THE NEW COMMONWEALTH AND NSW EVIDENCE ACTS

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Introduction

The purpose of this paper is provide some basic information regarding the new Commonwealth and NSW Evidence Acts and to advance a case for adoption of identical, or similar, legislation in other Australian jurisdictions.

Background

When the Evidence Act 1995 (Cth) received the Royal Assent on 23 February 1995, having passed through both Houses of the Federal Parliament some weeks before, an important milestone in the development of the Australian legal system was reached.

In July 1979 the Australian Law Reform Commission ("ALRC") had been given the task of reforming the rules of evidence applicable in federal courts. The ALRC engaged in lengthy consultation and prepared 2 discussion papers and 16 research papers on aspects of evidence law (some of them written by the author of this paper). An Interim Report was produced in 1985 and a Final Report in 1987. The Final Report included a draft Evidence Bill.

For several years there was no explicit governmental response. In 1991, however, the New South Wales Government introduced into Parliament its own Evidence Bill which implemented the majority of the ALRC recommendations. In the same year, the Commonwealth Government produced its own Bill. For various reasons, neither Bill was voted on. However, at the end of 1991, the Standing Committee of Attorneys-General gave in-principle support to substantially uniform evidence laws, based on the NSW and Commonwealth Bills. Consultation between NSW and the Commonwealth resulted in the production of essentially uniform legislation, represented by the

Evidence Bill 1993 (Cth) and the exposure draft Evidence Bill 1993 (NSW).

The Commonwealth Bill was passed by the House of Representatives on 19 October 1994. After the Senate Standing Committee on Legal and Constitutional Affairs tabled a favourable Final Report on 8 December 1994, the Bill was considered by the Senate and finally passed, with some amendments, on 2 February 1995. The House of Representatives agreed to the amendments on 7 February 1995.

Thus, more than 15 years after the reference on Evidence was given to the ALRC, the Commonwealth Act was enacted. Within months, the NSW Government had enacted the NSW Evidence Act (which, at the date of this paper, still awaits the Royal Assent). It is almost identical to the Commonwealth Act.

Application

The Commonwealth Act commenced operation on 18 April 1995. It applies to proceedings in federal courts and the courts of the Australian Capital Territory (in relation to hearings which commenced on or after that date). The NSW Act will commence operation on 1 September 1995, applying to all hearings commencing on that date or after in NSW courts (and tribunals which are required to apply the rules of evidence).

The Act (I will refer to both Acts as one) is a substantial piece of legislation - 197 sections, 100 printed pages in length. It is not technically a code. A number of topics sometimes associated with the law of evidence are not dealt with. The ALRC stated in its Interim Report that "the approach taken to the problem of definition has been to exclude:

> - Those topics which should be classified as part of the substantive law or which are so linked with the substantive law that they can only properly be considered in that context. These include legal and evidential burden of proof, parole evidence rule, res judicata, issue estoppel, presumptions.

> - Those topics of adjectival law which should be classified as procedural rather than evidentiary. The result of this distinction is the exclusion of rules such as those relating to the gathering of evidence (including evidence on commission), the perpetuation of testimony, who begins, notice of alibi evidence, no-case submissions and the standard of proof applicable.
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> - Topics such as ordering witnesses out-of-court, bans on the publication of evidence, duties of the prosecution in calling of evidence, the powers of judges and parties to call witnesses and the suggestion that there should be changes in the operation of forensic scientific services."[1]

As a result, the Act does not deal with a number of topics sometimes associated with the law of evidence. As well as those mentioned above, the Act does not deal with inferences (whether from evidence, or from the absence of evidence), with the exception of provisions dealing with the drawing of inferences from documents and things in order to determine admissibility and a provision forbidding the drawing of an adverse inference from exercise of the right to silence.

Further, to some extent, existing statute and common law relating to the rules of evidence is retained, in respect of both the Commonwealth and NSW Acts. Thus, for example, certain sections of the NSW Crimes Act which deal with issues of evidence have not been abrogated. Similarly, common law rules are retained to the extent that they are not inconsistent with the Act.

However, as Justice Smith of the Victorian Supreme Court (who was Commissioner in charge of the ALRC Reference) has stated:

> "In a practical sense, the Act will operate as a code. Thus, in dealing with evidentiary problems in the relevant courts, it will be necessary to look to the statute for the answer. It will not be relevant to look to the common law and prior statute law (and cases interpreting those statutes) unless the previous law has not been changed, or to do so would assist to understand the changes that have been made or terminology employed. The experience of the US Federal Rules [of Evidence] suggests that the Act will become a 'pocket bible', and the law, therefore, more accessible."[2]

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1 ALRC 26, vol 1, par 46.

