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Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

Reference: Foreign Evidence Amendment Bill 2008

FRIDAY, 20 FEBRUARY 2009

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Friday, 20 February 2009

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurlley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Crossin and Barnett

Terms of reference for the inquiry:

To inquire into and report on: Foreign Evidence Amendment Bill 2008

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Committee met at 1.02 pm

CHAIR (Senator Crossin)—I declare open this hearing of the Senate Standing Committee on Legal and Constitutional Affairs and its inquiry into the **Foreign Evidence Amendment Bill 2008**. This inquiry was referred to the committee by the Senate on 12 February 2009, for report by 6 March 2009. The primary purpose of the bill is to change the process to allow the admission of a foreign business record as evidence in court proceedings, unless the court considers the record is not reliable, probative or privileged. The amending legislation would retain the current provisions for adducing foreign material that does not appear to consist of a business record.

The committee has received six submissions to this inquiry and each of those have been authorised for publication and are available on our website. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of giving evidence to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. I remind you that we prefer all evidence to be given in public but of course you have the right to request that you provide your evidence in a private session in camera. You can request that of the committee if that is the case.

Secretary—Chair, I should just point out that the officers from the Attorney-General's Department and the DPP are here and are listening to the evidence.

MOULDS, Miss Sarah Petronella, Policy Lawyer, Law Council of Australia

ODGERS, Mr Stephen, SC, Member, National Criminal Law Committee, Law Council of Australia

Evidence was taken via teleconference—

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Odgers—I am representing the Law Council. I am a member of the Criminal Law Committee of the Law Council and I am also a Sydney barrister.

CHAIR—We have the Law Council's submission with us. Do you need to make any amendments or alterations to that submission?

Mr Odgers—No.

CHAIR—We do have our deputy chair, Senator Guy Barnett from Tasmania, on the line as well. There are just two senators available today for this inquiry. I think, as Peter Hallahan said at the beginning, that there are representatives from the Attorney-General's Department also listening in to this evidence. Mr Odgers, I now invite you to make an opening statement or to speak to your submission and then we will go to questions.

Mr Odgers—Thank you for the opportunity to make submissions in respect of the Foreign Evidence Amendment Bill. I do not propose to go through, in detail, the written submission that we have provided but I will touch on aspects of it in what I say. I will be focusing primarily on the foreign business records aspect of the amendment bill, although I note that there are other aspects of the bill which we have referred to in our written submission, particularly at pages 12, 13 and 14. In focusing on foreign business records the current position is that, for foreign business records to be admissible in an Australian court, they must comply with the usual rules of evidence that operate in that court. In Australia we have what is called uniform evidence legislation, which applies in the Federal Court in New South Wales, Tasmania, the ACT and will be applying in Victoria from probably the latter part of this year. Other states have different evidence legislation, but I think it would be fair to say that business records legislation tends to be pretty similar around the country.

The Law Council's major concern about the bill is that it will remove the requirement that foreign business records comply with normal rules of evidence. It largely displaces the operation of those rules. There is no longer a requirement to comply with those rules. Instead, there is imposed, essentially, an obligation on the party opposing the introduction of foreign business records to demonstrate that what appears to be a business record is not reliable, probative or privileged. Then, apart from that, there is reliance on a very broad judicial discretion, expressed in terms of what appears to be just or whether justice would be better served if the evidence was not admitted.

Can I make a preliminary point about that. In terms of the rules of admissibility, the law of evidence in this country is usually divided between rules and discretions. It has never been the view of the law that you can leave all of this to discretion. Discretion is inevitably uncertain, subjective and it depends on the judicial officer involved. I think a term that has been used for judicial discretion is that it imports palm tree justice: you do not know what the outcome will be. That is why there is a large number of rules of evidence which do not

have a large discretionary component. We would say it is simply a major change of approach to get rid of rules of admissibility and replace them with a broad judicial discretion.

I can quickly summarise the most important changes that the proposed amendments make relating to business records, compared with the current law. Firstly, it is not necessary for the prosecution to establish that what appears to be a business record is a business record; it is enough that it appears to be. That contrasts with all the business records provisions in Australian jurisdictions which require that the court be satisfied that it is in fact a business record. That is the first point of contrast.

Secondly, there is no obligation under the amending bill for it to be shown that any statement in the record is derived from a person who has personal knowledge about the thing stated. It is certainly required, under the uniform evidence legislation for business records, that you can show a linkage between the origin of the information and the business record and a person who either had or can reasonably be supposed to have had personal knowledge. As I say, that will not be present under the proposed amendment.

The third difference, and an important difference, is that business records are not admitted in Australia if they were prepared in anticipation of litigation or anticipation of a criminal proceeding. So the point is very simple—that if a record only comes into existence after it is anticipated that there is going to be litigation or a criminal proceeding, there is a very real risk that material will be created in the business record to benefit one side or other in the litigation or in the prosecution. For that very obvious reason, there is a rule in the business records legislation that such records do not fall within the business records exception to the hearsay rule. Again, that requirement is not to be found in the bill as it currently exists.

The fourth point is that, instead of these kinds of safeguards which I have specified, the bill imposes an onus, we would say, on the party opposing admission of the evidence to demonstrate that the record, or what appears to be the record, is not reliable, probative or privileged. Privilege I will put to one side. We do not have any major problems with that issue, because it retains the usual rules of privilege. Probative we say is not a particularly helpful concept in this context. It would normally be understood to mean relevant, which means that if it has any kind of bearing on the case it would be probative in some way and therefore is no real safeguard. The only real safeguard that no doubt the supporters of this bill point to is this 'not reliable' test.

Apart from replacing the specific rules which I have already articulated, we are concerned that it is expressed in terms which require the opposing party to satisfy the court that the evidence is not reliable. Of course, it does not impose any obligation to call evidence, but if the court simply does not know one way or the other then the burden will not be met—the evidence will be admitted subject to discretion. We see no justification whatsoever for not imposing an obligation on the prosecution to persuade the court that the record is reliable, rather than putting it in these negative terms. That is another criticism we bring to the bill.

The next criticism is one that relates to the fact that under the amendment, as is made clear in what has been said in the written submissions, a record which survives the Foreign Evidence Amendment Bill, or the Foreign Evidence Act as amended, will be admissible regardless of any rules of evidence to the contrary. So we have made the point in the written submission at page 11 that this means that all the major evidentiary exclusionary rules that exist in Australian law simply have no operative effect. By that I am referring to the rule relating to opinion evidence, the rule relating to tendency evidence—I am looking at the top of page 11 now—the rule relating to identification evidence, the rules relating to admissions and confessions and arguably also the rules relating to unlawfully or improperly obtained evidence.

