UNIFORM LEGISLATION, THE CONSTITUTION & FEDERALISM

an uneasy co-existence

David Kinley discusses the effects that uniform legislation can have on the constitutional and federal divisions of power.

David Kinley is a senior lecturer in law at ANU, currently on secondment with the ALRC as a legal specialist in human rights and constitutional law.

• • • • • • • • • • • • •

> *A federal constitution is, as compared with a unitary constitution, a weak form of government. ... A true federal government is based on the division of powers. It means a constant effort of statesmanship to balance one state of the confederacy against another.*

AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, 1915, p lxxvii)

> *[T]he federal system has outlived its usefulness ... the conditions which made federation a necessary stage in the evolution of Australia's nationhood have largely passed away, and ... the retention of the system now operates only as an obstacle to effective government and to a further advance. The problems which are today of greatest urgency are those which can best be solved either by a unified government or by a central government possessed of vastly expanded powers. It is time to recognise that the federation should be replaced by a unified state.*

G Greenwood, *The Future of Australian Federalism* (2nd edn, 1976, p xii)

• • • • • • • • • • • • •

The enactment of the Constitution Act in 1900 was a recognition of the benefits (some might say necessity) of the union of otherwise separate colonies. The seeds of independent nationhood sown by the framers had the immediate effect of uniting the six colonies in respect of key common concerns — the perceived benefits of free trade within Australia, the need to maintain common defence and immigration policies, and the desire to obtain substantial independence from Great Britain.

However, neither the question of federal/state responsibilities nor the matter of how and when to establish uniform legislation was definitively settled by the apparent demarcation of legislative powers granted to the Commonwealth under the Constitution Act. Despite this Act being the quintessential example of a uniform statute, it could not do this much.

The basis for most current law which applies equally in every state and territory is, of course, Commonwealth legislation — that is, legislation enacted under authority of the exclusive legislative powers expressly granted to the Commonwealth under the Constitution, or under authority of those heads of power it shares with the States. In respect of the latter the provisions of Commonwealth law are paramount (by way of s 109) and therefore establish effective uniformity.

In any federal system there will always be a certain level of this superior legislation. However, not all uniform legislation comes about through the Commonwealth Parliament acting independently of the States' legislatures. Uniform legislation can also result from agreement and co-operation between all Australian legislatures to enact identical legislation or to adopt model legislation developed in one jurisdiction.

The role of intergovernmental forums

A factor that has contributed to the development of uniform laws has been the many institutionalised forums in which such matters can be aired and through which intergovernmental agreements can be reached.

Today there are numerous examples of imminent or operational uniform legislation, including in the areas of: cross-border trade, credit, corporations

law, competition policy and legislation, evidence, environmental regulation, road transport. All of these have been agreed upon in such inter-governmental forums as the long established (since 1931) Standing Committee of Attorneys-General (SCAG) or the comparatively recently established (in 1992) Council of the Australian Governments (COAG), to name two of the most prominent bodies.

There are in fact currently 21 Commonwealth-State Ministerial Councils dealing with areas such as: the administration of justice; status of women; Aboriginal and Torres Strait Islanders; Education, employment and training; community services; immigration and multi-cultural affairs; consumer affairs; and, environmental protection. The development of uniform legislative initiatives has been greatly facilitated by the establishment of COAG (which succeeded the Special Premiers' Conferences) as the peak body for Ministerial Councils. It is serviced by a Commonwealth-State relations secretariat operating out of the Prime Minister's Office.[1]

It is clear that the instances of uniform legislation are set to increase dramatically over the coming years as is evidenced by the number and range of current projects, some of which have just begun whilst others are nearing completion. For example in relation to, health services; defamation; uniform trade measurement; occupational health and safety standards; building standards, and a model criminal code.[2]

Role of State legislatures

The means by which such uniform legislation comes into being raises constitutional questions that travel right to the heart of the Australian federal structure.

These agreements are not reached between the legislatures of the States and Territories, but between their respective governments. It is argued, therefore, that collusion between these governments in respect of specific pieces of legislation amounts to a usurpation of the legislative authority vested in each separate Australian legislature.

The legislative proposals that result from these intergovernmental agreements are presented to the individual State legislatures with, in addition to just the backing of the relevant government (which, is itself often enough to ensure its passage), the support of all Australian governments. The pressure placed on any single legislature to alter or reject the proposal is increased accordingly.

Of course the relevant Parliament may choose to act unilaterally in spite of such pressure. But, when it is sympathetic to the overall purpose of the uniform legislation, but seeks to differ in some way peculiar to the circumstances of that particular jurisdiction, or where it detects a failing in terms of purpose or drafting, it faces a dilemma. Either it accepts the proposal as it stands, 'warts and all', or it jeopardises the whole initiative by insisting on unilateral alteration.

It may be argued that this is the price to be paid for the rationalisation and harmonisation of law in areas that might otherwise be hostage to obfuscation, inequity and inefficiency. The Constitution does not preclude the development of our federal structure in this way. Indeed, some might argue that the increase in instances of uniform legislation in recent times is merely symptomatic of the maturation of Australia's federal system in its response to pressures from internal as well as external forces.

