The Uniform Evidence Act and the Anunga Rules: Accommodation or Annihilation?

By

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Introduction

In 2006, the Northern Territory Law Reform Committee's (NTLRC) *Report on the Uniform Evidence Act* was released.[1] In that report, the NTLRC noted the differences between the Uniform Evidence Act (UEA) and Northern Territory evidence laws. The NTLRC made particular mention of the impact of the UEA on the Anunga rules:

> *Insofar as the Northern Territory has any local common law the most obvious example would be the "ANUNGA" Rules propounded by Foster CJ and Muirhead J of the NTSC. It has never been deemed necessary to include the rules in the NT [Evidence Act], presumably because they have always been accepted by the Northern Territory courts since their inception. Again, bearing in mind that the UEA is not a code, there is no reason to interfere with these rules in any way and no reason to suppose that they will be any less effective under the UEA regime.*[2]

Whether the Anunga Rules can be accommodated within the UEA regime, as the NTLRC suggests, requires an analysis of the relevant provisions of the UEA. While it is true that the UEA in its entirety is not a code,[3] the Act does in effect codify many aspects of the law of evidence. In particular, the UEA excludes the operation of other laws regarding the admissibility of evidence and the competence and compellability of witnesses'.[4] Given that some of the Anunga Rules impact on the question of the admissibility of evidence, the potential for annihilation exists. Whether it will occur in practice is the focus of this paper. Before addressing this issue, however, it is helpful to pause briefly to reflect on the road to uniform evidence laws.

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[1] Northern Territory Law Reform Committee, *Report on the Uniform Evidence Act* (Report No 30, 2006).

[2] Northern Territory Law Reform Committee, *Report on the Uniform Evidence Act* (Report No 30, 2006) 24.

[3] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR) [2.5].

[4] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR) [2.6].

Towards a Uniform Evidence Law Regime

In 2011 the Northern Territory Government signalled its intention to introduce into the Northern Territory Parliament the Evidence (National Uniform Legislation) Act. This Bill is based on the UEA regime which currently applies in the federal courts, and the state and territory courts of the Australian Capital Territory, New South Wales, Norfolk Island, Tasmania and Victoria.

The UEAs were themselves the product of extensive research and consultation conducted in the 1980s by the Australian Law Reform Commission (ALRC) pursuant to terms of reference issued to the ALRC by the federal government. During the course of the inquiry, the ALRC published a series of research reports and discussion papers, an interim report, *Evidence* (ALRC 26, 1985) and a final report, *Evidence* (ALRC 38, 1987), which contained draft legislation.[5]

In 1991, the federal and New South Wales governments each introduced legislation substantially based on the ALRC's draft legislation. This legislation came into effect on 1 January 1995. The *Evidence Act 1995* (Cth) applies in federal courts and, by agreement, in the courts of the Australian Capital Territory. The *Evidence Act 1995* (NSW) applies in federal or state proceedings before New South Wales courts and in some tribunals. In 2001, Tasmania joined the UEA regime, as did Norfolk Island in 2004. [6] With the enactment of the *Evidence Act 2008* (Vic), the UEA regime also now applies in Victoria.

In July 2004, the federal Attorney-General asked the ALRC to conduct an inquiry into the operation of the *Evidence Act 1995* (Cth). The Attorney General of New South Wales issued similar terms of reference to the New South Wales Law Reform Commission (NSWLRC) for a review of the *Evidence Act 1995* (NSW). In November 2004, the Attorney-General of Victoria asked the Victorian Law Reform Commission (NLRC) to provide advice on the action required to facilitate the introduction of the UEA into Victoria. The ALRC, NSWLRC and VLRC collaborated in stakeholder and community consultations, and in the production of a Discussion Paper, *Review of the Uniform Evidence Acts*, and a final report, *Uniform Evidence Law* (ALRC 102).[7]

Almost all of the recommendations contained in ALRC 102 were reflected in the amendments to the *Evidence Act 1995* (NSW),[8] *Evidence Act 1995* (Cth),[9] *Evidence Act 2001* (Tas),[10] and the new *Evidence Act 2008* (Vic). The proposed Evidence

[5] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR) [1.4].
[6] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR) [1.7]-[1.10]..
[7] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR).
[8] *Evidence Amendment Act 2007* (NSW).
[9] *Evidence Amendment Act 2008* (Cth).
[10] Evidence Amendment Bill 2010 (Tas).