None of these would apply to foreign business records. That means that, for example, the requirement that the person who expressed an opinion have expertise is not present. The tendency rule normally excludes evidence which shows other criminality. That evidence is not excluded by that rule. Admissions evidence: there are in all Australian jurisdictions obligations for the prosecution to establish that any confession or admission was voluntarily made.

That is the common law requirement. In uniform evidence legislation the requirement is that it be shown that it was not obtained by violence or other extreme misconduct like that, including torture obviously, quite apart from any considerations of reliability. I want to emphasise that: under Australian law, even if there are good reasons to believe that an admission or a confession is reliable, it will be excluded and must be excluded if it was obtained involuntarily or by extreme misconduct which significantly impinges on the person's freedom of choice, like, obviously, torture. Again, that rule will not apply to evidence of foreign business records.

I think I have made the point: there is a whole series of exclusionary rules which do not operate in respect of this evidence. To leave it to discretion is, in the view of the Law Council, a wholly unsatisfactory solution to this problem. I would also point out that the discretionary provision that is currently in the Foreign Evidence Act at section 25 is expressed in the most vague and uncertain language, and it would be quite unclear how the kinds of concerns that justify the exclusionary rules would be taken into account in applying that very general discretion.

Let me conclude by saying that in the view of the Law Council these changes are so significant, so potentially dangerous, that they require the clearest demonstration of necessity. The Law Council has not seen such a clear demonstration, and we would say that there have not been adequate processes of consultation and review in respect of this whole amending process. We have noted in the written submission at page 7 inadequate processes of consultation review. We note that the Australian Law Reform Commission looked at the whole law of evidence only in 2004-05, in looking at reviewing the uniform evidence law, and so far as we are aware, looking at the report of the Law Reform Commission, there is no hint in any of that that the Commonwealth DPP, for example, raised concerns about business records provisions in the act or specifically about problems with foreign business records.

I am not saying that to criticise the Commonwealth Director of Public Prosecutions; what I am saying is that this is a matter of such importance that one would have thought that a body like the Australian Law Reform Commission would be perfectly placed to engage in the process of considering the problem that may exist in respect of foreign business records and in coming up with a committed and balanced solution to the problem. There can be no question that the uniform evidence legislation could be amended to cover foreign business records in all Australian courts. Currently the Commonwealth Evidence Act 1995 applies some of its provisions in all Australian courts. It seems to the Law Council that the proposed amendments are of such significance that this is a matter that really needs comprehensive review by the Australian Law Reform Commission before the step of amending the bill in the way proposed.

I have been talking for a while. I will not say anything more about the issues other than foreign business records. I have referred to issues relating to foreign testimony at pages 12 and 13 of the paper, and there is reference to the problem of retrospectivity at pages 13 and 14. But I think what is written there is fairly self-explanatory. I think I will stop at this point and let other people speak.

CHAIR—Thank you, Mr Odgers. Ms Moulds, was there anything you wanted to add to that?

Ms Moulds—No, thank you.

CHAIR—We will go to questions. I will start. Mr Odgers, I received just this morning some further points from the Attorney-General's Department. They say in this further submission, which you probably have not had a chance to see—

Mr Odgers—I think I have it.

CHAIR—They say that some of the current provisions of the Foreign Evidence Act are outdated and do not adequately accommodate Australia's increasing reliance on certain forms of foreign evidence. They then go on to say that, for example, Australia made 225 requests for mutual assistance in criminal matters in 2007-08 compared to 64 requests in 1994-95. I am only assuming here that perhaps the matter was not raised in the law reform review of 2004-05 because perhaps it has become more of an issue since those years, in the last three to four years, than it was during the time of the review.

Mr Odgers—As I say, I was not criticising the Commonwealth DPP for not raising it; I am merely making the point that it is something that would appropriately be the subject of a reference to the Law Reform Commission. I am not disputing that there is a greater use of foreign business records in prosecutions. That is not an issue here. There are claims in the submission that there have been problems, although I have to say that it is put at a level of generality that makes it very difficult for the Law Council to respond to. I think that is really the point I made earlier about the need for a clear demonstration of necessity for these amendments. The fact that there is more foreign evidence coming in is obviously not the justification. It is said to be the problems that have existed but, as I say, it is put at a level of generality that makes it very difficult to deal with.

CHAIR—Are you suggesting that it would be better to amend a sort of general evidence national state and territory legislation rather than just this foreign evidence?

Mr Odgers—I am saying there would be no difficulty whatsoever in amending the Commonwealth evidence act to make it apply generally to all Australian courts in respect of foreign evidence. With the fact that there is a constitutional power to pass a foreign evidence act, there is no question that it could be

incorporated in the evidence act. But at the end of the day it does not really matter whether it is in an evidence act or a foreign evidence act. What matters is what rules should apply. Law Council begins with a presumption that evidence is evidence and that if you have rules of evidence that apply, they should apply generally to all evidence. To the extent that there are specific reasons why those rules should be modified for foreign evidence—and we accept that there is an argument that some modification is appropriate—it is probably best done in the context of a review of all evidence laws. All I am proposing is that the Law Reform Commission, which has the expertise to look at laws of evidence generally, should be given a reference to consider this specific issue.

CHAIR—Sure; except the government would put to us that these changes are needed in order to progress their case that may arise under Operation Wickenby. So I guess they are saying to us that there is some urgency in this.

Mr Odgers—Again, it is difficult to respond without knowing precisely what the problem is that they say exists—

CHAIR—They are not likely to do that, are they, or else they throw their cards on the table in a sense, don't they, if they have an impending prosecution.

Mr Odgers—Law Council does not think it is appropriate to make very major changes to the rules of evidence that apply in all Australian jurisdictions on the basis of one case where it is said that there are specific problems.

CHAIR—Okay. Can I ask you, then, about the linkage issue that you raised. On page 11, as you said, you went through a number of acts that are either amended or discarded, I suppose, in relation to this.

Mr Odgers—The number of rules of evidence?

CHAIR—Yes. Are you suggesting, therefore, that if this bill is passed business records could be produced in a court case and you would not have to prove that, say, an accountant, or a tax agent, or a qualified financial person produced these?

Mr Odgers—Correct, there would be no obligation. Any expression of opinion contained in a foreign business record would not be subject to the opinion exclusionary rule in section 76 of the Commonwealth Evidence Act, and the only safeguard would be persuading the court that the evidence is not reliable or discretionary exclusion. None of the exclusionary rules or opinion tendency identification, admissions, et cetera would apply.

CHAIR—There would be no other rules of evidence in a country where this occurs?

Mr Odgers—I am sorry, I do not understand the question.

