Australian Government

Australian Law Reform Commission

ALRC submission on the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Evidence Amendment Bill 2008

28 July 2008

The Australian Law Reform Commission (ALRC) makes the following submission to the Australian Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Evidence Amendment Bill 2008 (Cth). In making this submission, the ALRC draws on its experience from the review of the Uniform Evidence Act scheme and the report *Uniform Evidence Law* (2005, ALRC 102).

The ALRC warmly supports the great bulk of the provisions of the Evidence Amendment Bill 2008 (Cth). The Bill is based on the provisions of the Model Uniform Evidence Bill (the 'Model Bill')[1] which incorporates almost all of the recommendations of ALRC 102.[2] As outlined below, the ALRC 102 recommendations are the product of an 18 month review of the Uniform Evidence Act scheme by the ALRC, the New South Wales Law Reform Commission (NSWLRC), and the Victorian Law Reform Commission (VLRC) (collectively referred to as the LRCs).

Importantly, the Model Bill was considered and endorsed by the Standing Committee of Attorneys-General (SCAG) on 30 July 2007. The SCAG Officers' Working Group was advised by an expert reference group consisting of Justice Tim Smith of the Supreme Court of Victoria and VLRC Commissioner-in-charge of the VLRC Evidence Inquiry, Justice James Wood AO QC of the NSWLRC, Mr Neil Williams SC of the NSW Bar and Professor Les McCrimmon, the ALRC Commissioner-in-charge of the Evidence Inquiry.

One of the primary objectives of the review of the Uniform Evidence Act scheme was to further the harmonisation of the laws of evidence throughout Australia. The Evidence Amendment Bill 2008 (Cth) departs in a couple of respects from the LRCs' recommendations, the Model Bill, the *Evidence Amendment Act 2007* (NSW) and the Evidence Bill 2008 (Vic). The ALRC is concerned that if these issues are not addressed at the Commonwealth level, then the opportunity to realise a truly uniform evidence regime in Australia may be compromised.

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1 A working group established by the Standing Committee of Attorneys-General considered the recommendations in *Uniform Evidence Law* (2005, ALRC 102) and developed a Model Uniform Evidence Bill which implemented most of the recommendations. The Model Uniform Evidence Bill, which is based on the *Evidence Act 1995* (NSW) as amended, was endorsed by the Standing Committee of Attorneys-General on 26 July 2007.

2 The ALRC notes that the Bill does not include the recommendations in relation to a general confidential relationships privilege. The Government has indicated, however, that it will address these issues when it responds to the ALRC's report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (2008, ALRC 107). This issue is discussed further below.

Background

The ALRC review of the Uniform Evidence Act scheme

In July 2004, the Attorney-General of Australia asked the ALRC to examine the operation of the *Evidence Act 1995* (Cth). The Terms of Reference for the Inquiry directed the ALRC to have regard to a number of matters, including the desirability of achieving greater clarity and effectiveness and promoting greater harmonisation of the laws of evidence in Australia.

The consultation process

As part of this reference, two consultation papers were published: an Issues Paper, *Review of the Uniform Evidence Act 1995* (ALRC IP 28) was released by the ALRC in December 2004; and a joint Discussion Paper, *Review of the Uniform Evidence Acts* (ALRC DP 69) was jointly produced by the LRCs in July 2005.

The ALRC established a broad based expert Advisory Committee which included members of the judiciary, practitioners from government and the private profession, and academic specialists in this field. The Advisory Committee met on three occasions before the publication of the final report, and assisted with the development of the recommendations.

The ALRC's consultation program for the inquiry included 'round table' discussions in every state and territory. Judicial officers from every jurisdiction and level of court, including some members of the High Court, were consulted. Legal practitioners from both branches of the profession, and their representative organisations, also were consulted, as were academics with an expertise in evidence law. Consultations also were held with organisations involved with specific client groups, for example Aboriginal Land Councils, victim support groups and sexual assault counsellors. In addition, the ALRC had the benefit of 130 written submissions from a broad range of stakeholders and interested parties.

To promote the harmonisation of the laws of evidence throughout Australia, as mandated in the ALRC's Terms of Reference, the ALRC met on two occasions with the Attorney-General of Queensland, and representatives of the Northern Territory Department of Justice, the Western Australian Department of Justice and the South Australian Attorney-General's Department.

