Australian Law Reform Commission review of the Evidence Act 1995

By Les McCrimmon[1]

Introduction

In July 2004, the Commonwealth attorney-general asked the Australian Law Reform Commission to review the operation of the *Evidence Act 1995* (Cth). The New South Wales Law Reform Commission received a similar reference from the attorney general of NSW to review the operation of the *Evidence Act 1995* (NSW). The Victorian Law Reform Commission has also 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 Uniform Evidence Act (UEA) into Victoria. To promote the UEA 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. An ongoing consultative relationship has also been established with the Tasmania Law Reform Institute and the Queensland Law Reform Commission.

The *Evidence Act 1995* (Cth) and (NSW) were enacted in 1995 in response to the ALRC's 1987 report no. 38 on the law of evidence. With the enactment of the *Evidence Act 2001* (Tas), Tasmania joined the UEA regime, and most recently Norfolk Island passed the *Evidence Act 2004* (Norfolk Is).

The recommendations of the *Evidence report* no. 38 and the provisions of the enacted Acts have been considered by the following bodies, all of which recommended enactment:

- 1988 - The New South Wales Law Reform Commission – *Report 56 on evidence*
- 1994 - The Senate Standing Committee on Legal and Constitutional Affairs – *Final report on Evidence Bill*
- 1996 - Law Reform Commissioner of Tasmania – *Report on the Uniform Evidence Act and its introduction to Tasmania*, No 74
- 1996 - Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements (Western Australia Legislative Assembly), *Evidence law*, 18th report of the 34th parliament
- 1996 - The Victorian Parliament Scrutiny of Acts and Regulations Committee – *Review of the Evidence Act 1958*
- 1999 - Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia final report*, Project 92 (1999), Ch 20
- 2003 - The Victorian Bar Council and the Law Institute of Victoria

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. While the passage of the *Evidence Act 1995* (Cth) had the effect of achieving uniformity in all federal courts, in non-UEA jurisdictions a different evidence law operates 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 for 100 questions designed to encourage informed public participation. To maximise the opportunity for interested stakeholders to participate in the review, the ALRC will hold consultations in all states, the ACT and the Northern Territory. Concurrently, the NSWLRC and the VLRC will be conducting their own consultations, often with the participation of the ALRC. 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.

The issues paper follows the organisation and structure of the UEA, with the inclusion of a chapter addressing areas currently outside the ambit 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 Act.

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. While judicial officers and legal

practitioners in UEA jurisdictions have an adequate knowledge of the legislative provisions, more needs to be done to familiarise those using the UEA with the policy underpinning the Act.

Further, the decade of operation of the UEA in NSW, the ACT and in the federal courts has reduced the obstacles to introduction facing those jurisdictions considering adopting the UEA. For example, 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.

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 ss135-137 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 s60 (which provides that the hearsay rule does not apply to evidence of a previous representation admitted for a non-hearsay purpose), s98 (dealing with the admissibility of coincidence evidence) and s102 (the statement of the credibility rule) require amendment, however views differ as to the form that any amendment should take.

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 'follow the path to a uniform evidence law'.[2]

1 Les McCrimmon is a commissioner of the Australian Law Reform Commission

2 S Odgers, *Uniform evidence law* (6th ed, 2004), [1.1.10].