CHAIR—This would be a one-off, a first-off.

Mr Odgers—This is unique.

CHAIR—The other issue you raised was the matter that, as I understand it, you are currently not allowed to prepare evidence—in this case, I am assuming it would be financial records—in anticipation of a trial. So I am assuming once someone is arrested, for example, what you are saying is you cannot doctor or—

Mr Odgers—Yes, you cannot get in a business record which only came into existence after it was anticipated that litigation was going to be happening, or a proceeding or some kind, or a criminal prosecution, or something that came into existence during an investigation of a criminal matter.

CHAIR—Let us say a company record. If I arrested you last week and a trial then was pending in September, I cannot produce a company's annual report, say in July, in anticipation of that trial. Is that right?

Mr Odgers—That is right, if the report came into existence during that period.

CHAIR—All right. And, again, those rules are discarded in this legislation?

Mr Odgers—Correct.

CHAIR—And we do not really understand why.

Mr Odgers—The justification is the one that you articulated earlier. 'There is a problem with a particular prosecution, it is difficult for us to get the evidence in, we want to introduce this extremely flexible approach to the evidence, which ultimately relies on you demonstrating it is not reliable or broad judicial discretion,' if I might simplify it.

CHAIR—Are you saying that the way this amendment stands and this law would stand if passed, it is the defendant who actually has to prove that the evidence is unreliable rather than the prosecution proving the evidence is reliable.

Mr Odgers—Yes, there is no question about that.

CHAIR—Is that unique?

Mr Odgers—I would not go that far, but I cannot think of an evidentiary rule either under the uniform evidence legislation or under the common law which says that there is a precondition to admissibility where to exclude it you have to show it is not reliable. Let me give you an example. Section 85 of the uniform evidence legislation deals with admissions, confessions, and requires the prosecution to show that the admission is reliable, effectively—I am using not precise language. I cannot think of a provision which imports a requirement of reliability but says it has to be shown that it is not reliable.

Let me just clarify that: the provision in the amending bill talks about the court considering the business record is not reliable. It does not specifically say the party opposing it coming in has to show it is not reliable, but the practical consequence is that the burden will be on that party because often enough the document itself, there will be nothing about it which will really tell you one way or the other whether it is reliable or not. There will be nothing obvious about it, which tends to point to a conclusion that it is not reliable. As a practical matter, the practical onus will be on the party opposing this evidence coming in to demonstrate and adduce evidence to show that the business record is not reliable.

CHAIR—I am assuming here that your criticism is of particularly sections 22 to 24.

Mr Odgers—Yes.

CHAIR—That is the main purpose of the bill in a sense.

Mr Odgers—That is exactly right. We are substantially opposing the real essence of the bill.

CHAIR—So the position of the Law Council would be that you would recommend to this Senate committee that we do not support the passage of this legislation.

Mr Odgers—That is correct.

Senator BARNETT—That is an appropriate ending. I wanted to get clarity on that, Mr Odgers. Thank you very much for your submission and your opening statement. It is very informative and, frankly, a very powerful argument. I will just clarify a few things. You do not support the bill in its current form, which means that you believe that it should not proceed.

Mr Odgers—That is correct.

Senator BARNETT—Do you support a review as in its being forwarded to the Australian Law Reform Commission, or this matter being forwarded to them for investigation and review?

Mr Odgers—Yes.

Senator BARNETT—At the end of your opening presentation you talked about the lack of consultation and review with key stakeholders, I assume such as yourselves. Can you provide further information or detail in that regard and exactly what level of consultation was there prior to the bill proceeding in its current form?

Mr Odgers—In the written submission you will notice that in the introduction on page 3 it stated in the third paragraph

The Law Council first became aware of the Bill upon its introduction into the House of Representatives on 3 December 2008. The Bill [then] came to the attention of the Law Council Criminal Law Liaison Committee which identified a number of concerns with the Bill.

It has been relatively recent.

Senator BARNETT—Let us put it pretty bluntly. You have not been consulted prior to its introduction.

Mr Odgers—I think Sarah might be in a better position to answer that than I am.

Ms Moulds—Yes, that is correct. The Law Council was not consulted prior to the introduction of the bill. However, we were given an opportunity after the bill had been passed in the House to have a meeting with the relevant officers of the Attorney-General's Department and the Commonwealth Director of Public Prosecutions to discuss with them our concerns, at which time they outlined their perspective on the rationale behind the bill, so we did have a discussion at that time.

Senator BARNETT—How did those discussions proceed? What outcomes were achieved, if any?

Ms Moulds—We agreed to disagree at the end of that meeting. It was valuable to talk to the officers and to find out a little bit about how they saw the bill operating, but unfortunately we were not able to resolve our key concerns about the bill.

Senator BARNETT—Did they accept any of your arguments or views, or simply agree to disagree?

Ms Moulds—I think we just agreed to disagree.

Senator BARNETT—On an important matter, but a minor matter, at the end of your submission you referred to the retrospective operation of the bill and specifically sections 22(3) and 24(4). I want to be a devil's advocate. I cannot speak for the department, but just hypothetically and as a devil's advocate, let us say that the bill passed in its current form, vis-a-vis this retrospective aspect. You are saying that evidence that is brought into existence before the bill commences could be used in a court of law as evidence.

Mr Odgers—That is right.

Senator BARNETT—On the other hand, let us say it passes in the next few months or whatever, and then in 10 years time—using your argument, and let us hope we would knock out these retrospective provisions so that they are not retrospective—there is a matter before the courts, evidence produced and the evidence relates to material that came into existence let us say post the passing of the bill, at the end of the year, you are saying that that evidence could not be produced and would not be allowed because it would be retrospective, if it was before the commencement of bill.

Mr Odgers—We are only concerned with evidence that was obtained before the bill was enacted. If the evidence was obtained before the bill was enacted, we say it is wrong that the bill would have the effect that evidence that would not be admissible at the time it was obtained in a courtroom, should become admissible from the date of the legislation coming into force. That is our concern in terms of the retrospectivity issue. I guess I am repeating what I said before, but that is the nature of it.

Senator BARNETT—All right. We have two other submissions which you may or may not have seen, one from the New South Wales Civil Liberties Council, and it, like you, recommends that the bill be referred to the Law Reform Commission for review. I have noted that that seems to be consistent with your views. They have also referred to the David Hicks matter. There is another submission by the lawyers Lemprier, Abbott and McLeod signed off by David McLeod, who we know reasonably well through the media. I do not know if you have had a chance to look at his submission, but if you have, do you have any views with respect to his concerns regarding the Guantanamo Bay amendment, as he calls it?

