation. Harmonisation should not be a process that impairs or stifles innovation in regional practices, but one that takes these advanced practices into account and benefits from them. If used in that way, both strategies will work together in creating best practices in cross border law enforcement.

Schengen and Prüm are excellent examples for regional cooperation becoming a harmonised framework. When Schengen was incorporated in the EU legal framework, other regional practices, like the BeNeLux cooperation and NeBeDeAGPol were also taken into account. It follows that harmonisation can successfully take place through the 'bottom-up' approach. A requirement though is that regional practices are given more consideration and are evaluated regularly as to their possible integration into the EU or Australian federal level legal framework. A problem that could be observed throughout the research in both Australia and Europe is that on the EU and Australian Federal level, knowledge about the regional practices is very limited. To promote regional strategies, links between the regional and the Union/Federal level need to be strengthened. Cooperation between states and territories and EU member states seems to be only one of many issues. Another cooperation deficit can be observed within the two entities. Practitioners do not always voluntarily promote their advanced regional cooperation strategies and will not bring them to the attention of policy makers. Examples like Schengen and Prüm are most likely exceptions rather than the rule. Finding out what strategies exist and how the two systems could benefit from them is therefore crucial.

This could be achieved through continuing research, reporting requirements and more network activities between different levels of government.

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 are therefore that first, the development of cross border police cooperation laws requires strong participation of practitioners in the policy development; second, that the enactment of model laws will be made easier if they are based on existing practices, and third, that the model laws should be compatible with the different laws and traditions in all jurisdictions concerned. Furthermore, the cross border laws should always allow for special regional practices to remain, consistent with the principle of subsidiarity<sup>iii</sup> to enable the law to cater and respond to the individual situations and distinctive crime problems in particular border regions. If these requirements are being adhered to the development of innovative regional strategies can continue, these strategies will be known to higher levels of governments and a harmonisation process can be considered.

## **Bibliography**

Benelux Treaty on Extradition and Mutual Legal Assistance in Criminal Matters, signed in Brussels, 27 June 1962 and entered into force on 11 December 1967 (available at <http://www.benelux.be/>).

Block, L. 2008. 'Combating Organised Crime in Europe: Practicalities of Police Cooperation'. *Policing* 2(1): 74-80.

Bronitt, S. and B. McSherry. 2005. *Principles of Criminal Law*. Oxford: Oxford University Press.

Council Decision 1999/435/EC of 20 May 1999. Available online: [http://eurlex.europa.eu/LexUriServ/site/en/oj/2000/L\\_239/L\\_23920000922en00010473.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2000/L_239/L_23920000922en00010473.pdf); OJ 2000 L 239 (Official Journal).

Council Act of 28 November 2002 (protocol on joint investigation teams), OJ C 312 of 16.12.2002.

- Council Act of 27 November 2003 (protocol), OJ C 2 of 06.01.2004.
- Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). Available online:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>.
- Cross-Border Justice Act 2008 WA. Available online:  
[http://www.austlii.edu.au/au/legis/wa/num\\_act/c82ja20087o2008255/](http://www.austlii.edu.au/au/legis/wa/num_act/c82ja20087o2008255/).
- Cross-Border Justice Bill 2009 SA. Available online:  
<http://www.austlii.edu.au/au/legis/sa/bill/cjb2009236>.
- Cross-Border Justice Bill 2008 NT. Available online:  
<http://www.austlii.edu.au/au/legis/nt/bill/cjb2008236/>.
- Cross-Border Justice Act and Bill Report NT. Available online:  
[www.austlii.edu.au/au/legis/nt/bill\\_srs/cjb2008236/srs.html](http://www.austlii.edu.au/au/legis/nt/bill_srs/cjb2008236/srs.html).
- Cross-Border Justice Act and Bill Report WA. Available online:  
[www.austlii.edu.au/au/legis/wa/num\\_act/c82ja20087o2008255/](http://www.austlii.edu.au/au/legis/wa/num_act/c82ja20087o2008255/).
- Etter, B. 2001. 'Policing: Reflecting on the Past, Projecting into the Future'. In: Enders, M. and B. Dupont (eds). *Policing the Lucky Country*. Sydney: Hawkins Press.
- Fijnaut, C. 1987. 'The Internationalisation of Criminal Investigation in Western Europe'. In: Fijnaut, C. and R. Hermans (eds). *Police Cooperation in Europe*. Lochem: J.B. van den Brink.
- Fijnaut, C. 1994. 'International Policing in Europe: Present and Future'. *European Law Review* 19(6): 600-618.
- Finnane, M. 1994. *Police and Government: Histories of Policing in Australia*. Oxford: Oxford University Press.
- French, R. 2006. 'Co-Operative Federalism in Australia – An Intellectual Resource for Europe?'. *Amicus Curiae* 65: 9-17.
- Gani, M. 2005. 'Codifying the Criminal Law: Implications for Interpretation'. *Criminal Law Journal* 29: 264-280.
- Gans, J. 2007. 'The Peter Falconio Investigation: Needles, Hay and DNA'. *Current Issues in Criminal Justice* 18: 415-430.

