

Review of the
Laws of Evidence
Information Paper

Evidence Uniformity



Victorian
Law Reform
Commission

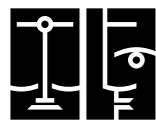
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Evidence Uniformity

TERMS OF REFERENCE FOR EVIDENCE REVIEW

On 22 November 2004 Attorney-General Rob Hulls asked the Victorian Law Reform Commission (VLRC) to review the laws of evidence applying in Victoria. The VLRC was directed to review the Evidence Act 1958 (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the Uniform Evidence Act (UEA) into Victoria, including any necessary modification of the existing provisions of the Act. The terms of reference for the review are contained in Appendix One.

The terms of reference are directed towards facilitating the introduction of the UEA in Victoria. The Justice Statement¹ released by the Attorney-General in May 2004 also makes it clear that the government wishes to implement the UEA.

Given these clear statements by the government, the VLRC intends to focus its attention on improvements which should be made to the UEA and the Victorian-specific provisions which need to be retained.

In this context, some background information may be helpful.

HISTORY AND POLICY BACKGROUND TO UEA

History—Reviews and Recommendations for Enactment

The provisions of the UEA closely follow the recommendations made in 1987 by the Australian Law Reform Commission (ALRC) in its *Evidence Report 38*. The recommendations of the report and the provisions of the enacted Acts have since been considered in depth by various bodies, each of which has recommended enactment:

- The New South Wales Law Reform Commission—*Evidence*, Report 56 (1988).
- The Senate Standing Committee on Legal and Constitutional Affairs—*Final Report on Evidence Bill* (1994).
- Law Reform Commissioner of Tasmania—*Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996).
- Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements (Western Australia Legislative Assembly), *Evidence Law*, 18th Report in the 34th Parliament (1996).
- Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia Final Report*, Project 92 (1999), Chapter 20.

The UEA is now operating in the federal courts and in the courts of New South Wales, the ACT, Tasmania and Norfolk Island, with some minimal differences between jurisdictions.

In Victoria, enactment has been recommended by:

- The Victorian Parliament Scrutiny of Acts and Regulations Committee—*Review of the Evidence Act 1958* in 1996.²

- The Victorian Bar Council and the Law Institute of Victoria jointly in November 2003.
- The VLRC in its 2004 reports on *Defences to Homicide* and *Sexual Offences*. These reports identified deficiencies in the laws of evidence that adversely affect the trial of such cases, and recommended adoption of some UEA provisions to address the deficiencies.

Experience of the UEA

The ALRC has received a reference to review the operation of the UEA. It recently released the Issues Paper *Review of the Evidence Act 1995*, and is now working on a discussion paper containing proposals for reform. It has already consulted widely with judges, practitioners and commentators in preparing the paper. ALRC President Professor David Weisbrot has been involved in these consultations and has advised the VLRC that:

A common theme arising from the consultations held prior to the publication of the...Issues Paper...is that the Evidence Act regime is working well. Judges and practitioners are familiar with the Act's provisions and underlying policy, and for a generation of law students, the Evidence Act has underpinned the teaching of evidence law. While commentators noted specific areas that require attention, the clear message is that a radical overhaul of the Act is neither necessary nor desirable. Further, anecdotal evidence suggests that, when given a choice of jurisdictions, commercial litigators seem to favour operating under the Evidence Act regimes, and file accordingly.³

¹ Department of Justice Victoria, *New Directions for the Victorian Justice System 2004–2014*, Attorney-General's Justice Statement (May 2004) 26.

² Chaired by Mr P J Ryan, MP.

³ Litigators may choose to initiate proceedings in a court which applies the Uniform Evidence Act.

The Need for Reform

The Attorney-General's Justice Statement said:

The common law has changed little since the 19th century. It is uncertain and arbitrary and has been unable to adjust to cope with modern technology. From time to time the *Evidence Act 1958* has been amended to address problems in the common law. It is currently a potpourri of provisions that are poorly organised and difficult to follow. A large number of provisions were added to deal with technological change but they have failed to do so. The Act does not address the many uncertainties and weaknesses of the common law.