Mr Odgers—I am certainly not familiar with the military commissions bill in the US. I think it is claimed that this Foreign Evidence Amendment Bill will be similar in significant respects to that legislation. I am not in a position to comment on that. I will repeat myself in two ways: it is remarkable that it is proposed to get rid of all the rules of admissibility and replace it by a regime which, firstly, requires the opponents to demonstrate evidence is not reliable and secondly, relies on a completely broad, unfocused judicial discretion. That is the first point I make. The second point I make is that one of those exclusionary rules, as I said before, relates to evidence that is obtained by torture or similar conduct. There is no doubt whatsoever that under Australian law, quite apart from any question of reliability, such evidence would be excluded by rule. It is not a matter of discretion, it is a rule. It is a big step to say, okay, we will just hope that a judge who is confronted by such evidence will say, 'Justice requires me to exclude it, even though it is reliable.'

Senator BARNETT—You would prefer that the judge not have that discretion; you would simply like the current rules of admissibility maintained.

Mr Odgers—We could get rid of all the law of evidence and just simply say, 'You, the judge, decide whether you think it is a fair thing that the evidence comes in.' For 200 years we have had rules and safeguard discretions, that is, discretions which operate outside the framework of those rules. The rules cover a very large part of the law of evidence. They are designed to give certainty and to reduce subjectivity and avoid reliance on a particular judge's sense of what is right and wrong.

Senator BARNETT—You sound like a very good black-letter lawyer.

Mr Odgers—I think there is a place for both rules and discretions.

Senator BARNETT—I studied evidence and I must say that it was not one of my best subjects at law school. But I wonder if you are arguing against yourself in a way. Wouldn't it be better to have rules which provided certainty and security regarding foreign evidence?

Mr Odgers—I could not agree more. To the extent that there is a legitimate justification for modifying the rules that apply for domestic business records to take into account specific problems with foreign records then that should occur in a comprehensive and thorough way.

Senator BARNETT—What are they? We have a number of options. One is that we do nothing and we simply leave it to the courts to decide and use their discretion regarding foreign evidence, which is my understanding, in the sense that they have to meet the Australian rules of evidence of admissibility. The second is that we send it to the Law Reform Commission and come back with further recommendations. The third is that we proceed with this bill either in its current form or as amended. What is the best avenue?

Mr Odgers—Our position is that the best avenue is to send it to the Law Reform Commission. If that is not accepted, then we would certainly want this bill to be heavily amended. I am not in a position right now to say precisely how it could be amended, but it would need to be very significantly changed to make it something which the Law Council could support.

Senator BARNETT—Do you disagree or do you accept the department's proposition that there are huge changes in the last 20 years—the chair referred to some evidence of that—in terms of technology and the way evidence is accepted and admitted. And do you think there is a need for amendments to the foreign evidence bill as it stands?

Mr Odgers—To be quite honest, I personally have not been persuaded that the current rules of evidence cannot adequately deal with it. There are systems in place for receiving audio-visual evidence from people overseas. The Commonwealth Evidence Act has specific provisions which make it easier, for example, to get foreign documents in. If a person is unavailable then the hearsay rule is modified to make it easier to get in hearsay. Over the last 20 years the evidence rules have been very significantly reformed to make them much more contemporary and to deal with contemporary issues.

Senator BARNETT—Quite seriously, what is motivating the department or the minister behind it? They have now put in a supplementary submission—that might have been today. It seems that they want to get this through as quickly as possible, and perhaps I am being cynical, but do I smell a rat? Is there something behind this as to why this is so important? The current rules have been operating all these years. Is there any demonstrable failure with the current arrangements? We have had evidence on the Hicks matter but, putting that to one side, are there any demonstrable failures? And dare I raise it, but is project Wickenby one possible motivation for the government to act on this? I mean, there is a lot riding on it. They have hundreds of millions of dollars expended to try and track down, again, hundreds of millions of dollars in tax fraud and so on. That is, frankly, it seems on a knife edge from what we have been reading in the *Financial Review* and other places. Can you comment on that, respond to it or even give any response to the project Wickenby proposition?

Mr Odgers—I do not think so, no.

Senator BARNETT—Well, you did not have to, but these are some of the fears. What is motivating them to push it through so swiftly?

Mr Odgers—I will just repeat that the Law Council does not believe that very radical legislation of this type could be justified by a single case. That is the first point I would make. Secondly, we cannot respond to suggested problems with the current legislation when they are put at a level of generality which says: 'Oh, there are problems; it is hard; and foreign laws are different.' How do we respond to that and say: 'Oh well, don't be silly. The current rules are flexible enough to let it in,' because we do not know what is said is the specific problem.

Senator BARNETT—That is what I am asking you. What is the specific problem?

Mr Odgers—We do not know.

Ms Moulds—Can I just add that on page 5 of our submission we note and provide some reference to the debate that occurred in the House of Representatives where some members referred to Operation Wickenby. That is probably as much as we can ascertain behind the rationale, from the debates.

Senator BARNETT—They have discussed it in the House of Representatives. I must say I have not been through that in detail, but what else can you say about that at this stage?

Ms Moulds—There was just a broad reference to the need to pass the amendments swiftly to ensure the successful prosecution of the cases arising from Operation Wickenby.

Senator BARNETT—From what you know of what is in the public arena about Wickenby, does that make sense? is there an argument there? Is there substance to that argument?

Ms Moulds—I am unable to comment on that one, I am sorry.

Mr Odgers—That is ditto from me.

Senator BARNETT—I think you have sort of covered the hearsay and this reverse onus of proof. You have expressed quite strongly that this is simply not on, you do not support it. That is exactly what would happen, there would be a reverse onus of proof. Is it section 69?

Mr Odgers—That is correct.

Senator BARNETT—Just to clarify, that is your position and you feel strongly about that?

Mr Odgers—Yes. There are a number of issues the Law Council is seriously concerned about, and that is one of them.

Senator BARNETT—I do not have any further questions.

CHAIR—Mr Odgers and Ms Mould, I thank you very much once again. I just reiterate that this committee appreciates the work that the Law Council provides and thank you very much for your expertise and your views on this.

Mr Odgers—Likewise.

[1.46 pm]

HUTTON, Ms Alexandra, Director, Legislation and Policy Section, International Assistance and Treaties Branch, Attorney-General's Department

MARSHALL, Mr Steven, Assistant Secretary, International Assistance and Treaties Branch, Attorney-General's Department

DAVIDSON, Mr Graeme, Deputy Director, Commonwealth Director of Public Prosecutions

TAYLOR, Ms Julie, Acting Principal Legal Officer, Commonwealth Director of Public Prosecutions

CHAIR—I welcome officers from the Attorney-General's Department.