The final report

The final report, *Uniform Evidence Law* (ALRC 102, 2005), completed jointly by the LRCs, was tabled in the Commonwealth and Victorian parliaments, and released in NSW, on 8 February 2006.

The inquiry concluded that the uniform Evidence Acts generally were working well, and that there were no major structural problems with the legislation, or with the underlying policy of the Acts. However, the LRCs made 63 important recommendations for reform which highlight the need in Australia for a single set of streamlined, flexible evidence laws.

National consistency and harmonisation

In ALRC 102, the LRCs expressed the view that:

- uniformity in evidence laws should be pursued unless there is good reason to the contrary;
- the uniform Evidence Acts should be a comprehensive statement of the laws of evidence—that is, with respect to rules of evidence applicable in all civil and criminal proceedings, it should not be necessary (ideally) to refer to other statutes; and

- the uniform Acts should be of general application to all criminal and civil proceedings. The corollary is that the uniform Evidence Acts generally should *not* include provisions of application only to specific offences or categories of witness. [3]

The uniform Evidence Acts are more correctly described as 'mirror' legislation rather than as uniform legislation. Mirror legislation refers to a situation in which a draft statute is enacted by separate legislation in each participating jurisdiction—which is what occurred when the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) were enacted. While this mechanism produces virtual uniformity at the outset, this often erodes over time as legislators exercise their independent political judgment and make piecemeal changes.[4]

Further, as more jurisdictions pass mirror legislation, the potential for divergence increases. This issue is not unique to the uniform Evidence Act regime. In order to ensure the maintenance of harmonisation over time and the general effectiveness of the uniform Evidence Acts, the LRCs expressed the view that Australian governments should consider initiating a joint review of the Acts within 10 years of the tabling of this Report. Such a review will prevent ossification, allow for monitoring of the implementation of the policy objectives and promote uniformity.[5]

It also was the LRCs' view that uniformity will be promoted if the Commonwealth, state and territory governments enter into an intergovernmental agreement. This agreement should provide that, subject to limited exceptions, any proposed change to the uniform Evidence Act in force in each jurisdiction be approved by the Standing Committee of Attorneys-General (SCAG). The party proposing the change should be required to give notice in writing to the other parties to the agreement, and the proposed amendment should be considered at the next SCAG meeting, or as otherwise agreed by the members of SCAG. [6]

The ALRC would encourage the Commonwealth to consider these recommendations in order to ensure that evidence laws remain consistent across the jurisdictions over time.

Comments on the Evidence Amendment Bill 2008 (Cth)

Professional confidential relationship privilege

The ALRC notes that the Evidence Amendment Bill 2008 (Cth) does not include a professional confidential relationship privilege.

The *Evidence Act 1995* (NSW), as amended, provides for a professional confidential relationship privilege under Part 3.10, Division 1A. The provisions under the Model Bill are based on the NSW *Evidence Act*.

The Attorney-General's second reading speech indicates that the Government has not included a professional confidential relationship privilege in the Bill as it is developing its response to the recent ALRC report, *Privilege in Perspective* (ALRC 107), which was tabled in January 2008.

Similarly, the Victorian Evidence Amendment Bill 2008, does not include a professional confidential relationship privilege. The Victorian Attorney-General indicated in the second reading speech that this privilege would be considered in the future when the Commonwealth enacted its model.

In ALRC 102, the LRCs expressed the view that it is in the interests of consistency and uniformity for the Commonwealth *Evidence Act* to adopt the New South Wales confidential professional relationship privilege provisions (with some minor amendments).[7]

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3 Australian Law Reform Commission, *Uniform Evidence Law* (2005, ALRC 102), [2.23]–[2.44].
4 B Opeskin, 'The Architecture of Public Health Reform' (2002) 22(2) Melbourne University Law Review 337, 349.
5 Australian Law Reform Commission, *Uniform Evidence Law* (2005, ALRC 102), Rec 2–3.
6 Australian Law Reform Commission, *Uniform Evidence Law* (2005, ALRC 102), Rec 2–1.
7 Australian Law Reform Commission, *Uniform Evidence Law* (2005, ALRC 102), Rec 15-1.