Economic efficiency as well as considerations of equity in treatment of individuals and organisations between jurisdictions in Australia are clearly strong reasons for specific legislative regimes to be rationalised. The examples of uniform legislation cited above bear this out.

International pressure for uniform laws

Of equal importance, however, is the influence of international pressure for uniformity of certain laws within the boundaries of any nation state. Many of the instances of uniform legislation cited above reflect the impact of international efforts to bring about universal legal standards — for example, in the field of environmental law (related environmental treaties), criminal and evidence laws (guarantees as to liberty of the person and a fair trial contained in the ICCPR), and, trade related laws (GATT and the multitude of bi-lateral trade agreements to which Australia is party).

Given the current prominence accorded to international covenants and conventions in Australian legal thought, there can be no doubt that the existence of international standards on any given legal issue will increasingly influence the instigation, as well as the consequent deliberations, of intergovernmental meetings and other forums concerning the development of Australia-wide initiatives establishing uniform or harmonised laws.

Involving parliaments

Of the three constitutional organs of government in each Australian jurisdiction, it would appear that the one that may stand to lose in the face of the

spreading instance of uniform legislation is Parliament. Yet, it must be said that the responses of Australian Parliaments and Assemblies — or more accurately, their members, committees and secretariats — have been somewhat mooted.

This might be explained by the fact that the benefits of uniform legislation are appreciated and understood, or by the inevitability of the fact that if it be the wish of governments to introduce such legislation then the effective control that each government has over the legislature in which it sits will ensure that wish comes true.

Such sentiments have not stopped Western Australia establishing (in 1993) Australia's first Standing Committee on Uniform Legislation Intergovernmental Agreements. Due largely to the galvanising efforts of that Committee, an appropriately joint initiative — comprising a working party of the Chairs of all scrutiny of bills and regulations committees in Australia — has produced a discussion paper discussing the problems that uniform legislation pose for those in Parliaments whose responsibility it is to scrutinise legislative proposals. This paper has been published separately in each jurisdiction by the relevant committee or committees.

In the words of the Commonwealth version of the discussion paper, the problem stems from the fact that intergovernmental agreements are drawn up 'in a manner that avoids recourse to Parliament'. 'This failure to bring such matters before Parliament', it continues, 'means that the public exposure and discussion initiated by it does not occur. Accordingly, there are very limited opportunities to improve the legislation'.[3]

To address this problem, the working party makes a number of suggestions and recommendations. The most important of which are: that exposure drafts of proposed uniform legislation be tabled in the Parliament of each jurisdiction; that Heads of Government agree not to enter a formal intergovernmental agreement for uniform legislation until such an exposure draft has been so tabled; and, amendments to proposed or enacted uniform legislation passed by the 'host Parliament' (that is, the legislature responsible for the enactment and maintenance of a 'template' statute to be followed by all other jurisdictions), be published in the Government Gazettes of all the other jurisdictions.[4]

Alteration of all the committees' terms of reference to provide explicitly for scrutiny of uniform legislative proposals was also recommended by the working party.

If adopted, these recommendations would, it is hoped, bring some meaningful degree of individual parliamentary scrutiny to bear on uniform legislation proposals. The danger is, of course, that such scrutiny will be, by definition, multiplied by the number of committees involved, thereby creating a great potential for inconsistency in outcome.

Conclusion

These thoroughly attainable recommendations are not likely to be sufficient truly to redress any imbalance of power that the institution of uniform legislation lends to governments at the expense of their respective parliaments. That battle is being waged on many fronts; uniform legislation is, in reality, a minor skirmish.

What, however, can be said of the concern shown by such bodies as the scrutiny committees in unison, is that the focus on the constitutional intricacies of responsible government rather than on that other great pillar upon which our constitution stands — federalism — is a telling indication that despite appearances to the contrary, whatever problems are posed by uniform legislation they are not (at least not yet) perceived to be ones that strike at the heart of Commonwealth-State relations. Indeed, the very nature of the enterprise of legislative uniformity indicates quite the reverse.

Still, one cannot help wondering whether we will reach a stage where the prevalence of uniform legislation due to its efficiency, fairness and convenience, might have become so overwhelming as to cast serious doubt on the sense of maintaining a federal structure such as we have at present. Perhaps such a question will be conspicuously placed on the agenda of the bi-centenary of the constitution — that is, if it has not been raised and answered before then!

Endnotes

1. For an overview of the roles, both current and future, of ministerial councils see A Hede, 'Reforming the Policy Role of Inter-Governmental Ministerial Councils' in A Hede & S Prasser (eds) *Policy Making in Volatile Times* (1993), 193.
2. See further, the list compiled in a Discussion Paper published jointly by the Senate Standing Committees on Regulations and Ordinances, and for the Scrutiny of Bills, entitled, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* (July 1995), p 17–20.
3. *op cit*, p 21, para 2.14.
4. *op cit* p 36, para 6.2.