

Review of the Uniform Evidence Acts

By

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Australian Government

Australian Law Reform Commission

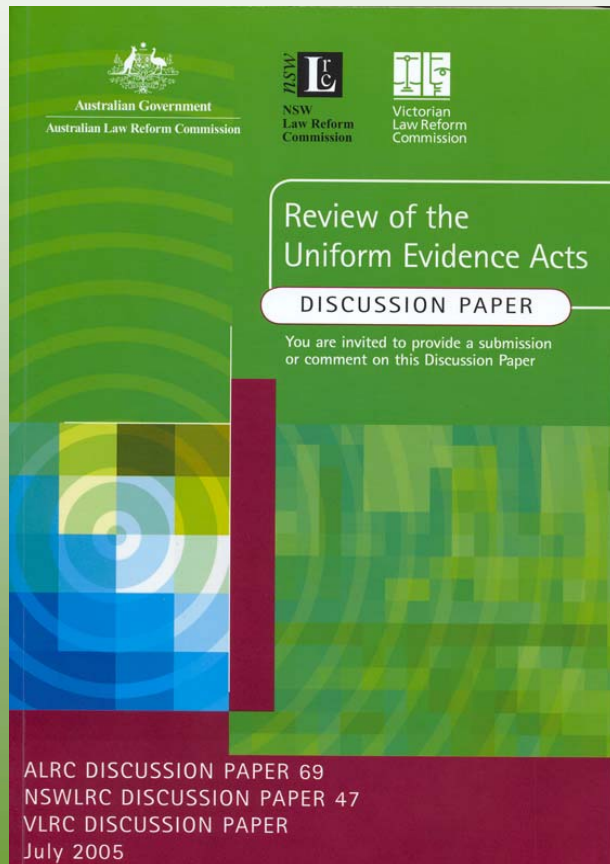
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Timeline

- 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



Consultations

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- Consultations on IP 28 and DP 69 were conducted in all states, the ACT and the Northern Territory
- Focusing primarily on regular users of the UEA including:
 - Judicial officers
 - Barristers
 - State and Territory Bar Associations and Law Societies
 - DPP and Public Defenders
 - Legal Aid
 - State and Territory Attorney-General's and Solicitor General's Depts
 - Legal Academics
 - Other organisations such as HREOC, Aboriginal Interpreter Service (NT), NSW Rape Crisis Centre, Aboriginal Land Councils, etc

Focus of Lecture

- Improper questions in cross-examination – s 41
- The factual basis of expert opinion evidence and the impact of s 60
- Tendency and coincidence, and evidence of disreputable conduct – s 101
- Professional confidential relationships privilege
- Sexual assault communications privilege
- Warnings to the jury – s 165

Improper Questions – s 41

- Proposal 5-2 – expands the criteria of what constitutes an improper question in cross-examination.
- Similar to the definition of improper question recently enacted in the *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW), however Commissions only propose the imposition of a duty on the trial judge to intervene in the case of a vulnerable witness.
- Proposal is controversial as it is seen by some to be:
 - contrary to the adversarial system; and
 - prejudicial to the defendant in a criminal case.

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]).

Factual Basis of Expert Opinion Evidence and Impact of s 60

- 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
- Commissions are of the view that an example of the correct approach to the admissibility of expert opinion evidence when the facts upon which the expert opinion is based have not been proved independently is Branson J’s decision in *Sydneywide Distributors P/L v Red Bull P/L* [2002] FCAFC 157

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 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.

Tendency and coincidence – s 101

- An issue in the Inquiry is the scope of s 101 – ie: does the ‘no reasonable explanation test’ enunciated in cases such as *Pfenning v The Queen* (1995) 182 CLR 461 and *Hoch v The Queen* (1988) 165 CLR 292 govern the test of ‘evidence substantially outweighs and prejudicial effect’ in s 101.
- Commissions are of the view the correct approach is that taken by the NSWCA in *R v Ellis* (2003) 58 NSWLR 700, which appears to have support in the HCA – see: *Ellis v The Queen* [2004] HCA Trans 488.
- No change to s 101 in relation to this issue is proposed.

Evidence of disreputable conduct – s 101

- Issue – should the test in s 101 be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although allegedly tendered for a non-tendency or coincidence purpose?
- Example – in a murder case where deceased died of stab wounds - evidence of past acts of domestic violence where the defendant used a knife are tendered to show the volatile relationship between the deceased and the defendant, not to show that the defendant had a tendency to stab the deceased when angry.
- **Q: Should the prosecution have to meet the s 101 test when tendering such evidence?**

Professional Confidential Relationship Privilege

- Proposal 13-7 – Part 3.10 of the *Evidence Act 1995* (Cth) should be amended to adopt the equivalent of Division 1A of the *Evidence Act 1995* (NSW)
- Very controversial proposal
- **Why?**

Sexual Assault Communications Privilege

- Proposal 13-7a – Part 3.10 of the *Evidence Act 1995* (Cth) and Part 3.10 Div 1B of the *Evidence Act 1995* (NSW) should be amended to include a sexual assault counselling privilege of a discretionary kind applicable to both civil and criminal proceedings.
- Note – Re: NSW – if proposal implemented the provisions now found in Pt 7 of the *Criminal Procedure Act 1986* (NSW) would be brought into the *Evidence Act 1995* (NSW).
- **Q: Should the privilege be qualified or absolute – arguments for and against?**

Warnings – s 165

- Issue re current requirement of trial judges to give to a jury a *Longman* warning in cases of delayed complaint.
- Longman warning consists essentially of a direction to the jury that:
 - Because of the passage of time the evidence of complaint cannot be adequately tested
 - It would be, therefore, dangerous to convict on that evidence
- **Q: Are there any problems with such a warning? If so, should how should such problems be addressed?**

Thank You and Good Luck in Your
Exam!