- Joubert, C. and H. Bevers. 1996. *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights*. The Hague: Kluwer Law International.
- Korf, D.J. 2002. 'Dutch Coffee Shops and Trends in Cannabis Use'. *Addictive Behaviour* 27: 851-866.
- Mitsilegas, V. 2009. *EU Criminal Law*. Oxford: Hart Publishing.
- Occhipinti, J. 2003. *The Politics of EU Police Cooperation – Towards a European FBI*. London: Lynne Rienner Publishers.
- Protocol Integrating the Schengen *Aquis* into the Framework of the European Union; for the definition of the Schengen *Aquis* see Decision 1999/435 (OJ L176, 10 July 1999, p1) corrected by Decision 2000/645, OJ L9, 13 January 2001, p 24.
- Prüm Convention, Council Document 10900/05, Brussels, 7 July 2005. Available online: <http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf>.
- Puntscher Riekmann, S. 2008. 'Security, Freedom and Accountability: Europol and Frontex'. In: Guild, E. and F. Geyer (eds). *Security versus Justice? Police and Judicial Cooperation in the European Union*. Aldershot: Ashgate.
- Sheptycki, . 2002. *In Search of Transnational Policing: Towards a Sociology of Global Policing*. Aldershot: Ashgate.
- Spapens, T. 2008. 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion'. In: Guild, E. and F. Geyer (eds). *Security versus Justice? Police and Judicial Cooperation in the European Union*. Aldershot: Ashgate.
- Storbeck, J. 1995. *La Coopération des Polices en Europe*. Les Cahiers de la Sécurité Intérieure. 175-180.
- Surveillance Devices Bill 2004. Available online: <http://wopared.parl.net/library/Pubs/bd/2003-04/04bd147.pdf>.
- Sutton, A. and S. James. 1996. 'Evaluation of Australian Drug Anti-Trafficking Law Enforcement'. *Australasian Centre for Police Research*, Report Series Number 128.
- Takala, H. 2004. 'Nordic Cooperation in Criminal Policy and Crime Prevention'. *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5: 131-142.

Treaty of Enschede. 2005. Available online:

[http://www.zakboekenpolitie.com/actualiteiten/rechtshulp/Duitsland\\_verdrag/politie\\_el\\_duitslandtrb86.pdf](http://www.zakboekenpolitie.com/actualiteiten/rechtshulp/Duitsland_verdrag/politie_el_duitslandtrb86.pdf).

Wilzing, J. and F. Mangelaars. 1993. 'Where does Politics Meet Practice in Establishing Europol?'. *European Journal on Criminal Policy and Research* 1(4): 71-82.

Woodward, R. 1993. 'Establishing Europol: The Story of Europol from its Origins to Present'. *European Journal on Criminal Policy and Research* 1(4): 7-33.

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<sup>ii</sup> See the Attorney General's Department Supplementary Submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into Harmonisation of Legal Systems relating to Trade and Commerce 22 March 2006, public hearing 21 March 2006.

<sup>iii</sup> As defined in Article 5 EC Treaty, the principle of subsidiarity 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.