The Victorian Parliament Scrutiny of Acts and Regulations Committee, in its 1996 Report, commented:

The Committee's own view, however, is that the current law of evidence in Victoria is complex, difficult to locate, and frequently uncertain. Adoption of the Act, on the other hand, would bring the rules of evidence together, in what the Bar aptly described as a 'conceptually coherent form'.⁴

After noting that the Act was not immune from criticism, the committee stated that it 'wholeheartedly agreed' with the observation that 'whatever criticisms one may have of the legislation it is a significant improvement on the existing common law and statutory provisions'.

Given our terms of reference, the VLRC's view is that it should not explore whether legislation based on the UEA should be introduced in Victoria. A detailed discussion of the reasons for changing the laws of evidence can be found in the original ALRC reports.⁵ Those reports strongly

support the views quoted above from the Justice Statement. They also contain a discussion about whether a comprehensive, uniform legislative approach should be taken.⁶ While those reports focus on federal and territory courts, similar issues arise and similar advantages would flow from the adoption of a comprehensive uniform legislative approach in Victoria.

It should also be noted that the enactment of the UEA has created the situation in Victoria where legal practitioners who practise or seek to practise in courts applying the UEA⁷ must be in a position to understand and apply two sets of laws of evidence—Victoria's and the UEA. This is an unnecessary burden and adds to the difficulty of legal practice and its cost and should be removed. Further, the application of the UEA in the other jurisdictions has provided a body of case law resolving questions of interpretation of the legislation. This should greatly assist implementation.

Fine-tuning the Uniform Evidence Act

Although we believe it is desirable to enact the UEA in Victoria, it does not follow that it should be enacted in its present form. The VLRC will carefully consider and assess the experience of the operation of the UEA. A number of specific concerns have been identified in the ALRC Issues Paper. These and any other concerns that may emerge in the review process need to be carefully considered and, where appropriate, changes made to the UEA before it is enacted.

To assist those who wish to consider the issues and comment on them, following is a description of the structure of the UEA and the policy framework underlying its provisions.

⁴ Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Evidence Act 1958 (Victoria) and Review of the Role and Appointment of Public Notaries*, Report No 12 (October 1996) 5.

⁵ Uncertainty in the law: see ALRC, *Evidence*, Interim Report 26, Volume 1 (1985) 43–107, Volume 2 (1985), Appendix C, and ALRC, *Evidence*, Report 38 (1987), Appendix C. For other criticisms of the law see ALRC, Interim Report 26, Volume 1, 121–277. See also the recent *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Law Reform Commissioner of Tasmania, Report 74 (1996), 10–14.

⁶ ALRC, *Evidence*, Interim Report 26, Volume 1 (1985), 108–118.

⁷ Federal courts and the Courts of New South Wales, A C T, Tasmania and Norfolk Island.

STRUCTURE OF THE ACT

General Structure

The UEA was structured so the provisions follow the order in which issues ordinarily arise in trials, from the point when a witness enters the witness box to the conclusion of the evidence in the hearing. There are three main substantive parts:

- **Adducing Evidence—Chapter 2, UEA:** This chapter deals with the rules relating to competence and compellability of witnesses, oaths and affirmations, the manner of giving oral evidence and documentary evidence and views.
- **Admissibility of Evidence—Chapter 3, UEA:** This chapter provides a code of rules which control the admissibility of evidence that has been adduced in the ways permitted by the rules in Chapter 2. They comprise rules relating to relevance, hearsay, opinion, admissions, judgments and convictions, tendency and coincidence, credibility, character, identification, privileges and discretions to exclude evidence.
- **Proof—Chapter 4, UEA:** This chapter contains rules about proof, in particular, the standard of proof, judicial notice, rules assisting the proof of certain facts, corroboration and warnings, together with provisions ancillary to other provisions of the Act, including protections for parties against whom hearsay or documentary evidence is led.

Structure of Rules of Admissibility

The rules of admissibility in Chapter 3 have their own internal structure. They are structured in the way the common law should be applied but frequently is not—something which can cause difficulty in determining whether the evidence is admissible. They commence with the key relevance provisions.

- The relevance provisions. Relevant evidence is defined in section 55 as follows:
 - (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

Section 56 then provides:

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

The discretion contained in the common law requirement of "sufficient" relevance⁸ is articulated in section 135. It provides as follows:

- The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
- (a) be unfairly prejudicial to a party; or
 - (b) be misleading or confusing; or
 - (c) cause or result in undue waste of time.

