

Momentum growing for national evidence law

Almost 20 years since the Australian Law Reform Commission (ALRC) first warned that Australia's jumble of evidence laws needed urgent overhaul, momentum is finally gathering to finish the job, with the ALRC joining with law reformers from almost every state and territory in an unprecedented review of evidence legislation.

"Evidence law provides the basic operating system that underlies all civil and criminal court proceedings in Australia," ALRC President Prof David Weisbrot said.

"But with a multiplicity of evidence laws operating in Australia, it is unnecessarily complex for lawyers and needlessly costly for litigants and business."

The ALRC and the NSW and Victorian law reform commissions have released a major Discussion Paper *Review of the Uniform Evidence Acts* (DP 69).

"The ALRC first proposed a scheme for uniform evidence legislation in the 1980s. It has been implemented in the federal courts, and those in New South Wales, the ACT, Tasmania and Norfolk Island, but each of the other states and territories chose to maintain its own evidence laws.

"This means lawyers in four states and the Northern Territory must be skilled in at least two different evidence regimes, depending upon whether they are appearing in a federal court or a state court on a given day. Similarly, business must contend with many different rules governing important matters such as client legal privilege and the storage and maintenance of corporate records.

"For the first time in almost 20 years, there's now real hope that Australia's evidence laws will be harmonised."

Professor Weisbrot said that extensive consultations with judges, magistrates, lawyers and community groups had shown support for greater harmonisation of evidence laws.

"They've told us that one of the benefits of a single, coherent evidence code is its accessibility - it's all in one place so there's no need to search law libraries to find the common law rules.

"We now have 10 years' experience in some jurisdictions with the uniform Evidence Acts. In consultations and submissions so far we've found strong agreement that, while some finetuning is required, the Acts generally work well and no dramatic changes are needed."

The ALRC Commissioner in charge of the inquiry, Assoc Prof Les McCrimmon, said DP 69 makes proposals for reform in such key issues as:

- client legal privilege (or 'legal professional privilege', as it is known in common law jurisdictions);
- the 'hearsay rule' and its many exceptions;
- exceptions for oral evidence of Aboriginal and Torres Strait Islander traditional laws and customs; and
- the impact of evidence laws on vulnerable witnesses, including victims of sexual assault.

Prof McCrimmon said the Discussion Paper proposes extending client legal privilege to include pre-trial communications between lawyers and their clients.

"The legal community is telling us client legal privilege needs clarification. Our consultations have revealed strong support for consistency between pre-trial and trial procedures," he said.

Prof McCrimmon said the inquiry is also considering whether the Commonwealth legislation should be amended to extend a qualified privilege to other professional relationships where there is an expectation of confidentiality; for example, communications between a doctor and a patient, or between a journalist and a source.

"The privilege in these instances would not be absolute - ultimately it

would be up to a judge to decide whether the evidence is of such importance to the case that it outweighs the harm of disclosure."

Prof McCrimmon said the 'hearsay rule' was a notoriously vexed area in most common law countries.

"There are so many exceptions to the general rule about whether hearsay evidence can be admitted, and for what purposes it can be used. The proposals we're putting up for discussion are aimed at addressing some of that complexity and trying to iron out some of the most common problems."

DP 69 also calls for feedback on the admissibility of hearsay and opinion evidence concerning Aboriginal and Torres Strait Islander traditional law and custom.

"Evidence about customs and usages transmitted across generations through an oral tradition can be very difficult to accommodate in our court system, because it often runs afoul of the hearsay rule.

"This is a particular problem in native title cases. Evidence about continuous ties to the land, land use and customs is often only available through oral histories," Prof McCrimmon said.

"Similar problems arise in other areas as well, such as where evidence relating to traditional marriage, adoption or inheritance may be relevant."

Prof McCrimmon said the Discussion Paper also contains proposals aimed at providing greater protection to vulnerable witnesses, by giving courts more clear authority to prevent intimidating, offensive, or humiliating questions in cross-examination.

The participating law reform commissions are consulting widely with relevant stakeholders, and are

News from the NTWLA cont...

was held in the Court House and attended by a good representative number of women lawyers in Alice Springs. Dr Nanette Rogers spoke eloquently and passionately about her early days as a legal practitioner in Sydney. Thanks must go again to the lawyers at Povey Stirk for their support of this event, especially Helen Nicholas, and to Magistrate Little for making this event possible. Lastly, I would like to thank the NTWLA Patron, Justice Sally Thomas, for her very generous support of the event.

July 2005

If you have received a copy of the Australian Women Lawyers'

newsletter for July 2005, you will be aware that a vacancy will arise on the High Court Bench later this year. The President of AWL, Noor Blumer, met recently with the Federal Attorney-General, Phillip Ruddock, to discuss suitable candidates. It is now the practice of the Attorney-General to have an in-confidence meeting with the AWL President to receive a list of names of outstanding women lawyers proposed by each state and territory women lawyers association for consideration of a new appointment to the High Court. Ms Blumer reports that Mr Ruddock welcomed and valued the input from AWL.

AWL is undertaking the compiling of the gender appearance statistics gathered from each jurisdiction. The surveys are almost complete and the early figures show that women lawyers across the board are still not achieving equity in the number, quality and financial worth of briefs. The adoption of the Equal Opportunity Briefing Policy by government briefing agencies, and major law firms such as Mallesons Stephens Jacques, Clayton Utz and Blake Dawson Waldron will go some way to address the imbalance. Firms which have adopted the policy recently, have also agreed to include a reporting requirement.

The AWL Board is continuing with its preparations for the inaugural AWL national conference. Discussions are taking place with a consultancy agency and I can report that the planned venue is Sydney. The conference is likely to be held in the middle of next year.

The Darwin Patron's Drinks held on 21 July was a fantastic success. Raelene Webb QC was the guest speaker (a copy of Raelene's speech is on page 8). Raelene spoke entertainingly of her life and times studying law and her early formative years as a practitioner. She also shared some revealing anecdotes of her times as a barrister representing the Northern Territory. She spoke eloquently on the need for integrity, courage and a sense of humour in the practice of law. Raelene very generously provided me with an electronic copy of her speech.

I have been invited to attend "Sundowner Drinks" at the Charles Darwin University by the Law Students' Association on 18 August 2005. I look forward to meeting the women undergraduates on that occasion.

Sir Curtis Keeble wrote to me this month. Sir Curtis is the father of Jane Mahoney and he supports the Jane Mahoney Collection annually with a generous donation. The committee have decided to hold drinks to celebrate recent additions to the Jane Mahoney Collection on Friday, 26 August 2005 in the Supreme Court Library.

The Annual General Meeting will be held on Friday 9 September 2005 in the ground floor conference room of the Department of Justice, 45 Mitchell Street, Darwin. All women who have a law degree or who are studying towards obtaining a degree in law are eligible to join NTWLA and nominate as a committee member in the forthcoming AGM.①

Momentum growing for national evidence law cont...

keen to hear from anyone with an interest in the matters under review.

Submissions - anything from handwritten notes and emailed dot-points to detailed legal commentary - will be accepted until mid-September. These will feed into the final report and recommendations, which must be provided to the Attorney-General in early December 2005.

DP 69 is free and online at www.austlii.edu.au/au/other/alrc/publications/dp/69/ or may be obtained from the ALRC.

Please note: The Discussion Paper contains questions and proposals for community consultation and comment - these are NOT final recommendations for reform. ①



PRACTITIONER

News & views from the LSNT Secretariat

The Practitioner is the Law Society's weekly email newsletter, which provides members with an update on what the Law Society has been doing. There is news, submissions, calls for comments and details of upcoming functions and events.

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