ONE NATION — ONE LAW?

uniformity and the role of alrc

(Photo courtesy Australian Geographic)

A profusion of gauges. Narrow, standard and broad gauge tracks all converged at Peterborough, north of Adelaide. Here locomotives were rotated onto the appropriate track with a turntable set in a roundhouse. Standardisation has made this a heritage item.

• • • • • • • • • • • • • •

Diversity is not always desirable

For 150 years Australian railways have been fragmented and muddled — handicapped by the inability of State governments to settle on a standard track width. Instead the Australian rail system was a mixture of three gauges: narrow, standard and broad.

In 1917 a person travelling from Brisbane to Perth had to change trains five times. Travelling between Sydney and Melbourne in the late 19th century, a puzzled Mark Twain wondered at having to change trains at the border town of Albury:

> *One or two reasons are given for this curious state of things. One is, that it represents the jealously existing between the colonies ... What the other is, I have forgotten ... It could be but another effort to explain the inexplicable.*

Track gauges had been chosen for factors such as cost (narrow gauges are cheaper), traffic (broad gauge could carry heavier loads) or even the

nationality of the chief engineer (it is said that the Chief Engineer for NSW who had worked on English railways chose standard gauge, while his Victorian counterpart used the broad gauge of his native Ireland). These differences added hours of delay and massive cost increases to interstate rail transport.

This year the task of converting 830 km of railway track between Melbourne and Adelaide from broad to standard gauge — a shift of 165mm — was completed. For the first time Australia's mainland state capitals are connected by a standard gauge railway.

In 1995, however, similar disparities in Australia's intangible legal infrastructure remain unresolved. For no apparent reason other than historical accident the States of Australia have elected to treat each other as foreign countries in many areas including defamation, rules of evidence, court procedures, criminal law and the laws governing commercial transactions. Complications, inefficiencies, duplications and injustices are the result.

The absurdity is obvious. State borders are rarely of any real relevance in legal disputes. Sir Owen Dixon, former Chief Justice of the High Court and one of Australia's most respected jurists called for uniformity of laws in 1957 when he was proposing the establishment of a national law reform body:

> *Is it not possible to place law reform on an Australia-wide basis?... In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia. Local conditions have nothing to do with it. Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia.*

As social mobility increases, businesses grow to become national and international, and advances in communications technology make distance irrelevant, the need for uniform and harmonised law becomes more pressing.

Although there is a consensus as to the desirability of uniform laws, in practice they seem to be very difficult to achieve. It is not easy to reach agreement on the form of the laws and unhappiness is often expressed at having to surrender a degree of sovereignty in arriving at national legislation.

A dull blanket of uniformity?

A caution against adopting 'uniformity for uniformity's sake' was made by Justice Michael Kirby in 1977 when he was Chairman of the ALRC. Writing in the University of Sydney Law Review, he argued that whenever uniform provisions are contemplated, a case should be made out for disturbing the constitutional balance of powers. While saying that in some areas reason, efficacy and economy made uniform laws desirable he suggested that law reform might suffer if it was the rule:

> *... a dull blanket of uniformity in a large scattered country such as Australia would pose a threat to experimentation and could actually hamper the cause of law reform. Who can doubt that progress has been made in this country by the imaginative experiments advanced in one jurisdiction, subsequently (often with few modifications) finding their way into other states.*

Other critics say that uniform law erodes the legislative sovereignty of the States, reduces the capacity of law to adapt to local conditions and can result in the adoption of 'lowest common denominator' legislation.

Of course proposals to achieve uniform laws must be justified like any other proposals for change. In many cases considerations of equality and efficiency make this a simple task. The articles contained in this issue of *Reform* provide many examples.

The methods used to achieve uniform, or harmonised, law can accommodate concerns about the erosion of State sovereignty and lack of flexibility. As for concerns about lowest common denominator legislation, lack of uniformity leaves room for reactionary and regressive laws along with Justice Kirby's 'imaginative experiments'. The treatment of indigenous Australians by State governments of the states provides a shameful example of this.

Role of the ALRC

As the national law reform body the question of uniform laws is intrinsic to the work of the Australian Law Reform Commission (ALRC). Indeed one of the functions, set out in s 6(d) the *Law Reform Commission Act 1973* (Cth) is 'to consider proposals for uniformity between laws of

the Territories and laws of the States'. The achievement of uniform or harmonised law is also directly relevant to the other functions of the ALRC in simplifying, modernising and improving the law.