- **Exclusionary rules.** Following the statement of the relevance rules, the chapter sets out the rules of exclusion (and exceptions to them) which may apply to evidence that is relevant. The rules direct consideration to the use to which the evidence can logically be put. Once such use is identified, relevance can be determined and any relevant exclusionary rule identified. The rules and exceptions have been set out in such a way that they can be considered in succession, in the order set out in the Act.
- **Remaining provisions—the discretions.** The chapter concludes with privilege provisions and exclusionary discretions (sections 135–138). As to the latter, in addition to the relevance discretion (section 135), section 136 gives a discretion to the court to control the use to be made of evidence:
 - ...if there is a danger that a particular use of the evidence might:
 - (a) be unfairly prejudicial to a party; or
 - (b) be misleading or confusing.

Section 137 provides:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

These provisions have an important role to play because the earlier sections relating to the proof of documents and the exclusionary rules are less technical and restrictive than those presently applying. As a result, occasions may arise where evidence is not excluded by the specific rules but should be or its use needs to be controlled. Sections 135, 136 and 137 can be used to deal with such situations.

Relaxation of the rules could also on occasions result in unfairness to the party against whom the evidence is led. In addition to the protection given by the discretions, the UEA addresses this issue by provisions requiring notice for hearsay and tendency and coincidence evidence, strengthened discovery powers and provisions enabling the court to require the attendance of witnesses and the production of documents by the party gaining the benefit of the more relaxed regime. Thus the UEA adds procedural powers to work in conjunction with the new rules of evidence.

POLICY FRAMEWORK

To gain a complete understanding of the legislation and the issues raised in Issues Paper 28, the underlying policy framework needs to be understood.

The original ALRC reports analysed the policy issues and set out the resulting policy framework that underpinned the examination of the law and its proposals and which now underpins the UEA.⁹

Taking as its starting point the proposition that the laws of evidence must serve the trial system, the ALRC examined and identified the nature and purposes of that system. It noted as an important feature the adversarial nature of the civil and criminal trial. It argued that this required rules to facilitate the preparation of litigation by the parties and for the guidance and control of the proceedings. In particular, the parties need to be able to organise their evidence for trial with reasonable confidence and to be able to assess their prospects. This led the ALRC to adopt the position that a rules approach should be taken unless it could not satisfactorily address the particular problem under consideration.¹⁰ Otherwise, it distinguished between the civil and the criminal trial systems.

- **The civil trial.** The ALRC described the civil trial as providing a method for the resolution of disputes between parties. In doing so it serves the purposes of an ordered society. It was emphasised that the system, therefore, must not merely resolve disputes but must do so in a way that commands the respect and confidence of the parties and the community. It concluded that to achieve that result the rules of evidence must enable the courts to make a genuine attempt to find the facts. Any limitation on that attempt required justification. In addition, procedural fairness, expedition, reasonable cost and the quality of the rules applied were seen as critical for community respect and confidence in the justice system.

- **The criminal trial.** The ALRC argued that the criminal trial is not directed to resolving disputes between parties. The criminal trial is an accusatorial process. The central question is whether the Crown has proved the accused guilty beyond reasonable doubt—it is not ‘to find out if the accused is guilty’. The accused is regarded as innocent until proven guilty. The ALRC described the ‘larger and more general object’ of the criminal trial as being to serve the purposes of the criminal law—‘to control, deter and punish the commission of crime for the general good’.¹¹ Community respect and confidence were again seen as critical. Like the civil trial, it was argued that to secure that respect and confidence there must be a genuine attempt to establish the facts on the basis on which the final decision is made.

In addition, the ALRC accepted the longstanding principle that it is in the interests of the community to minimise the risk of conviction of the innocent even if this may occasionally result in the acquittal of the guilty. This principle and the serious consequences of conviction, the real risk of error, the concern for individual rights and the danger of abuse of power, were seen as warranting limitations being placed at times on the fact-finding exercise, particularly in relation to evidence led for the prosecution. Finally, the fairness and efficiency of the system and the quality of the rules were again seen as affecting community respect and confidence.