2 The Hon Justice T H Smith, "Evidence Act 1995 - An Overview". Paper presented at the College of Law (Sydney), 8 April 1995, par 18.

Outline

The Act is divided into 5 chapters, which are themselves divided into parts and divisions:

Chapter 1 - Preliminary

Part 1.1 Formal Matters
Part 1.2 Application of this Act

Chapter 2 - Adducing Evidence

Part 2.1 Witnesses (containing divisions relating to competence and compellability, oaths and affirmations, examination-in-chief, cross-examination and re-examination)
Part 2.2 Documents
Part 2.3 Other Evidence

Chapter 3 - Admissibility of Evidence (containing Parts relating to the relevance rule, various exclusionary rules and discretions to exclude evidence)

Chapter 4 - Proof

Part 4.1 Standard of Proof
Part 4.2 Judicial Notice
Part 4.3 Facilitation of Proof
Part 4.4 Corroboration
Part 4.5 Warnings
Part 4.6 Ancillary Provisions

Chapter 5 - Miscellaneous (including provisions on proof by affidavit, waiver of the rules of evidence and procedure for determining admissibility)

This order is consistent with the intentions of the ALRC that the provisions should follow the order in which evidentiary issues ordinarily arise in a typical trial, from the moment that the first witness gets in the witness box to the determination of factual questions on the admissible evidence by the tribunal of fact (judge or jury) at the end of the trial.

The bulk of the Act (Chapter 3) is taken up with the rules relating to the admissibility of evidence. The ALRC explained the structure of this Chapter:

> "In this part of the legislation, the rules that control the admissibility of items of evidence are set out. It is intended to be an exhaustive statement of the law. It follows what is, on the better view, the existing structure of the law. The rules will apply at each stage of a witness' evidence - including cross-examination. The legislation commences with the basic rule on which the operation of this part of the Bill rests - all relevant evidence is admissible except as otherwise provided in the Bill. All irrelevant evidence is not admissible. There then follow provisions dealing with different types of evidence. In each case, there is a primary rule which operates to exclude evidence of that type and in each case exceptions to that exclusionary rule are set out. The categories of evidence dealt with are documents, hearsay evidence, opinion evidence, admissions, judgments and convictions, character and conduct, identification evidence, privileged communications, evidence included in the public interest - the disclosure of which may endanger State interests, evidence of statements made in settlement negotiations, and evidence of reasons for decision of judge or jury. Finally the legislation contains several discretions [including a 'relevance discretion'] to exclude evidence."[3]

To assist in applying the rules of admissibility, the Act includes a flow chart immediately preceding section 55.

Policy Framework

The Act draws a clear distinction between civil and criminal trials, imposing significantly greater restrictions on the admission of evidence in criminal proceedings. In civil trials, the aim of the Act is to enable parties to have their best available evidence admitted, subject to judicial discretion, to introduce more flexibility into the

3 ALRC 26, vol 1, par 510.

rules of evidence and to balance these changes with procedural safeguards (including notice requirements, enhanced discovery, and a "request system"). The ALRC asserted that the nature and purpose of the criminal trial differ significantly from those of civil trials - the accusatorial model requires that the prosecution prove guilt without the accused being obliged to assist and is designed to accord the accused certain procedural advantages over the prosecution. These advantages flow ultimately from the public interest in minimising the risk of convicting an innocent person.

On the other hand, notwithstanding the argument that the rules of evidence developed largely to keep from juries evidence which may be misused or mis-estimated by them, the ALRC was generally unwilling to draw any significant distinction between jury trials and trials with a judge sitting alone. It concluded that, on the available evidence, it should not be assumed that there is necessarily such a difference between the abilities of judicial officers and jurors that different rules of evidence should be applied to them.

General Merits

As the Federal Minister for Justice stated in March 1995, the "Evidence Act 1995 is one of the most important reforms in the administration of justice in Australia".

The rules of evidence applied in Australian courts are a central part of the system of procedural justice. They serve a number of functions - they regulate what material a court may consider in determining factual issues; how that material is to be presented in the court; and how the court actually goes about the task of deciding the factual issues on the basis of the evidence.

Until the enactment of the Evidence Act 1995 (Cth), and its NSW counterpart enacted in June 1995, the rules of evidence were largely part of the "common law", the product of long historical development by the courts themselves, with only limited statutory

modification. As a result, they reflected a variety of principles and values. They lacked coherence and structure. They were complex, technical and difficult to find. Substantial reform was long overdue. However, the courts were not prepared to engage in this process, believing that it was best left to the legislature.

