

Review of the uniform Evidence Act

An article by the Australian Law Reform Commission

Introduction¹

In July 2004, the Commonwealth Attorney-General asked the Australian Law Reform Commission (ALRC) to review the operation of the *Evidence Act 1995* (Cth). The New South Wales Law Reform Commission (NSWLRC) received a similar reference from the Attorney General of NSW to review the operation of the *Evidence Act 1995* (NSW), which was also enacted in response to the ALRC's 1987 Report No 38 on the law of evidence.

In jurisdictions currently outside the uniform Evidence Act (UEA) regime, the Victorian Law Reform Commission (VLRC) has been asked to review the *Evidence Act 1958* (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the UEA. Most recently, the Queensland Law Reform Commission has been asked to undertake a similar inquiry.

To promote the goal of greater harmonisation of the laws of evidence in Australia, the ALRC is conducting its review in conjunction with the NSWLRC and the VLRC with a view to producing joint recommendations. In addition, an ongoing consultative relationship has been established

with the Tasmania Law Reform Institute and the Queensland Law Reform Commission.

A primary objective of the current ALRC review, commenced on the eve of the tenth anniversary of the *Evidence Act 1995* (Cth), is to capitalise on a decade of operation of the UEA regime. It is hoped that the identification of pressure points that have arisen, and addressing aspects of the Act which require fine-tuning, will facilitate the UEA's take-up in all Australian states and territories, including the Northern Territory.

While the passage of the *Evidence Act 1995* (Cth) had the effect of achieving uniformity in all federal courts, in non-UEA jurisdictions different evidence laws operate in the state and territory courts. This is confusing and costly to litigants, and requires legal practitioners to master two different evidence regimes. Clearly this is an undesirable state of affairs.

ALRC Issues Paper 28

In December 2004, the ALRC released IP 28. The Issues Paper identifies the main issues relevant to the review, and provides background

information and 100 questions designed to encourage informed public participation.

The Issues Paper follows the organisation and structure of the UEA. Topics addressed include:

- * Examination and cross-examination of witnesses;
- * Documentary evidence;
- * The hearsay rule and its exceptions;
- * The opinion rule and its exceptions;
- * Admissions;
- * Tendency and coincidence evidence;
- * The credibility rule and its exceptions;
- * Identification evidence;
- * Privilege;
- * Discretions to exclude evidence;
- * Judicial notice;
- * Directions to the jury; and
- * Matters outside the uniform Evidence Acts.

To maximise the opportunity for interested stakeholders to participate in the review, the ALRC has held consultations in all states, the ACT and the Northern Territory. The consultations and submissions on IP 28 will form the foundation of a joint Discussion Paper to be released in mid-2005, which will contain proposals for reform.

Emerging Themes

From the consultations conducted and the submissions received to date, some emerging themes can be identified. The change of evidence regimes occasioned by the introduction of the *Evidence Act 1995* (Cth) and (NSW) resulted in judicial officers and legal practitioners in jurisdictions covered by the UEA having to master the UEA provisions and, in some areas, adapt to significant modifications of common law evidentiary principles. After a period of adjustment, it is clear that the UEA has 'bedded in', and the overwhelming view is that the UEA regime is working well.

Further, the decade of operation of

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feature

the UEA in NSW, the ACT and in the federal courts has reduced the obstacles to introduction facing those jurisdictions considering adopting the UEA. Tasmania joined the UEA regime with the enactment of the *Evidence Act 2001* (Tas).²

The Commission's consultations in Tasmania indicated clearly that judicial interpretation of UEA provisions, coupled with the publication of a number of excellent evidence texts and annotations of the UEA, facilitated the implementation of the UEA in that state. The Tasmanian experience should be reassuring to judicial officers and legal practitioners in the Northern Territory who feel concern at the possibility of disruption or uncertainty occasioned by a move to new evidence laws based on the UEA.

For those familiar with the UEA provisions, some specific themes relating to the operation of the legislation can be identified:

- * Judicial officers are using the discretionary provisions in ss 135-137 to exclude or limit the use of evidence in appropriate circumstances.
- * There is widespread support for the application of the UEA privilege provisions in pre-trial contexts.
- * If a recommendation is made to amend the *Evidence Act 1995* (Cth) to include privilege in relation to professional confidential relationships, the preferred view appears to be that the privilege should be qualified rather than absolute.
- * There are divergent views as to whether offence specific provisions, such as those dealing with cross-examination of a complainant in a sexual assault case, should be in separate federal, state and territory legislation, or in the UEA.
- * There is a general view that s 60 (which provides that the hearsay rule does not apply to evidence of a previous representation admitted for a non-hearsay purpose), s 98 (dealing with the admissibility of coincidence evidence) and s 102 (the

statement of the credibility rule) require amendment, however views differ as to the form that any amendment should take.

Another issue, which is of particular relevance to the Northern Territory, concerns the application of evidence laws to Aboriginal and Torres Strait Islander witnesses. For example, it has been suggested that, as recommended by the ALRC in its 1986 report *The Recognition of Aboriginal Customary Laws* (ALRC 31), the admissions of evidence given by a person as to a matter of Aboriginal customary laws or traditions is not excluded by the hearsay or opinion evidence rules if the person giving the evidence has special knowledge or experience of the customary laws of the community in relation to that matter.

Conclusion

The joint Discussion Paper to be released in mid-2005 will include draft proposals for change to the UEA. The

ALRC, together with the VLRC and NSWLRC, will be undertaking further consultations to gather feedback on the draft proposals. Submissions are also invited in response to the Discussion Paper. A Final Report will be completed in December 2005. The Report's recommendations, when implemented, will improve the UEA, and hopefully encourage non-UEA jurisdictions to join the UEA scheme.

To register an interest in the inquiry and receive a copy of the Discussion Paper upon its release, please email evidence@alrc.gov.au or register directly at the ALRC website at www.alrc.gov.au.^①

Endnotes

- ¹ A modified version of this article is to appear in a forthcoming edition of the NSW Bar News.
- ² Norfolk Island has also recently adopted the UEA: Evidence Act 2004 (Norfolk Is).

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