Evidence was taken via teleconference—

Mr Marshall—Senator, we also have the DPP with us. Given that the issues which I understand are of interest to the committee might cover areas within each of our respective agency's responsibilities, it might be useful if both agencies were to appear as part of the same hearing.

CHAIR—That would be good. I want to remind people that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy. You are given any reasonable opportunity to refer those questions to a superior officer or a minister. Only questions asking for opinions on matters of policy are prohibited, but it does not preclude questions asking for an explanation of policies or factual questions about when and how they were adopted. We received a submission this morning from the Attorney-General's Department but nothing from the DPP. Is that correct?

Mr Davidson—No, Madam Chair. We provided a submission, admittedly later this morning, but there was a submission electronically forwarded to the committee today.

Senator BARNETT—Chair, I do not have that, just for your reference.

CHAIR—I do, I have it here. It came through this morning in an email, yes?

Mr Davidson—I believe it was emailed through.

Senator BARNETT—I apologise, I do have one from the DPP.

CHAIR—It came through at about 9.30 or so.

Senator BARNETT—I have not read this submission.

CHAIR—I have just printed it off and have not had a chance to read it. I will ask officers from the Attorney-General's Department whether you have an opening statement that you would like to provide to us.

Mr Marshall—Firstly, we would like to thank the committee for the opportunity to appear today. I would just like to briefly outline the purpose of the bill and address some issues on safeguards. In terms of the purpose, the amendments before the committee are intended to streamline the process for adducing foreign business records into Australian criminal and related proceedings. The amendments would be limited to business records which are obtained through formal government-to-government channels and in accordance with the law of the requested country.

Business record evidence is frequently used in prosecutions for crimes such as financial fraud, money laundering, child pornography and drug importation. While such records are generally considered to be an accurate and reliable form of evidence, their admissibility in Australia is governed by detailed rules of evidence which vary between Australian jurisdictions. The requirements contained in these rules also often differ from those required under the laws of foreign countries in which business records may be located, which has on occasions made it difficult for that country to provide assistance to Australia. This limits the ability of Australian authorities to obtain foreign evidence which may be used in Australian criminal proceedings.

The bill is ultimately intended to provide appropriate flexibility to the court in determining whether to admit reliable evidence while maintaining key safeguards. It is acknowledged that the bill would override the detailed admissibility requirements of the relevant jurisdictions insofar as they relate to business records. The reasons for this I believe are explained in greater detail in the written submissions which have been prepared by this department and the Commonwealth Director of Public Prosecutions as well as in the explanatory memorandum to the bill.

The amendments would provide that where the court considers that the business records are not reliable, probative or are privileged then they must not be admitted into evidence. Further, the court would retain a

broad discretion to prevent foreign material, including business records, being adduced where justice would be better served by doing so. The amendments relate only to the threshold question of what materials should be allowed to be put before the court. Where the court determines that material should be admitted into evidence, it would then need to separately consider the weight to be given to that evidence. The amendments would also provide the court with an additional discretion to limit the use that might be made of foreign material where a particular use may be unfairly prejudicial to a party to the proceedings.

In these ways, the bill is designed to give effect to the government's intention to promote more responsive and flexible measures in securing international crime cooperation while maintaining the integrity of the key safeguards. That concludes my opening statement.

Senator BARNETT—Do you want the DPP to perhaps—

CHAIR—Yes, sorry, I am just busy scrawling the last bit said there. Mr Marshall, thank you for that. Mr Davidson, do you want to provide an opening statement to your submission?

Mr Davidson—Thank you, Madam Chair. I had intended that perhaps our submission might speak for itself, but if you have not had the opportunity to read that submission, perhaps I might just make a few introductory remarks.

CHAIR—I think that would be useful. I have got it, have not had a chance to read it, but it would be useful I think for us both if you on the *Hansard* record at least summarise what you think we should particularly pay attention to.

Mr Davidson—Thank you, Madam Chair. Perhaps I could briefly outline the nature of the problem as we see it. We are finding today that the increasingly transnational nature of crime and the relative ease of moving the proceeds of crime from one jurisdiction to another has had the effect that we are increasingly relying upon mutual assistance to provide evidence to us to enable us to bring cases. Mutual assistance is sought from a wide variety of countries, and that list seems to be growing.

Our experience is that the mutual assistance process can be a very slow process and in most cases we usually have only one opportunity to seek that evidence. The majority of our requests appears to be for business records, and in the Commonwealth crimes sphere many of our cases tend to be large and complicated involving voluminous documents. Under the present regime, as Mr Odgers has outlined, for business records to be admissible they must comply with the relevant state evidence act of the state where we are prosecuting. While there is some uniformity to the extent that the Commonwealth, Tasmania and the ACT have adopted a uniform evidence act, other states have not, and the admissibility requirements of business records do vary between those states. In fact, a document that may be admissible in one jurisdiction under their relevant business records provisions may not be admissible in another jurisdiction and some of our cases, as you will appreciate, extend beyond just one jurisdiction. We are often in the position of seeking evidence from overseas for the purpose of tendering that material in more than one jurisdiction. To date, our approach has been that if the evidence is not admissible pursuant to the state evidence acts, we will not seek to tender it. Our experience also is that, where evidence does comply with those state evidence acts, there will be often little objection to its tender or admission.

The essence of our issue is that other countries have different requirements to ours by reference to the admissibility of business records and often are unwilling to go beyond their own requirements when providing material to us. We also find that other countries are unfamiliar with the concepts that we use. By way of example, some countries do not actually use the concept of affidavit evidence. Further, other countries may be unwilling to comply with our stricter requirements for the admissibility of material, sometimes for fear of becoming a witness. Finally, because our requirements may be so extensive, they will require other countries to expend substantial resources in obtaining the material for us. This also might mean that the material that is returned does not comply with the provisions of the particular state evidence act.

The consequence of all this is that we may not be able to secure admissible business record evidence from overseas to prosecute cases in circumstances where the material that we have been returned with, appears on its face to be reliable and probative. We see the present bill as addressing many of the issues that we face. We understand the bill still imposes upon us as the prosecutor the onus of satisfying the court that the document appears to be a business record. However, the bill assists by providing for the admissibility of the business record unless the court is satisfied that the records are not reliable or probative. The bill also ensures that the court has a very wide and active discretion to reject or limit the use of the material that we attempt to adduce.

Finally, I note that what we are talking about is the ability to put the material before the court for assessment. Thank you.