Opinions will differ on the merits of the Act. No doubt, it will have its share of critics. On a theoretical level, it can be argued that the law in statutory form tends to become more rigid and inflexible, lacking the dynamics of the common law. Courts may have difficulty in developing rules of evidence in response to new types of evidence. The legislation will require more case law to clarify the uncertainties it creates. Amendment will be a difficult process. Injustice may be caused. On a more specific level, no doubt particular provisions will attract criticism, whether for the principles on which they are based or for the difficulties of interpretation and application they create.

Yet, for many, this legislation will be welcome. It will make the rules of evidence much easier to find. It may well make them easier to understand, and to inter-relate. It will certainly simplify many of the rules. It will facilitate the admission of evidence derived from modern information storing media and copying technologies. It will introduce greater flexibility in several areas of evidence law. It will hopefully provide a rational and principled system of trial procedure, one aimed at procedural justice. To the extent that other jurisdictions follow the lead of N.S.W. in enacting parallel legislation, citizens across this country will experience a substantially uniform system of trial procedure.

Of course, it will not solve all the problems with evidence. Deciding whether evidence is "relevant", for example, will remain a task for which the law can only provide limited assistance. Some "rules" can only be expressed in the most general language, articulating a principle rather than a precise test. While this will provide flexibility, the price will be uncertainty of result. In many areas, the Act accords considerable "discretion" to trial judges, both expressly and implicitly. However, it attempts to articulate

the applicable principles and provide guidance in the exercise of such discretion. Ultimately, it relies on the good sense of judges to apply the Act in a way consistent with the policy framework around which the Act is constructed.

Finally, an assessment of the merits of the Act can only take place after a careful and detailed study of the individual provisions. It is not possible to do that in this paper. At most, reference will be made to some of the more obvious changes in the law made by the Act.

Specific Changes

This discussion will be divided into two sections. First, changes which apply generally (to both civil and criminal proceedings). Then to changes applying only in criminal proceedings.

A. GENERAL CHANGES

s 32: a witness refreshing memory in court does not necessarily have to use a document made when the events were "fresh in the memory" (this will only be a relevant consideration to be taken into account by the trial judge in deciding whether or not to give leave to attempt to refresh memory from the document).

s 35: rule in Walker v Walker abolished (no penalty from "calling" for document).

s 38: cross-examination of own witness permissible if gives "unfavourable" evidence (not necessary to have declared "hostile").

s 42: court may disallow leading questions in cross-examination in appropriate circumstances (for example, if witness favourable to cross-examiner or "the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers." ie where there is a real danger that the witness is unusually susceptible to suggestive questioning).

s 46: while the rule in Browne v Dunn is not dealt with comprehensively, it appears clear that a trial judge can no longer refuse to admit evidence on the basis there has been a breach of the rule.

s 51: the "original document" prima facie rule for proving the contents of documents is abolished, replaced by a more flexible system (allowing the contents of documents to be proved in various ways under s 48) - in combination with the "request system" under ss 166-169. Section 167 provides that:

> A party may make a reasonable request to another party for the purpose of determining a question that relates to:
> (a) a previous representation; or
> ...
> (c) the authenticity, identity or admissibility of a document or thing.

Requests can extend to production of documents, things, calling of witnesses, testing, copying, etc. Under s 169:

> (1) If the party has, without reasonable cause, failed or refused to comply with a request, the court may, on application, make one or more of the following orders:
> (a) an order directing the party to comply with the request;
> (b) an order that the party produce a specified document or thing, or call as a witness a specified person, as mentioned in section 166;
> (c) an order that the evidence in relation to which the request was made is not to be admitted in evidence;
> (d) such order with respect to adjournment or costs as is just.

s 56: if evidence is not relevant (as defined in s 55) it is never admissible in a proceeding. If it is relevant, it is admissible, "except as otherwise provided by this Act". However, it may be excluded by one of the exclusionary rules, in the exercise of judicial discretion, or under one of the procedural provisions in the Act. In this context, the discretion under s 135 should be emphasised. Applying in both civil and criminal proceedings, it permits a court to 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.

s 59. The hearsay rule is substantially modified. This provision states:

> 59. (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

As the ALRC explained: "The proposal resolves the issue of whether the proposed rules should apply to implied assertions as well as express assertions, by recommending that a distinction be drawn between intended and unintended implied assertions, with the latter outside any hearsay rule".[4]

s 60: This provision is even more dramatic:

> 60. The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

The ALRC explained the reasoning behind the provision:

> "Under existing law hearsay evidence that is admissible for a non-hearsay purpose is not excluded, but may not be used by the court as evidence of the facts stated. This involves the drawing of unrealistic distinctions. The issue is resolved by defining the hearsay rule as preventing the admissibility of hearsay evidence where it is relevant by reason only that it would affect the court's assessment of the facts intended to be asserted. This would have the effect that evidence relevant for a non-hearsay purpose--eg to prove a prior consistent or inconsistent statement, or to prove the basis of the expert's opinion - will be admissible also of evidence of the facts stated."[5]

In this context s 136 should be noted:

> 136. The court may limit 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.

