

Invitation to participate in a review of the Evidence Act

Australian Law Reform Commission (ALRC) President Professor David Weisbrot said lawyers in some jurisdictions are in the difficult—and very unproductive—situation of dealing with one set of evidence laws if they appear in federal courts, and a completely different set of rules if they appear in a state or territory court across the road.

The Federal Government has asked the Australian Law Reform Commission (ALRC) to examine the operation of the Evidence Act 1995 (Cth). The legislation is based on a uniform Evidence Act scheme, which has been implemented by the Commonwealth, New South Wales, Tasmania and the Australian Capital Territory.

“The uniform Evidence Acts were a major milestone, which eliminated many dated evidence and procedural requirements in evidence law. They also ensured the law reflected technological change not known when the common law was shaped over the course of centuries. But the Acts have been in operation now for close to ten years, so it is timely to review the legislation to identify and address potential improvements,” Professor Weisbrot said.

NSW Attorney General, Bob Debus, has asked the NSW Law Reform Commission (NSWLRC) to conduct a similar inquiry into the operation of the Evidence Act 1995 (NSW). The ALRC will be working in association with the NSWLRC with a view to producing agreed recommendations.

The ALRC and the NSWLRC will consider whether changes are required to the Evidence Acts (or other relevant legislation) to address any deficit in the law. The ALRC’s consideration of these issues will be informed by the desirability of improving the clarity and effectiveness, and promoting greater harmonisation, of the laws of evidence in Australia.

The Terms of Reference require the ALRC and NSWLRC to focus particularly on concerns about:

- * the examination and re-

- examination of a witness;
- * the hearsay rule and its exceptions;
- * the opinion rule and its exceptions;
- * the credibility rule and its exceptions;
- * evidentiary privileges, including client legal privilege; and
- * the application of the rules of evidence contained in the Evidence Act to pre-trial procedures.

The full terms of reference are available from the ALRC’s website at www.alrc.gov.au.

“We’ll also be looking at how we can encourage greater harmonisation with the other states and territories - Western Australia, South Australia, the Northern Territory, Queensland and Victoria - that currently operate under different evidence laws,” Professor Weisbrot said.

“Many of the problems and complexities of evidence law stem from having a ‘one size fits all’ approach to evidence, whether a trial is conducted before a judge and jury, or before a judge alone.

“Explaining to a jury evidence rules, their exceptions and their application to the facts of a particular case is extraordinarily complicated. One of the things we’ll be investigating is whether different rules could be applied in the majority of cases in which there is no jury.

“It would be a radical step, so we’ll be canvassing the opinions of judges, lawyers and interested members of the community to find out the full range of views before making any recommendations for reform.”

Commissioners

The Commissioners conducting the inquiry are Professor David Weisbrot and Professor Anne Finlay.

Timeframe

To help clarify the issues under consideration in the inquiry, the ALRC and the NSWLRC will release an Issues Paper in late 2004. A further consultation paper, containing draft proposals for reform, will be published by the ALRC and NSWLRC in mid-2005. Under the terms of reference, a final report is due by 5 December 2005.

Submissions to the inquiry

The ALRC welcomes submissions from any individual, organisation or government agency. Submissions can be made to the ALRC at any time, or in response to a consultation document.

The ALRC will set deadlines for submission. These deadlines will be advised in the consultation papers and on the ALRC website. Submissions received after the deadline may not be able to be considered fully in the preparation of the following publication.

There are no formal requirements for submissions. A submission may be a short letter setting out your views on a particular topic covered by the inquiry, or a more substantial document covering a range of issues under consideration. They may be sent by mail, fax or email. Submissions in electronic format are appreciated.

In the interests of informed public

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Professional courtesy: not so common

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some four months previously. A matter of semantics?

The system of justice cannot survive if practitioners do not maintain their obligations to the courts.

I am unaware of what obligations the courts have to practitioners. Perhaps a reader could enlighten me?

To third parties

Again, section 44 requires a practitioner to "conduct dealings with members of the community and the affairs of others that affect the interests of others with honesty, fairness and courtesy and in a manner conducive to advancing the public interest".

The Rules of Professional Conduct and Practice are a little more specific. Rules 24 to 27. Of particular interest in the complaints area are Rules 24 (contracting for services) and 26 (misleading or threatening statements made to third parties), both of which have arisen in complaints I have dealt with over the last 12 months.

Conclusion

It all appears to depend on one's communication skills. It is not simply a matter of knowing the law and how to apply it. It is not even what one says but how one says it. It really is a matter of successfully conveying one's meaning to others and, hopefully, persuading them to one's own point of view.

Communication is after all what we lawyers are supposed be good at, isn't it? Well, isn't it?^①

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debate, the ALRC maintains an open inquiry policy. As submissions provide important evidence to the inquiry, it is common for the ALRC to quote them or refer to them in publications. However, the ALRC also accepts submissions made in confidence.

Confidential submissions may include personal experiences where there is a wish to retain privacy, or other sensitive information (such as commercial-in-confidence material).

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential. As part of the open inquiry policy, non-confidential submissions are made available to any person or organisation upon specific request.

A request for access to a confidential submission is determined in accordance with the federal Freedom of Information Act 1982, which has provisions designed to protect sensitive information given in confidence.

Participation in the inquiry

Although the ALRC is based in Sydney, it will be conducting consultations around Australia during the inquiry. If you would like the ALRC to meet with you or your organisation to discuss issues relevant to the inquiry, please contact the ALRC. This will help us to plan our meeting schedules.

To be placed on the mailing list for this inquiry and receive free copies of consultation papers for this inquiry, please contact the ALRC: GPO Box 3708, Sydney NSW 2001, Tel: (02) 8238 6333, Fax (02) 8238 6363, Email: evidence@alrc.gov.au^①

Risk seminars

Marsh Pty Ltd has arranged for Le Messurier Harrington to conduct two risk management seminars in October. One will be specifically targeting litigation lawyers and will be of relevance to solicitors and administrative staff.

The other seminar will be an introduction to sound risk and practice management as part of a two part series, with the second session being conducted early next year. This session will provide an introduction to risk and practice management, explore issues of claims, complaints and client satisfaction and consideration of engagement issues. Whilst this is appropriate for partners, solicitors and administrative staff, we particularly recommend that firms consider attendance for any newly qualified solicitor, articled clerks, paralegals, administrative staff or solicitors new to your firm.

Sessions will be held in late October at the LSNT in Darwin. More details are available from the Law Society Secretariat.^①

Administrative law essay prize

The Australian Institute of Administrative Law Inc is inviting entries for the 2005 AIAL Essay Prize in Administrative Law. The length of the essay is 8-10,000 words. The amount of the prize is \$2,000. Entries must be submitted by 1 March 2005.

Further details may be obtained by contacting:

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