⁹ ALRC, *Evidence*, Interim Report 26, Volume 1 (1985) 24–39; ALRC, *Evidence*, Report 38 (1987) 16–28.

¹⁰ ALRC, *Evidence*, Interim Report 26 (1985) Volume 1, 32–34.

¹¹ Quoting Neasey, J, Submission (15 April 1981) in ALRC, *Evidence*, Interim Report 26 (1985) Volume 1 [58].

The key elements of the framework identified in ALRC Report 38 and reflected in the UEA were:

- **Fact-finding.** The credibility of the trial system depends upon its performance in this area. As a result, the recommendations were directed 'primarily to enabling the parties to produce the probative evidence that is available to them'. Any departures from that position required justification.
- **Civil and criminal trials.** The different nature and purpose of civil and criminal trials should be taken into account. In deciding whether evidence against the accused should be admissible, a more stringent approach should be taken. The differences were also reflected in areas such as: the compellability of an accused, cross-examination of an accused, and exercise of a court's power in matters such as the granting of leave. In civil trials, a less detailed and more flexible approach was seen as appropriate to permit a party to tender all of the relevant evidence it has, subject to the constraints of fairness and cost.
- **Predictability.** The use of judicial discretions should be minimised, particularly in relation to the admission of evidence, and rules should generally be preferred over discretions.
- **Cost, time and other concerns.** The impact of proposals on the time and cost of the preparation and conduct of litigation was seen as an important consideration. At all times clarity and simplicity were key objectives.

HOW WE WILL CONDUCT THE REVIEW

The VLRC

Justice Tim Smith of the Supreme Court has been appointed as the commissioner in charge of the Evidence reference. Justice Smith was the commissioner in charge of the original ALRC reference which resulted in the UEA. VLRC Chairperson Professor Marcia Neave will also work on this reference, as will a Team Leader and one full-time and one part-time researcher.

Justice Smith is working on the reference full-time at the VLRC until the end of March 2005, and will then continue to work part-time for the life of the reference.

A Division of the VLRC has been established for the reference, comprising Professor Neave, Justice Smith, Justice David Harper (also of the Supreme Court), and Dr Iain Ross (Vice President of the Australian Industrial Relations Commission).

An advisory committee for the reference will be established soon.

Working With the ALRC and NSWLRC

The ALRC and NSW Law Reform Commission (NSWLRC) are undertaking concurrent reviews of evidence law. The VLRC's terms of reference require collaboration with these two commissions 'consistent with the goal of promoting harmonisation of the laws of evidence'. The VLRC will work closely with them.

Tasmania has also adopted the UEA. Although the Tasmanian Law Reform Institute does not have a general evidence reference at present, the Institute is taking an interest in the project and is involved in the review through the participation of a board member (Therese Henning) on the ALRC Advisory Committee.

The collaboration between commissions is a major project. This is the first time the VLRC has conducted a joint reference with another commission. Working together will allow the work to be divided between the three commissions. It will also give Victoria the opportunity to learn about how the Act is working in other jurisdictions.

Consideration of the ALRC Issues Paper should be treated as the first stage of the VLRC review. The VLRC does not intend to publish a separate issues paper for Victoria.

The purpose of the ALRC Issues Paper is to seek suggestions, particularly from those who are already using the UEA, for improvements to the UEA. We encourage those with an interest in the review to look through the Issues Paper to gain a familiarity with the issues and consider whether other matters should be raised. As the Commonwealth and NSW have had the UEA in place for 10 years, their commissions are best placed to identify the areas that need work by consulting users of the Act in their jurisdictions. The VLRC will participate in these consultations.

The ALRC Issues Paper 28 is available at <www.alrc.gov.au>.

Division of Work

Working closely with the other commissions will contribute to the VLRC reference's goal of harmonising the laws of evidence throughout Australia. The VLRC, ALRC and NSWLRC have met and agreed on the conduct of a joint approach to the task of reviewing the operation of the UEA. This includes a joint publication schedule. A joint Discussion Paper will be released in June 2005 which will include proposals for reform. A joint Report will be completed by the end of 2005, containing recommendations for changes to the UEA.