CHAIR—Thank you. I am going to go first. I know we have just received the DPP's submission this morning and I have just had a quick read to scan a couple of pages. To be honest with you, Mr Marshall, I am not actually convinced about the need for this legislation. I am going to give you an opportunity now to try and convince me as chair, why the haste and why we need this. If you are now saying to us that one of the reasons why the rules of admissibility of evidence need to be tossed out or overridden is because many foreign countries are unwilling or sometimes unable to provide the necessary documentation, why should we come down to the lowest common denominator? Why are we changing our laws simply because we cannot get documents that other countries are able to provide for us, when we maintain a very high standard of prosecution and a very high standard of protection for witnesses?

Mr Marshall—Ultimately the question as to the appropriate balance between reliance on the rules of admissibility and reliance on the judge's discretion will be a matter of policy. The concerns that have motivated development of this legislation are the fact that technical requirements of admissibility have been unable to be complied with because the relevant authorities in the foreign country are not in a position to meet those technical requirements. As a consequence of that, evidence which would otherwise be considered to be reliable is not able to be considered by the court.

CHAIR—Who would consider that evidence to be reliable if the rules of admissibility are now set to one side because of this legislation?

Mr Marshall—Ultimately that would be a matter for the court to consider the reliability of the evidence.

CHAIR—Under what act, though, if some acts are being set aside?

Mr Marshall—The provisions that will not apply in relation to foreign evidence are the specific rules as to which evidence shall or shall not be admitted, as contained in the relevant evidence legislation applicable to the jurisdiction.

CHAIR—Yes, but the Law Council has put to us this morning the view that there is quite a lot of opinion evidence, tendency evidence, identification evidence—evidence that would be excluded under certain sections would be excluded. I guess what I want to ask you is this: if I am in the dock here and I am about to be prosecuted for the major international crime of tax evasion, what do I rely on as a victim that would protect me when you as a DPP front up to the court with a whole bunch of financial records? What is my protection to say that these are not records that can be relied upon, if some of these acts are overwritten?

Mr Marshall—I should clarify, Madam Chair, that I am not appearing on behalf of the DPP; I am from the Attorney-General's Department.

CHAIR—I understand that, but you are responsible for writing this legislation. So in practical terms, once this legislation is passed, what act will I then rely on to protect me about the veracity of that evidence?

Mr Marshall—You would rely upon the discretions conferred upon the court under the act as amended by the bill.

CHAIR—Under this act as amended by the bill, but you are overriding some of those—

Mr Marshall—I apologise. Under the Foreign Evidence Act as amended by the bill.

CHAIR—What does that mean, though, in relation to the acts specified on page 11 of the Law Council's submission?

Mr Marshall—Under the bill there will be a new provision in section 24(6) of the Foreign Evidence Act which will say that the provisions in that act will have effect despite any Commonwealth, state or territory law about evidence. So effectively, as far as legal admissibility requirements are concerned, the Foreign Evidence Act will constitute a code. It will then be a matter for the judge to determine in accordance with the provisions proposed in the bill as to whether the material should in fact be admitted.

CHAIR—But the Law Council put to us this morning that the code that will be relied upon under this act is unique; that it overrides custom and practice with regard to evidence in this country. Do you not agree with their submission to us?

Mr Marshall—There is already some limitation on the applicability of normal evidence laws by virtue of the fact that parliament has passed a Foreign Evidence Act that is designed to accommodate the fact that the provision of evidence obtained from overseas before a court is in a different position from the provision of

information that has been obtained domestically in circumstances where the relevant witness can actually be required to testify. So to that extent I do not think it is unique. This bill is introducing further modifications to the Foreign Evidence Act which are intended to ensure that problems that might arise in foreign jurisdictions because of differences between the systems, as well as the fact that the witness will not be available to attend and give evidence in person, are addressed.

CHAIR—I am having a little difficulty. In my mind you seem to keep linking what you can locate and obtain from another country versus what you can admit in a court of law as evidence. Correct me if I am wrong, but are you simply saying that it is difficult to obtain from some countries what is needed to satisfy our laws so therefore we will change our laws to make the whole system easier? I am saying to you that if that is the case then I do not think that is fair on the person being prosecuted.

Mr Marshall—I might allow the DPP to comment more on the extent to which the current provisions affect their prosecutions, because that is not a matter within my expertise. It would be correct to say that overseas countries often will have material which, because of technical reasons, is unable to be produced in an Australian court. That has given rise to difficulties in terms of proceeding with evidence which would otherwise be essential to found a prosecution and would be available in the event that such evidence was located within Australia.

CHAIR—Following on from that, how do we obtain from a foreign country the evidence that we need that can be tabled in Australia in a court of law that still provides me with a high degree of threshold rights as a person being prosecuted?

Mr Marshall—I am not sure; I suppose that depends upon your definition of a high degree of threshold rights. If what a defendant insists upon is having the evidence subject to all of the same guarantees that are applicable in relation to evidence obtained domestically then you would be going back beyond what is already provided in the Foreign Evidence Act and basically providing that you might be in a position to insist upon having the person who produced the evidence in the foreign country come to Australia and be available to testify as to its veracity.

CHAIR—Why wouldn't you do that? We are talking about major crimes here. We are talking about rushing a bill through the parliament so that we can prosecute particular people under a current operation. We are not talking about something that is minuscule. If we are talking not only about a national crime of significance but an international crime of significance, why would you not do that?

Mr Marshall—In the first instance I would not want to be taken to suggest that this bill is targeting one specific operation.

CHAIR—Can I ask, then, if the Senate can take a bit more time in considering this?

Mr Marshall—I am not in a position to suggest how long the Senate should take in its consideration of legislation, beyond noting that we have been advised that there are a growing number of cases on foot in which the provision of evidence is being jeopardised by virtue of the fact that it is not able to be obtained in a manner which is consistent with the existing legislative requirements.

Senator BARNETT—That does not make sense, quite frankly, chair, and I am keen to pursue that. It is not consistent with the current arrangements. This bill has not been passed, so when you say it is not consistent with the current arrangements, what on earth are you talking about?

Mr Marshall—I am sorry Senator, you might have misheard me. What I was at least trying to articulate was to say that the evidence which is or has been obtained is not in a manner which can be admitted consistent with the existing regime.

Senator BARNETT—That is the whole point of the concern raised by the Law Council and other witnesses to this inquiry, that the level of safeguards and accuracy and other levels of terms and conditions of the admissibility are not consistent with the Australian provisions, and that is one of the reasons they strongly oppose it, because there seems to be a lesser form of safeguards. So are you supporting that approach, a lesser form of safeguards?

Mr Marshall—It is not for me to support a particular approach or otherwise, but I would comment that it is a different form of safeguards.

Senator BARNETT—Are they more stringent or less stringent than the current form of safeguards?

Mr Marshall—They are more detailed than the current safeguards.

Senator BARNETT—More detailed? How are they more detailed?