(National Uniform Legislation) Bill (NT) also reflects the recommendations contained in ALRC 102.

The Anunga Rules

In *R v Anunga*, Foster J (as he then was) of the Supreme Court of the Northern Territory 'put on record general guidelines for the conduct of police officers when interrogating Aboriginal persons'.[11] While expressed as 'guidelines', in an evidentiary context in the Northern Territory, the word 'rules', while not universally accepted, is probably more appropriate. As Foster J warned police, 'material departure from these guidelines will probably lead to the evidence of the interrogation, whether it be oral or in the form of a record of interview, being rejected'.[12] In subsequent years, the Northern Territory courts have excluded evidence of admissions on the basis of non-compliance with the Anunga Rules;[13] a result more consistent with rules than guidelines.

When an Indigenous person is being interrogated by the police, the Anunga Rules require that:

> *1 where necessary, an interpreter should be present,*
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> *2 where practical a 'prisoner's friend' should be present,*
>
> *3 care should be taken in administering the caution to ensure there is a proper understanding,*
>
> *4 leading questions should be avoided,*
>
> *5 even after an apparently frank and free confession is obtained, police should continue to investigate the matter to find proof of the commission of offences from other sources,*
>
> *6 police should offer the interviewee a meal, coffee, tea, water, and toilet breaks,*
>
> *7 suspects are not interviewed when ill, drunk or tired and that interviews should not last for an unreasonable length of time,*
>
> *8 if the suspect seeks legal advice, reasonable steps should be taken to obtain it and if the suspect states that they do not wish to answer any more questions, the interview should be terminated, and*
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> *9 substitute clothing should be provided where clothing is taken for forensic examination.*[14]

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[11] *R v Anunga* (1976) 11 ALR 412, 413.
[12] *R v Anunga* (1976) 11 ALR 412, 413.
[13] For example, see *R v Riley* [1994] NTSC 62; *R v Cotchilli* [2007] NTSC 52.
[14] H Douglas, The Cultural Specificity of Evidence: the Current Scope and Relevance of the *Anunga* Guidelines (1998) 2 *NSWLJ* 27, 30-31.

The exclusion of evidence on the basis of non-compliance with the Anunga Rules appears to be founded on the accused's right to a fair trial. Integral to that right in the context of Indigenous witnesses is procedural fairness in obtaining admissions, the administration of the caution, and the provision of an interpreter when necessary. How these fundamental protections are dealt with in jurisdictions governed by the UEA is the topic to which I now turn.

Applicability of the Anunga Rules in UEA Jurisdictions

Admissions

As has been noted above, the Anunga Rules help to ensure that an Indigenous accused is accorded a fair trial. In particular, the Rules assist the court in its analysis of whether the questioning of an Indigenous accused, during which an admission was elicited, was fair.

Under the UEA, an admission is defined in Part 1 of the Dictionary to the Act to mean

> *a previous representation that is:*
>
> *(a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and*
>
> *(b) adverse to the person's interest in the outcome of the proceeding.*

'Previous representation' is also defined and means 'a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced'.[15]

The admissibility of admissions is dealt with in Chapter 3, Part 3.4 of the UEA. The fact that the provisions relating to admissions fall within Chapter 3 is significant. Section 56, which deals with relevance, 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 phrase 'except as otherwise provided by this Act' displaces state and territory law – including common law cases such as *R v Anunga* – relating to the admissibility of evidence unless that law is preserved by the wording of the statute elsewhere in the UEA.[16] In the context of the Northern Territory, therefore, once the Evidence (Uniform National Legislation) Bill (NT) comes into force, *R v Anunga* will no longer be binding precedent on matters relating to the admissibility of evidence. As

[15] For example see Evidence (National Uniform Legislation) Bill (NT), Dictionary, Pt 1.
[16] S Odgers, *Uniform Evidence Law* (9th ed, Thomson Reuters, 2010) [1.3.260].

guidelines for the conduct of police in the interrogation of Indigenous persons, however, the Anunga Rules will continue to apply.