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4 ALRC 26, vol 1, par 684.
5 ALRC 26, vol 1, par 685.

Specific provisions dealing with hearsay in criminal cases are dealt with below.

s 80: this provision abolishes the "ultimate issue" and "common knowledge" rules in respect of expert opinion evidence. Reliance is placed on discretion (particularly s 135).

s 103: cross-examination regarding a matter relevant only to the credibility of a witness is only permissible if it has "substantial probative value".

s 106: in practical terms the "finality rule" for collateral matters is abolished.

s 118,119: the sole purpose test for legal professional privilege is replaced by a dominant purpose test.

s 128: a witness may be forced to answer questions notwithstanding the privilege against self-incrimination "in the interests of justice". If so required, the witness is given a certificate providing both use and indirect use immunity.

ss 146, 147: the admission of computer produced evidence is facilitated.

B CHANGES SPECIFIC TO CRIMINAL PROCEEDINGS

s 18: This provision grants a discretion to the trial judge to allow the spouse, child or parent of the accused to choose not to testify (subject to s 19 which compels evidence in certain domestic violence prosecutions).

s 20: The trial judge "may comment on a failure of the defendant to give evidence [but] the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned".

s 65: This provision deals with first hand hearsay in criminal trials where the maker of the representation is unavailable to testify. Clause 4 of Part 2 of the Dictionary deals with the unavailability of persons. It includes:

> (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
> (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

The most important parts of s 65 are:

> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:
> (a) made under a duty to make that representation or to make representations of that kind; or
> (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
> (c) made in circumstances that make it highly probable that the representation is reliable; or
> (d) against the interests of the person who made it at the time it was made.
>
> ...
>
> (7) Without limiting paragraph (2)(d), a representation is taken for the purposes of that paragraph to be against the interests of the person who made it if it tends:
> (a) to damage the person's reputation; or
> (b) to show that the person has committed an offence for which the person has not been convicted; or
> (c) to show that the person is liable in an action for damages.
>
> (8) The hearsay rule does not apply to:
> (a) oral evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
> (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.
>
> (9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:
> (a) is adduced by another party; and
> (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

It must be emphasised that discretionary exclusion is still possible.

s 66: This provision deals with first hand hearsay in criminal trials where the maker of the representation is available to testify.

> (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
> (a) that person; or
> (b) a person who saw, heard or otherwise perceived the representation being made;
> if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.
>
> (3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

s 84: The Act abolishes the voluntariness rule. In its place, the most important provisions are ss 84, 85, 90 and 138. Section 84 provides:

> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
> (b) a threat of conduct of that kind.

s 85: This provides:

> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
> (a) in the course of official questioning; or
> (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
>
> (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical

disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:
(i) the nature of the questions and the manner in which they were put; and
(ii) the nature of any threat, promise or other inducement made to the person questioned.

s 90 retains the fairness discretion.

s 94-101: these provisions deal with "tendency and coincidence" evidence (otherwise known as "propensity" and "similar fact" evidence). They impose notice requirements, require that the evidence (whether tended in civil or criminal proceedings) must have "significant probative value" and, where tendered against an accused, its probative value must "substantially outweigh" its prejudicial effect.

s 110: where an accused adduces good character in a "particular respect" (eg non-violence) the prosecution may only rebut with evidence of bad character in that respect (eg not evidence of dishonesty).

ss 113-116: these provisions substantially tighten up the rules relating to identification evidence, excluding such evidence unless an identification parade was held (unless it was not reasonable to have held one).

s 138: This provision effectively retains the Bunning v Cross discretion but puts the burden on the party seeking to have the evidence admitted.

s 164: this provision abolishes the "corroboration" rules but ...

s 165: this introduces a general system of warning for any evidence that may be unreliable (and various categories of evidence are expressly held to fall in this category eg hearsay, admissions, identification evidence, police informers, "verbals", accomplices, etc). Relevant provisions of s 164 are:

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable; and
(b) inform the jury of matters that may cause it to be unreliable; and
(c) warn the jury of the need for caution in determining whether to accept theevidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

Conclusion

No doubt views will differ on the merits of all these changes. Certainly there will be criticisms of individual provisions. Nevertheless, at the end of the day the issue is whether the package of reforms introduced by this Act is an improvement on the existing law of evidence. I believe that it is.