This sentiment was expressed at the establishment of the ALRC. When Kep Enderby, the Minister for Secondary Industry, made the second reading speech for the *Law Reform Commission Bill* in the House of Representatives in December 1973 he placed strong emphasis on the need for uniformity:

> *The Bill is also an expression of the Government's view that, except where local circumstances justify different treatment, people wherever they live in Australia should be subject to the same law. For this reason many questions of law reform must be dealt with on a national basis. ... There is no logical or necessary reason why these laws should vary from one place to another in Australia as they do or why a person should be subject to different rules of law simply because he crosses a State or Territory boundary. The situation is offensive in its absurdity.*

So, ever since its inception the ALRC has been concerned to encourage uniformity or at least ensure that this country's laws work in harmony. This is done in a number of ways.

Model proposals

Many of the areas examined by the ALRC in its references have a relevance both to Federal and State law. The research and consultation undertaken by the ALRC apply just as much to State laws as it does to the Commonwealth law that is the subject of the references.

As a rule ALRC recommendations are formulated with an view to their national application. In this way it is hoped that they might form a model to be adopted by the States.

The Evidence Acts enacted by both New South Wales and the Commonwealth are a good example of this process. These Acts are, on the whole, identical and were developed in conjunction based on work done by the ALRC.

These reforms have both improved a complicated and archaic area of law but they have also led to consistency between Australia's two largest jurisdictions. It is hoped that other States will follow the lead of New South Wales.

Cooperative efforts

All states and territories have their own law reform commissions except Victoria where this function is shared between a parliamentary committee and a council advising the Attorney-General. In many cases work done by one commission is applicable nationally. It makes sense to cooperate and ensure that the work of law reformers is not duplicated.

Every two years since the late 1970's the Australasian Law Reform Agencies Conference (ALRAC) has taken place. This is a valuable opportunity to compare notes and see what each other is doing. It is also an ideal place to consider cooperative uniform law reform projects.

At the last ALRAC in September this year the Uniform Succession project was launched to undertake uniform reform of the laws governing wills, the administration of estates and the like. Queensland has taken the lead in this project and is providing the Secretariat. Trusts law and real property law have been identified as other candidates in the near future.

In addition, the heads of Australian States and Territory law reform bodies agreed to meet together regularly to provide support and advice to the SCAG on its law reform agends.

Coordinating/clearinghouse role of the ALRC

As the Federal law reform body the ALRC is in a perfect position to facilitate the exchange of information between State bodies and to assist them in coordinating their efforts. To date this potential has not been fully realised and the role has been fulfilled in a somewhat ad hoc manner.

The Australia Foundation for Law Reform is a new initiative which aims to act as a forum for discussion of law reform issues. Not just between law reform bodies but involving all those with an interest in law reform. The ALRC hopes that the Foundation will lead to a more cooperative approach to tackling the ongoing task of law reform and building the debate to expose as early as possible areas of Australian law ripe for reform.

The ALRC also acts as a clearing house for material pertaining to law and law reform. There is an extensive library which is accessible by appoint ment. Through this journal *Reform,* the ALRC seeks to disseminate information on developments in law reform.

Implications of uniformity

As David Kinley points out in a later article, the concept of uniform laws forces a re-examination of the Constitution and the concept of federalism itself. When a State government agrees to adopt a law that is national in scope it is, to a greater or lesser degree, accepting a diminution in its own legislative power. Many question the role of the States themselves, as Bob Hawke did in his 1979 Boyer lectures, *The Resolution of Conflict*:

> *... the reality is that overwhelmingly the economic influences determining the welfare of the people of Australia are either national in their dimensions or international in their origins and only capable of a sensible response by a national government equipped with appropriate constitutional authority. That authority does not exist. ... The perpetuation of this anachronistic lunacy is hurting Australians every day of the week.*

Many of those calling for a republic also call for a re-thinking of the constitutional basis of Australia. In any case the expanding area of federal legislative power, supported by the High Court in decisions such as the *Franklin Dam* case, means that State Governments are feeling more and more encroached upon.

This is a reflection of the fact that many issues were unforeseeable at the time the Constitution was written. Would the framers have left defamation law to the States if they had known that the electronic media would develop the ability to instantaneously broadcast defamatory material across the continent? Would they have taken a different approach to the question of human rights? — at the time thought of as a domestic matter, now an issue of global concern and the subject of international treaties.

It may be that the steps towards uniform laws discussed in this issue of *Reform* are the harbingers of much greater and more fundamental changes.

Aren't Australians more likely now to believe that the high quality of their 100 year old democracy rests on a shared ethos of values crystallised over that time. And, that the time has arrived, as happens with the colours of the proudest military unit, for a laying up of the exhausted fabric of inherited colonial ad hocery. Mother's falterings at home behind a Westmininster facade of unity contrasts starkly with the charge of the green and gold. Such a people demand one uniform law.

Alan Rose

In 1937 passengers on the Trans-Australia Railway changed from standard to broad gauge trains at Port Pirie. (Photo courtesy Australian National)