Agreement has also been reached on a division of work between the commissions in the drafting of the Discussion Paper and the Report. The VLRC will be responsible for research and writing of chapters dealing with:

- competence and compellability;
- tendency and coincidence evidence (propensity, relationship and similar fact evidence); and
- credibility evidence.

The NSWLRC will research and write chapters on judicial notice and documentary evidence. The ALRC will prepare the balance.

Facilitation of Enactment in Victoria

Because the other commissions are required to report on this reference by the end of 2005, the VLRC is initially focusing on reviewing the operation of the provisions of the UEA. It is likely, however, that there will be Victorian-specific issues which will either be addressed in a separate chapter of the Discussion Paper and Final Report, or in a stand-alone VLRC publication.

In addition, the VLRC has to consider the question of legislative changes required to facilitate implementation of the UEA in Victoria. This aspect will be covered in a separate VLRC publication. We have set ourselves the goal of completing most of this work by the end of 2005, although our available resources and the demands of the joint publication schedule may delay this work.

TELL US WHAT YOU THINK

Consultation is crucial to the work of the VLRC. Although the date for submissions to the ALRC Issues Paper has passed, the ALRC has extended the deadline for Victorian practitioners to **23 March 2005**.

If you wish to comment on the ALRC paper, or raise other issues about the operation of the UEA and its interaction with existing Victorian law, please send your submission directly to the VLRC.

Unless you specify otherwise, your submission will be provided to the other commissions and will be treated as a public document.

We would prefer your submission in electronic format to enable us to send it to the other commissions.

Please send your submissions by email to law.reform@lawreform.vic.gov.au.



APPENDIX ONE

Reference on the Laws of Evidence

1. To review the *Evidence Act 1958* and other laws of evidence which apply in Victoria and to advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into Victoria, including any necessary modification of the existing provisions of the Uniform Evidence Act.
2. To consider whether modifications of the existing provisions of the Uniform Evidence Act are required:
 - to take account of case law on the operation of the Uniform Evidence Act in jurisdictions where the Act is currently in force;
 - in relation to the following topics which have been identified as areas of particular concern and are currently being considered by the Australian Law Reform Commission and the New South Wales Law Reform Commission:
 - the examination and re-examination of witnesses, before and during proceedings;
 - the hearsay rule and its exceptions;
 - the opinion rule and its exceptions;
 - the coincidence rule;
 - the credibility rule and its exceptions; and
 - privileges, including client legal privilege.
3. In conducting the review the Victorian Law Reform Commission should have regard to:
 - the experience gained in other jurisdictions in which the Uniform Evidence Act has been in force for some time;
 - the desirability of promoting harmonisation of the laws of evidence throughout Australia, in particular by consulting with the other members of the Uniform Evidence Act scheme;
 - recommendations for changes to the law of evidence which have already been made in the Victorian Law Reform Commission's Reports on Sexual Offences and Defences to Homicide;
 - the right of defendants in criminal trials to receive a fair trial; and
 - arrangements for vulnerable witnesses to provide evidence to promote their access to justice.

Consistent with the goal of promoting harmonisation of the laws of evidence, the Commission should collaborate with the New South Wales Law Reform Commission, and the Australian Law Reform Commission, in their respective reviews.

SUBMISSIONS

Deadline for submissions from Victorian practitioners to the ALRC Issues Paper is:

23 March 2005

How to make a submission

A submission may be made in writing, or by phone, or in person. You may choose to answer all of the questions or only those questions in which you have a particular interest or expertise. There is no form or format you need to follow.

Written submissions may be forwarded by:

- **Mail:** PO Box 4637, GPO Melbourne Vic 3001
- **Email:** law.reform@lawreform.vic.gov.au
- **Fax:** 8619 8600

Confidentiality

Submissions are public documents and may be accessed by any member of the public. If you want your submission to remain confidential you must clearly advise us whether:

- You want your submission to be quoted or sourced but your name not to be disclosed; or
- You do not want your submission to be quoted or sourced to you in a commission publication.

REGISTER YOUR INTEREST

If you would like to be kept informed about the progress of the VLRC's Review of the Laws of Evidence, please complete the following information and we will add you to our contact list.

Name: _____

Organisation (if applicable): _____

Position (if applicable): _____

Postal address: _____

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