In the context of admissions, the focus of the UEA provisions is not on whether the admission was voluntary, or 'whether the will of the accused was overborne in some way'.[17] Rather, the UEA

> *shifts the focus of the fact finder to the likely reliability or truth of the admission, in light of all the circumstances in which it was made, and the onus of proof on that issue is on the party tendering the evidence of the admission*.[18]

Section 85, which applies only in criminal proceedings and only to evidence of an admission made by an accused, specifically provides that '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'.[19] Lack of compliance with any of the Anunga Rules will be a relevant consideration when the court determines whether the police's questioning of an Indigenous accused made it likely that the truth of the admission was adversely affected.

Discretion to exclude admissions

At common law, a confession may be rejected if in all of the circumstances it would be unfair to use it against the accused.[20] In the exercise of this broad discretion, the majority of the High Court of Australia in *R v Swaffield; Pavic v The Queen* concluded that a judge may take into account considerations of voluntariness, reliability and public policy. [21] The latter was expressed by the court as

> *an overall discretion which might take account of all of the circumstance of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards*.[22]

Section 90 of the UEA, combined with s 84, which deals with admissions influenced by violence and certain other conduct, and s 138, which deals with improperly or illegally obtained evidence (discussed below), encapsulate the breadth of the fairness discretion at common law.[23] Section 90 provides:

> *In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:*

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[17] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR) [10.8].
[18] Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR) [10.8].
[19] For example see Evidence (National Uniform Legislation) Bill (NT), 85(2).
[20] JD Heydon, *Cross on Evidence* (8th Australian ed, 2010) [33680].
[21] *R v Swaffield: Pavic v The Queen* (1998) 192 CLR 159 at [70].
[22] *R v Swaffield: Pavic v The Queen* (1998) 192 CLR 159 at [69].
[23] *R v Swaffield: Pavic v The Queen* (1998) 192 CLR 159 at [70].

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstance in which the admission was made, it would be unfair to use the evidence.

Lack of compliance with any of the Anunga Rules are circumstances which properly could be taken into account when determining whether it would be unfair to use evidence of the admission adduced by the prosecution. The analysis will focus on whether the lack of compliance with the Anunga Rules adversely impacted on the likely reliability or truth of the admission, and on whether the admission was obtained at a price which, on public policy grounds, was unacceptable.

Improperly or illegally obtained evidence

Section 138(2)(a) of the UEA is another section that may come into play when there has been a breach of the Anunga Rules. It provides:

> *Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:*
>
> *(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning.*

Section 138(2) attempts to strike a balance between the public interest in obtaining admissions from suspects against 'the public interest in protecting the privacy and dignity of the suspect'.[24] While the section is aimed at constraining police interrogation tactics aimed at coercing a suspect,[25] in appropriate circumstances an argument could be made that the failure to provide a 'prisoner's friend', an interpreter, or to offer the suspect a meal, coffee, tea, water, and toilet breaks as required by the Anunga Rules was 'likely to impair substantially the ability of the person being questioned to respond rationally to the questioning'.

Impairment in and of itself is not sufficient. The failure to comply with the Anunga Rules has to 'impair substantially' the Indigenous witness being questioned 'to respond rationally to the questioning'. As the ALRC noted,

> *To require merely a casual link between the coercion and impairment of the ability to respond rationally to questions is too limiting. While the ability may be impaired, the suspect may still be able to respond rationally to questions. It is therefore proposed that the definition include conduct likely to impair substantially the ability to respond rationally to questions*.[26]

[24] Australian Law Reform Commission, *Evidence* (ALRC 26, vol 1, 1985) [965].
[25] Australian Law Reform Commission, *Evidence* (ALRC 26, vol 1, 1985) [965].
[26] Australian Law Reform Commission, *Evidence* (ALRC 26, vol 1, 1985) [965].

In other words, a technical breach of the Anunga Rules that does not impair substantially the ability of the Indigenous witness being questioned by the police to respond rationally to the questioning will not be excluded by s 138(2) of the UEA.

