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Australian Government
Australian Law Reform Commission

Professor David Weisbrot
President

24/3
Committee Secretary
House of Representatives Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

15 March 2006

Dear Committee Secretary

Inquiry into harmonisation of legal systems

The Australian Law Reform Commission (ALRC) has noted with interest the Committee's inquiry into the harmonisation of legal systems.

The ALRC has a particular interest in harmonisation of laws, since its functions (listed in s 21 of the *Australian Law Reform Commission Act 1996*) include the consideration of proposals:

- for uniformity between state and territory laws in relation to matters referred to it by the Attorney; and
- for complementary Commonwealth, state and territory laws about those matters.

Over its 30 year history, the ALRC has made a number of recommendations directed to greater harmonisation of Commonwealth, state and territory laws. Of particular relevance to the Committee's Terms of Reference are the ALRC's recommendations in relation to evidence law.

Evidence (ALRC 26 and ALRC 38)

In 1979, the ALRC received Terms of Reference to review Australia's evidence laws. The ALRC was asked to review the laws of evidence applicable in proceedings in federal courts and the courts of the Territories, with a view to producing a comprehensive law of evidence. The ALRC issued a series of research reports and discussion papers; an Interim Report, *Evidence* (ALRC 26) including draft legislation in 1985; and a final report, *Evidence* (ALRC 38) in 1987, which also contained draft legislation. Both ALRC 26 and ALRC 38 recommended that there should be a uniform law of evidence applying in proceedings in all federal and Territory courts.

The New South Wales Law Reform Commission (NSWLRC) conducted an inquiry into the law of evidence that commenced in 1966. It published two reports, a working paper, and three discussion papers during the course of that inquiry. However, when the ALRC received the Terms of Reference for its evidence inquiry in 1979, the NSWLRC suspended its work pending the outcome of the ALRC's inquiry. In its 1988 Report, *Evidence* (NSWLRC 56), the NSWLRC recommended that the bulk of the ALRC's proposals be adopted in New South Wales, and that the draft legislation be enacted.

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The Uniform Evidence Acts

In 1991, the Commonwealth and New South Wales governments each introduced legislation substantially based on—but differing in some respects from—the ALRC’s draft legislation. In the same year, the Standing Committee of Attorneys-General (SCAG) gave in-principle support to uniform legislation throughout Australia.

The Commonwealth and New South Wales parliaments each passed an Evidence Bill in 1993, to come into effect from 1 January 1995. The Acts were in most respects identical and are often colloquially referred to as the ‘uniform Evidence Acts’—but perhaps would be better described as ‘mirror’ legislation.

While this mechanism produces virtual uniformity at the outset, this often erodes over time as legislators exercise their independent political judgement and make piecemeal changes. For example, the New South Wales Parliament enacted the *Evidence Amendment (Confidential Communications) Act 1997* (NSW), which incorporated into Part 3.10 of the *Evidence Act 1995* (NSW) privileges in relation to professional confidential relationships and sexual assault communications. In 2002, the NSW Act was amended to adopt a broader definition of ‘de facto relationship’ and to insert a provision relating to warnings about children’s evidence. Comparable provisions were not introduced into the *Evidence Act 1995* (Cth)—thus diminishing the degree of uniformity that initially had been achieved.

Uniformity of Evidence Laws in Australia

The *Evidence Act 1995* (Cth) applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The *Evidence Act 1995* (NSW) applies in proceedings, federal or state, before New South Wales courts and some tribunals.

In 2001, Tasmania passed legislation that essentially mirrors the Commonwealth and New South Wales Acts, although there are some differences. In 2004, Norfolk Island passed legislation that essentially mirrors the *Evidence Act 1995* (NSW).

In the other states and territories, the law of evidence is a mixture of statute and common law, together with applicable rules of court.

Under s 79 of the *Judiciary Act 1903* (Cth), the laws of each state or territory—including the laws relating to procedure, evidence, and the competency of witnesses—are binding on all courts exercising federal jurisdiction in that state or territory. The effect of this is that the courts of the states and territories, when exercising federal jurisdiction, apply the law of the jurisdiction rather than the *Evidence Act 1995* (Cth), except for those provisions that have a wider reach.