Mr Marshall—The existing provisions are more detailed because there are a large number of sections in various evidence laws in different states and territories which purport to codify whether evidence may even be considered by a court. I think it would be fair to say the approach that this legislation adopts is to provide that if certain thresholds are met, which are then lesser thresholds, then the court will have certain discretions as to whether that evidence shall in fact be admitted.

Senator BARNETT—Yes, but it seems the evidence we have received is that the safeguards, firstly, are not as strict and comprehensive as the current safeguards that apply to Australian evidence; and, secondly, under this proposed new regime the court would have at least some level of discretion, which brings in the concerns regarding uncertainty and confusion with respect to admissibility. How do you respond to those arguments?

Mr Marshall—I would agree that the provisions which apply currently are more comprehensive. As I said, the question as to stringency is something I suppose ultimately would boil down to a value judgment.

Senator BARNETT—You cannot say whether they are more stringent or less stringent; you have not answered that question. You must know the answer to that question.

Mr Marshall—I would say that they are more detailed. I would say that they are harder for the prosecution to satisfy.

Senator BARNETT—It is a bit strange when you are reversing the onus of proof and it makes it easier for the prosecution.

Mr Marshall—I am sorry, I thought you were asking me whether the current requirements were more stringent, and I am saying that they would be harder for the prosecution to satisfy the current requirements than under the bill.

Senator BARNETT—That is exactly right, that is the way I see it. Under the bill it would be less stringent than the current arrangements: is that correct? You have just said they would be less stringent, correct, if the bill was passed?

Mr Marshall—What I said was that they would be less comprehensive and that I consider it would be harder for the DPP to meet the requirements which are currently under the act than would be the case if the bill was passed.

Senator BARNETT—That goes against every single piece of evidence and submission that we have received to date. I do not know if we have been on the same own hearing, and if you have heard the evidence from the Law Council and read their submissions, it is contrary to—

Mr Marshall—I am sorry, I do not think I was saying anything that was in contradiction to what they were suggesting. I will repeat to make it clear.

Senator BARNETT—Right, try again.

Mr Marshall—The provisions under the existing legislative regime impose more comprehensive requirements in relation to the ability of the prosecutor to adduce evidence, more comprehensive than would be the case under the bill. It would be easier if the bill was amended for the DPP to adduce the evidence.

Senator BARNETT—So it would be less stringent and easier for the prosecution to succeed if the bill passes in its current form: is that correct?

Mr Marshall—Yes—

Senator BARNETT—Let us go back now to the point you made earlier where you said that there was a growing number of cases on foot. Can you please explain and provide some evidence of that? You have to convince us that this is an urgent bill. If there are a growing number of cases on foot, okay, let us have a look at that. We need to deal with it and accept it prima facie. You cannot just say that and walk away; we need to have some sort of evidence. If we need to go into camera that is another matter, but you need to give us some evidence as to the urgency for the bill. Based on what the chair has said and certainly from my perspective, you have not convinced us of that; certainly you have not convinced me. So let us give it a go. You said that a growing number of cases are on foot. Can you provide some evidence?

Mr Marshall—Sure. I do not have detailed statistics, but what I can say is that the number of mutual assistance cases which Australia has been required to make over recent years has been increasing quite significantly. We referred to one figure in our submission as to the numbers over the last 10 years.

Senator BARNETT—In your supplementary submission.

Mr Marshall—We had 64 requests in 1994-95 and we made approximately 225 requests in the 2007-08 financial year. By way of example, the department has done a survey of the cases it has which are currently on hand where we have received material from foreign jurisdictions. There are approximately 70 of those cases. In 45 per cent of those cases the material was not provided in an admissible form, and the bulk of those cases related to business records.

CHAIR—Mr Marshall, can I say to you that what we are trying to do today is amend legislation so as to allow those documents to be tabled as evidence in a court case, yes?

Mr Marshall—Yes, it would be admitted in evidence.

CHAIR—If you are saying that currently they are in a form that our legislation restricts, what do I use, as the person being prosecuted, as a rebuttal? If I say to you, or even to the DPP if they want to answer this, ‘You prove to me that those records are fair, accurate, legitimate records,’ what will I rely on for that in my defence? I am picturing a situation here where you can just front up and say, ‘I’m going to charge you with tax evasion, and here is a document from X country that I am going to use in evidence, but because we are now changing the laws of this country, you cannot test the veracity of this document coming from this country.’

Mr Marshall—I might defer to the DPP on this particular question because we are getting into issues as to the practical application of these provisions.

Mr Davidson—Normally in the mutual assistance process when we send our draft requests over, we will attach to that material draft affidavits indicating to the country what areas they should cover and in what areas we need them to provide evidence. Normally we do not just get back a pile of documents. We get it back in the context that often we will have further documents and further material from that country in the form of testimony that indicates what steps they have taken, what material they have gained and from what sources and from whom that material has been sourced.

By way of example, sometimes we get back material where an investigating magistrate in another country has said, ‘I have spoken to a number of people, and they have produced these records,’ and leaves it at that as to the source of those records. In the context of any particular prosecution, we would anticipate that we would be presenting as much material from that foreign country that goes to the provenance of the documents and the reliability that we have.

At the end of the day, we, like any defendant, are constrained to that extent. I think the context in which the material is being presented may well influence a court as well to the extent that a court may say, ‘Well, if all I am getting is just a bare document that appears to be a business record, I will have real doubts about its probative and its value and its reliability in the context of a case.’

CHAIR—So what safeguards would then be in place, if this bill goes through, on the accurate content of foreign business records?

Mr Davidson—Often the content of the business record may well speak for itself. For example, what appears to be a bank statement outlining details in an account from what appears to be a reputable and recognised bank may well give the tribunal of fact confidence that that is a document that is reliable and probative.

CHAIR—Sure, but that is pretty obvious, isn’t it?

Mr Davidson—That is right.

CHAIR—I don’t think we are talking about documents that are pretty obvious that might have a bank’s logo. I am talking about maybe handwritten entries in a booklet or an annual report that is photocopied. What safeguards are there that will actually establish the accuracy of those records, the ones that aren’t blindingly obvious?

Mr Davidson—That is quite correct. There will be documents from their very nature and from their very appearance that a court, or even the prosecutor, would not be convinced as to the reliability or probative value of that document. We would expect that things like handwritten file notes on particular documents would be matters that the court would indicate it wasn’t satisfied as to the reliability or probative value of that material. The protection that we feel is proposed under the bill that is currently under consideration is that contained in sections 25 and 24A. I know that Mr Odgers has noted that a lot of the rules of evidence now that are codified and in legislation as rules were in fact based upon the common law and judicial decisions in relation to the

reliability of that evidence. We feel that in exercising a discretion under section 25 a court would be bound to look at those sorts of rules and discretions to exclude evidence.

