

Review of the Uniform Evidence Acts: Implications for Expert Evidence in Health Law

By

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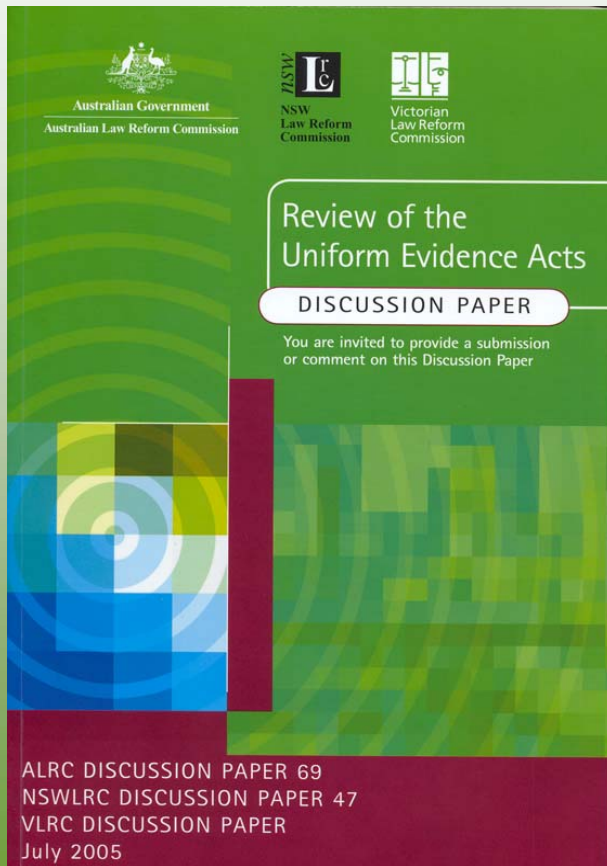
Review of the Uniform Evidence Acts

Timeline

- Issues Paper 28 released in December 2004
- Discussion Paper 69 released first week of July 2005
- Final Report to AG (Cth) 5 December 2005

Law Reform Bodies Involved

- ALRC, NSWLRC and VLRC involved in writing DP 69 and the final Report
- TasLRI, QLRC, NTLRC and WALRC consulted on issues relating to the Review



Primary Areas of Concern

- The factual basis of expert opinion evidence
 - The scope of *Makita (Australia) P/L v Sprowles (2001) 52 NSWLR 705*
 - The ‘asserted factual basis approach’ and the ‘true factual basis approach’ in *ASIC v Rich* [2005] NSWCA 152
- The impact of s 60
- The role of lawyers in the preparation of expert reports

The factual basis of expert opinion evidence

- Issue provoked much interest and comment in submissions and consultations.
- Sometimes difficult to distinguish concerns relating to the law of evidence from procedural concerns about the way in which courts control the adducing of expert opinion evidence.
- It is the preliminary view of the Commissions as expressed in DP 69 is that s 79 does not require that the facts relied upon by an expert be proved or that it be demonstrated that they will be proved (see [8.79]).

The factual basis of expert opinion evidence

- However, if important facts are not going to be established by admissible evidence independent of the expert's opinion, the UEA provides the following remedies:
 - The evidence may be limited under s 136 if there is a danger that a particular use of the evidence (eg for a hearsay purpose – s 60) might be unfairly prejudicial to a party or be misleading or confusing;
 - The failure to prove independently the factual basis may be extensive enough to require exclusion under s 135;
 - In extreme cases, the evidence may be excluded under s 55 as not meeting the test of relevance.

The impact of s 60

- The common law recognised the following exceptions to the hearsay rule:
 - The accumulated knowledge acquired by an expert;
 - The reported data of other experts; and
 - Information commonly relied on in particular trade or calling.
- Provided evidence is admissible for a non-hearsay purpose it is *prima facie* admissible for a hearsay purpose, subject to the discretionary and mandatory exclusions in ss 135 – 137 UEA.

Reform of s 60

- DP 69 proposed that the UEA be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay (thus overcoming the confusion resulting from *Lee v The Queen* (1998) 195 CLR 594).
- A question was asked in DP 69 as to whether s 60 should be amended to provide an exception for a previous representation of a party to any proceeding made to an expert to enable that expert to give evidence.

Reform of s 60

- Policy considerations arising from the proposed reform of s 60 to provide an exception for representations of a party relied upon by an expert.
 - Are the other admissibility provisions of the UEA, and in particular ss 135-137, a sufficient safeguard ; and
 - If s 60 is amended to include the exception, does the Act need to be amended to provide for the recognised common law exceptions?

The role of lawyers in the preparation of expert reports

- Que – should lawyers be more involved in the preparation of reports by experts?
- DP 69 noted:
 - The Commissions received divergent views.
 - Dominant view is that lawyers should be more involved in the preparation of expert reports in order to ensure that expert reports are in an admissible form.
 - Primary rationale – lawyers are involved in the drafting of affidavits for lay witnesses, so there is no logical reason why they should be excluded from assisting the expert to prepare a report which complies with evidentiary rules.
 - Concerns that lawyer involvement may increase the risk that expert reports will adopt an overly partisan position can be addressed through rules of court, legal practitioner rules of professional conduct and expert witness codes of conduct.