Thus, the passage of the *Evidence Act 1995* (Cth) has the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction. As a practical example, a Brisbane barrister defending a client charged with a federal crime before the Queensland Supreme Court would use that state’s evidence law—but would use the *Evidence Act 1995* (Cth) if appearing before the Federal Court, the Federal Magistrates Court or the Family Court on a different matter the next day.

Uniform Evidence Law (ALRC 102)

As noted in the Committee's background paper—*Harmonisation of Legal Systems Relating to Trade and Commerce*—the ALRC recently conducted a review of the operation of the uniform Evidence Acts, pursuant to terms of reference issued by the Attorney-General in July 2004. The primary objectives of this inquiry were twofold: to identify and address any defects in the uniform Evidence Acts; and to maintain and further the harmonisation of the laws of evidence throughout Australia.

The ALRC's final report, *Uniform Evidence Law (ALRC 102)*—produced in collaboration with the NSWLRC and the Victorian Law Reform Commissions, was tabled in the various Parliaments on 8 February 2006. (Although not formally a part of the process, representatives of the Queensland Law Reform Commission (QLRC), the Tasmanian Law Reform Institute and the Northern Territory Law Reform Committee (NTLRC) also participated in the workshops and meetings leading to the completion of the final report.)

Chapter 2 of ALRC 102 includes a number of recommendations directed to maintaining uniformity in evidence law. The three Commissions were mindful that as more jurisdictions introduce mirror uniform legislation, and time passes, the potential for divergence increases. The Commissions noted that this problem is not peculiar to the uniform Evidence Act regime—initiatives to enact uniform defamation and uniform legal profession legislation have raised similar issues.

In order to ensure harmonisation over time and the general effectiveness of the uniform Evidence Acts, the Commissions concluded that:

- SCAG should adopt an Inter-governmental Agreement (IGA) providing that, subject to limited exceptions, any proposed changes to the uniform Evidence Acts must be approved by SCAG. The IGA should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the IGA, and the proposed amendment must be considered and approved by SCAG before being implemented (Recommendation 2-1);
- all Australian jurisdictions should work towards harmonisation of provisions on related (but 'non-core') matters not otherwise covered in the uniform Evidence Acts, such as children's evidence and offence-specific evidentiary provisions (Recommendation 2-2); and
- Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years of the tabling of ALRC 102 (Recommendation 2-3).

Recent Developments

On 8 February 2006, the Australian Attorney-General and the Minister for Justice announced the first step towards implementation of Recommendation 2-1. The joint media release noted that the Commonwealth and State Attorneys-General have established a joint working group to advise them on amendments arising from the report's recommendations. The Attorney-General and the Minister for Justice also reiterated the Australian Government's strong support for national uniformity in evidence laws, stating that uniformity will lead to a more coherent and accessible approach across jurisdictions, as well as the reform of unsatisfactory aspects of the common law.

In recent times, a strong movement has emerged towards the harmonisation of evidence laws in Australia based on the uniform Evidence Act. In May 2005, the Northern Territory Attorney-General asked the NTLRC to 'review the Evidence Act (NT) and other laws of evidence which

apply in the Northern Territory and to advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into the Northern Territory, including the modification of the existing provisions of the Uniform Evidence Act'.

In February 2006, the VLRC released its report *Implementing the Uniform Evidence Act*. The report contains recommendations setting out in detail the amendments that will be necessary—both to the Uniform Evidence Act and the relevant Victorian legislation—when the Act is introduced in Victoria. The VLRC report is available online at <www.lawreform.vic.gov.au>.

The ALRC also has been advised that the Attorneys-General of Western Australia and South Australia have placed the introduction of the uniform Evidence Act on their respective legislative agendas.

In March 2005, the Queensland Attorney-General asked the QLRC to undertake a review under terms of reference similar to the ALRC's inquiry, with some minor modifications in relation to Queensland specific matters. The QLRC's Terms of Reference did not require the QLRC to advise on the action required to facilitate the introduction of the uniform Evidence Act into Queensland (as was the case in Victoria). The QLRC report was tabled in the Queensland Parliament in November 2005.

For your convenience, I have enclosed a copy of ALRC 102 in CD-rom format. You also can access the consultation documents, final report and other information about the ALRC inquiry on our website at <www.alrc.gov.au>.

Please do not hesitate to contact the ALRC if you require any further information in order to advance your inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read "David Weir". The signature is written in a cursive, flowing style.