The ALRC maintains the view that the confidential relationship privilege, as set out in the Model Bill, should be enacted in the Commonwealth *Evidence Act*. It was noted in ALRC 102 that there was support expressed for the New South Wales provisions during the LRCs inquiry, and a lack of submissions indicating a serious problem with them.[8]

The Commonwealth *Evidence Act* includes a privilege for journalist's sources, under Division 1A. This privilege, enacted in 2007, is framed in similar terms to the New South Wales confidential relationship privilege, although the definition of a 'protected confidence' is limited to a communication made by a person in confidence to a journalist. For the Commonwealth now to consider a different model or formulation of a confidential relationship privilege in relation to other professional relationships would endanger the goals of uniformity and clarity within the Uniform Evidence Acts.

In both ALRC 102 and ALRC 107, the ALRC noted that client legal privilege and a professional confidential relationship privilege are based on different policy rationales. The protection of confidential communications between a client and a lawyer facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice. A privilege for communications made in the course of a professional confidential relationship recognises that there is a general public interest in retaining confidentiality (for example, between a patient and a doctor) but also allows the court a discretion to override this interest where a greater public interest exists in allowing the evidence to be adduced.

As such, the ALRC is of the view that the enactment of a confidential relationship privilege within the Commonwealth Evidence Act would not be affected by any proposals for reform which would arise from the Government's response to ALRC 107.

Application of the Act to preliminary proceedings of courts

The Evidence Amendment Bill 2008 (Cth) does not extend the application of the privileges under the *Evidence Act* to preliminary proceedings of courts.[9]

The Attorney-General's second reading speech indicates that the extension of the privileges to pre-trial matters is a significant issue, and that the Government will be considering these matters as it develops its response to the ALRC's report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (2008, ALRC 107). While the ALRC agrees that this is appropriate in this context, it would emphasise the need for a nationally consistent approach to these matters. The ALRC notes that, unlike the Evidence Amendment Bill 2008 (Cth), the Model Bill, *Evidence Amendment Act 2007* (NSW) and the Evidence Amendment Bill 2008 (Vic) all extend the scope of the privileges to preliminary proceedings of courts, including a summons or subpoena to produce documents or give evidence, pre-trial discovery, non-party discovery, interrogatories, and a notice to produce.

Compellability of de facto partners

Section 18 of the uniform Evidence Acts permits certain categories of witnesses to object to giving evidence against an accused. The section, which applies only to criminal proceedings, provides that the court has the discretion to excuse a witness from testifying after balancing the risk of harm to the witness or to the witness' relationship with an accused against the probative value of the evidence. The witnesses that are currently entitled to raise the objection are an accused's spouse, de

8 Australian Law Reform Commission, *Uniform Evidence Law* (2005, ALRC 102), [15.34].
9 For a detailed discussion of the application of the privileges to pre-trial matters see *Uniform Evidence Law* (2005, ALRC 102), Ch 14.

facto spouse, parent or child. The definition of 'de facto spouse' in the *Evidence Act 1995* (Cth) does not extend to persons in a same-sex relationship.

The Evidence Amendment Bill 2008 (Cth) adopts the Model Bill provisions relating to the compellability of de facto partners. These provisions reflect the LRCs' recommendations.[10] These changes will ensure equality and avoid discrimination by according the same legal privileges in relation to compellability provisions to all those who are couples, irrespective of the sex of the parties involved. It also would reflect developments in social attitudes in Australia and result in greater uniformity between the uniform Evidence Act jurisdictions. The ALRC notes that the approach taken in the Evidence Amendment Bill 2008 (Cth) is consistent with the approach adopted in the *Evidence Amendment Act 2007* (NSW), and Evidence Amendment Bill 2008 (Vic), and under Tasmanian legislation.[11]

The ALRC supports the definition 'de facto partner' included in the Evidence Amendment Bill 2008 (Cth). In the ALRC's view, this approach is less prescriptive because it does not require that the parties to a relationship live together. It caters for a range of situations in which a couple may not cohabit but may nonetheless have a relationship with many of the other characteristics indicative of a de facto relationship. For example, circumstances can be envisaged where parties in a relationship choose to maintain separate residences, or live apart while one party is in long-term care outside the home. In such cases, the circumstances of any cohabitation (or lack of it) are just one factor to be taken into account in determining whether a de facto relationship exists.

10 Australian Law Reform Commission, *Uniform Evidence Law* (2005, ALRC 102), Recs 4–4 to 4–6.
11 *Evidence Act 2001* (Tas) and *Relationships Act 2003* (Tas).