However, if the breach is the result of a blatant disregard by the police of the requirements imposed by the Anunga Rules, or it is clear that the police improperly attempted to avoid the Rules, an argument could be made under s 138(1) that the evidence was obtained improperly. An analogous example is police improperly avoiding the effect of legislation requiring that questioning of suspects be recorded.[27] In such circumstances, a strong case for exclusion of the admission under s 138(1) can be made.[28]

Under s 138, the evidentiary onus is on the defendant to establish that the evidence was improperly or illegally obtained. If this onus is met, the evidentiary onus shifts to the prosecution 'to satisfy the court that the desirability of admitting such evidence outweighs the undesirability of admitting it, given the way in which it was obtained'.[29]

Cautioning of persons

The Anunga Rules provide that care should be taken in administering the caution to ensure there is a proper understanding of the substantive effect of the caution. Under the UEA, the cautioning of persons is governed by s 139. The failure to caution a suspect in the circumstances and as required by s 139(1) is considered to be evidence that was obtained improperly or in contravention of an Australian law pursuant to s 138(1)(a). To comply with s 139, the 'caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency'.[30] The New South Wales Court of Criminal Appeal, when considering this provision, noted that,

> *the section is purposive. It does not operate on an accused's general language ability. It operates on the ability to understand the concept underlying the caution and the function of a caution. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence*.[31]

It is clear, therefore, that the focus of both the Anunga Rules and s 139 of the UEA is to ensure that the suspect understands the substantive effect of the caution.

Interpreters

The Anunga Rules provide that, where practicable, an interpreter should be present. Writing in 1998, Douglas noted that,

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[27] For example see *Police Administration Act* (NT) ss 142, 143. Cf *R v Em* [2003] NSWCCA 374.
[28] S Odgers, *Uniform Evidence Law* (9th ed, Thomson Reuters, 2010) [1.3.15040].
[29] S Odgers, *Uniform Evidence Law* (9th ed, Thomson Reuters, 2010) [1.3.15000]
[30] For example see Evidence (National Uniform Legislation) Bill (NT), s 139(3).
[31] *R v Deng* [2001] NSWCCA 153 at [17]. See also S Odgers, *Uniform Evidence Law* (9th ed, Thomson Reuters, 2010) [1.3.15380].

> *[t]he Australian legal system is slowly starting to recognise the right to an interpreter and this is evidenced by the development of legislated rights. The common law, however, does not yet recognise a right to an interpreter at the interrogation or trial stage. Greater emphasis should be placed on the pretrial processes. The cultural shift could be encouraged by recognising rights to an interpreter at the pretrial stage at least in documents like the ICCPR*.[32]

While the establishment of agencies such as the Aboriginal Interpreter Service have improved access to interpreters for Indigenous people living in the Northern Territory, obtaining interpreters to assist in the questioning of Indigenous suspects, particularly in remote communities, remains a challenge.[33] Further, while the UEA makes provision for a witness giving evidence through an interpreter at trial,[34] the Act is silent on the provision of interpreter services during pre-trial stages. In this regard the common law, and in particular the Anunga Rules, will continue to apply in the Northern Territory after the Evidence (National Uniform Legislation) Bill (NT) comes into force.

Conclusion

In this paper an attempt has been made to illustrate how the Anunga Rules can be accommodated in jurisdictions which apply the UEA. While, overall, the UEA does not codify the law of evidence, matters relating to the admissibility of evidence are governed by the UEA provisions to the exclusion of common law evidentiary principles. After the enactment of the Evidence (National Uniform Legislation) Bill (NT), therefore, the case of *R v Anunga*,[35] and those common law cases that have applied *R v Anunga*, will no longer be binding authority in so far as they relate to the admissibility of evidence. A breach of the Anunga Rules, therefore, must be placed in the context of the relevant UEA provisions.

It follows, therefore, that it will be important for practitioners to formulate arguments based on a breach of the Anunga Rules in the language of the applicable UEA provision. While, as the above discussion has illustrated, such a breach may result in the exclusion of the evidence, establishing a technical breach of the Rules generally will not suffice. It must be established that such breach adversely impacts on the reliability or truth of the evidence, or alternatively, the evidence was obtained at a price which, on public policy grounds, is unacceptable.

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[32] H Douglas, The Cultural Specificity of Evidence: the Current Scope and Relevance of the *Anunga* Guidelines (1998) 2 *NSWLJ* 27, 46-47.

[33] C Heske, Interpreting Aboriginal Justice in the Territory' (2008) 33 *AltLJ* 5, 6.

[34] For example see Evidence (National Uniform Legislation) Bill (NT), s 30.

[35] *R v Anunga* (1976) 11 ALR 412, 413.