CHAIR—Okay, but what I am trying to get at is this. When you say a court, I am assuming you mean a judge would rule?

Mr Davidson—That is correct.

CHAIR—Okay. But if a judge rules that that stack of handwritten entry notes over there on lined paper, undated, will be admissible, what do I do as the victim to rely on to say, ‘No, they can’t be’?

Mr Davidson—If the court has exercised its discretion, are you asking what can you do?

CHAIR—Yes.

Mr Davidson—I think if the court exercises its discretion to say it is not convinced that it is not reliable or not probative and it is convinced that in fact that material would not be excluded through the exercise of a discretion under 25, or limited under section 24A, then you would have to answer the case.

CHAIR—Okay, but does that mean that I could rely on section 76 of the Evidence Act, or that I could rely under identification evidence?

Mr Davidson—I think you could rely upon that section and refer that section to the court in saying, ‘In exercising your discretion under 25 or under section 24A, this is a relevant matter.’ That should influence the way the discretion is exercised.

CHAIR—So I am now relying on a definition of relevant matter as opposed to reliant on sections in the Evidence Act?

Mr Davidson—No, I think you would be relying on section 25 in its existing form in the current Foreign Evidence Act.

The court may direct that foreign material not be adduced as evidence if it appears to the court’s satisfaction that, having regard to the interests of justice to the proceeding, justice would be better served if the foreign material was not adduced as evidence.

I would have thought that a court would have little difficulty in coming to a conclusion that undated notes on a scrap of paper, in relation to which the source or provenance of which was not established by any certain means, would be better excluded in the interests of justice.

CHAIR—Okay. Senator Barnett, do you have any other questions?

Senator BARNETT—I would like to ask whether this growing number of cases on foot includes the Wickenby case?

Mr Davidson—There are a number of cases, including child pornography, major fraud and matters involving tax, that would be included in the cases we have on hand.

Senator BARNETT—Does it include Wickenby? You mentioned major fraud, you have mentioned tax: I can assume it, but I would like you to confirm it.

Mr Marshall—It is difficult for us as public servants to comment on particular operations which might or might not be underway. I think it is a matter of record or at least of public record that the Wickenby investigation has involved investigations overseas. I can also say that these problems in relation to the Foreign Evidence Act have been previously raised and have been referred to in a variety of cases.

Senator BARNETT—Yes, including on the public record in the *Financial Review* and other places.

Mr Marshall—That is a media report.

Senator BARNETT—They are on the public record and they have not been denied by anybody.

Mr Marshall—I am not in a position to confirm or deny the extent to which certain evidentiary actions may have been taken in relation to any identified investigations.

Senator BARNETT—Let us go to the next question, relating to retrospectivity. If this bill is passed in its current form, the Law Council has expressed concern about retrospectivity. How would you argue against their concerns; and, secondly, would it not be the case that matters before the court at the moment whereby certain evidence was deemed inadmissible would, if this bill is passed, immediately become admissible?

Mr Marshall—I think in terms of the general question about the retrospectivity, the amendments will only apply to evidence which is sought to be adduced on or after the date those amendments commence. As Mr

Davidson has outlined, mutual assistance can take a considerable amount of time and often it is not possible to go back to a country to have evidence retaken in a way which comports with the applicable evidentiary rules at a given time. So, in terms of the retrospectivity issue, the amendments will apply in relation to evidence that is adduced after the amendments have actually happened. They will not validate evidence which might have been, I suppose, sought to have been produced in past cases and have been thrown out, but what it means is if the evidence has already been obtained overseas then it would be admissible.

Senator BARNETT—Yes, but try and answer my second question. Where there is some doubt about the evidence and its admissibility in cases on foot, would that then be admissible if this bill was passed?

Mr Marshall—I think it would be, yes.

Senator BARNETT—So that is, with respect, a clear link to the Wickenby case—they are my words, not yours; I am not putting them in your mouth. That would necessarily cover, I assume, the growing number of cases on foot that you are concerned about.

Mr Marshall—I think it would cover the growing number of cases on foot and the continuing growth in cases which we are expecting to continue into the future.

Senator BARNETT—Yes, but therefore can't you see the concerns that the Law Council have, and I am sure many others have, regarding retrospectivity: that if the bill passes it would make admissible what evidence would either otherwise not be admissible or there would be doubt regarding its admissibility?

Mr Marshall—Are you asking me to express—

Senator BARNETT—I am asking you to respond to that statement. Is that correct?

Mr Marshall—It is correct that the bill would change the admissibility requirements as of the date of the commencement of the bill. So as a matter of logic, if there is material which is adduced in a court following the commencement of the bill which may have been obtained from a foreign jurisdiction prior to the commencement of the bill, then that material would be admissible under the new regime.

Senator BARNETT—Exactly. With the greatest respect, that says to me exactly why there is an urgency for this, and I think I know why. You do not have to comment on it because we have already alluded to the Wickenby matter. But that is a matter for the government to respond to in due course. I think you could have had a reasonable argument in terms of urgency to deal with this matter by arguing that the states and territories have different laws, which they do apart from the four, I think, states and territories and the Commonwealth regarding a uniform evidence act. You could argue strongly that there are significant differences. You could have taken us down the line that highlighted the various differences where in some states and territories it is admissible but in others it is not. You have gone down this other track of highlighting the growing number of cases on foot, but you really have not, as far as I am concerned, provided evidence, or adequate evidence, to convince me and others of the urgency matter other than to plug up perhaps holes in litigation and cases that the Commonwealth may or may not have with certain defendants. Chair, I have no further questions.

CHAIR—Thank you, Senator Barnett. Mr Marshall and your colleague and Mr Davidson, we are out of time. We had scheduled to finish at this time, I understand. We have—I have anyway—a number of questions this committee would like to put on notice to you. We had some questions we were going to ask you today but we have got a little bit diverted, so we need to put these on notice. I would also like to ask you if you would look at the transcript of the Law Council evidence this morning and provide us with a response to their concerns about the legislation, if that would be all right for you to do.

Mr Marshall—Sure. We are in the committee's hands. We are more than happy to do that.

CHAIR—It would be helpful for us if you could provide to us some rebuttal of some of the concerns that were put to us by the Law Council this morning as well.

I thank the four of you for your attendance today. It has been a bit tough, I guess, but it is pretty important legislation and we need to be convinced of the urgency we need to be convinced about the merits of the bill before us. Thank you very much for your time and your attendance today.

Mr Marshall—Thank you, chair.

Committee adjourned at 2.33 pm